BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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Judges, Other High-Level Employees To Receive Salary Increases

When the House of Representatives, in the closing days of the 97th Congress, agreed to raise congressional salaries retroactive to December 17, 1982, from $60,662.50 to $69,800, it also voted a pay raise for federal judges and other high-level government employees whose salaries are tied to those of members of Congress.

Now, U.S. district judges' salaries will rise to $73,100 (up from $70,300); circuit judges' to $77,300 (from $74,300); associate Supreme Court justices' to $96,700 (from $93,000); and the Chief Justice's to $100,700 (from $96,800).

The salary increases are included in the lame-duck Congress's appropriation bill, which also provides funding for numerous executive agencies and the judiciary to continue operating through September 30, 1983.

The measure also lifts the pay cap on civil service and judicial service employees who are at grade 15, step 7 and above on the pay scale. Their salaries had been held at a $57,500 ceiling, which now rises to a limit of $63,800.

Employees at grade 15, step 7 will now receive $58,261; those at step 8 will go to $59,879; at step 9 to $61,497; and at step 10 to $63,115.

Those at grade 16, step 1 will not have an increase this time; but those at step 2 will receive an increase to $58,843; at step 3 to $60,741; at step 4 to $62,639; and at steps 5 through 9 to the upper limit of $63,800. ■

Task Forces Planned to Combat Drug Trafficking, Organized Crime

Buoyed by the success of the presidentially established South Florida Task Force on Crime in slowing drug smuggling and trafficking in that area, and concerned that the dimensions of the organized crime/illicit drug market connection require a larger national effort, President Reagan recently announced plans for an eight-point program to carry out a coordinated nationwide effort to attack drug trafficking. Of the eight parts, the initiative that will require the broadest integration of federal, state, and local law enforcement agencies is the implementation of twelve new regional task forces whose responsibilities will encompass all parts of the United States. The task forces are expected to begin operations in early 1983.

Like their predecessor task force in Florida, the new task forces will operate under the U.S. attorney general's direction and will make use of the coordinated resources at the federal level of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Bureau of Alcohol, Tobacco and Firearms, the Internal Revenue Service, the Immigration and Naturalization Service, the U.S. Marshals Service, the Customs Service, the Coast Guard, and in certain circumstances, of Department of Defense tracking and pursuit resources, regional enforcement coordinating committees, and local and state task forces.

While earlier attempts to interrupt drug-trafficking networks focused on street-level violators, the new campaign will attack the top levels of the illicit drug trade—those in organized crime networks who coordinate and finance international and domestic drug syndicates. To carry out this

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Courts Adopt Interim Bankruptcy Rules

The 97th Congress adjourned just before Christmas without meeting the second deadline imposed by the Supreme Court for enactment of remedial legislation in response to the Court's ruling in *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.* In that decision, the Court held in late June that portions of the Bankruptcy Reform Act of 1978 unconstitutionally assigned authority to bankruptcy judges in areas where certain powers could be exercised only by Article III judges, who are insulated from political pressures by life tenure and protection from pay cuts.

Congress has been considering various legislative proposals intended to resolve the jurisdictional problem since July. When Congress was unable to meet the Court's original October 4 deadline for legislation as noted in the *Marathon* judgment, the Court acceded to the Department of Justice's request for an extension to December 24. When the Justice Department asked for another extension following Congress's failure to act before adjournment, the Court did not grant it.

The federal district courts have therefore put into operation contingent rules, which were recommended by the Judicial Conference of the United States in September 1982 and thereafter approved by orders of all judicial councils of the circuits under authority conferred in 28 U.S.C. § 332. The judicial councils had previously ordered the adoption of a model rule dated September 23, 1982, which would have taken effect in adopting districts on October 5. A revised version of that model rule was issued by the Administrative Office on December 3, to become effective on December 25, if needed.

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campaign, Attorney General William French Smith asked a Senate appropriations subcommittee on December 9, 1982, for an additional $130 million for the remainder of fiscal year 1983. Smith claimed that his department had already achieved "substantial improvements in law enforcement" even in the face of budget cutbacks. Since the Reagan administration came into office, the various federal agencies slated to play integral roles in the new regional task forces are operating with about 20,000 fewer employees than they had under the prior administration.

Also on December 9, Associate Attorney General Rudolph W. Giuliani testified before the House Judiciary Subcommittee on Crime that the administration's war on drugs and organized crime will involve about 25 percent more FBI and DEA agents in drug-related work, requiring "the first major infusion of new agents" in a decade. While personnel already employed in federal enforcement agencies will assume task force duties, between 1,100 and 1,200 new positions will also be created, Mr. Giuliani said. Probably 1,100 to 1,500 individuals, in all, will be permanently assigned to the task forces. "A typical Task Force," Mr. Giuliani explained, "is expected to have 52 Justice Department investigators, 20 federal prosecutors, 50 non-Justice personnel from IRS, Alcohol, Tobacco and Firearms, Customs and other agencies, and 28 clerical and paralegal employees." Computers, automated data-processing equipment, and sophisticated communications resources will be provided to the task forces, along with aircraft and electronic surveillance equipment for court-approved monitoring. After their first year, regular budgets for the task forces will be submitted for congressional action.

Other plans in President Reagan's eight-point war on drugs and organized crime outlined by Mr. Giuliani include the following:

- Formation of a panel of distinguished Americans from diverse specialties related to the drug problem to analyze the influence of organized crime, region by region, and to hold public hearings on its findings. The administration expects the panel's work to yield recommendations for legislation and to heighten public awareness of and support for the administration's efforts to eradicate organized crime.
- Inauguration of a governors' project to effect criminal justice reforms and enforcement of local and state statutes against such types of racketeering as illegal gambling.
- Establishment of a cabinet-level committee, with the attorney general as chairman, to identify problems in coordinating the diverse agencies to be involved in this anticrime effort and to effect interagency and intergovernmental cooperation.
- Institution, by the Departments of Treasury and Justice, of a National Center for State and Local Law Enforcement Training at the Federal Law Enforcement Training Center at Glynco, Georgia. There, local law enforcement personnel will be trained in how to combat drug smuggling and new kinds of crime associated with syndicates, such as arson, bombing, bribery, computer theft, and contract fraud.
- Legislative reforms in such pertinent areas as bail, sentencing, criminal forfeiture, labor racketeering, and the exclusionary rule.
- Submission by the attorney general of an annual report to the president and the Congress of progress in the struggle against organized crime and organized criminal groups involved in illicit drug traffic.
- A request to Congress for appropriations for prison and jail construction "so that," according to Mr. Giuliani, "the mistake of releasing dangerous criminals because of overcrowded prisons will not be repeated."

Before its lame-duck session adjourned, Congress appropriated $127.5 million for the task force program for the remainder of fiscal 1983. According to Attorney General Smith, operations will begin early this month, with the program at full strength by August 1. ■

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AO Releases Data on Sentences Imposed

Since 1977, the year after the AO's Statistical Analysis and Reports Division (SARD) began classifying offenses according to U.S. Code titles and sections, the division has published an annual volume of statistics on sentences imposed on federal offenders. Each succeeding year, an updated edition has further refined the organization of the data, their accuracy, and their completeness.

The primary purpose of the recently released *United States District Courts Sentences Imposed Chart* for the twelve-month period ended June 30, 1981, is, like previous editions, to aid U.S. probation officers in preparing their presentence reports, and therefore, distribution of previous editions was restricted to judicial personnel. The new volume, however, is available to the public. Users of this volume are urged to use the latest edition (September 1982) of the companion publication *United States Title and Code Criminal Offense Citations Manual* in tandem with the *Sentences Imposed Chart*.

SARD cautions that, without additional data, the statistics presented in the chart can be misleading. Since each entry indicates the total sentence imposed on an individual in one

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Chief Justice Points to Unfinished Business In Year-End Report

In his annual year-end report highlighting developments in judicial administration, Chief Justice Warren E. Burger somberly notes that while many improvements have been made in the administration of justice," 'unfinished business'—the accumulated and deferred maintenance—outweighs the progress."

Reviewing a broad range of topics, the Chief Justice juxtaposes a short, albeit significant, list of positive activities and important developments with a long series of missed opportunities and partial responses. Acknowledging that often "more pressing immediate non-judicial problems tend to get priority," he states that needed changes in the judicial arena regrettably have moved slowly and in a piecemeal fashion.

On the positive side, Chief Justice Burger lauds Congress for the Federal Courts Improvement Act of 1982. In merging the U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals into the twelve-judge U.S. Court of Appeals for the Federal Circuit, that legislation provides recognition of the needs both for a national appellate court to handle technical areas of law and for a reduction of intercircuit conflicts and increasing appellate workloads. Furthermore, the act, in provisions unrelated to the creation of the new court, achieves several important "housekeeping" changes for the federal courts generally. The Chief Justice mentions the imposition of a more realistic basis for calculating the interest earned on money judgments during appeal and the limitation on

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Defendants Convicted in Murder of Judge Wood

On December 14 a federal jury in San Antonio convicted three defendants on six charges of conspiracy to commit murder, conspiracy to obstruct justice, and murder of a federal judge in the assassination of U.S. District Court Judge John H. Wood, Jr., on May 29, 1979.

Following an eleven-week trial in a courthouse named for Wood, the jury found Charles Voyde Harrelson guilty as the assassin. The prosecution had charged Harrelson with having been paid $250,000 for the murder by a convicted drug dealer who had been scheduled to begin a trial before Judge Wood on the day of the killing.

The murder, the first of a federal judge in a century, had set in motion one of the most extensive federal investigations in U.S. history, with the government spending about $5 million over three years to collect evidence for its case. The evidence included extensive recordings of conversations in which one of the parties was Jamiel Chagra, the man who allegedly hired Harrelson to assassinate Wood. Jamiel Chagra, now serving a thirty-year sentence for a drug conviction on the charges that would have been tried before Judge Wood, has yet to be tried on counts relating to the judge's murder.

Sentencing of the three defendants convicted on December 14 has been set for March 8 by Chief Judge William S. Sessions. Under 18 U.S.C. §§ 1111 and 1114, Harrelson faces a mandatory sentence of life imprisonment for the murder of a federal judge. His wife, previously sentenced to three years in prison after being convicted of purchasing the alleged murder weapon under a false name, will face a new sentence of up to five years for obstruction of justice. Chagra's wife Elizabeth, convicted of conspiracy to murder and obstruction of justice, also faces mandatory life imprisonment for the conspiracy-to-murder conviction. ■

CALENDAR

Jan. 13-14 Judicial Conference Committee to Implement the Criminal Justice Act

Jan. 14 Judicial Conference Committee on Administration of the Bankruptcy System

Jan. 18-21 Judicial Conference Committee on Judicial Ethics

Jan. 19-21 Workshop for Judges of the Ninth Circuit

Jan. 20-21 Judicial Conference Committee on Administration of the Magistrates System

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

Jan. 20-21 Judicial Conference Advisory Committee on Codes of Conduct

Jan. 24-25 Judicial Conference Committee on Court Administration

Jan. 24-25 Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice

Jan. 26-28 Workshop for Judges of the Eighth and Tenth Circuits

Jan. 27-28 Judicial Conference Committee on the Judicial Branch

Jan. 31-Feb. 1 Judicial Conference Committee on the Budget

Jan. 31-Feb. 1 Judicial Conference Committee on Administration of the Probation System

New Publications

The Federal Judicial Center has recently published the *1982 Annual Report* and the *1982 Catalog of Publications*. The annual report summarizes the Center's activities over the last year, and the catalog lists research reports and products of Center seminars and workshops published by the Center. To request a copy of either publication, please write to the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005. Please enclose a self-addressed, gummed mailing label, franked if possible.

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the tenure of chief judges as noteworthy.

In addition, he points to the passage of the Pretrial Services Act as a step in the right direction, as well as to continuing progress in state-federal relations as fostered by such organizations as the Conference of Chief Justices, the National Center for State Courts, the National Judicial College, the Institute for Court Management, and the newly created Subcommittee of the Judicial Conference of the United States on State-Federal Relations. Also, the significant work of the National Academy of Corrections merits praise, as does the growth in practical professional skills training in our law schools.

The majority of the Chief Justice's remarks concentrate on the problems that still need to be solved and highlight the partial steps and incomplete solutions that remain. Legislation dealing with the Supreme Court's workload is required; the elimination of the statutory mandatory jurisdiction and diversity jurisdiction must receive immediate attention. Similarly, help is needed to assist the lower federal courts in handling and managing their growing caseloads. While productivity is on the increase, new judgeships are "desperately needed," he said. Progress in alternative dispute resolution in the public and private sectors has been important, particularly in the area of arbitration, but Chief Justice Burger sees the need for more research and more support for these efforts.

Problems generated by the rising prisoner population also require more attention, according to the Chief Justice. The conditions of prisons must be improved and overcrowding decreased; the caliber and training of prison officials must be enhanced; and programs that provide education and opportunities for work experience must be instituted. In this last regard, Chief Justice Burger renews his call for prisons to become educational and productive institutions—schools and factories with fences.

Moreover, the Chief Justice seeks answers to resolve cases arising under bankruptcy laws, calls for changes in the techniques and tactics used by lawyers in order to decrease the costs of litigation, suggests the need for more court administrators, and asks for realistic solutions to financial matters to help stem the alarming number of resignations by judges.

Finally, Chief Justice Burger notes that there "is a need to look beyond our immediate problems and on to 1983-1999." He speaks favorably of a bill passed in the Senate in 1982 that would establish a commission to study state and federal courts. This commission would examine the jurisdiction of the courts, appraise current problems confronting them, and develop long-range plans for future needs. As we approach the 200th anniversary of the Convention of the Constitution of the United States, a commitment to such an endeavor is critical. Progress has been made, he concludes, but unfinished business remains and new problems have arisen.

Copies of the Chief Justice's report are available in the Federal Judicial Center's Information Service Office.

Position Available

Court Clerk/Administrator, District of Minnesota (including courts at St. Paul, Minneapolis, and Duluth). Salary from $39,689 to $54,755, depending on qualifications and experience. Requires minimum of ten years of progressively responsible administrative experience in public service or business. Education equivalents of undergraduate, postgraduate, or legal training may substitute for required general experience. Closing date for applications is February 15, 1983. To apply, send three copies of resume to Chief Judge, 684 U.S. Courthouse, 110 South Fourth Street, Minneapolis, MN 55401.

EQUAL OPPORTUNITY EMPLOYER

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case, categorized under the offense for which the longest term was imposed and without regard to the number and variety of other charges included in that case, the data alone should not be used to substantiate statements concerning severity of prison terms for a specific offense. SARD further cautions that the "mean" sentences provided as averages could be distorted by either extremely low or extremely high sentences. Extremes particularly affect categories with small numbers of defendants. Probation officers who need the data for presentence reports are advised, therefore, to provide data on the individual sentences, rather than on the average, when there are fewer than five sentences in an offense group. Prefatory material to the volume provides several alternative methods for recomputing data and averages to reduce the effects of extreme sentences when necessary.

The *Sentences Imposed Chart* presents the same basic data provided in appendix table D-5 of the AO's *Annual Report of the Director*, but with two major differences. Table D-5 accounts for the number of defendants convicted during a year and includes only the case with the most serious conviction when the same defendant is convicted in separate cases. The chart shows the sentences for all cases, regardless of multiple cases for the same defendant. Also, while the chart does not distinguish between regular sentences and sentences imposed under special statutes, table D-5 separately indicates indeterminate terms imposed under 18 U.S.C. § 4205(b)(1)-(2) or under the Youth Corrections Act and, in addition, accounts for life sentences under "Other." For these reasons, averages in the table differ from those in the chart.

Persons outside of the federal judiciary may purchase the *Sentences Imposed Chart* for $7.50 from the Government Printing Office. The stock number is 028-004-00048-6. ■

Justice Stevens Urges Supreme Court to Review "Rule of Four"

Arguing that the Supreme Court now takes on far too many cases, Justice John Paul Stevens recently noted that the Court itself could diminish the docket to a more manageable, reasonable size. Stating that the Court "has a greater capacity to solve its own problems than is often assumed," Justice Stevens urged an examination of the Rule of Four—the practice that whenever four justices of the Supreme Court vote to grant a petition for a writ of certiorari, the petition is granted even though the Court's majority has voted to deny it.

Delivering the James Madison Lecture at New York University School of Law, Justice Stevens discussed the importance and impact of judge-made rules, in particular, the doctrine of *stare decisis*. He spoke of the benefits of the doctrine and noted that adherence to it "increases the likelihood that judges will in fact administer justice impartially and that they will be perceived to be doing so." But while this significant judge-made rule creates a presumption that generally should be followed, there are persuasive, legitimate reasons for the Court to reject a prior decision and to overrule an earlier case.

Similarly, Justice Stevens argued that although the Rule of Four serves several important goals, he could "demonstrate that it would be entirely legitimate to reexamine the rule, that some of the arguments for preserving the rule are unsound, and that there are valued reasons for making a careful study before more drastic solutions to the Court's workload problems are adopted."

After noting several other procedural changes and modifications that this Court has accomplished already, Justice Stevens stated that more than 23 percent of the petitions granted in the 1979 term were the result of no more than four affirmative votes. For the October term, 1980, the figure

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Speedy Trial Act Upheld as Constitutional

The Fourth Circuit Court of Appeals has recently overruled a district court's objections to the constitutionality of the Speedy Trial Act of 1974, as amended, 18 U.S.C. §§ 3161 *et seq.* A three-judge panel, Chief Judge Harrison L. Winter presiding, reversed a district court holding (*United States* v. *Brainer*, 515 F. Supp. 627, 630 [D. Md. 1981]) that the act was invalid as "an unconstitutional encroachment upon the Judiciary," and remanded the case for further proceedings (*United States* v. *Brainer*, No. 81-5159, 4th Cir., Oct. 19, 1982).

Defendant Brainer's trial was scheduled eighty days after his initial appearance before a judicial officer, ten days later than required by the act. In response to defendant's motion to dismiss for lack of a speedy trial, the government asserted that the act was unconstitutional, a position the district court upheld. The defendant was then convicted and appealed. On appeal, the government switched its position and argued that the act *is* constitutional. Faced with this anomalous situation, the circuit court appointed an *amicus curiae* to argue the abandoned position.

Confronting the jurisdictional issues resulting from the government's change of position, the court held that the case had neither become moot nor lost the status of a case or controversy. At the moment the defendant filed for appeal, the court held, it acquired jurisdiction. It noted that the Supreme Court has on various occasions asserted the obligation of a court, when government confesses error and abandons a position taken in a lower court, to independently examine the errors confessed. Moreover, the court found the Supreme Court's practice of appointing an *amicus* to assert an abandoned cause neither implies that a lawsuit becomes moot nor implies that it loses its case-controversy status for lack of adversariness between counsel.

Turning to the merits, the panel disagreed with the district court that (1) the Speedy Trial Act's mandatory dismissal sanction for failure to meet its deadlines determines the substantive outcome of cases and therefore usurps the judiciary's constitutionally assigned adjudicative role and that (2) the act is an intrusion into judicial administration and thus a violation of the separation of powers.

First, the appeals court held, the Speedy Trial Act does not lay down rules of decision, but only rules of practice and procedure. Like the Federal Rules of Civil Procedure, statutes of limitation, and other procedural requirements through which Congress regulates the courts, the panel found the Speedy Trial Act to be of "unquestioned validity."

The issue of whether federal courts have a power of self-administration that invokes the separation of powers doctrine is a matter of first impression, the panel noted. The court assumed "without deciding," however, that although "federal courts possess some measure of administrative independence such that congressional intervention would, at some extreme point, pass the limit which separates the legislative from the judicial power,"... "[i]t does not follow, however, that the Speedy Trial Act represents such an extreme." Noting that the separation of powers doctrine does not set the branches of government apart in absolute isolation, the Court framed the issue as whether the Speedy Trial Act "prevents the [judiciary] from accomplishing its constitutionally assigned functions." The panel found that it did not do so. First, it held, the act contains several "safety-valves" that temper its mandatory dismissal sanctions. Second, the panel found that the record did not reveal why other options, such as conducting Brainer's brief trial during a regular or special recess or calling upon another judge in the district court, were not used. The court concluded that the Speedy Trial Act is constitutional both on its face and as applied. ■

FJC's Education and Training Division Offers Wide Variety of Programs for Judicial Personnel

During fiscal year 1982, the FJC's Division of Continuing Education and Training (E & T) developed, organized, presented, and/or sponsored 192 seminars and workshops for the judicial branch.

As part of the division's wide offering of educational services to judicial officers and court personnel, E&T attempts to provide every U.S. district judge the opportunity to attend at least one Center-developed course each fiscal year. In fiscal 1982, twenty-eight seminars, workshops, and institutions were offered to district judges, including two sentencing institutes (which were also attended by some chief probation officers), three conferences of metropolitan district chief judges, and eleven "mini-seminars" or informal video orientation programs for small groups of newly appointed district judges. (For a description of these events, see *The Third Branch*, July 1982.)

In addition, E & T presented five workshops and seminars for bankruptcy judges. Educational programs for U.S. magistrates were mandated by Congress (28 U.S.C. § 637) when the current magistrate system was established. In fiscal 1982, the Center held five orientation and advanced seminars for magistrates. The Center also supported twenty programs for U.S. probation officers, including a teleconference on white-collar crime that involved several hundred attendees in twenty different cities receiving simultaneous instruction by satellite-beamed closed-circuit television.

Further, the Center continued its cooperation with Fordham University's master's degree program for probation officers, and Center staff participated in two week-long seminars at Fordham that were part of the degree program.

The continuing education needs of clerks of court, chief deputy clerks, and deputy clerks are also attended to by the E & T Division; in 1982 the Center offered thirteen programs for these officials. Moreover, three programs for assistant federal public defenders were developed, and two programs for federal public defender investigators were designed and sponsored by the Center in 1982.

A variety of in-court training and education programs, provided to court personnel at various staff levels in their local courts, are presented by the E & T Division every year. In fiscal 1982, eighty-eight in-court workshops and training sessions were offered. To coordinate training services and promote local training, the Center has also requested each court to designate a training coordinator from its staff. The E & T Division has provided four special training programs for these coordinators. ■

Correction

November's *Third Branch* article summarizing the workload of the federal courts as of June 30, 1982, contained a typographical error. The decrease in pending caseload was, indeed, the first reduction since 1958, but it was a 0.2 percent decrease rather than the 10.2 percent decrease mentioned in the article.

Center Publishes Pattern Criminal Jury Instructions

As part of an effort to provide models for jury instructions that would be more readily understandable to laypersons than the pattern jury instructions commonly used in federal courts today, the Federal Judicial Center has published a collection of jury instructions that has achieved, according to one of its authors, "a substantial simplification of vocabulary and syntax."

The document, *Pattern Criminal Jury Instructions*, was prepared by a Center committee chaired by Judge Prentice H. Marshall (N.D. Ill.). Judge Thomas A. Flannery (D. D.C.) and Judge Patrick E. Higginbotham (5th Cir.) served on the committee and were assisted by Professors Paul Marcus and Thomas B. Littlewood of the University of Illinois. To ensure that conflict with circuit law was avoided, an experienced trial judge from each circuit reviewed the instructions in draft form.

The work of the committee was performed in the context of uncertainty about the fate of proposed revisions of the federal criminal code. The instructions in this volume, therefore, are limited to matters that probably would not be affected by enactment of a new code—such as the roles of judge and jury, the definition of reasonable doubt, the way to evaluate particular kinds of evidence, and explanations of such defenses as insanity and entrapment.

The committee's work was regarded as a pilot effort, and the publication of these instructions represents completion of its assignment. A subcommittee of the Jury Committee of the Judicial Conference has been appointed to carry the effort further. The loose-leaf format of the document will facilitate the addition of future instructions.

Copies of the report will be sent to all active U.S. district judges and will be made available to assistant U.S. attorneys and to federal public and community defenders. Others within the judicial branch may obtain copies by writing to the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005. Please enclose a self-addressed, gummed mailing label, franked if possible.

In addition, the instructions will be made available to the private bar in 1983 by at least two commercial publishers. West Publishing Company will include them in its Devitt and Blackmar service, and Matthew Bender and Company will include them in the supplements to several treatises. ■

Growth in Prison Population Is Highest Since 1926, Reports Justice Statistics Bureau

The nation's prison population on June 30, 1982, totaled 394,380, rising 6.9 percent in the first half of the year over the total at year's end, 1981, according to a bulletin released by the Bureau of Justice Statistics, an arm of the Department of Justice. This half-year increase is the equivalent of a 14.3 percent annual growth, which is 2 percent higher than that of any other year since these statistics were first compiled in 1926.

Even if the anticipated increase during the last half of 1982 were not to occur, the bureau reported, the prison population is expected to exceed 400,000 in the third quarter of the year.

If the current rate of growth continues, however, over one-half million individuals will be incarcerated by the end of 1984. The population figure for June 30, 1982, has grown 31.4 percent in just five years: in 1977, the total prison population was 300,024.

State prisoners accounted for the largest growth. The states' prison population increase in the first half-year was 7.9 percent, well over double the 3.2 percent increase in federal institutions. This is the second straight year of federal increases, following several consecutive years of net declines in federal prisoners.

Even though there are 3,000 fewer prisoners in the federal prison system than in 1978, the year registering the highest number, the current population is 4,000 higher than the rated capacity for federal prisons.

The consequence of increasing admissions, longer sentences, and declining paroles is "serious overcrowding" in both the federal and state prison systems. Changing public attitudes toward crime and criminals as reflected by courts—in increasing commitments—and legislatures—in passing stiff mandatory and determinate sentencing laws—together with new parole policies in many states, contribute to the size of the prison population. "In recent years," said the bureau, "the annual growth in the prison population has consistently outpaced the annual growth in arrests." Some states, in providing interpretive analyses of their data to the federal agency, also cited the role of economic conditions, including unemployment, in prison increases; others point to stiff new penalties for drunk drivers; and some call attention to "a significant rise in the number of persons unable to make bail." Indeed, said the bureau, even though persons sentenced to less than one-year terms and unsentenced persons (who may be in jail either awaiting trial, for safekeeping, for presentence evaluation, or committed to narcotics rehabilitation facilities) represent only 5 percent of the prison population, "the growth in this component is taxing many facilities. The short-sentence/no-sentence group increased by 22.8 percent in the first six months of 1982, compared to a 6.2 percent increase for those with longer sentences."

Another major factor in swelling prison enrollment, according to many observers of trends in corrections, is the disproportionate number in the general population of twenty-year-old to twenty-nine-year-old males, a group traditionally cast as "most prison-prone." Aside from its larger size, this group has also proved more crime-prone, arrest-prone, and commitment-prone than comparable population components of earlier eras. According to the bureau, "Had incarceration rates for this group remained constant, its mere size would have increased the prison rolls. But, in fact, the rate of incarceration for males in this age group has grown steadily since 1972 and even more sharply since 1980." ■

PERSONNEL

Confirmations

Frank X. Altimari, U.S. District Judge, E.D. N.Y., Dec. 10
Paul E. Plunkett, U.S. District Judge, N.D. Ill., Dec. 10
John W. Bissell, U.S. District Judge, D. N.J., Dec. 10
Frank W. Bullock, Jr., U.S. District Judge, M.D. N.C., Dec. 10
Sam H. Bell, U.S. District Judge, N.D. Ohio, Dec. 21

Resignations

Adrian A. Spears, U.S. District Judge, W.D. Tex., Dec. 31
Lynn C. Higby, U.S. District Judge, N.D. Fla., Jan. 3, 1983

Death

Lester L. Cecil, U.S. Circuit Judge, 6th Cir., Nov. 26

N.Y. Commission Suggests Adoption of Federal Voir Dire Rules

New York State "could create trial-time savings equivalent to the work product of twenty-six judges" if it replaced the procedure allowing counsel to conduct the voir dire in the selection of juries with a rule requiring judges to take responsibility for questioning members of the venire. Adopting the federal rule for jury selection is one of several recommended revisions to state laws governing the jury system in the final report of the Governor's Executive Advisory Commission on the Administration of Justice.

The commission determined from a survey of voir dire procedures in nearly a dozen counties that an average voir dire used "12.7 hours out of a total of thirty-five hours of trial time." In fact, in at least one-fifth of the cases surveyed, the voir dire was longer than actual trial time.

The governor's commission com-

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was over 30 percent, with about 29 percent for the 1981 term. He felt that these percentages were significant and indicated that "[i]f all—or even most—of those petitions had been denied, the number of cases scheduled for argument on the merits [for the current term] would be well within the range that all justices consider acceptable." Further, he felt that the "law would have fared just as well" if the lower court decisions in a large number of these cases had been allowed to stand.

To permit scholars to explore these conclusions, Justice Stevens listed twenty-six cases granted by just four votes in the 1946 term and thirty-six cases so granted in the 1979 term.

While Justice Stevens argued that reexamination of the Rule of Four would provide relief for the crowded docket, he noted that this is only one of many potential solutions. The removal of the remainder of the Court's mandatory jurisdiction would provide considerable help, as would greater judicial restraint during the case selection process. It is Justice Stevens's hope that the Court could "retain the rule," but he "would much prefer temporary, or possibly even permanent abandonment of the Rule of Four to certain kinds of major surgery that have been suggested." ■

BANKRUPTCY, from page 1

Several courts have modified or refined one of the two model rules; others have adopted one or the other without change. Rules adopted as contingencies are now in effect in all districts.

In brief, the interim measures allow a district court to delegate many bankruptcy powers to bankruptcy judges, in accordance with 11 U.S.C. § 105 and Bankruptcy Rule 927. A bankruptcy judge may enter orders and judgments that become effective immediately upon issuance, subject to district court review if requested by a party. In addition, a bankruptcy judge is to prepare findings, conclusions, and a proposed judgment for *Marathon*-type claims; a district judge will then review the recommendation and enter a judgment. If a bankruptcy judge certifies review for a certain order or judgment, a district judge will review it even if no objection has been filed. ■

VOIR DIRE, from page 7

pared "the average 2.5 hours" needed for a federal court's voir dire in New York with the 12.7-hour average used by the sampled New York State juries, multiplied by the approximately 3,500 felony cases tried in New York State in 1981, to reach its dramatic estimate of the potential time to be saved by adoption of the federal rule. (According to a 1977 FJC study entitled *Conduct of the Voir Dire Examination: Practices and Opinions of Federal District Judges*, by Gordon Bermant, federal voir dire examinations nationwide are even less time-consuming than those in New York. This study reported that 82 percent of the civil voir dires and 65 percent of the criminal voir dires took less than one hour.)

A flexible approach similar to that of F.R. Crim. P. 24(a) was advised by the commission, however, to give the court discretion in allowing supplementation by counsel in the voir dire. "If flexibility were observed," the commission noted, "we are confident that the change to judge-conducted voir dire would expedite the process of jury selection without sacrificing defendants' rights." ■

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THE THIRD BRANCH

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Supreme Court to Decide on Standard for Last-Minute Stays of Execution

While granting a late-hour stay of execution for a man sentenced to die in a Texas prison, the Supreme Court also agreed in an order on January 24 to confront the question of "the appropriate standard for granting or denying a stay of execution pending disposition of an appeal by a federal court of appeals by a death-sentenced federal habeas corpus petitioner."

In the order the Court granted certiorari to an application for stay of execution for Thomas A. Barefoot, who had been scheduled to die on January 25. Mr. Barefoot had been convicted of the 1978 murder of a police officer. Attorneys representing Mr. Barefoot had petitioned the Court of Appeals for the Fifth Circuit for a stay of execution and a full appeal, but were denied either without a hearing on the merits. On December 7, 1982, the death sentence was carried out on another convicted Texas murderer who had sought stays by the same route, but whose petition was denied certiorari by the Supreme Court.

The Supreme Court's January 24 order also directed the parties to present briefs and arguments on the issues on the appeal before the Fifth Circuit. Oral arguments are scheduled for April 26.

Until the Supreme Court decides on a standard for stays of execution, all pending executions nationwide effectively may be blocked. "It appears unlikely that a court of appeals would deny a stay of execution while the Supreme Court is considering the appropriate standard for granting or denying such stays," said Joel Berger, an attorney for the NAACP Legal Defense and Educational Fund, Inc. According to his organization's records, 1,137 individuals were under sentence of death at the end of 1982.

See STAYS, page 6

American Psychiatric Association Takes Position on Insanity Defense

In the wake of public response to the Hinckley verdict, in which a federal jury found the man who shot President Reagan and three other men "not guilty by reason of insanity," and a plethora of bills introduced in the Congress and in state legislatures aiming to abolish or revise the insanity defense, the American Psychiatric Association in January produced its first comprehensive position statement on the insanity defense. The APA is recognized as the major professional association of the nation's psychiatrists and has over 27,500 members.

Although reluctant to recommend specific standards for legislatures to include in adopting a legal definition of insanity or in establishing workable grounds for acquittal by reason of mental defect, the association urges retention of the insanity defense in some form. Because federal law requires finding the "will to harm" for moral blameworthiness and thus exonerates from punishment "certain defendants [who are] either lacking free will or, alternatively, lacking sufficient understanding of what they do, the insanity defense becomes the exception that proves the rule." Although authors of the APA document critically review the major legal formulations of insanity in Anglo-American history, they observe that "the exact wording of the insanity defense has never, through scientific studies or

See INSANITY, page 2

Teleconference Scheduled On Victim and Witness Protection Act

On March 15 the FJC will conduct its largest video teleconference to date, beaming information on the recently enacted Victim and Witness Protection Act of 1982 from a suburban Washington, D.C., public television studio to twenty-five public television studio "receive sites" around the country.

The majority of faculty members and attendees at previous FJC-sponsored video teleconferences (on the supervision of drug offenders and white-collar criminals and on the status of pretrial services legislation) were U.S. probation and pretrial officers. The upcoming seminar has been planned to inform U.S. circuit and district judges, U.S. magistrates, and federal public defenders, as well as U.S. probation and pretrial services officers.

Professor Louis Schwartz of the University of Pennsylvania Law School will provide an overview and analysis of the new legislation, and Judge Gerald Tjoflat (11th Cir.) will discuss new responsibilities imposed by the act on judges and magistrates. Fred Bennett (federal public defender, D. Md.) will discuss the new duties faced by federal defend-

See TELECONFERENCE, page 8

Inside. . .

Several bankruptcy bills introduced in Congress ...... p. 3

GAO notes disparities in prosecutive policies .... p. 3

Pilot project: Single terminal to access WESTLAW, LEXIS, JURIS .... p. 3

Chief justices set up forum on lawyer competence .... p. 5

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INSANITY, from page 1

the case approach, been shown to be the major determinant of whether a defendant is acquitted by reason of insanity."

The association is, however, "extremely skeptical" of the proposal to supplement or replace the insanity acquittal with a "guilty but mentally ill" verdict. This approach would give juries "an easy way out" of "grappling with the difficult moral issues" involved and is not meaningful without guarantees of subsequent mental health treatment for the offender.

Drafters of the APA statement take approving note of a standard recently promulgated by Professor Richard J. Bonnie (in the Final Report of the Task Force on the Insanity Defense, submitted to the Commonwealth of Virginia, Nov. 30, 1982), which would provide for acquittal for one "unable to appreciate the wrongfulness of his conduct at the time of the offense." The task force standard contains this formulation: "The terms mental disease or mental retardation include only those severely abnormal mental conditions that grossly and demonstrably impair a person's perception or understanding of reality and that are not primarily attributable to intoxication caused by substances which the defendant knowingly introduces into his body."

In line with this standard, another of the main thrusts of the APA's position is disagreement with legal theories that would include offenders who are sociopaths or who have other antisocial personality disorders among the "criminally insane." For mental disorders to lead to exculpation, the APA maintains, they must be "serious" and usually as severe as the psychoses. Modern psychiatric thinking holds that those with antisocial personality disorders (in lay terminology, "sociopaths") understand the nature of their acts but lack a conscience to dissuade them from committing them and therefore should "be held accountable for their behavior."

The association also expressed concern for the public safety arising from the premature release from mental institutions of potentially dangerous individuals. Public policy in some states, "as a consequence of some civil libertarian-type court rulings," directs that insanity acquittees may not be subjected to more restrictive confinement procedures than those used for civilly committed patients. "It is a mistake," the APA holds, "to analogize such insanity acquittees as fully equivalent to civil committees who...have not usually already demonstrated their clear-cut potential for dangerous behavior because they have not yet committed a highly dangerous act.... By contrast, the 'dangerousness' of insanity acquittees who have perpetrated violence has already been demonstrated."

Modern advances in psychopharmacological treatment lead only to "seeming restoration of sanity" for hospitalized offenders. While treatment and antipsychotic drugs reduce overt symptoms, this does not mean either that a patient is cured or that he or she is no longer dangerous. "The presumption should be that after initial hospitalization a long period of conditional release with careful supervision and outpatient treatment will be necessary to protect the public and to complete the appropriate treatment program." Where funds and other resources are lacking and where these procedures are not provided, "the public is subjected to great risk."

The association does not hold, however, that psychiatrists alone should make the decision as to whether to release an insanity acquittee. Nor should the decision be based solely on psychiatric testimony about the patient's current condition or potential dangerousness. Rather, the association recommends the use of a board to make confinement and release decisions, whose role would be akin to that of a parole board. A model program that the APA looks upon favorably is currently operating in Oregon.

A "guilty but mentally ill" verdict...would give juries an "easy way out" of "grappling with the difficult moral issues" involved.

The APA is not averse to those legislative proposals that would restrict psychiatrists appearing as expert witnesses to psychiatric diagnoses and to statements on the mental state and motivation of the defendant. Questions leading to "ultimate issue" testimony on "sanity/insanity" or "responsibility" require "impermissible leaps in logic" to legal and moral constructs that are not within the province of psychiatry. These questions not only lead to conflicting opinions between experts but also to a loss of faith by the public and distrust about the reliability of psychiatric testimony.

Similarly, the association is "exceedingly reluctant" to make a recommendation as to which party should bear the burden of proof in insanity defense proceedings. This, the APA claims, is a matter for the legislature to determine. The APA understands that "who bears the burden of proof may be quite important," especially when the "beyond a reasonable doubt" standard must be met. In accord with the Supreme Court in *Addington* v. *Texas* (99 S. Ct. 1804, 1811 [1979]), the APA holds that "psychiatric evidence is usually not sufficiently clear-cut to prove or disprove many legal facts 'beyond a reasonable doubt.' " ■

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Disparate Prosecutive Policies of U.S. Attorneys Produce Unequal Justice, Says GAO

Although criminal statutes and the attorney general, through the Executive Office for U.S. Attorneys and the Criminal Division of the Department of Justice, are entrusted with general supervision and certain authorities over U.S. attorneys, individual U.S. attorneys' offices have broad discretion in prosecutorial decisions and exercise widely disparate declination policies, all of which result in great differences in the treatment of suspected violators of federal laws.

This is among the conclusions of a recently released General Accounting Office report, *Greater Oversight and Uniformity Needed in U.S. Attorneys' Prosecutive Policies* (1982). GAO also found in its 1981 sampling of the operations of seven U.S. attorneys' offices that, because little cooperation exists among federal, state, and local authorities, cases declined for federal prosecution are seldom referred to state and local agencies, and, therefore, many go unprosecuted.

(The seven districts audited for the study were the Northern and Eastern Districts of California, the Northern and Southern Districts of Texas, the Southern District of Ohio, the Eastern District of Kentucky, and the District of Maryland.)

GAO's analysis showed, further, that individual U.S. attorneys' declination policies are not always consistent with law enforcement priorities for major offenses established by the Justice Department. Consequently, resources are being expended in the field on cases that do not meet federal criteria as major offenses. Moreover, a comparison of differing levels of monetary cutoffs among the seven U.S. attorneys' offices showed that suspected federal offenders are subject to different treatment for similar offenses. "We recognize that prosecutive resources are limited and prosecution of all federal offenses is prohibitive," the report acknowledges, but "consistency and equal justice require that offenders be treated similarly for similar offenses throughout the federal system."

The GAO report noted other problems resulting from poor communication among federal, state, and local law enforcement authorities, and also examined widely different usage rates of pretrial diversion programs among the districts.

As to plea bargaining, the GAO report asserts that "no one knows the full extent and impact of disparities in the use of plea agreements." The report takes note of provisions in the federal rules that give courts the authority to accept or reject plea agreements reached between the parties and to determine the extent to which plea agreements may be used in their jurisdictions, but also observes that there is wide disparity among district court practices. Judges differ in whether they will accept plea agreements conditioned on a defendant's receiving a specific sentence. Moreover, U.S. attorneys' offices differ greatly in their charge-reduction standards. To buttress the latter point, the GAO report cites the 1980 House Report on the Criminal

See GAO, page 4

New Bankruptcy Legislation Introduced

Deciding on a permanent remedy to cure the defects in the Bankruptcy Reform Act of 1978 ranks very high on the agenda of the 98th Congress. That act's section 241(a) was identified as at least partially invalid by the Supreme Court in its June 1982 decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, because it granted bankruptcy courts authority to exercise jurisdiction over ancillary causes without providing litigants the right to have their disputes settled by judges insulated from political pressures by the historical methods of being granted life tenure and protection from salary diminution.

As part of its holding in the *Northern Pipeline* case, the Supreme Court called upon Congress either to redraw, or "clarify," the existing bankruptcy courts' jurisdiction or to restructure the bankruptcy courts themselves so that jurisdiction would not need to be redrawn. As a possible solution to the impasse, in September 1982 the Judicial Conference submitted to Congress a report with an appended draft bill, which would have clarified bankruptcy courts' jurisdiction.

See LEGISLATION, page 6

Four Circuits Served by Automated Legal Research Project

Four circuit courts have been equipped with computer equipment by the Department of Justice to enable them to participate in the Automated Legal Research Pilot Project. Sanders II terminals in place in the D.C. Circuit, Second Circuit, Seventh Circuit, and Ninth Circuit allow specially trained operators to access from a single terminal the data bases and libraries available through LEXIS, WESTLAW, and JURIS.

The project is planned to extend through fiscal year 1983. The Administrative Office, which is administering the pilot program, will evaluate it before it is continued.

The Supreme Court Library already has the capability of accessing all three systems, but it employs three terminals to fulfill the tasks possible with one Sanders terminal.

Legal research specialists have been trained to search the systems in the four pilot courts, which were chosen because they are the heaviest users of computerized legal research services. Any member of the judiciary may direct a request for a computer-assisted search to these specialists, provided he or she has exhausted the search capabilities of systems in his or her circuit library.

Specialists may be reached by FTS at these phone numbers: D.C. Circuit (535-3400); Second Circuit (662-1052); Seventh Circuit (387-5661); and Ninth Circuit (556-6129). ■

GAO, from page 3

Code Revision Act of 1980, which asserts that "plea agreements in the federal system severely limit the range of permissible punishments available to a judge."

