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THE THIRD BRANCH

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Justice Stewart Eulogized Nationally

Justice Potter Stewart

Justice Potter Stewart, who served on the Supreme Court of the United States from 1958 until his retirement at the end of the term in 1981, died December 7th at the age of 70. He had been in ill health for the past several years.

Justice Stewart's home state was Ohio, and he had strong ties to that state. He replaced another justice from Ohio (Justice Burton), and when he was appointed by President Eisenhower he became the fifteenth justice to come to the Supreme Court from Ohio, either by birth or residence.

The Justice's father, James Garfield Stewart, was a member of the Supreme Court of Ohio and at one time was Mayor of Cincinnati. The Justice served as City Councilman in that city. His education was acquired in three countries—Switzerland, England, and the United States—and his law degree was earned at Yale Law School, where he graduated cum laude in 1941.

During World War II the Justice served in the U.S. Navy. He practiced law in New York and Cincinnati until he was appointed to the U.S. Court of

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Bicentennial Commission Adopts Policies

At its meeting in late November, the Commission on the Bicentennial of the U.S. Constitution adopted policies governing its recognition and support of bicentennial projects and adopted other regulations and policies governing its future activities.

On Dec. 5, Dr. Mark W. Cannon, the Commission's Staff Director, appeared before subcommittees of the U.S. House of Representatives to support amendments to the act that created the Commission. Among the amendments are provisions that would permit an increase in Commission personnel and raise the limits on private donations.

The Commission distributed its first newsletter, in which it reported on its own activities as well as those of other groups throughout the country.

For further information, contact the Commission on the Bicentennial of the U.S. Constitution at its new office, 734 Jackson Place, N.W., Washington, DC 20503, telephone (202) USA-1787.

Sentencing Commission Chairman to Form Advisory Committee

Judge Wilkins Sworn In as Chairman of U.S. Sentencing Commission

On Oct. 29, 1985, Judge William W. Wilkins, Jr. (D.S.C.) took the oath of office as Chairman of the newly created United States Sentencing Commission. The oath was administered by the Chief Justice of the United States in the West Conference Room of the Supreme Court with all other commissioners in attendance. Judge Wilkins was interviewed by The Third Branch *14 days later.*

Judge Wilkins was nominated to the federal bench in 1981 by President Reagan. Prior to that, he was Assistant County Solicitor and then was Solicitor for the Thirteenth Judicial Circuit in South Carolina (the equivalent of being state district attorney) from 1977 to 1981.

Judge Wilkins graduated from Davidson College and from the University of South Carolina School of Law, where he was editor-in-chief of the law review. Following law school, he served as a captain in the U.S. Army, and then clerked for Judge Clement F. Haynsworth, Jr. He has also been legislative assistant to U.S. Senator Strom Thurmond. For 8 years Judge Wilkins was in private practice in Greenville, S.C.

Judge William W. Wilkins, Jr.

The President announced his nominations for the members of the Sentencing Commission on Sept. 12, 1985, including your designation as Chairman. The Senate confirmed these nominations on Oct. 16, and the commissioners took their oaths

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CALENDAR

Jan. 10-11 Judicial Conference Committee on the Budget
Jan. 13-14 Judicial Conference Committee on the Operation of the Jury System
Jan. 13-14 Judicial Conference Committee on the Administration of the Probation System
Jan. 13-14 Judicial Conference Advisory Committee on Codes of Conduct
Jan. 15-17 Seminar for Bankruptcy Judges
Jan. 16-17 Judicial Conference Committee on the Administration of the Bankruptcy System
Jan. 20-21 Judicial Conference Committee on the Administration of the Criminal Law
Jan. 21-22 Judicial Conference Committee on Court Administration
Jan. 22-24 Judicial Conference Committee to Implement the Criminal Justice Act
Jan. 22-24 Seminar for Magistrates of the Ninth and Tenth Circuits
Jan. 23-24 Judicial Conference Committee on Rules of Practice and Procedure
Jan. 27-28 Judicial Conference Committee on the Judicial Branch
Jan. 27-29 Judicial Conference Committee on Judicial Ethics
Jan. 27-29 Workshop for Judges of the Ninth Circuit

THE THIRD BRANCH

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Editor

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

University of Virginia Law School Receiving Applications for Judges' Graduate Program

The University of Virginia Law School is currently receiving applications for the next class in its graduate program for judges, scheduled to start in the summer of 1986. The program is designed for state and federal appellate judges; U.S. circuit judges are encouraged to apply. U.S. district judges are also admitted to the program.

The program requires attendance at two resident sessions at the law school in Charlottesville in the summers of 1986 and 1987. The 1986 session will run from June 30 through Aug. 8. The deadline for applications is Jan. 31, 1986.

The Board of the Federal Judicial Center has again authorized funding to defray expenses of a limited number of federal judges who are accepted for this program. Those funds, together with the University of Virginia program funds, make it possible for federal judges to pursue the program with all necessary expenses covered.

Requests for applications, forms, and other information should be directed to:

Daniel J. Meador, Director
Graduate Program for Judges
University of Virginia Law School

Video Program on Federal Habeas Corpus Practice Now Available Through FJC

The Center this month announced the availability of a video program, *The Theory and Practice of Federal Habeas Corpus for State Prisoners*, with Professor Ira P. Robbins lecturing.

The three-hour program, a survey of major habeas corpus issues, is composed of seven separate segments on four tapes. It covers the background of habeas corpus, jurisdictional matters, exhaustion of state judicial remedies, abortive state proceedings, appeals and successive applications, and, in the concluding segment, developments that may be anticipated. A handout with case citations and relevant statutory and rule provisions is available.

The program is available on audiocassette as well as videotape, and either version may be ordered from the Center's media library by writing Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed, gummed label, preferably franked, and please be certain to specify either audiocassette (refer to catalog number AJ-738) (13 oz.) or videotape (catalog number VJ-073), and, if specifying videotape, whether 1/2" VHS format (3 lb.) or 3/4" U-Matic format (8 lb.). The volume of demand makes it impossible to process telephone orders.

The Center is not equipped to circulate its media holdings outside the federal judiciary, but chief judges of the circuit and district courts have been specially advised of the program's availability, in the event they wish to order it for use at meetings of state and federal judges or of court-sponsored programs for the bar.

Professor Robbins is Barnard T. Welsh Scholar and Professor of Law at the American University, Washington College of Law, and for the 1985-1986 academic year is serving as Judicial Fellow at the Center. In addition to his occasional lectures at various Center programs for judges and magistrates, Professor Robbins has spoken at symposia sponsored by the state-federal judicial councils in five states (see related story, p. 3). ■

State-Federal Judicial Council Meetings Discuss Sanctions, Calendars, Habeas Corpus

The year 1985 marked a resurgence of interest in the state-federal judicial council meetings, and some new subjects have emerged as a result of technological and other changes in the courts.

Montana's council, for example, had first on their agenda an exchange of information about use of video equipment as a training tool. As other councils have done, Montana's members discussed sanctions, especially as they relate to abuse of the discovery process. The sanctions Chief Judge James Battin imposed in the *Honda* case were used as a basis for the discussions. (*See Fjelstad v. American Honda Motor Co.*, 762 F.2d 1334 (9th Cir. 1985).)

New York's council met Dec. 2 in New York City and, among other matters, considered a report on habeas corpus cases written by Second Circuit Executive Steven Flanders and his staff. Statistics in this report show that of the 158 state habeas corpus cases reviewed by the Second Circuit over a two-year period (1983 and 1984), only three called for the unconditional release of a petitioner.

An outgrowth of the New York state-federal judicial council was a panel discussion of the merits of the individual calendar system, which attracted an audience of around 200 judges and lawyers. The panel was made up of two state and two federal judges, and both Chief Judge Sol Wachtler of New York's highest court and Chief Judge Wilfred Fein-

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FJC Audiocassette on Federal Rules of Evidence Available

The Center's Information Services Office has available for loan a 90-minute audiocassette entitled *The Text of the Federal Rules of Evidence.* The audiocassette was produced by the Center in November 1985, and is current through that date. It contains only the text of the rules; it does not include advisory committee notes or any other interpretive material. Like all Center audiocassettes, it may be played on most home and automobile tape decks.

Federal judicial personnel may request this audiocassette by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Please send a self-addressed, gummed label, preferably franked (but do not send an envelope), and refer to catalog number 1-A. The cassette weighs six ounces. The volume of requests for such materials precludes the Center's taking orders by telephone.

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Appeals for the Sixth Circuit at age 39, which made him the youngest federal judge then in service in this country.

Upon retirement, the Justice sat on several United States courts of appeals, in addition to making tape recordings for the blind, serving as an international arbitrator in an international case, and more recently on the President's Commission on Organized Crime and the National Bipartisan Commission on Central America.

Four years ago *The Third Branch* interviewed Justice Stewart in his chambers at the Court and he spoke candidly on several matters. Asked whether he had any regrets about anything in connection with the opinions of the Court, Justice Stewart answered, "Yes.... I wish I had had more time to write dissenting opinions." (See *The Third Branch*, vol. 14, no. 1, 1982.)

Justice Lewis F. Powell, Jr., writing in the Harvard Law Review in 1981 (95 Harvard Law Review 1 (1981)), noted that "Justice Stewart used oral argument to add an extra dimension to the Court's consideration of a case.... He skillfully used oral argument as a means of ensuring the kind of clarity of thought that exemplified his own writing.

"Justice Stewart wrote with a talent for phrasemaking that helped to convey complicated ideas in a few memorable words....Because his vote in cases was said to be 'unpredictable,' Potter Stewart was sometimes labeled a 'swing' vote. There is no doubt that...Justice Stewart was a voice of moderation. But he was always more than a check on judicial excess.

"In carrying out his responsibilities on the Supreme Court, Justice Stewart was ever conscious of the distinction between his personal

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of office on Oct. 29. What have you done thus far by way of organization?

I recently met with representatives of the Federal Judicial Center and requested that descriptive sentencing data be compiled for use by the Commission as a starting point for its efforts. Further, we are now involved in organizing individual and group efforts of the commissioners based upon our particular fields of expertise.

What size staff will you have and where will your offices be located?

We intend to appoint a staff director and such other staff members as are necessary. Obviously, we will need a staff with legal and research backgrounds. I envision the staff totaling no more than 40 people, including administrative and secretarial personnel. As for office space, we are located at National Place, 1331 Pennsylvania Ave., N.W., Washington, DC 20004, telephone (202) 662-8800.

How large a budget will you have to do all this?

Well, we are unsure of the long-range budget over the period of years the Commission will be in operation. Congress has initially appropriated $2.3 million.

That should give you ample funds?

Well, it's more than ample to get started. I'm sure it will carry us for some time. We are in the process of preparing a formal budget to be submitted to Congress.

Did you know any of the other commissioners prior to their affiliation with the Commission?

The commissioners are generally recognized for achievements in their respective fields, and I knew some by reputation; however, I did not know any of them personally.

Your service as Circuit Solicitor in South Carolina must have prepared you for the work of the Sentencing Commission.

I believe that my practical experience in the criminal justice field has made me aware of the many issues in the administration of justice which this Commission will address. I believe that this will help the Commission in formulating practical, fair, and effective approaches to the very complex problem of sentencing criminal defendants.

Did you find your service as law clerk to Judge Clement Haynsworth a good way to enter the legal profession?

I was law clerk to Judge Haynsworth right after I finished my service in the army. No young lawyer could have asked for a better experience. There is no better way to start a legal career than having the opportunity to work with a man like Judge Haynsworth. We still share a very close relationship. He and I have offices in the same building so I have the privilege of seeing him frequently.

The initial terms of the commissioners are staggered but you have a full term of six years. In addition, the act specifically states that the chairman is to be full-time. What happens to the cases assigned to you?

My first priority must be toward discharging my responsibilities as Chairman of the Sentencing Commission. However, I do intend to continue my work as a trial judge so that the movement of cases in South Carolina as far as my docket is concerned will not be delayed. Chief Judge Harrison Winter of the Fourth Circuit has coordinated with my district's Chief Judge, Charles Simons, and arrangements are being made to bring in senior judges to help out. In addition, United States District Judge G. Ross Anderson, Jr., with whom I share the workload in the Piedmont area of South Carolina, has agreed to assist me so that my docket can be maintained and cases disposed of in a timely fashion.

"If any judges who ... read this article are interested in serving on such a committee, I would appreciate their getting in touch with me."

April 12, 1986, is the date set forth in the act for completion of the initial guidelines by the Commission. Can you meet this deadline and send them to Congress by that date?

The law creating the Sentencing Commission provided a period of 18 months in which the sentencing guidelines were to be drafted. This initial 18-month period expires in April of 1986. Since the commissioners were only sworn in a few weeks ago, we now have only a few months to accomplish this task unless the law is amended. A proper job cannot be done in this short period of time. Consequently, the Commission has requested an extension of 12 months. Since this extension would be in keeping with Congress's original intent, I believe our request will be granted. [A bill was passed in the House on Dec. 16 delaying to April 1987 the date when the guidelines must be submitted to Congress for approval.]

It sounds like you have very good collegiality in your court and the cooperation of the judges in the South Carolina district.

Fortunately, yes.

Could you expand on the role of the Federal Judicial Center and what support you are expecting from Center personnel?

Well, I've already referred to what the Center is doing by compiling descriptive data for the Commission. Director Levin has assured us of the full cooperation of the Center: providing some of the data that we are going to need, and acting as a gathering point to collect data from the various agencies, assimilate it, put it in an understandable format, and submit it to the Commission.

How about the circuit judges who could soon be reviewing appeals from sentences?

Well, obviously, the guidelines are

going to be used by all of the district judges, and the appellate judges will have their work cut out for them reviewing sentences. What I intend to do is to request representatives from the district courts and the appellate courts to serve on an advisory committee to our Commission so that we can have input as we go through this process—from those who will actually be using these guidelines. I might add, if any judges who happen to read this article are interested in serving on such a committee, I would appreciate their getting in touch with me so that we may consider their interest in this work.

As you approach the task ahead, what do you see as the most difficult part of your job?

I believe that the most difficult aspect of our work will be something that I have experienced for 15 years as a trial attorney and as a trial judge—that is, accommodating and coordinating conflicts among and between people in an effort to resolve issues. There is a tremendous opportunity with this Commission to do something about a problem which everybody agrees needs to be resolved somehow. Everyone agrees that we need sentencing reform. The disagreement is over how much is needed, what the problems have been, and whether our remedy will infringe on viewpoints which people feel very strongly are correct. The point is that this Commission has been entrusted with this task jointly by the President, Congress, and the judicial branch, and has been given both a great deal of guidance and a great deal of leeway in how we can best accomplish our goals. In order that our guidelines will not only do justice but will also have a wide range of approval, we will involve judges, prosecuting attorneys, defense attorneys, victims, prison and probation personnel, and others in the decision-making process.

The federal prisons will be affected very directly by your work. Will you keep this in mind as you approach your tasks?

With regard to prison capacity, the problem as I see it—and apparently as Congress sees it, too—is that a formulation of public policy, if it is responsible, must simultaneously weigh the cost of that policy. It would do us no good to promulgate guidelines which bring about prison conditions which are unacceptable to everyone. However, if in establishing our policy and guidelines it becomes evident that removing more dangerous, predatory offenders from the streets will in fact require more prisons, we cannot shirk the responsibility to recommend this to the Congress. On the other hand, we will be searching for meaningful alternatives to incarceration, which could very well reduce the number of certain types of offenders who are presently given sentences which require incarceration.

Do you anticipate that you might take the Commission with you to visit some of the prisons?

Norman Carlson has already offered to do this. The Commission plans to visit various levels of prisons in the very near future.

Are you concerned that firmly established guidelines will make the sentencing process too mechanical?

I do not see this as a problem. It appears to me that Congress clearly intended guidelines which are meant to be followed. I believe that the provisions—for instance in 28 U.S.C. section 991(b)—plainly allow for some flexibility to permit individualized sentencing when warranted, to recognize mitigating or aggravated circumstances. Judges are human and are blessed with the experience and common sense which should always be a part of any decision they make. It is not our purpose or our intent to take this out of the process. I know from a lifetime affiliation with the courts—by watching my father in court when I was a boy, by participating as a lawyer myself, and now as a judge—that judges as human beings show human virtues, but are also subject to human emotions, to inconsistencies. We sometimes make decisions in sentencing which could be better if the exercise of sentencing discretion were better structured.

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Judge Wilkins with Senator Strom Thurmond, Chairman of the Senate Judiciary Committee, at Judge Wilkins's confirmation as Chairman of the Sentencing Commission.

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The result of sentencing practices today evidences great disparity, a sense of uncertainty and sometimes unfairness in the criminal process.

Do any of our states have anything similar to this?

Washington, Ohio, Minnesota, Pennsylvania, Maryland, and Florida have guidelines of one form or another.

"Everyone agrees that we need sentencing reform. The disagreement is over how much is needed."

The end result is to some degree a loss of respect for our system. This is not good, and this Commission was created to correct this.

Back to the circuit judges. They could vacate the sentence, they could remand to the district court, or a three-judge panel could substitute their own sentence?

The legislation is presently subject to some debate about the authority of appellate judges regarding their review of sentences. While the statute gives appellate judges the authority to "correct" a sentence, it would be unwise, in my judgment, to allow appellate judges to resentence a defendant. While technical corrections could be made if an appellate court found that the guidelines were erroneously applied, the better course would be to remand to the district court with instructions. Remember that the guidelines will provide for a 25 percent variance. A sentence should be imposed by the trial judge, with the defendant and all whom he wishes to speak for him in court. This is one area where I am confident that the Commission will make recommendations to the Congress to better define the role of appellate judges in reviewing sentences.

Judge, are there areas where the act is not really as specific as you would like it to be?

With any major act of Congress such as this, there are bound to be some areas that need some revision. That's one of our tasks, along with sentencing guidelines—to make recommendations to the Congress for amendments to the law where needed.

Does any nation presently have sentencing guidelines?

My understanding is that the effort by the United States is the first effort in history by any country to adopt *mandatory* sentencing guidelines.

Perhaps you will be setting an example.

Well, I understand a great deal of interest has been generated in the European countries about the work of this Commission, and perhaps if we do a good job—and we all intend to see that that happens—we may not only be an example for individual states in this country but also an example for other nations.

When you first got word of your nomination were you somewhat overwhelmed by the magnitude and scope of the project?

"Overwhelmed" is certainly an understatement. This is a mammoth task that Congress has given us, but with that comes a great deal of challenge.

"Our job is to develop guidelines that not only meet the mandate of Congress but also serve the public and society."

It's sort of humbling?

It sure is. But it has also been encouraging to see offers of support coming from so many different directions. Of course, the Center has been most supportive. The Bureau of Prisons has offered its assistance; so have the Parole Commission, the Department of Justice, and the Administrative Office. We have a lot of help from a lot of good agencies.

Everyone involved shares your concern.

That's right. Well it's very interesting work, and everybody has a lot of expertise to give us, so we are going to draw on that as best we can. I want to draw upon the resources that we have in the government already. That will not only save us money—I think we will find that the best experts are there.

There is another thing we are going to do that I think is very important. We need the input from a lot of different people and those people are going to be judges who actually are dealing with this problem. District attorneys will be a tremendous resource, and defense attorneys; I've had contacts already with some of those groups. Victims' rights groups are very important, and we need their input. We intend to hold public hearings around the nation, because our job is to develop guidelines that not only meet the mandate of Congress but also serve the public and society, and we can't do that without input from these various parties of interest in the field.

The legislation that created the Sentencing Commission has a long history in the Congress. In view of this, do you believe politics will play any role in the work of the Commission?

All of the commissioners are presidential appointees. All of us come to the Commission with varying philosophies. And all of us are committed to developing a set of guidelines which are honest, workable, and just. We intend to keep the Congress informed as we work toward this ultimate goal. We will have free, open, and, I'm sure, heated debate. I am confident that our decisions will be motivated only by serving the interests of justice. ■

COUNCILS, from page 3

berg of the Second Circuit endorsed the concept of sharing information through their state-federal councils. Judge Roger Miner, now on the U.S. Court of Appeals for the Second Circuit, characterized the individual calendar system as a "more effective and cost-efficient system of case management that offers greater personal satisfaction and sense of craftsmanship...than the master calendar system." Judge Charles Brieant (S.D.N.Y.) agreed with Judge Miner, and said that through the use of the individual calendar system "work is done with fewer judges. When a judge has a case from beginning to end he becomes a 'craftsman' as opposed to an 'assembly-line worker.' " (For other comments on the individual calendar system, see the interview with Chief Judge Constance Baker Motley (S.D.N.Y.) in *The Third Branch*, vol. 17, no. 12, Dec. 1985, at p. 7.) Though New York's court system is committed to convert to the individual assignment system, Chief Judge Wachtler reminded the audience that the nature of their existing format made it essential to retain some flexibility, at least initially, to determine how changes can best be made.

In the South, council meetings continued with an emphasis on habeas corpus proceedings in the states of Georgia, Alabama, and North Carolina.

The Federal Judicial Center continued its support of these meetings through reimbursement of travel and per diem expenses as well as by providing speakers. Professor Ira Robbins of American University Law School, now a Judicial Fellow at the Center, attended meetings in these states (some of the meetings extending into a second day) to work out better procedures for handling troublesome issues that come to both the state and federal courts, particularly in capital cases. Professor Robbins also spoke about habeas corpus procedures at a meeting of U.S. magistrates in September, and in January he will repeat this talk when another group of magistrates meets. (The Center makes his lecture, *The New Federal Habeas Corpus: Options and Alternatives for the Federal Judge or Magistrate*, available to federal judicial personnel on audiocassettes. To borrow a copy, write to Information Services, 1520 H St., N.W., Washington, DC 20005, or call FTS 633-6365.)

Litigation, a quarterly put out by the Litigation Section of the American Bar Association, contains a relevant article on federal jurisdiction by Professor Thomas E. Baker, of Texas Tech University, now a Judicial Fellow at the Supreme Court. *See Litigation*, vol. 11, no. 3 (Spring 1985). ■

FJC Handbook for Federal Judges' Secretaries Revised

The Center has published a revised edition of its *Handbook for Federal Judges' Secretaries*. The present edition reflects developments since the publication of the second edition in 1984. The loose-leaf format of the handbook, and its dated pages, are designed to accommodate future additions and other supplementary material.

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

Copies of the handbook are being distributed to all appellate, district, and bankruptcy judges and to all full-time magistrates. A single copy is available to each clerk's office and probation office upon request to the Information Services Office, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (3 lb.). Please do not send an envelope.

FJC Report on Rule 11 Sanctions Available

An Empirical Study of Rule 11 Sanctions, by Saul M. Kassin, a Judicial Fellow during 1984-1985, was recently published by the Center.

In an effort to determine how district judges interpret and apply rule 11 of the Federal Rules of Civil Procedure, the author surveyed the reactions of federal district judges to a series of hypothetical situations, drawn from actual cases in which rule 11 sanctions were requested. The study outlines 292 respondents' standards for imposing sanctions, the rationales articulated by the judges, the kinds of sanctions imposed, and the relationship between the surveyed judges' opinions and their expectations of how their colleagues would rule on the same issues.

The case descriptions presented to the respondents, the accompanying questionnaire, and a number of tables summarizing the study's findings are included in the report.

Copies of this report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (10 ounces). Please do not send an envelope.

PERSONNEL

Nominations

Duross Fitzpatrick, U.S. District Judge, M.D. Ga., Nov. 14

Robert J. Bryan, U.S. District Judge, W.D. Wash., Dec. 4

Miriam G. Cedarbaum, U.S. District Judge, S.D.N.Y., Dec. 4

Walter J. Gex III, U.S. District Judge, S.D. Miss., Dec. 4

David R. Hansen, U.S. District Judge, N.D. Iowa, Dec. 4

Danny J. Boggs, U.S. Circuit Judge, 6th Cir., Dec. 9

See PERSONNEL, page 10

Colleagues Remember Justice Stewart, Praise His Personal, Intellectual Qualities and Contributions to the Court

On Dec. 7, 1985, the Supreme Court released the following comments from the Justices on the death of Justice Stewart.

The Chief Justice

For more than two decades Justice Stewart gave dedicated and distinguished service to our country; first on the Court of Appeals (for the 6th Circuit) and then on the Supreme Court. His death removes a splendid jurist from the Bench. We mourn his loss.

Justice Brennan

Justice Stewart was more than a colleague and a very great and distinguished justice. He was a very close personal friend. I shall miss him very much.

Justice White

He was a great and extremely enjoyable colleage and I have missed him very much. I am sure he has left his mark in the books. Mrs. Stewart has all of Marion's and my sympathy.

Justice Marshall

He was truly great as a justice and as an American. He always put his country ahead of everything else.

Justice Blackmun

Potter Stewart carved out a distinguished career on the federal appellate bench. He added to the Supreme Court a basic centrist vision.

Justice Powell

Justice Stewart's ability as a jurist of great distinction is documented in some 80 volumes of the U.S. Reports. His highly constructive role in the day-to-day functioning of the Court can only be known by those privileged to serve with him. He often led in working out a consensus. He had the rare ability to be, at the same time, a forceful advocate and a generous colleague.

Justice Rehnquist

He was a good friend and a first rate judge.

Justice Stevens

Potter Stewart was a good friend and a great justice. He has been a true source of inspiration for me and I shall miss him more than I can say.

Justice O'Connor

I am particularly aware of the strong role played by Justice Stewart because I occupy the seat on the Court which he vacated in 1981. He devoted his life to public service and used his exceptional intellect for the enhancement of the quality of life for all citizens of this country. He was greatly admired by all his colleagues and his legion of friends throughout the land.

Administrative Office's 1985 Report on Federal Court Management Statistics Available

The Administrative Office of the U.S. Courts has released an annual report, *Federal Court Management Statistics*. The report contains information on the workload of federal judges during the years ended June 30, 1980, through June 30, 1985. The information is compiled from reports submitted to the Administrative Office by the clerks of the courts.

The report shows that the percentage change in total filings in the Court of Appeals for the District of Columbia was up by 58.1 percent in comparison to the previous year, while total filings in the courts of appeals for the Second, Third, and Fifth Circuits were down slightly. Total filings in the Fourth Circuit were up by 17.5 percent, and in the Eleventh Circuit by 12.4 percent. In the courts of appeals for the First, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits, total filings were up by varying percentages, but in each of these six circuits the increase was less than 10 percent.

For all of the circuit courts of appeals taken together, total filings were up by 5.9 percent over the previous year.

In the district courts, total filings in a year's time ranged from over 11,000 in the Southern District of New York to fewer than 1,000 in some sparsely populated districts.

The report reflects a 1984 change in the court of appeals statistical reporting criteria. Court of appeals workload statistics are shown as actions per panel because cases are generally handled by panels of three judges, while district court workload statistics are divided by the number of authorized judgeship positions in each court to provide the workload per judgeship. ■

Positions Available

Circuit Executive, U.S. Court of Appeals for the Ninth Circuit. Salary to $68,700. See 28 U.S.C. § 332(e) and (f) for special qualifications and general functions. To apply, send resume to Chief Judge James R. Browning, U.S. Court of Appeals, P.O. Box 547, San Francisco, CA 94101.

Assistant Circuit Executive for Legal Affairs, U.S. Court of Appeals for the Ninth Circuit. Salary from $26,311 to $31,019. Applicants must be attorneys with minimum of two years' legal experience and active membership in a federal bar. To apply, send resume by Jan. 20 to Richard Wieking, Acting Circuit Executive, U.S. Court of Appeals, P.O. Box 42068, San Francisco, CA 94141.

Clerk, U.S. Bankruptcy Court for the Northern District of Georgia. Salary to $68,700. To apply, send resume by Jan. 15 to Ben H. Carter, District Court Executive, 2211 U.S. Courthouse, 75 Spring St., Atlanta, GA 33035.

United States Bankruptcy Judge. Salary $68,400; 14-year appointment. Vacancies will occur in the following districts: S.D. Miss., W.D. La. (two vacancies), and W.D. Tex. For qualification standards and to apply by Feb. 14, contact Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp St., New Orleans, LA 70130.

EQUAL OPPORTUNITY EMPLOYERS

THE SOURCE

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

"Annual Eighth Circuit Survey." 18 *Creighton Law Review* 1003 (1985).

√ Brennan, William J., Jr., "In Defense of Dissents." Address at Hastings College of Law, Nov. 18, 1985.

Bork, Robert H. "Styles in Constitutional Theory." 26 *South Texas Law Journal* 383 (1985).

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Smith, Loren A. "Judicialization: The Twilight of Administrative Law." 85 *Duke Law Journal* 427 (1985).

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The Chief Justice congratulates members of the Sentencing Commission: (top, left to right) Michael K. Block, Helen G. Corrothers, Paul H. Robinson, and the Chief Justice; (bottom, left to right) the Chief Justice, Judge William W. Wilkins, Jr., Ilene H. Nagel, Judge George E. MacKinnon, and Judge Stephen G. Breyer.

Federal Courts' Budget Approved

The budget for the federal courts and their supporting personnel (exclusive of the U.S. Supreme Court, the Court of Appeals for the Federal Circuit, and the Court of International Trade) was approved by Congress Dec. 6 and signed by the President in the amount of $997,850,000 for 17,162 positions, an increase of 687 positions. The amount requested was $1,067,051,000 for 17,756 positions.

Were amounts for all courts included, the cumulative total approved would be $1,066,925,000. This is the second fiscal year the total budget for all federal courts has exceeded a billion dollars.

An amount of $32,750,000 is included for court security, which will support 888 contract security officers, who are under the supervision of the U.S. Marshals Service—an increase of 38 over 1985.

The House and Senate Conference action resulted in a denial of the request of $2,000,000 for a design for an office building on the United States Capitol grounds intended to house both the Administrative Office and the Federal Judicial Center. The conferees also restored $2,210,000, which is one-half of the one percent salary fund reduction that the Senate applied against "Salaries of Supporting Personnel."

The conferees included 100 additional officer positions (50 for probation and 50 for pretrial) and 50 additional clerical positions (25 for probation and 25 for pretrial). The 75 positions provided specifically for pretrial services are exclusively for districts with pretrial services organized outside probation and should be allocated to metropolitan districts with a total of six or more authorized judgeships. The 75 probation positions may be used to provide pretrial services through the probation office.

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preference and the proper role of a judge. '[T]he first duty of a justice,' he said, is 'to remove from his judicial work his own moral, philosophical, political, or religious beliefs.' "

Attorney Lloyd N. Cutler, who argued five cases before the Supreme Court during Justice Stewart's tenure, noted in the Harvard Law Review that "Justice Stewart relished the oral argument above all aspects of his judicial chores. He believed that most close cases turned on the quality of the oral argument, and he contributed enormously to its quality." Mr. Cutler stated that "perhaps [Justice Stewart's] finest judicial quality has been his imperviousness to typecasting."

A former clerk of Justice Stewart, Jerold H. Israel, has written that in his opinions as a Justice, Justice Stewart was ordinarily "very wary of imposing any broad, rather absolute limits on the exercise of governmental power, although most willing to examine the facts of the particular case to determine whether that power has been abused in the situation presented there."

(For comments from the Justices on the death of their colleague, see p. 8.) ■

PERSONNEL, from page 7

Confirmations

Frank X. Altimari, U.S. Circuit Judge, 2nd Cir., Dec. 16
Glenn L. Archer, Jr., U.S. Circuit Judge, Fed. Cir., Dec. 16
Bobby Ray Baldock, U.S. Circuit Judge, 10th Cir., Dec. 16
John T. Noonan, Jr., U.S. Circuit Judge, 9th Cir., Dec. 16
Deanell Reece Tacha, U.S. Circuit Judge, 10th Cir., Dec. 16
David R. Thompson, U.S. Circuit Judge, 9th Cir., Dec. 16
Morris S. Arnold, U.S. District Judge, W.D. Ark., Dec. 16
Garrett E. Brown, Jr., U.S. District Judge, D.N.J., Dec. 16
Patrick A. Conmy, U.S. District Judge, D.N.D., Dec. 16
Duross Fitzpatrick, U.S. District Judge, M.D. Ga., Dec. 16
Lynn N. Hughes, U.S. District Judge, S.D. Tex., Dec. 16
Alan B. Johnson, U.S. District Judge, D. Wyo., Dec. 16
Harry D. Leinenweber, U.S. District Judge, N.D. Ill., Dec. 16
J. Spencer Letts, U.S. District Judge, C.D. Cal., Dec. 16
Robert L. Miller, Jr., U.S. District Judge, N.D. Ind., Dec. 16
George H. Revercomb, U.S. District Judge, D.D.C., Dec. 16
Stanley Sporkin, U.S. District Judge, D.D.C., Dec. 16
Dickran M. Tevrizian, Jr., U.S. District Judge, C.D. Cal., Dec. 16
James L. Buckley, U.S. Circuit Judge, D.C. Cir., Dec. 17

Death

Potter Stewart, Associate Justice, Supreme Court of the United States (Retired), Dec. 7

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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THE THIRD BRANCH

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Deputy Attorney General D. Lowell Jensen Discusses His Role in Operation of Department of Justice

Deputy Attorney General D. Lowell Jensen was born in Utah but later moved to Alameda County, California. He received his undergraduate and law degrees from the University of California at Berkeley. After serving in the Army from 1952 to 1954, he was Deputy District Attorney of Alameda County (1955-1966). He was appointed District Attorney for Oakland, California, in 1969 and was elected to that position in 1970, 1974, and 1978.

Mr. Jensen served a term as President of the California District Attorneys' Association. He was an officer of the National District Attorneys' Association and a founding member of the Association's Commission on Victim/Witness Assistance.

In February 1981, President Reagan nominated Mr. Jensen to be Assistant Attorney General in charge of the Criminal Division. From there promotions followed to Associate Attorney General under Attorney General William French Smith and now to Deputy Attorney General under Attorney General Edwin Meese.

Would you please describe what your responsibilities are as Deputy Attorney General?

The Deputy Attorney General is the number two position of the Department of Justice, and that officer has responsibility, essentially, for all the day-by-day operations of the Department. My duties range across the entire face of the Department—personnel issues, budget issues, policy development and operational issues. I answer to the Attorney General and act in lieu

D. Lowell Jensen

of the Attorney General in those instances where it is required.

Did the Attorney General restructure the office and its jurisdiction when he came into office?

That's essentially correct. The Department's organization at the time Ed Schmults served as Deputy had the civil functions of the Department reporting through the Deputy

See JENSEN, page 4

New AIMS Explained in New Two-Part Videotapes

The Center has recently completed a video program on New AIMS, its Appellate Information Management System (see related story, p. 7). The program, *New AIMS*, is in two parts of about 45 minutes each and features Robert Hoecker, Chief Deputy Clerk of the Tenth Circuit Court of Appeals. Intended primarily for those interested in the detailed operation of the system, it provides a thorough explanation of aspects of the New AIMS case opening and docketing functions.

Those within the federal courts wishing to borrow the program should write to the Center's Information Services, 1520 H Street, N.W., Washington, DC 20005. We regret that we cannot accommodate orders by telephone. Please specify the format you want (VHS or U-matic). ■

Chief Justice Releases 1985 Year-End Report

In his 1985 annual report on the judiciary, the Chief Justice cited facts and statistics that show an alarming increase in the workload of the federal courts, and an equally disturbing lack of judge power to handle this workload. Some of the points made by the Chief Justice follow.

- Though public attention has recently focused on the national budget, there exists another deficit with which we must cope, our "judicial deficit" in the federal court system, which continues to grow.
- The number of filings increased over last year's total, both in the district courts (5 percent in civil cases and 7 percent in criminal cases) and in the courts of appeals (6 percent). The district judges increased their terminations (11 percent in civil cases and almost 5 percent in criminal cases) and the circuit judges increased their dispositions (around 1 percent). The dispositions during the 1985 year were accomplished with approximately the same number of judges, "already overworked," the Chief Justice reported.
- The 85 additional judgeships created by Congress in July of 1984 brought more judges to the courts, yet there are still 56 vacancies in the new judgeship positions as well as 41 vacancies caused by the usual attrition. "[T]he total number [of judges], when available, are too few to deal with the ever-rising caseload and

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Inside...

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enlarging jurisdiction. I have urged the President and the Senate to speed up the process."

• As in the past, the Chief Justice had words of commendation for the senior judges—federal judges who retire but continue to serve. Their aggregate contribution is equivalent to the work of at least 70 full-time active judges, said the Chief Justice, and, "Without the work of [these judges] the federal judicial system would have foundered." The Chief Justice is pressing Congress to remove the "Social Security barriers" that will cause a loss of services of senior judges.

• **Sentencing Commission.** Among other things, the Comprehensive Crime Control Act of 1984 created a United States Sentencing Commission, charged with the promulgation of guidelines for district courts to follow in sentencing. The commissioners have already commenced their work and the Administrative Office and the Federal Judicial Center are lending their support to this effort.

• **Quality advocacy.** After six years of study by the so-called "Devitt Committee," and pilot projects conducted by 13 pilot district courts under the chairmanship of Chief Judge James Lawrence King, the Judicial Conference has recommended that all district courts consider various programs to ensure that lawyers admitted to practice in the federal courts meet at least minimum standards. In his annual report, the Chief Justice concludes that "This recommendation marks a milestone in a debate that may be traced to studies that were generated a dozen years ago. Every District Court should require a basic admission standard."

Developments important to both state and federal courts were also reported by the Chief Justice and included:

• **State Justice Institute.** Always a proponent of assistance to the state courts, the Chief Justice added his endorsement to that of the Conference of Chief Justices to urge that Congress create a State Justice Institute. This legislation became law Nov. 8, 1984, and an appropriation of $8 million will soon be available to assist the states in improving their administration of justice. This money will encourage judicial training and continuing education, and will support studies and projects dealing with sentencing, alternatives to litigation, and other improvements.

• **Prisons and Corrections.** Progress on improvement of prison programs for education, vocational training, and employment was realized in 1985. An outgrowth of the 1983 Scandanavian prison visit and the 1984 National Task Force on Prison Industries is the National Center for Innovation in Corrections, affiliated with the George Washington University in Washington, D.C. After a year of accomplishments, the National Center has a remarkable record of 21 concepts for prison industry projects that link private employers with prison systems. The National Center hopes that eventually this coalition will bring about employment of at least 50 percent of the nearly 500,000 state and federal prison inmates (the national prisoner employment average is now around 10 percent). Of great significance is the inclusion in the Comprehensive Crime Control Act of 1984 of a section that exempts up to 20 pilot programs from protectionist laws that previously prohibited transportation of prison-made goods in interstate commerce.

The above is a partial listing of the contents of the entire Year-End Report. Copies of the entire 15-page report are available by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed, gummed mailing label (but do not send an envelope). ■

THE THIRD BRANCH

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Editor

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

PERSONNEL

Appointments

Thomas E. Scott, U.S. District Judge, S.D. Fla., Aug. 16

Alan A. McDonald, U.S. District Judge, E.D. Wash., Oct. 18

Brian B. Duff, U.S. District Judge, N.D. Ill., Oct. 25

Alan H. Nevas, U.S. District Judge, D. Conn., Oct. 26

Glen H. Davidson, U.S. District Judge, N.D. Miss., Oct. 29

David Sam, U.S. District Judge, D. Utah, Nov. 1

Laurence H. Silberman, U.S. Circuit Judge, D.C. Cir., Nov. 1

Richard H. Battey, U.S. District Judge, D.S.D., Nov. 2

John S. Rhoades, Sr., U.S. District Judge, S.D. Cal., Nov. 4

Stephen H. Anderson, U.S. Circuit Judge, 10th Cir., Nov. 8

Ferdinand F. Fernandez, U.S. District Judge, C.D. Cal., Nov. 8

David B. Sentelle, U.S. District Judge, W.D.N.C., Nov. 8

Robert E. Cowen, U.S. District Judge, D.N.J., Nov. 12

Jane R. Roth, U.S. District Judge, D. Del., Nov. 16

Edmund V. Ludwig, U.S. District Judge, E.D. Pa., Nov. 18

Alex Kozinski, U.S. Circuit Judge, 9th Cir., Dec. 10

Resignation

Frederick Lacey, U.S. District Judge, D.N.J., Feb. 1

Senior Status

William H. Orrick, Jr., U.S. District Judge, N.D. Cal., Oct. 31

Jesse E. Eschbach, U.S. Circuit Judge, 7th Cir., Nov. 4

Death

Ray McNichols, U.S. District Judge, D. Idaho, Dec. 25

Russell Wheeler to Direct Center's New Special Educational Services Division

A new Federal Judicial Center Division of Special Educational Services has been approved by the Center's Board to accommodate the increase in the training responsibilities of the Center. The new Division will be headed by Russell R. Wheeler, currently Deputy Director of the Continuing Education and Training Division. Mr. Wheeler was one of the first Judicial Fellows when the program was started in 1973. At the Supreme Court he served as Research Associate to the Administrative Assistant to the Chief Justice. From the Court he went to the National Center for State Courts, where he was a Senior Staff Assistant. In 1977, he returned to Washington to become Assistant Director of the Federal Judicial Center.

The Division of Continuing Education and Training, directed by Kenneth C. Crawford, will continue to be responsible for the Center's orientation and continuing education seminars and workshops for judges and supporting personnel. That Division will also continue to work with the Center's network of training coordinators and to administer the specialized tuition support program.

The new Division will be primarily responsible for the production of audio and video media education programs; educational publications, including reference manuals and monographs; administration of the Center's programs on sentencing policies and practices; and the growing number of special seminars and workshops, especially for judges, including the annual summer programs for circuit and district judges, satellite video seminars, and educational programs in support of state-federal judicial councils.

This organizational change will require no additional personnel or funds and is effective Feb. 1, 1986.■

The Chief Justice with some of the members of the Judicial Conference's Bicentennial Committee: (l. to r.) Judge Damon Keith (6th Cir.), Judge Helen Nies (Fed. Cir.), Chief Justice Burger, Chief Judge Robert Murphy (Md. Ct. App.), and Judge Dolores Sloviter (3rd Cir.). *See story, page 10.*

Legislation Affecting the Federal Judiciary Introduced in the First Session of the 99th Congress

Congress adjourned in 1985 without taking final action to extend the temporary exemption of senior judges from Social Security taxation. Action should be taken to permanently exempt senior judges in early 1986. Appropriate language was approved by both the House and Senate before Dec. 20, but failed of final passage due to controversy concerning a totally unrelated provision in the bill containing the senior judge provision.

A number of other legislative measures of interest to the federal judiciary were passed by the House and were still pending when Congress adjourned. They are summarized below.

H.R. 3550, the Rules Enabling Act of 1985. Passed by the House on Dec. 9, this bill has as its purpose revision of the process by which rules of procedure used in federal judicial proceedings, and the Federal Rules of Evidence, become effective. The bill provides for greater participation in the rule-making process by all interested persons, including members of the bench, bar, and public.

H.R. 3570, the Judicial Improvements Act of 1985. Passed by the House on Dec. 16, this omnibus bill effects reforms in several areas. The bill contains Judicial Conference-recommended reforms in the Judicial Survivors' Annuities Program. Among the reforms implemented by H.R. 3570 are increased annuity amounts for beneficiaries; preservation of the program's financial integrity; adjustments in eligibility standards; and provisions authorizing all currently serving judges to either "opt in" or "opt out" of the program. Because the existing program is an elective one, most new judges have in recent years elected not to participate. There have been

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CALENDAR

Feb. 9-15 Seminar for Newly Appointed District Court Judges

Feb. 10-12 Video Orientation Seminar for Newly Appointed Bankruptcy Judges

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to the Attorney General and the criminal functions reporting initially to an Associate Attorney General, then to the Deputy, and then to the Attorney General. My background is in the criminal law area and I was the Associate. What we contemplate in terms of structure during my service as Deputy would have the criminal portions of the Department reporting directly through me to the Attorney General, and the duties of the Associate essentially being related to the civil activities of the Department.

You have a California background. Did you know the Attorney General and the President in California?

I've been a prosecutor my whole professional career and was in the district attorney's office in Alameda County when Ed Meese joined that office. We were colleagues in the office for several years, and then, when President Reagan was elected as Governor of California, Mr. Meese went to the staff of the Governor and basically conducted liaison activities with all law enforcement entities in the state. One of my responsibilities at that time, as District Attorney in Alameda County—I had by then become District Attorney—was to represent the California District Attorneys' Association on legislative issues. So I dealt with Mr. Meese in that capacity and with the President at that time as Governor of California.

Each administration selects certain kinds of cases to concentrate on. Do you have any special programs that will have your and the Attorney General's special interest? What kinds of cases do you anticipate will be filed in the federal courts?

The emphasis by the Department on drug trafficking cases will continue. If you go back to the early days of Attorney General Smith's administration, a task force report on violent crime was prepared. In essence it set our focus on drug trafficking as a top priority. And so we will continue to do just that. Our other criminal areas of enforcement interest will be in organized crime and in white-collar crime, so all those activities will receive focus in terms of what can be expected of cases to be filed in federal courts.

Anything additional?

Those are really the basic areas. Obviously, our responsibilities run across the whole range of the criminal justice world, and when you talk about priorities you don't exclude other kinds of responsibilities.

"I've been a prosecutor my whole professional career."

But you only have so many U.S. attorneys and so many lawyers in the Department, and there is a lot of crime in this country.

That's right, and our activities will include enforcement of any federal law. You realize that most of the prosecution that takes place in the world of criminal justice is at the state and local level. That's an area of emphasis also; we have to build very strong partnerships with state and local entities.

Have you established special arrangements with state entities to assure that federal and state efforts are coordinated, especially in the criminal area?

That was one of the subjects that was discussed in the task force report—the need for a system of cooperation with state and local entities. Attorney General Smith ordered each U.S. attorney to reach out to form law enforcement coordinating committees across the country and that is taking place in a very successful sort of way—to build a partnership with state and local law enforcement officials.

Are these groups functioning in a manner similar to the state-federal judicial councils suggested by the Chief Justice?

To some extent. The Chief Justice is absolutely correct; you can't look at the state and local systems and the federal system as separate, autonomous entities. They have a great deal of overlap. In our world of enforcement, for example, there is a great deal of overlap and concurrent jurisdiction over criminal conduct, and there is a real need that we fashion our efforts so that they are complementary rather than independent or contradictory.

President Reagan has a Legal Affairs Council that meets from time to time. Do you have any relationship to that council?

At this time, in this term, there are two councils at the policy cabinet level. One is a domestic policy council and the other is an economic policy council. The Attorney General is the chair in the domestic policy council, and so that relationship continues in that fashion. And, obviously, I have a relationship to assist the Attorney General as the chair.

Do you attend the council meetings when the Attorney General is out of the city or otherwise unable to attend?

That's the role of the Deputy, and I do on those occasions; when he is not able to attend I represent the Department in his stead.

When the Attorney General met with the Judicial Conference of the United States last September, were you in attendance?

No, I was not.

Chief Justice Appoints Committee on AO

The Chief Justice has appointed an Ad Hoc Advisory Committee of Judges to examine the Administrative Office of the U.S. Courts concerning organization, responsibilities, personnel, and inter- and intra-judicial relationships.

Senior Judge Edward J. Devitt (D. Minn.) has been appointed Chairman of the Committee. Other members of the Committee are Chief Judges James Lawrence King (S.D. Fla.), Jack B. Weinstein (E.D.N.Y.), and Robert J. McNichols (E.D. Wash.). [Judge Ray McNichols, initially appointed to the Committee, died Dec. 25.]

The Attorney General mentioned then that he would move quickly on 20 circuit court judgeships and 66 district court judgeships. Is any significant progress being made to process these judgeships?

I think that there has been a good deal of progress. As you know, the process includes a series of steps. There are only, perhaps, a dozen positions in both the circuit courts and the district courts where no person has been identified as the candidate. Every other candidate has been identified, and they are either at stages where there are background investigations under way, and they are being considered by the American Bar Association for their recommendations; or they are awaiting Senate action. At this point the full course has been run for many appointments. The Senate has now confirmed some 60 judges of the circuit and district courts across the country in this congressional term and another 10 to 15 positions are awaiting Senate action at this time. [Mr. Jensen's statistics refer to the Department's estimates as of last October.]

So a lot of it awaits action in the Senate?

Well, there are different people who have parts of this process, and I think one has to look at the whole process to see how it is moving.