All U.S. attorneys' offices employ plea agreements, but at the time of GAO's survey, the Department of Justice had neither provided specific policy direction on their use to ensure consistency nor established reporting requirements so that Justice could monitor their use and identify and resolve disparities. In several districts GAO investigators discovered that complete documentation justifying plea agreements does not exist even within the U.S. attorneys' offices. Furthermore, plea agreements are usually arrived at without written office policies or procedures, and in many cases are not subject even to internal review procedures.

"Identical treatment of identical offenders may not be appropriate."

In its comment on GAO's evaluation, the Department of Justice agreed on the need to improve its oversight of U.S. attorneys' offices, to collect data on their operations, to improve field evaluations, and to coordinate federal prosecutive policies. Justice reported on numerous improvements instituted both before and after the appearance of the draft version of the GAO report. A new automated management information system (PROMIS) has been implemented, and the department anticipates much improvement in the handling of concurrent jurisdiction matters and, generally, in cooperation and coordination among the various law enforcement agencies through establishment of a Law Enforcement Coordinating Committee set up in each U.S. attorney's office.

Apart from these areas of accord with the GAO report, however, the Department of Justice is in general disagreement with GAO's findings. In a lengthy response appended to the report, Justice provides its rationale for allowing U.S. attorneys great flexibility to adopt the policies on declination, plea agreements, and pretrial diversion that are most responsive to the particular crime problems and resource allocation problems of their own areas. The response also outlines important factors that federal prosecutors consider in making prosecutorial decisions, which Justice believes received scant attention by GAO.

The response explains why Justice's position is at such variance with assumptions underpinning the GAO report. Regarding prosecutorial discretion generally, "Identical treatment of identical offenders may not be appropriate.... The nature of the offense is an insufficient basis for making comparisons," and, since Justice's pretrial diversion program is offender-oriented rather than offense-oriented, "any comparisons by type or quantity of offense are irrelevant." ■

1983 Judicial Conferences of the Circuits

Circuit	Dates	Location
District of Columbia	May 11-14	Hot Springs, Va.
First Circuit	Oct. 24-26	Portland, Me.
Second Circuit	Sept. 29-Oct. 1	Hershey, Pa.
Third Circuit	Oct. 2-5	Williamsburg, Va.
Fourth Circuit	June 23-25	Hot Springs, Va.
Fifth Circuit	April 10-13	Ft. Worth, Tex.
Sixth Circuit	July 7-10	Mackinac Island, Mich.
Seventh Circuit	May 1-3	Chicago, Ill.
Eighth Circuit	July 5-10	Colorado Springs, Colo.
Ninth Circuit	July 17-21	Kauai, Hawaii
Tenth Circuit	July 6-9	Sun Valley, Idaho
Eleventh Circuit	May 8-11	Savannah, Ga.
Federal Circuit	May 20	Washington, D.C.

PERSONNEL

Nominations

Sherman E. Unger, U.S. Circuit Judge, Fed. Cir., Dec. 15

John P. Vukasin, Jr., U.S. District Judge, N.D. Cal., Dec. 17

Appointments

Frank X. Altimari, U.S. District Judge, E.D. N.Y., Dec. 22

Frank W. Bullock, Jr., U.S. District Judge, M.D. N.C., Dec. 29

Sam H. Bell, U.S. District Judge, N.D. Ohio, Jan. 1

John W. Bissell, U.S. District Judge, D. N.J., Jan. 3

Paul E. Plunkett, U.S. District Judge, N.D. Ill., Jan. 17

Elevations

T. F. Gilroy Daly, Chief Judge, D. Conn., Jan. 1

Lawrence K. Karlton, Chief Judge, E.D. Cal., Jan. 27

Senior Status

Herbert N. Maletz, Judge, U.S. Court of International Trade, Dec. 31

T. Emmet Clarie, U.S. District Judge, D. Conn., Jan. 1

Philip C. Wilkins, U.S. District Judge, E.D. Cal., Jan. 27

Myron L. Gordon, U.S. District Judge, E.D. Wis., Feb. 12

Deaths

Leonard P. Moore, U.S. Senior Judge, 2nd Cir., Dec. 7

Ben C. Green, U.S. Senior Judge, N.D. Ohio, Jan. 12

NOTEWORTHY

A new U.S. Parole Commission manual, including yet another offense-severity scale, has been published and will be distributed to the appropriate personnel. The new offense-severity scale takes effect February 11, 1983.

* * *

Legal Services Corporation's new president, Donald P. Bogard, a longtime corporate lawyer, recently announced his support for a project of the American Corporate Counsel Association Pro Bono Committee.

The project will enlist lawyers from the approximately thirty thousand attorneys in corporate legal departments in the country to volunteer their time to assist poor clients who meet eligibility requirements with civil legal problems.

Legal Services Corporation representatives promised LSC help in training ACCA pro bono volunteers, as well as liaison help in matching corporate lawyers with legal services programs.

* * *

Faith P. Evans has become the first woman to have been nominated by a president to be a U.S. marshal. Ms. Evans, 45, is now serving as U.S. marshal for Hawaii.

Trained as a registered practical nurse, Ms. Evans served in the Hawaii House of Representatives from 1974 through 1980. As to being the first presidentially appointed female marshal, Ms. Evans said at her swearing-in ceremony, "Another door has opened, but the challenge is not so much in being the first, but doing the best job possible."

* * *

The total number of individuals incarcerated in federal and state corrections institutions exceeded 400,000 by the end of September 1982. New prison statistics released by the Bureau of Justice Statistics show a 9.9 percent increase in prisoners during the first nine months of 1982, compared with an 8.6 percent increase during the corresponding time period in 1981.

On September 30, 1982, federal prisons housed 29,403 prisoners, including 1,234 unsentenced persons under the jurisdiction of the Immigration and Naturalization Service.

The prison population rose in forty-one states and in the District of Columbia, with Oregon and Alaska showing the largest increases. Two states have larger numbers of prisoners than the entire federal prison system: Texas (33,554) and California (33,502). The New York (27,572) and Florida (26,986) prison systems are close behind.

Conference of Chief Justices Approves Coordinating Council on Lawyer Competence

The Conference of Chief Justices recently adopted the recommendation of its Task Force on Lawyer Competence to establish a new entity "to provide a forum for continuing discussion of the issues involved in lawyer competence and to coordinate the many competence assurance efforts currently under way." The proposed Coordinating Council on Lawyer Competence will oversee the development of an information exchange/clearinghouse and will develop model state lawyer competence programs and other initiatives for consideration by the conference.

The coordinating council will operate over a five-year period from January 1983 through December 1987. This relatively long life was planned to give the participants "confidence in the continuing interest of the Conference of Chief Justices in bar performance and its desire to sustain the effort necessary to bring about effective coordination and improvement of state lawyer competence assurance efforts."

Initially, the coordinating council will consist of twenty-four members, with Chief Justice Norman M. Krivosha of Nebraska serving as chairman. Chief Justice Vincent L. McKusick of Maine and Chief Justice Ward W. Reynoldson of Iowa have been appointed as representatives of the conference on the council. The remainder of the membership will include trial judges, academics, bar presidents, and representatives of organizations such as the Association of American Law Schools, the American Bar Association Section on Legal Education and Admissions to the Bar, the American Bar Association Task Force on Professional Competence, and the National Conference of Bar Examiners.

Among the organizations that will appoint representatives are the Federal Judicial Center and the Implementation Committee of the Judicial Conference of the United States on the Admission of Attorneys to Federal Practice (the King Committee). Both organizations had worked with and provided assistance to the conference's task force.

The National Center for State Courts will provide logistical support for the council's meetings, maintain its minutes, and prepare its materials.

Study Analyzes Jury Instructions

As noted in the January 1983 issue of *The Third Branch*, the Federal Judicial Center recently published and distributed a collection of criminal jury instructions developed to be more readily understandable to laypersons than the pattern jury instructions commonly used in federal courts today. Also noted in that article was the appointment of the Judicial Conference Subcommittee on Pattern Jury Instructions to carry the model instructions effort further.

For those readers interested generally in the topic, attention is directed to an article by Lawrence J. Severance and Elizabeth F. Loftus in the *Law and Society Review* (vol. 17, Nov. 1, 1982).

See INSTRUCTIONS, page 8

LEGISLATION, from page 3

Since the Congress took no action on legislative alternatives proposed before adjournment in late December, and because the Supreme Court did not extend a stay of its decision beyond December 24, the district courts have been operating under an interim or emergency rule suggested by the Judicial Conference, which, *inter alia*, removes contested matters from bankruptcy judges to district court judges.

Although the new Congress has been in session only a few weeks, hearings on various legislative proposals have already begun in subcommittees of each chamber's judiciary committee. Bills introduced thus far range from a proposal (H.R. 3, sponsored by Congressman Rodino, and related to his 97th Congress bill, H.R. 6978) to establish ninety-four independent Article III bankruptcy courts served by 227 judges, to a comprehensive bill to restructure the bankruptcy court system (S. 443, introduced by Senator Dole), to a bill which would preserve the existing Article I bankruptcy courts and assign "related to bankruptcy" cases to district courts (H.R. 1401, sponsored by Congressman Kastenmeier).

The Dole bill has the support of the Judicial Conference of the U.S., the Department of Justice, and other interested organizations. The Kastenmeier bill is supported by the Judicial Conference and the American Bar Association.

Among the features of the Dole legislation is the merger of all bankruptcy jurisdiction directly into the existing ninety-four district courts. An Office of Bankruptcy Administration would be established in each district to handle the large number of uncontested matters now handled by bankruptcy judges; and the Bankruptcy Administrator would also be charged with expediting resolution of contested matters by district judges (or magistrates, in cases where the parties have consented).

S. 443 also calls for creation of 165 new district court judgeships: the fifty-one positions approved by the Judicial Conference in September 1982, plus 114 new positions estimated as necessary to process contested bankruptcy matters.

Assistant Attorney General Jonathan C. Rose, in a statement before the Senate Judiciary Committee's Subcommittee on Courts, delivered January 24, and Deputy Attorney General Edward C. Shmults, on February 2, before the House Judiciary Committee's Subcommittee on Monopolies and Commercial Law, announced the administration's endorsement of the Judicial Conference's "merger" proposal, which is embodied in the Dole bill.

Since fewer new judges would be required, both officials pointed out, "this proposal would be considerably less expensive" than previous proposals. The bill "would result in the more efficient use of judicial manpower, and would avoid the creation now of new judgeships which might not be warranted in the years ahead."

Another "important advantage" of each proposal that the Judicial Conference has endorsed is that neither would "cause the major transformation of the character of the Article III judiciary that would result from the creation of a specialized bankruptcy court." ■

STAYS, from page 1

According to a story in the *Houston Chronicle*, Texas Assistant Attorney General Doug Becker said that the attorney general's office "will not oppose applications for stays of execution until the issues involved in the Barefoot case are resolved." There are currently 169 prisoners on death row in Texas.

Texas Attorney General Jim Maddox had argued against blocking Mr. Barefoot's execution. Following the Supreme Court's grant of a stay, however, the state decided not to ask the Court to reconsider its decision to hear the case. ■

Private Insurance Plans May Save Judges Money

U.S. District Judge H. Lee Sarokin (D. N.J.) has engaged in some after-hours fact-finding to discover how the government-sponsored optional life insurance program compares with private plans. Writing in the *Third Circuit Journal* (Fall 1982), Judge Sarokin reports some "startling" findings of his mission. If a judge opted for private individual coverage identical to the maximum federal plan and paid premiums over a twenty-year period from age 45 to age 65, the overall cost with one specified carrier would be $25,000 less than with the federal plan. A thirty-year schedule of premiums, to age 75, with another insurance company would be $47,800 less than with the government's group program. It is reasonable to assume, the judge adds, that "comparison with other group rates might create an even greater disparity."

The judge does not believe, however, that the federal plan "should be rejected out-of-hand." His main objection is that those "responsible for dispensing the government programs" have not advised judges or other federal employees of comparisons between government and private plans.

As to the survivors' annuity program, Judge Sarokin determined that he could purchase between $250,000 and $300,000 of private life insurance with the approximately $2,500 a year that contribution to the federal plan would cost him. "The full amount would be payable from the day the policy was acquired and, if invested at 10 percent, would generate $25,000 to $30,000 a year without in any way invading the principal amount received by the surviving spouse."

"Eighty-five percent of the judges have opted to participate in the annuity program, and I am confident that they did so, not after any careful analysis, but because they believed that the government could do for them what no private plan could do," said Judge Sarokin. ■

FJC Sponsors Seminar for District Judges and Clerks

The FJC is making preparations for a spring meeting of Seventh and Eighth Circuit chief district judges and clerks of district courts. The seminar will be held April 11 through 13 in St. Charles, Illinois.

A planning group chaired by Judge William J. Campbell has developed an agenda that will treat various areas of court administration and management, including juror utilization, case and calendar management, and automated systems for managing information.

This will be the first FJC seminar sponsored jointly for district judges and clerks of court. ■

Administrative Conference Recommendations

At its 25th plenary session held in December, the Administrative Conference of the United States, which makes recommendations for improvements to agencies of the government, the president, Congress, and the Judicial Conference of the United States, adopted two recommendations.

One, which relates to federal officials' liability for constitutional violations, calls on Congress to enact legislation that would substitute the United States as the sole defendant in all damage actions against executive branch officers and employees for constitutional torts committed while acting within the scope of their office or employment.

The second recommendation adopted came out of the conference's Judicial Review Committee and specifically addresses the subject of judicial review of rules in enforcement proceedings. The conference believes that Congress should consider certain factors (set forth in the recommendation) when deciding whether to restrict the availability of judicial review of agency rules to a limited period starting immediately after the issuance of an agency rule. Also included in this recommendation is the statement that when Congress does limit review, the limitation should, ordinarily, apply only to issues related to the rulemaking process or to the "adequacy of record support for the rule," and that other kinds of issues should remain open for review in enforcement proceedings.

Copies of the complete text of each of these recommendations are available in the Federal Judicial Center's Information Service Office. ■

Center Issues New Edition of Educational Media Catalog

The Center has recently published the third edition of its *Educational Media Catalog*, which lists audiocassettes, films, and videocassettes available for circulation to federal court personnel from the Center's Media Library. Copies are being sent to all federal judges and magistrates and to the offices of all clerks of district and bankruptcy courts (including divisional offices), chief probation officers, circuit and district court executives, federal public defenders, court librarians, and senior staff attorneys. A copy is also being provided to each of the training coordinators in the various courts.

The library contains presentations by judges, practitioners, and academicians that address a broad spectrum of subjects, including substantive legal issues, civil and criminal case management, the use of technology, and supervisory and office skills.

This third edition of the *Educational Media Catalog* is a measure of the growth of the library. Its collection of audiocassettes has grown to 1,200—almost three times the number listed in the second edition. In addition, the collection now includes approximately 160 videocassettes and 100 films.

In recognition of the changing nature of the library's collection, the third edition of the *Catalog* has been prepared in loose-leaf format. As new items are added and others deleted, holders of the third edition will

See CATALOG, page 8

THE SOURCE

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

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"The Supreme Court 1981 Term." 96 *Harvard Law Review* 1 (1982).

TELECONFERENCE, from page 1

ers, and Donald Chamlee (deputy chief, AO Probation Division) will provide an overview of additional assignments mandated by the statute for probation officers.

Speakers from districts that established local victim-impact reporting provisions prior to the passage of the legislation will discuss their experiences. They are Judge James Miller (D. Md.), Richard Martinez (chief probation officer, D. N.M.), and Ed DiToro (U.S. probation officer, E.D.N.Y.).

Agenda for a panel discussion on issues and problems arising from the new statute include plea bargaining and the implications for restitution in cases in which counts have been dismissed; the possibility of undue complications or delay resulting from complex victim harm/impact investigations; determining who is a victim and how to establish restitution conditions, such as deciding what harms are restorable and how services in lieu of money may be measured; coordination between the probation officer and the prosecutor; and the impact of early parole or revocation on restitution orders.

The cities to which the program will be telecast are Atlanta, Baltimore, Boston, Chicago, Cleveland, Columbia, S.C., Dallas, Denver, Detroit, Houston, Los Angeles, Louisville, Miami, New Orleans, New York, Philadelphia, Phoenix, Pittsburgh, Richmond, Sacramento, San Antonio, San Diego, San Francisco, St. Louis, and Tampa.

Because of budgetary constraints, the Center is unable to make travel funds available for the attendance of interested judicial system personnel who work at a distance from these sites. They may arrange on their own initiative, however, for transportation to the nearest receive site. To ensure the availability of space at the receive sites, those planning to attend should first contact the site coordinator in the probation office of the receiving city closest to them.

Approximately one month after the teleconference, the Center will make available videocassettes of the entire program. *The Third Branch* will announce their availability in a forthcoming issue. ■

INSTRUCTIONS, from page 5

"Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions" reports the findings of three related studies conducted by the authors. The first project analyzed questions asked by jurors who had participated in actual deliberations in order to identify the sources of misunderstanding; the second employed videotaped materials to highlight the linguistic problems that cause confusion for jurors and may interfere with their ability to apply instructions; and the third piece purports to demonstrate that juror understanding may be improved by applying psycholinguistic principles in the redrafting of pattern instructions. ■

CATALOG, from page 7

receive replacement pages and a revised table of contents. It is not possible to provide, and maintain, a copy of the *Catalog* for every employee who will use it. Rather, the Center would hope that the *Catalog* could be made available to personnel through the offices to which it is sent. ■

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 15
NUMBER 3
MARCH 1983

Chief Justice Calls For Temporary Panel To Reduce Supreme Court Caseload

Striking a note of increased urgency, Chief Justice Warren E. Burger has for the first time publicly advocated that Congress create a temporary, experimental panel to provide immediate relief for the Supreme Court's crushing caseload. The panel would be composed of existing federal judges serving on rotation for six months or a year and would have the limited function of deciding "all intercircuit conflicts and possibly, in addition, a defined category of statutory interpretation cases." The Chief Justice made the proposal in his Annual Report on the State of the Judiciary to the midyear meeting of the American Bar Association in New Orleans on February 6.

Chief Justice Warren E. Burger

The Chief Justice proposes that the panel be established for a five-year period and be made up of two judges from each of the twelve circuits and the U.S. Court of Appeals for the Federal Circuit, thus creating a pool of twenty-six judges from which seven or nine could be drawn for limited periods.

The Supreme Court would retain certiorari jurisdiction over the new panel's cases, but the Chief Justice is confident, on the basis of the experience with other special temporary panels, that the Supreme Court would not often need to grant further review.

For administrative purposes, the Chief Justice proposes that the panel be added to the U.S. Court of Appeals for the Federal Circuit, whose excellent facilities are located in Washington, but he also observes that the special panel could as well be added to the Temporary Emergency Court of Appeals, also located in Washington.

Legislation incorporating much of the Chief Justice's proposal has been introduced in Congress by Congressman Kastenmeier as H.R. 1970 on the House side and in the Senate as part of S. 645, a package whose chief sponsor is Senator Dole.

Although the Chief Justice does not assert that the proposed special panel is the best or only solution for a permanent remedy to relieve the Court of a portion of its increasingly overloaded calendar, he anticipates that the panel would immediately divert thirty-five to fifty cases a year from the Supreme Court's argument calendar. He also asks Congress to create a tripartite governmental commission with members appointed by each branch to study these problems and evaluate the efficacy of the special panel while it is in operation and well before its "sunset." The study commission could decide on continuing the intercircuit appeals panel or, optionally, adopting one of the other intermediate courts of appeals proposed by various commissions, committees, and individuals in the past dozen or so years—including the crea-

See CHIEF JUSTICE, page 2

United States and France Sign Prisoner Exchange Agreement

At a formal ceremony on January 25, attended by numerous high-ranking diplomats and law enforcement officials of the United States and France, Attorney General William French Smith and French Minister of Justice M. Robert Badinter on behalf of their governments signed a treaty providing for an exchange of foreign nationals convicted of serious offenses in each country. The Convention on the Transfer of Sentenced Persons will now be sent by President Reagan to the Senate for ratification. When ratified, it will stand parallel to existing prisoner exchange treaties between the United States and Bolivia, Canada, Mexico, Panama, Peru, Thailand, and Turkey.

In remarks delivered at the ceremony, Attorney General Smith declared that the French-U.S. treaty is "only the first step" in arriving at mutual law enforcement arrangements, which, it is hoped, will lead to "resolution of the problems that have arisen between our countries in the area of extradition."

See TREATY, page 4

Seminar for Newly Appointed U.S. District Court Judges

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

The usual reception for new judges and their families will be held on the Sunday preceding the opening of the seminar (May 1). The program also calls for a black-tie dinner at the Supreme Court on May 4.

CHIEF JUSTICE, from page 1

tion of courts advocated by the Freund Committee, the Hruska Commission, Justice James Duke Cameron (Sup. Ct. Ariz.), or others.

Whichever solution is later selected as a permanent entity, the Chief Justice is adamant that "only fundamental changes in structure and jurisdiction will provide a solution that will maintain the historic posture of the Supreme Court, will insure 'proper time for reflection,' preserve the traditional quality of its decisions, and avoid a breakdown of the system—or of some of the Justices."

Other federal courts' problems, Chief Justice Burger points out, "can be met by a combination of improved procedures, wider use of court administrators, and, ultimately, by the addition of more judges. . . . But in the Supreme Court more judges would not help."

The pressures facing the Supreme Court are so severe, the Chief Justice claims, "[i]t will no longer do to say glibly, as some have, that we do not need 'another tier of courts,' or another court, or a change in the structure of appellate procedure at the highest level simply because we have functioned since 1891 with the present structure." He adds, "That is meaningless in terms of the needs of the present and particularly of the next ten to twenty years and for the twenty-first century. We can no longer tolerate the vacuous notion that we can get along with the present structure 'because we have always done it that way.' "

Justice O'Connor Also Urges Action to Alleviate Pressures

Immediately prior to the Chief Justice's address, Justice Sandra Day O'Connor also called for changes to alleviate caseload pressures. "The statistics make it clear," she said, "that action is needed." Justice O'Connor recommended the abolition of the Supreme Court's mandatory jurisdiction and consideration of additional specialized federal appellate courts, like the Federal Circuit Court, "with exclusive appellate jurisdiction in . . . additional areas such as the fields of taxation and perhaps . . . agency review." The search for necessary change, she added, should consider the related burdens of all federal courts. She would require exhaustion of administrative remedies before a section 1983 action could be maintained and urged continued examination of the "elimination or reduction" of diversity jurisdiction. ■

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Co-editors

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

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

Position Available

Clerk, U.S. Bankruptcy Court, San Francisco, California. Salary from $56,945 to $62,639 (JSP-16). The clerk of court functions under the chief judge of the court and manages the administrative activities and statutory duties of the clerk's office. Requires a minimum of ten years of administrative or appropriate professional experience in public service or business and a thorough understanding of the organizational and procedural aspects of court management. Educational equivalents may be substituted. To apply, submit a resume by March 15, 1983, to Walter T. Moniz, Clerk, U.S. Bankruptcy Court, 450 Golden Gate Avenue, Box 36053, San Francisco, CA 94102.

EQUAL OPPORTUNITY EMPLOYER

CALENDAR

- Mar. 16-17 Judicial Conference of the United States
- Mar. 16-18 Seminar for Bankruptcy Judges
- Apr. 10-13 Fifth Circuit Judicial Conference
- Apr. 11-13 Seminar for Chief District Judges and Clerks of District Courts of the Seventh and Eighth Circuits
- Apr. 18-19 Workshop for Judges of the Sixth Circuit
- Apr. 18-20 Sentencing Institute for the Fourth and Eleventh Circuits
- May 2-7 Seminar for Newly Appointed U.S. District Judges

ABA Considers Rules of Professional Conduct

The American Bar Association's House of Delegates last month completed discussions started last August on a new code of professional ethics. The draft before the delegates was the product of a six-year study by an ABA Commission on Evaluation of Professional Standards.

Hours of debate were consumed in considering at least 169 proposals for changes, deletions, or additions recommended by state and local bar associations, ABA sections, committees, and divisions, and groups such as the National Association of Attorneys General, the American College of Trial Lawyers, and the International Association of Insurance Counsel. The task was concluded after 45 proposals were defeated, 97 withdrawn, and 27 approved. Redrafting has already started under the chairmanship of former ABA president Robert Meserve of Boston, replacing former chairman Robert Kutak, who died in January. The now-entitled Model Rules of Professional Conduct will be presented to the House of

See RULES, page 4

NOTEWORTHY

If you switched from one group health insurance plan to another during the federal government's recent "open season," but still have not received an ID card from your new insurer, you can expect to receive one soon. Until it arrives, it is probably wise to keep an alternative means of identification close at hand. Should the need arise, most doctors and hospitals will ask for the number found at the top right side of an employee's copy of a filled-out "Health Benefits Registration Form 2809" as proof of insurance coverage. Form 2809 is the one used by federal employees to indicate desired changes in coverage to become effective in 1983.

Other hospitals and doctors are willing to accept an employee's social security number as identification until the arrival of official ID cards.

* * *

Since 1977 the number of individuals entering the nation's 172 ABA-accredited law schools has steadily increased—until autumn 1982. This year's freshman class has 1.5 percent fewer students than last year's.

Nevertheless, overall law school enrollment continued to rise, albeit more slowly than in previous years—by a mere .4 percent. The percentages of minority and female law students are also higher than in 1981, by 4.3 percent and 1.5 percent, respectively.

Another significant statistic to emerge from the ABA's annual law school population survey is that candidates for post-J.D. degrees or study registered a marked 8.4 percent decrease in the current school year.

* * *

The Department of Justice has announced the selection of Oakdale, Louisiana, for construction of a $17 million detention center for aliens, to be capable of housing one thousand aliens awaiting deportation proceedings. Construction of the facility, which will employ about three hundred people, is expected to begin in six to nine months and to be completed approximately two years from now. The center will be operated jointly by the Bureau of Prisons and the Immigration and Naturalization Service.

The Reagan administration requested Congress in 1982 to appropriate funds for such an institution, as part of its program to ensure enforcement of the immigration laws. Even using space in federal, state, and local institutions, in addition to filling its own facilities, the INS has not had sufficient housing space to pursue its enforcement goals fully.

* * *

A new directory of mediation, arbitration, and conciliation programs has recently been published by the ABA's Special Committee on Dispute Resolution. The compilation presents descriptions—including information on program parameters, procedures, and staffing—of 180 dispute resolution programs in forty states.

The 200-page volume also includes a 10-page resource list of organizations and individuals who may be called upon for assistance in setting up new dispute resolution programs.

Copies of the *1983 Dispute Resolution Program Directory* are available for $15 from the ABA Special Committee on Alternative Means of Dispute Resolution, 1800 M Street, N.W., Washington, D.C. 20036.

* * *

The 97th Congress, close to last year's adjournment, approved the proposal to rename the federal post office and courthouse in Richmond, Virginia, the Walter E. Hoffman United States Courthouse. The act of Congress providing the change, Public Law 97-430, was signed into law January 8.

The Third Branch unfortunately does not have the space to enumerate even the highlights of Judge Hoffman's (E.D. Va.) long and estimable career. But one detail we might be forgiven for mentioning: He was director of the Federal Judicial Center from 1974 to 1977. ■

Sentencing Institute To Be Held April 18-20

A sentencing institute for circuit judges, district judges, and chief probation officers of the Fourth and Eleventh Circuits will be held in Raleigh, North Carolina, April 18-20.

In addition to a visit and tour of the Federal Correctional Institution at Butner, the agenda will include discussion of the obligations of the sentencing judge under the Victim and Witness Protection Act of 1982, new developments in the treatment of offenders with psychiatric problems, and the special problems in sentencing drug abusers. Several newly appointed trial judges from other circuits also will be invited to attend the institute.

As presently scheduled, this will be the only sentencing institute held in FY 1983, with the next session tentatively planned for the First, Third, and District of Columbia Circuits in April 1984. ■

PERSONNEL

Nominations

Gregory W. Carman, U.S. Court of International Trade Judge, Jan. 31

A. Joe Fish, U.S. District Judge, N.D. Tex., Jan. 31

Shirley W. Kram, U.S. District Judge, S.D.N.Y., Jan. 31

Pamela A. Rymer, U.S. District Judge, C.D. Cal., Jan. 31

Confirmations

A. Joe Fish, U.S. District Judge, N.D. Tex., Feb. 23

Pamela A. Rymer, U.S. District Judge, C.D. Cal., Feb. 23

Elevation

Albert W. Coffrin, Chief Judge, D. Vt., Jan. 20

Resignation

H. Curtis Meanor, U.S. District Judge, D.N.J., Feb. 7

MAR 1 6 1983

TREATY, from page 1

Approximately forty Americans are now serving time in French prisons, mostly on the French islands of Martinique and Guadeloupe in the Caribbean. Five French citizens are currently incarcerated in the U.S. federal prison system, and an undetermined number of French prisoners are incarcerated in state and local institutions.

By the end of 1982, 714 Americans imprisoned in various countries covered by exchange treaties had been returned to the United States, while 449 foreign nationals in American prisons had been transferred to their own countries.

The United States is now anticipating signing another transfer treaty when it is presented for signature in the Council of Europe on March 21. Ultimately, this may add nearly two dozen countries to the list of those maintaining prisoner exchange arrangements with the United States.

(For a description of the U.S. prison transfer programs with Mexico and Bolivia, see *The Third Branch*, July 1980.) ■

RULES, from page 2

Delegates for final approval when it meets next August in Atlanta, and if agreement is reached, they will then replace the association's 1969 Model Code of Professional Responsibility.

Other Actions

• The House of Delegates approved a recommendation to change the association's policy regarding the substantive test for insanity and agreed upon a policy regarding the allocation of burden of proof in insanity defense cases.

• Also approved by the House of Delegates was a resolution which urges that each state adopt a procedure providing that the state's highest court may answer a question of state law which has been certified to that court by an Article III federal court. The resolution also calls upon the National Conference of Commissioners on Uniform State Laws to review their Uniform Certification of Questions of Law Act "in light of the experience since 1967" to determine if revisions are now appropriate. ■

FJC Special Tuition Support

As most readers of *The Third Branch* know, the Federal Judicial Center underwrites the cost of tuition, and, if necessary, travel and subsistence, for judges and support personnel who wish to take courses at various educational institutions. The courses, however, must be clearly job related; support personnel's applications must have a supervisor's endorsement; and Center approval is always subject to the availability of funds and the need to distribute them equitably and according to the most pressing needs.

In all cases, advance approval for such support must be received from the Center. The Center will not reimburse anyone for tuition or any other costs if its approval for the course was not obtained in advance. Therefore, please do not enroll in any course with the expectation of Center reimbursement if you have not received prior approval. Requests for tuition support should be sent to the Center's Specialized Training Branch. In emergencies, call the branch at FTS 633-6332.

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THE THIRD BRANCH

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THE THIRD BRANCH

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APRIL 1983

Judge Tjoflat: Sentencing Reform Bill Will Allow Appellate Review, Limit Parole

Gerald Bard Tjoflat has been an appellate court judge since 1975, serving first on the Fifth Circuit and then on the Eleventh Circuit beginning October 1981. Prior to his appointment to the appellate bench, Judge Tjoflat served as a trial judge for the Middle District of Florida from 1970-1975. He was a Florida state circuit court judge before moving to the federal system.

For the past ten years, Judge Tjoflat has been a member of the Judicial Conference Committee on the Administration of the Probation System; he was appointed chairman of the committee in 1978. He is also a member of the Advisory Corrections Council.

In September of last year, the Judicial Conference authorized the Probation Committee to draft "legislative alternatives" to the sentencing reform proposals previously introduced by Congress. Could you inform us as to the status of that project and provide some detail on the contents of the draft?

Following the Conference's mandate and keeping in mind the consensus that has emerged in the Congress regarding sentencing reform, the committee has fashioned a simple sentencing model, one that should work efficiently with the least amount of disruption to the sentencing process. The bill, which will be submitted to the Judicial Conference in March, would establish a Sentencing Committee of the Judicial Conference which would promulgate guidelines for judges to use in fashioning sentences. In imposing sentence, the judge will be required to state the reasons therefor, giving due regard to the applicable guidelines. Sentencing will be subject to petition for appellate review by both the defendant and the government. The bill will limit the present parole function so that parole decisions will be based solely on post-conviction occurrences. The Parole Commission would no longer resentence offenders, as it presently does. Let me add that the sentencing guidelines the committee promulgates will be sent to the Judicial Conference for its approval and then on to the Congress, a procedure much like that used in rulemaking.

Judge Gerald Bard Tjoflat

Were there considerable differences among committee members that had to be reconciled before developing this draft bill?

Considering that we felt we had certain parameters within which we could realistically operate and given that we are in the twelfth year of criminal code revision and not writing on a clean slate, I don't think we had any great differences of opinion.

What are the next steps in this effort?

This will be dictated in part by what the Congress does. Sentencing

See TJOFLAT, page 2

Department of Justice Certifies Virginia's Prisoner Grievance System

The prisoner grievance procedure of the Commonwealth of Virginia has become the nation's first to acquire certification by the Department of Justice under the Civil Rights of Institutionalized Persons Act, Public Law 96-247. One of the expressed goals of this 1980 act is "encouraging the development and implementation of administrative mechanisms for the resolution of prisoner grievances within institutions."

The statute assigns responsibility to the attorney general to establish standards for such mechanisms in adult correctional and detention facilities and, also, to set up procedures to certify the grievance mechanisms that meet these standards. Any state or political subdivision may submit its plan for a grievance apparatus to the attorney general, who can, by the terms of the statute and later-promulgated regulations, grant certification if the procedure provides for a ninety-day limit on the processing of grievances from initiation to final disposition; for priority processing of emergency grievances; for safeguards against reprisals; for independent review of a final disposition, at a grievant's request, by a person or entity outside the institution; and for an advisory role for both employees and

See GRIEVANCE, page 2

Annual Index Published

Distribution of the 1982 edition of the annual index of *The Third Branch* to subscribers will occur this month. The new index covers all issues of Volume 14, from January through December 1982.

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

TJOFLAT, from page 1

reform bills are expected to be introduced in both houses very shortly, perhaps by the time this interview is printed. We anticipate that consideration of sentencing reform will be accelerated in both houses. This means that if the judicial branch wishes its ideas to be considered before the subject gets set in concrete, it should submit a bill to the Congress by the end of April at the latest.

Your committee has the responsibility for developing and coordinating the sentencing institutes that are convened for the federal judiciary. What is the significance of these institutes for the federal judges?

What we are trying to do with the institutes is to improve the quality of the administration of justice in the sentencing function as well as to provide the sentencing judge an opportunity to share ideas with other judges and others involved in the sentencing process, such as probation officers, correctional officers, parole-hearing examiners, inmates, and so on. We have tried to improve each of these sentencing institutes. The Center's staff has been involved in each institute and has helped us immeasurably in maintaining a continuity of program.

A visit to one of the Bureau of Prisons' facilities is an integral part of each of the sentencing institutes. Do you think it is important for judges to visit prisons at other opportunities?

It is difficult, to say the least, for a district judge to consider the various prison alternatives that may be available in a case when he really has no idea what those prison alternatives are like. Every district judge, shortly after he assumes office, should visit a maximum security prison, a medium security prison, and a minimum security prison or camp, the most likely places of incarceration. I deem it a must for new judges, in the first year of office, to visit four or five prisons. In fact, court of appeals judges ought to visit them too, even though there is presently no appellate review of sentencing. There is great benefit in visiting a facility alone, so that you can see it like it is, day in and day out. Plus, the judge has a chance to visit with the warden and learn about the prison's population, how it has changed over the years, and the programs that are available to the inmates and the limits of those programs. This will enable the judge to get a better understanding of the problems of the institution.

"One of the biggest problems facing the federal judiciary is the instability of the rule of law that results when we create great numbers of additional judgeships."

Doesn't the mini-institute program solve some of these problems?

In part. The purpose of the mini-institute is to enable newly appointed judges, early on, to get some exposure to a correctional facility and its role in the criminal justice system. They can gain some insight into how the correctional facility and the Bureau of Prisons operate, and how the Parole Commission functions at the prison level. This is important because the new judge might not get a chance to attend a regular sentencing institute for some years. But even with these programs, I feel that the judges should take every opportunity to visit prisons as often as they can.

Last year, the Victim and Witness Protection Act was passed. What are some of the significant consequences of this act for the federal judiciary?

First, in preparing a presentence report (in a case in which the act applies), the probation officer must make an in-depth investigation and assessment of the injury suffered by the victim of the crime and the ability of the offender to make the victim whole, and advise the sentencing judge accordingly. The judge, in fashioning the sentence, must take this information into account and order restitution unless he finds and states on the record some valid reason why the restitution sanction should not be imposed. An order of restitution must be made a condition of probation, if

See TJOFLAT, page 3

GRIEVANCE, from page 1

inmates in the "formulation, implementation, and operation of the system." These are minimum requirements, which any state may exceed. Virginia's plan surpasses the requirements in several respects.

Participation in the process by inmates is a requirement with considerable latitude that, according to the regulations, may be met by obtaining input from employees and inmates on general policy questions or, in some institutions, by inmate councils, solicitation of inmates' written comments through posted notices, advisory committee discussions, or inmate-staff "town meetings." States that have been working to bring their grievance structures in line with the regulations have found the matter of inmate participation the most difficult hurdle to cross; indeed, the subject is one that has stimulated considerable controversy in the corrections field. A spokesperson for the federal prison

See GRIEVANCE, page 4

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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.

Report on Federal Juror Usage Published by AO

Rising criminal indictments and a litigious society notwithstanding, federal jury trial days were .9 percent fewer in 1982 than in 1981, largely because criminal trial days declined by 2.1 percent and civil trial days remained virtually the same in the 1982 reporting period as compared with 1981.

For the twelve-month period ending June 30, 1982, the national average among U.S. district courts for jurors selected for or serving on jury trials was 61.6 percent, reflecting a steady but gradual improvement since 1979. Of the remaining prospective jurors, 15.6 percent had been challenged by court and counsel, leaving a large number of excess jurors neither selected for jury service nor challenged. In eight districts, more than three-quarters of the available venire persons were selected or served during the reporting year, and of these the Eastern District of Oklahoma reported the highest usage at 83 percent. That district also recorded the lowest percentage, .2 percent, of prospective jurors neither selected or serving nor challenged.

These data are included in *1982 Grand and Petit Juror Service in United States District Courts*, a volume on federal juror usage produced annually since 1971 by the AO's Statistical Analysis and Reports Division. Prior editions of this annual report were titled *Juror Utilization in U.S. District Courts*.

The bulk of the volume consists of juror usage profiles for each of the U.S. district courts, with numerous pertinent statistics on grand and petit juror usage for the year and in comparison with the preceding four years. Each district profile is also accompanied by notes on special factors, particular to that district, which help to explain its cumulative statistics.

See JURORS, page 4

TJOFLAT, from page 2

the offender is admitted to probation, or a condition of parole, if the offender is imprisoned. The enforcement of a restitution order is likely to present a variety of problems for the courts and the United States attorneys, especially the latter, for they are the ones largely responsible for the enforcement of this new law. Only time can tell us the extent of the problems we face.

I foresee substantial legal questions arising from the implementation of this law, questions like: What kind of hearing must be held to determine the extent of victim injury? What proof is required? What happens if the defendant contests the government's claim that there were victims or that the victims were injured? What standing, if any, will the victims have in the effort to collect the restitution awarded? What rights of appeal, if any, will the new law implicitly create? The legislative history answers few, if any, of these questions.

Are these issues going to be decided on a case-by-case basis?

I would think so, but I can see courts of appeals, in the exercise of their supervisory authority, creating procedural rules by instructing the district courts on how to proceed in these cases.

You have served as a trial judge and an appellate judge. Are there any particular matters related to the federal courts that concern you and that you would like to talk about?

One of the biggest problems facing the federal judiciary is the instability of the rule of law that results when we create great numbers of additional judgeships. The more judges we

Judge Gerald Bard Tjoflat

create at the appellate level, the larger we make courts of appeals, the more unstable the law becomes. If you have three judges on a court of appeals, the law is stable. It is stable for litigants, lawyers, and district judges. The outcome of a suit, should one be filed, is predictable. When you add the fourth judge to that court, you add some instability to the rule of law in that circuit because another point of view is added to the decision making. When you add the fifth judge, the sixth judge, when you get as large as the old Fifth Circuit was, with twenty-six judges, the law becomes extremely unstable. One of several thousand different panel combinations will decide the case, will interpret the law. Even if the court has a rule, as we did

See TJOFLAT, page 4

GRIEVANCE, from page 2

system, which does not include inmate participation in its grievance procedure, maintains that the Bureau of Prisons' grievance program is highly effective without inmate involvement.

Virginia's prisons have installed grievance committees composed of equal numbers of inmates and staff members. Inmate participants serve on a revolving basis from a pool of individuals elected by the prisoners. Grievances are not limited to particular areas, and a state spokesperson claims that 92.5 percent of prisoner complaints are resolved at that first, informal level.

Although several states have applied to the attorney general for certification of their programs, none but Virginia's has received even conditional approval. Wyoming has been making improvements to its program in line with Department of Justice regulations and appears likely to be the next state to gain certification.

Certified grievance mechanisms in the states could profoundly affect federal district court caseloads, especially in those districts and circuits in which prisoner civil rights petitions are proportionately high, because where a grievance mechanism has won the attorney general's certification, a district court may continue for up to ninety days a section 1983 case brought by an adult inmate to require the inmate first to exhaust administrative remedies. If the inmate is dissatisfied with the final administrative disposition of the complaint, the federal court will then hear the case.

In Virginia, which is usually at or near the top of the list in number of prisoner civil rights filings, it is too early to see the beneficial effects of its new grievance mechanism at the district court level, because the system was put into place in September 1982. Although a few cases have already been continued, says James Sisk, manager of Virginia's Ombudsman Services Unit, the effects of the grievance procedure can readily be seen in the declining numbers of prisoner appeals to regional administrators of corrections, the next level in the four-tier grievance structure after appeal to a warden or superintendent. Figures on prisoner appeals to regional administrators for the months of October-November 1981 (360 appeals), compared with parallel figures for the same months in 1982 (140 appeals), show a 61 percent decline following installation of the new grievance system. ■

TJOFLAT, from page 3

in the old Fifth, that one panel cannot overrule another, a court of twenty-six will still produce irreconcilable statements of the law.

This tremendous potential for instability in the rule of law creates a great deal of litigation. So you have a situation where you add judges to dispose of more cases, and at the court of appeals level, at least, the new judges may well cause more litigation than they can terminate.

As for district judges, the more you add to a court, to the extent that they declare the law they too add a measure of instability to the rule of law and thus create litigation.