Some attorneys general in the past have not sought or considered the independent investigations and evaluations of candidates for federal judgeships conducted by the American Bar Association. Do you think the ABA is helpful to the Department of Justice?

Well, this process now includes a reference to the American Bar Association for their review and recommendations of all the appointments to the district courts and the circuit courts. I think it is helpful.

Does the Office of Legal Policy handle the judgeships in conjunction with Mr. Fielding at the White House?

The Office of Legal Policy handles the preliminary review and processing of potential candidates here in the Department; then a discussion takes place in the Department and recommendations are made by the Attorney General. They are then discussed and reviewed in joint sessions with White House representatives and the Counsel for the President, Fred Fielding.

Are special efforts being made to have judgeship nominations representative of minorities and women?

Our efforts in terms of identifying candidates for presidential appointment are to find the highest quality judges in terms of legal experience, legal skill, and judicial qualities. That's our emphasis, and I think we find qualified candidates in all areas regardless of their ethnic or racial background.

Do you advise the candidates that come through here?

We don't give advice to the candidates. We think the candidates know what the issues are when they have their confirmation hearings, and I guess they have now become a matter of discussion. Candidates know what that is, and that's part of the confirmation process.

"We have to build very strong partnerships with state and local entities."

The Department of Justice requested permission to participate in the argument in the abortion case and that was denied. [*Thornburgh v. American College of Obstetricians and Gynecologists*, argued in the Supreme Court Nov. 5, 1985.] Did you consider that as a setback?

I wouldn't consider that a setback. Our participation there is submission of an amicus brief. It's very unusual that in circumstances of that nature amici be given time to argue, so we don't consider that a setback at all. We are well aware that that is very unusual—that those kinds of requests would be granted—so that we were not surprised by the denial.

Do you propose to make similar requests in other cases in order to advance other issues to the Court that you think are important for decision on that level?

I don't think that there is any difference from our normal procedures. We would either participate directly in those cases or seek amicus participation, with briefs or arguments. And, once again, I don't think it is the usual case that in our status as an amicus we would be given time to argue. There are such cases, but they're infrequent.

Do you have some pending now?

I don't know if there are any where we have been given time for argument.

The first order list for this term of court came out Oct. 7. How did you fare on that?

D. Lowell Jensen

There are several areas where the Department is a participant because of our interest. We've already mentioned the abortion cases. There are a number of cases involving issues in public employment, cases such as the post-*Stotts* cases, that are of great interest to the Department.

There are also cases involving resolution of issues in voting rights. There are cases dealing with the use of challenges in jury selection. Those

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are all of interest to the Department and they are all part of this term.

The Attorney General and the Deputy Attorney General have traditionally taken part in some of the cases argued before the Supreme Court. Do you plan on doing that?

There's no specific case I know of right now that would be of such interest. The problem is time; whether we would have enough time to do it.

A recent press release related to the FBI's computer system, and a plan to permit closer scrutiny of those individuals suspected of but not yet charged with committing white-collar crimes. Congressman Edwards of California referred to this when it came up at the Department's budget hearing, and he said that he was troubled by this plan because such a scheme could include innocent people; that he believed it "could include Communists and homosexuals." Some, he felt, could get swept up in a computer system that might be too comprehensive. He went so far as to say that the Department should go slowly on this, and to suggest that Congress might opt for limiting the Department's funds so that they could not be used for that particular computer program.

Let me see if I could respond to that. We are obviously very sensitive to the issues that surround the use of the so-called NCIC system. It is an incredibly important law enforcement tool, one that must be maintained, and we are as concerned and as aware of the sets of issues as the Congressman is. We do not want to do anything that will jeopardize the ongoing use of NCIC. We think this is a positive, forward type of system use. It isn't one that we need to move on with any other degree of expedition other than the fact that it would be an enhancement and a positive step forward. I think that maybe there is some misunderstanding about the system. The system that we contemplate putting in place—and essentially it would be experimental—to see whether or not it is useful—would simply allow investigative agencies, police agencies that have existing ongoing investigations, in fraud areas to be specifically defined, to simply notify the NCIC of the fact that there is such an investigation. If two agencies put identical entries into the system, the system would instantly show a "match." The system would then notify the police agencies involved that they should speak to each other about what appeared to be related investigative efforts. So nothing would go into the system other than the fact that there were ongoing investigations. Essentially what the system will do is replace with technology the ability of an agency to know that there are parallel investigations going on without making several thousand phone calls around the country. It's really not one that jeopardizes privacy interests at all, and the notion that it would include, as the Congressman said, Communists or homosexuals. It would only include them if they happened to be subjects of fraud investigations.

"I have been interested in seeing the exclusionary rule limited to an appropriate definition, and I think that the recent actions of the Supreme Court were consistent with that."

Did you get what you needed in the budget?

I think that the budget appropriations for NCIC are intact. We will be sensitive to this and we will not move in a way that would affect the appropriation. But we are going forward with the design and implementation of the system, and I think it is consistent with the appropriations.

Do you have your budget now for the whole Department?

The present Congress is considering the 1986 budget and it's still in process—fiscal '86.

Counting the whole budget, it must be enormous.

In one sense it's a great deal, and in another sense it's not so great. The budget is roughly at a level of $4 billion for the total Department. That's everything. There are something like 60,000 persons who work for the Department of Justice. Most of them are in the investigative agencies—bureaus like the FBI, the prison system, and the Immigration and Naturalization Service. That's where most of the dollars and people are located. And then, of course, there's a good deal for the civil and criminal responsibilities both in the litigative divisions here in Washington and in the offices of U.S. attorneys. In one sense $4 billion sounds like a lot. In another sense, it's not a great deal for a department with responsibility for all federal criminal and civil activities in the United States.

How many lawyers do you have just in Washington?

It's roughly 2,000, either here in Washington or in field offices that are part of the litigative divisions centered here in Washington.

What is the status of appointments for the State Justice Institute?

They are presently pending for appointment by the President. There are two levels of appointments. One comes from judges who have been nominated by the Judicial Conference. The names of those judges have gone over to the White House and they are presently being considered. Then the law contemplates that four other persons would be nominated, and a list of those persons has now been submitted to the White House. They are all presently pending and relatively shortly we expect that the appointments will be made.

What are some of your long-range plans for the Department that you would like to see come to fruition during your term in office?

We've already discussed some of the areas of interest for us; for example, the criminal enforcement program, which we will continue to refine and improve. In a general

sense, I would like to see that we make a permanent part of the criminal justice landscape the federal, state, and local relationships I spoke of. I believe in that very strongly. I think we've made a good start, however, but I think that we must continuously improve in order, as I say, to make it permanent. From a management standpoint, I would like to see us improve the Department's management information systems. We're on a growth curve as far as that is concerned; however, I would like to see us get to a much higher level of capacity in our use of technology in the area of management information.

You have written and spoken publicly about the exclusionary rule. Do you have a special interest in the rule?

I don't have any, other than the fact that, as I said, I've been a prosecutor my whole life and have watched the exclusionary rule come into existence and be defined over time. I have been interested in seeing the exclusionary rule limited to an appropriate definition, and I think that the recent actions of the Supreme Court were consistent with that—in terms of their *Leon* decision as to the scope of the exclusionary rule in cases where a search warrant is involved. I frankly would like to see the same kind of concepts as in *Leon* move forward in nonwarrant cases. I think that's where we ought to be as far as the exclusionary rule is concerned.

What's the status of the *Scaduto* case? He was the one who sued the crime commission because he was subpoenaed. Is the Department going to continue its interest in the case?

There is current consideration of that. My recollection is that the issue is whether or not we would seek certiorari, and that is now being considered. We think the *Scaduto* case is a very important case in that it does possibly affect a whole series of commissions that are out there and that have been there in the past. I think that it needs resolution. I'm not sure exactly where we are on that track, but it is a matter being considered.■

Ninth Circuit's New AIMS Program in Operation

The Ninth Circuit Court of Appeals will open the new year with a full-scale test of the case-opening portion of the New Appellate Information Management System (New AIMS) that has been developed by the Federal Judicial Center in cooperation with the Fourth, Ninth, and Tenth Circuits acting as pilot court sites.

Cathy A. Catterson, Ninth Circuit Clerk, reports that as of Jan. 3 her office started entering all new appeals into New AIMS. As a security precaution during the early stages of the test, the office is making frequent printed copies of the docketed information. As the accuracy and stability of the system are validated, the reliance on printed copies as backups will decrease, until, finally, printed docket sheets and other reports will be created only as needed for the court and parties.

The other two pilot courts will also soon begin entering data into the fully automated New AIMS docketing system. At present, the Fourth and Tenth Circuits project a March starting date.

These tests of the New AIMS system mark the first use of fully electronic docketing for the federal courts of appeals. Fully electronic docketing has been used to manage the felony dockets in many of the largest federal district courts since the early 1980s, when the Federal Judicial Center's COURTRAN Criminal system was transferred as an operational system from the Federal Judicial Center to the Administrative Office for subsequent maintenance and expansion. The goals of both systems are to speed the generation and retrieval of important case management information and to eliminate unnecessary reliance on and storage of paper records.

The New AIMS system is the first full-docketing records replacement system to be operated on computers installed in the courthouse and operated by local court staff. The earlier COURTRAN Criminal system depended on very large computers based in Washington and linked to the courts over telephone lines. Improvements and efficiencies in new computer and software technologies now allow all information processing to be controlled in the court by specially trained members of the clerk's office staff. Decentralized operation of programs designed and constructed according to national technical and substantive specifications is the hallmark of automation under the *Five-Year Plan for Automation in the United States Courts*, which is the document that guides the activities of the Federal Judicial Center and the Administrative Office in this generation of federal court automation development.

New AIMS is the first of three full-docketing systems the Center intends to transfer to the Administrative Office for maintenance and expansion. Another is a complete bankruptcy system, called BANCAP, which the Center is developing with the cooperation of the Western District of New York, the Western District of Texas, and the Western District of Washington. The third, and perhaps most complex, system is designed to fill the needs for docketing and managing the civil docket in the district courts. It is under full pilot test in the Arizona and the District of Columbia district courts, with further assistance from the Northern District of Georgia and the Western District of Texas. ■

New Judiciary Building

After many years of "urgings," Congress responded to the Chief Justice's request for a building to house all administrative personnel of the Judiciary in one place. The Administrative Office now occupies space in six locations and the Federal Judicial Center occupies space in four locations. Congress authorized $2 million for studies and plans.

CONGRESS, from page 3

several reasons for this, principally the absence of a "floor amount annuity" for survivors, the relatively small amounts of annuities derived under the standard computation formula, and inadequate statutorily mandated amounts payable to surviving children.

H.R. 3570 also addresses an existing problem concerning removal of cases from state to federal courts. Under present legislation, a litigant who tries to remove his or her case to federal court may have the case dismissed if the state court in which the action was initially brought did not have jurisdiction. H.R. 3570 would abolish the present judicial rule that an improvidently brought state civil action, the subject matter of which is within the exclusive jurisdiction of a federal district court, must be dismissed when it is removed to the federal district court by the defendant under 28 U.S.C. § 1441.

H.R. 3570 also would authorize payment of actual travel expenses to judges, not to exceed a ceiling amount established by the Judicial Conference, rather than the Office of Personnel Management. In the past judges have suffered financial losses when required to travel extensively, because the OPM-authorized amounts allocated for expenses have not adequately reflected regional cost differentials.

H.R. 3570 would also bring the fee schedule for the United States District Court for the District of Columbia into line with fee schedules in other district courts. (Presently, it costs only $10 to file a case in the United States District Court for the District of Columbia.) The exemption of this district court from the general fee provision originated in a period preceding the creation of the local Superior Court system in the District of Columbia.

Finally, H.R. 3570 clarifies the jurisdiction of the federal courts of appeals for judicial review of orders issued by the Federal Maritime Commission and the Maritime Administration in the Department of Transportation, and contains a technical corrections section renumbering three separate sections 1364 in the United States Code.

H.R. 3004, the Criminal Justice Act Revision of 1985. Passed by the House on Dec. 9, this bill would implement improvements in the administration of the Criminal Justice Act (CJA), including increases in compensation levels that may be paid to attorneys. The bill would raise the maximum hourly compensation rate to $50, but permit variations to as high as $75 per hour in those districts where such need is shown. The bill would eliminate the in-court and out-of-court hourly rate differential. The bill also would increase the overall per-case compensation maximums from $2,000 to $5,000 for felonies, from $800 to $1,500 for misdemeanors, to $3,000 for appeals, and to $1,000 for any other representation provided under the CJA, and increase the amount that may be incurred for the services of experts.

Matters still pending before the House Judiciary Committee for further consideration include court-ordered arbitration, creation of an intercircuit tribunal, and the Supreme Court's workload. ■

NOTEWORTHY

Study released. The Fund for Modern Courts, Inc., a nonprofit court reform organization located in New York, has released a study of the success of women and minorities in achieving judicial office. The study finds that such success depends to a large extent upon the method of selection, with a higher percentage of women and minorities chosen through an appointive process than through an elective system. (*See* "The Source," p. 9.)

New newsletter. The American Bar Association Lawyers Conference Task Force on the Reduction of Litigation Cost and Delay has issued the first issue of *Change Exchange*, a quarterly newsletter. The newsletter will report on efforts to reduce trial costs and delays.

Rand tort study. The Rand Corporation's Institute for Civil Justice, after conducting a two-year study of asbestos litigation, has concluded that a national commission is needed to address the problems that mass toxic-tort lawsuits are creating. The report, released in December, said that the commission is needed to study alternatives to the traditional tort system.

FJC's Summer 1986 Seminar to Discuss Constitutional Adjudication and the Judicial Process

The Center will sponsor a seminar on "Constitutional Adjudication and the Judicial Process in the Federal Courts" from June 16 to 20, 1986, on the campus of the School of Law, Boalt Hall, at the University of California at Berkeley.

The seminar will treat selected constitutional questions that are on federal court dockets in the 1980s and consider basic structural issues, such as federalism and judicial review, in the context of current litigation trends. Although the seminar's primary focus is on problems of substance and procedure in their contemporary manifestations, it will also, with an eye to the constitutional bicentennial celebration, give attention to their historical origins and evolution.

The seminar is being developed in consultation with a Center committee appointed by the Chief Justice and chaired by Chief Judge Howard Bratton (D.N.M.). Serving with him are Judges Daniel Friedman (Fed. Cir.), Antonin Scalia (D.C. Cir.), and Louis Pollak (E.D. Pa.).

Judges wishing to participate in the seminar should indicate that fact by letter to Russell Wheeler, Director of the Center's new Division of Special Educational Services (see related story, page 3). To ensure consideration, letters should be received by Feb. 17. ■

Three New Reports Released by Center

The Center recently published *Attorneys' Views of Local Rules Limiting Interrogatories,* by John Shapard and Carroll Seron.

This staff paper reports the results of a survey undertaken at the request of the Advisory Committee on Civil Rules of the Judicial Conference of the United States to help inform the Committee on proposals to impose limitations on interrogatories on a national basis.

Responses to the survey questionnaire were received from 271 attorneys who practice in one or more of 12 federal judicial districts with local district court rules limiting interrogatories. On the basis of these responses, the paper's authors conclude that such rules are effective in precluding unwarranted use of interrogatories without causing significant interference with the appropriate use of that discovery method.

The paper includes tables setting out the data derived from the survey as well as the questions asked the respondents.

The Center has released a publication entitled *Deciding Cases Without Argument: A Description of Procedures in the Courts of Appeals,* by Joe Cecil and Donna Stienstra of the Center's Research Division. The report describes the procedures and standards adopted by the federal courts of appeals for deciding cases without oral argument. It presents available statistical information, reviews local rules, and discusses responses of the clerks of the courts of appeals to a brief survey regarding court practices. The report does not attempt to evaluate the screening programs.

The Center recently published *Disability Appeals in Social Security Programs,* by Harvard Law School Professor Lance Liebman. This 45-page monograph analyzes how the courts have treated the basic substantive issues that disability appeals typically present. These include the duration of the disability, the nature of the alleged medical impairment, problems with medical evidence, the concept of "substantial gainful activity," the relationship between the origin of a disability and the claimant's covered status, termination of eligibility, and various administrative issues.

Although the bulk of the monograph describes the administrative procedures and legal issues involved in disability appeals, the paper also calls attention to the tension between bureaucratic imperatives and the judiciary's obligation to ensure fair treatment for individuals.

Copies of these papers can be obtained by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (but please do not send an envelope). ■

Positions Available

Clerk, U.S. District Court, Western District of Michigan. Commencing Apr. 1, 1986. Salary to $67,940. Requirements include 10 years' administrative experience (law practice may be substituted for general administrative experience; college education and degrees in public, business, or judicial administration or law may be substituted partially for general administrative experience). Send resume (original and three copies) by Feb. 28 to Stephen W. Karr, U.S. Magistrate, 666 Fed. Building, Grand Rapids, MI 49503.

Clerk, U.S. District Court, District of Kansas. Salary to $68,700. To apply, send resume by Apr. 1 to Earl E. O'Connor, Chief Judge, U.S. District Court, 122 Federal Building, P.O. Box 1428, Kansas City, KS 66117.

Chief Deputy Clerk, Tenth Circuit Court of Appeals, Denver, CO. Salary $37,599 to $67,940. High school graduate with at least six years' progressively responsible administrative or professional experience. College education may be substituted for general experience. Master's degree or graduate study may be substituted for two years' specialized experience.

Send resume and three copies, by Feb. 15, to Robert L. Hoecker, Clerk Designate, U.S. Court of Appeals, C-404 U.S. Courthouse, Denver, CO 80294, Phone: 303/844-3157 or FTS 564-3157.

Assistant to Circuit Executive, Fifth Circuit Court of Appeals. Salary to $44,430. Assists with Judicial Council matters, process for selection of bankruptcy judges, special research and study projects, and court planning. Requires undergraduate degree and work experience that clearly demonstrates administrative capability. Law degree helpful. Send resume by Mar. 15, 1986, to Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp St., New Orleans, LA 70130.

Assistant to Circuit Executive, Fifth Circuit Court of Appeals. Salary to $44,430, based on experience and qualifications. Serves as the circuit's space and facilities specialist, assists with compiling and evaluating court statistics and preparing statistical reports, and on special research projects. Degree in public, business, or judicial administration desirable. Send resume by March 15, 1986, to Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp St., New Orleans, LA 70130.

EQUAL OPPORTUNITY EMPLOYERS

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers.*

Community Mediation In Massachusetts: A Decade of Development, 1975-1985. Distric Court of the Trial Court of the Commonwealth of Massachusetts, 1986.

Finn, Peter. "Collaboration Between the Judiciary and Victim-Witness Assistance Programs." 69 *Judicature* 192(1986).

Gold, Michael E. "The Similarity of Congressional and Judicial Lawmaking Under Title VII of the Civil Rights Act of 1964." 18 *U.C. Davis Law Review* 721 (1985).

Maggiolo, Walter. *Techniques of Mediation.* Oceana Publications, Inc. 1985.

Morris, Richard B. "The Constitutional Thought of John Jay." *This Constitution : A Bicentennial Chronicle.* Project '87 of the American Historical Association and the American Political Science Association. Winter 1985.

Sabino, Anthony M. "Jury Trials in the Bankruptcy Court: A Continuing Controversy." 90 *Commercial Law Journal* 342 (1985).

The Success of Women and Minorities in Achieving Judicial Office: The Selection Process. Fund for Modern Courts, Inc., 1985.

Survey of Judicial Salaries. National Center for State Courts, Nov. 1985.

Swanson , John. "Privacy Limitations on Civil Discovery in Federal and California Practice." 17 *Pacific Law Journal* 1 (1985).

"Symposium on Bankruptcy." 38 *Vanderbilt Law Review* 665 (1985).

Tribe, Laurence H. *Constitutional Choices.* Harvard, 1985.

Umbreit, Mark. "Victim Offender Mediation and Judicial Leadership." 69 *Judicature* 202 (1986).

Winick, Bruce J. " Restructuring Competency to Stand Trial." 32 *UCLA Law Review* 921 (1985).

Chief Justice Appoints Judicial Conference Committee on Bicentennial of U.S. Constitution

A Judicial Conference Committee on the Bicentennial of the U.S. Constitution has been appointed by the Chief Justice as a special committee of the Judicial Conference of the United States. The Committee will dedicate its efforts toward encouraging the observation and celebration of the Constitution's bicentennial by the Judicial Branch.

The Committee, chaired by Chief Judge Howard T. Markey of the U.S. Court of Appeals for the Federal Circuit, held its initial, organizational meeting at the Supreme Court on Dec. 18 to begin planning for events extending from the 200th anniversary date of the Constitution's signing, Sept. 17, 1987, through the 1989 ratification anniversary.

Chief Judge Markey has announced that the Committee members, working with the Chief Justice, will design and implement programs and recommend them to circuit and district court bicentennial committees on behalf of the Judicial Conference. The Judicial Conference Committee on the Bicentennial of the U.S. Constitution will work closely with the National Commission on the Bicentennial of the U.S. Constitution. Chief Judge Markey will be liaison officer with the National Commission; Chief Justice Burger will be an ex officio member of the Judicial Conference Committee. ■

Deadline for Sentencing Commission Extended

The Senate has passed and President Reagan has signed legislation extending the time within which the U.S. Sentencing Commission must complete its guidelines. (*The Third Branch* last month reported that such a measure had already passed the House.)

The legislation extended the deadline by which the Commission must report a set of guidelines to Congress to April 1987. In addition, it altered the dates of the sentencing and parole aspects of the Comprehensive Crime Control Act, keeping the Parole Commission in operation for five years from the date the initial sentencing guidelines become effective.

The amendments to the sentencing laws that were to become effective Nov. 1, 1986, will now become effective Nov. 1, 1987.

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THE THIRD BRANCH

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Veteran Legislator Praises Judiciary, Shares Perspective on Federal Courts

Congressman Robert W. Kastenmeier (D-Wis.) is Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

After Army service, Congressman Kastenmeier received his law degree from the University of Wisconsin and practiced law in Watertown, Wis., from 1952 to 1958. He also served a three-year stint as a justice of the peace for Jefferson and Dodge Counties (1955–1958). He has represented his district since 1958, 28 continuous years in Congress.

The Subcommittee of which the Congressman is Chairman has legislative and oversight responsibility for the United States court system and for various elements within the Department of Justice. It also has legislative responsibility in several general subject areas, including court reform; corrections and prisons; the financing of legal services; attorneys' fees; alternatives to litigation; patents, trademarks, and copyrights; privacy; and First and Fourth Amendment rights.

Congressman Kastenmeier has sponsored bills enacted into law to reform the magistrates system, to create the U.S. Court of Appeals for the Federal Circuit, to provide jury reform, to establish a bankruptcy court system, to divide the Fifth Circuit into two new and autonomous circuits (the Fifth and the Eleventh), and to establish a federal judicial discipline mechanism. He was a sponsor of legislation to create the State Justice Institute.

Cong. Robert W. Kastenmeier

In 1985 the Congressman received the Distinguished Service Award from the National Center for State Courts, the Warren E. Burger Award of the Institute for Court Management, and a distinguished service award from the Association of U.S. Magistrates, all in recognition of his work in improving the administration of justice in federal and state courts.

You were interviewed by *The Third Branch* in June 1979; have the past several years caused you to change your general philosophy about federal courts?

No, indeed not. Today, I very

See KASTENMEIER, page 4

Chief Justice Asks Social Security Change

On Jan. 21, 1986, Chief Justice Burger sent to the Speaker of the House and the President of the Senate proposed remedial legislation to correct an inequity to senior judges in the 1983 Social Security amendments, "which, if left unaltered, could have a grave impact on the federal judiciary's ability to effectively manage its ever-increasing workload," the Chief Justice said.

Since Jan. 1, all 276 senior judges have been subject to a reduction in their retirement salaries through Social Security deductions if they perform any judicial duties. The income reduction for a senior judge who continues to serve has been calculated at between $3,000 and $12,000 annually, depending on a judge's circumstances.

The work of senior judges last year equaled the output of at least 85 active-service judges. ■

Organized Crime Panel Submits Report, Makes Recommendations

The President's Commission on Organized Crime, chaired by Judge Irving R. Kaufman (2nd Cir.), has submitted a report, *The Edge: Organized Crime, Business, and Labor Unions*, to President Reagan and Attorney General Edwin Meese. The Commission earlier issued an interim report entitled *The Cash Connection: Organized Crime, Financial Institutions and Money Laundering*, which recommended measures that, if taken, would curb organized crime's easy access to the financial institutions of the United States.

The second report, released Jan. 14, 1986, examines the problem of labor and management racketeering by organized crime in the United States. The report describes the impact on legitimate businesses of labor-management racketeering schemes, and explains how organized crime, through domination or influence of labor organizations, employers, and businesses, can control segments of entire economic markets and can distort the cost of doing business to marketplace participants through theft, extortion, bribery, price-fixing, fraud, and restraint of trade.

The Commission makes a series of administrative and legislative recommendations in both the civil and criminal law areas, and urges

See CRIME, page 3

Inside...

Univ. of Nevada Announces Degree Program for State And Federal Trial Judges

The University of Nevada (Reno) announced in January that the University, in conjunction with the National Judicial College, will offer a program leading to a Master of Judicial Studies to active state and federal trial judges who have earned law degrees from an ABA-accredited law school. Justice James Duke Cameron (Sup. Ct. Ariz.), a member of the Board of the Judicial College who designed the program in cooperation with the University, explained that requirements include 24 units of study and submission of a scholarly paper on a previously approved subject.

Though other universities have offered summer programs (including the University of Virginia, where appellate judges may earn a Master of Laws in the Judicial Process), the University of Nevada's advanced degree is the first designed exclusively for trial judges.

Commenting on the new program, Justice Florence Murray, Chairman of the Board of the National Judicial College, said, "It fills a void in the area of continuing education for trial judges. In addition, it affords those trial judges who have been recipients of the largess of the University of Nevada, through their affiliation with the National Judicial College, [an opportunity] to become true alumni of the University. It is another step in the College's continuing efforts to be of service to the judiciary." ■

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Editor

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

Judges Campbell and Tamm Receive Devitt Award

Judge William J. Campbell

Judge Edward A. Tamm (1906–85)

Judge William J. Campbell and the late Judge Edward A. Tamm have been named as this year's recipients of the highly prestigious Devitt Distinguished Service to Justice Award. Established in 1982, the award is made annually to a federal judge by the West Publishing Company "to bring public recognition to the contributions made by federal judges to the advancement of the cause of justice." Nominations are submitted by members of the legal profession and then considered by a committee of three.

The selection committee members currently are Justice Lewis F. Powell, Jr., of the Supreme Court of the United States, Chief Judge James R. Browning of the U.S. Court of Appeals for the Ninth Circuit, and Senior Judge Edward J. Devitt of the U.S. District Court for the District of Minnesota.

Senior Judge William J. Campbell, who has 45 years of service to the federal courts, was appointed to the U.S. District Court for the Northern District of Illinois by President Franklin D. Roosevelt in 1940, and became Chief Judge of that court in 1959. He took senior status in 1970, but his service to the federal courts continued. For the past fifteen years, the judge has made significant contributions to the work of the Federal Judicial Center, especially in connection with the Center's programs and workshops. In announcing the award the committee noted, "His long-time direction of national judicial educational programs has enhanced the quality of justice in this country."

An honorarium of $10,000 and a Swedish crystal obelisk especially designed for this award will be presented to Judge Campbell at a ceremony later this year.

Mrs. Edward A. Tamm will receive a like award, which will be made posthumously to the Judge at a special program in Washington next fall.

Judge Tamm, after a distinguished career as Assistant Director of the Federal Bureau of Investigation, was nominated to the U.S. District Court for the District of Columbia by President Harry S Truman in 1948 and to the U.S. Court of Appeals for the District of Columbia Circuit in 1965. His contributions to the work of the Judicial Conference of the United States were many and included the chairmanship of the Conference's Committee on Judicial Ethics. He was the first Chief Judge of the U.S. Emergency Court of Appeals. In announcing his posthumous selection, the committee said: "He was also recognized for establishing and administering a Federal Judiciary Ethics program and for supervising the annual filing of judges' ethics reports."

With 45 years of service by Judge Campbell and 37 by the late Judge Tamm, the aggregate number of years' service to the federal courts totals 82. In short, they have served long and well. ■

Sentencing Commission Staff Director, General Counsel Announced

Kay A. Knapp has been named Staff Director for the U.S. Sentencing Commission. Ms. Knapp is from St. Paul, Minn., and was formerly Research Director and later Director of the Minnesota Sentencing Guidelines Commission (from May 1982 to October 1985). Ms. Knapp has an extensive background in sentencing reform, corrections research, and policy formulation. She completed Ph.D. course work in political science and research methodology at the University of Kentucky and has written extensively on criminal justice and sentencing issues.

Denis J. Hauptly, former Senior Staff Attorney for the U.S. Court of Appeals for the First Circuit, has been named General Counsel for the U.S. Sentencing Commission. His background includes service as Associate Director of the Office of Legislation in the U.S. Department of Justice's Criminal Division, and various staff positions in the U.S. Attorney General's office, including the Office of Policy and Planning and the Office for Improvement in the Administration of Justice. ■

CALENDAR

Mar. 4–7 Video Orientation Seminar for Newly Appointed Magistrates

Mar. 12–13 Judicial Conference of the United States

Mar. 16–19 Sentencing Institute for the Second and Sixth Circuits

Mar. 19–21 Seminar for Magistrates of the First, Second, Third, Fourth, and D.C. Circuits

Mar. 19–21 Workshop for New Training Coordinators

Mar. 24–26 Conference of Metropolitan District Chief Judges

Apr. 2–4 Workshop for Judges of the Fourth Circuit

Chief Justice Burger Notes Constitution's Bicentennial in Speech to Lawyers

Chief Justice Warren Burger delivered a speech at the American Bar Association midyear meeting, following a 16-year custom. Rather than an "annual report" of the type he has given at past midyear meetings, the Chief Justice spoke instead about constitutional history and the upcoming 200th anniversary of the Constitution. He stressed in the speech "the prominent roles that lawyers played in drafting and securing ratification of the Constitution."

The Chief Justice also announced that the national Commission on the Bicentennial of the Constitution and the American Bar Association have agreed to join in sponsoring a national essay contest on the Constitution for students in more than 40,000 high schools. He also discussed the project *We the People*, a series of television programs to be broadcast over the Public Broadcasting System in 1987, and other ABA programs to trace the historical development of constitutional principles. ■

Supplement to Employment Discrimination Study Published

The Center recently published the second supplement to George Rutherglen's *Major Issues in the Federal Law of Employment Discrimination* (FJC 1983). This 62-page supplement summarizes developments in employment discrimination case law from September 1984 through August 1985. It also contains a bibliography of recent books and articles.

Among the topics discussed are claims of disparate treatment and religious discrimination under Title VII of the Civil Rights Act of 1964, attorneys' fees, and remedies for employment discrimination under the Equal Pay Act and the Age Discrimination in Employment Act.

It is intended that this supplement be used with the original publication and the first supplement, which was published a year ago. However, the table of authorities that appears in this volume is cumulative.

Copies of this supplement may be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (8 oz.), but do not send an envelope.

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improvement in the coordination among government agencies in combating organized crime.

In presenting the report, Judge Kaufman commented that "the most successful law enforcement efforts against organized crime have focused on making it more difficult, costly and dangerous to realize profits from illegal activity. No such effort can be complete without attacking the organized criminal groups who operate in the economic marketplace.

"The combined and coordinated efforts of the private sector and each branch of government can reduce and eventually eliminate the pernicious involvement of racketeers in our economy. . . . If these efforts are successful, a crippling blow will have been dealt to organized crime."

In addition to Judge Kaufman, 17 other persons, including Senator Strom Thurmond and Congressman Peter W. Rodino, serve on the Commission. ■

FJC to Hold Seminar for New Circuit Judges

The Federal Judicial Center will hold an orientation seminar for newly appointed U.S. circuit judges at the Dolley Madison House in Washington, D.C., April 14 through 16.

A reception will be held for the new judges at the Center the evening of April 13.

KASTENMEIER, from page 1

strongly feel that the federal courts, and indeed also the state courts, are doing a good job in terms of federal constitutional and statutory mandates. I say this despite the fact that judges today have increasingly found much greater burdens placed on them. There are more cases and the cases are more complex.

The last interview took place some six and a half years ago, and that is a long time, but my confidence in the judicial branch has stayed the same. I have stated with conviction to the Judicial Conference, that of the three branches of the federal government—the judicial, the legislative, the executive—the judicial branch is held in highest esteem, and I feel that the judiciary has earned that esteem. From a legislative standpoint, I am pleased to try to help the judicial branch cope with a number of challenges that have occurred in recent years, including the massive increases in litigation and in caseloads that confront the judiciary at every level, plus external pressures, including political challenges that have taken place in this period, such as attacks on court jurisdiction and also criticism of the courts about decision-making abilities.

Do you feel judicial activism is prevalent in the federal and state court systems, sometimes beyond what is jurisprudentially acceptable?

It's difficult for me to comment about state courts. State courts by their very nature are different from federal courts and are likely to be at some variance, one from the other. My only comment on state courts is that they tend to mirror judicial experience at the federal level. I believe that state courts are in the process of very substantial improvement in resources, in personnel, and generally in standards and their ability to cope with caseloads and the like.

With respect to the federal system, the term "judicial activism" is one that I'm not very fond of because it has no clear meaning. It is evident to legal scholars that what a judge may be constrained to decide in the year 1985 or 1986 may not have a literal nexus with the Constitution as drafted in 1787. The problems are so different. I would hate to have judges who are required to make decisions think that if they uttered any thought beyond that which appears somewhere else they would be engaging in judicial activism.

I know a few years back it was common to criticize so-called "liberal judges" for judicial activism. The federal courts now in terms of their theoretical political balance certainly are reflective to a considerable extent, at least in terms of sheer numbers, of this Administration, which has five years of appointments. Much of judicial activism therefore may be activism of judges appointed by a conservative President. But I'm not a critic of that.

My own view is that it ill serves us in the Congress or in the executive branch or indeed in the Attorney General's Office to criticize the judiciary as being unacceptably engaged in judicial activism. It does not help us deal with the problems of the judiciary. It does not help the judiciary, and it certainly undercuts, modestly I would hope, public confidence in the judicial branch. To this extent, if there is anything I am a critic of it is using these epithets with respect to the judiciary, particularly the federal judiciary. I would hope that we will have passed that period.

It became a popular subject.

Yes, it was for a while. Actually, I suggested at one point that it came as ill grace for a representative of the Administration, which has been making all the appointments to the judiciary for the last five years and which will have an opportunity for several more years to make such appointments, to be criticizing judges for judicial activism. But I must say that it may be that this is principally the opinion of one cabinet officer. I don't know that his predecessor was quite as critical in that connection. Frankly, such criticism does not help. It does not help the system operate, it does not help public confidence, it does not help respect for the rule of law, to make that sort of charge. The charge has always been ill founded, and I would hope that we are witnessing the end of it at this time.

Do you think federal diversity of citizenship jurisdiction will be eliminated any time soon?

I think so, one day. Maybe not this year or next. I do not feel any longer that there is a substantial differential in the quality of justice that can be rendered by a state trial court or a federal district court, both of which are in the state and draw jury panels from state residents in the normal case. But if I were a practicing lawyer, I would want as many forums as possible—two or more if possible—to litigate in. But I don't consider that to be a reasonable position today, given the question of finite judicial resources.

"Of the three branches of the federal government . . . the judicial branch is held in highest esteem."

While I am not considered a political conservative, I agree basically with conservative thinking on the nature of federalism—that is to say, state issues governed by state law ought to be in state courts and not in the federal courts, whatever the issues are, whether they are tort claims or product liability cases. And federal issues ought to be in federal courts. We had just the opposite not too many years ago. If there was a federal question and it didn't rise to a certain monetary level ($10,000) in controversy, a litigant couldn't necessarily get into a federal court. But if there was a state question involving a state incident and adequate diversity of citizenship, there might be jurisdiction in federal court. It should be just the opposite. The matters that are properly allocated to the states

should be in state court and the matters that are federal should be in federal court. Maybe it's oversimplistic, but it's a guiding principle that I and a number of the members of my subcommittee have followed over the years. In fact, we've convinced the House of this on more than one occasion, but, regrettably, not the Senate.

The state courts have been following the federal courts in many ways—the Victim and Witness Protection Act, for example. Many states now have their own victim and witness protection acts. Is this a trend?

I think it is. Historically, it has been accepted that federal courts may be better forums for many issues than state courts. Some people cite the higher quality of federal judges and the better ability of the federal courts to handle matters expeditiously and fairly. I think the state court systems have worked hard, very consciously, for about a decade, maybe longer, to upgrade their systems. The issue of state-federal disparity always comes up in a discussion concerning the proposed elimination of federal diversity of citizenship jurisdiction. It also has arisen in the context of, for example, the newly created State Justice Institute and other devices which are designed to improve and give uniformity to the states with respect to judicial standards. It is my conviction, however, that the state courts are in the process of improvement and have made enormous strides in the past few years. Growing uniformity between the two systems reflects much of the ease of the federal rules of practice and procedure, improved court management techniques, standards of selection, and the like. Unquestionably, with respect to laws involving procedures for handling litigation, for expediting certain types of cases, the states have borrowed from the federal system. At the same time, in some instances state courts have led the federal system. They very early used alternative dispute resolution mechanisms, such as arbitration. But in other respects, I think state courts have borrowed the best of the federal system. It would not be incorrect to say that cross-fertilization has occurred and both systems—federal and state—have benefited.

Cong. Robert W. Kastenmeier

You have introduced legislation (H.R. 3378) that would bring new communications technologies—electronic mail, cellular telephones, data and video transmissions—under the Wiretap Act (Omnibus Crime Control and Safe Streets Act of 1968). Why do you believe that legislation is necessary? In your view, has judicial supervision of Title III wiretap orders worked well?

I think judicial supervision has worked well. The history of Title III, starting nearly 18 or 19 years ago, shows that judicial supervision of Title III wiretap orders was a controversial question. Judicial supervision went a long way to establishing some sort of order with respect to the treatment of wiretapping in this country. Today, the problem is that the law just simply is outdated. It is so outmoded that new legislation is absolutely necessary. We are not alone in saying this. This point has been made by, among others, the Office of Technology Assessment and the General Accounting Office.

What has happened is that the use of various new technologies has been tested in the courts. In the absence of statutory guidance, the courts have had to rule on the application of the 1968 law to new technologies. Judges have had to fill in as best they could by construing what ought to be the case, at the same time saying that the Congress ought to update the Act. The Congress, as the policy-making branch, is in a position to delineate statutorily the usage of the new technology in terms of what is appropriately protected as a privacy right and how the government and other outside parties must respond. The courts cannot really do that. Judges can rule on a given legal question but they cannot make policy. Congress alone can do that, and I think we must.

We also must be mindful that in the year 1986 we may not be able to give guidance for more than the next 10 years. Technology tends to be literally outrunning our capacity to anticipate new uses, new rights or impingement upon rights that are not now contemplated, and the relationship of industries, individuals, and the government. Congress must establish a very sensitive and delicate balance among competing interests. Probably we can only do so for a limited period of time, but we must act now at least for the foreseeable future.

You share with the Chief Justice an overriding desire and commitment to improving the correctional system, state and federal, in this country. What, in the political scheme of things, do you envision over the next several years for the correctional system? What effect will the ongoing budget cuts—20 percent in the appropriations available to the Bureau of Prisons—have on the work of those in the correctional field?

I would like to set forth a positive agenda that we could accomplish in the corrections field. Such an agenda would include the Chief Justice's "factories with fences" concept. I'm supportive, as are many others, of his notion that we can make a prison experience, regrettable as it is, somewhat more helpful to the individual and to the institution and to society. Proposals for correctional improvements pale in connection with other

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practical problems that we now face. Some are budgetary, some are societal. Today we have higher numbers of people who are convicted of increasingly violent crimes. The prison system has a very difficult time dealing with these individuals, more difficult, I might say, than existed a generation ago. The profile of individuals incarcerated in maximum security institutions is very poor, by and large, in terms of the potential for those individuals to benefit behaviorally from incarceration. We have, unfortunately, become a more violent society and the correctional system has had to bear the brunt of that change. At the same time, rather than devote more resources to the seemingly intractable problem of how to deal with violent people, we have given up the notion that we are going to treat them and cure them of personality disorders so there will be no recidivism. I agree with Norm Carlson that our major obligation today is to provide humane incarceration for inmates consistent with administrative standards, or court-imposed standards—constitutional standards certainly—and to enable these individuals to have educational, work, and other opportunities if they can be helped.

We are facing cutbacks, and if Gramm-Rudman-Hollings is hard on some government agencies it will be doubly hard on prisons. It will have an enormous, negative impact. There is not very much budgetary flexibility in prisons. One can argue that we have so much committed to defense in terms of dollars that cutbacks in defense can be digested without great difficulty. But in prisons that is not the case. So much of corrections is in personnel, so much of it is in daily care of prisoners. We already have unacceptable overcrowding in most of our institutions in the federal system. And overcrowding is certainly true in the state systems.

We have nowhere to go but down. I say this as a challenge to us in connection with what we can look forward to for the next three or four years. Hopefully, this challenge will inspire us to treat this question somewhat separately, otherwise we will find courts faced with serious prison overcrowding being forced to consider releasing individuals, perhaps putting some individuals out on the streets who ought not be there for the protection of society. We will see the creation of chaotic conditions. In short, we have to have resources to devote to prison systems even if we, as reformers, would love to see people in halfway houses and in programs that did not involve prisons. Because of violence in our society, and because of the intractability of some of the problems, including narcotics-related matters, we will still have to have prisons.

"We have to have resources to devote to prison systems even if we . . . would love to see people in programs that did not involve prisons."

Just to exacerbate the situation, we have perhaps 1,500 to 1,800 Cubans who are being held for immigration purposes in the Atlanta Penitentiary.

There is a trend in corrections that we examined recently in my committee involving privatization of prisons or correctional facilities. I am not clear how privatization can be done at a state or federal level in the era of Gramm-Rudman-Hollings, because the private organizations intend to make money at their endeavor, substituting for what has traditionally been a governmental role. How private enterprise can make money and still deliver at reduced dollars available for corrections, while respecting constitutional and policy standards for incarceration, I do not understand. I'm very skeptical about that. Privatization is one of the few really new ideas that seems to have some currency, and, even though I am a skeptic about it, I'm afraid that it would have a better chance in an era in which we had increased dollars going into corrections.

So I am not optimistic about the next few years except in the sense that I think we will go through a trauma which may enable us thereafter to deal somewhat differently, and, hopefully, more effectively with the question of prisons and corrections in America.

You have been the guiding force behind virtually all of the major judicial reform legislation for a number of years. What motivates your untiring efforts for judicial reform?

My work has been intermittent, since we get other issues that often intervene, so that sometimes I find it hard to continue work on any given piece of legislation. But my feeling is that there is always an unfinished agenda and there always will be. Court improvement has been a goal shared by many—the American Bar Association certainly; the American judiciary, of course; and many others who have devoted themselves to how we can contribute to an improvement in our justice system. I feel I am just one of those persons.

Sometimes improvements are probably not seen as improvements by everyone. I am thinking specifically of judicial tenure and judicial ethics legislation. But I do think that we need public confidence in our institutions and I think in the federal system the judiciary has changed enormously in the last decade or so. It is no longer a single judge whom almost everyone knew serving virtually alone in the district, riding a sort of circuit of his or her own. From a nationwide perspective, the judiciary is essentially more bureaucratic and impersonal and certainly less collegial than it once was. We have seen these changes come about, and we've needed to create impersonal institutional and administrative means of dealing with problems such as complaints about judges. That's where judicial discipline and tenure and ethics come into play and a need for statutory enactment of provisions

See KASTENMEIER, page 8

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers.*

Abrahamson, Shirley S. "Redefining Roles: The Victims' Rights Movement." 1985 *Utah Law Review* 517.

Amar, Akhil. "A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction." 65 *Boston University Law Review* 205 (1985).

Blackmun, Harry A. "Section 1983 and Federal Protection of Individual Rights—Will the Statute Remain Alive or Fade Away?" 60 *New York University Law Review* 1 (1985).

Bork, Robert H. "Law, Morality, and Thomas More." Address to the Thomas More Society of America, Washington, D.C., Sept. 26, 1985.

Brennan, William J., Jr. "Rededication Address: The American Bar Association's Memorial to the Magna Carta." 19 *Loyola of Los Angeles Law Review* 55 (1985).

Cohen, George M. "Posnerian Jurisprudence and Economic Analysis of Law: The View from the Bench." 133 *University of Pennsylvania Law Review* 1117 (1985).

Directory of Criminal Justice Issues in the States. Criminal Justice Statistics Association, Washington, D.C.

Edwards, Harry T. "Hopes and Fears for Alternative Dispute Resolution." 21 *Willamette Law Review* 425 (1985).

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Estreicher, Samuel, and John E. Sexton. "New York University Supreme Court Project." 59 *New York University Law Review* 677-1929 (1985).

A Framework for Studying the Controversy Concerning the Federal Courts and Federalism. Advisory Commission on Intergovernmental Relations, Washington, D.C. (copies available from the Commission at 1111 20th St., N.W., Washington, D.C. 20575).

Geiselman, R. Edward, and Ronald P. Fisher. "Interviewing Victims and Witnesses of Crime." National Institute of Justice. *Research in Brief.* December 1985.

Gibney, Mark. "The Role of the Judiciary in Alien Admissions." VIII *Boston College International & Comparative Law Review* 341 (1985).

Goldberg, Arthur J. "Stanley Mosk: A Federalist for the 1980's." 12 *Hastings Constitutional Law Quarterly* 395 (1985).

Kaufman, Herbert. *Time, Chance, and Organizations: Natural Selection in a Perilous Environment.* Chatham House, 1985.

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1985 Grand and Petit Juror Service in United States District Courts. Administrative Office of the U.S. Courts, 1985.

Parness, Jeffrey A. "Groundless Pleadings and Certifying Attorneys in the Federal Courts." 1985 *Utah Law Review* 325.

Petersilia, Joan, and Susan Turner. *Guideline-Based Justice: The Implications for Racial Minorities.* Rand Publication Series, 1985.

Ranney, James T. "The Exclusionary Rule—The Illusion vs. the Reality." 46 *Montana Law Review* 289 (1985).

Schwartz, Bernard. *The Unpublished Opinions of the Warren Court.* Oxford, 1985.

Shafferman, Joel. "Privacy Plight of Public Employees." 13 *Hofstra Law Review* 189 (1985).

See SOURCE, page 9

Center Publishes New Audiovisual Media Catalog

The Center recently published the *1985 Catalog of Audiovisual Media Programs,* a substantial revision of the former *Educational Media Catalog.* This new edition lists audiocassettes, videocassettes, instructional software, and films available for loan to federal judicial personnel from the media library of the Center's Information Services.

The items are grouped by subject matter and include recordings of Center seminars and workshops, specially produced Center media programs, and programs obtained from commercial sources and other government agencies. Recordings of presentations at seminars are included on a selective basis in an effort to avoid needless duplication and to make the catalog easier to use. The programs were selected for inclusion based on the level of past usage and their topicality.

The introduction to the catalog further describes the organization of the materials listed and includes directions for requesting items and a reproducible request form (which should be retained for recurring use).

Copies of the catalog have been distributed to a large segment of the federal judiciary, including judges, magistrates, clerks, circuit and district executives, chief probation and pretrial services officers, offices of senior staff attorneys and federal public and community defenders, and court training coordinators. Other federal judicial personnel may obtain copies by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (6 oz.), but do not send an envelope. ■

1986 Circuit Judicial Conferences

First Circuit	Oct. 14-16	Dixville Notch, N.H.
Second Circuit	Sept. 4-7	Bolton Landing, N.Y.
Third Circuit	Sept. 28-30	Princeton, N.J.
Fourth Circuit	June 26-28	White Sulphur Springs, W. Va.
Fifth Circuit	May 11-14	Houston, Tex.
Sixth Circuit	May 14-18	Memphis, Tenn.
Seventh Circuit	May 18-20	Milwaukee, Wis.
Eighth Circuit	July 22-28	Minneapolis, Minn.
Ninth Circuit	Aug. 17-21	Sun Valley, Idaho
Tenth Circuit	July 9-12	Boulder, Colo.
Eleventh Circuit	May 11-14	Atlanta, Ga.
D.C. Circuit	May 18-20	Williamsburg, Va.
Federal Circuit	Apr. 23	Washington, D.C.