If we are to save for tomorrow the system of justice the framers gave us, we must be ever mindful of this problem. ■

JURORS, from page 3

Copies of the report are available on request at no charge to the judicial branch; members of the public may request a 60-day loan copy. Send requests to Chief, Statistical Analysis and Reports Division, Administrative Office of the U.S. Courts, Washington, D.C.20544. ■

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 15
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MAY 1983

Judge Friedman and Chief Judge Bratton Elected To Federal Judicial Center Board

Judge Daniel M. Friedman of the U.S. Court of Appeals for the Federal Circuit and Chief Judge Howard C. Bratton of the U.S. District Court for the District of New Mexico were elected members of the FJC's Board by the Judicial Conference at its March meeting.

Chief Judge Bratton was appointed to the federal bench in 1964 and has been chief judge since 1978. A graduate of the University of New Mexico and Yale Law School, he is the father of three and lives with his wife in Albuquerque, New Mexico.

For four years, until the merger of the U.S. Court of Claims and the U.S. Court of Customs and Patent Appeals in October 1982, Judge Friedman was chief judge of the Court of Claims. Before being appointed to that office, he was first deputy solicitor general of the United States, from 1968 to 1978, and in 1977 was acting solicitor general. A graduate of Columbia College and Columbia Law School, he resides with his wife in Washington, D.C.

Chief Judge Howard C. Bratton (l.) and Judge Daniel M. Friedman

The new Board members will occupy seats formerly held by Judge John D. Butzner, Jr., of the U.S. Court of Appeals for the Fourth Circuit, who has taken senior status, and Judge Donald S. Voorhees of the U.S. District Court for the Western District of Washington, whose four-year term expired in March. ■

Sentencing Bill Drafted by Judicial Conference

Taking into account the evidence of a firm congressional consensus on enacting sweeping sentencing revision, the Judicial Conference of the United States has adopted its own draft sentencing reform legislation for transmittal to Congress.

The Judicial Conference's proposal has three main provisions: determinate sentences, sentencing pursuant to guidelines developed by a Judicial Conference committee, and appellate review of a sentence at the request of either the defendant or the government.

With congressional authorization of determinate sentences, each defendant convicted in a federal court would know at the time of sentencing how long he or she would be incarcerated and the date of release, provided the inmate conformed to the rules of the institution of confinement.

See SENTENCING, page 4

Judicial Conference Adopts New Procedure For Selection of Law Clerks

A new procedure for coordinating the selection of law clerks by federal judges has been adopted by the Judicial Conference of the United States. Because of widespread dissatisfaction among law school administrators and faculty, as well as judges, with the uncoordinated selection procedures that have been employed in recent years, which saw recruiting of future clerks pushed farther and farther back into the second year of law school, the Judicial Conference in March 1982 appointed a small study group, the Ad Hoc Committee on the Law Clerk Selection Process, to explore options for coordinating law clerk selection.

After open meetings and discussions at professional meetings with both law school administrators and law firm placement personnel, the ad hoc committee voted to recommend to the Conference the mechanism strongly urged by the Association of American Law Schools, that student applications for judicial clerkships be deferred until the fall term of the third year of law school.

The Judicial Conference heard views endorsing this position and others supporting a summer-following-second-year, or June 15, date for commencing the application process. Ultimately, the Conference decided upon the following policy, effective immediately, for the selection of law clerks by the federal judiciary: Applications for law clerkships

See LAW CLERKS, page 2

TV in Federal Courts?

Media representatives are again seeking to use TV and still cameras in the federal district courts and courts of appeals and have filed a petition with the Judicial Conference of the United States to modify its rules. The request will likely be referred to a standing committee of the Judicial Conference. Four years ago the Conference modified the standards included in the Code of Judicial Conduct for United States Judges to allow federal judges discretion as to coverage of purely ceremonial occasions, such as granting citizenship.

More than a year ago the Supreme Court was asked by the National Association of Broadcasters and the Radio Television News Directors Association to allow TV coverage of its hearings. However, the Supreme Court declined to make any change in its long-standing practice.

LAW CLERKS, from page 1

will neither be received nor considered prior to September 15 in a student's third year of law school.

The new plan, which differs from earlier practice by stipulating a fixed date for opening the doors to applicants, is to operate on a trial basis for two years, after which it will be carefully evaluated.

The law schools gave a variety of reasons for wishing the clerkship selection process to be moved from the spring semester of the second year: Students' preoccupation with application preparation and interviews diverts them from the important task of preparing for exams, law review notes, and second-year essays; the deluge of requests for transcripts and letters of recommendation from faculty is a heavy burden on staff and faculty; faculty members often prefer to examine students' second-year grades and papers, as well as their performance in small seminars, before writing recommendations. The law schools prefer a uniform September starting date in order to have summer employers' appraisals of the students and also to interrupt a time in law school when other demands are the least burdensome.

Proponents of a June 15 starting date expressed concern about disrupting *any* semester of law school—for both law schools and law students—for the intensive, time-devouring clerkship application process. Some judges preferred the summer date because it would allow more time for interviews. The possibility that shortening the selection period might give the more prestigious law schools and those in major metropolitan centers, where many courts are located, a competitive advantage was also cited as a reason for choosing a summer initiation date.

Since the majority of law schools, by virtue of membership in the Association of American Law Schools, are now committed to the September 15 date for initiation of job application and placement activities, and since judges canvassed by members of the ad hoc committee felt that the most important goal was adoption of a uniform policy, it is hoped that all parties, law schools and judges alike, will now proceed with their coordinate roles in the selection process in consonance with the Judicial Conference's action. ■

Feinberg and Sneeden To Assist Committee on the Judicial Branch

Judge Irving R. Kaufman, chairman of the Judicial Conference Committee on the Judicial Branch, has announced that the work of his committee will be receiving assistance from two prominent Washington lawyers intimately familiar with the needs of the federal judiciary and the legislative process.

Kenneth R. Feinberg, special counsel to the Senate Judiciary Committee when its chairman was Senator Edward Kennedy, and Emory M. Sneeden, who was general counsel under Senator Strom Thurmond, have agreed to contribute their time and efforts, on a *pro bono publico* basis, to develop and implement congressional strategies designed to improve the personal financial security of federal judges.

In the last several years many judges have resigned to accept positions that have brought them more income and security, in most instances not so much to bring personal benefits to themselves but to their families. The entire economic picture as it relates to federal judges is already being studied by Messrs. Feinberg and Sneeden, with special attention being given to such matters as judicial pensions, survivors' annuities, per diem reimbursement, and salaries.

Kenneth Feinberg, a graduate of the University of Massachusetts and the New York University School of Law, began his career as law clerk to Chief Judge Stanley H. Fuld of the New York State Court of Appeals. In addition to his stint on the Senate Judiciary Committee from 1975 to 1978, he has been an adjunct professor of law at Georgetown University Law School since 1979, and currently is a partner in the firm of Kaye, Scholer, Fierman, Hays and Handler.

Emory M. Sneeden earned his J.D. degree at Wake Forest and studied international law at the Hague Academy in the Netherlands. He retired from military service with the rank of brigadier general, having served in both the Korean War and World War II. For two years, starting in 1975, he served as legislative and administrative assistant to Senator Strom Thurmond. He was counsel to the Antitrust and Monopoly Subcommittee of the Senate's Committee on the Judiciary, and when Senator Thurmond became chairman of the Judiciary Committee, he was promoted from minority chief counsel to chief counsel of that committee. Currently General Sneeden is affiliated with the firm of McNair, Glenn, Konduros, Corley, Singletary, Porter and Dibble, which has offices in Columbia, S.C., and Washington, D.C. ■

Correction

Apologies to Norfolkians. In our March issue, the newly renamed Walter E. Hoffman United States Courthouse was accidentally relocated in Richmond, although it is actually still firmly situated in Norfolk, Virginia.

THE THIRD BRANCH

BULLETIN OF THE FEDERAL COURTS

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

Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center.
Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

March Session of Judicial Conference Results in Variety of Actions

In addition to initiatives in the areas of sentencing and law clerk selection (see stories elsewhere in this issue), the Judicial Conference of the United States took a number of other actions at its March 1983 session, largely in accord with recommendations proffered by the Conference's committees. Among these were:

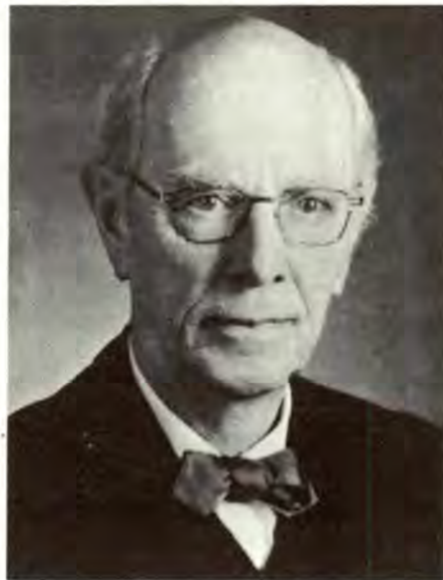
• Approval of a request for two additional judgeships for the Fifth Circuit. These two judgeships raise the total of the Judicial Conference's request in September 1982 to twenty-six additional appellate and fifty-one additional district court judgeships.

• A decision to revise the pay ceiling in a 1982 recommendation to Congress, now included in S. 443 (legislation introduced in the 98th Congress by Senator Dole), which would result in a pay cut for certain individuals in the federal judiciary. The previous recommendation, as set forth in S. 443, authorized the director of the AO to fix the salaries of all Article I judges and other supporting judicial officers, subject to the supervision of the Judicial Conference, using as a ceiling 85 percent of federal district court judges' salaries. The change would substitute Executive Level II salaries for the 85 percent ceiling.

• Approval of a schedule worked out by the AO and the National Archives and Records Service (NARS) for the transfer of machine-readable statistical records (computer tapes) to NARS for storage, retention, and disposition. Ten years after their creation, the AO's computer files will be transferred to NARS for retention as permanent records. For ten years following receipt of the files by NARS, access to the files will continue to be restricted. Thus, computerized statistical records may not be used, sold, loaned, destroyed, donated, or otherwise disposed of

See CONFERENCE, page 6

Judge Albert B. Maris Receives Devitt Award For Distinguished Service to Justice



Judge Albert B. Maris

Judge Albert B. Maris, senior judge of the U.S. Court of Appeals for the Third Circuit, was named in March as the first recipient of the Devitt Distinguished Service to Justice Award. Judge Maris was appointed to the U.S. district court in Philadelphia in 1936 and was elevated to the circuit court two years later. At age 89 and with 47 years' service, Judge Maris has the longest tenure of any federal judge still in active service. He assumed senior status in 1959.

The Devitt Award was established by the West Publishing Company of St. Paul, Minnesota, "to give recognition to the contributions of federal judges to the advancement of the cause of justice" and is named after Judge Edward J. Devitt of the U.S. district court at St. Paul, chief judge of that court from 1957 to 1981. Judge Devitt, a native Minnesotan, served on the selection panel along with Supreme Court Justice Byron R. White and Judge Gerald B. Tjoflat of the Eleventh Circuit.

In addition to his service on the Third Circuit bench, Judge Maris has been chief judge of the Temporary Emergency Court of Appeals and has been appointed by the U.S. Supreme Court as a special master in several complex cases.

A leader in judicial improvement programs, Judge Maris has contributed significantly to the work of the

See MARIS, page 8

Federal Jury Improvements Act Signed

The Federal Jury Improvements Act of 1982, Public Law 97-463, a package bill incorporating several provisions dealing with jury administration that had long been urged by the Judicial Conference, was passed late in the 97th Congress and signed by the president in January 1983.

The first section of the act amends 28 U.S.C. § 1875(d) to allow a court to require a defendant employer who loses in an employment rights action brought by a juror-employee to reimburse the government for fees and expenses charged by the employee's court-appointed attorney. Earlier, the statute had allowed for reimbursement only of privately retained counsel.

The next section of the act amends 28 U.S.C. § 1866(b) to allow service of juror summonses by ordinary mail as well as by registered or certified mail (research in this area has been conducted by the Center; see *The Third Branch*, November 1981). Courts still retain the discretion to use receipt-generating procedures where needed, such as with jurors who have not proved responsive to past summonses.

A final provision amends 28 U.S.C. § 1877 and 5 U.S.C. chapter 81, subchapter 1, to extend Federal Employees' Compensation Act coverage to federal jurors injured during the course of their jury service, rather than merely to federal employees rendering jury service, as in the prior language of the statute. ■

SENTENCING, from page 1

Thus, the bill would make major changes in the authority of the U.S. Parole Commission in regard to determining offenders' release dates. Under this legislation the commission would make its decisions on the basis of events that occurred after sentencing, rather than on the severity of the offense and the offender's risk category. The commission would continue to have authority over parolee supervision and revocation decisions.

The mechanism proposed by the Judicial Conference for developing sentencing guidelines differs from provisions in a Senate bill that passed in a previous session of Congress. The Conference envisions that the committee selected to promulgate, and later to monitor, the sentencing guidelines will be composed of four judges in regular, active service and of three members who neither are nor have been federal or state judges (at least one of whom must be a nonlawyer). Ultimately, each committee member would serve a once-renewable four-year term, but to ensure a certain amount of continuity during the early years of the committee, some charter members would serve five-year terms and others three-year terms.

While the Conference anticipates that development of the initial guidelines will be a job of considerable proportions, it expects that a part-time committee with staff assistance from the AO and the FJC will be adequate to the task of monitoring the guidelines once they have been promulgated.

The legislation requires that the guidelines take account of both offender and offense characteristics, and that they encompass parole eligibility dates as well as maximum terms. The guidelines are also to make determinations regarding an aggregation of fines and terms of imprisonment in cases in which defendants are convicted of multiple offenses.

The criminal provisions of the Narcotic Addict Rehabilitation Act would be repealed by the bill, and thus addicts would also be given determinate sentences. That part of the Youth Corrections Act allowing for indeterminate sentences would also be repealed, although the requirement that youth offenders sentenced under the act be confined in separate institutions would be retained.

The legislation also provides for either the government or the defendant to seek appellate review of a sentence on the ground that it is an incorrect application of the guidelines, in violation of prescribed procedures, or otherwise illegal.

Judges would be able under the new legislation, however, to depart from the guidelines if they found, on the basis of particular circumstances regarding the offense or offender, that the purposes of sentencing would be best served by such a departure.

A defendant could appeal an above-guideline sentence, and the government, provided it had the personal approval of the attorney general or the solicitor general, could appeal a below-guideline sentence.

The bill further provides that all issues relating to the sentence, including any challenge to the conviction, are to be raised in a single appeal. It allows no appeal from a sentence accepted by a party in a plea agreement. In addition, the legislation does not permit a party to raise an issue about the sentence for the first time at the appellate level. The alleged defects must have been specifically noted in a motion for reconsideration at the trial court level. With this departure from earlier congressional proposals that would allow piecemeal appeals, the Conference hopes to ensure that the sentence appealed from is the final sentence of the district court. ■

CALENDAR

- Apr. 25-27 District Court Case Management Workshop
- May 1-3 Seventh Circuit Judicial Conference
- May 1-7 Seminar for Newly Appointed District Judges
- May 2-4 Workshop for Fiscal Clerks of Bankruptcy Courts
- May 8-11 Eleventh Circuit Judicial Conference
- May 9-11 District Court Case Management Workshop
- May 10 Judicial Conference Advisory Committee on Appellate Rules
- May 11-14 District of Columbia Circuit Judicial Conference
- May 18-20 Seminar for Bankruptcy Judges
- May 20 Federal Circuit Judicial Conference
- May 23-25 Workshop for Fiscal Clerks of Bankruptcy Courts
- May 25-27 Seminar for Full-time Magistrates
- June 13-15 Workshop for Fiscal Clerks of Bankruptcy Courts

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Federal Circuit to Hold First Conference

The first annual conference of the Court of Appeals for the Federal Circuit will be held in Washington, D.C., on May 20 at the Washington Hilton Hotel.

Expected to attend the conference, in addition to lawyers who practice in this field of the law, are all judges of the U.S. Court of Appeals for the Federal Circuit, the U.S. Claims Court, and the Court of International Trade, other government officials whose work is related to the work of these courts, and members of the Merit Systems Protection Board.

The program will include addresses and panel discussions on a variety of subjects of interest to those who practice before the new court and on the kinds of appeals handled there.

Chief Justice Warren E. Burger is scheduled to address the gathering at the luncheon meeting. ■

Report on Certifying State Law Questions Published

Certifying Questions of State Law: Experience of Federal Judges, by Carroll Seron, has been published by the Center and is now available for distribution. This paper discusses the effectiveness of the procedure for certifying questions of state law to high state courts.

Forty-nine district and appellate judges responded to a survey about their experience in cases in which questions had been certified to a state supreme court. These judges were generally favorable toward the procedure, noting that the state's answer often resolved the dispute in the case. Among its advantages, which seem to outweigh the disadvantage of possible delay, are that an accurate answer from the appropriate tribunal avoids further litigation and that relations between state and federal courts are improved.

The judges surveyed cited the following as the most important factors in deciding whether to certify a question of state law: (1) the strength of a state's interest in the area of law under dispute, (2) the closeness of fit between the question raised in the case and questions of state law, (3) the degree to which the question requires the construction of a new or previously unconstrued statute, (4) the need to avoid inconsistency with later court decisions, and (5) the judge's past experience with the usefulness of a state court's answer.

To receive a copy of this report, write to the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005. Please enclose a self-addressed, gummed mailing label, franked if possible. ■

Human Rights Seminars for Federal Judges Continue

The Aspen Institute for Humanistic Studies, in cooperation with the Lawyers Committee for International Human Rights in New York City, is continuing its series of human rights seminars for small groups of federal circuit and district judges. The purpose of the seminars, according to Alice H. Henkin, the institute's coordinator of justice activities, and Robert B. McKay, senior fellow of the institute, is "to familiarize the judiciary with the international instruments and institutions for the protection of international human rights at a time of increasing interest in the domestic legal application of international human rights standards."

Two seminars have already taken place: one for judges of the First, Second, Third, Fourth, and District of Columbia Circuits and another for judges of the Sixth, Seventh, and Eighth Circuits. The next seminar, for judges of the Ninth and Tenth Circuits, is scheduled for this summer.

The final program, for judges of the Fifth and Eleventh Circuits, will take place early in 1984. Although the seminars are by invitation only, interested judges may write to Mrs. Henkin at the Aspen Institute, 717 Fifth Avenue, New York, NY 10022. Invitees attend the seminars as guests of the institute. ■

PERSONNEL

Nomination

William H. Barbour, Jr., U.S. District Judge, S.D. Miss., Mar. 15

Confirmations

Gregory W. Carman, U.S. Court of International Trade Judge, Mar. 2

Shirley W. Kram, U.S. District Judge, S.D.N.Y., Mar. 2

Appointments

Gregory W. Carman, U.S. Court of International Trade Judge, Mar. 10

A. Joe Fish, U.S. District Judge, N.D. Tex., Mar. 11

Elevation

Levin H. Campbell, Chief Judge, 1st Cir., Mar. 31

Senior Status

John L. Smith, Jr., U.S. District Judge, D.D.C., Jan. 31

Dennis R. Knapp, U.S. District Judge, S.D. W. Va., Feb. 25

Robert J. Kelleher, U.S. District Judge, C.D. Cal., Mar. 5

Frank M. Coffin, U.S. Circuit Judge, 1st Cir., Mar. 31

Death

William T. Sweigert, U.S. District Judge, N.D. Cal., Feb. 16

Position Available

Chief Deputy Clerk, U.S. Court of Appeals for the First Circuit (Boston, Mass.). Salary up to $34,930 (JSP-13). Candidates must be members of a bar and have a minimum of six years of progressively responsible experience in public service or business. Position currently vacant. Closing date for applications is May 20, 1983. Contact: Clerk, U.S. Court of Appeals, 1606 John W. McCormack Post Office and Courthouse, Boston, MA 02109.

EQUAL OPPORTUNITY EMPLOYER

CONFERENCE, from page 3

without the AO's consent for twenty years from their creation.

• Authorization of the drafting and transmittal to Congress of legislation to authorize the continued designation of the libraries of the Supreme Court and of several circuit courts as depository libraries.

• Approval of a court reporters' manual to aid court reporters in fulfilling their duties and to assist courts in supervising and utilizing their court reporters effectively. The manual, which is the first comprehensive codification of existing law, Conference policies, and procedures and which includes a newly adopted standard on transcript format, will be printed and distributed in the near future.

• Reaffirmation, in a related action, of the Conference's 1980 policy to leave to each court the decision to allow its court reporters to engage in outside reporting.

• Rejection of the Model Grand Jury Act that was approved by the ABA's House of Delegates at its semiannual meetings in February. Conference members felt that procedures written into the proposed model act would convert the grand jury process from an investigative into an adversarial system. In addition, the Conference was concerned that disputes arising from inflexible requirements in some procedures and vaguely worded requirements in others would result in burdensome "minitrials" that would prolong and sidetrack grand juries and tend to work against the aims of the Speedy Trial Act.

• Approval of a committee report recommending certain changes in a draft bail reform bill reviewed at the request of the House Judiciary Subcommittee on Courts, Civil Liberties, and Administration of Justice. The legislation, which is expected to be introduced in the 98th Congress, amends 18 U.S.C. § 3146 to authorize consideration of the safety of other persons and the community in the setting of conditions for pretrial release in federal criminal cases, to provide for detention of the accused in certain cases, and to authorize revocation of an order for pretrial release upon the defendant's commission of a criminal offense other than the offense charged.

The Committee on the Administration of Criminal Law recommended the following modifications of the draft bill: that a judicial officer be permitted to state orally on the record, as well as in writing, the reasons for imposing any special condition of release of an accused, and, similarly, that an oral statement be allowed when the court explains why the safety of the community cannot reasonably be ensured except by pretrial detention; that no specific time limits be imposed for holding a hearing to determine whether an individual has violated a release condition or on when a pretrial detention order must be entered, but that such a hearing be held or order entered "promptly"; and that no requirement be made that before ordering pretrial detention, a judicial officer must find "substantial probability that the accused committed the original offense for which release was granted."

The committee also agreed that the legislation should not include: a time limit on when a pretrial detainee must be brought to trial; a provision requiring discovery before a pretrial detention hearing to be "as full and free as possible"; standards for the place and conditions of confinement of a pretrial detainee; a provision to make disclosure of pretrial detention to the jury grounds for a mistrial; or a provision to require that a convicted individual be given credit for time served in pretrial detention.

• Receipt of a report stating that instead of requiring the unanimous approval of Committee on Ethics members before reference to the attorney general of a judicial officer's or employee's failure to file a financial disclosure form, the committee's procedures have been amended to require the affirmative vote of no fewer than ten members at a regularly scheduled or special meeting of the committee. To date, no case involving a member of the judiciary has been referred to the attorney general.

• Adoption of amendments to the *Guidelines for the Administration of the Criminal Justice Act*, chapter 2, section 2, new paragraph 2.18, and chapter 4, new paragraph 4.04, to require that cases assigned to a federal public or community defender organization be made in the name of the organization, rather than in the name of an individual staff attorney within the

See CONFERENCE, page 8

Financial Disclosure Deadline Nears

All judicial officers and judicial employees in grade 16 or above are required to file a financial disclosure statement for calendar year 1982 by May 15 if they worked at least sixty days during 1982. Annual filings are required by the Ethics in Government Act, 28 U.S.C.A. app. I, § 301 et seq.

Judges in senior status who have been certified by a circuit judicial council as performing "substantial judicial service" must file reports. Court reporters whose regular salary plus gross receipts from the sale of official transcripts amounted to at least $54,755 during 1982 are also required to file statements.

Part-time bankruptcy judges and part-time magistrates who did not work sixty days last year do not need to file statements. But court reporters and judicial officers (such as part-time bankruptcy judges and part-time magistrates) who are not required to file statements should advise the Judicial Ethics Committee of this fact.

Reporting individuals (excepting AO and FJC employees) should submit the signed original plus one copy of "AO Form 10" to the Judicial Ethics Committee and one copy to the clerk of the court in which they serve. AO and FJC employees required to file statements should submit two copies only to the Judicial Ethics Committee.

Teleconference Tapes Available from FJC

The Federal Judicial Center has available recordings, on either video or audio cassettes, of its March 15 teleconference on the Victim and Witness Protection Act of 1982, broadcast from Washington, D.C., to twenty-six receiving sites around the country. The 3-hour and 15-minute program features an overview and analysis of the act, a discussion of three districts' experiences in preparing victim impact statements, and an examination of a hypothetical case study showing issues and problems in applying the provisions of the act.

Forms with which to order the program have been sent to federal judicial system personnel likely to have the greatest interest in it. Those who did not receive the forms may request loan of the tapes by writing to the Center's Media Services Unit, Federal Judicial Center, 1520 H Streeet, N.W., Washington, D.C. 20005. Please indicate whether you want audio or video cassettes, and in the latter case, specify either VHS or U-matic format. The demand for these programs, and the logistics of duplicating copies, may make it impossible to fill your loan request immediately. If there is to be any significant delay, Media Services will advise you.

Please enclose a self-addressed, gummed mailing label, franked if possible, to expedite shipment. ■

Conference Statement on Bankruptcy Court System

At the adjournment of the Judicial Conference's semiannual session on March 17, the Public Information Office of the Supreme Court released the following statement, which had been approved by the Conference:

"There is no present crisis in the operation of the bankruptcy court system. Members of the Judicial Conference of the United States unanimously agree that the Model Rule for the Continued Operation of the Bankruptcy Court System is working well. The district and bankruptcy judges are administering the business of the bankruptcy courts effectively.

"Since March of 1977 the Judicial Conference has strongly opposed the creation of a separate court for bankruptcy proceedings whether constituted under Article I or Article III of the Constitution. The Conference recommends that the Congress not enact H.R. 3, or any bill, that creates separate Article III bankruptcy courts.

"The Supreme Court in *Northern Pipeline* invalidated part of the jurisdiction conferred upon existing departmental bankruptcy courts in the 1978 Bankruptcy Reform Act. Congress must decide whether to clarify bankruptcy jurisdiction or restructure bankruptcy courts.

"If Congress decides to clarify jurisdiction, the Judicial Conference recommends legislation that will statutorily authorize those procedures now employed under the Model Rule for the Continued Operation of the Bankruptcy Court System.

"If Congress decides to restructure the bankruptcy courts, the Judicial Conference supports the concepts embodied in S. 443 and opposes those embodied in H.R. 3." ■

Brookings Seminar Provides Forum for Exchange of Ideas

The Brookings Institution sponsored its sixth Seminar on the Administration of Justice, March 11 to 13, in Colonial Williamsburg. Brookings began the seminars in 1978 at the suggestion of Chief Justice Burger. They give the leadership of the federal judiciary and the Department of Justice the opportunity to review policy issues on federal judicial administration with members of the House and Senate judiciary committees.

This year's agenda included current issues of criminal justice, the economics of corrections policies, the impact of automation on the administration of justice, bankruptcy, the workload of the Supreme Court, and alternatives to courts and disincentives to the abuse of litigation.

Warren I. Cikens, senior staff member in the Brookings Advanced Study Program, and Mark W. Cannon, administrative assistant to the Chief Justice, coordinate the planning of the seminars with representatives of the judiciary, the Justice Department, and the judiciary committees. ■

Equal Employment Opportunity Director Named

R. Townsend Robinson has been named the director of Equal Employment Opportunity and Special Projects. In her new position, she directs the equal employment opportunity and affirmative action programs for the Administrative Office and the Federal Judicial Center, manages the discrimination complaint process, and serves as coordinator, adviser, and program consultant for the implementation of equal employment opportunity and affirmative action plans in the federal courts. In addition, in the area of special projects, she provides legal and technical assistance to the director and senior staff of the AO in various areas of judicial administration.

Mrs. Robinson, a native of Washington, D.C., graduated from Harvard Law School in 1974. She was an associate with the Washington law firm of Wilmer, Cutler & Pickering for four years, where she gained expertise in the fields of corporate law, state and federal taxation, employment discrimination law, and litigation. She joined the Administrative Office as an assistant general counsel in 1979 and served as principal legal adviser in the areas of personnel law and government contracting. While performing her duties as assistant general counsel, Mrs. Robinson served collaterally as the equal employment opportunity officer for the Administrative Office and the Federal Judicial Center from 1981 until assuming her new duties as director of Equal Employment Opportunity and Special Projects. ■

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organization. The new paragraphs are aimed at ensuring consistency with the legislative intent of the Criminal Justice Act that federal defenders be insulated from control and supervision by the court in which they practice.

• Receipt of a report that the Committee on Codes of Conduct had revised Advisory Opinion 53 of the *Code of Judicial Conduct for United States Judges*, "Political Involvement of a Judge's Spouse." The revised opinion includes language pointing out that while the canons of judicial conduct proscribe a judge from inappropriate political activity and even the mere appearance of impropriety in all his or her activities, "the committee does not advise spouses."

The revised opinion, designed to clarify the concerns arising from judges' associations with their spouses' political involvements, deletes the former advice against permitting the marital home to be used for political meetings or for fund raising and substitutes a paragraph advising that a judge not join in the use of the marital home for these purposes. Similarly, where the prior advisory opinion advised against permitting reference to the relationship between judge and spouse in a communication pertaining to the spouse's political activity, the opinion now advises that a judge should not "join in or approve" a reference to the relationship in such a communication.

• Authorization of ten new full-time magistrate positions and two part-time magistrate positions, but discontinuance of several other positions. Altogether, the number of full-time magistrates would increase from 228 to 238, while the number of part-time magistrates would decrease from 238 to 227; combination clerk-magistrate positions would decrease from 16 to 13.

• Agreement to set a new ceiling on part-time magistrates' salaries of $31,800 and to apply the 1982 government-wide cost-of-living adjustments to the salaries of part-time magistrates. ■

MARIS, from page 3

Judicial Conference committees, and his scholarly work on the rules committee gave leadership to the ongoing revision and modernization of the civil, criminal, bankruptcy, and appellate rules of procedure. He has testified extensively before congressional committees on the needs of the federal courts. His influence has also been felt beyond the continental boundaries of the United States through his work in drafting new law for the Virgin Islands, Guam, the Trust Territory of the Pacific Islands, and American Samoa. His efforts were influential in bringing about recodification of the U.S. Criminal and Judicial Codes in 1947 and 1948.

The citation conferring this award on Judge Maris concludes, "His never failing kindness, courtesy, gentleness, and tact have combined with wisdom, culture, energy, and dedication to shape a remarkable career of extraordinary achievement in advancing the cause of justice." ■

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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Chief Judge Godbold: Eleventh Circuit Organized Without Delays in Court Functioning

Not since 1929, when the old Eighth Circuit was reorganized into the new Eighth and the new Tenth Circuits, had there been a split of a U.S. court of appeals—until October 1, 1981. Then, the geographically huge and caseload-overwhelmed Fifth Circuit was recast into the new Fifth Circuit and the new Eleventh Circuit. The Fifth remained headquartered in New Orleans, while the Eleventh acquired headquarters in Atlanta.

Presiding over the intricate details of planning and then over the realities of the mammoth moves of paper, personnel, and property across the several states was Chief Judge John C. Godbold. He had been chief judge of the old Fifth for the eight months preceding the move, and became chief judge of the Eleventh upon its creation. Chief Judge Godbold, a graduate of Auburn and Harvard Law and a circuit judge since 1966, talked to The Third Branch *about the historic court reorganization, which has been recorded in greater detail than any prior such occasion in our history.*

Chief Judge John C. Godbold

Next October will mark the second anniversary of the new Eleventh Circuit. As the chief judge designate of the new circuit, what planning were you able to accomplish in advance?

To understand both planning and implementation of the new circuit, a little background is required. The former Fifth Circuit had thirty-five or thirty-six active and senior judges, depending on when one counts. Congress first authorized it to divide into separate administrative units, and the court elected to do so in two units, with both judges and cases divided geographically. Each unit had its own *en banc* court.

Contemporaneously with the court's making that decision, the active judges unanimously petitioned Congress to divide the court into two circuits—two separate, free-standing courts. All senior judges except one agreed with the petition. So, of thirty-five to thirty-six judges, all but one desired to divide.

Thus, we had to plan separation into units, but with contingency plans recognizing that almost as soon as the court was formed into units, Congress might create two separate courts.

We appointed a transition committee of judges and senior administrative personnel to anticipate needs and plan for a division. Then, as time went along, the details of division began to move more and more into the hands of the judges.

At the headquarters in New Orleans, which was the headquarters of the Fifth and would be the headquarters of one of the administrative units, there was not much to do. The physical facilities and the personnel and the case files, by and large, would stay in place.

The two levels, or two alternatives, I've just discussed—two units for sure, and maybe two courts—had particular impact with respect to hiring

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Chief Justice Seeks Creation of National En Banc Panel

In his welcoming remarks to the American Law Institute, which returned to Washington this year after two consecutive meetings in Philadelphia, Chief Justice Warren E. Burger addressed the Supreme Court caseload problem and possible changes.

The Chief Justice emphasized that there was nothing novel about his recent proposal for a special panel to deal with intercircuit conflicts: "The new special panel will be no more or less than a national *en banc* panel to do for the whole system what a circuit *en banc* does within a circuit."

He went on to say that he had received many comments since the proposal was made to the American Bar Association at its midyear meeting in February. (The member of the Supreme Court most recently to endorse this proposal is Justice Lewis F. Powell, Jr., in a speech delivered to the Eleventh Circuit Judicial Conference.) The Chief Justice indicated that he was prepared to modify the

See CHIEF JUSTICE, page 6

Legislative Developments

The Judiciary Committees of both the Senate and the House of Representatives are presently considering legislation that proposes to create, on an experimental basis, an intercircuit tribunal empowered to decide cases referred to it by the U.S. Supreme Court. S. 645 and H.R. 1970, as they stand now, are similar to Chief Justice Warren E. Burger's proposal to create a "temporary, special panel," as suggested in his Annual Report on the State of the Judiciary, delivered at the midyear meeting of the American Bar Association in New Orleans on February 6, 1983. See 69 *American Bar Association Journal* 442 (1983).

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senior personnel, the numbers of authorized staff, court rules, and many other matters.

Since there was no court headquarters in Atlanta, we had to prepare a unit headquarters building there. With good support from the General Services Administration, this was done in ninety days. Setting it up involved creating space for a complete clerk's office and a complete library. In fact, we had to strip the library area down to the bare walls and then rebuild it—all in ninety days.

You were moving into a building that housed the district court in Atlanta. Were they still moving out, or had they gone by that time?

The district court had moved to its new quarters, and the building was basically empty, except for the bankruptcy court on the upper two floors. The building was in dreadful condition. Nothing had been done to it for many years because of the realization that the district court would be leaving.

We had to buy furniture and equipment, such as rugs, drapes, and desks, to equip these two main facilities—the clerk's office and the library—and also provide some minimal accommodations for the judges.

On October 1, 1980, Unit B (which was to be based in Atlanta) began accepting filings of new appeals. Unit A, based in New Orleans, continued, of course, to receive new appeals. Appeals were allocated by geographical areas, the same geographical areas that were projected for the two possible new courts. Simultaneously, the judges began sitting by units. Almost at the same time that this procedure began to operate, Congress enacted legislation creating the two separate circuit courts, effective one year thereafter—October 1, 1981.

Let me tell you a little about hiring and training personnel. We elected to give personnel who had been connected with the old Fifth in New Orleans the option of where they wished to work—Atlanta or New Orleans. Most of the senior personnel elected to remain in New Orleans. The circuit executive elected to come to the Atlanta court, as did a few junior personnel. Personnel, transferring and borrowed, came from New Orleans to Atlanta in shifts to begin operation of the new headquarters there.

Starting when?

Some were there as early as the summer of 1980. They began to come on a regularly scheduled basis around October 1, 1980, when the Atlanta unit headquarters opened. In Atlanta persons were hired in increments, and they were sent to New Orleans for training—most of them for one or two months. Meanwhile, personnel, both senior and junior, came up from New Orleans to Atlanta on temporary assignments to operate that headquarters. As persons were hired in Atlanta, sent to New Orleans and trained, then sent back to Atlanta, the people who were temporarily in Atlanta were permitted to go back to New Orleans.

These initial personnel movements were generally under the supervision of Gilbert Ganucheau, the clerk of the Fifth Circuit, who did a magnificent job of both planning and implementing much of the transition.

Do you think the way the training and shifting of personnel were handled could be replicated if other courts split?

The two-step transition would perhaps be a useful way to divide one court into two, provided it were extended over a sufficient period of time. The main difficulty was that for a while we were proceeding alternatively, and, then, when establishment of two courts was mandated and there were no longer the two alternatives, the time frame was very short.

I'd like to tell you now about transfer of cases from one situs to another. There were between 2,000 and 2,500 cases pending in New Orleans that were to be transferred to Unit B—ultimately the Eleventh Circuit—in Atlanta. These were live cases, with papers coming in every day and going out every day.

When the headquarters was open in Atlanta and personnel were on hand, we moved the cases physically in three increments, transferring all of the cases from one state in one movement. Each movement was done on a weekend. The case files stayed open in New Orleans until five o'clock on a Friday afternoon. Over the weekend the cases to be moved were loaded in a van, sealed, sent to Atlanta, unsealed, and put on the shelves, and were open for handling at eight o'clock Monday morning.

We had, necessarily during this transition, a "joint filing rule." This meant that any case or any document filed in Atlanta that should have been filed in New Orleans was accepted for filing in Atlanta. Conversely, anything filed in New Orleans that should have been filed in Atlanta was accepted for filing in New Orleans, stamped with the time and date it was received. Nobody was hurt by reason of time limitation, that is, by reason of this transfer.

Over a period of about four months all the Atlanta cases that were pending in New Orleans were shifted to Atlanta, with people available there to take care of them from the moment the documents arrived.

Next, let me turn to how the bar knew about what was occurring and what they were called on to do.

We outlined the staged procedures

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THE THIRD BRANCH

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Provisions of Social Security Amendments As Applied to the Federal Judiciary

The accompanying article provides members of the federal judiciary with important information concerning the recently enacted Social Security Amendments of 1983. Under section 101(c) of this new law, as it now stands, the salaries of senior judges performing judicial duties by designation and assignment under 28 U.S.C. § 294 will become "wages" for FICA tax purposes as of January 1, 1984. Although not yet introduced at the time *The Third Branch* went to press, legislation has been drafted that would postpone for a two-year period the effective date of section 101(c), to permit sufficient time to evaluate the impact of the new law on members of the judiciary. Further developments with respect to this matter will be reported in future issues.

With the passage of the Social Security Amendments of 1983 (Pub. L. No. 98-21), justices, judges, bankruptcy judges, and magistrates, along with the president, vice-president, and most presidentially appointed officers in the executive branch, will become members of the social security system on January 1, 1984. All federal employees appointed or hired on or after that date will also be covered by the system.

Many members of the judiciary who have never, or at least not recently, worked under social security are asking two questions: How much does it cost? What is it worth to me and my family? The first question can be answered with reasonable precision; the answer to the second question varies with each individual depending on age, family situation, and work history. The level of future benefits also depends in part on trends in wages and inflation.

Social security provides benefits, in addition to medicare, upon retirement or disability to covered workers and their survivors. A worker who began paying the medicare tax in January 1983 is granted credit for medicare purposes for each quarter of federal service performed in previous years. To be eligible for the other social security benefits, however, a worker must actually serve under the system, and pay FICA taxes, for an extended period.

In 1984, the FICA tax rate will increase from 6.7 to 7 percent. This figure includes the 1.3 percent medicare tax that most members of the judiciary have been paying since January 1, 1983. The tax rate is scheduled to increase gradually until it reaches 7.65 percent in 1990.

The tax rate is applied to the social security "earnings base." The earnings base is currently $35,700, but it will be administratively adjusted upward in subsequent years as earning levels rise. The maximum FICA tax that can be imposed in 1983 is 6.7 percent of $35,700, or $2,392.

Regardless of age, a worker who receives "wages" is subject to the FICA tax in the year of receipt. "Wages" in the social security system means income earned as a result of services rendered. It does not include so-called unearned income.

To be eligible for retirement, disability, and survivor benefits, a worker must have credit for a certain number of quarters of work under the system. The amount of credit needed depends on the age of the worker. Younger members of the judiciary will need forty quarters of coverage to be fully insured by retirement benefits, but those who reached or will reach age 62 before 1991 will need lesser amounts. The general rule is that quarters of coverage must equal the number of years between 1950 and the year the worker reaches age 62. Thus a person who reached age 62 in 1981 would need thirty quarters (7.5 years) of coverage. The amounts of coverage needed for disability benefits or survivor benefits may be less than the amounts needed for retirement benefits. Information on the exact amount of credit needed under various circumstances at a particular age can be obtained from any social security office.

Many members of the judiciary earned social security credits as a result of earlier occupations. Those credits will be added to any credits earned as a member of the judiciary to determine eligibility for benefits. The amounts of previous earnings credited as well as earnings credited while in the judiciary are important factors in determining the level of benefits that insured members can anticipate.

The Social Security Act contemplates that most workers will cease all or substantially all of their wage-earning activities at age 65, the "normal retirement age," and begin drawing benefits if they are eligible. A worker may retire at age 62 with reduced benefits if he or she has the necessary quarters of coverage or may continue working beyond age 65, thereby earning increased benefits. For each year of covered work after age 65 and before age 70 there is, in addition to the increase in benefits that usually results from added earnings, a special credit that adds 3 percent to benefits for workers who reach age 65 after 1981 and 1 percent for older workers.

Persons between 62 and 70 who are receiving monthly social security retirement benefits may lose all or part of those benefits in any year they "earn" more than a specified exempt amount of wages. The exempt amount for 1983 is $6,600 for persons 65 or over and $4,920 for persons under 65. Each $2 of earnings in excess of the exempt amount results in a $1 reduction in benefits. This excess-earnings offset ceases to apply at age 70.

In addition to the general principles outlined above, senior judges will be subject on January 1, 1984, to a new provision specific to them. During

See SOCIAL SECURITY, page 4

SOCIAL SECURITY, from page 3

periods in which they perform judicial service by designation and assignment under 28 U.S.C. § 294, their salaries will become "wages" for FICA tax purposes and hence, until they reach age 70, "earnings" for purposes of the excess-earnings offset. Because this provision will undoubtedly discourage some senior judges from performing judicial service, Congress will be asked to delay its application until its effect on each senior judge can be determined. The Chief Justice and the Committee on the Judiciary have taken steps to acquaint congressional backers with the untoward impact of this statutory change on senior judges.

The most difficult aspect of the social security system for a worker is projecting the amount of benefits that he or she can expect upon retirement. The projection formula includes a number of variables that do not become fixed until the worker nears the year of his or her retirement. To approximate the amount of benefits to which they may eventually be entitled, interested members of the judiciary should obtain and read either SSA Publication No. 05-10047, entitled "Estimating Your Social Security Retirement Check" (for workers who reached age 62 before 1979), or SSA Publication No. 05-10070, same title (for workers who reach age 62 after 1978), as appropriate.