KASTENMEIER, from page 6

which I think in another time might have been unnecessary.

Are there many others in the House and Senate who are really interested in judicial administration? Are there many interested lawyers or former judges in Congress now?

Strangely enough, I think there are fewer than one would expect. We do have a number of members of the House and the Senate who are either former judges or have been practicing lawyers in the past. One would naturally assume that these people would be keenly interested on a continuing basis in the judiciary. In my opinion, their lack of special interest in judicial administration is because they have other duties. If they are on a committee that deals directly with court reform, they deal with it, but if they are on another committee their other duties sometimes just take them in other directions. There are a number of them who clearly are interested in these questions. You can reawaken a sense of concern about the judiciary in them, but the brunt of work is left to those of us who are directly challenged with the responsibility, as Howell Heflin and Strom Thurmond and many others are in the Senate.

The importance of their other work in the Senate and the House tends to override other matters?

Yes, I think so. If I take a bill to the floor, let's say such as increasing judicial survivors' benefits, it will get general support. Now it means that there is latent, strong support for judges, even though individual members will complain from time to time about judges for various reasons, as they do in any policy-making institution. Yet the support is there, and I think the residual good will and support for the judiciary generally, the federal judiciary certainly, is still notable in the House and Senate. Sometimes we may differ as a matter of policy whether the mandatory jurisdiction of the Supreme Court ought to be eliminated or not, or whether diversity ought to be changed, but basically I think there is support for the judiciary. I have no hesitation about moving legislation forward based on any fear that the House might disapprove because judges might be deemed "unpopular." That is not the case.

Among the bills passed by the House in December was the Rules Enabling Act of 1985 (H.R. 3550), affecting the way in which federal rules become effective. What particular concerns of yours does this measure address?

With respect to the Rules Enabling Act, this too, I think, responds to my own philosophy. Again, we want to be helpful with respect to the Judicial Conference and the standing committees that handle the rules. We were mindful of a number of suggestions and criticisms of the way things have been conducted in the past. We did think that openness, although resisted, I think, at the outset by some members of the judiciary, is desirable, and there is an essential element of openness that we have put into the Act. We've also tried to respond to concerns about the role the Supreme Court would play. We decided as a matter of policy that the Court ought to continue to review rule changes, even though it may not play a highly active role in the rules. The Supreme Court's rule-making role is very important to the state supreme courts in discharging similar responsibility. If the federal rules are to be given a high degree of credibility and followed as a model by the states, then the Supreme Court accomplishes by its rather passive review role an important function when all else is considered.

Again, the bill does not contemplate, hopefully, much of a role for the Congress. I remember some of my colleagues struggling with the rules in the past decade. I would hope that the Congress would again play a very passive role in connection with the rules in terms of approval. I do not want various questions on the rules of evidence or anything else to be politicized. There may be a couple of instances one could imagine that could lead to special legislation, but overall we would be very happy for these rules not to be altered by the Congress.

We do, however, at the same time believe that the rule-making process should not supersede acts of Congress, and that's recognized in the proposed legislation. Although there may have been some earlier question about it, the Judicial Conference has acceded to that point of view, and I think that was important.

"I . . . would always put elimination of the Supreme Court's mandatory jurisdiction and abolishment of diversity jurisdiction on my list of things I would like to see achieved."

Other bills are coming down. Of course, there is the proposed Intercircuit Tribunal, which we will want to look at. We just passed the Judicial Improvements Act, which contained a number of housekeeping changes, including judicial survivors' annuities reform. If one looks at the content of the Judicial Improvements Act from a judiciary perspective, it would have to be considered as a very positive amalgam of different provisions.

I, of course, would always put elimination of the Supreme Court's mandatory jurisdiction and abolishment of diversity jurisdiction on my list of things I would like to see achieved. There is some question whether the Senate cares to move those two matters forward. I would not merely pass them unless a showing is made that there is some interest on the part of the Senate in those matters.

Do political changes in Congress and the resultant changes in commit-

See KASTENMEIER, page 10

PERSONNEL

Nominations

Frank J. Magill, U.S. Circuit Judge, 8th Cir., Jan. 21
Ronald R. Lagueux, U.S. District Judge, D.R.I., Jan. 21
Lawrence P. Zatkoff, U.S. District Judge, E.D. Mich., Jan. 21
Danny J. Boggs, U.S. Circuit Judge, 6th Cir., Jan. 29
Sidney A. Fitzwater, U.S. District Judge, N.D. Tex., Jan. 29
Walter J. Gex III, U.S. District Judge, S.D. Miss., Jan. 29
Thomas J. McAvoy, U.S. District Judge, N.D.N.Y., Jan. 29
Jefferson B. Sessions III, U.S. District Judge, S.D. Ala., Jan. 29
Robert J. Bryan, U.S. District Judge, W.D. Wash., Feb. 3
Miriam G. Cedarbaum, U.S. District Judge, S.D.N.Y., Feb. 3
Raymond J. Dearie, U.S. District Judge, E.D.N.Y., Feb. 3
David R. Hansen, U.S. District Judge, N.D. Iowa, Feb. 3

Appointments

Stephen V. Wilson, U.S. District Judge, C.D. Cal., Dec. 6
Edward R. Korman, U.S. District Judge, E.D.N.Y., Dec. 16
Patrick A. Conmy, U.S. District Judge, D.N.D., Dec. 17
James L. Buckley, U.S. Circuit Judge, D.C. Cir., Dec. 19
Frank X. Altimari, U.S. Circuit Judge, 2d Cir., Dec. 23
Glenn L. Archer, Jr., U.S. Circuit Judge, Fed. Cir., Dec. 23
Lynn N. Hughes, U.S. District Judge, S.D. Tex., Dec. 23
George H. Revercomb, U.S. District Judge, D.D.C., Dec. 24
David R. Thompson, U.S. Circuit Judge, 9th Cir., Dec. 24
Morris S. Arnold, U.S. District Judge, W.D. Ark., Dec. 30
Duross Fitzpatrick, U.S. District Judge, M.D. Ga., Dec. 31
James L. Ryan, U.S. Circuit Judge, 6th Cir., Jan. 2
Robert L. Miller, U.S. District Judge, N.D. Ind., Jan. 10
J. Spencer Letts, U.S. District Judge, C.D. Cal., Jan. 13
Alan B. Johnson, U.S. District Judge, D. Wyo., Jan. 17

Senior Status

Paul Benson, U.S. District Judge, D.N.D., Dec. 31
Morgan Ford, Judge, U.S. Court of International Trade, Dec. 31

Deaths

Anthony T. Augelli, U.S. District Judge, D.N.J., Oct. 22
Roger Robb, U.S. Circuit Judge, D.C. Cir., Dec. 19

Positions Available

Clerk, U.S. Bankruptcy Court for the Middle District of Florida. Salary to $52,262. To apply, send resume by Apr. 15 to Alexander L. Paskay, Chief Judge, U.S. Bankruptcy Court, P.O. Box 1000, Tampa, FL 33601-1000.

* * *

Senior Supervisory Attorney, U.S. Court of Appeals for the Fifth Circuit. Salary to $44,430. Qualifications: three years of high quality legal experience with knowledge of federal practice and procedure; management experience or demonstrated interpersonal skills preferred; graduation in the upper third of law school class; law review or equivalent legal research, writing, and editing experience. To apply, send resume by Mar. 15 to Steven Felsenthal, Director, Staff Attorneys' Office, 600 Camp St., Rm. 116, New Orleans, LA 70130.

EQUAL OPPORTUNITY EMPLOYER

SOURCE, from page 7

Simon, Larry G. "The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?" 73 *California Law Review* 1480 (1985).

Stern, Barry J. "Presumptive Sentencing in Alaska." *Alaska Law Review*, December 1985, 227-70.

Weninger, Robert A. "Unjustified Sentence Disparity: A Case Study of the Leveling Effect of Parole." 36 *Syracuse Law Review* 715 (1985).

Immigration Talk Begins Ninth Circuit Lecture Program

Professor William Hing recently spoke on immigration issues at a meeting of Ninth Circuit appellate judges who were in San Francisco for court week. Also in attendance were several appellate staff attorneys and law clerks.

Professor Hing, of the Golden Gate University Law School, is a visiting professor at Stanford Law School for the 1985-1986 academic year. His was the first in a series of occasional lectures planned by the Ninth Circuit's education committee and sponsored and financed by the Center as part of its local training program. The law schools have been asked for sug-

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KASTENMEIER, from page 8

tee chairmen make significant changes in what legislation is passed into law or defeated? For example, there was a push in Congress to bring about more "court stripping"—depriving the courts of their jurisdiction—but it seems to have receded. Do you have any views on this?

Yes. Political changes often occur as winds of change. That is to say, changes do not necessarily mean that personnel—individual House members or Senators—have been replaced. The political winds of change are more important. So, while I cannot say that there have been changes in personnel that affect legislative outcomes, I do feel that during the last two or three years the mood has changed from one of attacking the jurisdiction of the courts, removing jurisdiction from the judiciary, in response to a series of major decisions of the Supreme Court. Court stripping as a political approach has been on the wane. I don't see that pressed any more, and I think that's a very healthy development. In my opinion, we have to come to terms with the function the judicial branch serves in society and that function serves this nation well. Whether or not I agree with every court decision is irrelevant. The judicial branch serves us well and I am very conservative when it comes to institutional changes, such as court stripping, being imposed on the judiciary by the legislative branch. ■

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gestions for prospective speakers and topics.

These programs represent another means to provide judges with an opportunity for dialogue with others who are working in areas closely related to the work of the federal courts. Other circuits interested in developing an occasional speaker series are invited to contact the Center's Division of Continuing Education and Training. ■

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Leaders Gather at Brookings Institution Forum

Last month, following a tradition started in 1978, the Brookings Institution brought together in Annapolis, Md., leaders from the three branches of the federal government, several state chief justices, and members of the academic community. Brookings' President Bruce K. MacLaury and Senior Staff Member Warren Cikins, along with A. Lee Fritschler, Director of Brookings' Center for Public Policy Education, designed the seminars to "give the participants the opportunity to explore together problems and issues in the administration of justice on an informal and off-the-record basis."

Chief Justice Burger explained in welcoming remarks that the meetings afforded the judiciary an opportunity for direct communication with others, especially representatives of the legislative and executive branches, whose activities acutely affect the work of the courts. He expressed the hope that these informal discussions would bring about a better understanding of how joint efforts can improve the delivery of justice in the courts. Also addressing the seminar were Attorney General Edwin Meese III, Senator Strom

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Chief Judge Sterrett on Tax Court Procedures, Court as Forum for Large and Small Cases

This month The Third Branch *went to an Article I specialized court to interview Chief Judge Samuel B. Sterrett of the United States Tax Court.*

The Judge, a native Washingtonian, received an LL.B. from the University of Virginia Law School, and a master's degree in taxation from New York University Law School. He served in the United States Army and, after graduating from the U.S. Merchant Marine Academy, in the U.S. Merchant Marine. A biographical sketch notes that the Judge sailed as a second mate on ships in both the Atlantic and Pacific Oceans. Quite naturally, his hobby is sailing, and he enjoys golf and duck hunting.

The Judge's career is replete with experience in tax law areas—private practice in Washington, D.C, and New York City; government service in the Office of the Regional Counsel of Internal Revenue Service in New York City; and appointment to the United States Tax Court, where he has served continuously since 1968. He has been presidentially reappointed to two 15-year terms, once in 1970 and again in 1985.

On June 1, 1985, his colleagues elected him Chief Judge of the Tax Court.

What is the origin of the United States Tax Court?

The origin, or the need for a Tax Court, goes back to the Sixteenth

Chief Judge Sterrett

Amendment and the enactment of the income tax law. The tax laws enacted in 1913 provided in effect that the government could simply

See STERRETT, page 4

Judges' Service on Commission Upheld

The Third Circuit Court of Appeals has held that voluntary service by Article III federal judges on the President's Commission on Organized Crime does not violate the separation of powers doctrine. *In re Scarfo,* No. 85-5539, slip op. (3rd Cir. Feb. 14, 1986).

The U.S. District Court for the District of New Jersey, following *In re Scaduto,* 763 F.2d 1191 (11th Cir. 1985), held that the presence of two members of the federal judiciary on the Commission violated the Constitution, and therefore quashed the Commission's subpoena of Scarfo. The Third Circuit vacated the district court's order and remanded with instructions to enforce the Commission's subpoena. (The Commission is chaired by Judge Irving R. Kaufman (2nd Cir.), and former Supreme Court Justice Potter Stewart served on the Commission until his death in December.) Noting that the work of the Commission is nonjudicial and that the service of judges on it is voluntary, the court declined to follow *Scaduto,* stating that "attention should be on the judge's conduct and not that of those who tendered, but did not impose, the powers....We are not prepared to say that the Constitution prohibits the service of Article III judges on any and all extrajudicial governmental committees or commissions."

See JUDGES, page 2

Inside

Center Publishes New Staff Paper

Court-Appointed Experts, a staff paper by Thomas E. Willging, was recently published by the Center.

The author discusses the mechanics of using Federal Rule of Evidence 706 to appoint an expert and to allocate payment of the costs. He also reports cases involving creative, nontestimonial use of experts under a combination of rule 706, Federal Rule of Civil Procedure 53 (special masters), and the inherent powers of the courts. The paper was prepared in response to questions raised by judges concerning what they perceived as the relatively infrequent use of court-appointed experts.

Copies of this report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed, gummed mailing label, preferably franked (4 oz.). Please do not send an envelope.

JUDGES, from page 1

Scarfo contended that service on the Commission brands a judge as "pro prosecution," and relied on the *Scaduto* conclusion that Commission activity was detrimental to the notion of judicial impartiality. The Third Circuit's opinion says that while the "appearance of bias" argument advanced by Scarfo is "troubling," it "does not persuade us that the Constitution has been violated. Rather, we conclude that it may be addressed in specific cases by a motion for recusal." ■

THE THIRD BRANCH

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

BROOKINGS, from page 1

Thurmond, Chairman of the Senate Judiciary Committee, and Congressman William J. Hughes, Chairman of the House Judiciary Subcommittee on Crime, who brought a message from Congressman Peter Rodino, Jr., Chairman of the House Judiciary Committee.

The Chief Justice expressed his personal appreciation for the attendance of his counterparts from the states, Chief Justice Edward F. Hennessey of the Supreme Judicial Court of Massachusetts, this year's Chairman of the Conference of Chief Justices; Chief Justice Robert F. Stephens of the Supreme Court of Kentucky; and Chief Judge Robert C. Murphy of the Court of Appeals of Maryland.

Chief Judge Murphy introduced Governor Harry Hughes of the host state, who discussed the impact of the 1786 Annapolis convention on the drafting of the U.S. Constitution.

Among the subjects that received special attention during the three-day meeting were the sentencing and bail provisions of the Comprehensive Crime Control Act of 1984, habeas corpus, the federalization of state tort law, mass tort litigation, judicial selection, and the proposed intercircuit panel to assist the Supreme Court of the United States with its growing workload. Professor Daniel J. Meador of the University of Virginia Law School restated his endorsement of the intercircuit panel, and Attorney General Meese has since added his endorsement.

Three chief judges from the federal courts were in attendance, Chief Judges Charles Clark, John C. Godbold, and Donald P. Lay. The Federal Judicial Center and the Administrative Office were represented by their directors, A. Leo Levin and L. Ralph Mecham. ■

1985 Financial Disclosure Statements Due in May

All judicial officers and judicial employees in Grade 16 and above are reminded that they are required to file financial disclosure statements for calendar year 1985 by May 15. This includes those employees who may have worked up to 60 days during 1985.

Annual filings are required by the Ethics in Government Act, 28 U.S.C. app. §§ 301–309 (1982).

Canadian Judicial Centre Project Underway

The Canadian judiciary is currently engaged in setting up the Canadian Judicial Centre. The project was announced by Chief Justice Brian Dickson of the Supreme Court of Canada and Federal Minister of Justice John Crosbie on Nov. 14, 1985. Presently in the conceptual stage, the project is directed by Justice William A. Stevenson of Edmonton, Alberta, who is assisted by a research advisor, Brian Grainger. Justice Stevenson is charged with undertaking a study of needs and resources "with a view to the establishment of permanent educational programs available to all judges and courts in Canada."

Justice Stevenson, a judge for ten years (the last five on the Alberta Court of Appeal), is a past president of the Canadian Institute for the Administration of Justice and a former professor of law. He will canvass and consult with individuals and organizations including the Canadian Judicial Council, the Chief Judges of the Provincial Courts, the Canadian Judges' Conference, the Association of Provincial Court Judges, the Canadian Institute for the Administration of Justice, the Canadian Institute for Advanced Legal Studies, and faculties of law and departments of government in Canadian colleges and universities.

Justice Stephenson and Mr. Grainger recently spent a day at the Federal Judicial Center and met with Director A. Leo Levin and other Center staff to learn how the FJC carries out its continuing education and training programs. ■

ABA's Midyear Meeting Held

Members of the ABA's House of Delegates debated and acted upon several issues of relevance to the federal courts at their recent midyear meeting. Some are listed below.

Tort law. The ABA's 441-member house unanimously rejected an American Medical Association proposal that asked that the ABA join its efforts to bring about changes in the tort law system. The AMA membership contend that malpractice judgments against doctors are excessively high; that the cost of malpractice insurance is excessively high; and that the combination is discouraging doctors from fully carrying out their responsibilities to their profession. The ABA house did acknowledge that the two professions share some common problems related to the tort law area and directed that entities of the ABA immediately set in motion studies that could bring about changes. As a start, it was suggested that ongoing consultations be held with representatives of health care groups, the insurance industry, state and federal governmental agencies, and all other appropriate individuals and organizations, "with the goal of seeking a broader consensus of how more equitably to compensate injured persons." In turning down the AMA proposal, however, the ABA did not close the door to cooperative efforts later, presumably after reports come in from the ABA studies.

The ABA House of Delegates approved a comprehensive report opposing a federal role in the area of medical malpractice and opposed the establishment of limitations on awards that may be realized by successful litigants in malpractice cases.

Intercircuit panel. The ABA house both refused to endorse and voted to oppose legislation that would establish, for an experimental period of time, an intercircuit panel to assist the Supreme Court with its growing caseload. The panel that would be established under the pending congressional bill would screen certain cases brought by parties hoping for review by the Supreme Court of the United States, mainly those cases involving issues where the circuit courts of appeals have handed down split decisions. In a rare house appearance by a Supreme Court justice to address a specific issue, Justice Rehnquist asked for ABA support to cure what he pointed out—as the Chief Justice has in the past—is a serious problem for the Court.

Arbitration. The ABA house approved a resolution to urge Congress to amend title 9 of the United States Code. This change would facilitate appeals to federal courts of appeals from orders of a federal district court that either refused a stay of litigation pending arbitration or denied an application to compel arbitration.

Privatization of prisons and jails. This issue raised much controversy and concern, and following debate it was urged that jurisdictions that are considering privatization not proceed until the complex constitutional, statutory, and contractual issues are developed with great care and study.

Bankruptcy. There was no dissent to a resolution that approved support of pending legislation to bring about priority of federal claims in nonbankruptcy administration. This would bring about conformity with the federal priorities under the Bankruptcy Code.

Grand jury subpoenas. Overwhelming approval came for a resolution to curb the government's use of grand jury subpoenas directed to attorneys whose clients are the subject of investigation by that grand jury. The Criminal Justice Section spoke to this issue, insisting that prior judicial approval should be mandatory where the prosecutor is seeking to compel an attorney-witness to provide evidence concerning a client, thereby removing the attorney-client privilege.

Copies of resolutions on these matters are available by contacting Alice O'Donnell at the Federal Judicial Center. ■

Congress Modifies Federal Pay Mechanism

When the President next delivers recommendations on judicial salaries to Congress, those recommendations will become effective after 30 days unless disapproved within that period by a joint resolution of Congress. Such resolution is subject to presidential veto, and if vetoed would have no legal effect unless the veto were overridden by a two-thirds majority of both the Senate and the House.

Congress modified its procedures for acting on federal salary revision late last year as part of the continuing appropriations resolution enacted at the end of the first session. Under prior law, a negative vote by either house was sufficient to veto the Pres-

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Karen M. Knab New D.C. Circuit Executive

Karen M. Knab has assumed the position of Circuit Executive for the District of Columbia Circuit.

Ms. Knab holds a bachelor's degree from St. Mary's College, University of Notre Dame, and a law degree from the University of Chicago. Her background includes work as Deputy Director of State Courts for the state of Wisconsin, Director of the Family Division of the Superior Court of the District of Columbia, and Director of Administration for the firm of Pepper, Hamilton & Scheetz. She has also served as Staff Attorney for the American Judicature Society and as Director of Corporate and Sales Tax of the Illinois Department of Revenue.

Ms. Knab has lectured for the National Center for State Courts, the D.C. Bar Continuing Legal Education Program, the Illinois Bar Continuing Legal Education Program, and Antioch College's Women and the Law series. She has published articles on various aspects of court management and court administration. ■

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audit a taxpayer's return, make a determination that additional tax was due, and then proceed to collect. Until 1924, the taxpayer had no right to have his or her tax liability judicially determined prior to the time he or she paid the tax. The only remedy was to pay the tax and then sue for

Chief Judge Sterrett

refund in either a U.S. district court or the U.S. Court of Claims. The self-assessment system was sort of a novel experiment, and it was recognized that to be effective, it could not appear to be arbitrary and capricious. So it quickly became obvious that the taxpayer ought to have an opportunity to litigate his or her liability first, and that led to the birth of the Board of Tax Appeals in 1924. The members were presidentially appointed for a term of years. They were considered to be experts in the field, and their exclusive jurisdiction was statutory—namely, to interpret the Internal Revenue Code.

The Tax Section of the American Bar Association, the Treasury, and the congressmen and senators were so pleased by the performance of the Board of Tax Appeals that in 1926 they altered its status so that appeals could no longer be taken to the district courts from the Board of Tax Appeals. The Board of Tax Appeals' decision was made a final one at the trial level. Since 1926 the basic role of the Board of Tax Appeals—soon to become the Tax Court of the United States, and now the United States Tax Court—has never changed. It has never had responsibility for investigative work; it has never had the responsibility for giving advisory opinions. It does not regulate. For over 60 years now, it has taken facts and applied the Internal Revenue Code and other pertinent authority to those facts. It has for over 60 years performed a purely judicial function.

"We historically have had a very effective stipulation process which I think may be the envy of some other courts."

And that's not a fact that is known by all. Now it's true that its technical status has changed over the years. When it was founded in 1924, and continuing into 1926, it was an independent agency in the executive branch of the government. In 1942, Congress changed the name of the Board of Tax Appeals to the Tax Court of the United States and gave each of the individuals, who used to be called "member," the title of judge. Nonetheless, it was still an independent agency in the executive branch of government.

Was there a subsequent change in the court's status?

Yes, in 1969 the court was given Article I status and the power to punish for contempt, along with certain other trappings that one associates with a court, such as the power to enforce subpoenas. Throughout this history there were constant efforts by some people to make the court an Article III court. Actually, a bill passed the House at one time to make it an Article III court. This was even an issue back in the early 1920s when Secretary of the Treasury Mellon came up with the idea for a Board of Tax Appeals. In the early stages nobody knew exactly how well the Board of Tax Appeals was going to perform—after all we'd only had an income tax for less than ten years. Many proposals have come up since then to give the court Article III status. The argument sometimes centers on procedural matters, that is, on who should represent the government in the Tax Court. If we become an Article III court, does that mean the Department of Justice or the U.S. Attorney should assume the responsibility for representing the government?

As I understand it, the Treasury Department thinks that there's too close a relationship between litigation in the Tax Court and tax policy to let it get out of its hands. Treasury ought to be able to determine what policy should be enacted and what policy the IRS ought to press in court, so the argument goes. The Chief Counsel of the IRS is the highest ranking government attorney who appears in the Tax Court, and he also holds the title of an Assistant General Counsel of the Treasury. The General Counsel himself does not involve himself in the litigation details of the Chief Counsel's Office. There also might be a problem of what committee on the Hill would have jurisdiction if the court became an Article III court. It currently comes under the jurisdiction of the Senate Finance and House Ways and Means Committees.

Can you describe the way the United States Tax Court functions today?

If the IRS audits a tax return involving income, estate, gift, and certain excise taxes, and after having audited that return and having discussed the issue with the taxpayer, no agreement can be reached on the amount of taxes due, the IRS will send a so-called statutory notice of deficiency to the taxpayer. The taxpayer then may elect to pay that deficiency and sue for refund in the U.S. District Court or the U.S. Claims Court, or he or she may choose to seek a judicial determination that he or she doesn't owe that amount of money by filing a petition in the Tax Court within 90 days from the date of the notice. That immediately stops

the government from assessing the tax. The government cannot collect until we have made a decision—barring the so-called jeopardy assessment situation, where the taxpayer might be fleeing the country or something like that. The government files an answer and the case is then at issue.

How are cases assigned to the judges?

Under the Internal Revenue Code the taxpayer is entitled to have a case heard as close to his or her place of residence as is reasonably possible. The Tax Court sits in some 80 cities throughout the country, and the taxpayer will normally choose the city that is closest to his or her home. Except in extraordinary circumstances, such as the location of witnesses, that is where the case will be tried. Now, the clerk's office keeps track of the request for place of trial in particular cities throughout the country. When the number of cases in the city justifies it, we will schedule a calendar in that city. In large cities such as New York and Los Angeles, that means we will hold court almost once a month.

"Settlements—God bless 'em! If we didn't have settlements we would just be down the tube."

Once the cities are chosen for a particular term—fall, winter, or spring—the chief judge sends that list around to his colleagues. Each judge is told to expect four or five weeks of trial in each of three terms. The judge will make his or her selections and forward them to the chief judge, who will make the final decision on who goes where. Once a judge is assigned to a particular calendar in a city, the chief judge will assign to him or her all the cases scheduled for trial on that calendar, and the cases then become that judge's responsibility. Fortunately, most cases are settled, but where the case is tried, the government will be represented by the Chief Counsel's Office of the Internal Revenue Service, and the taxpayer normally will have an attorney.

How often do you hear cases en banc?

We virtually never hear cases en banc. In disciplinary matters involving attorneys three judges sit if the issue may result in sanctions.

Can you tell us more about the procedure in the Tax Court?

Another raison d'être for the Tax Court is that the decisions be uniform throughout the country—so that the taxpayer in Florida gets the same answer as the taxpayer in California. The idea was that there ought to be a body of uniform judicial interpretation of the Internal Revenue Code.

The way our procedure works is that the Tax Court judge receives the evidence, either at a trial or via a full stipulation of facts, and then requires that the parties file briefs. The judge will examine the evidence, review the briefs, research the question of law presented, and then prepare an opinion which will contain findings of fact and a discussion of the applicable law, concluding with his or her decision. Incidentally, at the trial itself we are bound to follow the Federal Rules of Evidence of the United States District Court for the District of Columbia sitting without a jury.

To ensure uniformity, the judge sends the proposed opinion to the chief judge for review. Somebody has to read all the opinions to make sure that the 19 of us are consistent. The chief judge reviews the case, and if he finds that it's inconsistent with a decision of ours, say, 10 years ago, he talks to the judge, and the judge says, "I think that decision 10 years ago was wrong." The chief judge says, "That's your prerogative—I'll send it to conference." And then maybe the judge's colleagues will agree with him or her, and we reverse ourselves. But we go to conference, and that's when collegiality becomes so important and when you really get into the true appellate procedure, because the author of the opinion comes in to defend his or her opinion in front of his or her colleagues. Now, just as in the case of an appellate court, the fellow judges around the table will accept, almost without exception, the trial judge's findings of fact. The trial judge heard the evidence, saw the witnesses, and observed their demeanor; but other judges may then say that they think the trial judge did not apply the law correctly. It's debated, and the judges vote on the proposed opinion and can write concurring or dissenting opinions. It's called a court-reviewed case. We think it important to send certain cases to conference because it is our responsibility to be a national court, judicially establishing national standards for interpretation of tax law. We handle about 80 to 85 percent of the tax trial work.

Chief Judge Sterrett

Particularly important cases must go to conference and be considered by the whole court, because there are 19 judges on this court and every one of them is a tax professional. They consider the matter and the opinion goes out with the imprimatur of the full court. There are other reasons that cases go to conference. I cited the one where one of our colleagues wants to overrule a prior case. Another instance would be where on a given issue a U.S. circuit court of appeals

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had reversed us. The next time that same issue comes up in this court, the chief judge must send it to conference to decide whether we will follow that reversal. We will always follow that reversal *in that circuit* because there is no need to make the losing party take a needless appeal. However, as a *national* court, and while certainly respectful of any circuit court's opinion, we do not feel required to follow what one circuit says when deciding a case in another circuit. However, if on reconsideration of the issue we find the reasoning of the circuit court compelling, we are not too proud to reverse ourselves.

Does this fact lead attorneys to practice forum shopping?

Well, of course, the judge would be the last to ever know for a fact, because no lawyer is going to call up and say, "I am not going to your court!" I am sure it exists, but I doubt that it exists a great deal. For one thing, the price that you have to pay to go to the district court and the Claims Court is to pay the tax. And you may not have the money or want to pay the tax. But, on the other hand, if you can afford it and the precedents in the Claims Court, district court, or circuit court are better for your client than ours...then go. I think we would understand why you would do that.

What are the diffferences between regular members of the Tax Court and the special trial judges?

We have on the court both "regular" judges and special trial judges. The regular judges are presidentially appointed, subject to approval by the Senate Finance Committee, and then confirmation by the full Senate. We receive the same salary as U.S. district court judges, and we equate ourselves with U.S. district court judges in most ways. As for the special trial judges, they are selected by the Tax Court. They used to be called commissioners. They were equated at one time with the commissioners of the Court of Claims before the status of that court was changed.

Can you expand on the function of the special trial judges?

The advantage in having special trial judges, and in our being able to pick them, is that we can form a pool of adjudicators, all with a tax background, but with various specialties. It permits the chief judge, in assigning cases, to tailor the special trial judges' particular expertise to the particular issue at hand. They do almost all of the small tax case work, but also are assigned to hear many big, long trials involving complex factual patterns. They are invaluable and make a substantial contribution to the court's work. There are 17 special trial judges, 19 regular judges, and 8 senior judges.

It may become necessary, but at the moment we are not using the special trial judges as magistrates are used in the district courts, that is, to work on the case at an early stage and process it and get it ready for a regular judge. We do not do that at the moment, to any large extent, because so many of our cases wouldn't lend themselves to that sort of procedure.

Please explain the procedure for hearing small tax cases in your court.

There was a real need in this court for an informal proceeding for the small taxpayer, because the court has a dual function to perform. It has the function of deciding the most complicated questions of tax law for the edification of the tax bar and the government—cases involving millions of people or dollars. But it also has the responsibility to the small taxpayer who does not have a great deal of money at issue and who cannot afford to hire an attorney. Congress in its wisdom set up in 1969 a small tax case procedure where the taxpayer may, if the deficiency determined is under $10,000, elect the small tax case procedure—what we call "S cases."

What does that mean?

It means that the taxpayer gets a quick trial. In the large cities, from the time you file your small tax case petition you'll be in trial in six months, and you will get a decision a few months thereafter. In return for all this, there is no appeal by either party from the decision in a small tax case procedure. The S case is an informal trial. It's less costly; there's less

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PERSONNEL

Nominations

J. Daniel Mahoney, U.S. Circuit Judge, 2nd Cir., Feb. 7
Con. G. Cholakis, U.S. District Judge, N.D.N.Y., Feb. 7
Barbara K. Hackett, U.S. District Judge, E.D. Mich., Feb. 11
Stephen F. Williams, U.S. Circuit Judge, D.C. Cir., Feb. 19
Daniel A. Manion, U.S. Circuit Judge, 7th Cir., Feb. 24
Kenneth L. Ryskamp, U.S. District Judge, S.D. Fla., Mar. 12

Confirmations

Danny J. Boggs, U.S. Circuit Judge, 6th Cir., Mar. 3
Frank J. Magill, U.S. Circuit Judge, 8th Cir., Mar. 3
Miriam G. Cedarbaum, U.S. District Judge, S.D.N.Y., Mar. 3
David R. Hansen, U.S. District Judge, N.D. Iowa, Mar. 3
Ronald R. Lagueux, U.S. District Judge, D.R.I., Mar. 3
Thomas J. McAvoy, U.S. District Judge, N.D.N.Y., Mar. 3
Lawrence P. Zatkoff, U.S. District Judge, E.D. Mich., Mar. 3
Con. G. Cholakis, U.S. District Judge, N.D.N.Y., Mar. 14
Raymond J. Dearie, U.S. District Judge, E.D.N.Y., Mar. 14

Elevation

C. Arlen Beam, Chief Judge, D. Neb., Jan 7

Deaths

Jean S. Breitenstein, U.S. Circuit Judge, 10th Cir., Jan. 30
Edmund Port, U.S. District Judge, N.D.N.Y., Mar. 2
Latham Castle, U.S. Circuit Judge, 7th Cir., Mar. 10
Henry J. Friendly, U.S. Circuit Judge, 2nd Cir., Mar. 11

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application of rules of evidence where you represent yourself—and most small taxpayers do. It means the judge will involve himself or herself in the trial and ask questions to make sure all the facts that will help the taxpayer are brought out. It evens the scales between the taxpayer and the Chief Counsel's attorney. This is a very, very important part of our task in terms of making the self-assessment system work, because this is the level where most taxpayers are. It's their perception of the system that will determine the ultimate success of the system. We concentrate on trying to make the proceeding fair in reality as well as in appearance. The special trial judges handle almost all the S cases.

Can a nonlawyer represent a taxpayer in the Tax Court?

Yes. We have a proceeding whereby nonlawyers can take an exam and if they pass that exam they can represent taxpayers. The exam is intended to test the applicant's knowledge of court procedures as well as of substantive tax law. The court is on record as opposing a proposal in Congress that enrolled agents and CPAs be automatically allowed to practice in the Tax Court. That would amount to something like over 200,000 additional people entitled to practice before the court. We strongly oppose it. In the first place, enrolled agents are people that the IRS has certified as being qualified to represent a taxpayer in the administrative proceeding. Now it doesn't seem right to us that we should have to take, as an individual authorized to represent a taxpayer, somebody that one side has said knows the law. That means the IRS could pick who's going to represent a taxpayer, not only before it, but before the court, and we don't think that's right. Further, if accountants were allowed to represent taxpayers in the small tax case procedure it would cause the judge instinctively to feel he or she should involve himself or herself less in the proceeding. In other words, "He's got his representative. I should be more impartial in terms of questions I ask." The judge won't feel the obligation to involve himself or herself, to make sure the taxpayer is well represented. We do let the return preparer sit at the table and advise the taxpayer, and he or she could be a witness, so it's not as if the taxpayer is naked, so to speak. The program has been working well. We can cite law review articles by Professor Whitford and others which have said, "This is one small-claims court that works, and if it ain't broke, don't fix it." As an Article I court—a peculiar creature of Congress—we think if Congress is going to hold us accountable then they ought to give us the authority and responsibility to say who's going to represent taxpayers in our court.

Can you generalize on the filings that come to your court? How many involve individuals and how many involve business?

It's about 90 percent personal, 10 percent business. Recently, I found out something interesting. As of June 20, 1924, there were 1,507 civil tax cases pending in the U.S. district courts. In 1985, in U.S. district courts, there were 2,935 cases. In short, it's doubled in the U.S. district courts, but the Tax Court has gone from zero to about 73,000 cases, so I am sure the district courts are grateful for our existence.

A large part of our docket for a while was the so-called tax protester. The "tax protesters," as we use the phrase, are those who say, "The income tax law is unconstitutional."

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New Edition of Court Automation Plan

The 1985 update of the *Five-Year Plan for Automation in the United States Courts* emphasizes the Center's plans for completion of major systems under development and their transfer to the Administrative Office. The plan describes the Center's integrated case management system approach to electronic docketing systems and provides a general description of the new appellate information management system (New AIMS), the bankruptcy automation system (BANCAP), the full-docketing civil case management system (CIVIL), and the probation information management system (PIMS).

The report also summarizes the status of the various automated projects for which the Administrative Office is responsible. These range from developing, installing, and supporting a variety of software projects to procuring and installing decentralized computer systems for use by the courts, to defining future office automation requirements for chambers and support offices, to obtaining telephone and telecommunications networks required by the courts. The report outlines projected expansion plans through fiscal year 1990.

As described in the plan, during the past year, the Center established several training programs required to meet court needs for assistance and instruction in automation preparedness and systems management for this generation of major automated systems. In addition to the intensive training program developed for court-selected system administrators, an analogous management-level course was created to address the particular needs of senior court managers.

The Administrative Office provides training in the use of operational computer applications. Current policies relating to word-processing training and personal-computer training are also spelled out in the plan.

Looking beyond the completion of current major development efforts, the plan makes several projections about future automated support. ■

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"I am a natural being." "I am not subject to taxation." "It violates the Northwest Ordinance." That one sent us all to the history books. What's the Northwest Ordinance got to do with income tax law? Or they say, "We're off the gold standard." All these things are clearly frivolous. In those cases, Congress has authorized us to impose a penalty up to $5,000, and we have been doing it. Those cases are dropping off.

The other big area of our caseload—about 30 percent—is the so-called tax shelter case. These cases have been a management problem, because a shelter might involve investors spread throughout the country. Congress has given us some additional tools to manage those, and while we see some further increase, we think we see the light at the end of the tunnel. In short, we are concerned, but we think that we are going to be able to manage it.

How about settlements?

Settlements—God bless 'em! If we didn't have settlements we would just be down the tube.

Is it a pretty high rate?

Oh, 80 or 85 percent.

That's high. How do you encourage it, or do you?

We send out letters reminding parties that under our rules they are required to get together and stipulate facts. We historically have had a very effective stipulation process, which I think may be the envy of some other courts. We require the parties to get together and stipulate to documents, although they can always reserve the objection of relevancy. By requiring the parties to get together for the stipulation process, you're much more likely to get settlements, because you force the parties to talk to each other, go back and forth, and you force them to look in a mirror and analyze, with at least some degree of dispassion, the real merits of their case.

A number of our judges send out a standing pretrial order which directs the parties to get together and directs them to report to the court before trial.

Can you explain how the AT&T case got in the Tax Court?

I'll use it as an example of an expedited case. A taxpayer has a prerogative of filing a motion for assignment of a judge. The taxpayer also can file a motion for expedited treatment.

The AT&T case is about a distribution of 39 cents per share of Pacific Telesis stock—whether that amount is taxable as a dividend. It affects the three million AT&T shareholders. So both AT&T and the Internal Revenue Service want a judicial determination with respect to the taxable status of the dividend as soon as possible. It was agreed that the parties would file a joint motion requesting that the case be assigned to a judge who would give it expedited treatment.

As I said, the main bulk of cases are assigned to a judge by reason of his or her being assigned to a calendar. Outside that, in order to give special treatment to particularly significant questions of law, we encourage the taxpayers and the government to file a joint motion bringing to our attention the fact that the case is of unusual significance. It might involve, say, the meal money of state troopers, which could aggregate $10 million throughout the country, and thousands of state troopers waiting to find out whether their lunch money is taxable. The court ought to give them a quick answer because if they are wrong, interest is accumulating on the taxes. So the parties file this motion. I, as chief judge, will assign the case to a judge who promises me he or she will put this case at the top of the pile. We want to get an answer well within a year; no more than a year from the time the motion is filed, if the parties have proceeded promptly to trial or to submit the case on stipulated facts.

By judicial standards that is a quick response to a complicated legal question.

Generally our goal is to have a decision a year from the time the case is fully submitted—which means after briefing. Now in these expedited cases, I'm talking about well within a year after the motion was filed. So

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Positions Available

Clerk, U.S. Court of Appeals for the Eleventh Circuit, Atlanta, Georgia. Salary to $61,296. Ten years' administrative experience required (law practice may be substituted for experience; college education and degrees in public, business, or judicial administration and in law may be partially substituted). Send resume by Apr. 23 to Norman E. Zoller, Circuit Executive, U.S. Court of Appeals for the Eleventh Circuit, 50 Spring Street, S.W., Room 416, Atlanta, GA 30303, 404/331-5724 or FTS/242-5724.

* * *

Chief Probation Officer, U.S. District Court for the District of Columbia, Washington, D.C. Commencing Aug. 11. Salary to $61,296. Requirements include four years of experience in a helping profession, with one year of experience as a supervisor; an advanced degree in an appropriate social science is preferred. Send resume by May 15 to LeeAnn Flynn, Administrative Assistant to the Chief Judge, U.S. District Court, 3rd and Constitution Avenue, N.W., Washington, DC 20001.

* * *

Clerk, U.S. District Court for the Northern District of Alabama. Salary to $68,700. Ten years' administrative experience required (law practice may be substituted for experience; college education and degrees in public, business, or judicial administration and in law may be partially substituted.) Send resume by Apr. 30 to Hon. Sam C. Pointer, Jr., Chief Judge, U.S. District Court, Federal Courthouse, Birmingham, Alabama 35203.

EQUAL OPPORTUNITY EMPLOYERS

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there is a substantial difference. Generally speaking, we are in good shape in terms of being current, but you are never as good as you want to be.

How long has your court experimented with the issuance of summary bench decisions?

Congress, as a part of its effort to help us handle our backlog, gave us the authority to render bench opinions. Prior to that, as a court of record, we were required to make written findings of fact and write opinions. Congress in 1982 authorized us to enter bench opinions.

Some cases lend themselves to a bench opinion, cases where issues are simple and factual, and maybe depend upon the credibility of witnesses, or valuation cases—how much a painting is worth, for example. You have to listen to the experts and work it out toward X dollars. Some of the protester cases and the cases involving an alleged church we can dispose of by bench opinions. It saves a great deal of time. In fiscal year 1985, we had 340 bench opinions. It takes a little time for the judge, frankly, to feel comfortable making findings of fact and conclusions of law on the record extemporaneously. My colleagues are getting used to it, and its use will be increased. It's a very valuable tool, and we are grateful to Congress. We are constantly trying to figure out ways to move the 73,000 cases.

One of the ongoing discussions in the legal profession involves a very controversial subject: specialized courts.

I don't feel qualified to say whether or not there ought to be other specialized courts. I'd like to make a point which I don't think is sufficiently understood. While we are labeled a specialized court, federal tax consequences attach to property rights determined under local law, common law, the rules of the state statutes. Taxes are so pervasive and attach to so many different sorts of transactions that we are constantly deciding matters of state law and matters of common law. We have to go back and find out what the word "charitable" meant in the old English common law to interpret section 501(c)(3). People do not fully realize that while the bottom line is interpretation of the Tax Code, to get to that bottom line we have to be broadly based. We have to interpret contracts, divorce settlements, maintenance, child support payments, mineral rights, inheritance laws, and all that. All that is a matter of state law, and we have to get into those questions.

Generally how do you feel about our tax system in this country?

Our tax system needs improvement, I don't think there is any question about that. I think there is a lot of dissatisfaction out there. I think there is a perception among some that the system isn't fair, and when you are relying on a voluntary self-assessment system, the perception of it is very, very important. My colleagues and I believe that it's very important that we make sure that everybody who appears in court sees that he or she is getting his or her fair day in court. This is true particularly with respect to small taypayers, because it may well be the only appearance in court—other than a traffic court—that he or she will ever make. How the taxpayer is treated may very well shape his or her entire attitude toward the judicial system and, indeed, toward the government itself.

Our system must be fairly good, because we've had several countries come to us and try to examine our tax court system. We've got people from Thailand coming over in the near future. They are going to send a couple of judges here to see how our system works. The Canadians have already been to visit us. There have been others. ■

Mandatory Jurisdiction Changes Proposed

Representative Robert W. Kastenmeier (D-Wis.), chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, recently introduced legislation (H.R. 4149) that would substantially eliminate the mandatory jurisdiction of the Supreme Court of the United States.

In introducing the measure on Feb. 6, the Congressman noted that the legislation had passed the House during the 97th and 98th Congresses and enjoys strong support from the judicial and executive branches of government. Quoting from a letter of June 17, 1982, written to him by all nine of the Justices of the Supreme Court, he pointed out that they expressed their "complete support for the proposals."

The bill is favored by the Reagan administration, the Judicial Conference of the United States, and the ABA as well as all of the Justices.

Product-Liability Cases in Federal Courts Increase

"In the decade between 1974 and 1984, the number of product-liability suits in federal courts expanded 680 percent." Time Magazine, Mar. 24, 1986.

CALENDAR

Apr. 2-4 Workshop for Judges of the Fourth Circuit

Apr. 9-11 Seminar for Bankruptcy Judges

Apr. 9-11 Regional Seminar for Federal Public and Community Defenders

Apr. 13-16 Seminar for Newly Appointed Federal Appellate Judges

Apr. 21-22 Judicial Conference Advisory Committee on Civil Rules

Apr. 21-23 Sentencing Institute for the Ninth Circuit

Apr. 23 Judicial Conference of the Federal Circuit

Apr. 29-May 2 Video Orientation Seminar for Newly Appointed Magistrates

Apr. 30-May 2 Seminar for Bankruptcy Judges

Apr. 30-May 2 Juror Utilization and Management Workshop

THE SOURCE

The publications listed below may be of interest to The Third Branch *readers.*

Burger, Warren E. "Using Arbitration to Achieve Justice." 40 *The Arbitration Journal* 3 (1985).

Federal Judicial Workload Statistics During the Twelve Month Period Ended September 30, 1985. Administrative Office of the U.S. Courts, 1986.

Flanders, Steven. *United States Courts for the Second Circuit 1985—Report of the Circuit Executive.* 1985.

Jails in America: An Overview of Issues. American Correctional Association, 1985.

Judicial Education—A Guide to State & National Programs. Foundation for Women Judges, 1986.

The Justice Hugo L. Black Centennial Edition. 36 *Alabama Law Review* No. 3 (1985).

Keating, J. Michael, Jr. *Public Ends and Private Means: Accountability Among Private Providers of Public Social Services.* National Institute for Dispute Resolution, 1985.

Keith, Damon J. "Role of the Federal Judiciary." 32 *Federal Bar News & Journal* 409 (1985).

Leval, Pierre N. "From the Bench—Westmoreland v. CBS." 12 *Litigation* 7 (1985).

Markey, Howard T. "The Court of Appeals for the Federal Circuit: Challenge and Opportunity." 34 *American University Law Review* 595 (1985).

Martineau, Robert J., and Patricia A. Davidson. "Frivolous Appeals in the Federal Courts: The Ways of the Circuits." 34 *American University Law Review* 603 (1985).

Redmann, William V. "American Judges in Contemporary Society." 23 *Court Review* 6 (1986).

Rehnquist, William H. "Oral Advocacy." 27 *South Texas Law Review* 289 (1986).

Sessions, William S. "Federal Civil Practice—Where Are We Headed?" 32 *Federal Bar News & Journal* 412 (1985).

"The Supreme Court, 1984 Term." 99 *Harvard Law Review* 1 (1985).

"Symposium: The Burger Court and American Institutions." 60 *Notre Dame Law Review* No. 5 (1985).

Trubatch, Sheldon L. "Informed Judicial Decisionmaking: A Suggestion for a Judicial Office for Understanding Science and Technology." 10 *Columbia Journal of Environmental Law* 255 (1985).

Wick, William A. "Federal Rule of Civil Procedure 68: Proposed Amendments May Impose Liability for Opposing Counsel Fees." 28 *For the Defense* 18 (1986).