The 1983 act contains another provision that will have a financial impact on members of the judiciary. For the first time, a portion of some workers' social security benefits will be subject to federal income tax. If a former worker's adjusted gross income combined with 50 percent of his or her social security benefits exceeds a base amount ($25,000 for individual returns, $32,000 for joint returns, but zero dollars for returns of married persons filing separately), the worker must include in taxable income the lesser of (a) one-half the benefits or (b) one-half of the excess of combined income over the base amount. ■

GODBOLD, from page 2

through notices to the bar, both state bars and those in the large urban areas, through the news media, letters to the lawyers in all pending cases, speeches, and seminars. The word got out, and when a lawyer would slip, the joint filing rule acted as protection.

As soon as we knew that there would be two separate courts, we began work to establish rules and internal operating procedures for the new court—the Eleventh. The Fifth pretty well stayed with what it had: a building, personnel, and established rules and procedures. The largest impact of start-up work fell on the Eleventh.

The former Fifth already had an advisory committee of two or three lawyers from each state. The Eleventh recast its part of that advisory committee and appointed an additional lawyer from each of its states. This advisory committee assisted us in preparing new rules. The members swapped ideas, drafted proposals, and met with the judges. We finally had what we thought was an acceptable draft, and, at the next judicial conference of the Fifth, we had a special meeting of the people who would soon be part of the new circuit: judges, lawyers, advisory committee members, and so on. We distributed the proposed rules, made other proposals and suggestions, and had a long dialogue on the floor about all these ideas.

Let me switch to the library. As I said before, the library began from the bare walls. The first thing we did before buying any appreciable number of books was to survey courts around the country by letter, telephone, and other means (also with the help of the Administrative Office) to find available surplus books.

Librarians are happiest with brand-new books, but we made a judgment that we wanted first to exhaust the supply of surplus books that were in usable form, and we did locate about $125,000 worth of books that were simply transferred to us from others. Then we set about to buy the new books and the current periodicals that we needed and also to buy shelving and equipment.

Since you were on the Center's Board when the 1978 "Improving the Federal Court Library System" study was completed, you were aware there were a lot of books just boxed away in storage?

Yes, it was determined that there were a lot of surplus and stored books. Another interesting thing we discovered was that a newly constituted library built from the walls and floor up with acquisitions is probably of better quality than an existent library with the same number of books. An existent library will have obsolete and dubious material on hand, because it's not culled through and moved out. Everything in our library was newly acquired. And nothing was acquired that was not needed and useful. I estimate the library now has 25,000 volumes, and it's all good—nothing dubious or second-rate.

I want to underline that the Administrative Office gave us wonderful cooperation, too, on the library. They were great.

The two new circuits came into existence on October 1, 1981. By then, we had operated a year as two units. Despite difficulties, this one year's operation in what were essentially two de facto courts was helpful. We got a lot of "bugs" out.

I'm proud of the way this was done. Nobody was ever denied or delayed in filing a single paper or denied or delayed by the court. There was never a delay in acting on any emergency motion either in Atlanta or in New Orleans. No sittings of the old Fifth were canceled or delayed. No sittings of units were canceled or delayed. And, except for minor things that happen with new personnel, neither unit and neither new court stumbled or even broke stride. Things just kept going in their usual channels.

This took a lot of cooperation from the staff of the former Fifth and from

See GODBOLD, page 7

Fiscal 1984 Budget Request for Federal Judiciary Totals $924,734,000

On March 14, Representative Neal Smith of Iowa, chairman of the House Appropriations Subcommittee on the Departments of Commerce, Justice, State, the Judiciary, and Related Agencies, opened hearings on the federal judiciary's budget requests for fiscal year 1984, which begins October 1, 1983.

The appropriations request for all federal judicial agencies totals $924,734,000, an increase of $98,744,000 over the fiscal 1983 spending level. The entire third branch of government thus constitutes—as it has for many years—about one-tenth of 1 percent of the total federal budget authority sought from Congress, which is approximately $900 billion for fiscal 1984.

Chief Judge Charles Clark of the Fifth Circuit Court of Appeals, along with Senior Judge Oren Harris of the Eastern and Western Districts of Arkansas and Administrative Office Director William E. Foley, testified on behalf of the circuit, district, and bankruptcy courts' request for a fiscal 1984 appropriation of $860,284,000, an increase of $91,547,000 over the courts' approved spending level for fiscal 1983.

Chief Judge Clark, who is chairman of the Budget Committee of the Judicial Conference, explained that the 1984 budget submissions "reflect a major effort on the part of the Judiciary to reduce its request to the minimum." "We recognize the need," he continued, "for a commitment to fiscal restraint in the face of a projected record deficit."

Chief Judge Clark noted that one-half of the increased appropriations request is a result of the higher cost of maintaining the current level of services. Without these rises due to inflation and other factors beyond the courts' control, the judiciary's 1984 budgetary requirements would be only $45,609,000 (5.9 percent) over its 1983 level.

The noninflationary increases sought for fiscal 1984 are also due primarily to factors beyond the courts' control—continued increases in case filings, which Chief Judge Clark documented for the subcommittee, and the passage of new legislation, including the 1978 Bankruptcy Reform Act and the 1982 pretrial services legislation. The impact of rising filings is seen most directly in the request for 46 additional deputy clerks in the circuit courts, 430 more deputy clerks in the district courts, and 73 new positions for the probation service. For the bankruptcy courts, 321 more judges and staff persons are requested to fulfill the requirements of the 1978 bankruptcy reform legislation, and 319 additional positions are included for pretrial services. In all, 1,323 new positions are requested, including 134 not related to filing increases or new legislation. Were Congress to approve the new positions requested by all third branch agencies in their appropriations estimates, staffing in the judiciary would total 16,731 positions.

Direct costs for the new positions in the circuit, district, and bankruptcy courts will total more than $18,000,000. More than $9,000,000 will be needed for additional office space and nearly $7,000,000 for additional operational and maintenance costs associated with the new positions.

"To stay abreast of current management and information techniques," Chief Judge Clark added, "we are expanding the automation of many court functions. . . . We are also continuing experiments with new technologies to improve court procedures." The budget request contains $3,300,000 for such projects, which are expected to improve service to litigants.

An increase of approximately $3,000,000 is requested for defender services, much of it, Chief Judge Clark said, "a result of the continuing upward trend in the number of Criminal Justice Act appointments due to increased criminal filings." An additional $1,000,000 is requested to cover projected increases in the costs of grand and petit jurors in 1984; Judge Clark summarized the efforts the courts have expended to date to improve juror utilization.

Members of the House subcommittee were particularly interested in the workload and management of the courts. Their questions covered the judiciary's proposal to increase the number of circuit judgeships; alternative methods of handling litigation; the use and jurisdiction of magistrates; and, in the bankruptcy courts, the large pending caseload and proposals to clarify the courts' jurisdiction. The subcommittee was also interested in the progress of the new court security program and matters relating to courthouse space.

Referring to the increase in pending criminal cases, Representative

See BUDGET, page 6

Elections to Board Of Certification

Judge John H. Pratt (D.D.C.) and John W. Macy, Jr., have been elected and reelected, respectively, to serve on the Board of Certification. By statute, the board consists of the director of the AO, William E. Foley, the director of the FJC, A. Leo Levin, and three persons elected by the Judicial Conference, each to serve a renewable three-year term. Chief Judge Howard T. Markey (Fed. Cir.) was reelected to the board in 1982. The board is currently chaired by Director Levin.

Public Law 91-647, which prescribes the duties of circuit executives, also prescribes the responsibilities of the Board of Certification: to consider all applicants for certification (since certification is a prerequisite for appointment to a circuit executive position), to maintain a roster of certified individuals, and to publish the standards for certification. The Judicial Conference has directed that district court executives appointed under its experimental program also be board certified. ■

CHIEF JUSTICE, from page 1

proposal by having one court of appeals judge designated from each circuit to provide for a panel of nine, with four "reserves" who would replace any absent members of the regular panel.

The Chief Justice repeated his proposal to have the special panel submit a report on or before the completion of the five-to-seven-year sunset provision of the legislation. ■

BUDGET, from page 5

Smith asked if the Speedy Trial Act requirements were being met. Judge Clark explained that in 1982, 95.9 percent of the defendants were processed within the 30-day time limit from arrest to indictment, and 96.3 percent were tried within the 70-day limit from indictment to trial, the highest compliance rate that has been achieved to date.

The court security program is funded out of a new judicial appropriation for fiscal 1983. The U.S. Marshals Service is responsible for providing security to court personnel and facilities and is reimbursed by the judiciary. Howard Safir, assistant director of the Marshals Service, explained that after considerable delay, authority to hire contract guards had been obtained from the General Services Administration. The first guards are expected to be on board by July, and it is anticipated that the quality of these guards will be substantially higher than the quality of those previously provided by GSA, and at less cost per hour. The fiscal 1984 appropriation request of $16,250,000 for court security represents an increase of $3,290,000 over the 1983 funding level, and is needed to upgrade security at the 100 judicial facilities that need it most.

Appropriations hearings are the culmination of the budget development process, which has been under way for about a year. The process began with the AO's annual budget call in April 1982 to chief circuit and district judges, and to clerks of the bankruptcy courts, asking for personnel and other support services requirements for fiscal 1984. The estimates were reviewed by the appropriate committees of the Judicial Conference and its Budget Committee, and were submitted for approval by the Conference at its September 1982 meeting. The requests were subsequently incorporated into the president's budget before transmittal to the Congress.

Hearings before the House subcommittee were completed on March 14 and 15. Hearings before the corresponding Senate Appropriations Subcommittee were held on April 20. One of the principal topics of discussion at those hearings was the impact of social security reform legislation on active and senior judges. ■

PERSONNEL

Nominations

Julia S. Gibbons, U.S. District Judge, W.D. Tenn., Apr. 12

Ricardo H. Hinojosa, U.S. District Judge, S.D. Tex., Apr. 12

Joel M. Flaum, U.S. Circuit Judge, 7th Cir., Apr. 14

Sherman E. Unger, U.S. Circuit Judge, Fed. Cir., Apr. 21

Bobby Ray Baldock, U.S. District Judge, D.N.M., May 2

Confirmations

William H. Barbour, Jr., U.S. District Judge, S.D. Miss., Apr. 21

Joel M. Flaum, U.S. Circuit Judge, 7th Cir., May 4

Ricardo H. Hinojosa, U.S. District Judge, S.D. Tex., May 4

Appointments

William H. Barbour, Jr., U.S. District Judge, S.D. Miss, Apr. 28

Pamela A. Rymer, U.S. District Judge, C.D. Cal., Apr. 28

Shirley W. Kram, U.S. District Judge, S.D.N.Y., May 23

Resignation

Patricia J. Boyle, U.S. District Judge, E.D. Mich., Apr. 15

Positions Available

Circuit Librarian, U.S. Court of Appeals for the Eighth Circuit (St. Louis, Missouri). Salary from $24,500 to $34,900. J.D. and M.L.S. preferred. Requires three years of library experience, including reference and administrative duties. Responsibilities include administration and management of main library, with staff of three, and four branch libraries, each with one librarian; establishment of cataloging and classification policies; maintenance of lawbook inventory for circuit; and reference and research work, computer-assisted legal research, and indexing of slip opinions. Send resume and references to Lester C. Goodchild, Circuit Executive, U.S. Court of Appeals for the Eighth Circuit, 542 U.S. Courthouse, 1114 Market Street, St. Louis, MO 63101. Upon request, interviews may be scheduled during the AALL meeting in Houston, Texas, on June 28.

* * *

Clerk of Court, U.S. District Court, Central District of California (Los Angeles). Salary to $63,800, depending on education and experience. Responsibilities include directing jury and interpreter services; personnel administration; budget preparation; financial management; space and facilities management; and supervision of data processing, training, purchasing and service activities, systems analysis, and interagency coordination. Requires ten years of administrative experience, five of which must have been in a highly responsible management position. Obtain applications from Susan Lewis, U.S. District Court, 312 North Spring Street, Los Angeles, CA 90012, FTS 798-2904. Mail applications to the Honorable Edward Rafeedie at the above address by July 1, 1983.

Correction

Contrary to an item in the Personnel column in our May issue, U.S. Circuit Judge Frank M. Coffin (1st Cir.) did not take senior status when he relinquished his position as chief judge on March 31, 1983.

GODBOLD, from page 4

the Administrative Office. I can't say enough about what the AO did. When Congress authorized the division into two units, it didn't say anything about funding. It just said the Administrative Office would supply it. Our expenses were unbudgeted.

GSA cooperated well with us, and the FJC helped us with advice and counsel from time to time. Judge Charles Clark, who would become chief judge of the new Fifth, was wonderfully cooperative. We worked out hundreds of details together without a bobble. *All* the judges were cooperative. Because of details of transition, they were often operating with shorter time constraints. Some, in Atlanta, were camping out in abysmal quarters. They had to be patient with new personnel, and they were doing double duty, because many of them were on committees at both ends of the old circuit.

In summary, there was a lot of advance planning, though the advance time was rather short. The planning was done in increments as we moved along, and when the two circuits formally divided on October 1, 1981, and went two separate ways, everything at both ends was in place, operating effectively. There have been a few cleanup details since then, but not many.

Did any problems surface that you didn't anticipate?

In at least two areas, I did not think far enough ahead. First, when one court is becoming two, how do you divide a library, or do you divide it at all? Obviously, there can be differing views about this. Does the library belong to the judges? Does it belong to a place? Does it belong to either of the two new courts? Half and half to each? Ultimately, the problem was solved by a committee, with help from the AO. The basic library materials relating to Alabama, Florida, and Georgia went to Atlanta; everything else stayed in New Orleans.

I also didn't look far enough ahead on the matter of furniture—I don't mean in regard to things like government-issued desks, but, rather, furniture that has antique and historical, sentimental, and special decorative value. The same questions posed about the library apply to a court's collection of furniture. Does it belong to a site, or what exactly do you do with it? These questions, too, were ultimately worked out by a committee.

I knew in advance about another problem area, but I did not anticipate how difficult it would be. This was the problem of effectively administering what amounted to three separate streams of cases: the old Fifth Circuit cases, many of which were still ongoing, and the two sets of unit cases. Immediately upon division we also had the new Eleventh cases. This was more of a problem than I had realized. Sometimes a judge had to think hard to remember what hat he was wearing.

The Eleventh Circuit is generally following the law established by the Fifth Circuit. Is this working out satisfactorily for bench and bar?

Yes. The bar is unanimous in its approval of this. The problem of what law the new circuit would follow almost sneaked up on me. It simply didn't occur to me until a few months before D-Day, Division Day. It gradually began to soak into my consciousness that not only was it an issue, but it was an important issue.

We tried to find out what had happened when the Tenth Circuit was created out of the Eighth. We found a couple of district court decisions with one or two sentences in them that simply said, "We'll follow the Eighth Circuit decisions."

A professor of law at Texas Tech Law School, Professor Thomas Baker, who used to be a federal court law clerk and is a very able man, wrote a law review piece on this subject ["Precedent Times Three: Stare Decisis in the Divided Fifth Circuit," 35 *Southwestern Law Journal* 687 (1981)], the only study we could find, in which he developed the various possibilities for creating or identifying a body of law for a new court. His research and writing were helpful to us in our thinking, but we ended up doing the one thing he said was not permissible, adopting in toto the law of the former Fifth Circuit.

There were several reasons for doing this. In the first place, it was a means of having at once a stable and certain body of law. This was important to our judges. It was even more important to the district court, the bar, and the litigants—not only in terms of litigation but also in terms of planning their affairs. Moreover, the body of law that we incorporated from the former Fifth was a body of law that all the judges on the Eleventh had participated in formulating and carrying forward. Those were some of the reasons.

The thesis of Professor Baker's piece, which said this couldn't be done, was that a common-law court can create law only on a case-by-case basis; that is, any statement by the new court about governing law out-

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CALENDAR

- June 1-3 All Judicial Conference Subcommittees of the Court Administration Committee: Supporting Personnel, Judicial Statistics, Federal-State Relations, Federal Jurisdiction, Judicial Improvements
- June 6-7 Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice
- June 13-14 Judicial Conference Advisory Committee on Criminal Rules
- June 16 Judicial Conference Advisory Committee on Appellate Rules
- June 17 Judicial Conference Committee on Rules of Practice and Procedure
- June 23-25 Fourth Circuit Judicial Conference
- June 27-28 Judicial Conference Committee on Administration of the Magistrates System

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side the confines of the case would be pure *dictum*. To have agreed with this argument would have put us on the treadmill of choosing law from other sources on every point for twenty, thirty, forty, maybe fifty years. During all that time, the lawyers and litigants, the district judges, and others would not know what the law was. So we declined the invitation to adjudicate everything anew.

The mechanics by which we adopted former Fifth law might be of interest. A circuit can't establish that a whole body of law is its law through its judicial council, which is an administrative body. We selected a case where the law of the old Fifth was materially different from the law of some of the other circuits, and we voted it *en banc* to decide the question of choice of law. We heard the case *en banc* the morning of October 2, 1981, the second day we were in existence, because we had all been in New Orleans the day before closing down the old Fifth. We announced our decision later that day. In it we said, we choose the law of the old Fifth not only in this case but for all cases. [The formal opinion in the case, *Bonner* v. *City of Prichard, Alabama*, 661 F.2d 1206, was released November 3, 1981.]

Did you explain this background in your opinion?

Yes. The opinion discusses all the reasons for adopting the body of law of the old Fifth. We acknowledged what we were doing: The opinion said, we *chose this case* to make a choice of law. So, we acquired a body of law by judicial decision of the court *en banc* on the second day of the court's life.

Speaking practically, how would the court use or overturn precedent that is not its precedent?

A former Fifth Circuit opinion is just like an Eleventh Circuit opinion. If our court wants to sit *en banc* and overrule one of these adopted precedents, it's free to do so. Not because it's the former Fifth's precedent, but because we've adopted it as ours and we can change it any time we want to by sitting *en banc*.

On a matter in which we have no precedent brought over from the former Fifth we will carefully examine the precedent of all other circuits in order to make a choice.

Is anyone in your court recording in other ways what we are touching on in this interview: the history and background of a new court's formation, your thoughts in preparation for the division, and so on?

Very early we decided that we had a unique opportunity to record the history and the people and the documents of a new court. We began on an ad hoc basis trying to do this, until we would have the means to handle it more formally. The FJC was very supportive; it videotaped all the ceremonies relating to closing down the former Fifth and opening the new Fifth in New Orleans, and the next day did the same for the opening ceremonies of the Eleventh in Atlanta. We are delighted to have all that preserved.

Since then, we have been trying to film every court ceremonial occasion. We had a ceremony for Judge Elbert Tuttle in January that was filmed, for example. The less formal ceremonies like events at our judicial conference are recorded in informal photographs. In January we combined with the ceremony honoring Judge Tuttle a ceremony for the formal opening of the Eleventh Circuit Historical Society, which by then had been incorporated.

The Historical Society will carry on with the task we began informally. We are interested in events, people, and memorabilia in a tangible sense. We have some interest in the papers of judges, but we don't quite know what this will develop into.

Chief Judge Godbold had more to say on a variety of topics; the interview continues in the next issue of The Third Branch. ■

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THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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Supreme Court Orders Appellant to Pay Damages For "Frivolous" Appeal

On June 13, 1983, the Supreme Court, for the first time, invoked the provisions of Rule 49.2, which the Court adopted in 1980, and ordered an appellant to pay damages as a penalty for bringing a "frivolous" appeal.

In *Tatum, Elmo C. v. Regents of Nebraska—Lincoln* (No. 82-6145), the Court issued the following order: "The motion of respondents for damages is granted and damages are awarded to respondents in the amount of $500.00 pursuant to Supreme Court Rule 49.2." Mr. Tatum had brought a series of civil rights suits against the University of Nebraska charging that the university had discriminated against him by failing to provide adequate housing.

The Chief Justice and Justices Rehnquist, O'Connor, Powell, and White voted to impose the damages. Justices Brennan, Marshall, and Stevens dissented. Justice Blackmun took no part in the consideration or decision of the motion.

Chief Judge Godbold Suggests Ways To Improve the Courts of Appeals

Chief Judge John C. Godbold had been chief judge of the old Fifth Circuit for eight months when it was reorganized and split into the new Fifth Circuit and the new Eleventh Circuit on October 1, 1981. At that time, he became chief judge of the Eleventh Circuit. On a recent trip to Washington, he was interviewed for The Third Branch *about the planning and mechanics of this historic division. He also discussed various aspects of the operation of the Eleventh Circuit and the federal courts in general.*

Last month's issue (June 1983) carried Chief Judge Godbold's account of the organization of the new circuits. Following are some of his observations on other matters of interest to the judiciary.

There are twelve active judges in the Eleventh Circuit and four senior judges who continue to sit. Is this ample judge power to keep your docket current?

We can't tell yet. We are current, and I am very proud of this. Two years before the former Fifth Circuit divided, it was a year and a half behind in its work. Now, the Eleventh is current, and so is the new Fifth. I should define what I mean by "current," since obviously not every case has been decided. What I mean by "current" is that each case in which all the briefs have been filed has either been calendared for oral argument or is in the stream of the court's nonargument decisional system.

Two or three months ago we had oral argument calendars, scheduling cases to be argued in thirty or forty-five days, which were not full because we didn't have enough cases ready to put on them. We therefore had to add cases to these calendars, which resulted in some lawyers getting only about fifteen days' notice.

Becoming current in the sense I have described came about for two reasons. First, there was hard work by judges who pitched in to dispose of the large number of cases. Then, of course, the former Fifth with fifteen judges had grown to be two courts with twenty-six. Our new judge power began to affect the caseload.

At this moment, I don't know whether the Eleventh will have enough judges to stay current. The new Fifth has requested more judges, but the Eleventh has decided to gain a little more experience before we make a decision. Also, we have received invaluable help from visiting

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New AIMS Project to Start in Three Circuits

The Federal Judicial Center is undertaking a pilot project that will test the effectiveness of a new case management and docketing system for the courts of appeals that uses the latest in computer hardware and software designs.

On December 7, 1982, FJC Director A. Leo Levin addressed a letter to all chief judges of the thirteen courts of appeals, outlining the FJC's proposed effort and soliciting indications of the courts' interest. On the basis of the responses received, the FJC decided to proceed with the project.

The new system will be implemented successively in the Ninth, Tenth, and Fourth Circuits. Separate computers installed in each of these courts will provide the services now supplied by the Appellate Information Management System (AIMS) currently in use in the Second, Seventh, and Tenth Circuits and the Appellate Record Management System (ARMS) in use in the Ninth Circuit. The caseload management functions now provided by AIMS and ARMS include calendaring, motion tracking, scheduling, and issue tracking. In addition to these functions, the new system, which is called New AIMS, will provide a full docketing

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judges from other circuits and senior district judges.

One of your colleagues asserted, during an interview with The Third Branch **a few months ago, that if the size of the courts of appeals grows, instability in the rule of law likewise increases. Would you comment on this?**

I'm glad to comment, but I can only give my own opinion. I think that the law *does* tend to become unstable as the size of a court grows. I came on the former Fifth when there were twelve judges. We went to thirteen, then to fifteen, and finally to twenty-six. On the former Fifth we had either thirty-five or thirty-six, counting the senior judges, at one time. That number gave more than seven thousand different possible combinations of judges sitting in panels of three.

The former Fifth, the new Fifth, the Eleventh—all have had an "in-house stare decisis rule"; that is, one panel may not overrule another. This gives stability and continuity to the law. Nevertheless, sometimes inadvertently, sometimes intentionally, where there is a divergence of views there are variations in results. The tremendous number of possible combinations of three-judge panels makes it difficult to keep the law consistent.

A second consequence of size is trying to keep up with what the court is doing. In the former Fifth, this meant about four thousand opinions a year. In each of the new circuits, it's fifteen hundred to two thousand opinions. Not only do the circuit judges have to read these to keep up, but district judges, U.S. attorneys, litigants, their lawyers, and law clerks have to read them. The circuit judge's responsibility has been cut in half. Not only is there an institutional responsibility for trying to keep the law coherent and stable, but also each judge has an individual responsibility to participate in this in his own way and to watch to see if the court is "getting off track."

When the former Fifth sat *en banc* with twelve to fifteen judges on important and difficult issues, often the court would divide into two sides. It would be unusual for the court to divide three ways, although at times it did. But as the group grew in size to twenty-six, it tended to fragment into several groups. I don't mean just in opinion writing, but also in differing views of the law.

When the new court was formed, fragmentation ceased. A smaller *en banc* court performs the process of adjudication in the traditional manner. Usually, there is one view in one direction and an opposing view, with debate back and forth, and maybe people change their minds, but ultimately the court concludes with probably two views and maybe three once in a while. Seldom are there more than that. The process of adjudication remains an individual one, in which one agrees with View X or with View Y.

In contrast, the twenty-six-person *en banc* performed somewhat like a legislative body. It divided up into groups, with judges seeking accommodation on some ground that, while maybe not ideal for everybody, was at least agreeable to a majority. Its function became almost legislative and, therefore, antithetical to the way that appellate courts normally operate.

As you say, at some point a large court is on the way to becoming a legislative body, but, in between, is there a breakpoint? Is there a number of judges, or an approximate number, that is a maximum, after which to become larger is problematic?

This, again, is my own view. I think the ideal size for a court of appeals is not more than nine to twelve. I'm not enamored of the number "nine." When I went on the court of appeals, there were twelve and then thirteen and then fifteen. With twelve to fifteen, we could operate efficiently, but we found thirteen to fifteen somewhat more difficult than twelve. Over fifteen, the dynamics of size become almost overpowering.

Interestingly, the former Fifth, though it was drowning in cases, for nine years unanimously agreed it did not want more than fifteen judges. We asked Congress not to authorize any more.

How does size affect court administration?

I was chief of the former Fifth for a while. A big court creates all kinds of bureaucratic devices—layers of

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Circuit Executive Appointed

Dana H. Gallup, for thirteen years the clerk of court of the First Circuit Court of Appeals, has been named the first circuit executive of the First Circuit.

Mr. Gallup, 61, "started at the bottom," accepting his first appointment in the First Circuit as the court crier in 1947, while he was attending Northeastern University Law School. Thereafter he rose through the ranks in the office of the clerk of the court, where he held the chief deputy clerkship from 1949 to 1970, when he became clerk of court.

During World War II, Mr. Gallup was a B-24 bomber pilot. He entered the service as a second lieutenant and rose to the rank of major.

Father of three grown sons, Mr. Gallup lives in Cambridge, Massachusetts. ■

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1983-84 Judicial Fellows Announced

Donald H. J. Hermann and Susan M. Leeson, both outstanding young professors with records of achievement in various fields, have been selected by the Judicial Fellows Commission to be the Judicial Fellows for 1983-84.

Each will carry forward the purposes of the Judicial Fellows Program by working on a project or projects designed to aid in the resolution of problems confronting the federal judiciary. Ms. Leeson has been assigned to the Supreme Court and Mr. Hermann to the Administrative Office.

Susan M. Leeson and Donald H. J. Hermann are the Judicial Fellows for 1983-84. Ms. Leeson has been assigned to the Supreme Court and Mr. Hermann to the Administrative Office.

Susan Leeson, who has been in the political science department at Willamette University in Portland since 1970, is currently on a year's leave of absence from her post as professor and department chair to serve as clerk to U.S. Court of Appeals Judge Alfred T. Goodwin (9th Cir.).

She is the author of numerous scholarly articles in law and political science and, among other distinctions, has been a member of state and local land use and cultural commissions in Oregon.

Ms. Leeson received her B.A., magna cum laude, from Willamette and her M.A. and Ph.D., with distinction, from Claremont Graduate School. She also held two postdoctoral fellowships, one at Duke University, for work with John Hallowell, and the other at Princeton University, for a collaboration with A. T. Mason.

Donald Hermann, a professor of law at DePaul University in Chicago since 1972, received a B.A. with distinction from Stanford University, an M.A. and a Ph.D. from Northwestern University, a J.D. from Columbia University, and an L.L.M. from Harvard University.

Mr. Hermann has been a lecturer and faculty member at numerous colleges and universities in this country and in England, Italy, and Brazil, and has participated in many honors programs and special seminars. He is a prolific writer and has published dozens of articles and reviews on a broad range of topics for law journals and other legal periodicals, as well as several books, the most recent being *The Insanity Defense: Philosophical, Historical, and Legal Perspectives (1982).* ■

Social Security Update

Last month's story on the newly enacted Social Security Amendments noted that under section 101(c) of this new law, the salaries of senior judges performing judicial duties by designation and assignment under 28 U.S.C. § 294 will become "wages" for FICA tax purposes as of January 1, 1984. Recently, Senators George J. Mitchell and Arlen Specter each introduced legislation that would change that provision. As proposed in S. 1276 by Senator Mitchell and in S. 1375 by Senator Specter, section 101(c) would be amended specifically to exclude as wages the salaries of senior judges. Both bills have been referred to the Committee on Finance.

Parole Commission Proposes Rules on Sentence Reduction

The U.S. Parole Commission has published for comment in the *Federal Register* (48 Fed. Reg. 22,949 (1983)) three proposed rule changes affecting judicially imposed sentences for selected federal prisoners.

To assist in relieving overcrowding in federal prisons, as well as "to enhance equity among similarly situated offenders," the commission has proposed that the director of the Bureau of Prisons, using 18 U.S.C. §4205(g), petition the sentencing court for a reduction of the minimum sentence in particular cases. Candidates for such reductions would be serving sentences for which the minimum was longer than the maximum of the applicable parole guideline range, would already have served longer than that maximum, and would be otherwise suitable for release from prison. A recommendation to the Bureau of Prisons director for a reduction of sentence would be at the discretion of a regional commissioner.

The commission's second proposal would establish a policy of earlier release on parole for federal prisoners who offer their assistance in investigations and prosecutions of other serious offenders implicated in a crime other than their own. Such a policy would apply only in cases in which a prisoner's assistance had been otherwise unrewarded and his or her release would not threaten public safety.

The third proposed rule comprises procedures for the implementation of the Parole Commission's responsibilities under the Victim and Witness Protection Act. It provides that prisoners ordered by the sentencing judge to make restitution be given presumptive release dates by the commission. If at the time scheduled for release the prisoner had not satisfied the restitution order and it appeared that he had the ability to

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GSA to Stop Its Funding for Court Security

U.S. Marshals Service Will Contract for Private Security Guards

Budgetary restraints, which began during the Carter administration and have become more severe in the current administration, have resulted in marked cutbacks in protection provided to the courts by the General Services Administration's federal protective officers. Recently the GSA announced its intention to cease providing federal protective officers and contract guards at the entrances of federal buildings as of September 30, 1983. In some jurisdictions, GSA-funded guards have already been replaced.

In accordance with the March 1982 Agreement on Court Security between the Chief Justice and the Attorney General, the Administrative Office has acquired appropriations, which it will make available to the U.S. Marshals Service, the agency with primary responsibility for providing court security.

For fiscal year 1983, a $12 million account has been set up for the marshals to provide contract guards and security equipment. The AO's appropriations request to the Congress for fiscal year 1984 includes an additional $7.2 million. The additional funds will be used in part to pay for contract guards at building perimeters for courts where such guards are being withdrawn by the GSA.

The GSA recently delegated authority to the Marshals Service to contract directly for private security guard services, instead of reimbursing GSA for providing such services. The Marshals Service has just announced the first contract for guard services, to cover the federal courts in California. Solicitations for bids have been sent out for an additional twelve judicial districts during the 1983 fiscal year.

The new contract guards will be called "court security officers," and the Marshals Service has begun a three-pronged program to ensure that they are "of a quality superior to those currently being provided by the General Services Administration." Contract specifications require that all individuals serving as court security officers have at least three years' experience as certified law enforcement officers, pass a multilevel background investigation, and receive certification from an intensive week-long training program at the Federal Law Enforcement Training Center at Glynco, Georgia. The new officers will be appointed special deputy U.S. marshals, responsible to the local U.S. marshal, and while they are on duty in designated judicial areas of federal buildings, they will have total law enforcement authority.

By September 30, 1983, the Marshals Service expects to have 147 contract security officers trained and ready for assignment, and by September 30, 1984, it anticipates that as many as 500 officers will be serving. Within three years, the program should reach its goal of 800 to 1,000 court security officers.

To carry out and coordinate all these activities, the Court Security Division of the Marshals Service, with James E. O'Toole as chief, is working closely with the newly established Office of Court Security in the Administrative Office, under Peter G. McCabe, assistant director for program management. All inquiries on court security matters should be directed to Nicholas Vawryk of the Office of Court Security.

The U.S. marshal for each district will conduct security surveys of all buildings housing the federal courts. On the basis of survey results, a court security plan is to be prepared for each building. The plans, which were to have been completed in June and approved by the court security committee of each district, will be reviewed by the Court Security Division and the Office of Court Security. The court security committee of each district consists of the marshal, the chief judge of the district court, the clerk of court, the U.S. attorney, and the building manager for the particular federal facility. ■

Circuit Court Filings Continued to Rise in 1982

Cases filed in the twelve U.S. circuit courts of appeals in calendar year 1982 rose to an all-time high of 28,161 new appeals. This figure is 2.7 percent higher than the number of appeals docketed during the comparable period in 1981, but because terminations were 5.2 percent greater than in the previous year, the overall pending caseload at the end of 1982 was only 10 appeals larger than in 1981.

The number of appeals filed was larger in eight of the circuits, with the most significant increases occurring in the Eleventh Circuit (up 14.2 percent), the District of Columbia Circuit (up 9.2 percent), the First Circuit (up 8.4 percent), and the Third Circuit (up 7.3 percent). The Fourth Circuit had the greatest decrease—7.4 percent.

These data are derived from the recently published *Federal Judicial Workload Statistics*, the 1982 edition of an annual publication prepared by the Statistical Analysis and Reports Division of the AO. Tabular presentations show workload statistics for the federal courts, and in addition to civil and criminal filings and terminations in the courts of appeals and the district courts, include statistics on juror usage in the federal districts, on federal defender organizations, on bankruptcy courts, and on the federal probation system. The publication also includes the first cumulative three-month statistics on the workload of the United States Court of Appeals for the Federal Circuit, which was established on October 1, 1982.

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bureaucratic devices and alternative bureaucratic devices—to keep from drowning in administrative detail.

In a smaller group, administration is direct and personal and immediate. This leaves judges freer to judge and to get out of the business of administration.

In the former Fifth—with twenty-five or twenty-six active judges and eleven senior judges—the simplest sort of decisions that required court input had to be staffed, run through a committee, and so on, and then put before the big body. On a court of twelve judges, I can walk down the hall with three judges on the way to lunch, and we can settle a matter on which the position of two or three others is predictable.

"We have to be very careful that we don't confuse our desire for independence with a feeling that we are not accountable to anybody."

—Chief Judge John C. Godbold of the Eleventh Circuit

What percentage of your time is spent on administration?

Administration takes 50 to 60 percent of my time. I hope this will diminish as the new court puts many details behind it that arise simply from starting up.

What formulas or policies do you follow in assigning cases to a three-judge panel?

We have a very careful system for this. Assignment of judges to panels and assignment of cases to panels run on independent tracks, with neither track knowing what's happening on the other track until the two tracks come together at an appropriate time that I'll describe in a minute.

Assignment of judges to sit on panels is done by a committee of judges that does not include the chief judge. The committee operates with what I could best describe as "amended random selection." It begins with a computerized matrix that is totally random. Then data are fed in, such as when judges will be on vacation, when a judge has a wedding in his family, and when the chief judge will be going to a meeting of the Judicial Conference of the United States.

Out of this process comes the composition of every panel, set for a year in advance. Our panel assignments for the court year that begins this coming September were completed this March. They have been made known to all judges on the court, but the information is otherwise confidential. The panels are not revealed to the clerk.

The clerk is responsible for putting the calendars together for the three-judge panels. Around forty-five days before an oral argument calendar is to begin, the circuit executive delivers to the clerk the names of the judges who will sit on that oral argument calendar, and the clerk's office ships the briefs out to them. This is the first time that the two tracks come together.

Then is it made public?

Then the calendar goes to the lawyers. The names of the judges are usually made public two to three weeks ahead.

But as far as selecting a case to go before a judge or judges, or a judge or judges to sit on a particular case, there is no way that this can be done.

There is an exception for emergency and expedited cases. A case of great importance may arise, which a judge orders expedited, and then it is up to the clerk to decide what to do with it. He looks at the calendars of panels coming up within, say, the next thirty days. A panel may have lost a case because of a settlement, a continuance, or some other reason. The clerk plugs the expedited case into the first available vacancy. If there are two panels with vacancies, so that there is a choice, he puts the names of the two panels in a hat and, with a witness present, pulls one out of the hat.

What, if anything, do you feel can be done to improve advocacy or to lessen the potential for bad advocacy on the appellate level?

I do not consider the quality of advocacy unacceptable. Of course, I'd like to see it better, and it is materially better since I came on the bench sixteen years ago—in the courts in which I have had experience.

We've helped by doing two or three things. Beginning around 1970 several judges of the former Fifth began teaching oral advocacy and brief writing, by writing about these subjects in law review pieces, talking about them in seminars and speeches, and furnishing materials that state and local bars include in local manuals. Oral advocacy is better in our part of the country. A lot of the hokum and show has gone out of it. It's much more of a reasonable dialogue between people talking together about an important matter on which opinions can differ. It is better. That is not to say it couldn't be improved more, because it could.

Almost all judges on the Eleventh try to provide counsel with a little guidance when they appear for oral argument. Most of our judges who preside over panels announce when

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the proceedings begin that the court has read the briefs and is generally familiar with the issues, that counsel need not recite the facts but can approach the microphone and directly address the real issues that they think will be dispositive of the case, and that they can leave the rest of it out. This sets the boundaries and if counsel stray very far, a judge is likely to direct them into areas vital to the case. It is not as it used to be, when the oral advocate was sort of like Pavarotti giving a great solo dramatic performance, and nobody dared to interfere. It's much more of a two-way dialogue now, with the court guiding counsel a bit. And if a lawyer strays off-base—for example, by saying something abusive about the other lawyer—he'll be caught up short.

The bar understands this a lot better. Part of the reason for the greater understanding is that a high percentage of the lawyers appearing before courts of appeals today are young lawyers appearing for the first time, as appointed counsel.

The day of the lion of the bar who does nothing but appellate advocacy is about gone. Before the young lawyers appear, they find out the best way to handle an appellate court appearance, and they are not dependent upon any historical or personal pattern of experience.

What other steps could be taken to improve the courts of appeals?

I hope that Congress will help us by eliminating some of the minor and trivial matters we deal with. For more than 95 percent of the litigants in the federal system, a court of appeals is the court of final review. I would like to see the federal courts used chiefly as forums for safeguarding constitutional and other important rights. They are also the appropriate place for various other cases, but there should always be the recognition that the federal court is pretty heavy artillery to wheel up. In my judgment, it ought not to be directed to matters like the size of the print on a loan-closing statement under the Truth-in-Lending Act. We have no business deciding whether a used-car dealer should have known that an odometer reading of twelve thousand miles on a ten-year-old pickup truck had been altered, or whether a small farmer with six pigs has violated the Environmental Protection Act by moving the location of his pigpen.

This is not to say that the persons involved don't have real grievances. And there may be societal interests to satisfy that go beyond the person himself. It is a question of which institutions in society should settle these kinds of differences.

On the other hand, it is my belief that there are some problems that are so *big* that they have no place in the federal court system. Let's take the question of whether a multimillion-dollar dam, or a multibillion-dollar waterway, should be built. These are questions of major importance, with environmental, social, political, emotional, scientific, and historical significance. There's one thing such a question is not—it's not a legal problem. More than that, if made a legal problem it will be entrusted to one judge or to three judges who have no special expertise in the matter. Also, it may be entrusted to them to decide on the basis of the peculiar format of whether the right words are on a piece of paper, an impact statement. That's a strange way to decide whether it is in the country's interest, after a balancing of all the separate interests affected, to build a multimillion-dollar dam. Not only is the forum wrong, the wrong ques-

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CALENDAR

July 6-9 Tenth Circuit Judicial Conference

July 7-8 Judicial Conference Committee on Administration of the Bankruptcy System

July 7-10 Eighth Circuit Judicial Conference

July 7-10 Sixth Circuit Judicial Conference

July 11-12 Judicial Conference Committee on the Judicial Branch

July 11-12 Judicial Conference Committee on Court Administration

July 11-12 Judicial Conference Committee on Intercircuit Assignments

July 13-15 Judicial Conference Committee on Judicial Ethics

July 13-15 Judicial Conference Committee to Implement the Criminal Justice Act

July 17-21 Ninth Circuit Judicial Conference

July 25-26 Judicial Conference Committee on Administration of the Criminal Law

July 28-29 Judicial Conference Committee on Operation of the Jury System

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tion is asked. I would like to see us get out of this business—not because it's not important, but because there are other forums in which it can be settled better.

For instance, I sat on one case that involved the site of a new station on the metro line being built in Atlanta. The dispute was over whether it should be moved to another location because of a line of about six or eight sycamore trees. I understand the interest of the residents in the sycamores, and I understand the interest of the metro system. I'm just the wrong person to be deciding whose interest should prevail.

So you believe that too many questions are being brought to the federal courts for resolution?

Yes. This matter directly relates to new jurisdiction that Congress gives us. The legislators are fully within their powers in giving us new jurisdiction. But, you see, we are natural loci for new jurisdiction. It is assumed that since we are here, we are in place, we've got skilled personnel, and we've got a reasonably good track record, why not give it to us?

Something else that would improve matters in the courts of appeals is fewer and shorter opinions. The logic of fewer and shorter opinions is, in part, a function of allocation of resources. Some cases simply do not contribute to the body of the law. Relieving judges of the necessity of writing in these cases would leave them free to write in the cases that *will* contribute to the body of the law.

See GODBOLD, page 8

Pilot Courts Discuss Attorney Admissions Programs

A seminar for representatives of the pilot courts participating in the work of the Implementation Committee of the Judicial Conference of the United States on Admission of Attorneys to Federal Practice (the King Committee) was held in Washington, D.C., on June 6 and 7.

Judges, lawyers, and law professors from the Districts of California (Central and Northern), Florida (Northern and Southern), Illinois (Northern), Iowa (Southern), Maryland, Massachusetts, Michigan (Eastern and Western), Puerto Rico, Rhode Island, and Texas (Western) met to discuss the current status of their admissions programs, the consequences of complaints about the operation of the rules developed pursuant to these programs, and the provision of necessary funding and personnel support to the programs.

Herschel Friday, chair of the American Bar Association's Task Force on Professional Competence, addressed the seminar; he discussed the bar's view on enhancing attorney competence and shared the results of the task force's preliminary work. Chief Justice Burger attended one of the sessions, speaking briefly on the significance of the work in the pilot courts and thanking the participants for their contributions to the improvement of advocacy in the federal courts.

The Judicial Conference, at its September 1979 meeting, created the King Committee to implement and evaluate the major recommendations of the Judicial Conference Committee to Consider Standards for Admission to Practice in the Federal Courts, known as the Devitt Committee. These recommendations included the development of an admissions examination on federal practice subjects, a trial experience requirement, a peer review procedure, a law student practice provision, and support of continuing legal education programs on trial advocacy and federal practice. Rules implementing one or more of these recommendations have been (or are about to be) adopted in all of the pilot districts.

The June 6 and 7 program was the second such seminar for the pilot court representatives, the first having been held in April 1982 (see *The Third Branch*, July 1982). ■

PERSONNEL

Nominations

H. Ted Milburn, U.S. District Judge, E.D. Tenn., Apr. 14

Leonard D. Wexler, U.S. District Judge, E.D.N.Y., May 11

Pasco M. Bowman II, U.S. Circuit Judge, 8th Cir., May 24

Gene Carter, U.S. District Judge, D. Me., May 26

Hector M. Laffitte, U.S. District Judge, D.P.R., May 26

Peter C. Dorsey, U.S. District Judge, D. Conn., June 7

Confirmations

Bobby Ray Baldock, U.S. District Judge, D.N.M., June 6

Julia S. Gibbons, U.S. District Judge, W.D. Tenn., June 6

H. Ted Milburn, U.S. District Judge, E.D. Tenn., June 6

Appointments

Ricardo H. Hinojosa, U.S. District Judge, S.D. Tex., May 21

Joel M. Flaum, U.S. Circuit Judge, 7th Cir., June 1

Senior Status

William C. Keady, U.S. District Judge, N.D. Miss., Apr. 26

Edward T. Gignoux, Chief Judge, D. Me., June 1

Death

Harry C. Westover, U.S. District Judge, C.D. Cal., Apr. 14

PAROLE, from page 3

pay but had willfully failed to do so, he or she would not be released.

A hearing would be required if a release data was delayed more than 120 days because of an unsatisfied order of restitution. A reasonable plan for payment (or performance of services, if ordered by the court) would be required as a condition for the release on parole of any prisoner with an unsatisfied restitution order.

Comments on any of these proposals should be sent by July 15 to U.S. Parole Commission, 5550 Friendship Boulevard, Chevy Chase, MD 20815.

GODBOLD, from page 7

Historically, appellate courts wrote opinions, but, history to the contrary, the appellate judge deserves confidence when he rules on a routine, run-of-the-mill case, without having to write and explain why he did it.

Many judges are trying to limit themselves on writing opinions. It isn't easy. A judge operates with the understandable psychology that since he has done this work, and been through this intellectual process to reach this decision, and has either written it out or outlined the reasons for it, it's necessary for him to formalize his writing and make it available to the world at large, so they can understand why the decision was reached.

Before you opened up for business in the Eleventh, did you all agree to a policy on publication of opinions?

We carried forward the practice of the former Fifth, which permits a panel to decide in a particular case whether the opinion will be published. We do not have a rule on that, and we don't want a rule on it. We leave it up to each panel to decide. We do not have a rule that forbids citation of unpublished opinions; we neither encourage it nor forbid it. And we see very little citation.

Do you have any final comments on ways to improve the appellate courts?

Yes. I want to add that another thing we could do to help the courts of appeals—in fact, all federal courts—is to have a stronger sense of accountability. We've prided ourselves on our independence since 1789. But independence of judicial decision and action is not the same as lack of accountability. We have a responsibility to the bar and to the litigants and to the country for fair and efficient administration of the court system. Once in a while we get this confused with independence. We have to be careful that our jealously guarded independence is not a cloak for delay and inefficiency and lack of consideration for lawyers, litigants, and even for the public. We *should* feel accountable to the institutions that I referred to—the bar, the litigants, the lawyers, the country itself—and to our peers and to ourselves. The idea of a federal judge as sort of a baron of a privately owned fief is about gone. But we've still got a way to go in feeling a sense of accountability in a system in which the law doesn't impose any structure on us to force us to be accountable. We have to create it ourselves. And we have to be very careful that we don't confuse our desire for independence with a feeling that we are not accountable to anybody. ■

NEW AIMS, from page 1

capability. A users' group composed of one member from each of the thirteen circuits met at the FJC in mid-May to give initial guidance to the FJC on policy and technical matters pertaining to the development of New AIMS.

New AIMS is one of several projects now being undertaken by the Center to replace the presently centralized FJC/AO computer system with a decentralized system of individual computers placed in courts throughout the country. The goal of this new stage in computerization is to take advantage of recent developments in computer hardware and software technology. As in the past, every effort is being made in these projects to coordinate closely with the courts in which new systems are being implemented. ■

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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Former Congressman Tom Railsback Reflects On Needs of the Federal Judiciary

Tom Railsback (R-Ill.) recently left the House of Representatives after sixteen years of service. During his tenure, former congressman Railsback was a stalwart friend of the federal judiciary.

As a minority member of the House Subcommittee on Courts, Civil Liberties and Administration of Justice, he introduced or cosponsored many influential pieces of legislation. Among those profoundly affecting the judiciary were the Federal Magistrate Act of 1979 and the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which broadened the membership of circuit judicial councils and established procedures by which they receive complaints of judicial unfitness. Another initiative that he pursued, with Subcommittee Chairman Robert Kastenmeier, but that proved elusive in the 97th Congress, was the elimination of the mandatory jurisdiction of the Supreme Court.

Mr. Railsback is now executive vice-president of the Motion Picture Association of America, which has offices in Washington.

The size of federal court caseloads continues to grow, due in some part to new legislation that creates new causes of action. Do you believe our legislators fully understand the impact on the courts of legislative enactments? And, if not, what do you suggest as a remedy for this situation?

It is my belief that legislators do not always understand the impact on the courts of certain legislative enactments. At one point I introduced legislation which would have required a judicial impact statement, and I still think that's a good idea.

The other legislation that was considered as recently as last year—again legislation I introduced, cosponsored by Bob Kastenmeier and some others—would have repealed provisions in a number of statutes that give priorities to certain kinds of cases. That is something the American Bar Association and its Committee on Judicial Improvements have been very much concerned about and rightfully so in my opinion, but that

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FJC Completes Court Reporting Study

The Federal Judicial Center recently completed *A Comparative Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting,* which has been forwarded to the members of the Judicial Conference Committee on Court Administration. The report presents the results of Center research undertaken for the Judicial Conference in response to the mandate of section 401 of the Federal Courts Improvement Act of 1982 (96 Stat. 25, 56-57). (Copies will be available for general distribution in the near future, as described below.)

That legislation authorizes the Conference to promulgate regulations giving effect to an amendment to the federal court reporting statute that would broaden the types of official court reporting methods that each district judge may elect to use in his or her court.

The report concludes that given appropriate management and supervision, electronic sound recording can provide an accurate record of U.S. district court proceedings at reduced cost, without delay or interruption, and provide the basis for accurate and timely transcript delivery.

Background. As reported in the November 1982 *Third Branch,* section 401 was enacted in part because of controversy over General Accounting Office assertions that electronic sound recording methods should replace stenographic methods for

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Use Prisons to Train and Educate Inmates, Advocates Chief Justice

Although new prison facilities worth $1 billion are currently under construction and the next ten years will see as much as $10 billion spent for more of the same, "[j]ust more stone, mortar, and steel for walls and bars will not solve [the] dismal problem" faced by our society and our correctional systems as a result of our failure to rehabilitate criminals while they are incarcerated. Chief Justice Warren E. Burger told an audience of 16,000 people, including the graduating class at Pace University in New York City, on June 11, 1983, that it is a requirement of a civilized society that it "do whatever can reasonably be done to change that person before he or she goes back into the stream of society."

It is questionable whether current correctional practices help to divert prison inmates from returning to criminal pursuits once they are released, the Chief Justice told his audience, because when prisons are mere "human warehouses," they do not provide the means for prisoners to develop self-esteem, do not inculcate the work ethic, and do not transmit the skills and habits that would allow a released individual to lead a normal and productive life.

It behooves us to support legislation that would facilitate the conver-

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Victim and Witness Assistance in the States .. p. 7

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court reporting in U.S. district courts. Section 401(b) of the act directs the Conference to "experiment with the different methods of recording court proceedings." The purpose of the Center's experiment was to provide the Judicial Conference with information to use in determining whether to promulgate regulations that would give effect to a prospective amendment to 28 U.S.C. § 753(b). The prospective amendment would give "electronic sound recording or any other method" equal status with "shorthand [or] mechanical means" as a method of taking the record, "subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge." Under section 401(b), the regulations, and thus the amendment to 28 U.S.C. § 753(b), may not take effect until October 1, 1983. The act in no way mandates that the Conference promulgate regulations; and even if regulations are promulgated, use of electronic sound recording would be at the discretion of the judge.

The Third Branch will carry further information, as appropriate, on whatever action the Conference takes under the statute.

Project design. The Center, assisted by the Administrative Office, evaluated the operation of audio recording systems in twelve district courtrooms located in ten circuits. During the test, the stenographic reporters, as the official court reporters, took the official record and prepared transcript pursuant to statute and Judicial Conference policies. This allowed a side-by-side test of the two systems. Four-track cassette tape recorders were installed in eleven project courtrooms, and a reel-to-reel eight-track recorder was installed in one courtroom. Personnel employed in the office of the clerk of court were assigned to operate the recorders, prepare logs of the proceedings, and ship audio recordings and other materials to designated transcription companies whenever a transcript was ordered from the official court reporter.

The performance of the audio recording system was evaluated according to four criteria based on the legislative history of the statutory mandate: transcript accuracy, timeliness of transcript delivery, the systems' cost to the government, and the ease with which the systems can be used to record proceedings in and out of the courtroom.

Transcript accuracy. Transcript accuracy was evaluated using a stratified sample of 2,483 pages of audio-based transcript (and the matching pages from the official transcripts) drawn from 17,815 transcript pages from eighty-two civil and criminal cases of varying length and complexity, including several bilingual proceedings. Discrepancies between the paired transcript pages were compared with the audiotape to determine which transcript, if either, matched the tape.

This procedure was used for two separate evaluations. One

See STUDY, page 6

Small and Medium Courts to Receive Microcomputers

Five district courts will be working with the staff of the Federal Judicial Center in the installation of automated case management and court administration systems for small- and medium-size district courts. Each court is to be served by a microcomputer placed in the courthouse.

The five courts are the Southern District of Illinois, the District of Nebraska, the District of New Mexico, the Western District of Washington, and the Eastern District of Wisconsin. Initially, Illinois and Wisconsin will work with a case management system, New Mexico and Washington with a jury management system, and Nebraska with a property inventory system. Each court will eventually add one or more other applications from among the three just listed as well as attorney admissions, financial, and personnel systems.

These installations are the second phase of the Small and Medium Court Automation Project (SAMCAP), which has been undertaken jointly by the FJC and the Administrative Office as one of several steps to bring additional automated systems support to the courts while taking advantage of new developments in computer hardware and software. The first phase of the project placed small computers in several courts to test the feasibility and acceptability of an automated case management system that was independent of routine contact with computers located at the Center or the Administrative Office. Evaluations of the first phase were positive, and the Administrative Office has therefore proceeded with the procurement of additional equipment.

The microcomputers to be installed in the five courts for this second phase are more powerful than the hardware used for the first. Further, more of the courts' work will be facilitated by the newly available software programs.

The rate of expansion of installations under SAMCAP will depend on a number of factors. Courts desiring more information about the future of the project should contact Fred McBride, Chief, Systems Services Division, Administrative Office. ■

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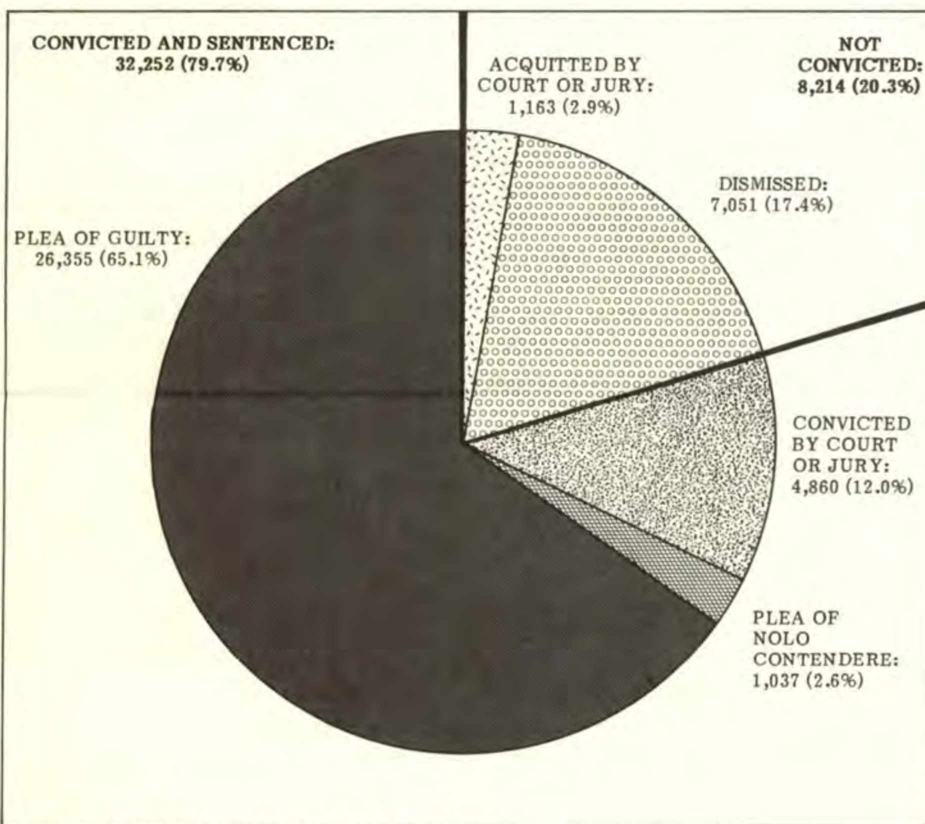
Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

AO Statistics Show Rise in Disposition Of Federal Offenders for 1982

The number of criminal defendants whose cases were disposed of by the U.S. district courts in the statistical year ending June 30, 1982, rose 6.1 percent over the corresponding figure for 1981. Of the 40,466 defendants, 79.7 percent, or 32,252, were convicted and sentenced by the district courts. Over four-fifths (81.7 percent) of those convicted had pled guilty, and 3.2 percent had pled *nolo contendere*. The number of defendants not convicted was 8,214, or 20.3 percent; cases against 7,051, or 17.4 of all prosecuted defendants, were dismissed, and 2.9 percent won acquittals following trials by judge or jury.

These conviction rates are included in the recently released volume *Federal Offenders in United States District Courts 1982*, an annual publication from the AO's Statistical Analysis and Reports Division that presents statistics on the outcome of U.S. prosecutions nationally and by district.

In addition to comparative data on the types of disposition and the types of sentences given defendants over the last decade, and in some categories over longer periods, the report presents demographic data on defendants in historical tables by major offenses. This year an additional table is provided to show the prior records of convicted defendants by their major offenses.



Source: Administrative Office of the U.S. Courts

Among significant data reported in the publication are the following statistics:

- Of the convicted defendants, 12,361, or 38.3 percent, received prison sentences, and 35.8 percent received terms of probation. Another 11 percent of those convicted received split sentences, consisting of short prison terms followed by probation terms. Close to two-thirds of those sentenced to prison received terms of more than two years; 47.3 percent of the total were sentenced for more than three years. Over half (55.4 percent) of probationers received terms of more than two years.

According to the *1982 Annual Report of the Director* of the Administrative Office, the increase in numbers of convicted individuals receiving prison sentences of less than one year was minimal, but the numbers of persons receiving longer sentences increased markedly from statistical 1981 to 1982. The average sentence in months has been increasing gradually since 1977 and in the last two years has jumped almost 7 months to 58.6 months. (This average does not

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Liability Insurance Available to Federal Judges

The American Bar Association's National Conference of Federal Trial Judges has announced the availability to federal judges of special professional liability insurance that may be purchased for as little as $100 per year for protection up to $500,000.

Federal trial and appellate judges have been concerned about recent civil filings alleging wrongful acts by the judges, particularly in matters involving performance of their nonjudicial duties. Accordingly, members of the conference's executive committee decided to investigate what insurance might be available to them. Judge Frederick B. Lacey (D.N.J.), vice-chairman of the conference, canvassed the field carefully, talked with a number of knowledgeable persons within the insurance industry and the legal profession, and ultimately made arrangements with a leading company for broad professional liability insurance coverage. Since then 130 federal judges have opted to take this coverage.

Judges who are interested in this insurance should contact Ernest Zavodnyik, staff director of the ABA's Judicial Administration Division, at 33 West Monroe Street, Chicago, IL 60603, (312) 621-9564.

OFFENDERS, from page 3

take into account those who received split sentences or those who, beginning in 1978, received indeterminate, Youth Corrections Act or youthful offender, or life sentences.)

• Increases in sentence terms for drug violators were particularly dramatic: While the average for marijuana violators in 1981 was 48.4 months, the average in 1982 was 56.5 months, a 16.7 percent increase. Similarly, the 1981 average of 49.8 months for controlled-substance violators increased by 18.5 percent to 59 months in 1982. The 1981 average of 62.7 months for narcotics violators increased by a smaller percentage, 5.4 percent, to 66.1 months in 1982.

• While 35.8 percent of convicted defendants in all categories were placed on probation, those convicted of the so-called white-collar crimes received sentences of probation more frequently: 52 percent in income tax fraud cases, 53 percent in other fraud cases, 43 percent in forgery cases, and 45 percent in federal gambling offense cases were placed on probation. (A high percentage of defendants convicted for antitrust violations received probation and/or other sentences, but because a substantial number of these defendants are corporations, comparable ratios are unavailable.)

• Of the defendants for whom prior criminal record was reported, 54.3 percent had prior records. For those with prior records, 53.1 percent had served prison terms, 44.8 percent had been on probation, and 2.1 percent had had records as juveniles. Of the number of individuals convicted in federal courts for whom age was reported (roughly 80 percent), nearly two-thirds, or 63 percent, were more than 29 years old. Women accounted for 15.4 percent of all defendants convicted in U.S. district courts in 1982, up from 10.7 percent in 1977.

• About one-fifth, or 20.4 percent, of the 4,593 jury trials ended with acquittals, while only 15.7 percent of the 1,430 bench trials ended with acquittals. ■

PRISONS, from page 1

sion of penal institutions into places of education and training and into factories for the production of goods—not only for humanitarian reasons, the Chief Justice said, but also "for our own protection and for our pocketbooks." He pointed out that, notwithstanding greater expenditures for law enforcement and improvements in the law enforcement profession, new and more stringent sentencing laws, and tougher parole and probation standards, 30 percent of America's homes are still touched by crime every year.

In addition to advising that we overhaul our correctional practices and convert our prisons into educational and training facilities that pay reasonable compensation to individuals who work there as well as charge something for room and board, the Chief Justice urged further imperatives. He counseled that it is necessary, also, to see to the repeal of those statutes that limit the amount of production by the prison industries and restrict the markets for their products, noting that the impact from their competition with the private sector would be very small. Related to this imperative is the equally strong need to repeal laws that discriminate against the interstate sale or transportation of prison-made products.

The Chief Justice also appealed to leaders of business and organized labor to cooperate in permitting the wider use of productive facilities in prisons. In this connection, he pointed to the small, but important, example being set in his home state of Minnesota, where fifty-two qualified prisoners are assembling computers for Control Data Corporation. The concept of involving inmates in relevant work has long been implemented in northern Europe, he pointed out, and, indeed, also in the People's Republic of China.

Replacing the sense of hopelessness that is so pervasive among prison inmates with the opportunity for a new life made possible from the self-esteem that comes from possession of a skill and good work habits, the Chief Justice observed, is much more likely to avert the "recall process" that sees so many repeat offenders sent back to prison. He predicted that "improvements in our systems can be made, and the improvements will cost less in the long run than failure to make them." ■

PERSONNEL

Nominations

Stephen N. Limbaugh, U.S. District Judge, E.D. & W.D. Mo., June 7
Marvin Katz, U.S. District Judge, E.D. Pa., June 21
James McGirr Kelly, U.S. District Judge, E.D. Pa., June 21
Thomas N. O'Neill, U.S. District Judge, E.D. Pa., June 21

Confirmations

Gene Carter, U.S. District Judge, D. Me., June 22
Leonard D. Wexler, U.S. District Judge, E.D.N.Y., June 22

Appointments

Bobby Ray Baldock, U.S. District Judge, D.N.M., June 17
Leonard D. Wexler, U.S. District Judge, E.D.N.Y., June 23
Julia S. Gibbons, U.S. District Judge, W.D. Tenn., June 24
H. Ted Milburn, U.S. District Judge, E.D. Tenn., June 24
Gene Carter, U.S. District Judge, D. Me., July 5

Elevations

Joe Eaton, Chief Judge, S.D. Fla., Dec. 31, 1982
John F. Nangle, Chief Judge, E.D. Mo., May 10
Conrad K. Cyr, Chief Judge, D. Me., June 1

Senior Status

H. Kenneth Wangelin, U.S. District Judge, E.D. & W.D. Mo., May 10

Deaths

Charles R. Scott, U.S. District Judge, M.D. Fla., May 12
Julius J. Hoffman, U.S. District Judge, N.D. Ill., July 1

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legislation died at the close of the last session. It has been reintroduced this session by Bob Kastenmeier.

When one looks at the number of statutes that assign priorities, it's amazing. It is clear the courts have had to disregard those statutory priorities because there are so many

of them. Congress would act wisely to simply provide the courts with the opportunity and the discretion to assign importance to certain matters which the courts think are of an urgent or an emergency nature. That is something that should be done quickly.

Everybody agrees that just adding more judges to the system isn't the total answer to relieving the caseload problem. What other actions would help?

I have another idea, which is not new. I'm a strong supporter of the idea of experimenting with neighborhood dispute resolution centers or tribunals. We were able to get a bill on dispute centers through and signed into law. It would have provided seed money only, which I favor. I don't favor a massive expenditure of funds to set up all kinds of neighborhood dispute tribunals or anything like that. On an expanded experimental basis it makes a great deal of sense to do what they've done in England, and that is to try to make greater use of dispute resolution centers that are not costly. In my opinion, they've been very effective. They do not always involve lawyers, but citizens who volunteer their time to try to mediate disputes.

They could be set up at a minimum of expense. What such a forum does is to give neighbors the opportunity to vent their wrath and make their explanations, and it gets the disputants—or the neighbors—talking. Often they are able to agree to a peaceful resolution. If we can save the courts the time and expense of hearing those minor claims, we ought to try it.

Congress has never adequately funded the bill we passed that set up the mechanism for providing seed money for neighborhood dispute resolution centers.

What about the caseload of the Supreme Court? Should certain areas of jurisdiction—certain kinds of cases—be removed; or should the Court have more discretion to decide what cases it will review?

I favor legislation, which I sponsored last year, that would eliminate the mandatory appellate jurisdiction of the Supreme Court and give it complete discretion over its jurisdiction.

And I favor the establishment of an intermediate court of appeals. This would be another permanent layer in the court system. But it should operate only after we see how the other temporary intercircuit tribunal operates.

What do you see as the most pressing judicial matters facing the 98th Congress?

The bankruptcy law is going to have to be amended to confer Article III status on the bankruptcy judges, or some alternative to that solution will have to be chosen. We have a real emergency since bankruptcy judges have been held not to have the requisite authority to decide some matters which have been assigned to them. That's one of the priority items of the House Judiciary Committee, as it well should be. I think the [Simpson-Mazzoli] immigration bill is enormously important. The criminal code revision is another matter that has been before the House Judiciary Committee for some time and on which it has not acted; and that's something that many members would like to resolve. Those are three essential matters.

> **"If one visits the prisons...it's very apparent that a lot of the industries are not relevant to any job opportunities that an inmate might be able to find once he or she leaves."**
>
> —*Tom Railsback*

In addition, there are problems concerning the courts that are generally referred to as providing access to justice—making certain that Americans have access to the courts for the speedy resolution of disputes of all kinds.

Also, I favor abolishing diversity of citizenship as a jurisdictional basis. And that amounts to about 25 percent of the civil filings. It's ridiculous to give plaintiffs the option to forum shop, and that's exactly what has been happening. It is the trial lawyers, primarily, who have been a very effective lobby against abolishing diversity of citizenship jurisdiction.

Do you think that criminal code reform will ever pass as an omnibus bill?

I am still optimistic, because I think there are many members who genuinely want that to happen. As you know, there are some members who are opposed to the substantive criminal code revision, and there are some revisions that are very controversial. My hope is that they not

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STUDY, from page 2

evaluation—of overall accuracy—attempted to resolve all discrepancies appearing in a 680-page subsample of the 2,483-page sample; the other evaluation attempted to resolve only those discrepancies in the 2,483 pages that panels of judges and lawyers determined would be "likely to make a difference" in any one of several potential uses of a transcript.

In the overall accuracy analysis, the audio-based transcript matched the audiotape in 56 percent of the 5,717 discrepancies that did not represent discretionary deviations under project transcription guidelines, the steno-based transcript matched the tape in 36 percent of such discrepancies, and neither transcript matched the tape in 3 percent of the discrepancies. The remaining discrepancies could not be resolved by listening to the audiotape. When the discrepancies were analyzed by individual court and by production schedule, the audio-based transcript continued to match the audiotape more than did the steno-based transcript in almost all situations.

To give the benefit of the doubt to the official transcript, all discrepancies that could not be resolved because of ambiguous speech or unintelligible tape were counted as "steno-based transcript correct." With this adjustment, the audio-based transcript matched the audiotape in 58 percent of the discrepancies, and the steno-based transcript matched it in 42 percent of the discrepancies, a difference that was statistically significant.

For the second accuracy analysis, legal assistants screened all discrepancies in the 2,483 pages to eliminate those that could not possibly make a difference if one or the other transcript were used for trial or appellate purposes. Panels of judges and lawyers reviewed the 6,781 remaining discrepancies.

The panels determined that 744 of the discrepancies submitted to them "were likely to make a difference" if one or the other transcript were used for posttrial motions, on appeal, or for a similar purpose. Analysis showed that the audio-based transcript matched the audiotape in 62 percent of these discrepancies and the steno-based transcript in 38 percent, counting discrepancies that could not be resolved by listening to the audiotape as "steno-based transcript correct." (Eight percent of the discrepancies could not be resolved because the speech on the audiotape was ambiguous or the tape was unintelligible.)

Some panel members stressed that many discrepancies that they could not conclude were "likely to make a difference" nevertheless represented intolerable errors of any federal court reporting system.

Timeliness of transcript production. The timeliness of audio-based transcript delivery was evaluated according to whether the transcription company delivered transcripts to the clerk of court within the Judicial Conference deadlines for ordinary (thirty days after order), expedited (seven days after order), daily (prior to the normal opening hour of court the next day), and hourly transcript (within two hours of the conclusion of the morning or afternoon session).

Eighty-three percent of the audio-based transcripts produced on the ordinary production schedule were delivered to the clerk of court within the thirty-day deadline, and 100 percent were delivered within thirty-five days; 64 percent of the steno-based transcripts were filed with the clerk of court within thirty days and 77 percent were filed within thirty-five days. (It is possible that more steno-based transcripts were delivered to the parties within the deadline than were filed with the clerk.)

Eighty-nine percent of the audio-based transcripts ordered for expedited production were delivered to the clerk of court within the deadline, after discounting for time for mailing to and from the transcription company. Although daily and hourly production was attempted in only a small number of project courts, almost without exception, audio-based transcripts ordered for such production were delivered to the clerk of court within the Judicial Conference deadlines.

There was no effort to compare audio-based transcript delivery with steno-based transcript delivery on any schedule but ordinary production, because records did not allow certain determination of when the steno-based transcripts were delivered to the parties. There is no evidence in project files to suggest they were not delivered to the parties on time.

Costs. The project calculated the comparative costs to the government of the audio recording and official court reporting systems. (Costs for almost all transcript production are met by the parties.) In calculating the cost of the audio system, it was necessary, among other things, to distinguish the portion of time that the equipment operator devoted to court reporting duties rather than regular duties in the clerk's office.

On the basis of costs incurred during the project, and projecting other costs that could be expected in normal operations but were not encountered during the project, the average annual cost of one audio court reporting system in a federal district court is $18,604, compared with $40,514 for the corresponding official stenographic reporting system. Projecting those costs over six years, the average cost of one audio court reporting system is about $125,000, compared with $275,000 for the official court reporting system.

Ease of use. Information from judges using the project courtrooms, audio operators, and site monitors appointed by the Center to observe the conduct of the test in each location provided bases for evaluation of the ease or difficulty with which the audio recording system was used in the court. Eleven of twelve judges said that the systems did not disrupt the conduct of proceedings, and five of seven said that the audio system

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State Laws Assist Crime Victims

The nationwide movement to recognize the needs of and assist the victims of crimes, which led to the enactment of the federal Victim and Witness Protection Act of 1982, has also stimulated a considerable amount of legislation by the states. According to a survey prepared under a grant for the Bureau of Justice Statistics in the Department of Justice, whose conclusions are presented in a recently released BJS bulletin, well over two-thirds of the states—"at least thirty-eight"—have laws to provide compensation for victims of violent crimes, under specified circumstances. Some of these statutes predated the federal legislation.

Eligible claimants, usually those who can show financial hardship, must apply for funds to compensate them for economic loss—such as medical expenses and loss of earning capacity or funeral expenses and lost support for dependents of deceased victims. Property losses are generally not compensable. Many state statutes require that victims have reported the crime to police and have cooperated in investigation of the crimes as well as in the prosecution of relevant cases. Compensation in most states, however, does not depend on either the arrest or the conviction of the offender.

A ceiling of $10,000 to $15,000 on the amount a single claimant can recover is the general norm; however, a few states allow payment up to $50,000. Most finance their victim compensation programs from general revenue funds.

The courts in most states with victim and witness statutes maintain discretion over whether to impose restitution, with only a few statutes providing for mandatory restitution. A new problem facing state court systems, singled out by the BJS bulletin *Victim and Witness Assistance*, is the additional expense resulting from the use of restitution, especially the cost of administrative follow-up to ensure execution of restitution orders. A few states impose a surcharge on convicted offenders to support the courts' restitution programs.

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throw their hands up and give up, but, rather, that they pursue it and try to get something done. If they have to eliminate those items that are more controversial, then they should go ahead and at least make some very meaningful needed changes. There have been some problems, as you know, because Chairman Conyers (chairman of the Subcommittee on Criminal Justice) has not been very enthusiastic about the bill.

You were a supporter of the financial disclosure provisions in the Ethics in Government Act. Are you still a supporter?

I believe there is value in openness in government. Rather than have all of the arbitrary limitations [on outside earnings] that we have imposed on ourselves, as a one-time reformer I've come to the conclusion that disclosure should be the key. If you let the public know what your outside sources of income are, then you don't need to worry so much about arbitrary limits imposed on those outside earnings.

The same thing applies to lobbying activities. As long as we have an idea of the money being spent by the special-interest groups—and now I represent one—that's the important thing, rather than preventing those interests from advocating their views. Yes, I think the important word is *disclosure*.

That's a little bit of an about-face for me, as at one time I favored very strong limits on outside earnings of members of Congress. And what has happened is that some very fine members are no longer able to stay in Congress because of the outside-earnings limitation. I think there are probably some judges who feel the same pressures.

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was generally able to provide playback of testimony during the proceedings.

Audio equipment reliability was satisfactory in some 4,200 hours of proceedings recorded in this study, but some equipment breakdowns occurred. Had the audio recording system been the official system, remedying these failures would have caused delays in the proceedings until backup systems could be activated. Six operators reported instances of relatively brief equipment failure. Two other operators reported equipment malfunctions that led to more serious problems, one lasting half a day, the other occurring on five separate days. No backup systems were provided to the project courts; however, backup systems were included in the cost projections of permanently installed systems.

The last chapter of the report includes several observations about advisable steps for the federal courts to take if audio recording is sanctioned as an official court reporting method, namely, overall management of the court reporting function, reliable transcription service selection, and adequate operator training.

Availability of report. The report has been prepared in a limited typescript edition in sufficient quantity for use by the Court Administration Committee, distribution to those involved in the experiment, and review by a joint task force appointed by the National Shorthand Reporters Association and United States Court Reporters Association.

The availability of a typeset edition later in the summer will be announced. Those wishing to be put on the mailing list to receive a copy should send a self-addressed, gummed label, preferably franked, to the Center's Information Service Office, 1520 H Street, N.W., Washington, D.C. 20005. (The volume of demand for Center reports is such that requests should be in writing rather than by telephone.) ■

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How would you remove some of those pressures from judges?

Retirement and annuities for judges' surviving spouses are very inadequate, in my opinion. Surviving spouses' annuities for judges and members of Congress and top-level employees in both the congressional and the executive branches are all much too low. There is a critical need to pay better salaries to be able to attract top-flight people to the top government positions, including the judiciary and the executive branch as well as the Congress.

Also, those younger judges and members of Congress with children of college age are going to have a very difficult time making ends meet. I know because I've been through it. Some of my colleagues have had to borrow in order to put their children through college. The American people, in my opinion, have a mistaken concept about how well off both the members of the judiciary and the members of Congress are. One sees younger judges, particularly from the urban areas, who are leaving the judiciary, and younger lawyers who are not declaring themselves interested in becoming a federal judge because the salaries are not even close to what they can make on the outside.

What areas in the corrections field most need improvement?

We have to continue to try to educate a rather apathetic American public about the terrible condition of our prisons, jails, and penitentiaries. We have to find alternatives to incarceration for those people who may not need to be incarcerated. To do that, we need improved diagnosis so that, after sentencing, an offender goes to a center at which it will be determined where that particular inmate is to be sent. And that involves improved psychiatric testing, background checks, and counseling.

In addition, we certainly need more relevant prison industries. If one visits the prisons, as I have done many times, it's very apparent that a lot of the industries are not revelant to any job opportunities that an inmate might be able to find once he or she leaves.

There is a critical need for better job opportunities and services for ex-offenders. I'm not talking about placing them at the expense of others who are out of work. But in some areas there is considerable prejudice against any ex-offender who may want to work and make a productive citizen out of himself or herself, so that it is very difficult for them to get jobs. I feel strongly about that.

Would you be willing to tell us your feelings now about your role in the Nixon impeachment procedures in the House?

That was an experience which was assigned to us, and a lot of us did not want it. But, having gone through it, I can say it was certainly the most memorable experience of my legislative career, and I am proud of the job that we did both from a legal standpoint as well as from a fact-finding standpoint. I believe many of us recognized that it would likely be the most important legislative decision in our lifetimes. So we took it very seriously. And what we did was very important, because it was a recognition that we should never let a president position himself or herself to use the federal government for his or her own purposes and to the detriment of other citizens who may have different views from that president.

I think it resulted in a less isolated office of president, one that is more accessible. Presidents Jerry Ford, Jimmy Carter, and Ronald Reagan have all been less imperial, more accessible, less isolated.

Also, I think some of the sensitive agencies of government—namely, the FBI, the CIA, and the IRS—are now superintended and monitored in a much more efficient and prudent way than was the case before, to see that they are fulfilling legitimate responsibilities. ■

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New Civil, Criminal, And Bankruptcy Rules Are in Effect

On August 1, 1983, the proposed changes to the Federal Rules of Civil Procedure and to the Federal Rules of Criminal Procedure that the Supreme Court had transmitted to Congress on April 28, 1983, became effective.

Proposals to amend rules 6, 7, 11, 16, 26, 52, 53, 67, and 72 through 76 of the civil rules and rules 6, 11, 12, 16, 23, 32, 35, and 55 of the criminal rules and to abrogate rule 58 of the criminal rules had been made by the Judicial Conference at its September 1982 session and forwarded to the Court at that time.

Certain changes to the civil rules encourage greater control of the various discovery devices by judges. Their stated aim is to curb both the overdiscovery and the evasion of discovery practices employed by some attorneys that lead to inordinately high costs and to delays in the courts.

Other changes in the civil rules involve the roles of federal magistrates; revisions made seek to conform the rules to the 1979 amendments to the Federal Magistrate Act. (See the October 1982 issue of *The Third Branch* for a summary of the rules changes.)

With the exception of one congressional amendment to rule 2002(f), the proposed set of bankruptcy rules, as adopted by the Judicial Conference at its fall 1982 meeting and as reported to the Congress by the Supreme Court in April 1983, also became effective August 1, 1983.

Under the rules enabling acts, unless both houses of Congress take action to the contrary, proposed rules of civil and criminal procedure and proposed bankruptcy rules become effective upon the expiration of ninety days from the date on which they were reported to Congress.

Five-Year Plan for Court Automation Released by AO and FJC

On July 29 Directors Foley and Levin mailed copies of a *Five-Year Plan for Automation in the United States Courts* to the chief judges of the circuit courts, for critical review and comments by the judges and their staffs.

The purpose of the five-year plan is to consolidate in a single document the automation research and development plans of the Federal Judicial Center and the implementation plans of the Administrative Office. The development and distribution of the plan respond to the need for information sharing and dialogue between the courts and the technical staffs located in Washington, D.C.

The five-year plan is more explicit and detailed than plans previously prepared or offered to the courts. The current plan contains a comprehensive review of the computer applications now operating in the courts; a statement of specific goals that could be reached by the end of fiscal 1988 (positing the availability of reasonable financial resources); and proposed timetables for reaching those goals.

The various components of the court system are considered in the plan: courts of appeals, district courts, bankruptcy courts, and probation offices, as well as the Administrative Office and Judicial Center.

Three elements of systems design and implementation are considered in the plan: computer hardware characteristics, software standards and capabilities, and strategies for introducing new systems successfully into the courts.

Hardware: The plan calls for a decentralization of computing resources. At present, the courts rely on mainframe computers located in Washington, D.C., which are connected over telephone lines to computer termi-

See PLAN, page 2

GAO Report Recommends Greater Use of Magistrates

The General Accounting Office released on July 8, 1983, a report to the Congress, entitled *Potential Benefits of Federal Magistrates System Can Be Better Realized*, which concludes that the workload handled by magistrates has played a substantial role in the dramatic increase in district court productivity in recent years. The report recommends, however, more efficient and effective use of magistrates and suggests specific action by the Congress and the Judicial Conference of the United States to that end.

Since Congress, on October 17, 1968, enacted Public Law 90-578, which provided among other things for the establishment of the United States magistrate system to replace the former system of commissioners, magistrates have handled annually "tens of thousands" of matters, substantially relieving district court judges. For example, for the twelve-month period ending June 30, 1982, magistrates disposed of 2,452 consensual civil cases. Of these, 262 were disposed of by jury trials, while 553 cases were disposed of by nonjury trials. Other statistics for the year ending June 30, 1982, that indicate

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Number on Death Row Reaches Record High

The number of state prisoners on death row at the end of 1982 reached the record high of 1,050 individuals, a figure 25 percent higher than the 838 awaiting execution at the close of 1981. In addition, six men in military custody were under death sentences at the end of 1982. According to an official of the Department of Justice's Bureau of Justice Statistics (BJS), the large number of inmates on death row shows both an increase in the number of death sentences handed down and many lengthy appeals. At the same time, there were fewer departures of prisoners from death row by means other than execution than is usually the case.

A recent BJS report, *Capital Punishment 1982*, also notes an 8 percent rise in the number of individuals sentenced to death in 1982 over the number condemned in 1981. In twenty-eight of the thirty-seven states authorizing capital punishment, 264 persons received death sentences in 1982. Four states accounted for nearly half the number of newly condemned inmates: California and Florida with thirty-nine persons each, Texas with twenty-eight, and Alabama with twenty.

Three separate decisions involving imposition of the death sentence were handed down by the Supreme Court on July 6. In each case, the sentence imposed by the state courts of California, Florida, and Texas was upheld (*California v. Ramos, Barclay v. Florida*, and *Barefoot v. Estelle*). Following *Barefoot*, which suggested procedural guidelines for handling applications for stays of execution on habeas corpus appeals pursuant to a certificate of probable cause, it is expected that many death sentence cases will proceed more expeditiously through the courts. ■

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Co-editors

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

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nals in the courts. Almost no computation or other automated information processing is accomplished in the courts themselves. In the new system, computers designed around the new microprocessor technologies will be placed in courthouses all around the country. Generally, each courthouse that requires automated case or court management facilities will be supplied with a microcomputer sufficient to meet the court's own needs. Communications between the court's computer and computers in Washington, D.C., will be less frequent than they are currently, thereby reducing telecommunications costs.

Software: The programs that will operate on the courts' computers will, as a rule, be initially developed, designed, or acquired by the Federal Judicial Center working in cooperation with groups of court personnel representing the users of the programs (Users' Groups). When a Users' Group has finished its task and the system has been tested and declared operational, the responsibility for the subsequent maintenance and enhancement of the system will be transferred to the Administrative Office. The basic operating software—the programs that manage the computer's resources efficiently—will be standardized across the country to ensure control of quality of operation. All functions performed by the current Courtran system will be included in the new system. The new system will expand the automated docketing (records replacement) feature of Courtran, among other additions to current capacity.

Strategies for introduction: Decentralizing the courts' computer operations places a new responsibility on court staff for the operation and maintenance of the equipment and software that will be introduced into the courts. There is a rapidly expanding need for training court staff to undertake the new responsibility. Not only more training, but new kinds of training, will be required.

The distribution of the five-year plan to the chief judges of the courts of appeals is one of several steps taken by the Center and the Administrative Office to explore and exploit new avenues of communication about automation for case and court management. ■

PERSONNEL

Nominations

Kenneth W. Starr, U.S. Circuit Judge, D.C. Cir., July 13
Morton R. Galane, U.S. District Judge, D. Nev., July 21
John F. Keenan, U.S. District Judge, S.D.N.Y., July 21

Confirmations

Pasco M. Bowman II, U.S. Circuit Judge, 8th Cir., July 18
Peter C. Dorsey, U.S. District Judge, D. Conn., July 18
Stephen N. Limbaugh, U.S. District Judge, E.D. & W.D. Mo., July 18
Hector M. Laffitte, U.S. District Judge, D.P.R., July 26
Marvin Katz, U.S. District Judge, E.D. Pa., Aug. 4
James McGirr Kelly, U.S. District Judge, E.D. Pa., Aug. 4
Thomas N. O'Neill, U.S. District Judge, E.D. Pa., Aug. 4

Deaths

Win G. Knoch, U.S. Circuit Judge, 7th Cir., May 23
Lawrence A. Whipple, U.S. District Judge, D.N.J., June 8
Oren R. Lewis, U.S. District Judge, E.D. Va., June 12

MAGISTRATES, from page 1

the volume of matters being processed by magistrates include: the disposition of 86,725 misdemeanors and petty offenses; the handling of 98,458 preliminary proceedings in criminal cases and 26,983 other criminal proceedings; the discharge of additional duties in 96,846 nonprisoner civil cases; and the review of 16,551 prisoner petitions.