SALARIES, from page 3

ident's quadrennial salary recommendations. Those procedures have now been modified, however, in response to the Supreme Court's invalidation of the one-house veto in *INS v. Chadha.*

The Commission on Executive, Legislative, and Judicial Salaries will continue to study and recommend to the President periodic revisions of the federal salary structure. The Commission made no proposals for specific salary adjustment to the President in connection with its review of salaries conducted in fiscal year 1985. However, the law authorizes a one-time Commission review in fiscal year 1987, after which the quadrennial cycle will resume in fiscal year 1989. The 1987 Commission will take office on Oct. 1, 1986, with a deadline of Dec. 15 to report its findings to the President, who would then transmit any recommendations for revised salary levels to Congress in January 1987. There has been no change in procedures governing annual cost-of-living increases. ■

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THE THIRD BRANCH

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THE THIRD BRANCH

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Kenneth C. Crawford Retires from FJC

Kenneth C. Crawford

The director of the Center's Division of Continuing Education and Training since 1971, Kenneth C. Crawford, retired as of May 2, 1986.

"Everyone familiar with the Center and its work appreciates Ken's key role in making the Center what it is today," said A. Leo Levin, director of the Center, in announcing Mr. Crawford's retirement. "The federal judicial system owes him an immense debt of gratitude."

Mr. Crawford, while serving as director of the Division of Continuing Education and Training, was instrumental in developing the Center's basic training programs as well as a number of innovations, such as the

See CRAWFORD, page 8

State Chief Justice Discusses Proposed Federalization of Tort Law, Other Issues

Chief Justice Edward F. Hennessey is a native Bostonian, and his roots are deep in the state of Massachusetts. Both his law and prelaw degrees are from

Chief Justice Hennessey

Northeastern University, and he engaged in the private practice of law in Boston for 16 years. Service in the United States Army interrupted the judge's career for four years; he was separated from the service in 1945 with the rank of captain and a Bronze Star.

The judge's judicial career started in 1966 on the Massachusetts Superior Court and includes elevation to the Supreme Judicial Court of Massachusetts five years later. Governor Michael Dukakis named him chief justice of the state's highest court in 1976, the position he currently holds.

Lecturer, writer, contributor to many activities of bar associations and public service organizations, Chief Justice Hennessey is this year chairman of the prestigious Conference of Chief Justices. The conference embraces a membership of 50 judges who hold the highest judicial rank in their respective states.

In the following interview Chief Justice Hennessey speaks out on many topics of interest to both state and federal judges, and he candidly evaluates many developments in judicial administration as well as the work of the Conference of Chief Justices and how this organization has a direct impact on the courts of this country.

See HENNESSEY, page 4

Judge Jose A. Cabranes Elected to FJC Board

At the March 1986 meeting of the Judicial Conference of the United States, Judge Jose A. Cabranes (D. Conn.) was elected to a four-year term on the Board of the Federal Judicial Center. He replaces Judge Warren K. Urbom (D. Neb.), whose term expired. By statute, FJC Board membership is limited to one term.

Judge Jose A. Cabranes

Judge Cabranes began service as a district judge in December 1979. At the time of his appointment, he was serving as general counsel and director of government relations of Yale University, a position to which he had been appointed in 1975. He practiced in a New York City law firm (1967–71); was an associate professor of law at Rutgers University Law School (1971–73); and served as special counsel to the governor of Puerto Rico and administrator in the Office of the Commonwealth of Puerto Rico, Washington, D.C. (1973–75).

Judge Cabranes is a graduate of Columbia College (A.B.), Yale Law School (J.D.), and Cambridge University (M. Litt. in International Law).

Judge Cabranes has served as public member of the United States

See CABRANES, page 9

Judicial Conference Weighs Budget Cuts

The Balanced Budget and Emergency Deficit Reduction Act of 1985 ("Gramm-Rudman-Hollings") requires that, commencing Mar. 1, 1986, sequestrations of 4.3 percent be made in each appropriation category in the fiscal year 1986 budget, a total sequestration of just over $40,000,000 in the budget of the federal judiciary.

Chief Judge Charles Clark, chairman of the Judicial Conference Committee on the Budget, reported that in response to Gramm-Rudman-Hollings the Chief Justice had directed the budget committee to make recommendations for selective reductions in expenditures in lieu of across-the-board sequestrations. The committee made a series of specific proposals to the executive committee of the conference, including a recommendation that legislation be sought to enable the judiciary to transfer funds between appropriations accounts. Since across-the-board cuts would have a profound disparate effect on personnel needed to support the administration of justice in the various courts, congressional approval was sought to transfer funds from "Salaries of Judges" and "Expenses of Operation and Maintenance of the Courts" to "Salaries of Supporting Personnel." The executive committee adopted a schedule of reductions, which was reaffirmed by the Judicial Conference. Chief Judge Clark emphasized that accomplishment of the fiscal goals set forth in the schedule of reductions cannot be accomplished without a sincere spirit of cooperation on the part of every judicial branch employee in the effort to reduce expenses. Exceptions to the schedule for individual courts must be approved by a special committee appointed by the Chief Justice.

Assuming that Congress confers authority to transfer funds between appropriation accounts, these cuts, together with other savings, will enable the federal judiciary to meet the sequestered amount of just over $40,000,000 required for fiscal year 1986, exclusive of the budgets of the Supreme Court, FJC, Court of Appeals for the Federal Circuit, and Court of International Trade, whose separate budgets have also been reduced by the operation of Gramm-Rudman-Hollings.

Should the supplemental appropriation requests be denied by the Congress or authority to transfer funds between appropriation accounts not be conferred quickly, both furloughs of judicial branch employees without pay and deferral of civil jury trials are possibilities during the last quarter of the fiscal year.

Included in the schedule of reductions reluctantly accepted by the conference was a cut of $1,360,000 in the judiciary's appropriation category of "Court Security," relating to building or perimeter security and equipment. The reduction would be realized by deferring the allocation of 60 additional court security officers authorized for fiscal year 1986; restricting the acquisition, installation, and maintenance of security equipment; and eliminating some court security officer positions. Chief Judge Clark also reported that the U.S. Marshals Service has been directed to absorb a substantial reduction of $6,500,000 in appropriations available for court security in fiscal year 1986. Marshals Service Director Stanley Morris has indicated that this reduction will have its greatest adverse impact on prisoner transportation and courtroom security. The conference unanimously approved a resolution expressing its concern about the impact of these cuts on court security, and authorized transmission of the resolution to representatives of the executive and legislative branches. ■

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Court Upholds Constitutionality of Circuit Investigatory Procedures, Limits Privilege

A specially designated panel of three judges, appointed from outside the Eleventh Circuit, has affirmed that circuit's application of investigatory procedures established by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. *Williams v. Mercer*, Nos. 85-2054, 85-5420, slip op. (11th Cir., Feb. 20, 1986).

The opinion disposed of two consolidated proceedings. One of these was an original enforcement proceeding commenced in the court of appeals to enforce subpoenas caused to be issued by the Investigating Committee of the Judicial Council of the Eleventh Circuit. Present and former members of the staff of Judge Alcee L. Hastings (S.D. Fla.) objected to the validity and enforce-

See PANEL, page 10

New Information on Circuit Conferences

The U.S. Court of Appeals for the Eighth Circuit will hold its Judicial Conference on July 23–26 in Minneapolis, Minn.

The U.S. Court of Appeals for the Ninth Circuit has changed the dates of its Judicial Conference in Sun Valley, Idaho, from Aug. 17–21 to Aug. 19–22.

Judicial Conference Takes Action on Range of Issues Affecting Federal Courts

Although Gramm-Rudman-Hollings and how it affects the federal courts took up a major part of the Judicial Conference's time, other matters also received attention. Upon the recommendation of the Committee on Court Administration, the conference acted with respect to the following issues:

• **Arbitration.** The conference voted to approve draft legislation substantively authorizing the present experimental court-ordered arbitration program. (The program has been conducted in the past through the process of "authorization by appropriation," i.e., through congressional funding but without express statutory authorization by the House and Senate Judiciary Committees.)

• **Relocation allowances.** The conference approved general guidelines governing the payment of employee relocation allowances. Under the guidelines, any employee transferred to a permanent position in the judicial branch is eligible for relocation allowances, provided that the employee agrees in writing to remain in government service for one year and that the chief judge of the receiving court certifies that the transfer is in the interest of the government. Noncareer employees such as law clerks are generally ineligible for relocation allowances upon initial appointment but may be reimbursed for relocation expenses incurred as the result of a judge's change of official duty station during the term of the appointment, provided that the employee signs the one-year service agreement. Judicial branch personnel, including judges taking senior status, who relocate primarily for their own convenience and at their own request may not be reimbursed for relocation expenses (5 U.S.C. § 5724(h)). Staff members required to relocate to retain their positions would be eligible for relocation assistance, provided the one-year service agreements are signed.

• **Debt Collection Act.** The conference approved regulations to implement the Debt Collection Act of 1982. The regulations establish a procedure for collection by means of salary offset of debts owed the United States by government employees, including all officers and employees whose salaries are disbursed by the AO, except Article III judges.

• **RICO.** The conference adopted a resolution urging "that the Congress should seriously consider narrowing the reach of" the civil Racketeer Influenced and Corrupt Organizations (RICO) provisions of the Organized Crime Control Act of 1970. The resolution noted in part that the "extraordinary penalties provided by the civil RICO statute [treble damages and attorney fees] are rapidly causing what would formerly have been considered routine breach of contract or common law fraud actions triable only in state courts, in the absence of diversity, to be filed in federal courts. This not only increases the burden on the federal courts, but causes friction with the state court system."

• **Government contract disputes.** The conference approved legislation that has been introduced in both the Senate and House relating to government contract disputes. The legislation would amend 28 U.S.C. §§ 1331 and 1491 to vest exclusive jurisdiction in these cases in the United States Claims Court, thus withdrawing jurisdiction from the district courts. However, the conference directed precatory words to Congress recommending that the legislation make it clear that the amendment to 28 U.S.C. § 1331(b)(2) is intended "solely to defeat district court jurisdiction as to claims against the United States relating to the award of a government contract."

Upon the recommendation of the Committee on the Administration of the Probation System, the conference endorsed legislation pending in Congress to the extent that it would make federal restitution orders nondischargeable in bankruptcy.

Upon the recommendation of the Committee to Implement the Criminal Justice Act, the conference voted to recommend that the act be amended to authorize, but not require, the delegation of a circuit chief judge's authority to approve excess fees to an active circuit judge selected by the chief judge; and to establish a holdover provision to permit the continued service of a federal public defender upon the expiration of the term of office until a successor is appointed or for one year, whichever is earlier.

The Committee on the Administration of the Criminal Law made a recommendation with respect to legislation pending in Congress (S. 1667 and H.R. 3378) that would extend the protections afforded by chapter 19 of title 18, U.S. Code, to advanced forms of electronic commu-

See CONFERENCE, page 10

Senior Judges Exempted from Social Security Tax

Senior federal judges have been permanently exempted by Congress from Social Security taxation, whether or not they perform judicial duties in retirement.

A provision of the Consolidated Omnibus Budget Reconciliation Act of 1986, signed into law on Apr. 7, amends sections of the Social Security Act and the Internal Revenue Code to provide that for the purposes of those sections, the term "wages" shall not include any payment of salary received by a senior federal judge during periods of continued judicial service by designation and assignment.

HENNESSEY, from page 1

In 1984, Congress created the State Justice Institute, but President Reagan has not made his appointments to the Institute's board. It appears that substantial budget cuts may foreclose the Institute from starting its work. Is the Conference of Chief Justices making efforts to see that the Institute starts functioning?

The Conference of Chief Justices is doing all that it can. The present impediment is that the president has *not* made the appointments to the board. This is consistent with his present effort to rescind the fiscal year 1986 funding and oppose the fiscal year 1987 funding. We hope that Congress will approve funds for both years, and we have appeared in congressional hearings to that end. Meanwhile we—the Conference of Chief Justices—and the National Center for State Courts are prepared to assist immediately in all reasonable ways to expedite the starting of the Institute. Of necessity, we are acting in lieu of the board. But the Institute cannot start until the board is appointed, and we are urging the president to make those appointments.

Recently, in appearing before a congressional committee on the funding question, I emphasized that the Institute can be especially useful in funding studies of the critical problems that jointly affect federal and state courts: federal tort law proposals; habeas corpus (especially as it affects state prisoners); and diversity jurisdiction. Presently no organization exists that could bring neutral and informed insight to these issues, which involve billions of dollars. It is a doubtful economy indeed to hold back the $8 million needed for the Institute in fiscal year 1986 and the $9 million requested for fiscal year 1987.

What do you see as the greatest problems of the state courts today?

Image or, in other words, promoting public confidence. This problem is pervasive in its impact. It affects our budgets; it certainly affects judges in terms of their ability and willingness to act with independence, free of unreasonable public and news media pressure. One example: There is constant pressure for more and longer incarcerations in criminal cases. The media, and consequently the public, seem to be unable or unwilling to consider sentencing and the lack of adequate prison capacity as part of the same problem. This is extremely serious; an independent judiciary with a good image is essential to good administration of justice. It is not overstating the matter to say that the nourishment of constitutional principles is at stake. Another unhappy factor as to our image is the public perception of excessive delay in civil cases. Unfortunately, in most jurisdictions the public perceives correctly. But the public does not perceive that the leisurely and litigious approach of some members of the bar is a major influence in excessive delay and excessive cost of litigation.

"[T]he leisurely and litigious approach of some members of the bar is a major influence in excessive delay and excessive cost of litigation."

How do you feel about diversity jurisdiction cases not being handled in the federal courts? Are the state courts equipped to handle such cases in the event federal diversity jurisdiction is abolished?

In all logic these cases should be disposed of in the state courts; only state law is involved. The Conference of Chief Justices has voted that diversity jurisdiction in the federal courts should be abolished. This is by far the majority opinion of the chief justices. However, it is not unanimous. A majority of the chief justices believe their states could not accept the extra burden without a substantial expansion of their judicial resources. A study we requested a few years ago reflected that eight states, including my own, Massachusetts, are in that category. Our Massachusetts trial court of general jurisdiction has more than enough on its plate now. While the number of diversity cases is relatively small compared to the total volume of state cases, they are not evenly distributed, and they tend to be cases that take more court time than the average state case.

During consideration of the State Justice Institute Act in 1984, a Senate report found that state court caseloads had increased partly as a result of federal government actions, among which were recently enacted federal legislation (including the Speedy Trial Act) and U.S. Supreme Court decisions increasing procedural due process requirements in a host of proceedings. Has this trend continued over the last few years, or has it abated somewhat?

PERSONNEL

Nominations

James L. Edmondson, U.S. Circuit Judge, 11th Cir., Mar. 26

Andrew J. Kleinfeld, U.S. District Judge, D. Alaska, Mar. 26

Confirmations

J. Daniel Mahoney, U.S. Circuit Judge, 2d Cir., Mar. 27

Barbara K. Hackett, U.S. District Judge, E.D. Mich., Mar. 27

Appointment

Walter J. Gex III, U.S. District Judge, S.D. Miss., Feb. 25

Deaths

D. Dortch Warriner, U.S. District Judge, E.D. Va., Mar. 17

Albert Tate, Jr., U.S. Circuit Judge, 5th Cir., Mar. 27

Without question, state court caseloads have increased over the years, in part because of federal legislation and in part because of Supreme Court decisions that changed the ground rules. We have no statistical information as to how much of the increase in state court caseloads is attributable to these reasons, and I'm sure nobody else does either. Nor do we know whether the trend has continued or abated. I would suspect that the decisions of the Burger Court have not had the same impact on litigation as those of the Warren Court, but I would be hard put to prove it.

As you know, of course, if Congress were to enact new legislation in such pervasive areas as products liability, medical malpractice, and so forth, it might well stimulate a flood of litigation for some years to come until all the ramifications had been explored. Incidentally, procedural due process decisions of the Supreme Court have probably not had as much effect on the volume of litigation as have federal legislation and decisions of the Supreme Court in the civil rights area.

Has state court concern with habeas corpus litigation decreased any over the last decade? Can the state-federal judicial councils be helpful in dealing with this problem?

While state-federal judicial councils in some states have helped to iron out some local problems between the two systems, I believe that the state court concern about habeas corpus relating to state prisoners has not decreased over the last decade, but if anything has been exacerbated. It is still a major irritant both for the public and for state court judges. The concern is for *finality* consistent with the Constitution and consistent with fairness. This is reflected by the fact that it continues to receive the attention of the Conference of Chief Justices, as evidenced by conference resolutions adopted in 1983, 1984, and 1985. Only Congress, not state-federal judicial councils, can effectively deal with the problem. Why Congress does not act is a mystery to me.

Have the chief justices taken up problems related to capital cases at their meetings?

To my knowledge, the Conference of Chief Justices has not taken up problems related to capital cases at its meetings, except as capital cases are prime producers of habeas corpus petitions and except for a program on proportionality review of death sentences at its midwinter meeting in Houston several years ago.

Chief Justice Hennessey

In the federal system there are specialized courts to speed up the processing of cases: the U.S. Claims Court, the Court of International Trade, the Temporary Emergency Court of Appeals. Do you have personal convictions on the use of specialized courts on the state level?

There is no general agreement as to the value of specialized courts versus courts with general jurisdiction. We have some specialized courts in Massachusetts, such as the Housing Court, that work well. A couple of years ago, New Jersey established a new tax court to take over matters previously handled by the Division of Tax Appeals—an administrative agency that had become increasingly backlogged. It is interesting that this was done at the same time New Jersey was eliminating other limited jurisdiction courts such as the Juvenile and Domestic Relations Courts and the County District Courts. A lot depends, I think, on the local situation and where the problems are. As soon as you establish a single trial court of general jurisdiction, people start looking for ways to specialize again. The federal courts are a good example, with the resort to magistrates and bankruptcy judges to free up the time of Article III district court judges. Specialized courts are introduced in any judicial system at the cost of flexibility that permits the interchange of personnel where and as needed.

The Conference of Chief Justices is urging that should an intercircuit panel be created, all state cases be excepted from submission to the panel, thus limiting intercircuit panel cases to those that involve conflicts among the federal circuits. Why is the conference concerned about having the state cases thus handled, since it has not voiced objections to having them in the district courts?

Our policy position is based on the historic fact that only the Supreme Court of the United States can review by direct appeal or certiorari decisions of the highest courts of the states. We do not think it appropriate to alter that relationship in the manner proposed by the intercircuit tribunal. The House Judiciary Committee has agreed with us on this point, and we hope the Senate will go along. Presumably, the principal reason for the tribunal—as illustrated by its name and composition—is to give greater uniformity to the national law through resolution of intercircuit conflicts that the Supreme Court would like to see resolved but does not have time to consider. The tribunal would be composed of revolving panels of judges from the federal circuits, judges who would not otherwise have jurisdiction over state deci-

See HENNESSEY, page 6

HENNESSEY, from page 5

sions. We have no objection to the panel deciding any cases that come to it from the federal courts, even if a state question is involved. But our federal system makes the Supreme Court the only court with direct jurisdiction to review the highest courts of the states, and we want to keep it that way. Federal district courts, it follows, do not directly review state decisions, and the Conference of Chief Justices *does* object to the fact that federal collateral review by habeas corpus is sometimes extended beyond constitutional requirements, and beyond the dictates of fairness and good sense.

Senator Thurmond has introduced legislation on the attorneys' fees issue that evolved from *Pulliam v. Allen*, which held that judicial officers are not immune from attorneys' fees awards. The Judicial Conference of the United States has endorsed the efforts of the Conference of Chief Justices to eliminate what they see as a potential inequity to judges. Would you comment, please?

Support from the Judicial Conference on the critical issue of judicial immunity is a very significant and welcome development in state-federal judicial relations and demonstrates the importance of the work being done by the Subcommittee on Federal-State Relations of the Court Administration Committee of the Judicial Conference. This subcommittee, as you know, was appointed by Chief Justice Burger in 1982 and was the first unit of the Judicial Conference to have state judges in its membership. Thus, when the Conference of Chief Justices passed a resolution urging the Judicial Conference to support legislation protecting state judges against attorneys' fees awards, the issue was referred to the Subcommittee on Federal-State Relations for the initial study and recommendation. You recall, of course, that the Supreme Court based its opinion in *Pulliam* on statutory construction, and said it was for Congress, not the Court, to decide the extent to which state judges should be free from attorneys' fees awards under 42 U.S.C. § 1988. In its response, the subcommittee recommended an amendment to section 1988 that would bar fee awards against a judge "who would be immune from actions for damages arising out of the same act or omission about which complaint is made." This recommendation was approved by the Court Administration Committee and the Judicial Conference. It is the basis for the legislation introduced at the request of the Judicial Conference by Senators Thurmond and Hatch, and will, if enacted, restore the doctrine of judicial immunity to its pre-*Pulliam* state. The Conference of Chief Justices is, of course, delighted to have this very important support. It is invaluable to us in our work with the Congress. I believe that the threat of *Pulliam* judgments is as substantial a threat to judicial independence as we have seen in our time. It is not the monetary risk alone that matters—that can be dealt with to some extent by insurance and by indemnification statutes—it is the threat of judgment itself. Judges simply should not have to look over their shoulders at the prospect of

See HENNESSEY, page 7

CALENDAR

Apr. 29–May 2 Video Orientation Seminar for Newly Appointed Magistrates

Apr. 30–May 2 Seminar for Bankruptcy Judges

Apr. 30–May 2 Juror Utilization and Management Workshop

May 1–3 Judicial Conference Ad Hoc Committee on American Inns of Court

May 5–8 Video Orientation Seminar for Newly Appointed District Judges

May 11–14 Eleventh Circuit Judicial Conference

May 11–14 Fifth Circuit Judicial Conference

May 13–15 Regional Seminar for Probation Pretrial Officers

May 14–16 Seminar for Training Coordinators of the Eighth Circuit

May 14–18 Sixth Circuit Judicial Conference

May 18–20 D.C. Circuit Judicial Conference

May 18–20 Seventh Circuit Judicial Conference

May 22–23 Seminar for Appellate Conference Attorneys

May 26–28 Judicial Conference Advisory Committee on Bankruptcy Rules

May 27–28 Judicial Conference Subcommittee on Judicial Improvements

May 29 Judicial Conference Ad Hoc Advisory Committee on the Administrative Office

HENNESSEY, from page 6

personal liability arising out of their judicial decisions. The principal opponents of the remedial legislation are civil rights organizations. The provision for attorneys' fees in civil rights cases is a good one; it encourages aggressive enforcement of civil rights against unconstitutional actions of government officials. But as to *Pulliam*, the civil rights groups are wrong. They express no concern for the principle of judicial immunity and thus promote one value at the expense of an equal or greater value: judicial independence.

While help with the *Pulliam* problem is perhaps the most dramatic result of work to date by the Subcommittee on Federal-State Relations, it is by no means the only one. There also have been important developments in other areas, including lawyer discipline, the certification of state law questions, and the federal rules of practice and procedure, which serve as the de facto rules for many state court systems. Other issues of common concern are under consideration, and we look forward to a cooperative approach on many more. There are five federal and four state judges on the subcommittee, with Judge S. Hugh Dillin of the Southern District of Indiana as chairman. State judges on the panel have uniformly praised the fine spirit of collegiality that has characterized its work, as well as the many practical results. We think it will play an increasingly important role in improving relations between state and federal judiciaries and in promoting national solutions to common problems.

The September 1985 proceedings of the Judicial Conference of the U.S. read "Rules of practice and evidence adopted in the federal system are of significant import for state court systems because of the state use of federal rules as models. In order to enhance both federal and state judicial interests, the Chief Justice agreed to the committee's recommendation that a representative of the Conference of Chief Justices be named to the Standing Committee on Rules of Practice and Procedure and each of its advisory committees, except the Advisory Committee on Bankruptcy Rules." Have state court judges been appointed to these advisory committees, and, if they have, are they finding this helpful?

As I said, this is another important development resulting from the work of the Judicial Conference's Subcommittee on Federal-State Relations. We are pleased that the Chief Justice has agreed to this recommendation of the subcommittee, as approved by the Court Administration Committee, and that he already has appointed state judges to two of the four advisory committees involved. Experience to date has been too limited to make judgments, but we are confident that this type of cooperation will be useful and that it will prove beneficial to the federal system as well as the state systems.

"I think judges who oppose all forms of presumptive sentencing and guidelines are shortsighted."

Eight or more states have some form of sentencing guidelines, and the U.S. Sentencing Commission is at work formulating federal guidelines. In your experience, are state court judges generally favorably disposed toward sentencing guidelines? Do you believe such guidelines answer a public perception that more uniformity and less judicial discretion is needed in the criminal justice area?

My perception is that, among state judges, views are mixed as to sentencing guidelines. I personally support the concept of sentencing according to weighted criteria, under guidelines that have been established according to experience. I have also endorsed in my own state a presumptive sentencing structure within which guidelines can work. My support is conditioned on the necessity that reasonable discretion in sentencing be still left to the judge. This is essential; every case and every offender must be treated individually. There must also be appellate or peer review, at the behest of either government or defendant, if the judge moves outside the guidelines. Guidelines support even-handedness in criminal dispositions; we need this badly. I think judges who oppose all forms of presumptive sentencing and guidelines are shortsighted. Public and media pressure is for more and longer incarcerations. Without guidelines and presumptive sentencing, the danger is that mandatory sentencing legislation will proliferate. I can't say anything good about mandatory sentencing.

Is the Conference of Chief Justices an effective organization for the exchange of experiences among the state court systems and for the formulation of policy on matters of concern to them?

The answer here, of course, is a definite yes. I mention here the wide-ranging scope of the programs at our annual and midyear meetings as well as some of the more significant issues which the conference has developed and articulated before the Congress and elsewhere as the position of the state courts. A few of these are federal review of state court convictions; judicial immunity, subsequent to the decision in *Pulliam v. Allen;* the Coordinating Council on Lawyer Competence; federal interference in regulation of the legal profession; federal intervention in state tort law, particularly as to products liability; and the State Justice Institute Act. Composed as the conference is of the heads of the judicial branch of government in each of the states, it is the *only* organization that is truly in a position to for-

See HENNESSEY, page 8

HENNESSEY, from page 7

mulate national policies with regard to matters affecting the state judiciaries.

The National Center for State Courts was organized in 1971—almost 15 years ago—following a suggestion made by Chief Justice Burger at the first National Conference on the Judiciary. You are the president of the National Center. Has it lived up to its potential?

The National Center today is indispensable. It is the one organization that the Conference of Chief Justices and the court systems of the 50 states could not do without. It provides invaluable help to the state court systems through its research into problems common to all courts, through its direct expert assistance to individual states and courts, through its training programs in the area of court management, and through its many clearinghouse services. The tangible evidence of this is the fact that its primary financial support comes from voluntary payments by the state court systems.

What is the position of the Conference of Chief Justices as to proposed federal tort legislation, especially in the area of products liability?

The conference is emphatically opposed. Tort law is for the states to develop. The proposed federal legislation would preempt the massive body of state statutory and common law and impose a federal statute. This is an unprecedented extension of the reach of the commerce clause.

The impact of federal legislation in this area would be to get rid of a system of tort law that has taken the states decades to develop and substitute a new statutory scheme that must be interpreted, defined, and applied. It would take a long, long while for any uniformity to arise by dint of cross-precedent on a case-by-case basis in most states.

If we have the federal statute, our confident prediction is that we will have a legal quagmire for many, many years to come. It will be an unholy mess if Congress throws a whole new quick-fix statute at the states.

If the case can be made that substantial tort reform is necessary at this time—by reason of the impact on industry and on the medical profession—it should come in the states. The states can do it with the help of the American Law Institute and the Uniform Law Commissioners, and only in that way are we going to get fair adjustment of the tort law of the country. ■

THE SOURCE

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

Baker, Thomas E. "The *Ambiguous* Independent and Adequate State Ground in Criminal Cases: Federalism Along a Möbius Strip." 19 *Georgia Law Review* 799 (1985).

"Critical Issues in Tort Law Reform: A Search for Principles." Conference Sponsored by the Program in Civil Liability, Yale Law School. XIV *Journal of Legal Studies* 459–629 (1985).

Kastenmeier, Robert W., and Michael J. Remington. "The Semiconductor Chip Protection Act of 1984: A Swamp or Firm Ground?" 70 *Minnesota Law Review* 417 (1985).

Lambros, Thomas D. "The Alternatives Movement: Rekindling America's Creative Spirit." 1 *Ohio State Journal on Dispute Resolution* 3 (1985).

Marshall, Thurgood. "Remarks on the Death Penalty Made at the Judicial Conference of the Second Circuit." 86 *Columbia Law Review* 1 (1986).

Meador, Daniel J. "American Courts in the Bicentennial Decade and Beyond." 55 *Mississippi Law Journal* 1 (1985).

✓ Rehnquist, William H. "The Changing Role of the Supreme Court." Address at Florida State University, Feb. 6, 1986.

Sofaer, Abraham D. "The Political Offense Exception and Terrorism." 24 *The Forum* no. 2, at 1 (1986).

Steinglass, Stephen H. "Wrongful Death Actions and Section 1983." 60 *Indiana Law Journal* 559 (1984–85).

Wallace, Clifford J. "Before State and Federal Courts Clash." 24 *Judges' Journal* 36 (Fall 1985).

Webster, William H. "Sophisticated Surveillance—Intolerable Intrusion or Prudent Protection?" 63 *Washington University Law Quarterly* 351 (1985).

CRAWFORD, from page 1

four-day regional video seminars for newly appointed judges. Mr. Crawford has agreed to continue to make his services available to the Center on a contract basis, Director Levin announced.

Mr. Crawford came to the Center after a distinguished career in the United States Army, rising to the rank of colonel, and including a tour as commandant of the Judge Advocate General's School in Charlottesville, Va. He retired from military service on June 1, 1970, and spent one year as associate director of the Southwestern Legal Foundation in Dallas, Tex., before coming to the Center. His service in the government totals more than 40 years.

He earned a master of arts degree from George Washington University and a doctor of jurisprudence degree from the University of Virginia. In 1970, he was awarded an honorary doctor of laws degree by Illinois College, the institution from which he also received his undergraduate degree. Mr. Crawford is also a graduate of the United States Army War College, the United States Army General Staff and Command College, and the Management Program for Executives at the University of Pittsburgh.

He is the author of several law-related publications and has taught law at universities and colleges in the United States and overseas. He has also lectured throughout the world. ■

Parole Comm'n Begins Special Curfew Program

The U.S. Parole Commission is implementing an experimental special curfew parole program. The program advances the parole release dates for certain prisoners on the condition that, once released, they remain in their places of residence during a specified period of time each night. Such a condition will serve as a substitute for community treatment center residence for a period of up to 60 days for those prisoners accepted into the program. The program is designed for prisoners who would qualify for community treatment center residence but who have acceptable release plans and do not require a center's support services.

Prisoners meeting the criteria for placement in the program will receive a parole certificate that contains the special condition that, during a period as long as the first 60 days of parole, the parolee will remain at his place of residence between the hours of 9:00 p.m. and 6:00 a.m. each night unless given advance permission to leave by the probation officer. Further, the parolee must maintain a telephone without a call-forwarding device at the place of residence for this period.

The special curfew parole program will provide a significant savings to the Bureau of Prisons, a savings necessitated by current budgetary constraints and deficit reduction legislation. The program is a joint effort of the Parole Commission, the Bureau of Prisons, and the United States Probation Service. ■

CABRANES, from page 1
Delegation to the Belgrade Meeting of the Conference on Security and Cooperation in Europe (1977–78) and as consultant to the Secretary of State of the United States (1978). He is also a member of the American Law Institute and the Council on Foreign Relations. ■

Judge William W. Wilkins, Jr., Chairman of Sentencing Commission, Discusses Goals

The Center Advisory Committee on Education Concerning 1984 Crime Legislation, appointed by the Chief Justice and chaired by Judge A. David Mazzone of the District of Massachusetts, met recently with the members of the United States Sentencing Commission. The meeting produced a suggestion that The Third Branch *carry periodic reports on commission activities in order to keep federal judges and supporting personnel informed about the commission's work. This is the first article in that series.*

District Judge William W. Wilkins, Jr., the commission chairman, stated

NEWS FROM THE SENTENCING COMMISSION

recently that, as a prosecutor for six years and now a district judge for five years, he had once been somewhat "skeptical . . . about the idea of federal sentencing guidelines." But his analysis of national federal sentencing data convinced him "of the great need for improvement in the area of sentencing." It is a conviction, he said "that many judges have long shared."

Judge Wilkins discussed the commission and its work at the Brookings Institution's Seminar on the Administration of Justice, held in March in Annapolis.

When defendants with similar characteristics, who committed the same crime, "receive dramatically different sentences due primarily to a single factor—which judge rapped the gavel . . . we should not be surprised by the widespread perception that sentencing is often purely the luck of the draw."

He stressed that "we judges owe it to those we serve, including those we sentence, to better satisfy the basic requirements of justice: certainty, fairness, and, to a much greater extent than has been the practice, equality of treatment of similar defendants who commit similar crimes. Our goal must be justice not only for the defendant, but for the victim of crime, and for society."

When similar defendants who committed similar crimes are incarcerated in the same facility, they "may at some point compare notes on our judicial system. It is not whether they like those who put them behind bars that concerns me—it is whether they can respect the fairness of a judicial system which produces such inexplicable results."

Judge Wilkins recalled Justice Frankfurter's admonition that judicial authority rests ultimately on "public confidence in its moral sanction." "Unwarranted sentencing disparity," Judge Wilkins said, "undermines public confidence in our system. Unwarranted disparity breeds disrespect."

Although the present system may have worked well "in a less complicated age," Congress created the Sentencing Commission because the system "falls short now with more than 550 district judges throughout our nation addressing the complexities of sentencing on an individual basis. In order to ensure fairness and consistency," he said, "sentencing discretion must be better structured."

* * *

The commission's first public hearing was set for Apr. 15 in Washington. The hearing was scheduled to provide the commission various perspectives on its task of ranking the seriousness of federal crimes. The witness list included representatives from the American Civil Liberties Union, the Washington Legal Foundation, and the Association of the Bar of the City of New York. ■

PANEL, from page 2

ment of the subpoenas, which sought the staff members' appearance and the production of certain documents and records.

In the other proceeding, Judge Hastings and two of the subpoenaed staff appealed from a district court judgment that dismissed their action seeking injunctive, declaratory, and other relief against the subpoenas.

The court of appeals rejected the argument that the Constitution's impeachment provisions require that the House of Representatives itself perform all preliminary investigatory functions in deciding whether to impeach. Rather, the investigatory powers that the act assigned to the committee, including subpoena power, are ancillary to the administration of the courts. Further, the investigatory procedures established by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 do not unconstitutionally intrude upon the independence of sitting Article III judges, the court held.

It also held that although a qualified privilege exists between judges and staff in the performance of their judicial duties, it may be overcome absent a showing that the requested documents would reveal communications concerning official judicial business, and in light of the investigatory committee's needs and the general nature of the judge's confidentiality interest. ■

CONFERENCE, from page 3

nications. The conference concurred in the committee's recommendation that in the event of enactment of this legislation, the legislative history make clear that judges would be permitted to authorize magistrates to entertain applications and issue orders approving the installation and use of pen registers and tracking devices.

The Committee on the Operation of the Jury System recommended an updated and shortened model grand jury charge, and the conference approved. Copies of the new model grand jury charge are being transmitted to all chief district court judges. ■

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Bicentennial Commission to Participate in Philadelphia and Maryland Celebrations

The Commission on the Bicentennial of the U.S. Constitution will join in major programs scheduled in Philadelphia and Maryland in connection with the observance of the 200th anniversary of the signing of the United States Constitution.

Because of the special significance of the bicentennial to Philadelphia, where the Constitution was signed on Sept. 17, 1787, the commission will join Philadelphia's efforts to focus national attention on the Constitution. Two major exhibits, "The Great Fabric of America" and "Miracle at Philadelphia," will open there on Sept. 17, 1986. The "Miracle at Philadelphia" exhibit will be the largest show of objects from the period of the Constitution's signing ever assembled. Philadelphia's year-long program of activities, called "We the People—200," will culminate Sept. 17, 1987.

The commission will also participate in Maryland's celebration of the 200th anniversary of the Annapolis Convention, and will hold a two-day meeting in Annapolis on Sept. 12–13, 1986, in conjunction with the Maryland celebration.

The Annapolis Convention consisted of a gathering of 12 delegates from five states in September 1786. The action taken by those delegates led to a resolution calling for a national meeting to discuss amendments to the Articles of Confederation. A national meeting was then called by the Continental Congress for May of 1787, and led to the writing of the United States Constitution. The United States Constitution is the oldest written instrument of national government in continuous use in the world.

Legislation is pending in Congress that would make Sept. 17, 1987, a one-time national holiday. Another pending bill would extend the work of the Bicentennial Commission through 1991. ■

Senate Passes Bankruptcy, Annuities Bills

The following bills in Congress are of interest to the judiciary.

• **Bankruptcy bill.** Legislation to provide additional bankruptcy judges (S. 1923) was considered in the Senate and passed on May 8. As reported by the Senate Judiciary Committee (S. Rep. 99-269), the bill included 34 of the 48 new positions recommended by the Judicial Conference. The bill was amended on the Senate floor to provide a total of 49 additional judgeships, including all of the Conference's recommendations and one additional position for the Western District of North Carolina. No action has yet been scheduled on either of the House bills on bankruptcy judgeships (H.R. 4128 and H.R. 4140).

During Senate consideration of the bankruptcy judgeship bill, an amendment was adopted that would make permanent the pilot U.S. trustee program, under the Department of Justice, for the administration of bankruptcy estates. The amendment essentially incorporates the provisions of S. 1961, which was the subject of hearings on Mar. 25. One important change is a provision that would permit individual judicial districts to opt out of the U.S. trustee program. In districts exercising this option, estates would be administered under a system of court-appointed officers established by the Judicial Conference. Hearings were held on Mar. 20 on companion House bills (H.R. 2660 and H.R.

See LEGISLATION, page 9

Sixth Circuit Chief Recalls History, Wants More Experimentation

The Honorable Pierce Lively, chief judge of the U.S. Court of Appeals for the Sixth Circuit since 1983, was born in Louisville, Ky., and received his A.B. degree from Centre College of Kentucky at Maysville. Following service in the U.S. Navy during World War II, the judge earned an LL.B. at the University of Virginia. He practiced law in Danville, Ky., from 1949 until appointed to the Sixth Circuit in 1972. A member of the Judicial Conference of the United States, Judge Lively is currently chairman of the Conference's Advisory Committee on Appellate Rules.

Chief Judge Lively

Your circuit includes both northern cities such as Detroit and southern cities such as Louisville, so you were required to hear school desegregation cases originating in both parts of the country. Were there any unexpected developments during the years those cases were being litigated?

Of course, we were not the leaders in the southern cases; the old Fifth and the Fourth Circuit implemented *Brown v. Board of Education*. We had significant cases from

See LIVELY, page 4

New FJC Study Available on Settlement Strategies

The Center recently published *Settlement Strategies for Federal District Judges*, by D. Marie Provine, who completed this study while serving as a judicial fellow in the Center's Research Division. The report describes different techniques for settlement, such as judicial mediation, court-annexed arbitration, the use of special masters, summary jury trials, minitrials, and magistrate-hosted settlement conferences. It utilizes information and insights exchanged in the course of a special conference that brought together a group of experienced judges who, collectively, offered a rich experience with varying types of judicial involvement in settlement. It also draws on literature in the field and on personal interviews. The report analyzes the settlement-oriented options available so as to provide a framework that will enable judges to consider settlement strategies they may wish to apply in their courts.

Dr. Provine is associate professor of political science at the Maxwell School of Citizenship and Public Affairs, Syracuse University.

Copies of this report can be obtained by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (8 oz.). Please do not send an envelope.

THE THIRD BRANCH

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

New and Amended Federal Rules of Appellate Procedure Before Congress for Review

Three new Federal Rules of Appellate Procedure, and several amendments to existing appellate rules, have been adopted by the Supreme Court and on Mar. 10, 1986, were transmitted to Congress by the Chief Justice. The new rules and the amendments will take effect July 1, 1986, absent congressional action.

New rule 3.1 concerns appeals pursuant to 28 U.S.C. § 636(c)(3) from judgments entered by magistrates in civil cases. New rule 5.1 specifies the procedures for appeals by permission under 28 U.S.C. § 636(c)(5) of district court judgments entered after an appeal pursuant to 28 U.S.C. § 636(c)(4) from a judgment entered upon direction of a magistrate in a civil case. New rule 15.1 relates to briefs and oral arguments in NLRB proceedings.

In accordance with a request from the Supreme Court that gender-specific language be eliminated from the appellate rules, the Advisory Committee on Appellate Rules amended other appellate rules as necessary. As to these rules, the Judicial Conference Committee on Rules of Practice and Procedure reported that "these proposed amendments are merely stylistic and no substantive change is intended." ■

PERSONNEL

Nominations

Alfred J. Lechner, Jr., U.S. District Judge, D.N.J., Apr. 8
Patricia C. Fawsett, U.S. District Judge, M.D. Fla., Apr. 9
Alan E. Norris, U.S. Circuit Judge, 6th Cir., Apr. 22
John G. Davies, U.S. District Judge, C.D. Cal., Apr. 22
David Hittner, U.S. District Judge, S.D. Tex., Apr. 22
Douglas P. Woodlock, U.S. District Judge, D. Mass., Apr. 22

Confirmations

Kenneth L. Ryskamp, U.S. District Judge, S.D. Fla., Apr. 23
Robert J. Bryan, U.S. District Judge, W.D. Wash., Apr. 24
James L. Edmondson, U.S. Circuit Judge, 11th Cir., Apr. 29

Appointments

Thomas J. McAvoy, U.S. District Judge, N.D.N.Y., Mar. 6
David R. Hansen, U.S. District Judge, N.D. Iowa, Mar. 11
Raymond J. Dearie, U.S. District Judge, E.D.N.Y., Mar. 21
Miriam G. Cedarbaum, U.S. District Judge, S.D.N.Y., Mar. 27
Frank J. Magill, U.S. Circuit Judge, 8th Cir., Apr. 1
Barbara K. Hackett, U.S. District Judge, E.D. Mich., Apr. 7
Sidney A. Fitzwater, U.S. District Judge, N.D. Tex., Apr. 21

Elevations

Alexander Harvey II, Chief Judge, D. Md., Mar. 1
Philip Pratt, Chief Judge, E.D. Mich., Mar. 2
Douglas W. Hillman, Chief Judge, W.D. Mich., Apr. 17

Resignation

Emory M. Sneeden, U.S. Circuit Judge, 4th Cir., Mar. 1

Senior Status

Nicholas J. Walinski, U.S. District Judge, N.D. Ohio, Dec. 1
Barrington D. Parker, U.S. District Judge, D.D.C., Dec. 19

Deaths

Edward J. Dimock, U.S. District Judge, S.D.N.Y., Mar. 17
R. Dorsey Watkins, U.S. District Judge, D. Md., Mar. 19
Richmond B. Keech, U.S. District Judge, D.D.C., Apr. 13
Lindsay Almond, U.S. Circuit Judge, Fed. Cir., Apr. 14
William E. Doyle, U.S. Circuit Judge, 10th Cir., May 2

Witnesses Differ at Hearing on Federal Sentencing Guidelines

This is one in a series of articles to keep federal judges and supporting personnel informed about the commission's work.

Hearings on offense seriousness. Witnesses at the Sentencing Commission's first public hearing on Apr. 15 expressed a wide diversity of opinion on offense seriousness and how it might be measured.

In opening the hearing, commission Chairman William W. Wilkins, Jr., asked the witnesses, "What is it about a particular crime, the way in which it was committed, and its impact on others that should be considered by this commission in writing guidelines?"

The commission's statutory mandate directs it to consider whether

NEWS FROM THE SENTENCING COMMISSION

several specified factors have relevance to the type of sentence served and to take them into account "only to the extent that they do have relevance." Three of the factors specifically mentioned in the statute are "the nature and degree of the harm caused by the offense," "the community view of the gravity of the offense," and "the public concern generated by the offense." 28 U.S.C. § 994(c).

At the hearing, the National Rifle Association, for example, called for "swift and certain punishment for serious, violent and dangerous armed criminals, but ... a policy of leniency for technical, paperwork and *malum prohibitum* violations of laws regarding firearms acquisition, transfer, transportation and disposition among the generally honest gun owners of this country."

A witness for the American Civil Liberties Union disagreed with the view that "the common street criminal or the person who commits one illegal act motivated by a real or perceived need, emotional, financial or political, is a serious threat to society .... On the other hand," he said, "I consider economic criminals, corporate lawlessness and official corruption to be most threatening to our society."

At the hearing, Chairman Wilkins noted that "the severity of the sanction imposed should reflect the seriousness of the criminal conduct involved," and that the commission "must not only formulate appropriate sentences for the criminal conduct involved, but ... must also formulate sentences which are rational and explainable." The resulting system "must articulate to judges who impose sentences, to victims who suffer crimes, to defendants who receive punishments and to the American public why a particular sentence is appropriate," he said.

The commission invites comment on its work from judges, supporting personnel, and all other interested persons. Correspondence may be mailed to the U.S. Sentencing Commission, 1331 Pennsylvania Avenue, N.W., Suite 1400, Washington, DC 20004. The commission can also be reached at 202/662-8800. ■

Center Publishes Research Report on Punishments for Federal Crimes

The Center has completed a research report that presents data on punishments imposed on persons convicted of federal crimes. In determining the punishments, the study took account not only of the sentences imposed by judges but also of the operation of the parole system and the "good time" statute. The report was prepared to provide the U.S. Sentencing Commission with information about current practice that can be used to provide reference points in commission deliberations.

The information is based on 39,304 offenders sentenced between January 1984 and February 1985. For offenders within the jurisdiction of the Parole Commission, the initial parole decision was used to estimate the time that would actually be served. Where no initial parole decision was available, the parole decision was estimated. An estimate of good time was also made for each offender sentenced to imprisonment.

The report comprises 1,279 pages; except for a 37-page introduction that describes purposes and methodology, it consists entirely of 276 tables and 275 graphs showing the punishments for various offense/offender groups. It is the first study to use information from the Federal Probation Sentencing and Supervision Information System (FPSSIS), which was inaugurated by the Administrative Office in 1983 and provides data previously unavailable about the characteristics of offenses and offenders.

The report, entitled *Punishments Imposed on Federal Offenders*, was prepared by Anthony Partridge, Patricia A. Lombard, and Barbara Meierhoefer of the Center's Research Division. Because of its bulk and the probable limited interest in much of the detailed data, it has been reproduced in very limited quantity. An abridged version, however, consisting of the introduction and an illustrative set of tables and graphs, has been printed under the title *Punishments for Federal Crimes*, and may be obtained from Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (12 oz.), but do not send an envelope.

The full report may be inspected at the Center's Information Services Office. A limited number of copies are also available for loan to federal court personnel and for interlibrary loan. The report is also being published privately; those interested should write William S. Hein, Hein & Co., 1285 Main St., Buffalo, NY 14209.

LIVELY, from page 1

Nashville, Memphis, and Louisville but they were not early enough to break much ground. I suppose the most unexpected development was the difficulty that we had with remedies. There was no question of violation in cases from Kentucky and Tennessee; since state law required dual school systems, the violation was established as a matter of law. All we were concerned with was remedy, and to a large extent our dealing with the southern cases concerned itself with determining either whether a voluntarily accepted plan of desegregation went far enough or whether a court-imposed plan went too far.

It was quite a different story, of course, in the cases from our two northern states. Michigan and Ohio outlawed segregation in their public schools many years ago, so the first battle was over whether there were violations in the school systems. Most school systems in those states resisted this first determination. Once it was determined that there had been an equal protection violation in a particular school system we got into the same sort of thing that we had experienced earlier in the southern school cases—finding a suitable remedy.

It is interesting that you mention Louisville and Detroit because an unexpected development did involve those two school systems. We approved a desegregation plan for Louisville that had the effect of requiring the Louisville Independent School District and the Jefferson County, Ky., school system to merge. They were independent by law, but the plan would only work if the two were actually merged. They did merge and are merged today. While we were working on the Louisville problem, the Detroit case came up to us. The judge there had said, "Well, Detroit is so rapidly becoming a majority black city that there's really no feasible way to desegregate the Detroit school system without bringing in some white school systems." So in the Detroit case we approved a desegregation plan that could have involved exchanging pupils from 53 neighboring suburban school districts with students from the Detroit school system in order to achieve a racial balance in the schools. The Supreme Court held that this was not permitted, because the plaintiffs in the Detroit case had not proved that any of the suburban school districts were deliberately segregated or that their practices had contributed significantly to the problem of Detroit's rapidly becoming a one-race school system. It is interesting because on the surface the two remedies looked so similar, and yet the Supreme Court permitted the Louisville remedy to stand and reversed our court on the Detroit one. The difference, of course, is that both school systems involved in the Louisville case had been segregated by law before 1954.