The GAO conducted its review at eleven federal district courts and the Administrative Office of the United States Courts. Court selections were based on caseload size, the number of magistrates within the court, and the court's location. These eleven trial courts accounted for 20 percent of all cases filed in and 21 percent of all cases terminated by the federal district courts in statistical year 1981. Field review work was performed between January 1981 and May 1982. Subsequent data through January 1983 were obtained from the Administrative Office.

The report notes that Congress intended the magistrate system to be a flexible one, capable of addressing the particular needs and requirements of each district court, and that because of this flexibility, the magistrate system has evolved differently in the various trial courts. (The Federal Judicial Center will publish this fall *The Roles of Magistrates in Federal District Courts*, an in-depth description of the scope of responsibilities of full-time magistrates in eighty-two district courts.)

The report further notes that while district courts promulgate the local rules that govern the use of magistrates, the day-to-day decisions on the duties and case assignments of magistrates are made by individual judges. Consequently, GAO asserts that the personal preferences of judges dictate the many assignments of duties to magistrates. Other factors involved in the assignment of cases to magistrates include the judges' perceptions of individual magistrates' capabilities, evaluation of magistrates' available time, and beliefs concerning what types of cases magistrates are permitted to handle. As "only a few judges" make minimal use of magistrates because they are philosophically opposed to them, GAO advocates "more routine and formalized flow of information" to judges about the experience of other judges with magistrates, arguing that this would encourage expanded use.

As a consequence of its study of the federal magistrate system, GAO has made four recommendations to the Judicial Conference of the United States: (1) the Conference should disseminate more widely to all district courts criteria it uses in determining whether or not to authorize new magistrate positions and should encourage qualifying courts to request additional positions; (2) the Conference should encourage all district courts to develop a comprehensive plan for using magistrates more effectively and efficiently; (3) the Conference should disseminate to trial courts that are restricting the use of magistrates information concerning the experience of trial courts that have been using their magistrates extensively and effectively; and (4) the Conference should provide additional guidance to district courts in implementing the civil trial provisions of the Federal Magistrate Act of 1979.

The GAO has also made one substantive recommendation to Congress to amend the language of the civil trial provisions of the 1979 Federal Magistrate Act to clarify the authority of the district judges to manage the courts' caseload and to maintain control over specific cases.

See MAGISTRATES, page 8

Ninth Circuit Rules Magistrates May Not Enter Judgments

On August 5, 1983, the United States Court of Appeals for the Ninth Circuit handed down an opinion on a matter of first impression, declaring unconstitutional section 2 of the Federal Magistrate Act of 1979, 28 U.S.C. § 636(c), insofar as it permitted magistrates—with the consent of all parties—not only to conduct civil trials but also to enter judgments. The issue on appeal in *Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc.*, C.A. Nos. 82-3152, 82-3182 (slip opinion 1983), was whether Article III of the United States Constitution prohibited federal magistrates from entering judgments in cases conducted by the magistrate with the consent of all parties.

Relying heavily on the United States Supreme Court's plurality opinion in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S. Ct. 285 (1982), a unanimous panel of the Ninth Circuit held that while federal magistrates could "perform the lesser functions of presiding over a trial and recommending a disposition," the entry of judgment was a function reserved for Article III officers. After elaborating on the factors that preclude magistrates from being considered Article III judges, the three-judge panel held that this case did not fall within any of the exceptions under which Congress may constitutionally vest traditional judicial functions in non-Article III officers. The court did, however, emphasize the right of magistrates to hear a case by consent and to recommend a disposition so long as there was review de novo by a district judge.

Taking into consideration the three factors balanced by the Supreme Court in *Marathon Pipe Line*, the Ninth Circuit determined that its holding in *Pacemaker Diagnostic Clinic* would apply prospectively. The lower court's decision upholding the constitutionality of section 636(c) was vacated and the case remanded to "the district judge to review the decision of the magistrate in the manner provided by 28 U.S.C. § 636(b)(1)." A request for reconsideration en banc is pending.

NOTEWORTHY

Eighth Circuit newsletter. The Eighth Circuit joins the growing list of newsletter publishers among the circuits with the premier of its *Eighth Circuit News* in spring 1983. Volume One, Number One includes reports on new circuit rules and interoffice word processing and an article on the circuit's preargument settlement conference program. For further information, contact the Office of the Circuit Executive, the newsletter's publisher, at (FTS) 279-6219.

* * *

Sex discrimination by juries? Juries in personal injury cases, on the average nationwide, render favorable verdicts to men more often than to women and give higher awards to men in their fifties than to any other group of plaintiffs from ages 18 through 64. This is not to say that women do not often win personal injury cases. Nevertheless, the group awarded the lowest recoveries are 18- and 19-year-old women. Furthermore, women's chances of recovery diminish as they grow older, with women 60-64 years of age winning their cases 16 percent less often than the nationwide average. These data are reported by Jury Verdict Research, Inc., a private group that surveys and analyzes personal injury litigation.

* * *

Prison population. In recent weeks, the number of inmates in the forty-three federal penal institutions has been hovering just above or just below the all-time record high population of 30,491, registered on August 14, 1977. In early July a prison population count tallied 30,566 individuals. Federal prisons have a rated capacity of slightly under 24,000.

In one thirty-day period alone—from mid-April to mid-May—the federal institutions experienced a 1 percent increase, of nearly three hundred individuals; this figure represents about half the population of a new prison.

Bureau of Prisons officials expect a continuing long-term increase in the federal prison population over the next several years.

During the same reporting period, calendar year 1982, the combined state and federal prison population grew by 42,915 inmates to reach a record total of 412,303 individuals. According to figures provided by the Bureau of Justice Statistics, the incarceration rate rose to 170 inmates per 100,000 U.S. population from 152 per 100,000 in 1981. The highest rate of incarceration, 301 per 100,000 inhabitants, is in Nevada; North Dakota, with 47 per 100,000 population, has the lowest rate. All states with rates exceeding 200 per 100,000 are in either the South or the Southwest.

* * *

Minimum-security camp for federal prisoners. To provide some relief for its overcrowding problem, the Bureau of Prisons has decided to seek acquisition of the site of an abandoned Air Force base at Duluth, Minnesota, for adaptation to a minimum-security camp. The eighteen facilities currently housing inmates at the lowest security level, called "level one," are 32 percent above rated capacity.

Since the site of the former air base is surplus government property, it could be acquired without cost. The proposal for its acquisition has been given to budget officials at the Department of Justice and will then be forwarded to the Office of Management and Budget for review and approval. If the proposal is approved, Congress will be asked to reprogram and appropriate funds for the new camp.

* * *

Prison overcrowding. Twenty-four state correctional systems (including Puerto Rico's) are under court orders to correct overcrowding, according to an early 1983 survey conducted by *Corrections Compendium*. None of the Canadian systems—federal or provincial—nor the United States federal prison system is under such a court order. A *Compendium* survey carried out one year earlier showed twenty-six state systems in the United States under court orders.

Eight states reported use of "emergency release" mechanisms, allowing early parole of certain inmates to relieve overcrowding. Michigan, under its Prison Overcrowding Emergency Powers Act, reduces minimum sentences of prisoners by 90 days when its prison population exceeds 95 percent of rated capacity for 30 consecutive days, making many prisoners eligible for early screening by the Parole Board. Operating under similar legislation, Illinois has granted early release to about 7,200 inmates since 1980. Five additional states are considering similar legislation.

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ABA Approves Model Rules Of Professional Conduct

Several matters of interest to the federal judiciary were considered at the annual meeting of the American Bar Association when it met last month in Atlanta. Some are listed below.

At the general assembly that followed the address of President Reagan on August 1, a resolution was presented that called on the association to urge Congress to "remedy the constitutional crisis" created by the *Marathon Pipe Line* case by creating additional judgeships in the federal system, to be filled by Article III judges "whose principal duties would be to hear and decide in the first instance all litigation arising in or related to bankruptcy cases." By a close vote the resolution was defeated.

At the meetings of the 387-member House of Delegates, the Model Rules of Professional Conduct were approved; the rules are the culmination of a five-year study by a commission of the association that reviewed and recommended changes in the ABA Code of Professional Responsibility, which had been adopted in 1969. While some basic principles of ethics first incorporated in the code in 1908 remain unchanged, the membership has long agreed that societal and other significant changes related to the legal profession require that major changes be made to make them more realistic. Some differences surfaced during the debates (mainly related to disclosure or nondisclosure of information received from clients), but the basic work completed at the midyear meeting last February resulted in approval by a wide vote.

In other actions the House of Delegates:

• Approved "Guidelines for Reviewing the Qualifications of Candidates for State Judicial Office." Approval came, however, only after a clarification of language related to use of the word "handicapped," to make it clear that certain physical handicaps were not necessarily a detriment to performance of office.

• Defeated a proposal that would have authorized the Federal Trade Commission to preempt the traditional powers of state supreme courts to regulate all lawyers or groups of lawyers in areas such as codes of ethics, disciplinary rules, and commercial and business practices.

• Approved a resolution that called on Congress to enact legislation aimed at modernizing existing international extradition practices. Included in the resolution was a recommendation that Congress preserve the jurisdiction of the federal courts in this area to make the initial determination as to whether extradition is barred by the "political offense exception."

• Approved proposals to change the Freedom of Information Act. Faced with several recommendations, the House finally agreed to recommend clarification of what is incorporated in the language presently in the act that refers to "agency records." Of special significance was approval of a move to tighten control over requests made of intelligence agencies.

• Opposed in principle the imposition of capital punishment upon any person for any offense committed while under the age of eighteen.

• Approved support for legislation that would substitute the United States as defendant in constitutional tort actions against individual government employees. Included was a requirement that the attorney general of the United States report to Congress on corrective policy and disci-

See ABA, page 8

Eleventh Circuit Appoints Circuit Executive and Clerk of Court

Norman E. Zoller (l.) and Spencer D. Mercer are the recently named top executives of the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit has appointed two long-time court officials as its top executives, naming Norman E. Zoller as circuit executive and Spencer D. Mercer as clerk of the court. The appointments became effective August 1.

Norman Zoller, 43, had been clerk of the court from its creation on October 1, 1981. Before coming to the circuit, he was court administrator for the state trial courts of both general and special jurisdiction in Hamilton County, Ohio. Earlier, he had been principal administrative assistant to two mayors of Cincinnati.

Mr. Zoller is also a much-decorated Army veteran, having served two tours in Vietnam. He left the service at the rank of major. He holds a B.A. and an M.A. degree from the University of Cincinnati and a law degree from Northern Kentucky State University. Mr. Zoller and his wife, Harriett, live with their two sons in Atlanta.

Spencer Mercer, 44, came to the Eleventh Circuit following a fifteen-year association with the Northern District of Georgia. For nine years he was chief deputy clerk there, and prior to that was a courtroom deputy clerk. Mr. Mercer attended Georgia Southern College. He, his wife Joan, and their son live in Lithia Springs, Georgia. ■

Recent Visitors to the Federal Judicial Center

John MacBean, Robert A. Crozier, and Patrick O'Flannagan (l. to r.), three members of an eight-person Australia-New Zealand Labor Leader Project

Associate Dean Kelebone Maope, School of Law, National University of Lesotho, Maseru, Lesotho

New Edition of Sentences Imposed Chart Published by Administrative Office

A new edition of the *United States District Courts Sentences Imposed Chart*, covering penalties handed down by the ninety-five district courts during the twelve-month period ending June 30, 1982, has been released this summer by the Administrative Office's Statistical Analysis and Reports Division (SARD). This volume has been made available for sale to the general public through the U.S. Government Printing Office, as was last year's publication. Single copies have been distributed to appropriate judicial personnel.

The current revision of the *Chart*, like predecessor volumes since 1977, has been designed primarily for the use of U.S. probation officers in the preparation of presentence reports. Members of the judiciary have also used earlier editions of the *Chart*.

Sentences are listed according to U.S. Code titles and sections, together with the four-digit AO offense code, under which each defendant was convicted. To obtain proper codes for each title and section, users are urged to consult the September 1982 edition of the companion volume, *United States Title and Code Criminal Offense Citations Manual*. Each entry or line in the *Chart* shows a specific sentence, including months of imprisonment, months of probation, dollar amounts of fines, and the number of defendants who received that sentence in their individual cases.

For defendants convicted of multiple offenses in a single case, with consecutive sentences imposed, the sentences have been added together and placed under the most serious offense for which the defendant was convicted. When concurrent terms were imposed in the same case, the sentence appears under the offense having the longest term. When two or more terms of equal duration have been imposed, the sentence is classified under the offense with the highest severity code.

Sentences imposed on other defendants in the same case, and on the same defendant in other cases, are listed separately. Thus, the *Chart* differs from appendix table D-5 of the Administrative Office's *Annual Report of the Director*, which, in reporting the number of defendants convicted in a year, classifies each defendant only once under the case for which the most serious conviction was obtained. In addition, while table D-5 provides separate categories for regular sentences and sentences imposed under special statutes (such as 18 U.S.C. § 5010 of the Youth Corrections Act, 18 U.S.C. § 5037 of the Federal Juvenile Delinquency Act, and 18 U.S.C. § 4205(b)(1) or (2)), the *Chart* lists sentences without distinguishing their statutory bases.

Average sentences are indicated, but users are cautioned against citing such sentences, particularly in offense categories with few entries. Indeed, SARD perceives that the *Chart's* greatest utility is, first, in showing individual sentences; second, in providing the range and frequency of terms imposed; and, third, in highlighting unusually long or short terms that affect the resulting average. For users who need refined averages, prefatory material in the *Chart* provides alternative methods of recomputing the data

See SENTENCES, page 8

CALENDAR

Sept. 12-14 Seminar for Senior Staff Attorneys
Sept. 21-22 Judicial Conference of the United States
Sept. 26-28 Pro Se Deputy Clerks of District Courts
Sept. 29-Oct. 1 Second Circuit Judicial Conference

THE SOURCE

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

Alarcon, Arthur L. "Fair Trial v. Free Press: Who's on First?" 14 *University of West Los Angeles Law Review* 1 (1983).

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Berkman, Miriam. "Perspectives on the Death Penalty: Judicial Behavior and the Eighth Amendment," 1 *Yale Law & Policy Review* 41 (1982).

Boruch, Robert F., and Joe S. Cecil. *Solutions to Ethical and Legal Problems in Social Research* (Academic Press, 1983).

Brazil, Wayne D., Geoffrey C. Hazard, Jr., and Paul R. Rice. *Managing Complex Litigation: A Practical Guide to the Use of Special Masters* (American Bar Foundation, 1983).

✓ Burger, Warren E. "The Need for 'Time and Freshness of Mind,'" 6 *American Journal of Trial Advocacy* 311 (1982).

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✓ DeMascio, Robert E., William L. Norton, and Richard Lieb. *Fourteen Years or Life: The Bankruptcy Court Dilemma* (National Legal Center for the Public Interest, 1983).

Edwards, Harry T. "Goals in Life Worth Pursuing," 10 *Florida State University Law Review* 517 (1983).

Feinberg, Wilfred. Remarks at the Annual Dinner of the New York Patent Association, March 25, 1983.

Friendly, Henry J. "Indiscretion About Discretion," 31 *Emory Law Journal* 747 (Fall 1982).

Goldberg-Ambrose, Carole E. "The Protective Jurisdiction of the Federal Courts," 30 *UCLA Law Review* 542 (1983).

Keeton, Robert E. "The Role of the Judge in Non-Judicial Dispute Resolution," address at the Corporate Dispute Resolution Institute, Northwestern University, November 11, 1982.

King, Lawrence P. "The Unmaking of a Bankruptcy Court: Aftermath of *Northern Pipeline v. Marathon*," 40 *Washington and Lee Law Review* 99 (1983).

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✓ Lay, Donald P. "Will the Proposed National Court of Appeals Create More Problems Than It Solves?" 66 *Judicature* 437 (May 1983).

McKay, Robert B. "Civil Litigation and the Public Interest," 31 *University of Kansas Law Review* 409 (1983).

Ninth Annual Tenth Circuit Survey, June 1, 1981—May 31, 1982, including "The Political and Administrative History of the United States Court of Appeals for the Tenth Circuit" by Arthur J. Stanley, Jr., and Irma Russell. 60 *Denver Law Journal* 2 (1983).

✓ O'Connor, Sandra Day. "Professional Competence and Social Responsibility: Fulfilling the Vanderbilt Vision," 36 *Vanderbilt Law Review* 1 (1983).

✓ Pollack, Milton. "Cutting the Fat from Pretrial Proceedings," 97 *Federal Rules Decisions* 319 (1983).

Posner, Richard A. "Will the Federal Courts of Appeals Survive Until 1984? An Essay on Delegation and Specialization of the Judicial Function," 56 *Southern California Law Review* 761 (1983).

Presser, Stephen B. *Studies in the History of the U.S. Courts of the Third Circuit* (Third Circuit Bicentennial Committee, 1983).

Rossum, Ralph A. "Congress, the Constitution, and the Appellate Jurisdiction of the Supreme Court: The Letter and the Spirit of the Exceptions Clause," 24 *William and Mary Law Review* 385 (1983).

Roszkowski, Stanley J. "Sentencing Provisions in the Federal System," 13 *Loyola University Law Journal* 621 (1982).

Wright, Charles Alan. *The Law of Federal Courts*, 4th ed. (West, 1983).

Yearbook 1983. Supreme Court Historical Society (Washington, 1983).

President Creates Organized Crime Commission

A twenty-member Commission on Organized Crime has been established by President Reagan to study the impact on American society of organized crime and to recommend governmental actions to combat it. Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit has been designated head of the commission, to which former Supreme Court Justice Potter Stewart has also been appointed. Other members have been drawn from present and former government posts, local law enforcement positions, the bar, and law schools.

The commission, which is part of the president's broad, multi-faceted program for fighting narcotics trafficking and organized crime that was announced in fall 1982, has been directed to hold public hearings in various locations around the country and to submit a report on March 1, 1986.

Judge Kaufman has selected Peter F. Vaira, former United States attorney for the Eastern District of Pennsylvania, to be executive director of the commission, and Alan J. Hruska, a New York attorney, to be its general counsel.

MAGISTRATES, from page 3

GAO recommends that 28 U.S.C. § 636(c)(2) be amended to read as follows:

"The designation of a magistrate to conduct proceedings in a jury or non-jury civil matter under this section shall not preclude the district court from exercising jurisdiction over any case on its own motion. The district judge shall, however, advise consenting litigants of the reason their matter is not being referred to a magistrate."

Both the Judicial Conference Committee on the Administration of the Federal Magistrates System and the Administrative Office have agreed, in accordance with the Judicial Conference's stated policy of encouraging district courts to take full advantage of the provisions of the Federal Magistrate Act and to use their magistrates extensively, to continue to explore additional ways in which the communication of the Conference's policy can be best accomplished.

The Division of Magistrates of the Administrative Office is in the process of devising measures implementing the recommendations of the GAO. Inquiries concerning any recommendation of the report or any action undertaken pursuant to the recommendations should be directed to the Division of Magistrates (FTS 633-6251). Copies of the report may be obtained from the Division of Magistrates upon request. ■

ABA, from page 5

plinary actions taken against individuals whose acts have caused payment by the government. Approval did not come, however, until agreement was reached that a definite dollar limitation be established when punitive damages are assessed against the federal government.

• Approved a resolution giving the president broad powers in instances of immigration emergencies. The original proposal was to approve legislation that would authorize the president to restrict travel, to permit interdiction of boats carrying potential asylum applicants, and to authorize the armed forces to carry out traditional civil law enforcement. After debate, substitute language was adopted with particular emphasis on language calling for judicial review.

The full text of these and other resolutions is available from the FJC Information Service Office. ■

SENTENCES, from page 6

to minimize the distortion caused by extreme sentences in a category.

The *United States District Courts Sentences Imposed Chart* may be obtained by individuals outside the federal judiciary for $6.50 through the Government Printing Office. The stock number is 028-004-0053-2. An errata sheet, concerning about twenty specific probation terms shown and other minor errors, is being prepared and will be distributed shortly, probably in conjunction with mailings to the individual districts of specific district charts extracted from the large volume. ■

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Chief Judge Markey Reviews First Year of Court of Appeals for the Federal Circuit

Howard Thomas Markey became chief judge of the United States Court of Appeals for the Federal Circuit upon the merger of the Court of Customs and Patent Appeals and the Court of Claims on October 1, 1982. He had served as chief judge of the Court of Customs and Patent Appeals since June 1972.

In addition to his court-related responsibilities, Chief Judge Markey has been extremely active in federal judicial administration. He has been a member of the Judicial Conference of the United States for more than ten years and has served on the Committee on Court Administration since 1979; he is chairman of the Advisory Committee on Codes of Conduct and serves on the Board of Certification for Circuit Executives. In addition, he was coordinator of the Committee on the Bicentennial of the Constitution.

From his chambers across the courtyard from the Federal Judicial Center, Chief Judge Markey detailed some of the operating procedures of the newest federal court of appeals and discussed the first year's activities.

October 1, 1983, marks the first anniversary of the new Court of Appeals for the Federal Circuit (CAFC). In retrospect, are you pleased with developments during the court's first year?

With all the usual expressions of humility, I certainly am pleased. Because of the magnanimity, cooperation, and willingness of the judges to adopt new ways of conducting their professional lives, the court was well launched and has now completed a very successful "shakedown" cruise. All appeals filed since the court began have been heard within thirty days of becoming ready for hearing; the time from hearing to decision has averaged one month; the time from filing to decision has averaged 5.7 months. We added more than 1,000 lawyers to the 8,000 who came over automatically from the bars of our predecessor

See MARKEY, page 7

E.D.N.Y. Committee Recommends Amendments To Local Rules Relating to Discovery

Twenty-three proposed amendments to the local rules of the Eastern District of New York were presented recently to Chief Judge Jack B. Weinstein. The proposals are part of a report prepared by the Special Committee on Effective Discovery in Civil Cases for the Eastern District of New York, established last fall by Judge Weinstein to study civil discovery practices in the district. The special committee also assessed the potential impact on local procedures of the new amendments to the Federal Rules of Civil Procedure that became effective August 1, 1983.

The court is seeking comments from bar associations, individual lawyers, and members of the public on the proposals, which the court will consider in early fall. It is anticipated that public hearings on the proposed rules will be scheduled in early October. The 46-page report has been disseminated nationally to stimulate widespread comment.

The special committee's proposals focus on remedying current abuses in discovery that lead to delays and excessive costs for both parties and taxpayers. The exercise of "cooperation and common courtesy" by attorneys engaged in discovery is recognized as the sine qua non for improving discovery, and to reorient litigators to the new spirit of cooperation, the first rule reasserts the "golden rule" as applied to attorney adversaries.

Concomitant with such cooperation among attorneys is the expectation,

See EDNY, page 2

Provisions of Victim and Witness Protection Act Found Unconstitutional

Provisions of the Victim and Witness Protection Act of 1982 (Pub. L. No. 97-291) that require a federal court to order restitution to victims of certain federal crimes have been declared unconstitutional in a recent decision handed down by United States District Court Judge William M. Acker (N.D. Ala.). The judge held in *United States v. Welden* (C.R. 83-AR-123-M) that the applicable sections of the act, 18 U.S.C. §§ 3579 and 3580, are in violation of the constitutional guarantees of civil jury trial, due process, and equal protection.

The decision was announced from the bench on July 20, and a 38-page "memorandum opinion" issued July 29, 1983. The U.S. Attorney's Office for the Northern District of Alabama on August 17 filed a notice of intention to appeal the decision to the Eleventh Circuit Court of Appeals. According to Assistant U.S. Attorney Herbert B. Henry III, the government's brief is expected to be filed sometime in October.

Judge Acker found that since section 3579(h) of the act provides that a restitution order may be enforced as a civil judgment, and since, in the instant case, the amount in controversy exceeds $20, defendants are entitled to a jury trial. The judge held that "since under §§ 3579 and 3580

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Proposed Amendments to Civil and Criminal Rules Submitted for Comment ... p. 3

Court Automation Update .... p. 6

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articulated in another rule, that attorneys will approach their obligations to the certification requirements of rules 11 and 26(g) of the federal rules in a serious and deliberate manner. Since the court expects "that an attorney's obligations with respect to certification will be honored," satellite motions regarding attorneys' certifications under those rules are "discouraged."

Although the proposed rules assume that cooperation among litigators will be the norm, sanctions for nonfulfillment of this obligation are provided. In the event of motions challenging attorneys' certifications, as with other delaying or cost-inflating maneuvers, the losing party or counsel or both may be required to pay the reasonable expenses, including attorneys' fees, incurred by the other party. Such fee-shifting is the chief mechanism suggested throughout the rules to sanction improper discovery practices and is the device called on in the lengthy rule 23 of the report.

The committee also believes that discovery matters could be resolved more expeditiously by magistrates, who could give greater and more prompt attention to disputes and simultaneously free judges to concentrate on other matters. One new rule would require the judge, promptly after joinder of issue, and reasonably before expiration of the 120-day period after the complaint has been filed, to review the pleadings and decide whether the judge or a magistrate shall conduct the scheduling conference. At the same time the judge would decide whether discovery matters will also be referred to a magistrate. The judge could at any time enlarge or diminish the scope of any reference to a magistrate.

At numerous places in the proposed rules, telephone conferences are encouraged as a means of resolving discovery disputes promptly. A coordinate rule prohibits the filing of motions regarding a discovery dispute without leave of the court. When leave is so granted, the attorneys must explain in reasonable detail the efforts they have made to try to resolve the dispute.

Other proposed new rules identify additional vulnerable points in the discovery process where delays have often occurred, and they address these also with new procedures or prohibitions. In addition, certain widespread abuses are identified by the new rules as presumptively improper, and the rules place the burden on the attorney using such practices to justify them.

Requests for copies of the proposals, as well as comments on them, should be sent to Robert C. Heinemann, Clerk of the Court, U.S. District Court, 225 Cadman Plaza East, Brooklyn, NY 11201. ■

CALENDAR

- Sept. 27 Ad Hoc Committee on the Media Petition
- Sept. 29 - Oct. 1 Second Circuit Judicial Conference
- Oct. 2-5 Third Circuit Judicial Conference
- Oct. 9-11 Conference of Metropolitan District Chief Judges
- Oct. 11-14 Workshop for Newly Appointed Training Coordinators
- Oct. 24-26 First Circuit Judicial Conference

Guidelines for Teleconference Service Users

All judicial personnel are reminded of current GSA regulations relating to telephone conference calls. A recent incident in which a judge issued an order to show cause on a contempt basis to a GSA operator, who was adhering to these regulations, makes it important for court personnel to be aware of them. Highlights of the GSA Bulletin (FPMR F-152, June 10, 1983) that describes telephone conferencing services to federal agencies are provided for the benefit of all government personnel and the regulations therein govern all personnel.

Local teleconference service. This service is available to users served by many GSA consolidated telephone systems and provides for the connection of up to five telephones within each of the fifty states. Agencies in the National Capital Region should contact the National Teleconference Service by calling FTS 245-3333 for scheduling.

National Teleconference Service. This service provides for the connection of up to twenty-eight telephones within the fifty states, Puerto Rico, and the Virgin Islands. For details concerning conference availability, arrangements, and requirements, callers should contact the Service in Washington, D.C. (FTS 245-3333). Conferences involving five or fewer connections can be arranged through one's local GSA system operators. The Service *must* be notified *in advance* of any call that may last for more than one hour or otherwise exceed the capacity of the telephone system.

Conference scheduling. All conference service is provided on a first-come, first-served basis. Conference originators should contact the appropriate operator, preferably twenty-four hours in advance, to determine if the service will be available at the time desired. Once the conference has been scheduled, the following information will be required: (1) originator's name, agency, and FTS agency identification symbol; (2) date and duration of proposed conference; and (3) name, location, and telephone number of each participant.

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center.
Joseph F. Spaniol, Jr., Deputy Director, Administrative Office, U.S. Courts.

Highlights of Proposed Amendments to Federal Civil and Criminal Rules of Procedure

Highlighted below are several proposed amendments to the federal rules of civil and criminal procedure that are of potentially broad interest and impact.

Federal Rules of Civil Procedure

• *Rule 52(a).* The amendment, as contemplated, would eliminate the existing confusion and conflicts among the circuits regarding the standard to be applied in reviewing district court findings of fact based on documentary evidence: It provides that such findings, as is the case with findings based on oral evidence, may not be set aside unless clearly erroneous. According to the Advisory Committee on Civil Rules, the effect of this change would be to recognize that the trial court, not the appellate court, is the appropriate finder of facts in nonjury trials and in disposing of interlocutory injunctions, thus promoting stability and judicial economy.

• *Rule 68.* The proposed new rule, entitled "Offer of Settlement," would supplant the existing rule, now labeled "Offer of Judgment." Extensive revisions of this rule would permit any party, plaintiff or defendant, at any time thirty days prior to the commencement of trial, to serve upon an adverse party an offer, denominated as an offer under this rule, to settle a claim for the consideration specified in the offer and to stipulate dismissal of claim or to allow judgment to be entered accordingly. The offer is to remain open for thirty days unless the court authorizes early withdrawal. Acceptance must be in writing within thirty days, or the offer is deemed withdrawn.

If the judgment rendered is not more favorable to an offeree than the unaccepted offer and if the offer remained open for thirty days, an offeree must pay costs and expenses (including reasonable attorneys' fees) incurred by the offeror after the making of the offer. A claimant-offeror is also entitled to interest on the amount of money the claimant offered to accept. Expenses and interest may be reduced by the court to the extent they are excessive or unjustified given the circumstances.

In a bifurcated proceeding, an offer of settlement may be made after the liability of one party to another has been determined.

The revised rule 68 is not applicable to rule 23 class or derivative actions.

The drafters of the amendments anticipate that the newly crafted rule will remedy weaknesses that have rendered rule 68, as it now stands, ineffective and will encourage early settlement before heavy litigation expenses have been incurred.

• *Rule 83.* The proposed amendment seeks both to eliminate inconsistencies between local rules and federal rules and to improve the local rulemaking process by requiring public notice and opportunity to comment before local rules are adopted. Local rules so adopted would remain in effect unless abrogated or amended by the judicial council of the circuit in which the district is located.

Rule 83, as proposed, would also permit experimental local rulemaking for careful testing and evaluation of procedural proposals. With the

See RULES, page 4

Hearings Set on Proposed Changes to Federal Rules

Judge Edward T. Gignoux, chairman of the Judicial Conference Committee on Rules of Practice and Procedure, recently announced that the Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules have proposed certain technical and substantive amendments to the federal rules. These proposals have not yet been considered or acted upon by the Committee on Rules of Practice and Procedure, the full membership of the Judicial Conference, or the Supreme Court.

Drafts of the proposed amendments, which are accompanied by explanatory notes prepared by the respective advisory committees, have been submitted to the bench and bar and to the public generally for comment. All comments on the proposals, as well as requests for copies of the proposals, should be sent to the Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts, Washington, D.C. 20544.

Federal Rules of Civil Procedure. Federal civil rules proposed to be amended are rules 5, 6, 45, 52, 68, 71A, and 83 and admiralty rules B, C, and E. Hearings on these rules will be held at the National Courts Building in Washington, D.C., on Wednesday, January 18, 1984, and at the U.S. courthouse in Los Angeles, California, on Friday, February 3, 1984. Anyone wishing to testify should contact the committee at the above address prior to January 2, 1984.

Federal Rules of Criminal Procedure. Federal criminal rules proposed to be amended are rules 6(a), 6(e), 11(c), 12.1(f), 12.2(e), 29(b), 30, 35(b), and 49(e). The Advisory Committee on Criminal Rules has also proposed certain amendments to rule 9(a) of the Rules Governing Section 2254 Cases in the United States District Courts and rule 9(a) of the Rules Governing Section 2255 Proceedings in the United States District Courts. Hearings on these proposed amendments will be held on February 14, 1984, at the National Courts Building in Washington, D.C., and, on the same date, at the federal court building in San Francisco, California. Those wishing to testify on these proposals should contact the committee prior to January 15, 1984.

All the rules will ultimately be submitted to the Congress for consideration, but not until final drafts are approved by the Judicial Conference and the Supreme Court. Under the rules enabling acts, if neither house of Congress takes action on the civil and criminal procedural rules within ninety days after submission, they automatically become law.

In the accompanying article, some of the more significant proposals are highlighted.

As space allows, photographs of members of the various federal courts and their courthouses will be published in The Third Branch. *Above are photographs of the United States District Court for the District of Maryland and the U.S. courthouse in Baltimore. Judges of this court are, sitting left to right, Senior Judge Edward S. Northrop, Senior Judge Roszel C. Thomsen, Chief Judge Frank A. Kaufman, Senior Judge R. Dorsey Watkins, and Judge Alexander Harvey II; and standing left to right, Judge Norman P. Ramsey, Judge Joseph C. Howard, Judge Joseph H. Young, Judge James R. Miller, Jr., Judge Herbert F. Murray, Judge Shirley B. Jones (resigned), and Judge Walter E. Black, Jr.*

RULES, from page 3

prior approval of its judicial council, a district court could adopt—after public notice and opportunity to comment had been given—for a period of no longer than two years, an experimental rule that could not be challenged for its inconsistency with the Federal Rules of Civil Procedure.

The proposed amendment also contemplates that copies of local rules, upon their promulgation, shall be forwarded to the Administrative Office of the United States Courts and to the trial court's respective judicial councils rather than to the United States Supreme Court.

Supplemental Rules for Certain Admiralty and Maritime Claims

• *Rule B and Rule C.* These two supplemental rules have been amended to ensure procedural due process in the issuance of any attachment or garnishment process and in the issuance of any warrant of arrest, respectively. Except in cases involving exigent circumstances, judicial authorization—after review of a verified complaint and an affidavit in support thereof and after a prima facie showing that plaintiff has a maritime claim against the defendant in the amount sued for and that defendant is not present in the district, or that an action in rem does exist—is necessary for the issuance of any attachment process or warrant for arrest of the vessel or other property. The court shall issue an order authorizing such attachment or warrant and the clerk shall prepare the applicable papers. No additional court orders are necessary for enforcement.

In the case of exigent circumstances, the clerk shall issue a summons and process of attachment or a summons and warrant for arrest; the plaintiff, however, bears the burden of showing, in a postattachment or postarrest hearing under rule E(4)(f), that exigent circumstances existed at the time the summons was issued.

• *Rule E.* Under the proposed addition to rule E(4)(f), any person claiming any interest in attachment or arrested property would be entitled

See RULES, page 6

Center Publications and Audiovisual Programs Can Assist Law Clerks

Many Center publications may be helpful to law clerks, especially those clerks who are new to the federal judicial system. Recent publications include, for example,

• a manual treating employment discrimination and civil rights actions in the federal courts, by a federal district judge;

• a legislative history of the 1974 Speedy Trial Act, by a member of the Center's staff who has worked with the Judicial Conference's Criminal Law Committee on matters pertaining to the act;

• an overview of federal class actions and an analysis of the legal issues raised under the "Black Lung" Act, both by law professors with special expertise in those subjects.

Other publications include empirical studies of case management techniques and analyses of the organization and management of the federal courts.

The Center's annual *Catalog of Publications* lists and annotates all Center publications. These publications are free of charge, and law clerks are encouraged to request any item they wish. A copy of the 1982 *Catalog* should be available in each judge's chambers, but clerks may request additional copies from the Center's Information Service at FTS 633-6365. The 1983 *Catalog* will be distributed shortly to every federal judge.

Items of likely interest to law clerks are also available from the Center's Media Library and are listed in the *Educational Media Catalog.* The library includes audio and video cassettes of presentations by judges and academicians at Center seminars and workshops, as well as commercially produced programs on legal and management subjects. The 1982 *Catalog* explains how to borrow these items from the library.

VICTIM, from page 1

[of the act] a court is unable to impanel a jury for the purpose of deciding a disputed issue of damage" or restitution, pertinent sections of the act are violative of the Seventh Amendment.

The court found also that the statute fails to meet both due process and equal protection requirements of the Fifth and Fourteenth Amendments. "There is a crucial distinction between ordering restitution as a condition of probation" under 18 U.S.C. § 3651 of the Probation Act, he said, "and entering a civil judgment against a person on the hearsay testimony of a witness, without any discovery and without cross-examination." The latter, since it is enforceable as a judgment and is *res judicata*, requires more procedural safeguards than are provided by the act, he held. Furthermore, Judge Acker also declared that the act failed to provide the court with ascertainable standards for carrying it out—such as rules of evidence, rules of discovery, burdens of proof, requirements of notice and of standing, and more. "This Court thinks that Congress granted too much discretion to the courts and to the Attorney General, and by exceeding its powers of delegation, created a potential Frankenstein," Judge Acker stated.

The probability of disparate results in different federal courts arising from the restitution provisions of the act prompted the judge to conclude also that "it is impossible to look forward to enough equality of application for the Act to comply with 'equal protection.' "

Defendants in the case had been convicted of offenses arising under 18 U.S.C. § 1201(a)(1), the kidnapping statute. They had challenged not only the constitutionality of the act's restitution provisions but also the sum suggested in the victim impact statement of their presentence reports as the appropriate restitution due one victim. Judge Acker also questioned the $599 medical bill for the victim: He expressed the view in his memorandum opinion that the sum appeared inadequate. Moreover, the judge identified two additional "victims": one man who had been killed during commission of the crime and a third person whose vehicle had been damaged during the course of the crime. The judge was critical that presentence reports submitted to the court did not recommend restitution for them.

In addition to surveying parts of the act's sketchy "legislative history or lack of legislative history," in con-

See VICTIM, page 6

Department of Justice Issues Guidelines on Victim and Witness Protection Act

Two important documents regarding implementation of the Victim and Witness Protection Act of 1982 were released by the Department of Justice this summer. One outlines responsibilities to victims and witnesses of designated department officials, and the other provides departmental policy on the victim impact statement and restitution aspects of the act.

In accordance with section 6 of the act, the attorney general on July 9, 1983, issued "Guidelines for Victim and Witness Assistance" for departmental personnel to follow in responding to the needs of crime victims and witnesses. The guidelines, which became effective upon issuance, were published at 48 *Federal Register* 33,774 (July 25, 1983). They are directed specifically at components of the Department of Justice engaged in the detection, investigation, or prosecution of crimes, and "apply in all cases in which individual victims are adversely affected by criminal conduct or in which witnesses provide information regarding criminal activity."

The guidelines include a section of terms employed in the act. A "victim" is one "who suffers direct or threatened physical, emotional or financial harm as a result of the commission of a crime or who is an immediate family member of a minor or a homicide victim." Although governmental entities may be victims, they are not subject to the assistance and services provided by the act.

The guidelines direct the designation of at least one individual in each U.S. attorney's office, litigating division, and investigative agency as primarily responsible for victim-witness services. Moreover, all Department of Justice components are directed to cooperate with one another and with state and local law enforcement personnel to ensure maximum assistance to victims and witnesses in conformance with the intent of the act.

The designated official is responsible for ensuring that the appropriate U.S. probation officer is provided with all the information needed for preparation of the victim impact statement to be included in the mandatory presentence investigation report. This official is also charged with informing the victim that the probation officer is responsible for preparing such a statement and with instructing the victim on how to contact the probation officer concerning the statement.

The second document released by the Department of Justice, "Implementation of Restitution Provisions of Victim-Witness Protection Act of 1982," is designed to resolve certain questions about the victim impact statement and restitution that are unanswered in the text of the act itself and is for the guidance of assistant U.S. attorneys and other Department of Justice attorneys.

Recognizing that "the act does not contain all of the mechanisms necessary to carry out its provisions and some adjustments will be necessary," the department declares its policy in the form of answers to questions on thirty-five issues that have already been raised about these provisions, including some problems articulated by panelists last March at the Center's video teleconference on the new legislation.

Distribution of the second document has been limited, partly because it is an internal policy position paper. Video or audio cassettes of an edited version of proceedings at the Center's Victim and Witness video teleconference, referred to above, are available for loan from the FJC's Media Services Unit, 1520 H Street, N.W., Washington, D.C. 20005.

Information Management Systems Installed In N.D. Ohio, Ninth and Tenth Circuits

The distribution of the *Five-Year Plan for Automation in the United States Courts* was announced in last month's issue of *The Third Branch*. That document contains the automation research and development plans of the Federal Judicial Center and the implementation plans of the Administrative Office of the U.S. Courts. Pursuant to those plans, the Center will begin implementation and testing of two automated management systems on October 1.

In the Northern District of Ohio, the Center will take the initial steps for automated management of a probation office. The Probation Information Management System (PIMS) will be installed and tested in Akron, Cleveland, Toledo, and Youngstown. The goal of PIMS is to use office automation technology to enhance the local probation offices' case flow management and supervisory capabilities. Estimates made by the Probation Division of the Administrative Office suggest that considerable savings in cost and time, as well as increased efficiency, can be effected through this automation. The project in Ohio is designed to measure the extent of such savings and improved management.

The second system, an appellate information management and records replacement system called New AIMS, will be tested initially in the Ninth and Tenth Circuits, with installation in the Fourth Circuit to follow at the beginning of 1984. The computer equipment to be used in the first two circuits is now operational, and work is under way to modify the systems according to the particular preferences of the circuits. (For more detail on New AIMS, see the July 1983 issue of *The Third Branch*.) ■

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nection with what he perceived as inadequate drafting, Judge Acker also posed approximately forty "questions" and subquestions that he believes are begged by the text of the act. Officials in the Criminal Division of the Department of Justice have said that they are readying responses to the "questions" section of Judge Acker's memorandum opinion. ■

RULES, from page 4

to a prompt hearing at which plaintiff must show why the attachment or arrest should not be vacated.

Federal Rules of Criminal Procedure

• *Rule 6*. Two of the proposed revisions to this rule would permit, under subdivision (e)(3), more disclosure of grand jury information to officials and employees of state and local governments. The proposed revision to rule 6(e)(3)(A)(ii) would make explicit that an attorney for the federal government, in accordance with his or her duty to enforce federal criminal law and to assist him or her in such duty, may disclose without the court's approval grand jury information to government personnel, including personnel of a state or subdivision thereof.

Rule 6(e)(C)(iii) would permit, upon the request of an attorney for the federal government, disclosure of grand jury information, otherwise prohibited, to an appropriate state or local official, only after a showing that such matters might disclose a violation of state criminal law.

• *Rule 11*. The suggested amendment to this rule would require that a court, prior to the acceptance of a plea of guilty or nolo contendere, advise the defendant that, among other things, he or she may be subject to an order to make restitution to a victim of the offense under the provisions of the Victim and Witness Protection Act of 1982 (Pub. L. No. 97-291, 96 Stat. 1248). ■

PERSONNEL

Nominations

Martin L. C. Feldman, U.S. District Judge, E.D. La., Sept. 12
C. Roger Vinson, U.S. District Judge, N.D. Fla., Sept. 12

Appointments

Stephen N. Limbaugh, U.S. District Judge, E.D. & W.D. Mo., July 21
Peter C. Dorsey, U.S. District Judge, D. Conn., July 29
James McGirr Kelly, U.S. District Judge, E.D. Pa., Aug. 19
Hector M. Laffitte, U.S. District Judge, D.P.R., Aug. 22
Marvin Katz, U.S. District Judge, E.D. Pa., Aug. 26
Thomas N. O'Neill, U.S. District Judge, E.D. Pa., Aug. 30
Pasco M. Bowman II, U.S. Circuit Judge, 8th Cir., Sept. 1

Death

John C. Pickett, U.S. Circuit Judge, 10th Cir., Sept. 1

Social Security Update

As reported in the June issue, under section 101(c) of the recently enacted Social Security Amendments, the salaries of senior judges performing judicial duties by designation and assignment pursuant to 28 U.S.C. § 294 will become "wages" for FICA tax purposes as of January 1, 1984. Legislation independently introduced by Senators George J. Mitchell and Arlen Specter to change that provision (S. 1276 and S. 1375) remains in the Senate Committee on Finance; no hearings or other activity has been scheduled. In addition, Congressman W. Henson Moore introduced a bill (H.R. 3463) that would exempt senior judges from the social security payroll tax. H.R. 3463 currently is pending in the House Committee on Ways and Means.

Further developments with respect to this matter will be reported in future issues.

MARKEY, from page 1

courts. Further, attendance at our [circuit] judicial conference totaled 1,400.

Are there some procedures you might wish changed?

A few. Our advisory committee has a number of rule changes under consideration, dealing with such fine-tuning steps as greater guidance on en banc suggestions, time for filing certified lists, modifying the format for briefs and appendixes, and the like.

Have the lawyers who now practice in the CAFC, and who once practiced in the Court of Customs and Patent Appeals and the Court of Claims, adjusted to new procedures?

Yes, very well. The CAFC adopted FRAP [Federal Rules of Appellate Procedure] with only the few minor modifications made mandatory by our mission. Lawyers who had practiced before the Court of Customs and Patent Appeals and the Court of Claims had, of course, practiced under FRAP in other courts, so no great adjustment was needed.

Are many of your decisions being appealed to the Supreme Court?

Thus far, there have been petitions for certiorari filed in 6 percent of our decided cases. None has been granted.

When you started functioning as a new court, did you adopt precedent already established in other courts?

Yes. We sat en banc in our first case and, like the new Eleventh Circuit, adopted as precedents the holdings of our two predecessor courts.

Under the act setting up the CAFC, the court may sit in panels of more than three. Why did you select five as a number to constitute a panel in some cases?

We sit normally in panels of three. We have sat in five-judge panels where the case appears of sufficient broad effect and the court deems it advisable to add strength and acceptance to the outcome. The court has employed five-judge panels to decide a number of appeals from district courts in complex patent cases and in the appeals of air traffic controllers from the Merit Systems Protection Board, for example. While we could sit in panels of seven or nine, I doubt we ever will. A court diminishes its capacity, of course, when it sits in panels of more than three. We have been willing to accept that, however, in quite a few cases that appeared to warrant it, and have sat en banc sua sponte in five cases dealing particularly with questions of our jurisdiction.

How are your panels selected?

"We have sat in five-judge panels where the case appears of sufficient broad effect and the court deems it advisable to add strength and acceptance to the outcome."

—Chief Judge Howard Thomas Markey

Three or four panels sit each day of our year-round monthly sessions. Membership of the panels changes each day during a session, so that each judge gets to sit with every other judge frequently during the year, and each judge eligible to preside will do so at least a few times each year. The clerk calendars blocks of mixed-type cases to panels that are merely lettered and with no knowledge of who sits on what panels, so that each judge sits each month on all types of cases from the 112 tribunals and 666 decision makers from which appeals may come.

Are the members of the panel announced in advance?

No. I see no need or value to the court or to the administration of justice in making such announcements. Nor has our bar pressed in that direction. The lawyers come prepared to argue on the law and the facts of their cases. I believe, and I expect our bar will continue to believe, that they will receive the same courteous treatment and their arguments will receive the same careful consideration no matter which judges are on their panel.

With nationwide geographic jurisdiction, does the CAFC hold hearings in cities other than Washington, D.C.?

Yes. Though the travel involved is only that of counsel, and most lawyers don't seem to mind coming to Washington, where they can often handle matters with other offices, we do sit in other cities when enough cases are ready in a particular area to make up a docket.

In how many other cities did you hear cases during your first year?

Panels of the CAFC sat in San Francisco and in Chicago, where the Ninth and Seventh Circuits were gracious hosts indeed.

How do the judges decide whether to issue a published or an unpublished opinion?

The parties receive an opinion in every case disposed of on the merits. Some (about 60 percent) have been unpublished opinions of one to four pages telling the loser why his or her arguments were not persuasive. The decision to employ an unpublished opinion must be unanimous on the panel. The court adopted some thirteen criteria by which to measure the need for a published opinion, but all come down to deciding whether non-parties would find what is published worth reading.

How much and what kind of staff assistance do you and other members of the court have?

Each judge has two law clerks and a secretary. A senior technical assistant and his assistant serve all judges and the court. The clerk has twelve persons on his staff, and the adminis-

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trative services officer has four persons on her staff.

Is your present staff adequate to meet your needs?

Yes, so far. We may ask for more some day, but only after, not before, the need is firmly established.

What have you done to avoid conflict among CAFC holdings or with holdings of your predecessor courts?

With exclusive substantive jurisdiction in the legal fields of international trade, patents, and claims against the government, the government personnel merit protection system, and government contracts—and remembering the congressional desire to ensure uniformity in all those fields—it would be tragic if the court permitted conflict among its own holdings. We have established a defense in depth. The senior technical assistant reads every opinion ready for issue against his index file. Each panel-approved opinion is circulated among all judges for comment. If time presses, any judge may issue a "Hold Sheet" printed on red paper. In each case of even suspected conflict, everything grinds to a screeching halt until the question is resolved. Finally, a holding of a CAFC panel, or of either predecessor court, can be overruled only by action of the court en banc.

How many cases has the court disposed of?

The number of cases doesn't tell very much. Most are complex, involving advanced technology. Some are less complex, but we have few or none that might be disposed of summarily. In its first eleven months, the court terminated 549 appeals—28 from the Court of International Trade, 57 from district courts, 100 from the Claims Court, 4 from the International Trade Commission, 141 from the Patent and Trademark Office, 159 from the Merit Systems Protection Board, 47 from the boards of contract appeals, and 1 from the secretary of commerce. In addition, the court disposed of twelve petitions for writs of mandamus.

Is the CAFC a forerunner of similar court structures, or is the court likely to be given additional substantive jurisdiction?

Those are matters for the Congress, of course. Even if we had the time to concern ourselves with such matters—and we don't—it would be inappropriate. Our job is to do the best we can and let others worry about the type of future changes you mentioned. ■

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Bankruptcy Judge Galgay Elected to FJC Board

At its fall meeting, the Judicial Conference of the United States elected Bankruptcy Judge John Jerome Galgay, of the Southern District of New York, to a four-year term on the Board of the Federal Judicial Center. Judge Galgay fills the position on the Board reserved for a bankruptcy judge, replacing Bankruptcy Judge Lloyd D. George (D. Nev.), whose term expired this past September.

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

Bankruptcy Judge John J. Galgay

Judge Galgay received his LL.B. from Northeastern University School of Law in 1939. ■

Application of FICA Tax To Senior Judges' Salaries Deferred

On October 11, 1983, President Reagan signed into law H.R. 4101 (Pub. L. No. 98-118), an extension of the Federal Supplemental Compensation Act of 1982. Section 4 of that legislation contains a two-year delay of the provision of the Social Security Amendments of 1983 that would have subjected the salaries of senior judges performing judicial duties by designation and assignment to FICA taxes as of January 1, 1984.

Section 4 reads as follows: "Notwithstanding section 101(d) of the Social Security Amendments of 1983, the amendments made by section 101(c) of such Act shall apply only with respect to remuneration paid after December 31, 1985. Remuneration paid prior to January 1, 1986 under section 371(b) of title 28, United States Code, to an individual performing service under section 294 of such title, shall not be included in the term 'wages' for purposes of section 209 of the Social Security Act or section 3121(a) of the Internal Revenue Code of 1954."

JCUS Approves Use of Electronic Sound Recording

The Judicial Conference of the United States has adopted regulations, pursuant to statute, broadening the range of official court reporting methods that United States district judges may authorize for use in their courts. Starting January 1, 1984, judges may for the first time direct the use of audio recording to produce the official record of proceedings required by law or by rule or order of court, from which official transcripts may also be produced. District judges may continue to use shorthand or stenotype as the official reporting method in their courtrooms, however. The statute and the regulations stress that the choice among available

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Deputy Attorney General Schmults Discusses His Role in DOJ Activities

Edward C. Schmults was appointed deputy attorney general, the second in command at the Department of Justice, in February 1981. A graduate of Yale University and the Harvard Law School, Mr. Schmults was a partner in the New York City firm of White & Case before accepting a number of assignments in the Nixon and Ford administrations. He served as general counsel and under secretary at the Department of the Treasury and was deputy counsel to the president from October 1975 until January 1977.

In the following interview, Deputy Attorney General Schmults highlights the Justice Department's accomplishments during the first three years of President Reagan's term and talks about goals and expectations for the coming year.

Please briefly describe your basic responsibilities as deputy attorney general.

Well, that's very easy to do—I assist the attorney general. When we came into office, the attorney general reorganized the Department of Justice to restore the deputy's role to what it had been traditionally, and that is to span the entire department. The associate attorney general reports to the attorney general through me. It was only during the Carter years that the deputy and the associate attorney general split the department and essentially both reported to the attorney general. Apparently there was some confu-

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1983 AO Annual Report Reveals Federal Court Filings Continue to Increase

Filings in the twelve regional courts of appeals rose 6 percent in statistical year 1983 over the previous year. The total number of new appeals docketed during the twelve-month period ending June 30, 1983, was 29,630, which represents an average of 673 filings per authorized three-judge panel, the highest number in history. While dispositions during this period increased 2.4 percent over 1982, this number was not high enough to offset the number of new filings, and left 22,480 appeals pending (4.5 percent more than were pending on June 30, 1982).

These statistics and other detailed reports on the business of the courts and the operations of the Administrative Office are contained in the *1983 Annual Report of the Director*, which was presented to the Judicial Conference at its September session.

(The volume also includes statistics through June 30 for the Court of Appeals for the Federal Circuit; for more up-to-date figures on the operations of that court, see *The Third Branch*, October 1983, interview with Chief Judge Howard Markey.)

In the district courts, civil filings also reached a new record. In statistical year 1983, 241,842 actions were filed, which is 17.3 percent higher than the number of cases filed during the comparable period in the previous year. The average number of civil filings per authorized district judge was 470 cases.

Increases occurred in all major bases of jurisdiction, but rises in certain classifications are particularly noteworthy. Civil cases in which the United States was plaintiff were 22.6 percent higher in statistical 1983, mainly because of a 37.6 rise in cases filed by the United States for recovery of overpayments and enforcements of judgment. Civil cases in which the United States was defendant also rose steeply—by 33.4 percent. This increase was largely due to a 58.6 percent rise in litigation over claims for disability insurance benefits (up 89.6 percent) and supplemental security income claims (up 51.2 percent). Other areas showing steep rises were bankruptcy appeals to district courts (up 47.5 percent), copyright cases (up 27.5 percent), and employment civil rights cases (up 18.3 percent).

The disposition rate for civil cases in statistical year 1983 was 13.7 percent higher than for 1982. However, because of the large increase in filings, the pending caseload rose by 12.9 percent, or an average of 450 cases per judgeship.

Criminal filings in the district courts also rose, with 35,872 new cases filed. This number is 9.8 percent higher than that for the previous year, representing an average of 70 new cases for every U.S. district judge. Although dispositions of criminal cases were 6.6 higher in 1983 than in 1982, they still did not keep pace with the increase in filings, resulting in an increase of 11.3 percent, or 18,546 cases, in pending caseload. ■

Center Publishes "Fraud and Civil Liability Under the Federal Securities Laws"

The Center has released *"Fraud" and Civil Liability under the Federal Securities Laws*, a monograph written for the Center by Louis Loss, William Nelson Cromwell Professor of Law at Harvard University.

This paper is an in-depth examination of four of the eight federal statutes relating to fraud and civil liability, namely, the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940. The author discusses these statutes in light of the American Law Institute's proposed Federal Securities Code (1980 and 2d Supp. 1981), which would integrate all the statutes and codify much of the case law as well as administrative rules and practices. Relevant cases are discussed, and a bibliography of treatises on this subject is included.

To receive a copy, write to the Center's Information Services Office, 1520 H Street, N.W., Washington, D.C. 20005. Please enclose a self-addressed, gummed label, preferably franked. (The volume of demand for Center reports is such that requests should be in writing rather than by telephone.) ■

Position Available

Clerk, U.S. Court of Appeals for the Second Circuit, New York, New York. Salary from $56,945 to $63,800 (JSP-16). Requires B.A. Graduate degree in law or in public, judicial, or business administration is desirable, and substantial experience in a position of significant management responsibility in the public or private sector is necessary. To apply, submit a resume by November 15, 1983, to Steven Flanders, Circuit Executive, U.S. Courthouse, Foley Square, New York, New York 10007.

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Chief Justice Emphasizes Need for Change In Lawyers' Attitude

"In their highest role, lawyers should be the healers of conflicts and, as such, provide the lubricants that help the diverse parts of a complex pluralistic social order function with a minimum of friction," said Chief Justice Warren E. Burger in a recent address delivered in London, England. Nevertheless, he continued, "In America...the current generation of lawyers, or at least far too many of them, seem to act more like warriors eager to do battle than healers seeking peace."

Speaking last July at the dedication of the new facility of the Center for Law Studies of the University of Notre Dame—which allows Notre Dame law students to spend one school year in London—the Chief Justice pointed to the need for a "change [in] attitude of a good many lawyers."

To accomplish this change, he declared that "the moral basis of law must be emphasized for without that foundation the law would be, or it would become, a set of sterile, mechanical rules devoid of real meaning in terms of human values." In addition, "professional ethics must have far greater attention from the profession." Last, to facilitate the peaceable resolution of conflicts at the negotiating table as well as in the courtroom, "standards of civility and decorum are imperative." The Chief Justice observed, "Civility cools the excessive ardor of the adversary system. I regret to say that civility is in short supply in our courtrooms."

The need to maintain these standards should begin in the law schools, the Chief Justice said. American law schools do very well in teaching the law and legal analysis, he said, "but a system of legal education that teaches lawyers to think brilliantly yet fails to teach them how to act with civility and according to high professional standards with a com-

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Four Circuit Chief Judges Differ in Congressional Testimony on Proposed Intercircuit Tribunal

The chief judges of the United States Courts of Appeals for the Second, Third, Eighth, and Eleventh Circuits testified this past September before the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice on H.R. 1968, a proposal to abolish almost all of the Supreme Court's mandatory appellate jurisdiction, and H.R. 1970, a proposal to create an intercircuit tribunal of the United States courts of appeals. The September 22 hearings, at which Chief Judges Wilfred Feinberg (2nd Cir.), Collins J. Seitz (3rd Cir.), Donald P. Lay (8th Cir.), and John C. Godbold (11th Cir.) testified, were the third in a series of such hearings conducted by the subcommittee, which is chaired by Representative Robert W. Kastenmeier (D-Wis.).

Chief Judges (l. to r.) Donald P. Lay, Collins J. Seitz, John C. Godbold, and Wilfred Feinberg testify before House subcommittee.

The four chief circuit judges expressed uniform support for H.R. 1968, the "Supreme Court Mandatory Appellate Jurisdiction Reform Act of 1983," which, in eliminating virtually all of the Court's obligatory appellate jurisdiction, would vest more discretion in the hands of the justices as to which cases they would hear.

Support was not unanimous, however, for H.R. 1970, the "Intercircuit Tribunal of the United States Courts of Appeals Act." Two of the four judges endorsed the concept of this experimental court; both of these judges gave great weight to the need to resolve intercircuit conflicts. Chief Judge Seitz, while noting that "many judges and lawyers [have] react[ed] negatively to the creation of an Intercircuit Tribunal," including some members of his own court, testified that "our primary concern should be with the evenhandedness of the justice that the American people are entitled to receive." However, in his opinion, "a serious volume crunch confronts the Supreme Court," which "threatens to overwhelm the concept of equal justice for all Americans." He views the creation of the intercircuit tribunal as a "modest yet important response" that would further the goal of equal justice to all by providing a uniform interpretation of federal statutes and regulations.

In his support of H.R. 1970, Chief Judge Godbold presented statistical data on cases involving intercircuit conflicts in the Eleventh Circuit. Staff attorneys of the Eleventh Circuit randomly selected and analyzed 200 cases from the 1,200 published opinions handed down in that circuit in one year. They concluded that 15 of those cases either initiated or continued conflicts among the thirteen

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methods belongs to the individual judge. (The full text of the regulations, as adopted by the Conference, is printed below.)

The regulations are to "be augmented by guidelines issued by the Director of the Administrative Office, containing technical standards for equipment and procedures for implementation." The Conference also authorized the Chief Justice to appoint a committee of Conference members to monitor the AO's implementation of the regulations.

According to the regulations, should the need for stenotype or other reporter services diminish because district judges elect to use audio recording as the official court reporting method, "any reduction in personnel shall, where feasible, be accomplished through attrition."

The Third Branch will provide, as available, information on how district judges can request installation of audio recording equipment in their courtrooms and the procedures that will govern its use.

The regulations were adopted pursuant to the Federal Courts Improvement Act of 1982, which contained a prospective amendment to the federal court reporting statute, 28 U.S.C. § 753(b). That amendment gives "electronic sound recording or any other method" equal status with shorthand or stenotype reporting as a method of taking the record, subject to Judicial Conference regulations and subject to the discretion and approval of the judge. The act provided, however, that the amendment would not take effect until the Conference regulations became effective, which could not be prior to October 1, 1983. Furthermore, it directed the Conference to experiment with alternative court reporting methods.

The Federal Judicial Center undertook that statutorily mandated experiment for the Conference and published the results last July in *A Comparative Evaluation of Stenographic and Audiotape Methods for United States District Court Reporting* (see *The Third Branch*, August 1983). The Center's report concludes that given appropriate

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Judicial Conference Has Long Considered Audio Recording Alternative

The action of the Judicial Conference allowing audio recording as an official court reporting method at the discretion of the judge is hardly the first time that the Conference has considered such a proposal. The Conference's early interest in electronic sound recording is documented in the reports of its proceedings and in a February 1961 *Report on Electronic Sound Recording in the Trial Courts of the State of Alaska*, by Warren Olney III, then director of the Administrative Office.

Early in 1958, the Conference appointed a subcommittee to study possible changes in the federal court reporting system. One item considered by the subcommittee, to quote the Olney report, was "the practicality of electronic recording of court proceedings by salaried Government employees in the clerk's office."

Tests conducted by the Administrative Office in various district courts, using sound-belt equipment modified from the recording apparatus then used in airport control towers, convinced the subcommittee that audio recording was a ready alternative to stenotype reporting for those judges who wished to use it. In September 1959, the Conference instructed the Administrative Office, "whenever possible and agreeable to the judges concerned, to supply electronic recording systems for use in the United States district courts whenever a vacancy occurs in the office of the existing court reporter."

Former director Olney visited Alaska in late October 1960 to compare the audio recording method used throughout Alaska's state courts with the stenotype reporting in use in Alaska's federal courts. He concluded that the audio recording method produced a more complete and usable record and a more accurate and timely transcript, at less cost to the government or the parties. As he put it, the "doubts and fears expressed by numerous court reporters, judges, and others as to the practicality of electronic sound recording of proceedings in trial courts have proved to be illusory and without substance."

Congress, though, declined to appropriate funds for a small number of recorders to implement the Judicial Conference resolution of September 1959. A 1965 statute, however, amended 28 U.S.C. § 753(b) to allow the official reporters to use audio recording as a back-up device, the only change to that section until the Federal Courts Improvement Act of 1982.

Electronic Sound Recording Regulations

1. Effective January 1, 1984, pursuant to 28 U.S.C. 753(b), individual United States district court judges may direct the use of shorthand, mechanical means, electronic sound recording, or any other suitable method, as the means of producing a verbatim record of proceedings required by law or by rule or order of the court. The judge should consider the nature of the proceedings, the availability of transcription services and any other factors that may be relevant in determining the method to be used in producing a verbatim record that will best serve the court and the litigants.

2. Electronic sound recording equipment, for purposes of this regulation, shall be multi-channel audio equipment. This regulation shall be augmented by guidelines issued by the Director of the Administrative Office, containing technical standards for equipment and procedures for implementation.

3. In the event the need for shorthand, stenotype, or other reporter services should diminish by reason of the utilization of electronic sound recording equipment, any reduction in personnel shall, where feasible, be accomplished through attrition.

Judicial Conference Takes Wide-Ranging Initiatives at Its September Meeting

In addition to adopting regulations for the use of electronic sound recording in federal courts (see story, page 1), the Judicial Conference of the United States took a number of other initiatives at its September 1983 meetings. The Conference—

• Assigned, on an experimental basis, the function of oversight of court automation to the Subcommittee on Judicial Improvements of the Committee on Court Administration and authorized the Chief Justice to enlarge the membership of the subcommittee if needed. Among its newly assigned responsibilities, the subcommittee will review the AO and FJC's "five-year plan" for computerization of various functions in the federal courts, and will approve budgets, timetables, and priorities recommended for such automation. (For a summary of the five-year plan, see the September issue of *The Third Branch*).

• Approved the recommendation of the Committee on Court Administration to support a February 1983 American Bar Association resolution urging the adoption by every state of a procedure providing for definitive resolution by the highest court of the state of questions of state law certified from an Article III court of the United States.

• Approved, in principle, legislation (H.R. 3084) to provide for the random selection of a specific court of appeals where petitions for review of an executive agency order are filed "simultaneously" in two or more appellate courts (the "race to the courthouse"). The Conference's approval, however, contained a refinement. At present, H.R. 3084 reflects the recommendation of the Administrative Conference of the United States that the Administrative Office be the body to choose, by random selection, which court of appeals would take jurisdiction over such an appeal, subject to the existing power to transfer the case in the interest of justice. The Judicial Conference agreed, however, with the Committee on Court Administration that, rather than the Administrative Office, the Judicial Panel on Multidistrict Litigation, which already exercises a similar function regarding other matters, would be the appropriate body to handle such an assignment.

• Recommended that certain oversights in the statute establishing the Court of Appeals for the Federal Circuit (CAFC) be corrected. Thus the Conference supports passage of H.R. 1291, which would provide a sixty-day time period for appeals to the CAFC from a determination of the International Trade Commission. The Conference also supports legislation (recently introduced as H.R. 3824) that would provide for interlocutory appeals from the district courts to the CAFC by amending the interlocutory appeals statute (28 U.S.C. § 1292(b)).

• Authorized law clerks and legal assistants (other than career law clerks) to elect not to be covered by the civil service retirement system. This proposal is to be applied prospectively only and will still permit those affected to elect other benefits such as group health and life insurance.

• Approved guidelines providing that court reporters who serve on "regular tours of duty" and new secretaries of circuit and district judges are to earn annual leave in accordance with the Leave Act, 5 U.S.C. §§ 6301 et seq. Current secretaries may elect to be placed under the Leave Act.

• Agreed that too many cases are being brought under 42 U.S.C. § 1983 and directed the Committee on Court Administration to produce draft legislation to require exhaustion of state administrative remedies in section 1983 cases for consideration by the Conference at its spring 1984 session.

• Received a report from the Committee on Judicial Ethics regarding compliance by judicial officers and judicial employees with financial disclosure requirements of the Ethics in Government Act and noting minor changes to the instructions and reporting form for individuals required to file annual financial statements.

• Approved several amendments to the "Guidelines for the Administration of the Criminal Justice Act" regarding the fixing of compensation for attorneys assigned to Criminal Justice Act (CJA) cases. One amendment modifies the requirement that appointed counsel seeking compensation under the act submit a memo-

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JCUS Amends Date for Consideration of Law Clerk Applications

In addition to other actions taken at its fall meeting, the Judicial Conference decided to amend its March 1983 resolution regarding the date the federal judiciary should begin considering applications for law clerks to federal judges. The new date for opening the application process is July 15 of the summer following the applicant's second year of law school. The summer starting date replaces the later date—September 15 of a student's third year—adopted last spring by the Judicial Conference as part of a larger policy stipulating a uniform time frame for federal law clerk selection. It is anticipated that the earlier initiation date will facilitate interviews with candidates during the summer vacation.

The amended policy reads as follows: "Applications for law clerkships will neither be received nor considered prior to July 15 between a student's second and third year of law school. This policy shall be effective immediately for a trial period of two years, at which time it will be reexamined in light of the experience under it and with the benefit of the views of all federal judges formed by reference to that experience."

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management and supervision, electronic sound recording can provide an accurate record of U.S. district court proceedings at reduced cost, without delay or interruption, and provide the basis for timely transcript delivery. The experiment compared the performance of audio recording with the performance of the official stenotype reporting method in twelve district courtrooms, on the basis of transcript accuracy, timeliness of transcript delivery, costs to the government, and ease of use. ■

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circuits. Applying the same ratio—that is, the number of the cases involving conflicts divided by the number of cases in the sample population—to the 1,200 cases, they determined that the Eleventh Circuit in one year had 90 cases involving intercircuit conflicts. The staff attorneys were further able to extrapolate that given 1,200 cases, 36 of them would create new conflicts. While acknowledging that "perfect homogeneity and harmony of law is not necessary," Chief Judge Godbold asserted that a significant number of conflict cases are of sufficient national significance to require unifying attention. Of these, however, he concluded that not many are of such import as to merit the "final stamp" of the Supreme Court.

Chief Judge Lay, in contrast, testified that he found it illusory to conclude that there is "a great need to resolve intercircuit conflicts." Only thirty-two of the cases reviewed by the Eighth Circuit last term presented possible conflicts among the circuits, he stated, and in many of these cases the existence of an intercircuit conflict was dubious. In further support of his position, Chief Judge Lay emphasized that "respect of our sister circuits is something paramount in everyone's mind" and that percolation in certain areas of the law is of great merit to all. Instead of experimenting with an intercircuit tribunal, he would prefer to wait and observe the impact of H.R. 1968 (if it is passed) on the workload of the Supreme Court.

Chief Judge Feinberg concurred with Chief Judge Lay in stating that he opposes the concept of an intercircuit tribunal "at least until other measures have been tried." During his testimony he noted that the active judges of the Second Circuit joined him in his letter to Chairman Kastenmeier expressing opposition to H.R. 1970, and that Senior Judge Henry J. Friendly in a separate letter to the chairman of the subcommittee also supported the position of the Second Circuit's active judges. Among the reasons for the judges' opposition, reasons also noted by Chief Judge Lay, are that the bill would create a fourth tier of review that would only exacerbate the problem of delay already being experienced by litigants; that it would not relieve the Supreme Court of its already great burdens but, rather, would add the further burden of reviewing cases for reference to the proposed intermediate court; and that the "need for additional capacity to resolve conflicts among the circuits is exaggerated." ■

FILMS & TAPES

The Center has prepared a 105-minute video program based on its March 1983 Teleconference on the Victim and Witness Protection Act of 1982. This program is condensed from the longer three-hour video program already made available. Intended for trial and appellate judges, the edited version contains the portions that judges viewing the teleconference found most useful.

To accompany the videotapes, the Center has compiled a packet that includes materials distributed at the teleconference, victim and witness guidelines developed by the Department of Justice, examples of relevant court orders, the memorandum opinion of Judge William Acker (N.D. Ala.) declaring unconstitutional the act's restitution provisions, and other items judges are likely to find instructive.

The Center has placed video playback equipment in each district court and will make the new tapes available to any judge who wishes to view them. In larger districts, judges may wish to view and discuss the tapes in a group. Those who have video playback equipment may opt to view the tapes at home. The tapes are available in both VHS or three-quarter-inch format, but not in Beta format.

To order the tapes, call or write John Hawkins, Media Services, 1520 H Street, N.W., Washington, D.C. 20005 (FTS 633-6216). Please refer to identification number VJ-052 when requesting the tapes.

* * *

In an effort to prepare court employees for the new computer systems described in the *Five-Year Plan for Automation in the United States Courts* (see the September issue of *The Third Branch*), the Center is developing various training opportunities. It recently purchased a videotape entitled *Microcomputers: An Introduction*. This 25-minute tape provides a brief orientation to microcomputers and explores the human aspects of becoming acquainted with computers. Although not intended to provide substantive training, the tape will be useful to court staff who have little understanding of what computers are and how they can be used in the working environment. The tape is ideal for informal, small-group viewing and discussion. Where available, a court staff member with some computer expertise and experience can be invited to discuss the tape and respond to viewer questions. This tape is also available through the Center's Media Services Unit. ■

Whenever a separation is made between liberty and justice, neither, in my opinion, is safe.
—Edmund Burke

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sion about who was in charge when the attorney general was absent. The attorney general decided that, as he and I were not steeped in criminal justice experience, he would look for an associate who had a solid criminal justice background, and that the

criminal justice components of the department would report to the attorney general through the associate and then the deputy. We would have the benefit of having a senior official to consider all those criminal justice issues before they came up to us.

Who handles the judgeships?

That is another responsibility that historically has been handled in the deputy's office. It is quite an administrative burden. We thought that it would be desirable to move most of that burden to the Office of Legal Policy, which is headed by Assistant Attorney General Jonathan Rose. The administrative work is done there and then the work product comes to the attorney general and to me each week. The attorney general then decides what recommendations he will make to the White House. The recommendations are considered by a White House committee which meets every other week. Jon Rose and I represent the attorney general at those meetings.

When Attorney General Smith was interviewed by The Third Branch **in June 1981, he noted his intention to use informal advisory committees to aid in the nomination process. What role have these committees taken?**

That interview was held early on in the administration. At that time, the attorney general was considering whether to draw on his experience with California state judicial appointments, where such committees were used. But as he got into the process, he decided that having these advisory commissions—which I believe were only going to apply to circuit court nominations—would be time-consuming and probably were not necessary. With circuit courts, we are talking about a much smaller number of vacancies, for which one tends to look initially and primarily to sitting judges, federal district court judges, and other well-known practitioners or academics. It is not that difficult to identify outstanding candidates. So we never used those informal advisory commissions. They are not a part of the process.

"I think that judicial restraint is perhaps the most important thing that the courts can do for themselves to limit the growth of litigation."

—Deputy Attorney General Edward C. Schmults

Critics have charged that the administration has not been sufficiently aggressive in nominating women and minorities to the federal bench. How would you respond to that charge?

We certainly would like to do better and I think we are doing better in that respect. We wish we had appointed more women and more minorities. I think there are a couple of reasons for that. First, women and minorities constitute only a small percentage of all attorneys with the requisite experience. If one looks at those who have graduated from law school in or before 1972—that is, those attorneys with at least ten years' experience—I believe less than 4 percent of them are women and less than 4 percent are minorities. Law school classes changed dramatically in the seventies and eighties. My feeling is that in a few years we are going to have a very large universe of women and minorities from which to choose. That's the first point; it's not an excuse, but it makes the job more difficult.

Second, in the overwhelming number of cases, the district court recommendations have come from senators. By and large, they have not recommended women and minorities to us. We have spoken to some senators and told them that we are very interested in looking at strong candidates who happen to be minorities and women.

Our efforts are showing some results. Of the twenty judicial candidates we have in the pipeline—that is, either pending confirmation in the Senate or undergoing FBI background checks—a little more than a third are women or minorities. Now that's a much higher percentage than in our initial group of about 108 Article III judges, from which we have appointed 13 women and minorities. On the Article I courts—the Tax Court, the Claims Court, and the D.C. courts—four of the thirteen appointees have been women and four minorities. Therefore, we have become more "aggressive," if I can adopt the critics' term, in our efforts to identify qualified women and minority candidates. Our record a year from now will reflect this.

As the administration concludes its third year in office, what would you list as the major accomplishments of the Justice Department?

I would certainly list the strides we have made in dealing with organized crime and drugs. There I would cite the attorney general's action in bringing the FBI into the drug interdiction business for the first time and establishing a new relationship between the FBI and the Drug

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Enforcement Administration. I would also note the establishment and funding of the new organized crime-drug task forces around the country. They are now up and running in twelve core cities, joining the task force that's already in place in South Florida. I believe that they are going to be seen as a major accomplishment of the Reagan administration and the Smith Justice Department. They really stem in part from the Violent Crime Task Force, which was one of the first actions the attorney general took. So our whole program of fighting crime, of which there are a variety of components, is a major accomplishment.

While not yet reflected in legislation, we've taken great strides toward obtaining immigration reform. The Justice Department, particularly the attorney general, has brought the need for immigration reform to the attention of the American people. We have had overwhelming editorial support. An omnibus reform bill has passed the Senate twice by overwhelming bipartisan margins. And we hope that there will be final action soon on this issue. While that's not yet an "accomplishment," it is a significant milestone, I hope, on the way to accomplishment.

I would also certainly cite our accomplishments in the antitrust area—the new merger guidelines and the program of eliminating or modifying old, outdated consent decrees which have become anticompetitive. Of course, the actions Bill Baxter [assistant attorney general] took in courageously dealing with the AT&T and IBM cases in ways that were in the public interest were really major achievements.

In our civil rights policies we've likewise achieved major accomplishments. There I think we've changed the approach taken in developing appropriate remedies through our effort to eliminate the use of racial quotas as remedies for racial discrimination and our effort to abandon the use of forced busing as a remedy in school desegregation cases, which really did not promote, in our view, desegregation or quality education.

The efforts the attorney general has made in many of his speeches to articulate the need for judicial restraint are also important. We hope his discussion of this topic has convinced some judges that they ought to take a look—another look—at the proper role of the judiciary. Indeed, all of us in government, in each branch, should do that from time to time.

It is important to note that our discussions of judicial restraint are part of a broader effort by the administration to clarify and reestablish the proper limits of the powers and responsibilities of each branch of government. Thus, for example, this administration has taken great pains to assure that executive branch regulatory activity is within the scope of its legislated authority by, for instance, establishing very early a regime of OMB oversight over the regulatory process. We have also sought—successfully—to limit overreaching by the legislative branch by convincing the Supreme Court that legislative vetoes over executive functions are unconstitutional. Indeed, our successful litigation of the *Chadha* case [*Immigration and Naturalization Service v. Chadha*, 51 U.S.L.W. 4907 (1983)] is one of the most far-reaching accomplishments of the Smith Justice Department.

Are there any big disappointments?

I would say the major disappointments have been the failure of Congress to enact the immigration bill and significant crime legislation. On both of those fronts, we are working as hard as we can to get bills enacted, and I hope that's going to happen.

Do you anticipate action on either of those two fronts or on anything else of significance in the fourth year of the term?

Well, in a sense it's getting more difficult as we move into a presidential election year—what some people call the "silly season"—but so far as immigration is concerned, our sense of that is that a strong momentum has built up; the Senate has passed it twice. We have editorial support from newspapers around the country. They overwhelmingly demonstrate that there is a great deal of support for immigration reform out there. Four House committees have now considered the immigration bill, and their collective membership is close to half the House. So our sense of it is, yes, the immigration bill is ultimately going to be passed. But as two or three months go by our apprehension will increase; we hope that passage will happen sooner rather than later.

With respect to the crime legisla-

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PERSONNEL

Nominations

Maryanne T. Barry, U.S. District Judge, D.N.J., Sept. 14

Thomas J. Curran, U.S. District Judge, E.D. Wis., Sept. 20

Confirmations

Kenneth W. Starr, U.S. Circuit Judge, D.C. Cir., Sept. 20

John F. Keenan, U.S. District Judge, S.D.N.Y., Sept. 20

Martin L. C. Feldman, U.S. District Judge, E.D. La., Oct. 4

C. Roger Vinson, U.S. District Judge, N.D. Fla., Oct. 4

Maryanne T. Barry, U.S. District Judge, D.N.J., Oct. 6

Elevation

Pierce Lively, U.S. Circuit Chief Judge, 6th Cir., Oct. 1

Senior Status

George E. MacKinnon, U.S. Circuit Judge, D.C. Cir., May 20

Milton Pollack, U.S. District Judge, S.D.N.Y., Sept. 29

Deaths

Cale J. Holder, U.S. District Judge, S.D. Ind., Aug. 23

David T. Lewis, U.S. Circuit Judge, 10th Cir., Sept. 28

Delegation of German Jurists Visits Center

Above, left to right, Gerhard Robbers, Advisor to the President of the Federal Constitutional Court, Federal Republic of Germany; Wilhelm Gehrlein, President of the Supreme Court for Saarland, Saarbrucken; Hermann Oxfort, Senator for Justice, Berlin; Ernst Benda, President of the Federal Constitutional Court; and U.S. Circuit Judge Daniel M. Friedman watch demonstration of FJC computer equipment. Above left, Professor Ernst Benda. Left, FJC Director A. Leo Levin talks with Mr. Gehrlein. The delegation included six other judges, lawyers, and professors.

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tion, again, I think we will get a good, strong bill through the Senate. The bill passed the last Congress 95 to 1 in the Senate. It got bottled up in the House, but we have some reason to believe that important elements of our core crime bill providing for sentencing and bail reform and criminal forfeiture, and other parts of it, have a better chance to move through the House this time. While I'm optimistic, it's going to take a lot of hard work.

You just mentioned several things that may be passed by Congress in the criminal code and criminal law reform area. What about sentencing reform—what do you believe are the chances of that passing this year?

As to criminal code reform, we attempted to take up that cudgel and move the criminal code in our first year to build on what had gone on before in the last decade. It seems to be too heavy to move. It was attacked from the right and left and every which way. What we really did, more or less, was to drop comprehensive code reform for now and boil out some of the really good provisions and add some concepts that the president and the attorney general wanted to have. We've got a good solid piece of core anticrime legislation.

Sentencing reform is one of the most important components. Our proposal would provide for a sentencing commission to set out guidelines. Judges could sentence people outside the guidelines; if they run on the low side, the government could appeal, and, of course, the defendant could appeal if they run on the high side. We hope this is going to reduce the disparity in sentencing. There's a good chance that sentencing reform will move. There is a lot of support in the House. Peter Rodino, chairman of the Judiciary Committee, has indicated that he is prepared to move a sentencing bill.

We hope that bail reform will be another component passed by both houses. This reform would authorize a judge to take into account the defendant's danger or threat to the community. If a person is regarded as dangerous, that person could be held in jail pending trial. The proposal would also reverse the presumption in favor of postconviction bail. It would establish a presumption that there would be no bail at that time unless there were good reasons to have it.

Is the administration supporting the development of a separate commission—a distinctly new commission for sentencing guideline development?

The bill does provide for a sentencing commission. The function of the commission will be to set sentencing guidelines and to monitor the opera-

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tion of the new sentencing system. It is contemplated that the work of the commission will be largely completed within six years' time, though the commission will not go completely out of existence. After a period of six years, all of the members of the commission except the chairman will go from full-time to part-time status.

What about the paroling authority?

Parole would be abolished under our bill. In a sense, this is a truth-in-sentencing bill. You see newspaper headlines in which a judge sentences a bank robber to twenty years. The public says, "Twenty years—that looks like a good stiff sentence," and then the bank robber is out in six or seven. Under these proposals, defendants convicted will serve the sentences to which they are sentenced by judges without second-guessing by the Parole Commission. There will be truth in sentencing. The judge who has seen the evidence at trial is, after all, in the best position to determine what the sentence should be.

Our prisons and jails at both the state and federal levels are rapidly becoming overcrowded, and at the same time, serious crime is being more vigorously prosecuted. What do we do about this apparent dilemma?

I don't think there is one single answer to this large problem. When the Reagan administration came into office, the federal prison system was about 10 percent under capacity and now we are about 27 percent over capacity. So we see the crunch right in the federal prison system, and many of the state prison systems are much worse off.

There are a number of answers; we are trying to get them all under way. One is to build more federal prisons and we are doing that. There is money in our budget for that. For instance, a new high-rise metropolitan corrections facility will be built in Los Angeles, and we are building prisons elsewhere around the country.

Second, we've got a program under way to obtain surplus properties from the military and elsewhere and not only use them for federal prisons and facilities but make them available to states. In many cases, the states can get these properties with buildings already on them. We are supporting a bill that would allow properties to be turned over to the states at no cost.

Third, we're reviewing properties that become available as a result of school closings and the like around the country. The school population is going down; many private schools are unable to continue. Some of those school facilities make very good minimum- or medium-security prisons.

We've also got to do a better job with classification of inmates. We must view prison cells as a finite resource and be sure we use them for the more violent people in our society. But at the same time, I should note that we believe very firmly that certain "white-collar" criminals, such as hard-core price-fixers, those convicted of public corruption, and the like, ought to spend some time in prison. These are serious crimes that in our view deserve some prison time.

Recently the president appointed a federal circuit judge and a retired Supreme Court justice to two commissions, one relating to organized crime and the other to Central America. Were these unique opportunities or will the president make similar appointments in the future?

That's hard to say. I know of no other commissions right now on which we are considering asking members of the judiciary to serve. But I don't know that I can say that these two were unique either. It will depend on where the president thinks he can get the best talent to serve on these commissions.

Are there any restrictions on or problems with such appointments?

There are some things one has to think about. For example, I assume that a judge wouldn't want to serve on a commission in which he or she may be considering or taking positions on issues that might come before him or her as a judge. There might also be problems if a judge were required to spend an undue

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mitment to human values has failed to perform its mission."

Another area in which law schools are remiss is in encouraging students to ask hard questions about the validity of the methods used in our system of justice. "We who are schooled in the adversary process should not resist submitting the system itself to adversary examination. Indeed, we should lead the way," the Chief Justice declared.

Law schools should also be inculcating in students an understanding of the need to organize and regulate the profession. If the profession, together with the courts, does not perform such self-regulation, he cautioned, the time may come when regulation will be imposed by legislative action.

The Center for Law Studies, which began in 1968 as a summer program to study law abroad, in 1969 became the first year-round center for American, comparative, and international law studies in England by American students. Second-year Notre Dame law students in London for the program not only enroll in certain traditional American law courses but also benefit from English law courses taken with English students under noted British legal scholars and professors. Credits earned in the London classes may be transferred to the Notre Dame Law School.