You have testified before the Senate Judiciary Committee on the impact of Social Security cases on the court caseload. Can you comment on the volume of such cases in your circuit and the effect it has on court management?

First, I would like to say that my interest in the subject really began with a January 1977 Department of Justice report called *The Needs of Federal Courts*. Attorney General Edward Levi appointed a committee

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Speech by Judge Devitt Available from Center

Your Honor, a brief address that Senior Judge Edward J. Devitt (D. Minn.) has given at FJC seminars as advice for newly appointed district judges, is now available as a Center publication. To obtain a copy, write to the Center's Information Services, 1520 H St., N.W., Washington DC 20005. Enclose a self-addressed mailing label, preferably franked (2 oz.). Please do not send an envelope.

CALENDAR

June 2–4 Regional Seminar for Probation Officers

June 9–10 Judicial Conference Subcommittee on Judicial Statistics

June 10–12 Regional Seminar for Probation Officers

June 10–12 Workshop for Training Coordinators of the Eighth Circuit

June 12–13 Judicial Conference Advisory Committee on Criminal Rules

June 12–13 Judicial Conference Subcommittee on Supporting Personnel

June 16–17 Judicial Conference Subcommittee on Federal Jurisdiction

June 16–17 Judicial Conference Subcommittee on Federal-State Relations

June 16–20 Seminar on "Constitutional Adjudication and the Judicial Process in the Federal Courts"

June 18–19 Judicial Conference Committee to Implement the Criminal Justice Act

June 18–20 Seminar for Magistrates of the Fifth and Eleventh Circuits

June 19–20 Judicial Conference Committee on the Administration of the Bankruptcy System

June 23–24 Judicial Conference Committee on the Judicial Branch

June 26–28 Fourth Circuit Judicial Conference

June 30–July 1 Judicial Conference Committee on the Administration of the Criminal Law

June 30–July 1 Judicial Conference Committee on the Administration of the Magistrates System

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to look into the problems of the federal courts and to prescribe some remedies. Then Solicitor General, now Circuit Judge, Robert H. Bork was chairman of that committee, which published a very fine analysis of the problems of the federal c urts. Among its recommendations was the establishment of a new system of tribunals to handle some of the litigation traditionally included in the work of Article III courts. The committee spoke specifically of a special court, probably to be established under Article I of the Constitution, to handle such matters as Social Security cases. A number of bills have been introduced in Congress to create such a court, and the Judicial Conference of the United States has endorsed the creation of this court, but to date no legislation has been adopted. I was pleased to note in the *New York Times* in March that the Justice Department is apparently now prepared to support once again the creation of such a court.

Getting back to your original question, in 1985 there were 18,225 Social Security cases filed in the district courts of the United States. Approximately 24 percent of these, or 4,347, were filed in the district courts of the Sixth Circuit. In 1985 there were 1,175 appeals of Social Security cases from district courts to courts of appeals throughout the nation. Three hundred one of these, or approximately 25 percent of the national total, were filed in the United States Court of Appeals for the Sixth Circuit. These appeals constituted 11 percent of our court's civil docket.

"[I]n the Social Security appeal ... we are not using our judicial resources very wisely."

When you examine carefully what is involved in the Social Security appeal, it becomes clear, to me at least, that we are not using our judicial resources very wisely. These are disability cases. Most of these cases are heard by an administrative law judge; they are reviewed by an appeals council within the Social Security Administration, and that results in a decision of the secretary. The disappointed claimant can then file an action in the district court, and in most cases the record is referred to a magistrate who studies the administrative record. There is no new hearing after the administrative law judge's action. The magistrate makes a recommendation, and the district judge is required to review that same administrative record de novo before either accepting or rejecting the magistrate's recommendations. This is all done on cross-motions for summary judgment. If the answer is still "no benefits," the claimant may appeal to the court of appeals for his or her circuit. Three judges then are required to read the same administrative record, and in some cases hear oral argument. In most cases, the only question from the time the proceedings end in the Social Security Administration is whether the decision is supported by substantial evidence. All of the judges are merely reviewing factual matters, and a very large portion of each record consists of medical proof.

It seems to me that a special court could quickly acquire some expertise in this field. I don't denigrate the importance of Social Security cases to the litigants; like all cases, they are the most impotant thing in the world to the parties involved. But I do think the claimants would get much faster answers in a special court than they now do, being required to take their turn on the crowded district court and courts of appeals dockets. I believe if an Article I court were established to hear these cases, ordinarily there should be no appeal beyond that court. If a bona fide issue of statutory construction or constitutionality were raised, however, there could be an appeal to a court of appeals to determine those legal questions. But there should be no further review of the record for substantial evidence, no third-layer review of that issue by three appellate judges.

"I don't think you would take anything away from the Social Security claimant by creating [a] specialized court."

So parties in Social Security cases don't stipulate?

No, they seldom stipulate to anything. The claimant has medical proof, and the secretary often sends the claimant to a medical consultant, who frequently disagrees with the claimant's doctor. To have four

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Paper by Judge Hunter Published by FJC

The Center recently published *The Judicial Conference and Its Committee on Court Administration*, an 18-page paper based on a presentation by Judge Elmo B. Hunter (W.D. Mo.), in his capacity as chairman of the committee, to the Conference of Metropolitan District Chief Judges in October 1985.

Judge Hunter provides a brief history of the administrative structure of the federal courts and the origins of the Judicial Conference of the United States. He also describes the current committee structure of the Conference, emphasizing the Committee on Court Administration and its subcommittees.

A copy of this publication can be obtained by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (2 oz.). Please do not send an envelope.

LIVELY, from page 5

United States judges reviewing issues that are purely factual seems to me a waste of resources. I don't think you would take anything away from the Social Security claimant by creating this specialized court.

Your circuit covers four states; you have 15 judgeships on the Court of Appeals for the Sixth Circuit; and there are 56 district court judgeships. Do you make a point of visiting these jurisdictions regularly?

Our circuit covers Ohio, Michigan, Kentucky, and Tennessee. Let me describe the circuit to you in the words of the late Justice Potter Stewart: "The Sixth Federal Judicial Circuit is a cross-section of the nation, extending from the tip of Michigan's upper peninsula to the Mississippi border. It straddles the heartland of our country. So it is that the United States Court of Appeals for the Sixth Circuit is not a regional court but in every sense a national one. Its workload reflects the pluralism and diversity of national life." That was an introduction to a speech that Justice Stewart made some years ago when he was our circuit justice. We think it describes the Sixth Circuit quite well.

Do I make a point of visiting the districts regularly? I don't have a schedule, but I accept invitations to the various cities in our four states to judge moot courts and speak to bar associations and judges' groups. I always try to see the judges while I am there, but our circuit executive keeps up the regular contact with the district courts more than I do.

Chief Judge Lively

How are your panels chosen, and who makes up the list?

We have fifteen active judges, and the court is now divided into three divisions. Each division has five active judges. The court sits to hear arguments thirty-six weeks each year, and each time the court is in session one of these divisions is sitting. A senior judge or a district judge joins the five active judges, and thus we have two panels each session. Both panels sit Monday, Tuesday, Thursday, and Friday. Each panel hears twenty argued cases and eight cases on briefs in those four days. They use Wednesdays for motion practice to try to keep abreast of the inundation of motions that all courts of appeals are now experiencing.

The panels are selected through a computer-assisted program, operated by our circuit executive. Judges are assigned to a division of the court for six months at a time, and every six months these divisions are scrambled. The same three judges sit as a panel all four days of the week. Each judge on our court sits twelve weeks a year, hearing twenty argued cases, and deciding eight cases on briefs. Thus, each judge sits on 240 argued cases and 96 cases on briefs for a total of 336 per year. That is the normal load, not counting motions, emergencies, or en banc hearings and rehearings.

Your court was confronted with the issue of the constitutionality of applying certain law enforcement "profiles" used to detect suspected drug couriers in airports. Can you briefly explain this line of cases?

Yes, we were often invited to rule on the validity of a so-called drug courier profile. It was argued that the profile provides probable cause for arrest of a person suspected of carrying contraband drugs. We never did hold that the profile alone provides probable cause. However, on several occasions our court has held that various factors included in the profile might raise a reasonable suspicion sufficient to support a limited *Terry*-type stop, which is a temporary investigative detention. Most of our airport-stop cases concern one or both of the following issues: First, whether a person stopped for ques-

See LIVELY, page 7

Positions Available

Judge, U.S. Bankruptcy Court, Northern District of Texas. Salary to $68,400; 14-year appointment. Persons with law degrees whose character, experience, ability, and impartiality qualify them to serve in the federal judiciary may request applications from Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp Street, New Orleans, LA 70130.

* * *

Circuit Executive, U.S. Court of Appeals for the Eighth Circuit. Salary to $68,000. Background in court administration essential. See 28 U.S.C. § 332(e) and (f) for special qualifications and general functions. To assure consideration, application must be received by June 25. Apply to Chief Judge Donald P. Lay, U.S. Court of Appeals, P.O. Box 75908, St. Paul, MN 55175.

EQUAL OPPORTUNITY EMPLOYERS

Workload Statistics Released by AO

The Administrative Office has released the *Federal Judicial Workload Statistics* report on the business of the federal courts for the 12-month period ended Dec. 31, 1985.

Requests for the report should be directed to the Statistical Analysis and Reports Division of the Administrative Office of the U.S. Courts, Washington, DC 20544.

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tioning by officers—and perhaps later requested to accompany officers to some area other than the public area of the airport—was "seized" within the meaning of the Fourth Amendment, and second, whether the consent of a person so stopped was in fact voluntarily given. The ultimate question, of course, is whether the effect of one's being stopped for such questioning invalidates a later search. *United States v. Mendenhall* [596 F.2d 706 (6th Cir. 1979)] is probably the leading case from the Sixth Circuit. It went to the Supreme Court, and they reversed our finding of a Fourth Amendment violation.

These are interesting cases because they involve rather unusual police work. Some drug enforcement agency people have developed an uncanny ability to spot drug couriers, and one agent, who operated for some time in the Detroit airport, was particularly adept at this. I don't think any court has approved the drug courier profile in toto. Maybe some court has, but we have not.

The Federal Rules of Appellate Procedure were adopted in 1968. The types of cases and the procedures used to process cases in the federal courts have changed with the times, but the rules have not been significantly changed. As chairman of the Advisory Committee on Appellate Rules, do you give thought to making those changes or to changing how the rules are drafted?

We do give a lot of thought to changes. The Advisory Committee has a twofold purpose. First is to monitor on a continuing basis the operation of the Federal Rules of Appellate Procedure; second is to recommend changes to ensure the continued effective operation of the rules. So we monitor and we recommend changes. We receive suggestions from all sorts of sources about changes; from practicing lawyers, even litigants sometimes, judges who spot problems with the rules, law professors, obviously—from all these sources. Our practice is to consider every suggestion that we receive.

The first thing we do is pass the suggestions to the reporter for the committee. If she determines that a suggestion is identical or nearly identical to one that the committee has already investigated and discharged, we don't forward it to the full committee. Otherwise, after she makes her investigation and a report on how she thinks it would affect the operation of the courts of appeals, every suggestion is forwarded to the full committee for consideration.

The committee has just completed a study of rule 30, Federal Rules of Appellate Procedure, which requires an appendix in most civil cases. There was some thought that the appendix requirement might be adding unnecessarily to the cost of appeals. The committee conducted an in-depth survey. We contacted many judges, lawyers, law professors, and clerks of court to determine how the appendix is being used—whether it is wasteful, whether it is something that the judges rely on, and whether it helps move cases along. Some of the courts of appeals do not require an appendix. That is not a violation of the rules because there is an exception in rule 30(f) that permits a court of appeals to dispense with the appendix.

The committee concluded that most courts of appeals still find the appendix useful and valuable; also that lawyers find it a good discipline early in the appellate process to be required to think through what they want to send to the court of appeals in addition to their briefs. So the

See LIVELY, page 8

FJC Systems Director Returns to Research

Gordon Bermant, the director of the FJC Innovations and Systems Development Division since January 1982, has asked to return to the Research Division, where he served for six years before moving to the Systems Division. Mr. Bermant came to the FJC as a research psychologist in the Research Division in July 1976 and was deputy director of that division from January 1980 until January 1982, when he became director of the Systems Division.

In his letter to Director A. Leo Levin requesting reassignment, Mr. Bermant wrote: "I have always considered research to be my primary calling, and I would be pleased to return my energies to the very important work of the Research Division. What we began in systems in 1982 set the stage for a transformation of automated systems for the courts [and] we have accomplished much. We have initiated the evolution from centralized to decentralized computing; installed a nationwide standard operating system; built a powerful, flexible case management system that can provide full case management services through the operation of an electronic docket; begun pilot tests of this system in eight appellate, district and bankruptcy courts; and developed training curricula and materials to support the continued successful operation of this system. Along the way we also built a prototype case-management system for the probation offices and conducted a major study of alternative court reporting methods."

In response, Director Levin said Mr. Bermant "has been innovative and creative, inspired dedication on the part of his staff, and achieved an impressive record of accomplishment despite great fiscal constraints. We count ourselves fortunate that he will remain with the Center."

The vacancy caused by Mr. Bermant's return to the Research Division has been announced. ■

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committee came to the conclusion that the appendix is still valuable, and we recommended that it be kept. We also recommended sanctions for overinclusion of materials in the appendix or for otherwise not following the rules. That was an interesting study, and it's the sort of thing that an advisory committee should do as part of its monitoring service to the courts.

What was the reaction to your recommended sanctions?

Sanctions are now very popular with courts. Our committee found they are not very popular with the bar when we put our proposed amendments out for comment. Most of the comment was on this one small provision recommending sanctions.

I want to emphasize that the Advisory Committee is just that, advisory. Our Standing Committee on Rules of Practice and Procedure actually makes the final decision on what amendments to the various rules—civil, criminal, bankruptcy, admiralty, and appellate—will be recommended to the Judicial Conference and to the Supreme Court. Our job is to keep in touch with the bench and bar to find out where improvements can be made. There will always be a lot of room for improvement, I am sure.

Following the September 1985 meeting of the Judicial Conference, state judges were appointed to the advisory committees on rules. Chief Justice Vincent McKusick of the Supreme Court of Maine is on your committee. Is this mutually helpful?

It is very helpful to our committee. Chief Justice McKusick was appointed in 1984. We were the first advisory committee to have a state judge added. Our response was so enthusiastic, I think it had something to do with the movement to put them on all of the advisory committees. It is a great help to get the point of view of an experienced state appellate judge. Many states modeled their rules after the federal rules. Yet, they "plow a little different ground," so they have some different experiences with the rules, and they can contribute greatly. Chief Justice McKusick was a fine addition to our committee.

What's the answer to the criticism that local rules go beyond the national rules?

It's a valid criticism. Obviously, such far-reaching local rules are not within the spirit of the national rules. Uniformity was one of the chief aims of the movement toward national rules of practice. There is some justification for local variations, because each circuit has a history that antedates 1968 by a good many years; practices had built up, and it would be very difficult to tell the bar that these practices were going to be abandoned. So local rules that do not seriously violate the rules of appellate procedure, but more or less supplement them, do not create problems. However, Judge Edward Gignoux reported to the Judicial Conference in March that the Standing Committee on Rules of Practice and Procedure is beginning a study of all local rules. This is a tremendous task, but it should lead to a reduction in conflicts between national and local rules.

The first woman to be appointed to a federal court was Florence Allen, who took her oath on Apr. 9, 1934. Did the judges on the Sixth Circuit—all men—resent a woman coming into what had been strictly a "man's world"? Are there any around the circuit now who remember her?

I'm the only one. I clerked for Judge Shackelford Miller, Jr., of the Sixth Circuit of 1948. I was in the courthouse a lot that year, and I knew Judge Allen. She was a formidable lady. But she was the only judge who always remembered the law clerks' names. Of course then there were only six law clerks; but she made the effort.

The gentlemen with whom she served were from a different age. They probably had never known a woman lawyer, much less a woman judge. She was not mistreated, but some of these men were uneasy with her. They had never experienced collegial relations with a woman. Although these men, who went to law school in the teens and the twenties, weren't prepared for a female colleague, she was highly respected. And as if to prove that she

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Robbins Named Acting Head of Education Div.

Professor Ira Robbins, currently serving as a 1985–86 judicial fellow in the Center's Research Division, has assumed the position of acting director of the Continuing Education and Training Division. Professor Robbins is a professor of law at American University's Washington College of Law.

Professor Robbins is already well known to the federal judiciary. He has lectured widely for the Center and has spoken at meetings of both state and federal judges on several subjects of concern to the courts, including habeas corpus and capital cases. He is a graduate of the University of Pennsylvania and Harvard University Law School and was a pro se law clerk in the Second Circuit for two years.

Kenneth C. Crawford, who retired as the director of the Continuing Education and Training Division on May 2, has continued to make his services available to the Center on a contract basis.

The search for a new director of the Continuing Education and Training Division is continuing. Interested applicants for the position should send resumes and supporting papers to the personnel director, Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005. ■

LIVELY, from page 8

was an equal, at least, of the men, she became the patent expert on the Sixth Circuit. She wrote some of the most difficult patent decisions that came out of those years. Judge Allen, I am sure, felt somewhat left out of things at times, but the respect was complete.

If you could make some major change in the federal court system what would it be?

I have mentioned the Article I court for Social Security appeals. There are several changes that many judges agree on. One is the elimination or sharp restriction of diversity jurisdiction. Beyond that, I would like to see more experimentation in the federal court system. I think we tend to stay wedded to our systems and our methods pretty much, whereas we might be more venturesome. I favor the Intercircuit Panel Act, S. 704, which has a sunset provision after five years. If it is not working the way it's intended to, the experiment dies. I think that approach is very useful when an idea is broached for improving the court system.

"I favor the Intercircuit Panel Act, S. 704, which has a sunset provision after five years."

One practice of the courts of appeals that I would like to see changed is permitting petitions for rehearing en banc to be filed without any cost to the litigants. It is very clear from the rule that deals with petitions for rehearing en banc that they should be the exception and not the rule. However, they are now filed in almost every case. All 15 judges must read all the petitions, and very few are granted. One suggestion that I have heard is to require an additional fee to file a petition for rehearing en banc; it could be a fee comparable to the filing fee in district court. The chance of getting rehearing en banc is remote, and it should be remote. These cases have been heard by panels of three judges, and it is unrealistic for lawyers to expect rehearing after a panel of three judges has reviewed the case. I would like to see some restrictions.

One of my serious concerns now, and probably the most serious concern of all appellate judges, is the fact that sentence review is in the offing. This could greatly enlarge the number of appeals. There are some criminal cases now that aren't appealed. I doubt that there would be any that would not be appealed if we had sentence review. This represents a really worrisome development for the courts of appeals because we are already fully occupied and the idea of having to review sentencing is something that we don't relish. ■

LEGISLATION, from page 1

3664). It has been the Judicial Conference's position that placing estate administration under the Department of Justice creates a conflict of interest and generates costly duplications of effort. The Conference believes that the "administrative" functions associated with bankruptcy estates pending before the courts should remain the judiciary's responsibility.

Finally, the Senate also amended the judgeship bill to include special provisions for bankruptcy cases involving family farmers. The amendment incorporates the provisions of S. 2249. Upon completing consideration of the bill and amendments, the Senate took up H.R. 2211, a House-passed bill dealing with farm bankruptcies, amended that bill to incorporate the provisions of the Senate bill as amended, and passed the amended version of H.R. 2211.

• **Retirement.** Draft legislation has been submitted to Congress to pro-

See LEGISLATION, page 10

Recusal Not Needed If Conflict Is Clerk's

If a judge's law clerk has a possible conflict of interest, the clerk, not the judge, must be disqualified, the Eleventh Circuit Court of Appeals has held. *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011 (11th Cir. 1986).

Hunt, acting as receiver of a life insurance company, brought suit under the Racketeer Influenced and Corrupt Organizations Act (RICO), securities law, and state common law against defendants for allegedly engaging in fraudulent transactions that depleted the company's assets. Hunt argued that the district judge should have recused himself because two of the judge's law clerks accepted offers of employment from a law firm representing several of the defendants while the case was pending.

The Court of Appeals disagreed: "Absent actual bias, disqualification is necessary only if a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality [citations omitted]. It is true that a reasonable person might wonder about a law clerk's impartiality in cases in which his future employer is serving as counsel. Clerks should not work on such cases, just as a judge should not hear cases in which his business associates are involved .... A judge is not necessarily forbidden, however, to do all that is prohibited to each of his clerks. If a clerk has a possible conflict of interest, it is the clerk, not the judge, who must be disqualified."

In this case, the record indicated that neither of the two clerks in question worked on the case or even talked about it with the judge to any significant extent, and the appellant did not allege any actual bias on the part of the district judge. Thus, the district judge properly denied the motion for recusal, the Eleventh Circuit held in a per curiam opinion. ■

LEGISLATION, from page 9

vide a new retirement system for fixed-term judicial officers, a system similar to that now available to territorial judges under 28 U.S.C. § 373. The legislation would extend the coverage of the judicial retirement system to bankruptcy judges, judges of the United States Claims Court, and United States magistrates.

The purpose of the legislation is to provide a viable system for developing a corps of "senior" federal judicial officers available to assist in the disposition of cases before the courts. Limited authority now exists to recall retired bankruptcy judges and Claims Court judges. The magistrates system has no parallel to even that limited authority.

In his capacity as secretary to the Judicial Conference of the United States, L. Ralph Mecham, director of the AO, transmitted the Conference's recommendation of the proposed legislation in letters earlier this year to House Speaker Thomas P. O'Neill, Jr., and Senate President George Bush. Those letters noted: "The current Civil Service Retirement System is designed for the typical career Government employee who enters the civil service early and remains for many years. Recruitment for judicial office of individuals who are at the peak of legal experience and earnings is made more difficult under that retirement system because their age often precludes the attainment of sufficient years of service to earn significant retirement benefits under the Civil Service Retirement program."

• **Annuities.** H.R. 3570, one provision of which would reform and improve the federal justices and judges survivors' annuities program (see *The Third Branch*, vol. 18, no. 2, at 3), was passed, with amendments, by the Senate. The House version would increase the amount of the judges' annual contribution rate to the annuities system from 4.5 percent to 5 percent, with the government providing any difference necessary to fund the program. The Senate amendments do not change the House-passed increase in the judges' contribution but limit the government's rate of contribution to 9 percent. The Senate version sets an annuity ceiling of 50 percent of the judge's salary (compared to 55 percent under the House version). (The present maximum is 40 percent.) The minimum amount of annuity—30 percent in the House version—is 25 percent as passed by the Senate. The bill also makes significant improvements in annuities for surviving children. ■

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Chief Justice Burger Announces Retirement to Devote Full Time to Bicentennial Comm'n; Justice Rehnquist to Be New Chief Justice

Photo courtesy Sup. Ct. Hist. Soc'y

Chief Justice-designate Rehnquist

Chief Justice Warren E. Burger submitted to President Reagan on June 17 a letter announcing his retirement "to be effective July 10 or as soon thereafter as my successor is qualified."

The Chief Justice announced that one of the compelling reasons was to assure that the work of the Committee on the Bicentennial of the Constitution, of which he is chairman, goes forward so that "the story of our great constitutional system [will] be recalled to the American people . . . to tell that story as it should be told." The conclusion of the letter stated the Chief Justice's intention "to continue to devote every energy to help make our system of justice work better."

President Reagan on June 20 nominated Associate Justice William H. Rehnquist to be the next Chief Justice of the United States.

The Chief Justice's announcement came as *The Third Branch* was at the printers. Some comments on his contributions to the judiciary follow.

Tributes to Chief Justice Warren E. Burger

William H. Rehnquist, Associate Justice, Supreme Court of the United States, Chief Justice of the United States-designate

I can say without any doubt in my mind at all that Chief Justice Burger will be remembered not just for his leadership of the Supreme Court of the United States but as one of the great judicial administrators that has ever held that office. Certainly he ranks with Chief Justice Taft in that respect.

A. Leo Levin (Director, Federal Judicial Center)

Chief Justice Burger's impact on the procedures and processes of our courts is of historic dimension. He has long recognized the need to seek alternatives to tradition-encrusted ways of doing judicial business. Nor has his interest been limited to courts. But for him, the phrase "alternative dispute resolution" would not have gained the currency it has in our lexicon.

Photo courtesy Sup. Ct. Hist. Soc'y

Chief Justice Burger

His curiosity, and his realization that innovations must be explored even though some will fail, have reaped benefits for the judicial system and, more important, for the lit-

See BURGER, page 2

New D.C. Circuit Chief Judge Wald Interviewed

Judge Patricia M. Wald was born in Connecticut and graduated from Connecticut College and Yale Law School. She is a member of Phi Beta Kappa and Order of the Coif. After clerking for Judge Jerome Frank (2nd Cir.), she became affiliated with a Washington, D.C., law firm.

Judge Wald was an attorney with the Office of Criminal Justice of the Justice Department in 1967–68, then worked for D.C. Legal Services, and later for the Mental Health Law Project for five years, where she was litigation director. From 1977 to 1979, she was assistant attorney general for legislative affairs at the Department of Justice.

Service on various commissions, boards, and councils, including the President's Commission on Crime in the District of Columbia, demonstrates her interest in subjects as diverse as juvenile justice, drug abuse, administrative law, and the judicial process.

Judge Wald was appointed to the District of Columbia Circuit in 1979. On July 26, she will become chief judge of that circuit.

Your new title carries with it a lot of administrative work. Some judges like being a court administrator; others object and say they would prefer to have their time spent strictly on the cases. How do you feel about this?

Seven years on the court have taught me how important adminis-

See WALD, page 6

BURGER, from page 1

igants and citizenry it serves. He believes deeply in the importance of judicial education. Broad acceptance of these values is a legacy of the 17 years he has chaired the Board of the Federal Judicial Center, an organization he helped create through conversations with his good friend Warren Olney. He brought wisdom, energy, and great dedication to that chairmanship. As a result, much of the best of the Center's work is a reflection of his initiatives, insights, and vision.

L. Ralph Mecham (Director, Administrative Office, FJC Board Member)

I know of no Chief Justice who has achieved more in reshaping federal judicial administration than has Chief Justice Warren Burger. He is a judges' Chief Justice, concerned about their welfare and morale. He is also jealous of the lofty reputation of the judiciary for integrity, probity, and the careful husbanding of taxpayers' resources.

William E. Foley (Former Administrative Office Director)

I was fortunate to be both deputy director and director of the AO during the time Chief Justice Burger was in office, especially because of his deep interest in court administration, not only the federal courts but also the state courts. Certainly he ranks with Chief Justices Taft and Hughes, who also worked so effectively in this area. In this respect as well as many other ways, he was an inspiration to all of us. He will be greatly missed.

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Ernest Friesen (Former Administrative Office Director)

Everyone in the field of court administration owes Chief Justice Burger their gratitude for his leadership in establishing its roots and supporting its growth. We would not be where we are today without him. He has done more for judicial administration than any judge in our Nation's history.

Tributes from Chief Judges of the Circuits

Chief Judge Spottswood W. Robinson III (D.C. Cir.)

I was privileged to serve with Chief Justice Burger on the United States Court of Appeals for the D.C. Circuit and to work with him as Chief Justice. Lawyers and legal scholars will long recall his important contributions in many areas of the law in decisions over his 30 years on the federal bench. That body of work speaks for itself. As federal judges we are acutely aware of his unparalleled commitment to improving the efficiency and administration of the federal courts and as a result the quality of justice they dispense. All Americans are indebted to Chief Justice Burger for these contributions to our Nation.

Chief Judge Levin H. Campbell (1st Cir.)

I doubt the lower federal courts have ever had, or will ever have again, as staunch a friend and leader when it comes to promoting their efficient management and operations. The Chief knew that it takes more than words on paper to make a court function. Courts are people—judges, clerks, and administrators. They have all the management problems of any human institution. Chief Justice Burger worked tirelessly to see that the federal courts meet the highest possible administrative standards.

Chief Judge Wilfred Feinberg (2nd Cir.)

In Warren Burger's 17 years as Chief Justice, he labored untiringly to give the judiciary the means of coping with the problems thrust upon them by the unprecedented number and complexity of the cases coming into the courts. He was truly the Chief Justice of the United States, focusing his concern not just on the federal judiciary but on the state systems as well. For example, the Institute for Court Management, the National Center for State Courts, the use of circuit and district court executives, and the modernization of equipment are all due to his leadership. His efforts to obtain an adequate level of compensation for the federal judiciary were unceasing. His place in history is secure.

Chief Judge Ruggero J. Aldisert (3rd Cir.)

I know Chief Justice Burger well. I worked with him for seven years as a member of the Federal Judicial Center Board and, more recently, as a member of the Judicial Conference of the United States. He has a penchant for detail and was thoroughly prepared for every agenda item. He shall be remembered for a unique administrative style and a profound interest in the entire federal judiciary.

Chief Judge Harrison L. Winter (4th Cir.)

I express my personal regret and that of each member of the court that Chief Justice Burger is relinquishing his office. His service has covered a momentous 17 years. He has established an enduring reputation for superb leadership and has earned the admiration and respect of all members of the judiciary. We wish him well in the years ahead.

Chief Judge Charles Clark (5th Cir.)

The Chief Justice advanced the science, the art, and the style of judging as has no other person in history. He does not leave a legacy of precedent alone. Because his unique zeal and zest for judicial administration produced a myriad of innovations, every member of the third branch can do the work of justice at today's pace.

See BURGER, page 13

Several Circuit Judicial Conferences Held, Wide Range of Topics Discussed, Debated

Chief Justice Burger and Justices Harry Blackmun, Byron R. White, John Paul Stevens, Sandra Day O'Connor, and Lewis Powell were among the speakers at circuit conferences held recently.

Chief Justice Burger, circuit justice for the D.C. Circuit, spoke at the circuit's judicial conference, held in Williamsburg, Va. Chief Judge Spottswood W. Robinson III welcomed attendees to the conference.

A panel on affirmative action was moderated by Judge Antonin Scalia. The conference also featured workshops on "Juvenile Justice" (moderated by District Judge Joyce H. Green); "Is Deregulation Dead?" (moderated by Circuit Judge Laurence H. Silberman); "Problems of the Bench and Bar" (moderated by District Judge Thomas F. Hogan); and "Difficult Choices: Coping With a Surging Caseload in the Court of Appeals" (moderated by Judge Patricia M. Wald, who will become chief judge of the circuit this month). Professor Henry P. Monaghan of Columbia University School of Law spoke on "Taking the Courts of Appeals Seriously."

The fourth Federal Circuit judicial conference was held in Washington, D.C. Chief Judge Howard T. Markey reported on the state of the court. Judge Markey moderated a discussion, "The First Three Years of the Federal Circuit: A Critique," which featured views of members of the bar who specialize in the areas of patents and trademarks, Claims Court practice, Court of International Trade practice, and Merit Systems Protection Board practice. Judges representing the Federal Circuit (Daniel M. Friedman and Helen W. Nies), the United States Court of International Trade (Chief Judge Edward D. Re), and the U.S. Claims Court (Chief Judge Loren A. Smith) commented on the lawyers' views. Associate Attorney General Arnold I. Burns spoke on the crisis in tort liability and about the Department of Justice's new guidelines regarding consent decrees and special masters. Separate "breakout sessions" on the various areas of practice in the Federal Circuit dealt with specialized topics in each area.

Chief Judge Charles Clark presided over the forty-third Fifth Circuit judicial conference, held in Houston, Tex. Justice Byron R. White, circuit justice for the Fifth Circuit, and Solicitor General Charles Fried were among this year's speakers. Program segments included Duke University Law School Dean Paul D. Carrington's talk on "The Constitutionalization of Morality"; the introduction of new judges; panels on recent decisions of the Supreme Court, jury selection and comprehension, bankruptcy cases, RICO liability, and complex litigation; and talks on mass torts, federalism, and the subject "Are Lawyers Benefiting Our Society?"

The forty-seventh Sixth Circuit judicial conference was held in Memphis, Tenn. Chief Judge Pierce Lively welcomed the conferees. Justice Sandra Day O'Connor, circuit justice for the Sixth Circuit, addressed the participants. A panel on civil RICO discussed developments since the case of *Sedima v. Imrex Co.*, 105 S. Ct. 3275 (1985). Other panels dealt with recent developments in the awarding of fees in federal courts and in § 1983 litigation.

The Seventh Circuit judicial conference was held in Milwaukee, Wis. Chief Judge Walter J. Cummings gave a report on the state of the judiciary. Justice John Paul Stevens, circuit justice for the Seventh Circuit, gave a report on the work of the Supreme Court, and Attorney General Edwin Meese III and Congressman Robert W. Kastenmeier (D-Wis.) spoke. "Current Advocacy Issues in the Court of Appeals" and "Current Practice Problems in the District Courts" were among the presentations. Both discussions were led by panels of judges and practicing lawyers. The session on current advocacy issues was designed to elicit an exchange of views on the

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Civil Rights Plaintiff Awarded Fees, Costs From State Judge Under *Pulliam* Rationale

In a civil rights case brought by a woman who had been jailed by order of a state judge, the defendant judge has been ordered to pay attorneys' fees and costs pursuant to 42 U.S.C. § 1988. The case, *Davis v. City of Charleston*, No. S 84-283C[D], slip op. (E.D. Mo. May 6, 1986), was decided by U.S. District Judge H. Kenneth Wangelin and depended for its holding on the Supreme Court's decision in *Pulliam v. Allen*, 466 U.S. 522 (1984). *Pulliam* held that Congress did not intend to limit the injunctive relief available under 42 U.S.C § 1983 so as to prevent such relief against a state judge and that a prevailing plaintiff in such a case is also entitled to recover attorneys' fees from a defendant judge under § 1988.

The plaintiff in *Davis* had been sentenced to 14 days in jail by a Missouri circuit judge after she failed to pay a $250 fine for disturbing the peace. The judge had issued an order requiring plaintiff to appear and show cause why the fine would not be paid, or to pay the fine by a certain date. The plaintiff informed the court by telephone on the appointed date that she did not have the money to pay the fine, thereby raising "at least an inference" that the reason for nonpayment was one of poverty rather than contempt. Judge Wangelin ruled that the Missouri judge erred when he sent her to jail without first holding an "on-the-record" hearing to determine conclusively the reason

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Public Hearing Held on Prior Records; Questions About Guidelines Answered

This is one in a series of articles to keep federal judges and supporting personnel informed about the Sentencing Commission's work.

The commission's second public hearing, on May 22, dealt with how the sentencing guidelines should treat a defendant's prior criminal record: How, for example, should the commission define state felony and misdemeanor offenses in view of the definitional disparity among states and between states and the federal system? How, if at all, should the guidelines take into account the length of time that defendants with prior records have gone without committing new crimes? Should juvenile offenses be considered in establishing sentences for adult offenders?

NEWS FROM THE SENTENCING COMMISSION

The hearing continued the dialogue between the commission, members of the criminal justice community, and other interested groups and individuals. Among the witnesses were William F. Weld, U.S. attorney from Boston; Thomas W. Hillier, federal public defender from Seattle; Donald L. Chamlee, director of the AO's Probation Division, and three probation officers from across the country; and Melvin D. Mercer, section chief in the FBI's Identification Bureau.

Hearings on sanctions imposed on organizations were held June 10. Hearings are scheduled on sentencing options (July 15) and plea negotiations (Sept. 23).

Questions and answers. Whenever the commission meets with judges, lawyers, probation officers, and others in criminal justice, many of the same questions are asked. The "News from the Sentencing Commission" column will present some of these questions and answers, which, said Judge William W. Wilkins, the commission's chairman, "reflect the opinion of the U.S. Sentencing Commission and are phrased in terms of what will happen when the guidelines go into effect."

When do the guidelines become effective?

The commission must submit sentencing guidelines to Congress by April 13, 1987. Congress has six months from the date of submission for examination and review. By statute, the guidelines are to go into effect at the end of this six-month period. Congress may, of course, change these dates.

Because parole is abolished for defendants sentenced under the guidelines, what will happen to defendants sentenced prior to the effective date of the guidelines?

Inmates serving existing sentences will not be affected when the sentencing guidelines go into effect. The guidelines and policies promulgated by the commission will only apply to those defendants who commit offenses and are sentenced after the effective date of the guidelines. The release date for prisoners who were not sentenced under the guidelines will be set by the Parole Commission before it is statutorily abolished five years after the guidelines go into effect (see 18 U.S.C. § 3551).

Will the guidelines allow for consideration of special concerns or problems in a local community regarding a particular crime?

Yes. Congress has authorized the commission to take into consideration relevant public concern generated by an offense, the community view of the gravity of an offense, and the current incidence of an offense in the community and nationally (see 28 U.S.C. § 994(c)).

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Massachusetts Calendar Notes Bicentennial Events

The calendar of the United States District Court for the District of Massachusetts contains a lesson in constitutional history every day.

That's because since March, the calendar of court business posted each day throughout the courthouse and distributed to all court-related offices also includes a brief note describing a significant event in constitutional history that occurred in a previous year on that date. These "United States Constitution Bicentennial Notes" appear as the lead item on the daily calendar, neatly boxed and in boldface type.

"It's an eyecatcher," explained Clerk of Court George F. McGrath, whose office prepares the calendar. "It's a constant reminder of the Constitution's history, every single day."

McGrath explained that the idea was proposed by Judge A. David Mazzone, upon receipt of a bicentennial calendar issued by the Commission on the Bicentennial of the United States Constitution. Chief Judge Andrew A. Caffrey readily endorsed the concept, McGrath said, and starting on March 20 and every court day since, the clerk's office has headlined its daily calendar with the historical notes from the commission's bicentennial calendar.

The bicentennial notes have quickly become a popular item around the courthouse, McGrath said. For example, on May 14, the calendar noted that on that date in 1787, the opening of the Constitutional Convention was delayed because representatives of only two states were present. McGrath said that his office received numerous calls from readers that day inquiring, "which two states?"

Sample copies of the District of Massachusetts daily calendar incorporating the bicentennial notes are on file at the Center, and may be obtained by writing to Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a stamped, self-addressed envelope (1 oz.).

Chief Justice Burger Shares Concerns for Administration of Justice with ALI Meeting

The legal profession is changing, and some of these changes reflect negatively on the profession, Chief Justice Burger told the annual meeting of the American Law Institute.

In his speech, the Chief Justice cited "very disturbing developments in the administration of justice which must be studied," including:

- Excessive and unrealistic jury awards, especially on punitive damages;
- High increases in insurance costs, especially for product liability, professional practice liability, and other comparable areas;
- Unnecessarily long trials, many times prolonged when judges allow the lawyers to control the jury selection process; the jury selection is the judges' responsibility, after receiving from counsel, if necessary, proposed questions to prospective jurors;
- Contingency fees. The whole fee area should be studied, said the Chief Justice, and where necessary corrected. "The true function of our profession should be to gain an acceptable result in the shortest possible time with the least amount of stress and the lowest possible cost to the client. If courts do not take control of this subject, legislatures will."

Published conclusions that a "litigation explosion" does not exist are nonsense; the Chief Justice is adamant that increasingly heavy caseloads are prevalent in both state and federal courts, especially the latter.

In speaking to the same group last year about the administration of civil justice in the United States, the Chief Justice asked, "Is there a better way?" The ALI studied the issues raised by his question, and ALI Director Geoffrey Hazard, ALI President Roswell Perkins, and Judge Arlin M. Adams of the Third Circuit are planning a conference to explore the issues. Judge Adams is chairman of the ALI's organizing committee. No date has been set.

A related development is a study of the legal profession commenced last year by the ABA's Commission on Professionalism under the chairmanship of Justin A. Stanley, former ABA president and a prominent Chicago practitioner. The Chief Justice termed the study "very significant." This group will focus principally on recent developments that are making an impact on the practice of law. The commission's report is expected to be presented to the ABA's house of delegates next August.

The Chief Justice also cited a recent lecture by ALI member Daniel Meador, a University of Virginia law professor, who said, "The American legal scene is the most complicated in the world." Professor Meador was referring to the system as a whole, the Chief Justice added, not to the "acute developments of the past five years or more."

With input from the ABA and the ALI as well as practicing lawyers and judges (state and federal), the upcoming ALI study of civil justice should be as significant as the ABA study of criminal justice standards and the 1976 Pound Conference.

Also reflecting concern about the legal system is a 1986 book by the ABA Lawyers Conference Task Force entitled *Defeating Delay—Developing and Implementing a Court Delay Reduction Program.* Chief Justice Burger's foreword to the volume commends the manual as an "example of the profession seeking to improve its work." ■

Judges Broderick, Peckham Testify Before House Subcommittee on Court-Annexed Arbitration Bill

Two federal judges were among those testifying at a recent hearing on arbitration and the federal courts before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the Committee on the Judiciary of the House of Representatives. The hearing concerned the proposed Court-Annexed Arbitration Act of 1986 (H.R. 4341).

Judge Raymond J. Broderick (E.D. Pa.) and Chief Judge Robert Peckham (N.D. Cal.) testified about the use of court-annexed arbitration in their respective districts. Chief Judge Peckham is the chairman of a task force appointed by Chief Judge James R. Browning of the Ninth Circuit to study alternative dispute resolution in that circuit. The statement of Judge Elmo B. Hunter (W.D. Mo.), chairman of the Committee on Court Administration of the Judicial Conference, was also read into the record at the hearing.

Since 1978, the Eastern District of Pennsylvania and the Northern District of California have operated pilot court-annexed arbitration programs. In addition to those districts, eight additional courts instituted arbitration in a variety of forms between October of 1984 and January of 1986. H.R. 4341 would expressly authorize the existing ten programs and provide for such programs in five additional districts if the Judicial Conference approves.

Judges Broderick and Peckham noted that the programs in their respective districts differ substantially from each other. For example, the arbitration proceedings in the Eastern District of Pennsylvania take place in the courthouse, whereas those in the Northern District of California are conducted in a more informal setting; the Pennsylvania arbitration proceedings are conducted by a panel of three experienced lawyers, whereas the California cases are heard by a single arbitrator.

Existing programs have been operating without specific statutory authorization, although funds to operate them have been appropriated by

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tration is, especially in this court. At the present time we are facing a serious rise in our filings and the beginnings of what could be a serious backlog problem. Therefore, I think that administering the court, making sure that we use our most important resource—which is judge time—wisely and efficiently, is critical. I am quite willing to and I intend to devote as much time as necessary to accomplish that goal.

Everybody on the court probably would rather spend their time deciding substantive cases, but there is no question in my mind that running a court efficiently, keeping the other judges reasonably content with the way in which the court is being run, will over the long run be a valuable investment of my time. I've had some administrative experience in the government, and that has reinforced my sense of how important administration is and that you have to spend time on it.

Are you introducing any new procedures, especially those that relate to processing cases?

Actually, this is a very critical summer and upcoming year for us. Because of the upsurge in cases, we have had a judges' task force working all spring on many new reforms in the way we schedule our cases. We are going to put those into operation over the summer. It probably doesn't merit going into all of the details here except to say that we are drawing quite a bit on the experience of some of our sister circuits which have tried such things as the expedited or fast calendar, in which most of the cases do not need oral argument and dispositions can be done more quickly. A particular need in this circuit is for a special calendar for the complex administrative law cases, which take so much of our time. We are going to make sure that the same panel has those cases from the very beginning, so that they don't get fragmented between motions panels and merits panels and so that panel can itself move the complex cases along at an appropriate rate and make all of the preliminary preargument decisions about them.

We've also made quite a few changes in our staff counsel's office; we have had up to now what we call court law clerks, the rough equivalent of chambers law clerks, to handle motions. Now we are moving in the direction of having assistant staff counsel, who have had some experience in practice and are willing to stay around for more than one year.

Judge Patricia M. Wald

This is the pattern in most other circuits. All of these changes are geared to enabling us to process as many more cases as we need to and as quickly as we want to, with the right amount of judge time that the cases deserve. I do emphasize, though, that we are not just in an automatic case-processing business to bring our numbers up. We still plan to give each case its due. But I think all of us have felt that there are quicker ways to do justice in some cases, and in fact our changes will allow us more time to spend on the cases which require more time.

Do you have any screening procedures established for the circuit?

Well, let me talk about CAMP a little bit and then about what we are looking to accomplish through computerization. We have had for many years, at least as long as I've been here, a form of CAMP— the civil appeals management plan. The staff counsel would pick out those cases that looked like they were going to be very complex and complicated with many parties involved and then get all the counsel together to see if the issues could be simplified, and whether some of the briefs could be consolidated. In addition, she would propose a format for the oral arguments. The fact remains, however, that she is only one person with one assistant. In that sense we have had a much smaller staff counsel's office, certainly, than the Second Circuit and many of the other circuits. What we plan to do in the future is to energize our staff counsel's operations and reallocate her time. We feel that with more experienced assistant staff counsel to work on the motions and some of the other duties, we will be able to free up the staff counsel and her assistant to do a lot more by way of early identification of the cases that need to be managed.

We're also going to begin, very modestly, some experimentation in the settlement area. We've done none of that. There has never been any attempt to settle cases at the appellate level here. We are all aware of the Second Circuit's very enviable record in terms of the number of cases that they have settled; in fact, we have had a member of their staff down here to talk to us. Everybody thinks, however, that there may be a big difference in the potential for settlement in this circuit as opposed to the Second Circuit. Well over 80 percent of our cases are government cases. I think the Second Circuit has a lot more commercial cases—private party cases. That doesn't mean that there isn't some potential for settlement in our cases, but we will have to work slowly and find out just what the potential is before using any substantial amount of resources in these Gramm-Rudman days.

As far as computerization goes,

we have a new circuit executive who does have background in computerization. Given Gramm-Rudman and given the Administrative Office's own program specs for computerization, again our money will be limited; we are going to do the best we can with our resources.

How are the panels assigned in your court?

The panels are assigned without any participation by any of the judges, including the chief judge. We try hard for complete randomization, so that there will be no inference that particular judges have been assigned to particular cases. The chief judge, as it is now, does not participate in any of the assignment of judges except in three-judge courts, and then he has a seriatim list that he goes by. I think that's the right thing to do. I was a lawyer in this circuit and I know how concerned we were that particular judges would not be automatically assigned to particular types of cases. I think it is very important—especially in a court that is made up of judges with varied backgrounds, ideologies, and leanings—to make sure that nobody thinks that the chief judge or any other judge is able to handpick cases. As far as I'm concerned, the randomization procedure works well.

Your dissents record some strong feelings on certain issues. Do you feel it important that this emphasis be recorded for the benefit of the bar and parties to the litigation?

I couldn't imagine writing a dissent if I didn't feel strongly about it, and I don't think that my dissents are any more strongly worded than most of my brethren's or my sister's on the court. I think dissents are important, though one shouldn't be profligate about writing them at the drop of a hat. In a period when the court does have quite strong differences on very important points, I believe that a heartfelt dissent serves a positive function, not only in expressing the dissenter's view to the bar, to one's colleagues, possibly to the Supreme Court, and to commentators in the field. But even more important a dissent usually has the effect of making the majority think twice. The majority, in light of the dissent, sometimes moderates its own opinion and sometimes goes to a second deeper level of thinking when it has to answer the issues raised by the dissent. So if one keeps dissents on a civil level, they can serve a constructive purpose. Dissents make sure that all the issues have been gotten out on the table. I know in my own case if I anticipate a dissent, I pay extraordinary care to the rationale of the majority opinion I am writing. Sometimes points that slip by if you don't have any opposition will surface and get resolved if you have somebody watching over your shoulder, ready to point out every possible error.

"In a period when the court does have quite strong differences on very important points, I believe that a heartfelt dissent serves a positive function ...."

Sometimes a dissent ultimately comes out a majority opinion.

I've seen that happen often in panels. I have also seen it happen in en bancs. Then there is also the old technique of writing what's been called the "invitational dissent" to get the attention of the Supreme Court, something which has gone on for decades and decades. The judge that I clerked for, Jerome Frank of the Second Circuit, was a famous dissenter; he was very open about the so-called invitational dissent, often beginning his dissent with a phrase like, "Even if I haven't won my brethren ...."

You have expressed concern about conflicting opinions of federal courts (including the Supreme Court) on the liability of government decision makers, especially over the past 25 years. Has anything made you change your views?

Well, I don't think we have yet settled for all time the state of individual or official liability. As I pointed out in a law review article, it is a very thorny problem. Nobody wants to take away accountability; at the same time, nobody wants to chill government officials' capability to make on-the-spot decisions for fear that they'll have to take out mortgages on their homes in order to pay personal liability awards. When I was in the government I worked hard but unsuccessfully on a bill—and I still think it is an excellent idea—which would extend the Federal Tort Claims Act to waive sovereign immunity for the so-called constitutional torts for which most individual government officials are now sued individually, the § 1983-type actions. That would serve as a middle ground between making sure there were some adequate remedies for victim wrongs, yet not penalizing officials who make mistakes by threatening them with economic ruin. It would also provide the courts with a better atmosphere in which to make liability decisions. We have had very few verdicts against individual government officials where they had to pay out of their own pockets. You can count the number on one hand. The courts really don't like to penalize an individual government employee that way unless they absolutely have to. We could make our decisions about the rights and wrongs of government conduct in a less pressured way if we didn't have to worry about bringing personal economic ruin on people. This is one area where the solution may have to be

"... I think after a year on the court you probably know the Administrative Procedure Act by heart."

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legislative. I also point out that part of the bill that I worked on did have an alternate mechanism for disciplining administrators who were found to have violated somebody's constitutional rights, so they were not going to get off scot free. Right now the debate is being played out under the rubric of the ancient doctrine of immunity, and I think that is probably too heavy a burden for that doctrine to bear. That is why I'd like to see the Federal Tort Claims Act amended.

As chief judge, you will have to handle initially any complaints filed against judges on the Court of Appeals for the D.C. Circuit.

Well, I've been on the court before and since passage of the Judicial Conduct and Disability Act of 1980, the act that sets up procedures for processing complaints against judges. I am aware that the chief judge is the gatekeeper. Some of these complaints have gone on to committees for consideration by the judicial council. I think it's probably one of the least pleasant aspects of the job, but a necessary one. The present chief judge, Spottswood Robinson, has performed admirably, and I can only hope to follow in his footsteps.

You recently wrote an article in which you pointed out that different judges play different roles: "loner, inveterate disagreer, almost automatic agreer, or a conciliator able to influence rationales or even results by negotiations." What is your role?

It has varied from case to case and from time to time. There are eras on the court when you are in sync with the majority of the court, and then personnel changes come about among the judges and you may find yourself more frequently in the minority. I suppose that any judge who spends any considerable amount of time on a court runs into that. One aims in a period of sharp ideological differences among the judges to try to find the common ground in as many cases as possible. I think at this particular time the role of conciliator—if you can conciliate your own conscience—is an extra important one. On the other hand, no one looking at my record would say that I am an inveterate agreer, and I hope that they don't think I am an inveterate disagreer. A quick look at the statistics, I think, would indicate that I don't dissent that much more frequently than most of my colleagues. On the other hand, there are some of my colleagues who hardly dissent at all, and I'm certainly not in that group. As law gets more and more prolific, and there are more and more decisions out there, and the difficulty of making decisions consistent becomes greater, we all strive to find something that will hold the court together. On a practical level we simply can't afford to have more than a certain number of en bancs a year. We simply cannot accommodate them in our schedule, and so in important cases it is generally more profitable to try to find a common ground on the panel level rather than have to go on to the en banc level.

The Federal Judicial Workload Statistics for the year ending Sept. 30, 1985, show that the D.C. Circuit had almost a 41 percent increase in filings, the highest increase in the country. To what do you attribute the sudden increase, which brought an attendant decrease in terminations?

Well, we've asked ourselves that question again and again, and interestingly enough during the year in which we had the greatest upsurge it was across the board, not concentrated in any one area. Now, agency cases, as you know, account for the largest proportion of our cases, and we did have a disproportionate increase in them. But we also had an increase in U.S. civil, private civil, and even some in criminal. Now this year, so far, our statistics show a slight decline, something around 11 percent. On the other hand, the prior year left us with a great amount of cases to be disposed of. We also have had some increase in our terminations. That's encouraging, especially since we now have

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Positions Available

Director of Continuing Education and Training, Federal Judicial Center. Salary to $68,700, commensurate with education and experience. Civil service status is not required. Responsible for developing and managing a variety of education and training programs for all federal court personnel, including circuit judges, district judges, bankruptcy judges, magistrates, clerks of court, librarians, appellate staff attorneys, probation officers, and federal public defenders.

Candidates should have law degrees and excellent writing and organizational skills. Demonstrated professional experience in developing and implementing continuing education and training programs—particularly experience with education programs for lawyers, judges, or judicial personnel—and demonstrated ability to manage a professional staff are all highly desirable. Send resume or government application form to Personnel Officer (Announcement No. 86-008), Federal Judicial Center, 1520 H St., N.W., Washington, DC 20005. Applications must be received by July 15, 1986. However, the position will remain open until filled.

Chief Deputy Clerk, U.S. Court of Appeals for the Eleventh Circuit. Salary to $52,262, depending upon experience and education. Minimum requirements six years' progressively responsible managerial or administrative experience; bachelor's, postgraduate, or law degrees desirable. Send resume with cover letter highlighting relevant experience by Aug. 11 to Miguel J. Cortez, Clerk, 50 Spring Street, S.W., Atlanta, GA 30303-3147.

EQUAL OPPORTUNITY EMPLOYERS

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two vacancies on the bench, so if we have two more bodies by this time next year, we ought to be able to do considerably better on that. In the first couple of years of this administration our agency cases dropped precipitously—regulations were not coming out as fast, some agency spots had not been filled, so that the backlog was forming at the agency level rather than ours. Once those got filled and the agencies processed their own cases, they started pouring in to us. Still, overall over a 10-year period, or a 5-year period, even though we have these roller coaster things from year to year, there's no question that the filings have gone up. I think that's the thing we are trying to deal with now, the fact that the caseload is not going to go down much from what it is now. I doubt that we will have an increase in judicial resources, so that's why we're trying to use our judge time in the best way possible.

Statistics for the same time period show that your court received new filings totaling 1,428 cases, 50 percent of which involved administrative law cases. Are there special problems involved with administrative law cases, or does this high percentage mean the members of your court develop an expertise which makes it easier?

Let me go back to the first part of your question. Administrative law cases are the bread and butter of this circuit, and nobody comes on to this circuit without knowing that's what they are going to get. Administrative law cases are not, however, fungible. We have some that are relatively simple, and they can be turned out relatively fast (although they tend to be more complicated than private civil actions). We have some agency cases that are incredibly complicated, that have 200 different parties appealing from a major regulation and thousands of pages of appendices. Actually, I found that the issues, the legal issues, in administrative law are not more complicated, they are in fact less complicated than in some other fields of law. What is complicated is wading through the evidence that goes to support the regulations or the procedures that went on down below at the agency level, or understanding the basic transaction or the subject matter that the agency is dealing with in order to be able to evaluate whether what the agency has done is rational and not arbitrary and capricious. Those are the things that take most of the time. As far as experience in administrative law is concerned, I think after a year on the court you probably know the Administrative Procedure Act by heart. You probably know all the major precedents in the administrative law field. In that sense, you know the analytical framework, but I don't think any number of years on the court will prepare you for the wide variety of scientific and other subject matters which you have to evaluate in terms of those issues. I mean, one day you may get a complicated gas and oil case, the next day a Medicare regulation, the next day a labor problem; so that there is always something new around the corner. I don't think one ever can say, "Oh, well, this is just another administrative law case." Actually most people outside would say, "Oh, isn't that too bad you have to spend all this time with this boring administrative law case." They are not boring. I have come to like the administrative law cases better than many of the more traditionally attractive constitutional law cases. The administrative law cases affect a lot of people. They are part of the life around us. They usually involve some very interesting areas that you can learn about that you wouldn't learn about otherwise. So I'm quite content with that being a major part of our workload.

"[W]e may have to be less tolerant of the delay-oriented, frivolous cases."

It's funny: The law clerks who come to the court are thrilled in the beginning with the notion that they'll get to work on a constitutional law case, and they are appalled at the notion they may have to work on Federal Energy Regulatory Commission cases that year. By the end of the year, many of them say they really enjoyed the administrative law cases and they were tormented, as indeed they should be, by the constitutional law cases.

Would you favor the establishment of a special court to handle only Social Security cases?

I am probably not the best person to ask about that. We simply don't get that many of them in this circuit. The occasional ones we get don't give us the feeling of being overwhelmed. I will generalize, though, about the administrative law cases of which we do get many more than other circuits. There are many statutes which have only the D.C. Circuit as the forum of review. I have heard and read about proposals to establish administrative law courts, environmental courts, and other special courts. Generally, I have not been in favor of those. I have thought that with respect to the important administrative law appeals that we get—in the environmental field, even from the Federal Energy Regulatory Commission— that it was a very healthy thing to have them reviewed by a generalist court. Having to make your case to nonspecialists means that the agencies have to write their rationales and make their decisions with the expectation that they can be explained adequately to and convince a court of intelligent generalists. That requires the agencies to think about their rationales more carefully and not use too much jargon. I have generally been wary of proliferation of specialized courts.

I am afraid of the balkanization of administrative law with specialized courts. I think there should continue to be some unifying principles of

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administrative law.

It has been said that the volume of motions practice in the courts of appeals has gone up, that it is even a potential problem. Is this true?

Our motions practice did go up simultaneously with the upsurge of filings. As best we can analyze it, a couple of things happened. One, we have had a dichotomy between the way motions are processed and the way merits cases are processed. Judges sat on motions for two months, and with the help of the court law clerks and the staff counsel a motions conference was held every week and 20 to 30 motions were decided. Meanwhile, the merits cases were going along on a different track with different panels. We found that the longer a case of any consequence or of any complexity stayed on our docket, the more motions it tended to generate. In other words, if it was there for a year, it tended to spawn a flurry of motions. Lawyers, I guess, become frustrated with waiting and say, "Let's file a motion to dismiss; let's file this, or that." So we hope that as we work to process the merits cases more expeditiously, we will see a downgrade in the number of motions that those cases are generating along the route before disposition.

The second thing relates to something I mentioned earlier. By taking our most complex cases and putting them on a special track, the same panel will sit on the case from the beginning to the end, including all of the motions as well as the final merits. That system, I think, will produce two advantages. One, lawyers will be more reluctant to file marginally useful motions when they know that the same panel will look at all of them as well as evaluate the case at the merits level. Secondly, we will have less confusion and inconsistency on the outcomes. I have seen some cases—lamentable, but they have been there—where a motions panel has done one thing that has sent the wrong signal to the litigants, who have then been surprised or dismayed, as the case may be, by what the merits panel did; we have had possible inconsistencies that lead to confusion as to the law of the case, as to what is happening, and as to scheduling because two different panels—or maybe three or four, depending on the number of motions—were sitting on the same case. By keeping one panel with that case all the way through, I think we can eliminate some of that. Also, generally trying to bring the argument on the merits of the case closer to the date of filing of the appeal, we will leave less time in there for these motions.

"My main goal is to be an efficient chief judge ...."

Have you used rule 11 to impose sanctions very often in the D.C. Circuit?

In the last year this court, somewhat belatedly, has begun to impose sanctions on frivolous appeals by assessing the attorneys' costs and the costs of the appeals to the other party. In the last six months I think we've had six to eight of them. That may not sound like much, but it is a giant step for us. Our judges feel somewhat overwhelmed by the numbers of cases we are being hit with and are recognizing that if we are to take care of the important cases we may have to be less tolerant of the delay-oriented, frivolous cases. Some of our opinions discussing the bad effects of frivolous pleadings and assessing costs have been very strongly worded, so that if those counsel intend to practice extensively in our court in the future, they had best think long and hard before filing their next dubious brief or motion.

Because of Gramm-Rudman cuts, most of the circuits are making many changes. What has the D.C. Circuit done?

Gramm-Rudman has hit us hard, along with most of the other circuits. We have submitted our proposals for taking the cuts to the Judicial Conference committee. I think the timing of Gramm-Rudman has been particularly unfortunate for us in a couple of ways. One, we are at a juncture right now where we want to do some new things; we need to do some new things like computerization because of our rising backlog. Some other circuits, perhaps more foresightedly than we, asked for extra staff and special programs years ago when funds were more available. Now, just when we really want and need some infusion of new programs, the ceilings have been imposed. Nonetheless, we are determined to move ahead as best we can. I understand the theory of Gramm-Rudman—that everybody takes the same cut—but it is ironic that the judiciary will have to absorb cuts out of such a small budget. You can go just so far in terms of no new library books or no more travel allowance or no coffee and doughnuts for the jurors. But you hit that bottom very soon, and then you are into personnel. Most of us do not feel that we are overstaffed by any means, quite to the contrary. The large agencies have much more to cut from before they have to hit at the core of their functions.

To what extent do you involve your law clerks in your work?

Law clerks are extremely valuable because of the sounding board role that they play for judges. In a busy court your colleagues just do not have time to go into the details of opinion writing with you. In other words, we hear the case, we have an initial conference, and we tell our colleagues our reasons, and then we go off and one judge writes the opinion. The other judges are so busy that you don't walk down the hall and start talking with one of your colleagues about how you are going to word this sentence or elaborate a point. They are busy writing their own opinions. Yet, very often when you start to write an opinion you find it is a minefield, and all

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WALD, from page 10

sorts of new problems emerge that simply didn't surface at the level of oral argument or in your conference with your colleagues. And it is there that the law clerks, aside from the research and the checking and sometimes the drafting that they do, are so valuable. They have to listen to you. They have to debate with you, and if they are good law clerks they will tell you when they think you are right and when they think you are wrong; you will get the benefit of their reactions to your ideas. Now it is possible to become overly dependent on them; all of us are cognizant of that, although the fact that we only have them for one year at a time helps to counter the dependency danger. I think it was Wade McCree that said judges should always remember, in relation to their law clerks, the old biblical statement that "Methuselah leaned on his staff and died." When all is said and done, however, there is no judge in the world that can actually read every page of every record, check every footnote, all by himself or herself without help. We simply have to be selective in what requires our personal involvement and what we are able to delegate.

Do you select from certain schools?

No, I don't. Over the last seven years I must have selected from a dozen schools. There is no question that sometimes when you have had very good experience with one school, you tend to give weight to the recommendations of particular professors who have sent you very good people, but I always try to spread it around. In any one year I wouldn't want to have more than one or at the most two from the same law school because there is a risk of getting a repeat of the same response. Different orientations and insights on the same subject matter often come from law students who have gone to different schools and have been exposed to different professors and philosophies.

I have had clerks from Yale, Harvard, Columbia, New York University, Northwestern, Wisconsin, George Washington, Georgetown, Stanford, and Michigan.

Only one woman has previously served as a chief judge of a federal circuit court, and then for only a little over four months, so you are making federal court history. Would you like to comment? [Judge Florence E. Allen (1884–1966) served on the Sixth Circuit from April 1934 to October 1959. She was chief judge of the circuit from Sept. 17, 1958, until Feb. 5, 1959. Subsequent amendments to title 28, United States Code, require that a chief judge relinquish a chief judgeship upon attaining the age of 70.]

Only recently I learned I will not be the first woman chief judge of a circuit; Florence Allen in the Sixth Circuit held that honor back in 1959. I read a book about Judge Allen that was quite interesting. Her period as chief judge came at the tail end of 25 years of serving on the Sixth Circuit,

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PERSONNEL

Nominations

John E. Conway, U.S. District Judge, D.N.M., May 14
Edwin M. Kosik, U.S. District Judge, M.D. Pa., May 14
William D. Stiehl, U.S. District Judge, S.D. Ill., May 14
D. Lowell Jensen, U.S. District Judge, N.D. Cal., June 2
William W. Wilkins, Jr., U.S. Circuit Judge, 4th Cir., June 3
Karen L. Henderson, U.S. District Judge, D.S.C., June 3
Charles R. Simpson III, U.S. District Judge, W.D. Ky., June 6
William H. Rehnquist, Chief Justice of the United States, June 20
Antonin Scalia, Associate Justice, Supreme Court of the U.S., June 24

Confirmations

Andrew J. Kleinfeld, U.S. District Judge, D. Alaska, May 14
Alan E. Norris, U.S. Circuit Judge, 6th Cir., June 6
John G. Davies, U.S. District Judge, C.D. Cal., June 6
Patricia C. Fawsett, U.S. District Judge, M.D. Fla., June 6
David Hittner, U.S. District Judge, S.D. Texas, June 6
Alfred J. Lechner, Jr., U.S. District Judge, D.N.J., June 6
Nicholas Tsoucalas, Judge, Court of International Trade, June 6
William W. Wilkins, Jr., U.S. Circuit Judge, 4th Cir., June 13
Stephen F. Williams, U.S. Circuit Judge, D.C. Cir., June 13
John E. Conway, U.S. District Judge, D.N.M., June 13
Karen L. Henderson, U.S. District Judge, D.S.C., June 13
Edwin M. Kosik, U.S. District Judge, M.D. Pa., June 13
William D. Stiehl, U.S. District Judge, S.D. Ill., June 13
Douglas P. Woodlock, U.S. District Judge, D. Mass., June 13

Appointments

Danny J. Boggs, U.S. Circuit Judge, 6th Cir., Mar. 27
J. Daniel Mahoney, U.S. Circuit Judge, 2nd Cir., Apr. 29
Kenneth L. Ryskamp, U.S. District Judge, S.D. Fla., May 2

Senior Status

J. Skelly Wright, U.S. Circuit Judge, D.C. Cir., June 1
Robert Boochever, U.S. Circuit Judge, 9th Cir., June 10
Leroy J. Contie, Jr., U.S. Circuit Judge, 6th Cir., June 30
Leonard I. Garth, U.S. Circuit Judge, 3rd Cir., June 30
Frank A. Kaufman, U.S. District Judge, D. Md., June 16

Retirement

Warren E. Burger, Chief Justice of the United States, July 10, or as soon thereafter as a successor is qualified.

WALD, from page 11

from 1934 to 1959, and it was more a capping of her career than I perceive my job will be. Right now in this court we are undergoing a transition from one generation of judges to another. In seven years I have assumed the senior position on a court of twelve judges. That kind of personnel turnover brought about a lot of changes in the way the court operates. Also, because of the caseflow problems we have talked about, we'll be doing things a lot differently, trying out a lot of new systems. We also have a new staff counsel and a new circuit executive, so in a sense the court really is entering a new era.

Back to Judge Allen for a minute: She had been a hard fighter for the causes she believed in. At one point she made a statement that she didn't think that you could have the kind of active career that she had had in the law and be married and have children; I think that was the feeling of those times—that you had to make a choice. Obviously, my situation with five children is very different, and I think that speaks well for the progress that women have made in at least getting rid of the stereotype that you have to choose forever between career and marriage or motherhood. Although I don't suggest that there are not periods in a woman's life when you do have to make choices, or that those choices are easy, I don't think you have to make a permanent choice one way or the other anymore.

The other thing that was interesting in Florence Allen's biography was her very discrete anecdotes about the reaction to her coming on the court. She said that she heard that one of the judges upon learning of her appointment took to bed for two days. Other judges wouldn't meet her glance head on. They went out to lunch very frequently to a men-only club without taking her. She wasn't assigned certain kinds of cases. None of that would happen now. Whatever lingering discrimination there may be in court systems against women, there is no question that on our court none of the things that happened to Florence Allen would happen, nor would we let them happen.

"After a while people should forget that I am a woman, but I should never forget it."

I believe that being a woman chief judge has some significance. It's important in one sense to get it over with, so that if I do well, nobody will raise an eyebrow the next time. My main goal is to be an efficient chief judge, to make life a little easier for the other judges so that they can worry about judging and not about all the things that are going wrong around the courthouse. After a while people should forget that I am a woman, but I should never forget it. There are still areas in which women, because of their past experience, should always try hard to make sure that some of the things that happened to them won't happen to other women.

At the time Judge Allen was chief judge, there was no requirement that the chief judge relinquish the position upon becoming 70 years of age.

Yes. And when she left the chief judgeship she retired; she did not continue to serve. But make no mistake, she was tough. As Chief Judge Lively said in his interview in *The Third Branch* [June 1986], she was a formidable woman. On the other hand, reading her biography and looking over her articles—I noted she was also a very prolific writer; she wrote 16 or 17 law review articles during the time she was on the court, many about women—she was very cognizant of the need to push women ahead in the profession. She wrote a lot of her articles in what was then the *Woman's Law Journal*. She made a lot of speeches, too, many to the National Association of Women Lawyers. She stayed very strong in her commitments to women in the bar right up to the end. ■

ARBITRATION, from page 5

Congress. As Judge Hunter's statement noted, "Back in 1977, while the general concepts of court-annexed arbitration were known, no federal court really had experience with the specifics of how an actual program should be operated. Both the legislative and judicial branches then needed to know more about how such programs would work before declaring them fully acceptable, incorporating them into standard court processes or mandating them by law."

Judges Peckham and Broderick expressed the view that the courts' inherent authority together with rule 16 of the Federal Rules of Civil Procedure constitute sufficient basis for the operation of such programs by the courts. They noted that the FJC is engaged in a study of the court-annexed arbitration programs that have been operated to date.

In March, the Judicial Conference, upon the approval of the Committee on Court Administration, approved draft legislation that would provide statutory authorization for the present experimental program. That draft legislation was presented to the subcommittee at the hearing. ■

FEES, from page 3

for nonpayment. Applying *Pulliam*, Judge Wangelin held that the defendant was liable for attorneys' fees and costs, but reduced the sum requested by the plaintiff from more than $8,000 to $460.

An appeal to the Eighth Circuit Court of Appeals has been filed. ■

BURGER, from page 2

Chief Judge Pierce Lively (6th Cir.)

The close association on the Judicial Conference has given the members of that body an opportunity to see a remarkable judge at work. As a member of the Conference, I have been amazed at Chief Justice Burger's capacity to deal with so many problems and to deal with them so well.

Chief Judge Walter J. Cummings (7th Cir.)

The Chief Justice and I began a warm association 33 years ago in the Justice Department. His close administration of the federal courts is the shining hallmark of his tenure. His friendly cooperation with the circuit chiefs has won reciprocal admiration. His unexpected departure leaves us with a personal loss.

Chief Judge Donald P. Lay (8th Cir.)

Chief Justice Burger deserves a tribute from all Americans for his great service to the Nation. I have never known anyone who thrives on indefatigable energy as he does. The work of a Supreme Court justice by itself requires a full-time effort, yet the Chief Justice has been able to carry on this work and accomplish many other extracurricular tasks as well.

Chief Judge James R. Browning (9th Cir.)

One thing is clear, even now, about history's assessment of Chief Justice Burger: He will surely be recognized as one of our greatest Chief Justices in terms of judicial administration.

Chief Judge William J. Holloway, Jr. (10th Cir.)

Chief Justice Burger has given the Nation's judiciary inspiring leadership. His boundless energy, his dedication to judicial reforms, and his contributions to the improvement of state and federal court relations have significantly advanced our judicial system. We will long benefit from the momentum of his public service.

Chief Judge John Godbold (11th Cir.)

The Chief Justice gave great force and vitality to the goal that the courts perform their functions well. His broad concern embraced all courts, federal and state, and the judges who sit on them and the lawyers who practice before them. The Chief's vision was not limited to today but looked to the future as well. Our country and especially the judiciary will miss his strong voice.

Chief Judge Howard T. Markey (Fed. Cir.)

The Chief Justice will be remembered as a far-thinking administrator who presided over a massive expansion in all segments of the third branch and a simultaneous trebling of its workload. That the judiciary maintained its efficiency and stability throughout that growth period is to the credit of all but in large part reflects the Chief Justice's total dedication to the tasks that confronted him.

Tributes from Past and Present FJC Board Members

Judge Frank Coffin (1st Cir.)

I feel that we are losing the services of a unique institutional leader as well as a constant friend and supporter. Chief Justice Burger has pioneered in seeking to improve the governance of the judiciary to reach out to the public in communicating the needs and responsibility of the judiciary, and to improve the morale of all judges, trial and appellate, state and federal.

Judge Arlin M. Adams (3rd Cir.)

It was with great regret that I learned of the Chief Justice's impending retirement. He has been, to my knowledge, the greatest administrator the Supreme Court and the federal judiciary have known. Indeed, his genuine concern for the jurisprudential, institutional, and personal challenges faced by every American judge has been most remarkable.

Judge Cornelia Kennedy (6th Cir.)

Chief Justice Burger, both by his tireless personal example and through his leadership, contributed enormously not only to the federal courts but also to state courts. His legacy is one of greater court efficiency and a sense of mission and *esprit de corps* which continue to inspire every judge. He has truly been a Chief Justice of the United States.

Chief Judge Aubrey E. Robinson, Jr. (D.D.C.)

The leadership of Chief Justice Warren Burger was an inspiration to all who have had the honor of serving on the Board of the Federal Judicial Center. His boundless energy and deep commitment in working with the Board and staff account for the success of the Center in meeting its responsibility of service to the federal judiciary.

Judge Edward J. Devitt (D. Minn.)

I hate to see the Chief Justice leave the court, but all in all I feel he did the right thing at the right time and for the right reason. The important work of the Bicentennial Commission will be enhanced by his active leadership, just as have all our Nation's courts—state and federal. Chief Justice Burger served as a leader for all courts, not just the Supreme Court, and his leadership will be missed.

Chief Judge Howard C. Bratton (D.N.M.)

History will surely record that Chief Justice Burger's contributions in the field of judicial administration are unequalled. It has been a high privilege to serve on the Board of the Federal Judicial Center with him. Under his guidance the Center has developed from infancy to maturity and has become a valuable resource for the federal judiciary.

Judge William Sessions (W.D. Tex.)

Chief Justice Burger's constant unselfish, inspirational, and extraordinary leadership of the bench and bar has left its indelible imprint on

See BURGER, page 14

SENTENCING, from page 4

Will present prison capacity be the controlling factor in drafting the guidelines?

No. Although present prison capacity will not act as a primary constraint on the formulation of sentencing guidelines, the commission is sensitive to the problem of prison overcrowding. The commission is working with the Bureau of Prisons to assess the impact sentencing under the proposed guidelines will have on prison facilities. Any formulation of responsible public policy must be weighed against all costs involved. As required by statute, alternatives to incarceration are being explored, and the commission is holding a public hearing on sentencing options. As directed by Congress, the commission will make recommendations concerning any needed expansion or change in the nature or capacity of prison facilities resulting from the guidelines (see 28 U.S.C. § 994(g)). Similar consideration and evaluation are being given to the problem of probation workload under the guidelines.

Can payment of a fine or restitution be imposed as a condition of probation?

Yes. The statute provides that a sentencing court may impose a variety of conditions on a sentence of probation (18 U.S.C. § 3563(b)). Payment of fines and restitution to victims are specifically included in this wide range of probationary conditions authorized by the statute (18 U.S.C. § 3563(a)(2)).

What type of sentence may be imposed pursuant to a revocation of probation?

The statute provides that if a defendant violates a condition of probation, the court may either continue or extend the probationary period or it may revoke probation and impose any other sentence available at the time of the initial sentencing (18 U.S.C. § 3565(a)). The commission expects to issue guidelines and/or policy statements regarding resentencing after probation revocation.

Can incarceration be imposed as a condition of probation?

Yes. The statute provides that during the first year of probation, custody may be imposed as a condition of probation for limited intervals of time (18 U.S.C. § 3563(b)). Congress did not carry forward the split sentences provided in 18 U.S.C. § 3651, since, under the new statute, a period of incarceration can be imposed followed by a term of supervised release (18 U.S.C. § 3583). S. Rep. No. 98-225, 98th Cong., 1st Sess., p. 98.

Since parole will be abolished when the guidelines become effective, will there be any form of supervision over defendants after release from prison?

Yes. In addition to a sentence of incarceration, the court may order a period of postrelease supervision by a probation officer according to specified conditions (18 U.S.C. § 3624(e)). The commission expects to provide guidance concerning the appropriate use of supervised release (28 U.S.C. § 994(a)).

If a defendant violates a condition of supervised release, may incarceration be imposed as a sanction?

If incarceration is to be ordered for a violation of a condition of supervised release, the statute requires that it be done pursuant to the contempt power of the court (18 U.S.C. § 3583(e)).

Can incarceration and a fine be imposed in the alternative?

No. The statute expressly precludes such alternative sentencing (18 U.S.C. § 3572(e)). However, under certain circumstances, the failure to make bona fide efforts to pay a fine can result in resentencing to a term of imprisonment (18 U.S.C. § 3614).

Since sentences under the guidelines will be determinate, will a prisoner receive credit for good behavior?

Yes. A prisoner serving a term of imprisonment for more than a year shall receive 54 days' credit toward the service of his sentence each year, unless the Bureau of Prisons determines that, during that year, the prisoner has not satisfactorily complied with institutional disciplinary regulations (18 U.S.C. § 3624(b)). Such credit vests when received and may not later be withdrawn. *Id.*

This provision replaces a confusing array of statutes and administrative procedures concerning the determination of a prisoner's release date. Congress intended to introduce certainty into a prisoner's expected release date by providing a uniform good-time credit and by eliminating artificially high sentences traditionally imposed to counterbalance early release under the parole system. S. Rep. No. 98-225, 98th Cong., 1st Sess., pp. 146–47.

May a court modify a term of imprisonment after imposition?

A term of imprisonment may be modified only under three circumstances: (1) upon the motion of the director of the Bureau of Prisons, if the court finds that extraordinary and compelling reasons warrant reduction and the requested reduction is consistent with applicable policy statements issued by the commis-

See SENTENCING, page 15

BURGER, from page 13

the law and the institutions he touched during his tenure as a great and untiring Chief Justice. I was truly privileged to serve with him on the Board of the Federal Judicial Center.

Judge Walter E. Hoffman (E.D. Va.)

As a former director and Board member of the Federal Judicial Center I have had many contacts with Chief Justice Burger. We are warm personal friends. If anyone has earned his retirement and the right to live a more relaxed life, it is the present Chief Justice. He will go down in history as the most outstanding administrator and leader of the judicial system in the United States. ■

SENTENCING, from page 14

sion; (2) to the limited extent expressly permitted by statute or rule 35 of the Federal Rules of Criminal Procedure to correct error or to recognize postsentence cooperation; or (3) where the defendant has been sentenced under a guideline range subsequently reduced by the commission, if such a reduction is consistent with the commission's stated policy (18 U.S.C. § 3582(c)).

Will fines play a substantial role in the sentencing guidelines?

Yes. The Sentencing Reform Act dramatically increases the fines that may be imposed upon a convicted person or organization (18 U.S.C. § 3571). Under the new law, a convicted person may be fined up to $250,000 for a felony or a misdemeanor resulting in the loss of human life. For any other misdemeanor, a person may be fined up to $25,000, and for an infraction, up to $1,000. An organization may be fined up to $500,000 for a felony or a misdemeanor resulting in the loss of human life, $100,000 for any other misdemeanor, and $10,000 for an infraction. These substantial increases provide meaningful sentencing options, which are being carefully considered by the commission.

Under what circumstances may a judge deviate from the guidelines?

Although a judge is expected to sentence within the guideline range, the statute provides for exceptions if aggravating or mitigating circumstances "not adequately taken into consideration by the Sentencing Commission" are found to exist (18 U.S.C. § 3553(b)). In such exceptional cases, the judge must explain on the record justifiable reasons for not following the guidelines (18 U.S.C. § 3553(c)). The defendant can appeal when sentences exceed the guidelines (18 U.S.C. § 3742(a)). With the personal approval of the attorney general or the solicitor general, the government can appeal when sentences fall below the guidelines (18 U.S.C. § 3742(b)).

CIRCUITS, from page 3

ways in which the court of appeals conducts its business and to suggest improvements. Among the issues discussed were briefing, oral argument, and published and unpublished opinions. The session on practice problems in the district courts touched on discovery disputes, methods of resolving other motions, the use of magistrates, judicial involvement in settlement, and the conduct of trials.

Other presentations during the conference included a talk by Judge Marvin E. Aspen (N.D. Ill.) on "Inns of Court," a panel on "The Pros and Cons of a Nationwide United States Trustee System," and a panel on civil RICO issues.

Chief Judge John C. Godbold called into session in Atlanta the fifth Eleventh Circuit judicial conference, with 421 conferees attending.

Justice Lewis Powell, circuit justice for the Eleventh Circuit, addressed the meeting and gave a report on some of the circuit's cases reviewed thus far during the Supreme Court's October 1985 term. He commended the judges of the circuit for their hard work and for what he called "a good record." Justice Harry Blackmun also spoke, outlining the work of the Supreme Court during this term, with emphasis on court matters he felt were of most interest to the Eleventh Circuit judiciary.

In his annual report on the business of the circuit, Chief Judge Godbold gave an explanation of statistical charts on the workload of the circuit and led the conferees through a graphic description of both circuit and national caseloads.

The Eleventh Circuit statistics are impressive. One chart, reflecting national reports on caseloads, shows that the second greatest number of cases filed during calendar year 1985 was filed in the Eleventh Circuit, and the judge pointed out that the circuit judges disposed of "all [this business] with only 12 active and 5 senior judges."

On the district court level, the charts for the calendar year 1985 show that case determinations on the merits per active judge were the highest in the country—approximately 180 per judge—and that median time for final disposition was reduced from 12.7 to 10.4 months.

Chief Judge Godbold called special attention to two matters: First, currently there are more capital cases in the Eleventh Circuit than all the other circuits combined; and second, the work of the state-federal meetings has been enormously productive, especially the certification of state law questions by the high courts of the states. ■

CALENDAR

July 9-10 Judicial Conference Committee on Rules of Practice and Procedure

July 9-11 Seminar for Training Coordinators of the First and Second Circuits

July 9-12 Tenth Circuit Judicial Conference

July 11-13 Seminar for Training Coordinators of the Seventh Circuit

July 14 Judicial Conference Advisory Committee on Codes of Conduct

July 16-18 Seminar for Magistrates of the Sixth, Seventh, and Eighth Circuits

July 21-23 Judicial Conference Committee on Judicial Ethics

July 23-26 Eighth Circuit Judicial Conference

July 28-29 Judicial Conference Committee on Court Administration

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

July 28-31 Orientation Seminar for New U.S. Probation and Pretrial Services Officers

July 31-Aug. 1 Judicial Conference Committee on the Administration of the Probation System

THE SOURCE

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

Baker, Thomas E. "Thinking About Federal Jurisdiction—Of Serpents and Swallows." 17 *St. Mary's L.J.* 239 (1986).

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Burns, Arnold I. Address on the Constitution and its bicentennial at the Gibraltar Forum, Buffalo, NY, May 2, 1986.

"Construing the Constitution." Addresses by William J. Brennan, Jr., John Paul Stevens, Edwin Meese III. 19 *U.C. Davis L. Rev.* 2, 15, 22 (1985).

Day, David S. "Expert Discovery Under Federal Rule 26(b)(4): An Empirical Study in South Dakota." 31 *South Dakota L. Rev.* 40 (1985).

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THE THIRD BRANCH

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THE THIRD BRANCH

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AO Director L. Ralph Mecham Reviews His First Year in the Federal Court System

L. Ralph Mecham, a former university vice president, corporate official, and aide to a U.S. senator, became the sixth director of the Administrative Office upon the resignation of William E. Foley last year. Appointment to this office is by the Supreme Court.

Mr. Mecham has earned degrees at the University of Utah (B.S.), George Washington University (J.D.), and Harvard (M.P.A.). His educational background also includes congressional and graduate fellowships at Harvard.

L. Ralph Mecham

July 15 marked your first anniversary as director of the Administrative Office of the U.S. Courts. Did you experience any "surprises" after you became involved in managing the business of the federal courts?

Well, there were both surprises I found and surprises that just happened. I guess the biggest surprise, and probably the one that has been most demanding over this past year, has been the whole matter of Gramm-Rudman-Hollings and what it has done to the judiciary and what has been required as a result for the AO. It has been a big headache. An example is the Executive Committee decision to suspend civil jury trials temporarily because to do otherwise would have meant we would have been in open violation of the Antideficiency Act.

One of the interesting things that I found was what I would call a flat versus hierarchical organization. I really hadn't been fully prepared for that, although I guess I should have been, having taught constitutional law and having some familiarity with the courts. Basically, I have never seen an organization where there is less hierarchy and more bosses. I have at least 1,000 bosses that I have to be responsive to, a tremendous amount of responsibility, and very little authority. I don't object to that. I realize the constitutional values of an independent judiciary, but it nonetheless makes for a very interesting and at times difficult

See MECHAM, page 4

FJC Completes Transfer of New AIMS to AO

Automation in the federal courts passed an important milestone on July 1, when the Federal Judicial Center and the Administrative Office completed the transfer of the New Appellate Information Management System (New AIMS) to the AO. The transfer marks the system's transition from developmental to operational status.

New AIMS is an electronic docketing and case management system that eliminates the most burdensome paperwork of the offices of the clerks of the courts of appeals. It operates on computers located and operated in the courts themselves, thus removing the requirement of earlier automated systems for constant telephone connections between the courts and computers located in Washington, D.C.

New AIMS was developed by the FJC in close cooperation with the

See NEW AIMS, page 8

Seminar Scheduled for New District Judges

FJC Director A. Leo Levin has announced that the next seminar for newly appointed U.S. district court judges will be held Sept. 22–27, 1986, at Dolley Madison House in Washington.

A reception for the new judges and their families is scheduled for Sunday, Sept. 21, at 6 p.m., and a black tie dinner at the U.S. Supreme Court for Thursday, Sept. 25.

Bicentennial Comm'n Praises Chief Justice

The Commission on the Bicentennial of the Constitution, in a unanimous resolution, has commended Chief Justice Burger for his "act of unsurpassed dedication and patriotism" in announcing his intention to devote his full efforts to his duties as chairman of the commission and retire as Chief Justice. The resolution was adopted at the commission's seventh meeting, held June 20 and 21 in Washington.

At the meeting, the commission concentrated on programs designed to educate the American public about the 200th anniversary of the writing of the Constitution. The commission heard several proposals from private, state-government, and federal agency representatives, all concerned with how their respective groups can contribute to the educational goals of the commission. Eleven state bicentennial commissions (Connecticut, Hawaii, Iowa, Maine, Montana, New Jersey, New Mexico, Oklahoma, Vermont, Wisconsin, and Wyoming) were recognized, and 14 cities and counties were recognized as Bicentennial Communities. The commission also recognized officially a number of projects that involve conferences,

See BICENTENNIAL, page 8

Commission to Hold Regional Hearings in Fall

This is one of a series of articles to keep federal judges and supporting personnel informed about the Sentencing Commission's work.

Pursuant to statute, the Sentencing Commission is to submit guidelines to Congress by April

NEWS FROM THE SENTENCING COMMISSION

1987. In order to solicit the widest possible comment on its work, the commission plans to publish a tentative working draft of the guidelines in the *Federal Register* in late September. While not a complete or final document, the draft will be detailed enough to permit substantive discussion of the approach the commission has adopted.

To help facilitate the free exchange of ideas on the guidelines, the commission is scheduling regional hearings across the country. The hearing dates and locations are Oct. 17, Chicago; Oct. 21, New York City; Oct. 29, Atlanta; Nov. 5, Denver; Nov. 18, San Francisco; Dec. 2–3, Washington, D.C.

Based on the comment generated at these regional hearings and through written critiques of the draft guidelines, the commission will amend and refine the guidelines in order to present a final draft to Congress by April 1987. The commission solicits *Third Branch* readers' views now and at any point during the public comment period this fall.

Congress recently sent the President H.R. 4801, a bill making important technical amendments to the Sentencing Reform Act. The key provisions of H.R. 4801 make two modifications of the act's requirement that the maximum term of imprisonment in a range not exceed the minimum term by more than 25 percent. This requirement caused problems with respect to the ranges imposing the longest terms of imprisonment as well as the ranges imposing the shortest terms.

At the top end, the 25 percent limitation created difficulty because there was no way mathematically to compute the minimum term of imprisonment in a range where the maximum term was life imprisonment. H.R. 4801 alleviated this difficulty by providing that "if the minimum term of the range is 30 years or more, the maximum may be life imprisonment."

An amendment made at the low end of the imprisonment ranges will affect an even larger number of cases. The problem caused by the 25 percent limitation at the low end was that the commission would have to create many narrow, impractical guideline prison ranges. For example, if the guidelines provided for a minimum sentence of 30 days, then the maximum sentence could only be 37.5 days. These ranges would unduly restrict the discretion of the sentencing judge. Congress responded to this problem by setting the maximum of a range at "the greater of 25 percent or 6 months" more than the minimum. This means that if the guidelines called for a minimum sentence of 30 days

See SENTENCING, page 8

Congress Approves Supplemental Appropriations, Funds Available for Civil Jury Trials

Congress has approved and President Reagan has signed the urgent supplemental appropriations bill, H.R. 4515, which provides $3.8 million in supplemental funding for the fees and allowances of jurors. Accordingly, the Judicial Conference's Executive Committee has rescinded its previous advice to suspend civil jury trials.

In addition to funding for jurors, the bill provides for the transfer of $8 million into the appropriation "salaries of supporting personnel" and $3 million into "space and facilities." These transfers were derived from a projected balance in the "salaries of judges" appropriation and from savings achieved through Gramm-Rudman-Hollings reductions in the "expenses of operation and maintenance of the courts" appropriation; they will be applied to personnel salaries and rental of space. This transfer of funds is sufficient to preclude the likelihood of any furlough of personnel at the end of the fiscal year, according to L. Ralph Mecham, AO director.

The supplemental approval also contains $1.2 million for an additional 200 deputy clerk positions and $1.3 million for a study of the construction of a new judiciary building. ■

Amendments to Federal Rules of Appellate Procedure Effective

Since Congress took no action to defer the effective date of the amendments to the Federal Rules of Appellate Procedure that were adopted by the Supreme Court on Mar. 10 pursuant to 28 U.S.C. § 2072, they became effective July 1, 1986, as provided in the Supreme Court Order promulgating them (set out in House Document 99–179). A copy of this order was forwarded to all federal judges and U.S. magistrates in March. ■

THE THIRD BRANCH

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Stoorza Named FJC Systems Div. Director

Edwin L. ("Larry") Stoorza, Jr., is the new director of the FJC's Innovations and Systems Development Division, replacing Gordon Bermant.

Mr. Stoorza came to the FJC in 1976, serving as project leader for the design and development of AIMS and as deputy director of the Innovations and Systems Development Division. In 1981, he joined the AO as chief of the Systems Services Branch to ensure a smooth

Larry Stoorza

Courtran transfer and to assist in coordinating the automation activities of the AO and FJC. He then became assistant director of Management Systems and Services of the AO. In that position, he was responsible for directing the activities of the Statistical Analysis and Reports Division, Administrative Services Division, and Systems Services Division.

A native Texan, Mr. Stoorza is a graduate of the University of Oklahoma and was recently promoted to the rank of captain in the U.S. Naval Reserve. ■

Judicial Workload Statistics Published

The *Reports of the Proceedings of the Judicial Conference of the United States*, held in March 1985 and in September 1985, together with the *Annual Report of the Director of the Administrative Office* have been published.

The volume includes an analysis of the workload of the federal courts for the 12-month period ended June 30, 1985. It was prepared by the Statistical Analysis and Reports Division, with appendix tables generated by the Systems Services Division.

Judicial Conf. Certifies Impeachment of Judge May Be Warranted

The Judicial Conference of the United States has certified to the speaker of the House of Representatives that "consideration of the impeachment" of Judge Harry E. Claiborne (D. Nev.) "may be warranted." The certificate was signed by Chief Justice Warren E. Burger on June 30, 1986, and states that on June 18, 1986, the Judicial Council of the Ninth Circuit certified to the Judicial Conference (as provided by 28 U.S.C. § 372(c)(7)(B)) that Judge Claiborne "has engaged in conduct which might constitute grounds for impeachment under Article I of the United States Constitution." The certificate of the Ninth Circuit Judicial Council, dated June 18, 1986, was signed by Chief Judge James R. Browning.

The Judicial Conference's certificate also notes that "in special session by telephonic conference call," the Conference "has exercised its authority under 28 U.S.C. § 372(c)(8) to consider the certificate of the Judicial Council of the Ninth Circuit." The Judicial Conference, acting upon the Ninth Circuit's certificate and upon the certified official records of Judge Claiborne's conviction in the district court, concurred in the Ninth Circuit's determinations.

Judge Claiborne was convicted in the U.S. District Court for the District of Nevada on two counts of violating §7206(1) of the Internal Revenue Code. That conviction became final May 1, 1986, when the district court received the mandate of the U.S. Court of Appeals for the Ninth Circuit, affirming the lower court's judgment. ■

McCafferty Retires as Division Chief at AO

On June 30, James A. McCafferty, chief of the Statistical Analysis and Reports Division of the Administrative Office, retired. His 38 years of government service include 23 years with the AO.

Mr. McCafferty's work with statistics gathering started during his tenure at the U.S. Bureau of Prisons. When the AO's Statistical Analysis and Reports Division was formed in 1977, he was designated division chief.

In submitting his resignation, Mr. McCafferty wrote: "I have seen our technological advances rise from simple manual statistical systems to highly sophisticated communication of data from the courts to the main computer in the division. I have seen the expanded use of federal judicial statistics." Mr. McCafferty also praised the division's staff and their dedicated service.

Mr. McCafferty's service was recognized when AO personnel honored him recently at a luncheon. AO Director L. Ralph Mecham, in addressing the gathering, said, "We are losing a valued employee who has provided dedicated leadership in an area vital to the work of the federal courts." ■

Positions Available

Federal Public Defender, E.D.N.C. Salary to $70,500. Requires law degree and membership in a state bar; five years' criminal practice experience (preferably with significant federal criminal trial experience). Apply by Aug. 31 on form available from J. Rich Leonard, Clerk, U.S. District Court, P.O. Box 25670, Raleigh, NC 27611.

* * *

Federal Public Defender, S.D. W.Va. Salary fixed by 4th Cir. Four-year appointment. Requirements as in above notice; must start work by Oct. 15, 1986. Apply by Aug. 15 on form available from Ronald D. Lawson, Clerk, U.S. District Court, P.O. Box 2546, Charleston, WV 25329.

EQUAL OPPORTUNITY EMPLOYERS

MECHAM, from page 1

administrative challenge where you must have management by consensus—a collegial kind of management—where you have to work by consensus and moral suasion.

Do you think the judges don't realize that you have limits on what you can do?

I think, in fact, a few of them do not appreciate it, particularly those who are not involved in Judicial Conference committees or who may not have had experience working with Congress. But there are some very substantial limits on what the AO can do. For example, we are limited by the policies established by the Judicial Conference and its committees. Secondly, I can assure you, we are limited by what Congress does. The classic example is Gramm-Rudman-Hollings itself—plus the whole appropriations process, and not just the money; Congress determines court personnel levels; they determine whether the courts can have probation and the pretrial services in a mixed administration or whether they have to be separate. Almost day to day we must deal with limitations imposed on AO policy by Congress and by the Judicial Conference.

Do most of the questions come from the new judges?

Yes, some are from new judges, but also from a few others who have not had to wrestle with congressional requirements. Moreover, some in the judicial family do not appreciate the other external limits imposed upon us. We have virtually no jurisdiction over buildings for the courts and very little over tenant alterations. That's GSA's role. And, likewise, we have very little to say with respect to the U.S. Marshals Service or the Office of Personnel Management or the General Accounting Office, all of which restrict what we can do in the AO and what the judiciary can do.

What is the complement of personnel in the AO?

Presently we have 538 employees. Our authorized positions are 583. We have been operating, because of Gramm-Rudman-Hollings, at a level of actually less than the 94 percent limit required for the rest of the judicial supporting personnel under standards imposed by the Judicial Conference.

There are over 1,000 Article III federal judges in the system, and it takes a lot of management to see that the judges and their supporting staff have everything they need to process their cases. What are your biggest problems?