The events at which Chief Justice Burger spoke marked the opening of the center in its new quarters at 7 Albemarle Street, London. A long-term lease for the property was made possible by a grant from the estate of Dagmar Concannon, a prominent Chicago lawyer who died in 1953. ■

NOTEWORTHY

Health insurance. Government employees will have an opportunity to switch health insurance plans during the next "open season," to be held from November 14 through December 9. Thousands of employees are expected to do precisely that—switch—because average premiums will be 19 percent higher than they are now when new contracts take effect in January, and many employees will abandon higher-priced plans for more economical ones. The average increase for 1983 premiums was 24 percent, but because of switchovers, the average premium actually paid this year by federal workers and retirees was 4 percent higher than the previous year's.

Brochures with descriptive materials and comparisons of the various major health plans will soon be distributed to employees.

* * *

Prison increase rate. According to prison population statistics released recently by the Bureau of Justice Statistics (BJS), the number of federal offenders imprisoned during the first quarter of 1983 was 6.3 percent higher than the number in the corresponding period of 1982. This growth rate is more than double the increase in state prisoners nationally.

At the end of the first 1983 quarter, there were 425,678 prisoners in both the state and federal systems. At the close of the first quarter of 1982, 381,947 inmates were tallied.

Nationwide, 175 persons were incarcerated for every 100,000 of the general population. At year's end 1982, the corresponding figure was 170 per 100,000 population.

* * *

Reasons for prison overcrowding. Extrajudicial factors account in large part for prison overcrowding, another BJS report shows. One of the reasons the prison population has been increasing is that many state legislatures have passed laws limiting the role of courts and parole boards in sentencing. Forty-three states have enacted mandatory sentencing statutes, and since 1976, nine states have rescinded parole boards' authority to grant early release to prisoners.

* * *

Executive clemency. On May 5, 1983, President Reagan approved a revision of the rules governing petitions for pardon and other forms of executive clemency, the first revision of these rules since 1962. The new rules simplify and update the clemency procedures, authorize the attorney general to delegate responsibility in clemency matters, and lengthen pardon applicants' waiting period for eligibility to a minimum of five years, with a minimum of seven years required for more serious crimes. Further, there is an increase in the categories of crimes requiring the longer waiting period for eligibility. Finally, the new rules broaden the discretionary authority to release clemency records in the public interest.

Specific questions regarding these rules should be directed to David C. Stephenson, Acting Pardon Attorney, U.S. Department of Justice, Washington, D.C. 20830. ■

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amount of time away from the court on commission work. So I think one has to look at what the commission is going to do and what the particular judge's activities are.

There may, in some situations, also be some constitutional questions which must be considered. We would not ask a judge to serve on a commission that exercised executive branch powers. The two commissions that you've mentioned are essentially advisory in nature, and so we saw no constitutional concerns with judges serving on those commissions.

What major problems do you believe face the federal judiciary?

Certainly I would cite the caseload problem—just about all the Supreme Court justices and others have talked about this. The Chief Justice has proposed creation of an intermediate circuit court of appeals termed the Intercircuit Tribunal as a response to the Supreme Court's overload. Something has to be done about the burdens imposed by the litigation explosion not only in the Supreme Court but in the district and circuit courts as well.

There are several specific things that we can do. One is to create more judges. The administration is in favor of the new judgeships that the Judicial Conference has recommended. We support enactment of an omnibus judgeship bill now.

Next, we have supported a number of legislative changes or recommendations to address the caseload problem. We would eliminate diversity jurisdiction; we would eliminate the Supreme Court's mandatory jurisdiction; we would eliminate the civil priorities that have been built up in a helter-skelter way; and we would reform the habeas corpus laws. There are, of course, other things that can be done to help the courts reduce the caseloads. I think that judicial restraint is perhaps the most important thing that the courts can do for themselves to limit the growth of litigation.

We also have a serious problem with the level of judicial salaries. One of the major problems facing the judiciary will be retaining for full careers those outstanding people who are willing to go on the bench, and not having them leave after only four or five years because they have to earn more money to support their families and educate their children. The attorney general and I have both said that we think judicial salaries ought to be raised and that pension benefits ought to be adjusted. These are some of the things that really ought to be fixed to preserve our wonderful judiciary. ■

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CONFERENCE, from page 5

randum detailing services provided. This memorandum will now be required only if counsel claims in excess of $750 for district court representation. Formerly, the threshold was $400. However, counsel claiming less than $750 in a district court, or counsel claiming any amount in a court of appeals, may at the court's discretion still be required to submit such a memorandum to justify the compensation claimed. The Conference also adopted an amendment directing judges and magistrates, when setting compensation for attorneys providing representation under the act, to apply the compensation maximum for the offense originally charged, even if the case is disposed of at a lower level. In addition, the Conference approved adding language to the guidelines to encourage judicial officers who reduce CJA compensation vouchers to notify appointed counsel and provide an explanation for the reduction.

- Noted an Executive Committee action approving a resolution favoring an amendment to the Criminal Justice Act that would authorize the Judicial Conference to establish and modify all dollar limitations and compensation maximums under the act.
- Approved and authorized transmission to Congress of a proposal to amend the Criminal Justice Act to permit judges and magistrates to give retroactive approval, in certain circumstances, of claims for investigative, expert, and other services.
- Adopted a change in the juror qualification questionnaire to provide for Hispanics' self-identification on the form. Accordingly, the form has been redesigned so that Hispanics may identify themselves in subcategories within the larger categories of the white and black races.
- Approved and authorized transmission to Congress of the Conference's opposition to a provision in H.R. 50 that would prohibit district courts from delegating to U.S. magistrates the function of holding evidentiary hearings in habeas corpus matters.
- Voiced strong opposition to H.R. 46, which would remove the jurisdiction of any Article III court "to modify, directly or indirectly, any order of a court of a state if such order is, will be, or was, subject to review by the highest court of such state."
- Agreed to oppose enactment of H.R. 3125, which would introduce "judge-shopping" by providing for the reassignment of certain cases to another judicial officer if all parties of one side of a civil or criminal case to be tried in a district or bankruptcy court file an application requesting such reassignment.
- Endorsed the provision in S. 829 that would make it a crime to threaten or injure a family member of a U.S. judge in connection with the judge's official activity, and reaffirmed support for legislation that would make it a crime to intimidate or threaten bodily harm to U.S. court officers and employees as a result of their performance of their duties. ■

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Justice Rehnquist Emphasizes Importance Of Oral Argument

Supreme Court Justice William H. Rehnquist recently gave some significant advice to attorneys contemplating oral argument before appellate tribunals, and particularly before the Supreme Court. Many litigators, the justice believes, fail to appreciate the singular values inherent in high-quality oral argument, and these individuals mistakenly approach the two instruments of appellate advocacy, the brief and the oral argument, "as the functional equivalent of one another." Many counsel, the justice contends, view an oral argument as no more than a "brief with gestures."

The intangible values of oral argument, in the view of Justice Rehnquist, are several. Oral argument provides an opportunity for direct, intimate interchange between court and counsel. "[T]he sense of immediacy and involvement—the three-dimensional experience—one gains from such a proceeding is especially important to the judges." In addition,

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Role of Budget Committee in Funding Process Detailed by Chief Judge Charles Clark

Judge Charles Clark was appointed to the United States Court of Appeals for the Fifth Circuit in October 1969 and became chief judge on October 1, 1981, when that court was reorganized and split into the new Fifth and the new Eleventh Circuits. As chief judge, he was appointed a member of the Judicial Conference of the United States in 1981. For the past three years, Chief Judge Clark has been chairman of the Judicial Conference Committee on the Budget; he has also served on the Advisory Committee on Appellate Rules since 1979.

Recently, The Third Branch *met with Chief Judge Clark to discuss both the reorganization and the operating procedures of the new Fifth Circuit. He also provided some insight into the critical role and functioning of the Budget Committee, describing the steps and considerations that precede the preparation of annual funding requests.*

Chief Judge Clark attended Millsaps College and Tulane University and received his LL.B. from the University of Mississippi.

Chief Judge Charles Clark

On October 1, 1981, the Fifth Circuit was officially divided. As the first chief judge of the new Fifth Circuit, what were your main concerns and problems as you prepared for the change?

We had to separate cases and judges geographically and create an entire, new court support system in Atlanta that could function independently from the day of division, and we had to do this in a way that would cause the least confusion and inconvenience to the district courts and to the bar. At the same time, we had to keep operations in New Orleans as near normal as possible. Everybody had to work a little harder, and they did. The excellence of our staffs was never more apparent. Judge Godbold in his recently published interview with *The Third Branch* [June 1983] described the administrative details of how this

See CLARK, page 4

FJC to Sponsor 1984 Summer Seminar

The Federal Judicial Center will present a one-week experimental seminar on "Problems Judges Confront in the Litigation of Economic Issues," from July 9 to 13, 1984, on the campus of the University of Wisconsin Law School in Madison.

The seminar, much of which will be offered in small-group discussion sessions, will treat such matters as expert witnesses, taking judicial notice, and when questions should be presented to the jury and when they should be decided by the judge. Understanding statistics, and problems of statistical proof, will receive special attention at the seminar. Although economic theory and concepts will be an important part of the discussions, the program is not a "law and economics" seminar in the conventional sense.

Judges interested in attending should write Kenneth C. Crawford, Director of the Division of Continuing Education and Training, Federal Judicial Center, 1520 H Street, N.W., Washington, D.C. 20005. Letters should be received by January 30. Although the program is designed primarily for district judges, appellate judges may also apply.

Pursuant to Board policy, this seminar will be the only special program for judges sponsored by the Center in the 1984 summer.

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FJC Releases New Study of CAMP Program ...... p. 5

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oral argument is one of only two collegial events in a case (the other being the conference discussion of a case), and by responding to judges' concerns at the only occasion where counsel may be present, counsel can significantly aid both judges and clients.

Justice Rehnquist presented his views on several aspects of oral advocacy in two different speeches this fall. The first speech addressed the Conference on Supreme Court Advocacy on October 17 in Washington, D.C. The second, more wide-ranging speech was the Brainerd Currie Lecture given at Mercer University School of Law in Atlanta, Georgia, on October 20.

In the Atlanta speech, Justice Rehnquist questioned "the wisdom of dispensing with oral argument to the extent that we now seem to be doing in this country." He drew comparisons among the high degree of respect held for oral advocacy in the early days of the United States, the continuing importance today of oral presentations by counsel before the English courts of appeals, and the current trend in our own system toward a diminishing regard for oral advocacy. During its 1824 term, for example, the Supreme Court devoted twenty hours to oral argument in *Gibbons v. Ogden*. In the English appellate courts, he further noted, oral arguments "are a complete substitute for briefs" and, instead of written opinions, judges usually deliver oral opinions at the close of argument of each case.

Justice Rehnquist stated that dwindling judicial time and the pressures of enormous caseloads have led to restrictions on oral argument. He noted a 1975 Federal Judicial Center survey (Goldman, *Attitudes of United States Judges Toward Limitation of Oral Argument and Opinion-Writing in the United States Courts of Appeals*) showing that the vast majority of federal judges take a dim view of oral argument in many cases, and he questioned whether one reason for these judges' negative attitude about oral advocacy might be the quality of oral advocacy to which they are subjected. While admitting that the Supreme Court, because of its control over its own docket, is able to allow oral argument to a greater degree than is possible in a court to which appeal is a matter of right, the justice questioned whether restrictions on oral argument are the best response to these difficult conditions. Justice Rehnquist stated that he firmly believes "a poorly argued case, whether in the briefs or in oral argument, is apt to be a poorly decided case."

In both speeches, Justice Rehnquist offered his audience a short course on desirable goals for oral advocates. He explained that no uniform rules on the subject can be proffered, because appellate courts and the judges who sit on them differ greatly. That they differ and that they are not an "abstract, platonic embodiment of appellate judges as a class," but rather are "three, five, seven, or nine flesh and blood men and women," ought to be the starting point for oral advocates' preparation. It is thus important for counsel to find out prior to a court appearance what a particular court expects from an oral argument.

Further, counsel should understand how the physical attributes of a courtroom affect oral presentation. In the Supreme Court, the justice pointed out, where "the acoustics are terrible," declamation in a grand manner is not advisable because justices and counsel must all use a microphone in the Court chamber. Although there may be a large "audience listening to you, your message is directed to the nine individuals on the bench, and the more you keep your tone conversational, rather than hortatory, the better your case will fare."

He also urged advocates to come to terms with the significant differences between the functions of briefs and oral arguments. "[U]nder no circumstances should you simply recite, summarize, or selectively read from your brief and consider it a satisfactory oral argument." Neither should the oral presentation be a dry recitation of law. Rather, like the preview of a movie that consists of "dramatic or interesting scenes that are apt to catch the interest of the viewer and make him want to see the entire movie," oral argument should have

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CALENDAR

- Dec. 1-2 Judicial Conference Subcommittee on Federal/State Court Relations
- Dec. 1-2 Judicial Conference Committee on Administration of the Magistrates System
- Dec. 12-13 Judicial Conference Subcommittee on Judicial Improvements
- Dec. 12-13 Judicial Conference Subcommittee on Judicial Statistics
- Dec. 15 Judicial Conference Advisory Committee on Appellate Rules
- Dec. 15-16 Judicial Conference Subcommittee on Supporting Personnel
- Jan. 5-6, 1984 Judicial Conference Committee on Administration of the Bankruptcy System
- Jan. 26-27, 1984 Judicial Conference Implementation Committee on Admission of Attorneys to Federal Practice

THE THIRD BRANCH
BULLETIN OF THE FEDERAL COURTS

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

Chief Justice Warren E. Burger

Holiday Message from Chief Justice Warren E. Burger

This holiday season affords me a welcome opportunity to express appreciation to judges, their staffs, and support personnel for an impressive year of accomplishments in the Judicial Branch. But in the year ahead we will have to press even more vigorously to achieve needed improvements in the administration of justice.

As always, senior judges have performed nobly. Even in the face of the risk that they would be taxed for the privilege of volunteer work, they overwhelmingly indicated they would pay the price. Happily, we were able to persuade Congress to postpone for two years application of the amendments to the Social Security Act. I hope a permanent solution will be found.

Federal judges throughout the country deserve commendation. Filings in district courts and courts of appeals continue to grow dramatically. Legislative action is long overdue. But judges and supporting personnel are responding admirably to a difficult situation.

The Judicial Conference, the Administrative Office, and the Department of Justice have made significant progress this year in the joint effort to provide adequate, dependable security protection in all court facilities. Planning committees now are functioning in most judicial districts. Cooperation between the Marshals Service and the Administrative Office has been improved.

The Judicial Branch also has manifested a spirit of cooperation with the President's request for cost savings. The Budget Committee of the Judicial Conference has worked diligently with Congress to curb spending wherever possible. The Administrative Office and the Federal Judicial Center have been leaders in reducing expenditures by restructuring programs. Circuit Chief Charles Clark, chairman of the Budget Committee, has noted that our efforts to operate the Judicial Branch in a responsible fiscal manner, and to justify every increase we request, have convinced Congress of the validity of our funding needs.

History makes it clear, as Justice Jackson once noted, that our government works best when its three branches function cooperatively in areas of common concern. This is particularly true in the Judicial Branch, where our jurisdiction, our personnel, and our funding are the province of the Executive and Legislative Branches. This year end finds unresolved many pressing issues in the administration of justice.

To each of you I say "Thank you."

Mrs. Burger joins me in sending our best wishes for a Merry Christmas and all good things in the New Year.

Sincerely,

Warren E. Burger

Senior Judges Contribute Substantially to Judicial System

The application of Social Security taxes to the salaries of senior judges who continue to take judicial assignments—which under section 101(c) of the Social Security Amendments would have become effective on January 1, 1984—has been deferred for two years by the enactment of P.L. 98-118. Because of the economic disincentive created by section 101(c) for senior judges to continue to render services to the judicial system after December 31, 1983, the Administrative Office of the United States Courts anticipated a serious reduction in the ranks of these judges by year's end 1983. "The sudden loss of these services," according to the Judicial Conference Committee on the Judicial Branch, "would [have] be[en] catastrophic."

Currently, well over 200 senior judges in the federal system gratuitously perform judicial tasks equivalent to the work of approximately 70 judges in active service. The benefits that these judges' services provide the judicial system are substantial. Without additional recompense other than their retirement incomes, senior judges hear appeals in the circuit courts and conduct trials at the district court level, in addition to performing numerous other vital functions. Relevant statistics for the twelve-month period ending June 30, 1983, highlight their contributions. At the appellate level, senior judges participated in 5,089 cases disposed of after oral argument and 1,286 cases disposed of after submission of the briefs. Senior judges, at the trial level, disposed of 21,049 civil actions and cases involving 2,662 criminal defendants; they also conducted 2,259 civil and criminal trials.

As Chief Justice Warren E. Burger expressed a few years ago, "the value of the continuing services performed by these judges who have no obligation to continue work . . . can be measured in the millions of dollars each year." ■

REHNQUIST, from page 2

"flesh and blood . . . insert[ed] into it."

Justice Rehnquist concluded both presentations by noting that oral advocacy has a special importance in the Supreme Court. "For unlike other appellate courts, a grant of certiorari by the Supreme Court to review a decision of a lower court suggests that the case at issue is a genuinely doubtful one. The winning party in the court below has the benefit of a decision by that court on exactly the same issues that will be decided by the Supreme Court. Nonetheless, the most common reason Members of our Court vote to grant certiorari is that they doubt the correctness of the decision of the lower court." Advocates on either side have an ideal opportunity in oral argument to convince the justices of the merits of their position. In the justice's opinion, counsel should "[s]trike while the iron is hot!" ■

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was accomplished. I will add only that it was a cooperative venture involving every judge and every person associated with the old court. It also required a great deal of judicial good will on both sides of the split to avoid "quarreling over the estate." That the division was entirely amicable I think reflects well on both courts.

In retrospect, was there anything that you might have done differently?

Nothing of any major consequence. We could have been a little more forward-looking on some of the matters Judge Godbold mentioned. Problems that developed in several areas might have been avoided if we could have stopped the processes of the court. But the millstones had to keep grinding. We did try hard to make it a smooth transition, and much of the credit is due to the quality of the staff that supported us and the bar that worked with us.

Do you delegate to other judges some of the administrative work that necessarily comes to the chief judge of a big circuit?

Yes. The delegation works like this: Every major court support unit and court function is directly supervised by a judge-proctor who assumes complete responsibility for management. I am not involved unless that proctor calls on me. Having a single person rather than a committee in charge promotes efficiency. Lydia Comberrel, our circuit executive, and her staff take a big share of the load. She has an excellent working relationship with every circuit and district judge and clerk, and with the Administrative Office and the Federal Judicial Center. This enables me to delegate a great many administrative details to her office. The result is that I can devote over 70 percent of my time to judicial duties and thus carry a full, regular active judge share when we are short of judge power, as we are now.

There are now fourteen circuit judgeships in the Fifth Circuit. It is still a large circuit with a heavy caseload. How do you cope with this? Is your judge power now ample?

Let me answer the second part of your question first. Our judge power

See CLARK, page 5

PERSONNEL

Nominations

Thomas G. Hull, U.S. District Judge, E.D. Tenn., Oct. 24
Lenore C. Nesbitt, U.S. District Judge, S.D. Fla., Oct. 31
W. Eugene Davis, U.S. Circuit Judge, 5th Cir., Nov. 1
Stanley S. Harris, U.S. District Judge, D.D.C., Nov. 1
G. Kendall Sharp, U.S. District Judge, M.D. Fla. Nov. 1
George E. Woods, U.S. District Judge, E.D. Mich., Nov. 1
Jane A. Restani, U.S. Court of International Trade Judge, Nov. 3

Confirmations

Thomas J. Curran, U.S. District Judge, E.D. Wis., Nov. 4
W. Eugene Davis, U.S. Circuit Judge, 5th Cir., Nov. 15

Appointments

Kenneth W. Starr, U.S. Circuit Judge, D.C. Cir., Oct. 11
Martin L. C. Feldman, U.S. District Judge, E.D. La., Oct. 12
John F. Keenan, U.S. District Judge, S.D.N.Y., Oct. 21
C. Roger Vinson, U.S. District Judge, N.D. Fla., Nov. 4
Maryanne T. Barry, U.S. District Judge, D.N.J., Nov. 10

Senior Status

Dan M. Russell, Jr., U.S. District Judge, S.D. Miss., Oct. 25

Death

Allen Hannay, U.S. District Judge, S.D. Tex., Oct. 22

Correction

The appointment date for U.S. Circuit Judge Pasco M. Bowman was incorrectly noted in the October issue. Judge Bowman was appointed to the Eighth Circuit on August 1, 1983.

Australian Justice Meets with U.S. Judges and Lawyers on Federal Rules of Evidence

Professor Stephen A. Saltzburg of the University of Virginia School of Law, U.S. District Court Judge Charles W. Joiner (E.D. Mich.), and Justice Michael Kirby of Sydney, N.S.W., Australia (l. to r.), at conference on Federal Rules of Evidence.

Early in October, at the request of Justice Michael Kirby, chairman of the Law Reform Commission of Australia, the Federal Judicial Center hosted a small conference of federal judges and lawyers to review the U.S. Federal Rules of Evidence and a recent analysis of the rules sponsored by the American Bar Association.

The Law Reform Commission has been asked by the Australian federal attorney general to study the desirability of a uniform federal law of evidence for Australia, and Justice Kirby sought the meeting to assist with this effort. He said that the commission turned naturally to the federal evidence rules of the United States "to discuss their applicability and the lessons from them for us in Australia."

Of particular current interest to practitioners in Australia are such matters as handling the admissibility of computer-generated evidence and computer records, the requirement in some Australian states that the defense give advance notice to the prosecution of intention to raise a defense of alibi during criminal pretrial disclosure, and what advantages and disadvantages there are to having rules of evidence incorporated in a uniform code.

The Center will provide Justice Kirby with an edited videotape of the conference so that he can share the conference discussions with Australian judges, barristers and solicitors, and members of Parliament who may be involved in the drafting as well as the use of the rules. ■

Second Circuit's CAMP Program Reevaluated

The Center has just released *A Reevaluation of the Civil Appeals Management Plan,* a research report by Anthony Partridge and Allan Lind.

This report presents the results of the Center's second evaluation of the Civil Appeals Management Plan (CAMP), which was initiated in the Second Circuit in 1974. While the results of the first evaluation, conducted by Jerry Goldman, were inconclusive, the results of this second evaluation are strikingly more favorable.

Under the plan, attorneys in civil appeals are required to confer with a lawyer on the staff of the court of appeals in an effort to (1) encourage settlement or withdrawal of appeals, (2) improve the quality of briefs and arguments in appeals that do not settle, and (3) resolve procedural problems. Appeals are also made subject to scheduling orders that set deadlines for the various steps required to make an appeal ready for argument.

In the second experiment, which began in 1978, the CAMP treatment was withheld from approximately one-third of the appeals that would otherwise have been subject to it. The experiment included a total of 470 appeals, of which 318 were assigned to CAMP and 152 were assigned to the control group.

The evaluation revealed that CAMP does produce the benefits

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is not sufficient. The pending omnibus legislation includes two additional circuit judges and seven district judges for the Fifth Circuit. This will bring our authorized active circuit judge strength to sixteen and active district judge strength to sixty-one. Having been part of a court of fifteen that was increased to twenty-six, our judges learned firsthand that diminishing returns could result from continually adding judges to an appellate court. The judges must function as a single court and create a single, consistent body of law. As the number of judges increases, this becomes increasingly difficult. However, we were also aware of the problems that come from letting judge power fall behind caseload. Delay is indeed the deadliest form of denial.

To go back to the first part of your question, we are still the second largest federal appellate court in number of judges and in caseload. Our workload per active judge is among the highest in the nation. We cope with that caseload by constant pressure on judges and staff to keep the pace. We publish internal statistics on the performance of each judge to maximize peer pressure. Our case-flow system is designed so that cases get on a judge's desk for evaluation and decision as soon as briefing is complete. This "screening" process results in decision without oral argument in over half of our cases.

In the year ending June 30, active judges decided 851 cases in this way. All of these cases receive the separate study of three judges, who must be unanimous as to summary disposition and as to opinion. Any doubt about summary treatment is resolved in favor of moving the case to the oral argument track. Given the broad geographic area we serve, this summary process is much preferable to a system that would require travel to an oral argument site by lawyers and judges in every case. The bar's acceptance of this procedure is indicated by the fact that the number of cases in

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which both parties request decision without argument increases every year.

A critical element in our system is our clerk's office. With what I hope you will accept as pardonable pride, I say that Gilbert Ganucheau is the finest clerk of court in the nation. The bench and bar of the Fifth Circuit unanimously agree. It is extremely rare for any of our judges to be involved with the regular flow of problems that inevitably arise from dealing with the bar on filings and procedures. The creation of geographic work units maximizes understanding and efficiency in the staff and the bar. Furthermore, by giving the greatest possible help to practitioners—and by answering dumb questions as quickly and courteously as they do smart ones—the clerk's office staff avoids untold administrative and judicial problems that would otherwise plague judges. This superior level of help to the bar in getting briefs, motions, and pleadings filed in proper form and on time promotes efficiency in judicial disposition as well as good lawyering.

I must say, though, that the last eighteen months have been especially difficult ones for the court. The vacancy created by Judge Ainsworth's death in December 1981 has just now been filled. In addition, we lost the service of another active judge for five months last year because of illness. When the individual opinion output of each regular active judge on your court averages 127 fully briefed cases, as it did for the Fifth last year, you know it cannot be long sustained.

Do you have a rule or policy on publication of opinions in the Fifth Circuit?

Yes. Our policy is based on the premise that the publication of opinions or parts of opinions that have no precedential value (that merely decide a case on the basis of well-settled principles of law) imposes needless expense on the public and burdens on the court and bar. However, opinions that may in any way interest persons in addition to the parties to a case should be published.

An opinion will be published if it establishes, alters, or modifies a rule of law; applies an established rule of law to significantly different facts; explains, criticizes, or reviews the law; creates or resolves a conflict of authority; or is of significant public interest. An opinion normally will be published if it contains a concurring or dissenting opinion or if it reverses the decision below or affirms it upon different grounds from the grounds used by the district judge.

"Delay is indeed the deadliest form of denial."
—Chief Judge Charles Clark

Our present rule also contains a presumption in favor of publication. Unpublished opinions are precedent. However, the rule urges that citation be limited to establishing the law of the case, res judicata, collateral estoppel, or related facts. An attorney citing an unpublished opinion must attach a copy of it to each copy of the brief.

In the year ending September 30, 1983, we published 55 percent of our opinions. The rest were distributed in manuscript form only to the parties and to the district court involved. The 55 percent still created more than 7,800 pages in the *Federal Reporter*. We are now considering ways to further reduce the volume of material we publish. It may be of interest to your readers to know that we have experienced no difficulty to date because of our policy allowing citation of unpublished opinions.

Who bears the responsibility for raising the publication/nonpublication question?

The primary responsibility falls on the writing judge. The publication proctor and I have the job of sensitizing judges, particularly to our partial publication policy. One of the problems with fine-tuning our publication policy is that we are just inundated

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NOTEWORTHY

Bankruptcies. Although "the dramatic increases in bankruptcy filings from 1979 through 1981 are continuing to level off," according to the *1983 Annual Report of the Director* of the AO, the number of bankruptcy estates filed in 1983 rose 1.5 percent over the preceding year, totaling 535,597 estates. Thus, while the number of terminations increased to a record high of 449,029 (8.8 percent higher than in 1982), the pending estate workload jumped from 725,622 estates in 1982 to 812,190 estates in 1983.

Business bankruptcies jumped significantly in the recent reporting period, rising from 77,503 estates in 1982 to 95,439 estates in 1983. Business bankruptcies were 17.8 percent of the total estate filings for the year.

* * *

Judicial workload. The Administrative Office has recently published its annual statistical compilation on the workload of federal judges. The report, titled *Federal Court Management Statistics 1983*, provides tables showing workload data per judgeship for each U.S. district court and, per panel, for each U.S. court of appeals, for the twelve months ending June 30, 1983. Historical data from 1978 to 1983 are included in the tables. National profiles are also provided.

* * *

Publication 106. The Probation Division of the AO has published *The Supervision Process: Publication 106*, a monograph for probation officers detailing official policies on supervision of offenders. In addition to listing the critical steps in supervising a case, the monograph also provides guidance on case file management. One section deals with special situations, such as community service orders, offenders' employment problems, alcohol- and drug-abusing offenders, and white-collar offenders. ■

Center Releases Revised Sentencing Options Report and Updated Study of Court-Annexed Arbitration

A new edition of *The Sentencing Options of Federal District Judges* is available for distribution.

This work, by Anthony Partridge, Alan J. Chaset, and William B. Eldridge of the FJC staff, was first published in 1979 and last revised in May 1982. The new edition is current to June 15, 1983. The revisions include a new section on restitution orders as well as a number of modifications to reflect new case law and changes in Bureau of Prisons and Parole Commission regulations.

Copies of the work have been distributed to district judges, magistrates, probation officers, and public and community defenders, as well as to other persons in the judicial branch who have requested previous editions. Copies have also been provided to the Department of Justice for the use of government attorneys. Others who wish to receive a copy should write to the Center's Information Services Office, 1520 H Street, N.W., Washington, D.C. 20005. Please enclose a self-addressed, gummed label, preferably franked.

* * *

The Federal Judicial Center has recently published a revised edition of *Evaluation of Court-Annexed Arbitration in Three Federal District Courts,* to include a large number of cases that were still pending at the time the study was first published. The original report, by E. Allan Lind and John E. Shapard, was published in March 1981 and provided an analysis of experimental arbitration programs in the Northern District of California, the District of Connecticut, and the Eastern District of Pennsylvania for the programs' first two and one-half years. That analysis has since been updated. The new volume includes both the original report and the updated material.

Along with the results already documented (see *The Third Branch,* July 1981), the new data collected and analyzed by the Center clearly demonstrate that court-annexed arbitration substantially reduces the proportion of cases that ultimately go to trial. The incidence of trial among cases referred to arbitration in two of the courts was reduced by 50 percent. A more dramatic finding, drawn from the same data, is that fewer than 2 percent—only 18 of 943—of the cases referred to arbitration in the Eastern District of Pennsylvania in 1979 ever reached trial de novo.

Commenting on these data in a recent article for the Symposium on Reducing Court Costs and Delay ("Court-Annexed Arbitration," 16 *U. Mich. J.L. Ref.* 537 (1983)), FJC Director A. Leo Levin noted that while court-annexed arbitration "[a]lone . . . cannot dissolve the backlogs," the analysis of the data obtained from this federal experiment reveals a potential savings of approximately forty trials a year. That savings represents, he argued, "more than the total number of trials that any one judge can be expected to try over the course of an entire year," and may mean "the difference between ever-increasing backlogs and a court remaining current."

Under the rules adopted in the pilot courts, cases eligible for arbitration are required to undergo a hearing before a panel of one of three experienced attorneys within a specified period after filing. Any party to the case may reject the arbitration award and demand a trial de novo. As part of the study, the Center monitored all cases eligible for the programs, surveyed counsel and arbitrators, and interviewed court personnel involved in administering the programs.

To receive a copy of the revised report, write to the Center's Information Services Office at the above address.

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with things to read—every moment that I had when traveling here to Washington was spent reading. It's oppressive at times. Even with the split of the circuits, the amount of reading required is still more than a mule can do. The problem is, if you let it go, not only is it harder to do later, but people are suffering. Somebody is losing that case every day it's not decided.

What criteria do you use when deciding to hear cases en banc?

The statute permits a case to be heard *en banc* only if a majority of the active judges vote to do so. Each judge necessarily votes on the basis of a personal conviction that the case satisfies the statutory requirement that it be of exceptional importance, or that consideration of it is necessary to resolve a conflict in the circuit's precedents. The circuit does not have an anti-*en banc* policy, but we try to limit rehearings *en banc* to cases that genuinely meet the statutory standard. Our conservative, but not restrictive, policy has resulted in our rehearing fifteen to twenty cases *en banc* each year.

An opinion of the Eleventh Circuit, released shortly after the split of the circuits, announced that established precedents of the old Fifth would be followed. Do you foresee reasons why the Eleventh Circuit might, in some areas of the law, go en banc **and change some of these precedents?**

That decision is, of course, entirely their prerogative. The intent of the legislation that split the circuits was that we would wind up with two circuits that were entirely untied, except by what the Supreme Court and the statutes of the United States tell both of us we've got to do. I think there is going to be some drift in opinions in the circuits, but I doubt that there will be drift on basic issues. All of the judges of our court, from the most "conservative" to the most "liberal"—those at each end of the spectrum of differences of opinion on the major social issues involved in some of our decisions—were as convinced as those at the center that there was going to be no change in the philosophy of the courts. I believe that the experience of the last two years has proved that, and I expect

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United States Court of Appeals for the Fifth Circuit, New Orleans

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that the next twenty-five will reinforce that belief.

As chairman of the Budget Committee, how do you go about the task of seeing that the judicial branch has ample funds to function effectively?

To those who think of budgeting in terms of fixing priorities and dividing available resources between needs, the name "Budget Committee" is somewhat of a misnomer. We do not fix fiscal restraints on any program or activity of the judiciary. Courts across the country and their councils decide when to request new bankruptcy judges, magistrates, legal assistants, court reporters, staffing for senior judges, and space and other facilities. The various [Judicial] Conference committees and program divisions of the Administrative Office that deal with these and other personnel and material needs also set nationwide levels of activity they will recommend to the Conference.

Most of these levels are based on work measurement studies approved by the Conference. Our committee staff then prices those requests and programs and backs them with the justifications that we and the program divisions develop. The Budget Committee reviews the fiscal compilations and justifications and presents the results to the Conference. If the Conference approves, the resulting budget document is presented to the appropriations subcommittees of the House and Senate. Representatives of the Budget Committee appear before the subcommittees to answer questions and supply any additional information requested.

While the legislative branch does not act to our satisfaction in all ways, I believe that appropriations is one area in which everyone agrees Congress has done a most commendable job. The House and Senate appropriations subcommittees that consider the budget of the judiciary give meticulous but considerate attention to our requests and justifications. Even in these years of alarming budget deficits and mounting pressure for spending cutbacks, our requests have not been harmfully cut. At the same time, substantial reductions have been made in many executive branch budgets. I attribute this to competent work by subcommittee staff and the understanding and cooperation of subcommittee members. Obviously, too, our efforts to operate the judicial branch on a reasonable, responsible fiscal basis and to justify every increase we request have convinced Congress our requests deserve funding. They know we are completely candid and forthcoming. Maintaining this credibility with Congress is a major objective of the Budget Committee.

If a funding shortage develops in the execution of a budget, the Administrative Office consults with the Budget Committee on the method of dealing with it. This may take the form of requesting a supplemental appropriation or cutting back implementation of a program. In 1962, the Conference vested in the Budget Committee authority to "arrange and time" requests to Congress to fund budget items approved by the Conference should this become necessary to assure success in obtaining funds. One example of this timing function is the proposed expansion of the National Court Library System, which we agreed to implement over a period of five years. Another example is the plan for automation, which was phased over five years for fiscal purposes as well as for administrative and logistical reasons. The Budget Committee may also be called on to decide whether to request the Senate to restore any reductions the House makes in our budget requests. Budgets for the Supreme Court, the Court of Appeals for the Federal Circuit, the Court of International Trade, the Administrative Office, and the Federal Judicial Center are prepared and presented to Congress separately.

The budget for the entire judiciary has remained at approximately one-tenth of 1 percent of the total federal budget since 1977. We do not believe the courts can rely on this "staying even" or even on the relatively small size of our total expenditures to project future spending levels. The staggering budget deficits of recent years cannot long continue. If any drastic curtailment of federal spending should be ordained, the judicial branch would surely be required to retrench with the rest of the government.

The mechanics of preparing the budget document—a figure-filled book about one-inch thick—is the joint effort of the Administrative Office staffs that work with the various program committees of the Conference and the AO's very competent Financial Management Division. The

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THE SOURCE

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

Allen, Karen M., Nathan A. Schachtman, and David R. Wilson. "Federal Habeas Corpus and Its Reform: An Empirical Analysis." 13 *Rutgers Law Journal* 675 (1983).

Atiyah, P. S. "The Legacy of Holmes Through English Eyes." 63 *Boston University Law Review* 279 (1983).

Burbank, Stephen B. "Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power." 11 *Hofstra Law Review* 997 (1983).

Griswold, Erwin N. "The Explosive Growth of Law Through Legislation and the Need for Legislative Scholarship." 20 *Harvard Journal on Legislation* 267 (1983).

Hufstedler, Shirley M. "Is America Over-Lawyered?" 31 *Cleveland State Law Review* 371 (1983).

Manville, Daniel E., and John Boston. *Prisoners' Self-Help Litigation Manual* (2nd ed. Oceana 1983).

✓ Rehnquist, William B. Address to Conference on Supreme Court Advocacy, Washington, D.C., October 17, 1983.

✓ Rehnquist, William B. "Oral Advocacy: A Disappearing Art." Brainerd Currie Lecture, Mercer University School of Law, October 20, 1983.

✓ Seitz, Collins J. "State of the Circuit Address." Third Circuit Judicial Conference, October 4, 1983.

Symposium: Reducing Court Costs and Delay. Articles by Janofsky, Leonard S. "Reducing Court Costs and Delay: An Overview"; Meador, Daniel J. "An Appellate Court Dilemma and a Solution through Subject Matter Organization"; Erickson, William H. "Colorado's Answer to the Local Rules Problem"; Chapper, Joy A. "Oral Argument and Expediting Appeals: A Compatible Combination"; Weisberger, Joseph R. "Appellate Caseload: Meeting the Challenge in Rhode Island"; Levin, A. Leo. "Court-Annexed Arbitration"; and Connolly, Paul R. J. "The Organized Bar: A Catalyst for Court Reform." 16 *University of Michigan Journal of Law Reform* 467 (1983).

Symposium: White Collar Crime. Articles by Marcus, Paul. "White Collar Crime: A Legal Overview"; Holderman, James F. "Reconciling RICO's Conspiracy and 'Group' Enterprise Concepts with Traditional Conspiracy Doctrine"; Webb, Dan K., and Scott F. Turow. "RICO Forfeiture in Practice: A Prosecutorial Perspective"; Brickey, Kathleen F. "Conspiracy, Group Danger and the Corporate Defendant"; and Nagel, Ilene H., and Sheldon J. Plager. "RICO, Past and Future: Some Observations and Conclusions." 52 *Cincinnati Law Review* 456 (1983). ■

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detailed checking and supervision of the document are done by members of the Budget Committee at twice yearly meetings. We frequently consult with chairpersons or staffs of other committees about unusual requests and questionable justifications.

What do you feel are the major accomplishments under your three-year chairmanship?

We have built on the spirit of congressional trust and confidence developed by past committees, increased our involvement with other Conference committees, and developed an automated accounting system that can detail expenditures by court districts and circuits so each court unit can keep track of its expenditures and compare them with those of comparable courts. We have also launched a program to decentralize the control of expenditures. The annual budget allowance for furniture and furnishings is already being controlled and disbursed by court units.

What are your major concerns when you prepare the budget, especially when you are aware there are some areas where vital needs exist?

Because the Budget Committee is the first to sense overall and comparative reasonableness of the expenditures required for each program, we are uniquely able to spot programs whose costs are increasing more rapidly than the average. We look for these. We also concentrate on the justifications supplied for each increase sought. It is critical for us to fully understand the information we will present to the Conference and Congress.

Requests for personnel have the greatest impact on our budget. Most of these requests are based on projected caseloads and Conference-approved staffing formulae. Predicting caseloads, particularly several years into the future as the budgeting process requires, calls for an educated guess at best. We try to be doubly sure that all contingencies we can forecast are used in these projections. We also keep a constant eye on the staffing formulae so that if any of them appear to depart from actual experience, we can call this to the attention of the affected program division and the Conference.

How do you go about preparing the statement you file at the time you appear before the Senate and House appropriations committees, knowing that so much hinges on what requests you make and how you present these requests?

I try to see each part of the budget request from a congressional perspective and anticipate in the statement what the subcommittee will want to know. When program costs are large, I emphasize why the judicial need exists, as in the case of our new marshal-oriented security pro-

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gram, or point out what new legislation has required the increase, as in the case of the institution of pretrial services on a nationwide basis.

Do you have any suggestions on how the government's budget requests might be better processed to avoid a total halt to spending, as has happened at the end of the fiscal year on some occasions?

If your question relates to the two recent periods in which Congress has allowed government agencies to founder for lack of appropriations bills, I have no practical suggestions. We are a small part of the overall appropriations process. Not only is the judiciary's appropriation among the smallest made, it is also linked with Commerce, the State Department, Justice, and related agencies. Only Congress has the power to rearrange this. The Budget Committee has discussed whether a separate appropriation might be desirable. Our best judgment at this time is that we are better off with the knowledgeable and effective committees that now handle this budgeting group.

The present tension between the appropriations and budget committees of the Congress also indicates that we should stay put. If there were any way to get biennial appropriations with the right to adjust for uncontrollable increases, that might be a solution. Seeking this would, of course, require Conference authorization and congressional approval. I wish I had a good answer.

If your question relates to the spending freezes that have been imposed, better forecasting of needs is the ideal answer. When that fails, a timely request to Congress for reprogramming or a supplemental appropriation may be all that can forestall a freeze. Each of these steps takes time, and it is not always available. We cannot violate the Anti-Deficiency Act, which bars any overspending of appropriations. The Budget Committee is also seeking authority to consolidate appropriation categories to give us increased administrative flexibility to transfer funds within our budget. ■

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expected of it. The authors' best estimate is that CAMP results in settlement or withdrawal of about 10 percent of appeals that are eligible for CAMP, producing a reduction of approximately 8 percent in the total number of appeals—both civil and criminal—that are argued to the court. CAMP also reduces average disposition time. Most attorneys participating in the program regard it favorably; some of them find that it helps improve the quality of briefs and arguments and can be helpful in resolving procedural problems.

The primary costs of the program to the court are the salaries of staff counsel and related overhead. For litigants, there are the costs of having their lawyers attend CAMP conferences. Moreover, some attorneys complain of undue pressure to settle.

Although the true magnitude of CAMP's reduction of the argument rate is uncertain because of the limited sample of appeals studied, the authors conclude that the program is worth its costs.

Copies of the report will be distributed to all chief judges of the courts of appeals, appellate judges of the Second Circuit, conference attorneys in the courts of appeals, and circuit executives. Others who wish to receive a copy of this report should write to the Center's Information Services Office, 1520 H Street, N.W., Washington, D.C. 20005. Please enclose a self-addressed, gummed label, preferably franked. ■

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