L. Ralph Mecham

The biggest problems clearly are: First, to cope with Gramm-Rudman-Hollings; second, to help defend our budget with the appropriations committees and with the budget committees of Congress. We have an excellent budget committee of the Judicial Conference chaired by Chief Judge Charles Clark, who is really a judicial statesman. The AO plays an important role in that. Third is the delicate balancing act to implement policies required by Congress and the Judicial Conference that may not be popular with judicial personnel. The fourth problem is to assist in providing the kind of services that are needed: everything from payroll to personnel to supplies to equipment. One of the major programs we now have is the area of automation. Better than one-third of our budget in the AO goes to help automate the courts' administration.

When a candidate for a judgeship is nominated for appointment to a federal court, do you make contact immediately?

We do. The day after they are nominated I send a letter congratulating them and inviting them to come by the office, perhaps at the time of their Senate confirmation hearings. We then set up briefings. I meet with them personally and Deputy Director Jim Macklin often meets with them as well, and then we have people come in from the personnel division who can acquaint the judges with how they hire, how much they can pay their law clerks and their secretaries, what their benefits may be such as judicial survivors' benefits, travel, per diem, subsistence, insurance, and that sort of thing. And, of course, we also talk to them about the assistance we can give, of a limited nature, on space requirements. If they are moving into chambers that are being vacated by a judge, that is easy. But if they are not, or if it is a new judge where there are no chambers, that is more of a challenge for us.

If they don't have space in the courthouse, do you have to lease space?

GSA must lease space, and that means that sometimes other agencies may be deposed in a federal building that is already occupied. The space problem is one of the most vexing problems facing the judiciary, because for new judges where there is no space available I have heard of delays up to five to six years before they get into the quarters planned for them. GSA feels that it can't begin the real work on a project until a new judge is confirmed and funds are available. At the AO we can do better than that, but our role is narrow.

Currently the courts are functioning under the Five-Year Plan for Automation in the U.S. Courts, which is being implemented jointly by the AO and the FJC. Given the constraints of Gramm-Rudman-

Hollings, are you able to keep on schedule?

Gramm-Rudman-Hollings has hit this program, too. However, I don't think it has hit the fundamental part of it in a basic way yet. There have been some delays, but we have been able to keep our computer equipment and installation program going at a pretty good clip. We have had to reduce the number of computers that we plan to install this year from 31 to 26, but that is not as bad as it could have been. It has meant that we have had to delay general office equipment and word processing equipment a little more than we would have preferred. And, of course, there had to be some personnel cuts in order to meet our 94 percent quota, so we have had fewer people available for automation functions than we would have liked. As for the New AIMS program for the appellate courts, we were able to accept transfer of that just two days ago from the FJC [see related story, p. 1]. We are making progress. We hope we will be able to continue moving. We will see how Congress treats us during this next fiscal year. It's very important.

"I have at least 1,000 bosses that I have to be responsive to, a tremendous amount of responsibility, and very little authority."

How much is in the AO's fiscal year 1986 budget, and how much do you expect to have for fiscal year 1987?

Our current fiscal year appropriation is about $28 million. That contrasts with a budget for the judiciary overall of $1,031,000,000. So the AO budget is 2.7 percent of the total judiciary budget.

The House Appropriations Committee has approved for the judiciary overall an increase of almost $143 million over fiscal year 1986, for a total budget of about $1,174,000,000. The judiciary got a somewhat larger increase than did the other agencies covered by our appropriation, namely State, Commerce, and Justice Departments; that is, a 14 percent increase. That is less by $54 million than we had asked for, but nonetheless we got the biggest increase, and I feel quite encouraged by it. Big problems remain, of course—the full House, the Senate—and we have to get it by the president. Then we must see what happens when Gramm-Rudman-Hollings, round two, kicks in next Oct. 1.

When the supplemental funds for fiscal year 1986 came through, did that mean that Congress was recognizing the fact that the courts *must* stay open—that judges must be available for certain matters—or did they decide the courts just needed more money?

Well, both, I think. Actually, our Judicial Conference Budget Committee and the AO had anticipated that we would not have enough money for jurors' funds for the fiscal year, and so last February the judiciary asked Congress for additional funds. We alerted the Judicial Conference in March that unless more funds were appropriated the Conference would conceivably have to suspend civil jury trials. So Congress was alerted well in advance, as was the Judicial Conference in March. Both appropriations committees in Congress recognized we must have additional funding, and they approved it. The only trouble came when they included it in the supplemental appropriation bill for fiscal year '86. There were many controversial provisions which caused delays of a month or two in the House and additional delays in the Senate. Consequently, we literally ran out of money for civil jury trials as of June 16 because supplemental money had not yet been appropriated. Congress did appropriate the money and the president, we were told, indicated he would sign the bill, so the Conference was able to lift the suspension. Congress knew we needed the money. They knew that it was vital, but there were these institutional delays that caused the problem. Actually, the courts were open, and even in the regular workaday business civil jury trials are delayed or postponed for a whole variety of reasons. So a brief delay was not a cataclysmic thing, but it was nonetheless very serious because, to my knowledge, this is the first time that civil jury trials have ever had to be deferred because of a lack of funds. It caused serious disruption throughout the judiciary.

"We literally ran out of money for civil trials as of June 16. It caused serious disruption throughout the judiciary."

Have you made any managerial changes since taking office?

Yes, we did indeed make some managerial changes. The Chief Justice expected me to do so, and I am sure others in the judicial branch did as well. They ranged from such things as doing away with an assistant director position to the Chief Justice appointing a committee, chaired by Judge Edward Devitt with three other distinguished judges, to look at the overall management and staffing of the AO. That committee is about ready to report. We have also beefed up our whole space and facilities team, trying to deal with that very difficult challenge posed by GSA and by the necessity to have adequate chambers and courts. I think we have substantially strengthened our legislative response and are supportive of the judiciary in that area. We have tried both to push for and to be more responsive to judges generally, including bankruptcy judges. We have tried to instill an attitude in our

See MECHAM, page 6

MECHAM, from page 5

employees—most of them already had it—to be prompt and polite and professional; to have pride in their work; to be positive and to operate under a rebuttable presumption that if somebody in the courts is requesting something, we would try to get it. And if it was impossible, we would let them know that and why. We've initiated a program of goal-setting on an annual basis with periodic review and objectives. And, of course, we have complied fully with Gramm-Rudman-Hollings, setting staff limits actually below the 94 percent of our authorization. We are adopting zero sum budgeting for the AO so as to justify every dollar that is spent. We do not assume we need the money just because we have had it in the past.

So there have been quite a few management changes, but there are going to be many more and some of them quite soon. I am a great believer in management by objectives. I don't think it is a panacea, but I do think it has value. We did this in the corporation for which I worked, the university where I was vice president, the government agencies where I have served.

Could we talk about the future of the courts? Do you believe the federal court system will continue to grow at the pace it has over the past 20 or so years? Do you anticipate added problems with growth?

Well, district court filings between 1969 and 1985, which is roughly the period of Chief Justice Burger's incumbency, are up 178 percent, appeals filings are up 226 percent, the number of district court judgeships has gone up 69 percent, appellate judgeships have gone up 61 percent. The budget overall for the judiciary has expanded by 720 percent and the major reason is the exploding caseload. I talked to a researcher who is studying this, and he tells me that during Chief Justice Burger's administration there have been 314 statutes passed by Congress which have added to the jurisdiction of the federal judiciary. It is no wonder the caseload has jumped. In my opinion, the courts' jurisdiction will continue to expand until Congress comes up with a dollar figure for each new jurisdictional item they impose on the judiciary and are compelled to provide funding before the law goes into effect. A judicial impact statement is needed. Usually the authorizing legislation is separate from the appropriation. Somehow we have to make those who impose these burdens on the courts realize what they are doing. I would predict a continued increase in court work until such things as diversity jurisdiction are ended. Twenty-five percent of the current caseload comes from diversity disputes. Unless Congress starts cutting back on some of the jurisdiction already given or stops the flow of statutes, I think the judiciary will continue to grow. So the future of the judiciary depends for the most part on what Congress does and what happens in the economy as in the case of bankruptcy cases. Bankruptcy filings, we project, will go up 35 percent this year, a sign of an unhealthy economy, at least in the areas where these filings are taking place. Of course, the courts can do much themselves to improve case management and judicial administration.

"We have tried to instill an attitude in our employees to have pride in their work and to [presume] that if somebody in the courts is requesting something, we would try to get it."

Your position carries with it the title of secretary of the Judicial Conference of the U.S. What responsibilities come with this?

I am indeed secretary, and I regard the secretariat responsibility of the AO to the Judicial Conference and its committees to be of paramount importance, and we give the highest priority to it.

Does the AO staff the committees working on Judicial Conference matters?

We do provide staffing, and I regard this as an essential function for judicial administration in our country. We have certain members of the staff assigned to work with the Judicial Conference as an entity. We serve the Judicial Conference as such and respond to its chairmen and the Chief Justice, and I work very closely with him in that capacity. But each of the committees and subcommittees requires staffing. Jim Macklin, my deputy, for example, works with the rules committees and court administration. Our general counsel staffs the judicial branch committee. We have at least one staff member assigned to every subcommittee and to every committee of the Conference.

Staff members work with the committees and help prepare the agenda. They handle the information flow to the committee members. They are responsive to the requests of the chairmen. They may be involved in setting up studies. They help in arranging the meetings which are held by the committees and subcommittees, and handle the logistics involved. It's a major responsibility and it's a very important one.

Could you describe how the AO cooperates with the Conference committees in drafting legislation to be proposed to Congress?

Well, it happens two ways. Often we will have requests from Congress to comment on specific legislation, and in response to that request, the AO, working with the Conference committee chairmen and the subcommittees, will endeavor to frame a response. It might just be a letter commenting on a bill, or it may be actually writing amendments. That's one aspect of it. The other aspect is that the Conference itself will, as part of the committee process, or on its own initiative, propose legisla-

tion, and then it is necessary to draft implementing bills. Some typical recent examples: bankruptcy judgeship legislation and retirement of magistrates, bankruptcy judges, Claims Court judges, and others. On behalf of the Conference, I submit Conference-approved legislation to Congress, and usually members agree to sponsor it.

What happens if you learn that specific legislation has already been introduced that you believe will pose a great problem for the federal courts?

Usually we would alert the relevant committees of the Conference, if they were not already apprised of it, and a suitable response will then be framed. If there is time, it will go up through the normal committee procedures. Sometimes we have to make some ad hoc decisions in response to an emergency. Usually, though, it will involve an issue where we already have policy guidance of some kind from the Conference, or we can get it presently from the committees and subcommittees. Yes, we would respond. However, I must also say that if it impacts the judiciary, most frequently we will receive a request from the congressional committees for action. Of course, there are times when amendments are offered on the floor of the House or the Senate, particularly in the Senate where the rules are much looser on germaneness and where discipline is much less tight. There, an amendment can be offered without our having any chance to respond at all. No forewarning at all. To illustrate, some floor amendments were added to the bankruptcy judgeship bill in the Senate that the Conference opposed, and we didn't know they were coming up. We do have an opportunity to seek some corrective action in the House, but had the amendments come on a House-passed bill then the only recourse would be to the Senate and House conferees.

The chairman of the House Judiciary Committee has said he will initiate impeachment procedures in the House against a federal judge. Will the AO get involved in any way?

In fact, the AO was asked several questions by Chairman Kastenmeier of the House subcommittee which handled the Judge Claiborne matter in the House. As you know, the House performs the equivalent of a grand jury function in the impeachment process, and we received many questions and worked cooperatively with the chief judge and clerk of the court in Las Vegas, Nev., and with Chief Judge Browning in providing information to the committee. We don't know what we will be asked to do by the Senate. On July 1, a certificate was delivered to the speaker of the House certifying at the direction and on behalf of the Judicial Conference, which held an emergency meeting on June 27, that the Conference had determined that there might be grounds for impeachment. Similar action had been taken previously by the Ninth Circuit. The Chief Justice conveyed the Ninth Circuit's certification along with that of the Conference to the House [see related story, p. 3].

"There have been quite a few management changes, but there are going to be many more and some of them quite soon."

Is there anything in the federal court system you would like to see changed?

As for management improvements, the field is "white already to harvest" in the AO. We have many great people. But we have probably done a better job in trying to help the courts improve management, for example in the area of automation, than we have helped ourselves. We don't have a five-year automation or management plan for the AO and we are going to have one for automation, word processing, and for management generally. Fortunately, we have many good people who work effectively with those resources we do have. Then, too, the courts can improve their management. Chief Justice Burger certainly has done more than anyone I know to try to make all participants in the judicial family management-conscious. Obviously this has to be done in a collegial way; it can't be imposed on anyone. But that clearly is something, I think, where the judicial branch can do a better job.

You asked for a sort of "legislative wish list." I think that increasingly the judiciary should be able to control its own destiny with fewer outside controls. Some of my staff disagree with me in part, but I think more and more we need to get control of the money for buildings and for tenants' alterations, and perhaps contract out projects instead of having to go through GSA. Secondly, in the AO we need to be under the same personnel system the rest of the judiciary is. We have the anomaly of having great difficulty in hiring people from the courts because they are not under the competitive system. The judiciary ought to have its own personnel system. We shouldn't have to follow all the red tape that the Office of Personnel Management imposes. That's got to change. We must improve our relationships between the courts and the AO and the U.S. Marshals Service. I hope we can do a better job at that. The police function is in the executive branch and ought to be there, but I believe we can work more closely.

Would you change the security system for the judiciary?

You are talking now about personal security? I think the Marshals Service generally does a good job, but Gramm-Rudman-Hollings cuts had to be made by the marshals; then with the AO, they had to cut back the number of court security officers and, lastly, the number of GSA guards was reduced. I've got to

See MECHAM, page 8

MECHAM, from page 7

believe that the cumulative effect was to reduce security for judges generally. It's a very difficult problem and adds to the inherent tension which arises with dual administration.

Another area, and I should have perhaps mentioned this first: I hope the Quadrennial Commission will take steps to raise judicial salaries along with congressional salaries and those for political appointees of the executive branch. I think it has to be done. I know it's difficult to do that when you have the specter of Gramm-Rudman-Hollings and large deficits hanging fire over the economy. But I think it must happen if the country is to attract the best judges and keep those we have now. Judges need to have financial security. I recognize they are not going to be paid as much as they would if they were in the private practice of law, and they know that. They're public-spirited or they would not be in the jobs they are in. But there's an important area where we must have a major breakthrough, and that's the area of salaries for judges and for the judicial system generally.

Because of inflation since 1969, judges' salaries have gone down in real dollars substantially. If they were being paid at 1969 rates, in 1985 dollars a district judge would receive about $130,000 and a circuit judge $137,000. In fairness they ought to be paid at least that much just to stay even. Last year we gained a major legislative breakthrough on travel and subsistence. The benefits will commence Oct. 1, 1986. For example, a judge coming to Washington, D.C., on judicial business is probably going to get more than twice (if he or she itemizes expenses) as much as the judge is able to get now. ■

NEW AIMS, from page 1

Fourth, Ninth, and Tenth Circuit Courts of Appeals, which acted as pilot courts for this project. The Center and the pilot courts were joined by representatives from the other circuits and from the AO at critical points in the planning and development of the system.

The major advantage New AIMS brings to the court is its powerful ability to generate schedules, forms, and reports directly from the accumulation and processing of coded docket entries. New AIMS is intentionally open-ended in its design, which means that courts can increase their uses of it as they become more familiar with its features. The Center is now incorporating many of the features and capabilities of New AIMS into systems under development for the district and bankruptcy courts. New AIMS thus brings an indirect benefit to these other courts as well. The AO is currently working with the Second, Sixth, and Seventh Circuits on schedules for the installation of New AIMS in those courts. ■

SENTENCING, from page 2

for a particular minor offense, the Commission will have the authority to authorize a maximum guideline sentence of seven months. ■

BICENTENNIAL, from page 1

broadcasts, lecture series, and other forums for educating the public about the Constitution.

Senator Dennis DeConcini (D-Ariz.), ranking minority member of the Senate Judiciary Committee Constitution Subcommittee, was introduced as a new member of the commission, replacing Washington attorney Edward P. Morgan, who died in March. ■

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Judge Frank Johnson Discusses Civil Rights In the Sixties; Prison Reform in Alabama

Judge Frank M. Johnson, Jr., is a native of Alabama and received his LL.B from the University of Alabama in 1943.

The judge's federal career began with his appointment as U.S. attorney for the Northern District of Alabama in 1953. After two years he was appointed to the U.S. District Court, where he served until 1979, when he was elevated to the Fifth Circuit. When the Fifth Circuit was restructured in 1981, Alabama became part of the new Eleventh Circuit.

Though he is well known for his civil rights decisions, those cases are only a part of over 30 years' outstanding service on the federal bench, a fact recognized when he was given the prestigious Devitt Award in 1985.

Your early years were spent in Winston County, Alabama. Did this community affect your approach to the law and to deciding constitutional issues?

I think background affects everyone. Northwest Alabama, where Winston County is situated, was inhabited back in the early 1800s by remnants of Andrew Jackson's army after he had been down to fight the Creek Indians. Land in Tennessee at that time was selling for $2 and $3 an acre but you could buy land in Winston County for 5 cents and 10 cents an acre. Many of Jackson's men went back to Tennessee and got their families and returned to northwest Alabama, where they bought small parcels of land—something that they could farm on their own. Slavery wasn't known in that part of the state, so if your farm was tended, you tended it.

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This was subsistence farming?

Absolutely. The people in Winston County adhered rather fervently to the Jacksonian philosophy out of fierce loyalty to the national government. The most dramatic example of that was about the time the

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House Approves More Bankruptcy Judgeships

On Aug. 5, the House approved H.R. 5316, a bill to authorize 52 additional bankruptcy judgeships and to make permanent the U.S. trustee program for the administration of bankruptcy estates under the Department of Justice, mandating the program in every judicial district.

During House and Senate hearings on the bill, Judge Robert E. DeMascio (E.D. Mich.), chairman of the Judicial Conference's bankruptcy committee, summarized the Conference's objections to the U.S. trustee program.

Judge DeMascio noted that housing the program in the Department of Justice, which in many cases represents the interests of executive branch agencies as creditors of the estate, creates conflicts of interest. He further noted the cost of the U.S. trustee program. Because providing sufficient staff support at all the locations where bankruptcy judges sit on a regular basis would be too expensive for the department, its travel costs will increase and delays in cases can be expected. The U.S. trustees will have to duplicate the efforts of the clerk's offices, other Justice Department lawyers, and personnel of such other agencies as the IRS. The national U.S. trustee program is now estimated to cost more than $50 million on a regular basis; Judge DeMascio stated the Conference's opinion that a similar program operated in the judiciary

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Center Publishes Two Bibliographies on the Bicentennial of the U.S. Constitution

The Center has recently issued two publications related to the bicentennial of the United States Constitution.

The Writing and Ratification of the U.S. Constitution: An Abbreviated Bibliography is a brief annotated list of seventeen books and articles on the Philadelphia Convention of 1787, its causes, and subsequent events.

The Writing and Ratification of the U.S. Constitution: A Bibliography, by Russell R. Wheeler, is a more extensive bibliography on the subject, consisting of 44 pages. This publication deals mainly with the founding period but also includes, more broadly, some literature on American constitutional history. The abbreviated bibliography mentioned above is included in this larger version. Both versions include a 2-page chronology of events of the founding period.

The bibliographies were prepared by the Center to assist federal judges and other members of the federal judicial system with their participation in the celebration of the bicentennial of the Constitution.

A copy of either or both of these bibliographies can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (2 oz. for the shorter version; 8 oz. for the longer). Please do not send an envelope.

Sentencing Commission Asks for Outside Input

This is one of a series of articles to keep federal judges and supporting personnel informed about the Sentencing Commission's work.

The U.S. Sentencing Commission continues to solicit the widest possible comment on its work. To this end, it will publish working draft guidelines for public comment in late September in the *Federal Register*. While not a complete or final document, the working draft will be detailed enough to allow meaningful evaluation. It will also identify important issues that the commission

NEWS FROM THE SENTENCING COMMISSION

believes need more extensive public input. The commission stresses that changes in the draft will be made up until the time the guidelines are submitted to Congress next year.

The Sentencing Commission urges interested parties to study the draft after its publication and submit written suggestions on how to improve it. Chairman William W. Wilkins, Jr., emphasized that the "guidelines should reflect the combined efforts of as many interested people as possible."

In conjunction with publication of the working draft, the commission is planning a series of public hearings across the country, which the commission hopes interested individuals will plan to attend. Dates for the hearings were listed in the August issue of *The Third Branch*. Further details, including the specific location of each hearing, will be provided as the information becomes available.

* * *

The Sentencing Commission's most recent public hearing on July 15 generated wide-ranging opinions on the sentencing options that are available and appropriate for defendants convicted of federal offenses. Testifying at the hearing, Assistant Attorney General Douglas Ginsburg of the Justice Department's Antitrust Division argued for mandatory jail terms for most Sherman Act violators, including first-time price-fixers. While serving to punish the offender, a prison sentence would also act as a deterrent to others contemplating similar criminal activity, he said. "Deterrence is the primary goal of criminal antitrust enforcement, and we are convinced that accomplishing this goal requires the use of very substantial penalties in the form of both fines and imprisonment," Ginsburg testified.

Herb Hoelter and Marcia Shein, representing the National Association of Criminal Defense Lawyers, argued for more emphasis on alternative sentencing and less on imprisonment. "There is no evidence that longer prison sentences provide greater deterrence than shorter ones," Ms. Shein said.

The commission's fifth hearing is scheduled for Sept. 23, 1986, in Washington, D.C., and will deal with the topic of plea negotiations. ■

Nominations to State Justice Institute Board

President Reagan in July nominated 9 of the 11-member Board of Directors of the State Justice Institute, subject to Senate confirmation. Two remaining appointments are to be made—one from the public sector, the other from the judiciary.

Creation of the State Justice Institute was proposed by the Conference of Chief Justices in 1979, and the institute was established by statute in 1984. Under this legislation, it is authorized to make grants to support the state courts, law schools, national nonprofit organizations, and other groups working in the areas of judicial administration, continuing judicial education and training, and judicial research.

Though President Reagan proposed a recission of the institute's fiscal 1986 funds, Congress did not approve it. Thus, although the $8 million appropriated for fiscal year 1986 remains available until Sept. 30, the institute probably will not have time to spend or obligate most of that amount before the beginning of fiscal year 1987. Any unspent or unobligated fiscal year 1986 funds would revert to the Treasury on Sept. 30. ■

THE THIRD BRANCH

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ABA House Receives Report on Professionalism

A special commission of the American Bar Association has recommended changes directed at improving the professionalism of law schools, practicing lawyers, and judges. The commission was formed in February 1985 following Chief Justice Burger's call for a study to determine whether practicing lawyers are "moving away from the principles of professionalism." John C. Shepherd, then ABA president, agreed with the need for such a study, and the commission was constituted under the chairmanship of former ABA president Justin A. Stanley.

The commission's 155-page report contains recommendations directed to law schools, practicing lawyers, bar associations, and judges. The report recommends improved coverage of ethics in law schools, higher standards for law school admissions, more and better continuing education for practicing lawyers, more understandable, and written, fee arrangements with clients, and strict use of sanctions for errant lawyers by the judiciary (with an added recommendation that state courts adopt a rule similar to Federal Rule of Civil Procedure 11). The report emphasizes the need to educate the public about the legal profession, since much of the criticism leveled at lawyers and judges results from a lack of knowledge as to how the judicial systems—state and federal—function.

Members of the ABA House of Delegates considered the report at the ABA's annual meeting last month. The report will now be distributed to bar associations and the judiciary. ■

Parole Commission Cracks Down on Crack

The U.S. Parole Commission has proposed amending its parole policy guidelines so as to sanction more appropriately offenses related to the form of cocaine popularly known as "crack." The commission has solicited public comments on the content of the proposed guidelines.

The current guidelines, contained in 28 C.F.R. § 2.20, include an Offense Behavior Severity Index to assist in categorizing the severity of various forms of criminal conduct. Although examples relating to cocaine offenses exist, separate guidelines are believed necessary in light of differences between ordinary forms of cocaine and the more potent crack. For example, the present guidelines for heroin and opiate offenses take into account the relative potencies of heroin and Dilaudid, and multiply distributed amounts of Dilaudid by a factor of two to convert such amounts to their heroin equivalents. A similar conversion factor might be appropriate for crack, the Parole Commission belives. Guidelines that reflect the smaller quantities involved in trafficking in the more potent crack might also be developed. In addition, because of the difficulty of analyzing the purity of small amounts of crack, the guidelines for crack may need to take account of its weight alone, rather than both its weight and its purity, the factors assessed for heroin and ordinary cocaine.

House Cuts Appropriations for Judiciary; Final Word Rests with the Senate

The House of Representatives has approved and sent to the Senate a bill that includes appropriations for the judiciary in the amount of $1,103,017,000 (exclusive of the Supreme Court). This figure is $107,080,000, or 9 percent, less than the judiciary had requested.

The reduction came about in two ways. The House Appropriations Committee in July cut $53,297,000 from the judiciary's request. In addition, the bill for the Commerce, Justice, and State Departments and the judiciary as passed by the full House included an amendment introduced by Congressman Bill Frenzel (R-Minn.) that provides for a further reduction of 5.03 percent in the judiciary's appropriations (with the exception of salaries of Article III judges). The Frenzel amendment thus further reduced the funds available to the judiciary (exclusive of the Supreme Court) for fiscal year 1987 by an additional $53.8 million.

On July 22, AO Director L. Ralph Mecham, on behalf of the Judicial Conference's Budget Committee, wrote to Senator Warren B. Rudman (R-N.H.), chairman of the Senate Committee on Appropriations, asking that the committee amend the bill to exempt the judiciary from the provisions of the Frenzel amendment. The amount approved by the House Appropriations Committee before the amendment—$53,297,000 less than requested—is "the bare minimum amount required by the courts and related agencies to fulfill their basic mission," Mecham said.

On Aug. 14 the Senate Appropriations Committee struck the Frenzel amendment and voted to restore $50,699,000 of the funds cut. ■

Impeachment Papers Received by Senate

On July 22, the House of Representatives unanimously voted four articles of impeachment against Judge Harry Claiborne (D. Nev.). Chief Justice Burger, on behalf of the Judicial Conference of the United States, had previously certified to the speaker of the House that the Conference and the Judicial Council of the Ninth Circuit had determined that there might be grounds for impeachment (see August *The Third Branch*).

On August 6, members of the House of Representatives formally

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Civil War started. The state of Alabama seceded from the Union; the state legislature passed a secession resolution. The people in Winston County met and they passed a secession resolution of their own; the theory behind it was that if the state of Alabama as a political entity of the national government had a right to withdraw by secession resolution, then Winston County as a political entity of the state of Alabama had the same right to withdraw from the state—and they did. They passed a resolution that read like this: "We agree with Jackson," meaning Andrew Jackson, "that no state can legally get out of the Union, but if we're mistaken in this and a state can lawfully and legally secede or withdraw from being a part of the Union, then any county being a part of the state, by the same process of reasoning, could cease to be part of the state. We think that our neighbors in the South made a great mistake when they attempted to secede and set up a new government. However, we do not desire to see our neighbors in the South mistreated and therefore we are not going to take up arms against them, but on the other hand we are not going to shoot at the flag of our fathers, Old Glory, the flag of Washington, the flag of Jefferson, the flag of Jackson. Therefore, we ask that the Confederacy on the one hand, and the Union on the other hand, leave us alone, leave us unmolested so that we may work out our political and financial destiny here in the hills of northwest Alabama." That is the reason they called the county the Free State of Winston. And, of course, that is a part of my heritage.

So they were a county, but not a part of Alabama?

Well, after the Civil War was over everyone ignored it. But that demonstrates their attitude. During the war the Confederacy sent press forces in there to impress the men who were eligible or who they thought were eligible into the Confederate Army. Most of the men went through what they called the underground and joined the Union forces; a lot of my forefathers fought for the Union forces. On the other hand, some of them were officers in the Confederate Army. It was a divided family.

The ordinary citizen up there has an individual strength. They have

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integrity. They believe in the personal integrity of the individual and they all respect it.

Those were the kinds of people who through their integrity and fortitude helped establish our country.

That's right. Those people were not then, and many of them aren't now, highly educated in the formal sense, but they are highly intelligent and they have a deep respect for the rights of the individual.

Do you have any kin there now?

Most of them have left. I may have been the last one to leave there, when I was appointed to the federal bench and moved to Montgomery in 1955.

You were U.S. attorney from 1953 to 1955. Were civil rights cases filed when you were in this office? If so, would you say that this experience prepared you for the civil rights issues that you handled on the district court?

Well, I handled some civil rights cases during the time I was U.S. attorney. During that time my headquarters were in Birmingham. A lot of these cases were section 241 and 242 cases. However, I guess the most dramatic case that I prosecuted when I was U.S. attorney was *United States v. Fred & Oscar Dial.* The Dial family was a very prominent family from down in Sumter County, Alabama. Sumter County is the southernmost county in the Northern District of Alabama, and some of the plantation owners had a practice at that time, according to the evidence, of going over to Meridian, Mississippi, which wasn't far from Sumter County, and they would find healthy, strong black men who had been convicted by the justice of the peace courts and sentenced to jail because they hadn't paid their debts. These people would go to the court and pay what was owed and take custody of the blacks at the jail and take them back to their large plantations in Sumter County, Alabama. Then they would go and get the families of these men and bring them to their plantations. The only subsistence the blacks had was from the plantation store. If they attempted to run off from the plantation, the owners would take their bloodhounds and they would get them in the swamps, there along the Tombigbee River. It was in 1954 when I prosecuted this case that primarily concerned one fellow, black, by the name of Monk Thompson, who had run away from the plantation. They took the dogs and they found him in the swamp and they brought him back and they strapped him, according to the evidence, to a bale of hay and they whipped him with a bullwhip. He died. His body wound up in a funeral home in Livingston, Alabama, which is also in Sumter County, and the people in the funeral home took a picture of the body and sent the photograph to me as the U.S. attorney. I sent the FBI down there and they investigated it; the grand jury indicted them, and I prosecuted them for involuntary servitude, for peonage, and for slavery. The defendants

hired the most prominent law firm in the South to represent them, and the case lasted a full week. Judge Seybourn Lynne, who went on the bench a few years before I did, was the trial judge. The jury convicted them, and the judge sent them to the penitentiary for the conviction of involuntary servitude. That's one experience that caused me not to be too surprised at some of the things I ran into when I became U.S. district judge in 1955.

If things like this were going on, why didn't your predecessors in office do something about it?

Well, I don't know whether it was reported to them as dramatically as it was reported to me, which was by a picture of a dead black man with bullwhip stripes all over his body. And I had access to a good FBI agent that I sent down there, and he made a very, very thorough investigation. The grand jurors were incensed when I presented the case to the grand jury, and the verdict reflects the petit jury was also incensed.

We had other cases, of course. We had section 242 cases—violations where law enforcement officers would discriminate against blacks and summarily punish them after they had been legally arrested, things like that. Those were misdemeanor cases.

I'd like to go into the early civil rights cases you handled and your personal reactions to the tasks before you. The Supreme Court decisions were definite in what they said, but they were not specifically tailored to the cases you handled.

The Supreme Court didn't decide *Brown v. Board of Education* until 1954, and I was U.S. attorney in Birmingham at that time. When I was appointed a federal district judge I moved to a new district. It was the second time in the history of the country that that had ever occurred. I suppose it is just politically expedient to appoint judges from the district where they are to serve. The first time a federal judge was appointed to a district other than where he resided occurred in Tennessee, when President Hoover appointed a judge to the Western District of Tennessee when he lived over in the Eastern District. The second time was when President Eisenhower appointed me from the Northern District of Alabama to the Middle District of Alabama. I was

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the only judge in the Middle District. My predecessor had died five or six months before I was sworn in. When I moved to Montgomery, the headquarters for the district court, Circuit Judge Richard T. Rives had been on the bench four years. President Harry Truman appointed him, and Judge Rives and I served together on many three-judge cases. The first one we served on was with Judge Seybourn Lynne (the trial judge in the *Dial* case), in 1956, *Browder v. Gayle.* This was after Martin Luther King had made his presence on the scene in Montgomery, and after he established the bus boycott. City and state officials refused to allow the black people to sit in front of a certain line on the buses. There was clear precedent for segregating on the basis of race because the Supreme Court in the 1890s had decided *Plessy v. Ferguson* and that *was* a public transportation case. The first Justice Harlan dissented in that case, a prescient and beautifully written dissent. The law is now settled that you cannot in any public facility discriminate on the basis of race without violating the Fourteenth Amendment to the Constitution of the United States. However, it was not settled in 1956. We heard oral arguments in the *Browder* case after it had been pleaded to the point that the parties joined issue as to the constitutionality of the public transportation ordinances and state statutes that segregated people on the basis of race. Judge Rives and I wrote an opinion declaring the public transportation segregation laws unconstitutional. We didn't deal with enforced segregation in all public facilities specifically because the issue wasn't before us, but the decision laid the groundwork for other public facility cases being decided contrary to the *Plessy* rationale. *Plessy* had not been overruled except as to the operation of public education facilities—the only issue before the Supreme Court in *Brown v. Board of Education.* In *Brown* the Supreme Court did not overrule *Plessy,* so the lower federal courts were left with a *Plessy* case and left with a Supreme Court decision outlawing segregation in public schools, and that's where we were when we heard arguments and had our postargument conference in *Browder.*

Judge Rives and I decided that there was a doctrinal trend reflected by the Supreme Court's decision in *Brown* that made *Plessy* no longer the law, and we declined to follow it. We declared unconstitutional and enjoined segregation in public transportation facilities in Alabama. Judge Lynne dissented. He had a very valid, legal basis for dissenting because *Plessy* had not been overruled. But as it turned out the *Browder* case went up on appeal and the Supreme Court affirmed what Judge Rives and I had held. Hindsight tells us that we were right in perceiving a doctrinal trend and going along and not waiting for them to overrule *Plessy.*

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You made history.

Well, as future challenges were presented we went from there to all aspects of public facilities—airports, public parks, restrooms in public facilities, restaurants functioning in interstate commerce; and then the district judges were required to commence the implementation of *Brown v. Board of Education*. I didn't have any real problems in these cases involving segregation on the basis of race in public institutions or in institutions operated as public facilities as far as the law was concerned. It was one of the most basic things, according to my concept of the Constitution, that you can't discriminate against a citizen in the use of public facilities whether it is a school, whether it is buses, whether it is libraries, whether it is public parks. Regardless of what the public facility is, if you discriminate in its use or availability on the basis of race, you are violating the Fourteenth Amendment. So that is the basis on which I have always put such decisions.

It took some courage though.

Well, I don't know. When you look back on it you say, "Well, why did I do that?" And then you ask yourself, "What alternative did I have?" As long as I remained a federal judge and adhered to the oath that I had taken, I had no option.

How did you three judges go about deciding *Browder*?

Judges on multijudge courts do not confer before they have studied the briefs and heard the oral arguments. They do not start conferring until there is a complete submission. After we had completed the oral arguments in *Browder v. Gayle*, we went to chambers and, as is the practice, the presiding judge called upon the junior judge to express himself. That practice is followed to keep the junior judge from being swayed or being intimidated by a senior judge expressing his position first. So Judge Rives as presiding judge said, "Well, Frank, what do you think about this case?" I responded to the effect that in my opinion discrimination on the basis of race in the use or availability of public facilities—and this certainly includes public transportation facilities—violates constitutional rights under the Fourteenth Amendment to the Constitution of the United States. The evidence was clear and really not controverted that these black citizens were being discriminated against in the use of these public facilities, and they were being discriminated against by a public entity, the city of Montgomery and the state of Alabama, in the use of these public facilities solely because of their race, and I said, "If I can read the Constitution of the United States, that is unconstitutional. That's the way I vote."

And he said, "You are right"?

That's right. These cases get easy when they were decided 25 to 30 years ago, you know.

There were some turbulent years for you as you pioneered in the civil rights area—a cross was burned on your lawn, your mother's home was dynamited. How did you cope with all this?

The years were to some extent turbulent, but I had no difficulty coping with the problems. Federal judges are now and were then given a lot of authority. They were given that authority deliberately. Federal judges were appointed for life, "during good behavior," and that is designed to insulate them from social pressures and insulate them from political pressures. That insulation is not given to them because the framers of the Constitution admired judges or just wanted to favor them with lifetime tenure; it is given to them so they can act impartially, so they can decide cases as the facts and the law require they be decided, and in doing so do not have to fear any social, economic, or political pressures. Those protections make it easy for a judge, who has the desire, to correctly decide cases that involve constitutional principles on the basis of the Constitution. When a person accepts an appointment as a United States judge—district judge, circuit judge, or Supreme Court justice—he or she implicitly agrees with the government and the people of this country that if appointed as federal judge—to a position that gives a lifetime tenure, that insulates from all of these pressures whether they be social, political, or economic—that if given these insulations he or she will decide the cases impartially; will decide these cases according to the Constitution, regardless of the consequences. That's always been my attitude. It still is, and with that attitude it is not difficult to cope with the cases even if they do involve some pressures.

"When you look back on it you say, 'Well, why did I do that?' And then you ask yourself, 'What alternative did I have?'"

Did you lose some friends?

Well, I have been asked that question many times. And this is not a trite answer. It's a real genuine feeling that if I lost any friends, the friends weren't worthy of being friends. If I lost them because of de-

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Cook New Chief of AO Division

David L. Cook was appointed chief of the Administrative Office's Statistical Analysis and Reports Division, effective July 14, 1986. Mr. Cook has been with the AO since February 1972. He was promoted to the position of assistant chief of the Statistical Analysis and Reports Branch in January 1977.

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cisions I made in cases that were initiated by parties over whom I had no control, cases that concerned matters over which the court had jurisdiction, cases that had to be decided—it didn't bother me if someone didn't like it. Some people still don't like some decisions that federal judges make. That wasn't unique to the late 50s and the 60s and the early 70s.

I'd like to make a point before we leave this question. Neither Mrs. Johnson, I, nor our son ever felt ostracized. We had and continue to have very close friends throughout the state, throughout the South and the nation; people whom we wanted to be friends with and whose friendship we continue to enjoy and treasure. As for people whom we didn't want to be friends with, we did our own ostracizing and we did even before I became a federal judge and before we moved to Montgomery in 1955, and we still do.

Were your colleagues on the bench supportive? Did any of them come and say, "I know you are going through a lot"?

Well, it's hard for one judge to support another judge. You know they know what the problems are, you know they know what the duty is that's on the judge to decide the case. They know that he didn't initiate the litigation or formulate the issues. Judge Rives and I were very close friends, and my wife and Mrs. Rives were very close. Judge Lynne and I were always friends and we still are. I started trying cases in the federal court before Judge Lynne. He went on the bench ten years before I did, so I've always admired him as a judge and as a person, and we have always been very close. Judge Hobart Grooms was and is a close friend also. He went on the federal bench the same day I was sworn in as U.S. attorney in 1953. He was subjected to a lot of hassling up in the Birmingham area. The fact that I may have been subjected to some criticism in the press didn't make me unique, because other judges were being subjected to the same type of criticism. You might say we were all supportive of each other.

Did you have any protection or court security in the 50s and 60s?

We had very adequate security during what you referred to as the "turbulent years" in the late 1950s and 1960s. The U.S. Marshals Service was most supportive. You didn't have marshals who did not go into the courtroom then. They went into the courtroom in all instances. The FBI gave federal judges security if there was any indication that some federal law was being violated or a violation was contemplated. If we had a highly emotional situation or some situation that the Marshals Service or the FBI thought was volatile and the risk was pretty high, we had officers who afforded the necessary security. After my father died, my mother's home was dynamited, and there was no question but that it was dynamited because I had and have the same name as my father and his address was listed in the telephone book; the bombing was designed to intimidate and harass me. The FBI and the marshals gave my mother protection for as long as she would tolerate it. She said they kept her awake at night slamming doors and shining lights around the house. She eventually requested that they be removed from the immediate area.

"The fact that I may have been subjected to some criticism in the press didn't make me unique, because other judges were being subjected to the same type of criticism."

Do you think there are issues today that are as emotional as the civil rights cases?

Absolutely. For example, death penalty cases are just as emotional. Judges are still subjected to criticism based in whole or at least in part on an emotionalism that attends the decisions when federal judges set aside convictions in death cases and order retrial. The criticism is sometimes

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Study of Standard Pretrial Procedures Published

The Center recently published *The Use of Standard Pretrial Procedures: An Assessment of Local Rule 235 of the Northern District of Georgia*, by Carroll Seron of the Center's Research Division.

In January 1985, judges in the Northern District of Georgia adopted local rule 235, which applies a standard pretrial procedure to nearly all cases filed in the district. The rule requires lawyers to hold a settlement conference and provide a certificate of settlement activity, a preliminary statement of the case as it stands after the settlement conference, a list of all interested parties that discloses potential conflicts, and a final pretrial order on an established form. The rule was adopted as part of a general revision of the district's rules; other rules cover such matters as discovery limitations and motions practice. Local rule 235 is a clear example of a court's effort to comply with the requirements of rule 16 of the Federal Rules of Civil Procedure while minimizing the early involvement of judges.

The paper describes the factors that led to the district's decision to standardize its procedures and the steps taken to bring the changes about. A primary goal of the paper is to present the judges' assessment of the various aspects of their program based on one year's experience with it. Judges considering changes in their case management practices may find the Georgia experience instructive.

Copies of the report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005.

PERSONNEL

Nominations

Richard B. McQuade, Jr., U.S. District Judge, N.D. Ohio, July 28

Joel F. Dubina, U.S. District Judge, M.D. Ala., July 30

James K. Porter, U.S. District Judge, E.D. Tenn., July 30

Confirmation

Daniel A. Manion, U.S. Circuit Judge, 7th Cir., June 26

Appointments

Con. G. Cholakis, U.S. District Judge, N.D.N.Y., May 29

Robert J. Bryan, U.S. District Judge, W.D. Wash., June 2

Lawrence P. Zatkoff, U.S. District Judge, E.D. Mich., June 6

James L. Edmondson, U.S. Circuit Judge, 11th Cir., June 9

Nicholas Tsoucalas, Judge, U.S. Court of International Trade, June 11

Nomination Withdrawn

Jefferson B. Sessions III, U.S. District Judge, S.D. Ala., July 31

Elevations

John F. Grady, Chief Judge, N.D. Ill., July 1

Ralph G. Thompson, Chief Judge, W.D. Okla., July 1

John P. Fullam, Chief Judge, E.D. Pa., July 20

Senior Status

Wendell A. Miles, U.S. District Judge, W.D. Mich., May 9

Robert E. Varner, U.S. District Judge, M.D. Ala., June 12

Luther B. Eubanks, U.S. District Judge, W.D. Okla., June 30

Frank J. McGarr, U.S. District Judge, N.D. Ill., June 30

Deaths

James A. Coolahan, U.S. District Judge, D.N.J., July 16

Alfred L. Luongo, Chief Judge, E.D. Pa., July 19

Edwin D. Steel, Jr., U.S. District Judge, D. Del., July 27

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just as vitriolic, just as severe as it was in any desegregation case I ever had.

Would you please comment on the Alabama prison system and the cases that came before you in 1975.

The state of Alabama is not required under the state constitution or the federal Constitution to operate a prison system; no state is so required by law. As a practical matter they are required to operate some kind of penal system; however, if they do, they are required to operate it without violating basic constitutional rights as guaranteed by the Eighth Amendment. A state cannot treat prisoners in a cruel and inhuman manner and the evidence in the *James v. Wallace, Pugh v. Locke,* and *Newman v. State of Alabama* prison cases in Alabama, when the cases were heard, reflected that the conditions incident to incarceration in the larger Alabama prisons were clearly violative of the Eighth Amendment to the Constitution, and the defendant's lawyer—the governor's lawyer—after the fourth or fifth day of taking testimony got up in open court and said, "Judge, we acknowledge that the operation of the prisons in Alabama is violative of the Eighth Amendment to the Constitution of the United States." Well, a federal judge cannot if he is going to afford any relief to the parties say, "Well, I'll enter an order finding that you are in violation of the Eighth Amendment to the Constitution." What relief do the prisoners get from that? A judge must, in order to afford some relief, devise some means whereby there is within a reasonable time the elimination of the conditions that give rise to the violations of the constitutional rights. And that's where the problem comes and that's where a judge really gets involved insofar as the state's financial ability to eliminate the violations is concerned. But as it turned out Alabama solved its prison problems. It has implemented all of the minimum standards that I ordered implemented. Those standards were designed to eliminate these Eighth Amendment violations. Alabama has gone further than that and built new prisons that I didn't even envision at the time, and it now has one of the finest state penal systems in the United States.

How long did it take?

It took about 10 or 12 years. But it took 100 years for the conditions to get to the point that they violated the Eighth Amendment; under such circumstances you cannot expect to eliminate those conditions overnight.

"A judge must, in order to afford some relief, devise some means whereby there is within a reasonable time the elimination of the conditions that give rise to the violations of the constitutional rights."

Why did you elect to appoint a committee instead of a special master to monitor the standards you established for the prisons?

I appointed what I called the human rights committee to monitor the implementation of the minimum standards that I determined to be necessary; I entered a very detailed court decree after the constitutional violations were found. I had found that in litigation involving the operation of state institutions such as mental hospitals and prisons detailed mandatory injunctions were necessary.

How did you select the committee? Were they from various disciplines?

Yes, they were. The committee included physicians, attorneys, educators, minorities, law enforcement officers, maintenance experts, sociologists, psychologists, counsel-

See JOHNSON, page 9

JOHNSON, from page 8
ors, labor officials, *and*, most important, homemakers and mothers, who can detect physical and mental indignities quicker than most. I let the parties suggest people who would be appointed—both sides.

Were there newspaper people, who might be able to explain it in articles?

Yes, and they did. They shed a lot of light on the situations in the Alabama prison system and the mental health system. A district judge owes it to himself and the court upon which he serves to protect the office he holds and he has to keep himself in a position of being able to enforce his decree; the worst thing that can happen to a district judge is to enter a decree and not enforce it. If he ever does that, he's in bad shape as far as the enforcement of his future decrees is concerned.

What were the major parts of the charge to the human rights committee?

I first gave them the background of the cases and explained why I had entered a court order enjoining the state of Alabama officials from failing, within the times prescribed, to implement certain minimum standards designed to eliminate the egregious constitutional violations then in existence in the state prison system. I pointed out that at the conclusion of seven days of trial, counsel for the state defendants stated to the court: "Your Honor, the defendants in this case, the Alabama Board of Corrections and several of its officers, rest their case at this time. They rest their case based upon the amended complaints filed and upon the overwhelming majority of the evidence, which shows that an Eighth Amendment violation has and is now occurring to inmates in the Alabama Prison System."

I also explained to the members of the committee that "an Eighth Amendment violation confession means that the state of Alabama in the operation of its prison system throughout the state is operating the system in such a manner as to treat those incarcerated in the Alabama prisons in a cruel and inhuman manner. In spite of some of the public reactions of one or more state officials to this court order, it must be kept in mind that the court order was not only based upon the overwhelming evidence but was based upon over 1,000 stipulated facts, testimony of Alabama Prison Commissioner Sullivan, and the confession of cruel and inhuman conditions as made by the counsel that represented all of the state defendants."

The committee's responsibilities were then spelled out, calling their attention in particular to their responsibility to monitor implementation of the prison standards established by the court and to determine whether conscientious efforts on the part of prison officials were being made to comply with the standards. This part of the charge reads: "You should also take particular notice that you have a further duty and authority to monitor the implementation of the standards set up by this court in *Newman v. Alabama*, a copy [of which] was handed to you [and which] is concerned with the inadequacy of medical treatment provided prison inmates in Alabama's prison system."

The Tenth Amendment to our Constitution, which reserves powers not expressly granted to the federal government for the states, was called to their attention. The charge explains, however, that this amendment "does not relieve the states of a single obligation imposed on them by the Constitution of the United States." I had no hesitancy as a federal judge in saying this, and in adding, "The history of federal litigation, particularly for the last 20 years in this state, is replete with instances of state officials who could have chosen one of any number of courses to alleviate unconstitutional conditions of which they were fully aware, and who chose instead to do nothing.... Consequently, the federal courts time after time have been required to step into the vacuum left by the state's inaction. It must be added that these cases rarely come as a surprise to anyone, because they are generally filed and decided only after the aggrieved parties have exhausted all hope of vindicating their rights through other channels."

I frankly told the membership of this committee that their "job is not going to be an easy one. Several instances will illustrate the pervasive and gross neglect of prisoners' medical needs which prevails within the Alabama prison system."

I then cited specific instances of maltreatment or lack of treatment—

See JOHNSON, page 10

Annuities Program Amended

President Reagan has signed into law H.R. 3570, amending 28 U.S.C. § 376 to reform and improve the federal justices and judges' survivors annuities program (Pub. L. 99-336). The amendments become effective Oct. 1, 1986. For a description of the provisions of the bill, see June *The Third Branch*.

CALENDAR

Sept. 4–7 Second Circuit Judicial Conference
Sept. 10–12 Workshop for Clerks of U.S. District Courts
Sept. 15 Judicial Conference Ad Hoc Committee on Inns of Court
Sept. 18–19 Judicial Conference of the United States
Sept. 21–23 Third Circuit Judicial Conference
Sept. 22–27 Seminar for Newly Appointed U.S. District Court Judges
Sept. 24–26 Workshop for Bankruptcy Chief Deputy Clerks

JOHNSON, from page 9

in some instances, the patient/prisoner had even died as a direct result of inhumane conditions, including unsanitary living conditions, unsanitary food storage and preparation, stench, and dangerously exposed electric wires. A major problem—overcrowding—was especially called to the committee's attention.

The charge concluded with: "The selection of the members of this Human Rights Committee was not at random. You were selected because of your dedication to a humanitarian concept that human beings must not be treated as animals, and in a cruel and inhuman manner, by other human beings. You were selected because of the expertise that you possess in various fields and endeavors, which expertise will enable you to intelligently evaluate, weigh, and monitor the implementation of these court orders. And so I say to you today: proceed with dignity and courtesy in your relationship with the penal officials but proceed with firmness and resoluteness, keeping your eyes on the polestar, i.e., the elimination of the existing inhumane and barbaric conditions in the Alabama penal system."

[The *Newman* and *Pugh* cases were appealed to the Fifth Circuit. The circuit court approved the steps taken by the court "to ensure reasonably adequate food, clothing, shelter, sanitation, necessary medical attention, and personal safety for the prisoners" and to generally bring about improved conditions in the Alabama prison system; the court held that the judge's mandates were "justifiably invoked" and within the "sound discretion" of the district court to cure Eighth Amendment violations. The opinion disapproved the Human Rights Committee, however, stating that "a less intrusive, more effective approach would have been to name one monitor for each of the prisons . . . with full authority to *observe*, and to report his *observations* to the Court, with no authority to intervene in daily prison operations." *Newman v. State*, 559 F.2d 283, 290 (5th Cir. 1977) (emphasis in original). Judge Johnson's charge to the committee is available from the FJC's Information Services.]

Did you get involved in the split of the Fifth Circuit?

Yes. We first started talking about splitting the circuit back in 1977, and the proposal at that time was to divide into four states and two states—Louisiana and Texas were to be one circuit and Mississippi, Alabama, Georgia, and Florida were to constitute the other circuit. I was a district judge then, but it was apparent to me that such a division was both philosophically and geographically bad. I thought that it might have been, whether I was right or wrong, an effort to divide because of some racial problems and because of some rulings some of the old Fifth Circuit judges were making that maybe some congressmen were not liking. So I opposed it at that time, but when it came on later I was, as a circuit judge, designated by the Fifth Circuit to be a spokesman for the circuit after the judges passed a resolution requesting Congress to split the circuit three/three, and I appeared and testified before the Kastenmeier subcommittee in support of the split. So I was very much involved.

You have established a reputation for being a good manager. Do you have any innovations for management techniques to recommend to new judges coming into the system?

I think a judge must be a good administrator, particularly the chief judge in a district court. He cannot leave court administration up to someone else. A court won't administer itself. Good court administration is critical to the operation of a good court. Chief Justice Burger recognizes this. He's one of the finest court administrators we have ever had, and he insists on good court administration at every level of the federal judicial system. Chief Judge John Godbold of the Eleventh Circuit is a crackerjack court administrator. And it results in the Eleventh Circuit's being one of the best run circuits in the country. You can tell that from the statistics that are regularly distributed by the Administrative Office. One of the basic approaches to being a good court administrator is case management. You manage a case from the day it's filed until it's disposed of. You don't leave it up to court employees to do the case management—except to implement the court policies.

Especially the lawyers?

Well, as a general observation,

See JOHNSON, page 11

NOTEWORTHY

Recommendations on prison industries. The recommendations of the National Task Force on Prison Industries have been published by the National Center for Innovation in Corrections (NCIC), located at George Washington University in Washington, D.C. The task force was formed in 1984 and convened under the guidance of Chief Justice Burger and the Brookings Institution in 1985. Its 50 recommendations concern such issues as the role of the public sector, private industry, and labor unions in the prison industries concept; the payment of prevailing wages to inmates for production meeting private sector standards; and possible union membership for inmates.

The foreword to the task force's report, *National Conference on Prison Industries: Discussions and Recommendations*, notes that "a new, enlightened, public-private partnership is the key to restoring prison industries to the wide level of employment it enjoyed a century ago—without the exploitation and inefficiencies."

Copies of the report are available from NCIC, George Washington University, 2130 H St., N.W., Room 621, Washington, DC 20052. ■

JOHNSON, from page 10

they won't. That's the problem that some district courts experience in allowing the lawyers to bring the case on for trial when they get ready. A good docket clerk will keep the judge to whom a case is assigned apprised of the date of the filing, the date that the answer is due, the date that the motion to dismiss is filed, and that case is automatically put on a regularly scheduled motion calendar for submission of those motions. When the case is ripe for pretrial, it's automatically put on a pretrial calendar and doesn't just sit there. I found it absolutely necessary to be a case manager when I was a district judge.

Are there some areas in the federal court system you would like to see changed?

What we need to do is to improve efficiency and effectiveness and cut unnecessary cost in the operation of the courts without affecting the quality of the work of the court. One area where money could be saved is in the administration of the bankruptcy court system. Currently, as you know, bankruptcy employees in each judicial district are under the supervision of a separate bankruptcy clerk rather than the clerk of the court. If the bankruptcy employees were under the supervision of and integrated into the office of the clerk of the district court, this would eliminate duplication of equipment, especially all the automation equipment. In administration, it would eliminate that duplication. You'd reduce the need for a substantial number of employees, and I would guess that consolidating would result in a savings to the court system in excess of a million dollars a year. Unfortunately, this may not be possible. In S. 1923 the Senate has said that there can be no such consolidation without the approval of the Judicial Conference and the Congress. I hope this court administration proscription will not become law.

Habeas corpus filings in the federal courts continue at a high rate. Do you believe the habeas corpus filings will always be with us?

Yes. The roots of the Great Writ of Habeas Corpus can be traced back further than the Magna Carta, to the twelfth century or earlier. Throughout English history, prior to the birth of this country, the writ was used to free prisoners who had been imprisoned arbitrarily and, therefore, without due process of law. The writ was later incorporated in Article I of the federal Constitution and in many state constitutions. Although some of the states omitted the writ from their constitutions, the most plausible explanation for their omission is that the writ was too fundamental to be questioned.

Today, the writ provides the primary mechanism for the vindication of federal constitutional rights. In the first place, federal courts have more experience than state courts in dealing with federal issues, and therefore are generally more competent to decide issues of federal law. Also, federal judges, unlike most state judges, are given lifetime tenure, which insulates them from local politics and adverse popular opinion. Many elected state judges have proved reluctant to overturn convictions even where the prisoner was clearly denied due process. Overturning a conviction is often an unpopular and misunderstood decision than can cost an elected state judge his job. The availability of the federal habeas writ guarantees that a prisoner can present his constitutional claims to a tribunal that is not subject to the same kind of political pressure.

Certainly the habeas writ entails costs; by providing a forum where prisoners can vindicate meritorious federal claims, federal courts are required to entertain many nonmeritorious or even frivolous claims. But it is a cornerstone of our system of justice that we are willing to pay great costs to avoid condemning innocent persons. In order to ensure that innocent people are not arbitra-

See JOHNSON, page 12

THE SOURCE

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

Aldisert, Ruggero J. "The House of the Law." 19 *Loyola of Los Angeles L. Rev.* 755 (1986).

Alschuler, Albert W. "Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases." 99 *Harvard L. Rev.* 1808 (1986).

"Annual Eighth Circuit Survey." 19 *Creighton L. Rev.* no. 4 (1985–86).

Bennett, Steven. "Summary Disposition of Appeals: Lessons from the D.C. Circuit." 30 *St. Louis University L.J.* 463 (1986).

Breger, Marshall J. "The APA: An Administrative Conference Perspective." 72 *Virginia L. Rev.* 337 (1986).

Funke, Gail S. (ed.). *National Conference on Prison Industries: Discussions and Recommendations.* National Center for Innovation in Corrections, George Washington University, 1986.

Gallant, Kenneth S. "Judicial Rule-Making Absent Legislative Review: The Limits of Separation of Powers." 38 *Oklahoma L. Rev.* 447 (1985).

Gross, Leonard E. "Judicial Speech: Discipline and the First Amendment." 36 *Syracuse L. Rev.* 1181 (1986).

"In Tribute to John Minor Wisdom." 60 *Tulane L. Rev.* 231 (1985).

Kilgarlin, William W., and Jennifer Bruch. "Disqualification and Recusal of Judges." 17 *St. Mary's L.J.* 599 (1986).

Lay, Donald P. "Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act." 71 *Iowa L. Rev.* 935 (1986).

Marshall, Prentice. "Some Reflections on the Quality of Life of a United States District Judge." 27 *Arizona L. Rev.* 593 (1985).

Mikva, Abner J. "The Changing Role of Judicial Review." 38 *Administrative L. Rev.* 115 (1986).

Weiner, Charles R. "From the Bench: Concentrating on Cooperation." 12 *Litigation* 5 (Winter 1986).

JOHNSON, from page 11

rily condemned, our Constitution guarantees that every defendant has the right to due process of law. This right is equally strong—even where there is overwhelming evidence of guilt. Without the habeas writ, the right to due process would be seriously eroded and, in many cases, empty. If the preservation of the Great Writ requires the expenditure of a large amount of judicial resources, that is a cost that our society traditionally has been, and should always remain, willing to pay. ■

IMPEACHMENT, from page 3

presented the articles of impeachment to the Senate. The Senate Rules Committee is expected to work out the procedural rules to be followed in Judge Claiborne's Senate trial, which is unlikely to begin before mid-September. ■

BANKRUPTCY, from page 1

would cost about half that amount.

Current U.S. trustee proposals would increase assessments against estates to pay the additional costs, a policy decision for Congress, Judge DeMascio noted. "Whatever system the Congress may develop for increasing assessments could as easily be applied against the costs of the Judicial Conference's proposed bankruptcy administrator." Finally, "Bankruptcy cases are filed with and are pending before the courts. It makes no sense to call upon another branch of the government to 'administer' cases pending in the judicial branch. Such a diffusion of basic responsibilities in bankruptcy cases can only lead to confusion as judges attempt to manage their dockets while U.S. trustees are independently administering the underlying estates."

The Conference's proposal for bankruptcy administrators provides for their appointment by the courts of appeals, much as federal defenders are now appointed, thus guaranteeing the independence of the administrators. In a recent survey of all circuit and district judges and all bankruptcy judges, the respondents overwhelmingly favored a program in the judiciary rather than the Department of Justice.

"The courts have certainly never been given the opportunity to demonstrate our ability to operate a similar program, with a full range of powers, and to have that experience compared to the U.S. trustee pilot program by an independent agency such as the GAO," Judge DeMascio said.

On Aug. 17 the Senate made its version of the bill (see June *The Third Branch*) an amendment to the House bill and requested a conference. The Senate version lets courts opt out of the trustee program. ■

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Senate Judiciary Committee Member Discusses Federal Courts' Role, Specific Legal Issues

Senator Orrin G. Hatch (R-Utah) is the fourth-ranking Republican on the Senate Judiciary Committee, and with the upcoming retirements of Senators Mathias and Laxalt will rank second. He was first elected to the U.S. Senate on Nov. 2, 1976, and reelected in 1982. Senator Hatch is chairman of the Senate Committee on Labor and Human Resources and of the Senate Judiciary Committee's Subcommittee on the Constitution. He is a graduate of Brigham Young University (B.S.) and the University of Pittsburgh (LL.B.) and practiced law in Utah and Pennsylvania.

You wrote several years ago that the matter of attorneys' fees had gotten out of hand. Do you plan a legislative initiative on this issue?

Many share the view that fee-shifting litigation has gotten out of hand. A recent Supreme Court opinion noted that litigation over fees "serves no productive purpose, vindicates no one's civil rights, and exacerbates the myriad problems of crowded appellate dockets." Much of this litigation arises because the operative language of the fee-shifting statutes simply discusses the award of reasonable fees without any standards or guidance as to what is a reasonable fee. Now my Subcommittee on the Constitution has held several hearings on the Legal Fees Equity Act, which would codify many standards developed by recent Supreme Court cases and also set a generally applicable cap of $75

Senator Orrin G. Hatch

See HATCH, page 4

Skoler to Head FJC Education & Training Div.

The Board of the Federal Judicial Center has unanimously approved the appointment of Daniel L. Skoler to be the director of the Center's Division of Continuing Education and Training. He succeeds Kenneth C. Crawford, who retired in May (see *The Third Branch*, May 1986).

Daniel L. Skoler

Mr. Skoler brings to the Center extensive experience in judicial education and administration, serving as executive director of the National Council of Juvenile and Family Court Judges from 1962–65, then as assistant director of the American Judicature Society and executive director of the American Bar Association's Commission on Correctional Facilities and Services and its Commission on the Mentally Disabled.

He directed the Department of Justice's block grant program under the Omnibus Crime Control and Safe Streets Act of 1968. More recently, he has served as deputy associate commissioner of the Office of Hearings and Appeals at the Social Security Administration and then as

See SKOLER, page 2

Judicial Pay, Marshals Service Bills Pending

The following legislative items are of interest to the judiciary.

• Senator George J. Mitchell (D-Me.) has introduced a bill, S. 2691, to allow federal judges to receive the same pay increases as are granted for all other federal employees. Senators Ernest Hollings (D-S.C.) and Lloyd Bentsen (D-Tex.) are cosponsors of the bill. This bill would serve to correct what Senator Mitchell has characterized as a "hurdle of affirmative congressional action" that only judges and "no other federal employee need face" to obtain pay increases. The "hurdle" is section 140 of Pub. L. 97-92, enacted in 1981, which excludes judges from the Executive Salary Cost-of-Living Adjustment Act provisions applicable to other high-level federal officers. That measure was enacted following what Senator Mitchell

See LEGISLATION, page 7

Inside . . .

Judges Asked to Submit Comments on Guidelines

NEWS FROM THE SENTENCING COMMISSION

The Sentencing Commission is soliciting written comments on its preliminary draft guidelines, which were to be published in the *Federal Register* in September and sent to each federal circuit and district judge. Critical analysis of the draft and the issues it raises will help the commission as it drafts its final guidelines in early 1987. Federal judges and all others interested in the administration of criminal justice are encouraged to study the preliminary draft guidelines and submit their comments to the commission at 1331 Pennsylvania Ave., N.W., Suite 1400, Washington, DC 20004, Attention: Guidelines Comments. Comments should be received by Dec. 3.

As reported in recent issues of *The Third Branch*, the commission will also hold public hearings on the preliminary draft guidelines, starting in Chicago on Oct. 17, to be followed by hearings in New York City on Oct. 21, Atlanta on Oct. 29, Denver on Nov. 5, San Francisco on Nov. 18, and Washington, DC, on Dec. 2–3. The Judicial Conference has authorized the chief judge of each circuit to designate a circuit judge and a district judge to participate in the Sentencing Commission hearing in the city nearest to them. All hearings will begin at 10 a.m. and will be held in each city's ceremonial courtroom in the federal courthouse, except in New York City, where the hearing will be held in Courtroom 318 of the federal courthouse. The public comment period will close at the end of the Washington hearing in December.

* * *

On Sept. 23, 1986, the Sentencing Commission held a hearing in Washington, DC, on the proper role of plea agreements in a sentencing guidelines system. The hearing was the fifth in a series addressing topics of importance in the development of the guidelines.

The guidance the commission gives sentencing judges on plea agreements is especially important because approximately 90 percent of federal criminal cases are presently disposed of by guilty pleas. The legislative history of the Sentencing Reform Act reflects congressional concern that plea agreements should not be used to circumvent the sentencing guidelines. Witnesses at the Sept. 23 hearing addressed the questions of the appropriate limits of judicial scrutiny of negotiated plea agreements and the impact of guidelines on "charge bargaining" under Fed. R. Crim. P. 11(e)(1)(B) and "sentence bargaining" under Fed. R. Crim. P. 11(e)(1)(C). ■

ABA Supports Civil RICO Reform, Grand Jury Procedural Protection Bill, Other Proposals

The American Bar Association at its annual meeting this summer approved several resolutions of interest to the federal courts.

- The ABA supported a proposed amendment to "civil RICO" provisions that would change the definition of "pattern of racketeering activity" to require that the alleged acts be shown to be part of a continuing scheme or plan of criminal activity, to increase to five the number of criminal acts that must be alleged in wire and mail fraud cases, and reduce to five years the time period over which the alleged acts must have occurred. The provision would make Fed. R. Civ. P. 65 applicable to RICO with respect to granting injunctive relief and would provide that a party who brings a frivolous or bad faith suit shall be subject to costs and attorneys' fees.
- The ABA endorsed that portion of the King Committee report that encourages law schools to continue improvements in practice-oriented legal education. The ABA urged U.S. district courts, however, not to require trial experience until the Judicial Conference is able to verify empirically that such measures do in fact improve the quality of advocacy.
- The ABA supported pending legislation, H.R. 5367, to provide stronger sanctions for violations of grand jury procedural rules. For example, in *United States v. Mechanik*, 106 S. Ct. 938 (1986), the Supreme Court held that although Fed. R. Crim. P. 6(d) (which provides that only one witness may be present in the grand jury room at any time) had been violated by the joint testimony of two law enforcement agents before the grand jury, it was "harmless error," precluding a re-

See ABA, page 8

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chairman of the Trademark Trial and Appeal Board in the Department of Commerce.

A 1952 graduate of Harvard Law School and a practitioner with a New York firm for seven years, he has lectured and written extensively on law-related subjects and judicial administration. His book *Organizing the Non-System: Government Structuring of Criminal Justice Systems* was published in 1977. ■

Bonventre, Hodson Chosen to Be Judicial Fellows

Vincent Martin Bonventre and Thomas S. Hodson have been selected as Judicial Fellows for 1986–87.

Vincent Bonventre

Vincent Bonventre is a graduate of Union College and Brooklyn Law School, and holds an M.A. in government from the University of Virginia. He is a Ph.D. candidate at U. Va., writing a dissertation on the free exercise of religion, and has served as an assistant professor of government there. He was criminal trial counsel with the Judge Advocate General's Corps in 1977–80 while holding the rank of captain in the U.S. Army. At the time of his application to the Judicial Fellows program, Mr. Bonventre was law clerk to Judge Matthew J. Jasen of the New York Court of Appeals. He will be assigned to the FJC's Research Division.

Thomas Hodson at the time of his application was a judge of the highest level trial court in Ohio. A graduate of Ohio University and of the Ohio State University College of Law, he was first elected to the bench in 1979. He has experience in print and broadcast journalism, has been a visiting professor at the Scripps School of Journalism at Ohio University, and has taught or participated in numerous programs on judicial education and court/media relations. He will be assigned to the Supreme Court. ■

Thomas Hodson

Justices, Legislators, Panelists Speak at Recent Federal Circuit Judicial Conferences

The Fourth, Eighth, Ninth, and Tenth Circuit Judicial Conferences were held recently. Participants addressed a wide range of topics affecting the courts' work.

- Chief Justice Warren E. Burger addressed the Fourth Circuit conference in White Sulphur Springs, W. Va. Other speakers included law professors Irving Younger of the University of Minnesota and Laurens Walker of the University of Virginia, who spoke on the relationship between law and the social sciences. There were also presentations on attorney-client privilege. New judges of the circuit were introduced, and a panel of academics reviewed major Supreme Court decisions of the October 1985 term.
- The Ninth Circuit conference in Sun Valley, Idaho, had as its theme the public's view of how the court conducts its business. Justice Byron R. White, Attorney General Edwin Meese, III, and Representative Neal Smith (D-Iowa) were among the conference's special guests. Rep. Smith (chairman of the House Appropriations Committee's subcommittee on appropriations for the de-

See CIRCUITS, page 8

State Court Judge Held Not Immune from Suit

A state court judge was not immune from suit under 42 U.S.C. §§ 1981 and 1983 in a case alleging violations of a court employee's civil rights, the Seventh Circuit held recently in *McMillan v. Svetanoff*, 793 F.2d 149 (7th Cir. 1986).

The case arose when the newly elected judge of an Indiana county superior court took office and dismissed his entire courtroom staff, including McMillan, a court reporter. She sued, alleging that she had been dismissed because she was black and a Democrat. The district court denied the judge's motion to dismiss, and the Seventh Circuit affirmed. "Immunity is only granted when essential to protect the integrity of the judicial process," the circuit court noted, saying that courts must be "hesitant in applying the doctrine [of judicial immunity] to judges acting outside the traditional dispute resolution function." "Hiring and firing of employees is typically an administrative task" rather than one that "implicates the judicial decisionmaking process."

The circuit court distinguished its earlier decision in *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), a case that held a judge was immune from suit for firing a probation officer. In *Forrester*, "because the probation officer advised the judge on substantive decisionmaking, the judge's own discretion was sufficiently at risk to fall within the [judicial immunity] doctrine's purpose .... Because court reporters are not similarly situated such analysis is not dispositive" in the *McMillan* case, the court said.

HATCH, from page 1

per hour on fee awards. According to expert witnesses, this will suffice to attract competent attorneys to meritorious suits while avoiding windfalls for attorneys in protracted litigation over fee amounts.

In the *Harvard Law Review*, you recently warned against politicization of the process of approving Supreme Court nominees. Would you comment on the nomination process as you see it at this juncture?

Injecting political considerations into the confirmation process tends to make the judiciary just another political branch of government. If the Senate treats the judiciary like another political branch, it will take on that character in the eyes of the public. The judiciary's nonpolitical role, which has been the basis of its independence and prestige, should not be jeopardized by partisan considerations.

With regard to President Reagan, most presidents who have served two terms have had a greater impact on the judiciary than Reagan, as have several who have served even less time. For instance, Woodrow Wilson served eight years. He appointed 50 percent of the federal judges. Eisenhower served eight years; he appointed 69.9 percent. Roosevelt—thirteen years—appointed 77.3 percent. Nixon served six years and appointed 45.2 percent. Johnson, five years, appointed almost 54 percent. Kennedy—three years—37.4 percent, Carter—four years—39.1 percent, and Reagan—five and a half years—36.2 percent. Should President Reagan finish out his term, by the end of 1988 he could approach 50 percent, which would put him on the order of, say, Woodrow Wilson or even Lyndon Johnson.

In terms of quality, Reagan's judges have also been excellent. Giving three points for each exceptionally well-qualified judge, two points for every well-qualified, and one point for every qualified (according to the ABA ratings), Reagan has a 1.61 rating for all Article III judges, which is slightly ahead of Carter's 1.60 rating. So he's done very well there.

How is the Senate Judiciary Committee responding to the increased emphasis on alternative dispute resolution?

Given the growing chorus of authoritative voices seeking tort reform and the pressures on all court dockets, we must encourage responsible alternatives. In the long run, however, even alternatives like arbitration are only going to work if the courts remain available as the ultimate resolvers of disputes. The judicial branch serves the irreplaceable function of being the final backstop.

Would codify fee standards.

In June, the Senate Judiciary Committee approved legislation to create an intercircuit tribunal, but with modifications. Chief Justice Burger has said he cannot support the bill in its present form. Is there a version of the bill you favor?

The Chief Justice withdrew his support from the bill after the DeConcini amendment was adopted on a nine-to-eight vote. Senator DeConcini's amendment expanded the panel to thirteen members, who were to be chosen by their respective circuits, rather than nine members chosen by the Supreme Court. I voted against this amendment. In my opinion, the panel is only likely to reduce the Court's burden if it has the Court's trust. If the panel is not reflective of the Supreme Court itself, the Court will be reluctant to refer many cases and will feel compelled to give detailed review to the panel's product. Thus, a panel that does not have the Court's full trust could actually increase the Court's caseload. Since this was to be merely a temporary experiment, it made sense to let the Court try a system with which it would be most comfortable.

Do you favor the creation of special courts—for example, an Article I court to handle Social Security cases?

We hear often about a proposed Social Security court, because there are approximately 1.3 million complaints filed every year under this program. Moreover, I have heard estimates that a significant percentage—as much as 15 to 20 percent of our federal court caseload—is derived from Social Security cases. The House subcommittee considered the idea of a special court in 1982 but the bill died in subcommittee. It failed, as I understand it, because it was an expensive proposal whose ability to reduce the federal court caseload was severely questioned. Our American system of justice has avoided the specialized court systems customary in Europe for good reasons. Courts attuned to narrow issues become little more than bureaucrats administering a special program for a target constituency. We expect our judges to resolve disputes according to broader and more equitable constitutional and legal principles.

As chairman of the Senate Judiciary Committee's Subcommittee on the Constitution, give us your thoughts on the likelihood of any constitutional amendments in the foreseeable future.

See HATCH, page 5

HATCH, from page 4

Well, first the balanced budget amendment that passed the Senate in 1982: It failed by one vote in 1986. Unbalanced budgets for 27 of the last 28 years demonstrates the need for constitutional reform. History indicates that the Nation's founders considered a balanced budget an unwritten constitutional principle.

Another possible constitutional amendment concerns school prayer: There are few areas of constitutional adjudication which are more confused. For instance, the wall-of-separation doctrine has fostered a climate of government hostility toward our traditional heritage of religious faith, and there is a need to restore the correct vision of the First Amendment.

I think there are a lot of other possible subjects as well. For instance, the issue of abortion: I believe that a constitutional amendment may be the only way to give legislative bodies and the people a role in resolving the issue of abortion. The Equal Rights Amendment is another subject. Some feel that this proposal should have been the Twenty-seventh Amendment, but others feel that it would have judicialized and nationalized vast areas of decision making now handled by state, local, and federal legislative and executive governments. There are whole volumes written on that issue. We held over twelve hearings on the ERA and were startled to find out what the ERA really would mean in constitutional terms.

Electoral college reform is still mentioned on occasion. There are those who want direct election of the president. On the other hand, the electoral college does prevent a single populous region from capturing the presidency.

These, I would say, are the best long shots for a new amendment to the Constitution. Who knows? There may be others.

Do you favor a "balanced budget" constitutional amendment?

Yes. Every state save one has such a requirement, and they have worked very well to control deficit spending. Deficits are linked to high taxation, inflation, and unemployment, factors which gradually erode our national strength and freedoms.

You favored several years ago a bill to withdraw the jurisdiction of lower federal courts to issue any order "requiring the assignment of students to schools on the basis of race or which has the effect of excluding any student from any public school on the basis of race." Do you still favor such legislation?

The bill to which you refer, S. 37, is currently pending on the Judiciary Committee calendar after receiving four-to-one approval in the Subcommittee on the Constitution. S. 37, the Public School Civil Rights Act, does not deprive any court of authority to hear and decide cases. It merely employs Article III and section five of the Fourteenth Amendment to withdraw the discriminatory remedy of forced busing from the quiver of remedies to be deployed in discrimination suits. This is in no way novel. The Norris–LaGuardia Act withdrew injunctions as a remedy in certain labor disputes; the Tax Injunction Act and the Johnson Act also withdrew certain remedies with regard to state taxation and regulatory policies. These and numerous similar laws have consistently been upheld as constitutional.

On a related issue, I recently voted against an amendment to deny the Supreme Court any appellate jurisdiction over school-prayer cases. For many reasons, I felt that it was not prudent for Congress to circumscribe the Supreme Court's appellate jurisdiction in this manner.

In your opinion, should the federal courts have their diversity jurisdiction removed as a means for coping with the caseloads?

I think most trial lawyers—those who really have tried cases through the years—would be very loath to see federal diversity jurisdiction taken away from the federal courts. There is a lot of justice which has

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PERSONNEL

Nominations

Diarmuid F. O'Scannlain, U.S. Circuit Judge, 9th Cir., Aug. 11

James L. Graham, U.S. District Judge, S.D. Ohio, Aug. 15

Frederic N. Smalkin, U.S. District Judge, D. Md., Aug. 15

James R. Spencer, U.S. District Judge, E.D. Va., Sept. 9

Appointments

William H. Rehnquist, Chief Justice of the United States, Sept. 26

Antonin Scalia, Associate Justice, Supreme Court of the United States, Sept. 26

D. Lowell Jensen, U.S. District Judge, N.D. Cal., June 27

Stephen F. Williams, U.S. Circuit Judge, D.C. Cir., June 29

Patricia C. Fawsett, U.S. District Judge, M.D. Fla., June 30

Alan E. Norris, U.S. Circuit Judge, 6th Cir., July 1

David Hittner, U.S. District Judge, S.D. Tex., July 1

John E. Conway, U.S. District Judge, D.N.M., July 3

William W. Wilkins, Jr., U.S. Circuit Judge, 4th Cir., July 10

Karen L. Henderson, U.S. District Judge, D.S.C., July 11

Andrew J. Kleinfeld, U.S. District Judge, D. Alaska, July 14

Edwin M. Kosik, U.S. District Judge, M.D. Pa., July 15

Alfred J. Lechner, Jr., U.S. District Judge, D.N.J., July 15

John G. Davies, U.S. District Judge, C.D. Cal., July 18

Douglas P. Woodlock, U.S. District Judge, D. Mass., July 21

William D. Stiehl, U.S. District Judge, S.D. Ill., Aug. 1

Elevations

Paul H. Roney, Chief Judge, 11th Cir., Sept. 3

Solomon Blatt, Jr., Chief Judge, D.S.C., Aug. 18

William J. Bauer, Chief Judge, 7th Cir., Sept. 29

HATCH, from page 5

occurred as a result of that ability to go to the federal courts rather than the state courts in true diversity cases. I, for one, would not want to see diversity jurisdiction removed.

Are there changes you would like to see in the Freedom of Information Act?

Last Congress, the Senate passed my Freedom of Information Act Reform Act unanimously. This bill was drafted to offer more protection to confidential law enforcement informants and investigations. No fewer than five detailed studies have documented that FOIA could be "used by organized crime to evade prosecution and retaliate against informants." Those are the words of the Violent Crime Task Force. In addition, the bill offers some procedural protections for business trade secrets and personal privacy of individuals about whom the federal government keeps extensive files. The FOIA is another statute which would not generate as much litigation if its broad language were clarified—as my bill intends to accomplish.

The new extradition treaty between the U.S. and Great Britain would take away the authority of U.S. judges to refuse extradition of persons accused of violent crimes, but the Senate has not yet ratified the treaty. [On July 17, 1986, the Senate ratified the treaty.] What is your view on this issue?

In my view, we need to retain within our law on extradition some flexibility for judges to review the merits of the individual case. For this reason I have had sincere reservations about this treaty. We have held extensive exploratory hearings before my Subcommittee on the Constitution in which we looked at the potential constitutional and legal issues involved in ratifying a treaty of this character. Furthermore, I am concerned about the Diplock Courts and a variety of other matters that seem to be part of the problem with regard to this treaty. So I am not a rubber stamp for the support of this treaty, although I really do feel we have to do everything we can to fight against terrorism in our society today.

As a high-ranking member of the judiciary committee, is there any one issue related to the federal courts that you would place on your high priority list to change?

Well, I think there is a whole raft of areas where we have a particular interest. For instance, I think something has to be done with regard to section 1983 cases and the whole area of state and municipal liability. We are finding now that municipalities across this country cannot get insurance to protect the public servants who serve them. Moreover, even judges have been subject to these suits recently. My bill to strengthen this aspect of judicial immunity was recently approved by my subcommittee, five to zero. And I think we've got to solve that problem within the near future. [See related story, p. 3.]

We also need to solve the problems of malpractice, legal, medical, and otherwise—the whole area of product liability and tort reform as well. If we don't look into all of these areas and resolve them, we're going to find it very difficult for our society to bear the burden of mounting litigiousness.

I also think in the area of civil rights we have got to resolve the question whether or not we have to use an intent test or an effects or results test to identify discrimination. If we just use a disparate impact test or a statistical analysis test, then it seems to me that we will be unlocking a Pandora's box of litigation in this country like never before, and, I think, to the detriment of almost everybody in the country, including minorities. I do believe that the intent test allows circumstantial evidence. It allows all kinds of direct and indirect proof. That is not all that difficult to prove in true cases of discrimination, but there are those who want to be able to make a case of discrimination merely on the basis of statistics when in fact no actual discrimination existed. The whole area of civil rights is very important to me, because I am a great believer in it, but I think we have got to resolve the conflict between those two standards of proof. And I can accept either resolution, but it is no secret that I would prefer to have an intent test in the law in order to say, "this is a person who discriminates." ■

CALENDAR

Oct. 8–10 Seminar for Bankruptcy Judges
Oct. 8–10 Workshop for New Training Coordinators
Oct. 14–16 First Circuit Judicial Conference
Oct. 22–24 Eastern Regional Seminar for Federal Public and Community Defenders
Oct. 27–29 Workshop for Judges of the Eleventh Circuit
Oct. 29–Nov. 1 Seminar for Federal Defender Investigators
Oct. 30–31 Workshop for Appellate Judges

Positions Available

Staff Counsel, Legal Office, U.S. Supreme Court. Legal work for the justices. Salary from $37,599. Must be attorney with minimum of three years' practice, preferably including federal and constitutional law and appellate experience. Send Form 171, references, and a brief writing sample by Oct. 24 to Elizabeth Saxon, Personnel Officer, Supreme Court of the U.S., Room 3, Washington, DC 20543 (202/479-3404).

* * *

Clerk, U.S. Bankruptcy Court, D. Utah. Salary from $44,430 to $57,759. To apply, send resume by Oct. 20 to Chief Judge Glen E. Clark, U.S. Bankruptcy Court, 350 S. Main, Room 361, Salt Lake City, UT 84101.

EQUAL OPPORTUNITY EMPLOYERS

LEGISLATION, from page 1

termed a "misreading" of the Supreme Court's opinion in *United States v. Will*, 449 U.S. 200 (1980), in which the Court, on constitutional grounds, awarded judges two out of four contested salary adjustments.

Judge Frank M. Coffin (1st Cir.), as chairman of the Judicial Conference's Committee on the Judicial Branch, last year sent a letter, together with new evidence of legislative intent, requesting another ruling from the comptroller general concerning the permanency of section 140. In response, in February 1986, the comptroller general ruled for the fourth time that section 140 is permanent law. Judge Coffin stated that he was "disappointed in the comptroller general's ruling, particularly in light of the new material submitted, but I am pleased with the legislation introduced by Senator Mitchell as well as the interest being taken by other senators to remove this inequity." Although the comptroller general ruled that section 140 is permanent, he simultaneously urged its repeal, stating that it is doubtful Congress intended the effect achieved. Senator Mitchell's bill is based on the repealing language recommended by the comptroller general.

- The Senate Judiciary Committee's Subcommittee on Security and Terrorism held a hearing Aug. 13 on legislation sponsored by the Justice Department concerning the U.S. Marshals Service (S. 2044, H.R. 3870, H.R. 4001). S. 2044 would establish the Marshals Service as a bureau within the Department of Justice. Stanley Morris, director of the Marshals Service, testified in support of S. 2044.

Judges William S. Sessions (W.D. Tex.), chairman of the Subcommittee on Judicial Improvements of the Judicial Conference's Committee on Court Administration, Sam C. Pointer, Jr. (N.D. Ala.), and Dudley H. Bowen, Jr. (S.D. Ga.) also testified at the hearing. Judge Sessions told the Senate subcommittee that many judges find S. 2044's modifications of the authority that is currently contained in 28 U.S.C. § 569 "unsettling." Judge Sessions provided the Senate subcommittee with a proposed amendment to S. 2044, recommended by the Judicial Conference's Court Administration Committee, which will preserve individual judges' authority to compel the presence of deputy U.S. marshals during district court proceedings. Mr. Morris stated that he agreed with the Court Administration Committee's proposed version of language to replace the existing section 569. Copies of prepared statements presented by Judges Sessions and Bowen and by Mr. Morris are available from the Legislative Affairs Office of the AO.

- The House Judiciary Committee's Subcommittee on Criminal Justice will hold hearings on proposed amendments to the Criminal Fine Enforcement Act of 1984 (H.R. 3682). The bill would provide for the collection of magistrate-imposed fines by clerks of court, a proposal opposed by the Judicial Conference. Judge Gerald B. Tjoflat (11th Cir.) will present the views of the Judicial Conference before the House subcommittee. It is the Conference's policy that it is inappropriate for the judiciary to collect criminal fines, except in limited circumstances when it is in the public interest for the courts to perform this executive branch function.

- The House Judiciary Committee's Subcommittee on Criminal Justice has concluded hearings on several bills related to the Racketeer Influenced and Corrupt Organizations Act (RICO) (H.R. 2517, H.R. 5290, H.R. 2943, H.R. 3985, and H.R. 4892). The subcommittee adopted a "clean bill," subsequently introduced as H.R. 5445, which would retain a private civil damage remedy for actual damages plus costs, including reasonable attorney fees. The treble-damage award provided by the existing act would be retained in suits brought by the attorney general or by state attorneys general. H.R. 5445 fixes a two-year statute of limitations; establishes derivative liability of parent organizations for illicit activity of their employees and agents, if the parent organization knew of and derived benefit from the illicit activity; and requires the plaintiff to establish fraud by clear and convincing evidence. H.R. 5445 would also change the statute's name to the Pattern of Illicit Activity Act.

- Representative Carlos J. Moorhead (R-Cal.) introduced a bill to establish a Federal Courts Study Commission (H.R. 5467). The bill is identical to one previously introduced in the Senate by Senators Strom Thurmond (R-S.C.) and Howell Heflin (D-Ala.). ■

THE SOURCE

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

Administrative Office of the U.S. Courts, *1986 Annual Report of the Director.*

✓ Brennan, William J., Jr. "The Fourteenth Amendment." Address to Section on Individual Rights and Responsibilities of the ABA, Aug. 8, 1986.

Burger, Warren E. "The High Cost of Prison Tuition." 40 *University of Miami L. Rev.* 903 (1986).

✓ Burger, Warren E. Remarks to the ABA, Aug. 11, 1986.

Hug, Procter, Jr., National Judicial College Jackson Lecture, Aug. 8, 1986.

Kaufman, Irving R. "Focusing Legislative Attention on the Administrative Needs of the Courts." Institute of Judicial Administration, Aug. 9, 1986.

✓ Powell, Lewis F., Jr. Remarks to American Bar Association Litigation Section meeting, Aug. 12, 1986.

Stevens, John Paul. "The Supreme Court of the United States: Reflections After a Summer Recess." 27 *South Texas L. Rev.* 447 (1986).

CIRCUITS, from page 3

partments of Commerce, State, Justice, and the Judiciary) discussed the fiscal implications for the judiciary of Gramm–Rudman–Hollings, and Chief Judge James R. Browning gave the state of the circuit address. A panel considered "The Judiciary and Society: Responsibility On and Off the Bench"; another group discussed "The High Profile Cases as Seen by the Judge, the Lawyer, and the Media," giving their views about whether it is possible to protect all constitutional rights and maintain judicial and journalistic independence. Members of the conference from each of the districts held separate meetings to discuss the state of the administration of justice in their district.

• Speakers at the Tenth Circuit conference in Denver were Justice Byron R. White, circuit justice for that circuit, Chief Judge Ruggero J. Aldisert (3rd Cir.), A. Leo Levin, director of the FJC, and L. Ralph Mecham, director of the AO. The program included talks and panel discussions on topics such as moral vision and the reconciliation of professionalism, special admission to practice in the federal courts, and the First Amendment.

• The list of speakers at the Eighth Circuit conference in Minneapolis was led by Justice Harry A. Blackmun, circuit justice for that circuit. Chief Judge Donald P. Lay reported on the work of the U.S. Judicial Conference, and FBI Director William H. Webster (a former judge on the Eighth Circuit) spoke on national security concerns in relation to the First Amendment. Judge William W. Wilkins, Jr. (4th Cir.), chairman of the U.S. Sentencing Commission, reported on progress made in drafting sentencing guidelines and answered questions. Law professors Daniel J. Meador of the University of Virginia and John E. Sexton of New York University debated the question whether an intercircuit panel should be established. ■

ABA, from page 2

versal of the conviction on appeal. H.R. 5367 would provide for dismissal of an indictment under such circumstances.

• The ABA endorsed a proposed change in the time period between when an offer of judgment under Fed. R. Civ. P. 68 is made and when it must be accepted or rejected. Presently the rule states that an offer may be made "[a]t any time more than 10 days before the trial begins." The ABA proposal would change the language concerning the timing of the offer so that the offer could be made "at any time more than 60 days after service of the summons and complaints . . . but not less than 60 days before trial." Now, both plaintiffs and defendants allegedly have difficulty concluding settlement negotiations between the time of the offer of judgment and the scheduled trial date (especially where insurance is involved). Sanctions under the rule would also be increased. The "trigger criterion" for imposition of sanctions would remain the same (automatic if the offeree obtains at trial a result less favorable than the rejected settlement offer), but the court would not impose sanctions on its own motion, only upon the offeror's.

For further information on these matters contact Alice O'Donnell, 1520 H. St., N.W., Washington, DC 20005, or FTS 633-6359. ■

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THE THIRD BRANCH

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THE THIRD BRANCH

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Justices Discuss Constitution, Affirmative Action, Death Penalty, Bicentennial Celebration Plans at Circuit Judicial Conferences

Justices of the Supreme Court have spoken at circuit judicial conferences held in recent months. Reprinted below are excerpts from the remarks of several of the justices made at recent circuit conferences for which texts were available.

Justice Byron R. White at the Ninth Circuit Judicial Conference, Aug. 22, 1986, Sun Valley, Idaho

The Constitution doesn't require a Supreme Court justice to be a lawyer. All of them have been—of one kind or another. Nor does it require that a justice have any prior judicial experience. And I hope that presidents will not abandon the notion that from time to time a lawyer should be appointed from the bar who has no judicial experience. Such lawyers are closer to the public, they are closer to reality, and they bring a very different point of view and attitude to the Court than a circuit court judge does. I don't mean to insult circuit or district court judges, but they are just different. Judges tend, when they have been on the bench for a while, to become set in their ways; they may think they are more flexible than they used to be, but I doubt it. That goes for me, too. It was a wonderful thing to put Lewis Powell on the Court, and I hope that presidents don't forget to appoint some justices straight from the practice. It will make the Court more responsive, for the Court must remember that its decisions aren't going to last if they won't stand the test of time....

See JUSTICES, page 2

Arthur Miller Describes Federal Rules Revision Process, Changes in Law School Environment

Arthur R. Miller is a professor of law at Harvard Law School, where he graduated magna cum laude. He received his B.A. from the University of Rochester and, following law school, practiced in New York, then taught at the universities of Minnesota and Michigan before joining the faculty at Harvard. Professor Miller is the coauthor with Charles Alan Wright of Federal Practice and Procedure *and the author of numerous other law-related books and articles. He was the reporter to the Advisory Committee on Civil Rules of the Judicial Conference of the United States and a member of a special advisory group to the Chief Justice on federal civil litigation. He is the host of a syndicated television show called "Miller's Court," a legal expert for "Good Morning, America," and has lectured at FJC seminars for newly appointed district judges.*

Professor Arthur R. Miller

You have been a lecturer at the Center for many years now, speaking on such matters as federal rules, class actions, and jury trials. Based on this and your involvement in the seminars for newly appointed district judges, what are your reactions to the federal judiciary today?

It is always a special treat to be part of the faculty at the seminars for newly appointed judges. They seem to me to be eager and anxious to develop their judging tools to the finest. I have especially been impressed in the recent sessions with the intensity of their involvement and the tremendous range of experi-

See MILLER, page 8

Judicial Conference Requests Judgeships, Approves '88 Budget

The Judicial Conference of the United States asked the Congress to authorize 56 additional district court judgeships and 13 additional judgeships on the courts of appeals.

The Conference also resolved at its semiannual meeting in September that Congress should ensure that funds are always available to fulfill the constitutionally created right to a jury trial. (Civil jury trials were temporarily suspended for five weeks last July due to a threatened exhaustion of juror funds.) In other actions, the Conference:

- Approved a fiscal year 1988 budget of $1.3 billion, an increase of 14 percent above the amount recently approved by the Senate's Committee on Appropriations for fiscal year 1987. The Conference also agreed to certain cost reduction measures in response to the Gramm–Rudman–Hollings Act, including staffing limitations and restrictions upon expenditures for travel by judges and judicial branch employees.
- Approved a resolution recording their "esteem, respect, and affection for the Honorable Warren E. Burger and their appreciation of his contribution to the administration of Justice and to the Nation."

See CONFERENCE, page 12

JUSTICES, from page 1

The Framers of the Constitution opted for a limited government. That is, they thought there ought to be some ground rules for those who want to govern, rules that would be enforceable.... The Framers opted for dividing up political power. They kept the states as independent entities. They divided the federal government into distinct parts. And then they imposed very important ground rules. The courts, they anticipated, would enforce these rules, as well as this division of powers. This gave the judiciary an authority that was new to the world at that time, an authority that gives the judiciary a role in how the government is to be run. One of the problems with this is that some of the provisions of the Constitution are obviously minority-oriented and to enforce them you must disagree with the majority....

If this decision is to have a Constitution and ground rules that limit the majority, it is inherent in that system that judges must decide high-profile cases that stir up terrific storms. But that has been our choice. Judges would have plenty to do if they did nothing but find the historical facts and had a perfectly plain rule of law to guide their decision. But we, the judges in our country, must make a great deal of law in deciding cases. Congress can't write laws that are perfectly clear, and many times Congress can't arrive at precise decisions and must go up one level of generality, creating an ambiguity that ends up on the judge's desk. Or Congress deliberately uses general language and leaves it to the courts or the administrative agencies to provide the specifics. Most of the antitrust law, for example, you find in the case books. You can't find out what the Sherman Act means by reading it. Nor can you find out what an unfair labor practice is by perusing the statute. You must go to the decisions of the administrative agency and the courts. Similarly, most of the constitutional law is not to be found by reading the Constitution, which is a very short document. To find the constitutional law you must read the cases. This is judge-made law, a function that judges are performing every single day, and unavoidably so.

"You can't find out what the Sherman Act means by reading it. Nor can you know what an unfair labor practice is by perusing the statute. ... Similarly, most of the constitutional law is not to be found by reading the Constitution, which is a very short document."

—Justice Byron R. White

Justice Thurgood Marshall at the Second Circuit Judicial Conference, Sept. 5, 1986, Bolton Landing, New York

I believe all of the participants in the current debate about affirmative action agree that the ultimate goal is the creation of a "colorblind" society. From this common premise, however, two very different conclusions have apparently been drawn: the first is that "race-conscious" remedies may not be used to eliminate the effects of such discrimination against Negroes and other minority groups in American society. This conclusion has been expanded into the proposition that courts and parties entering into consent decrees are limited to remedies which provide relief to identified individual victims of discrimination. But the second conclusion which may be drawn from our common preference for a colorblind society is that the vestiges of racial bias in America are so pernicious, and so difficult to remove, that we must take advantage of all the remedial measures at our disposal.

The difference between these views may be accounted for, in part, by a difference of opinion as to how close we presently are to the "colorblind" society to which we aspire. I believe that, given the position from which America began, we still have a very long way to go....

Obviously, I too believe in the colorblind society, but it has been and remains an aspiration. It is a goal toward which our society has progressed uncertainly.... The argument against affirmative action is an argument in favor of leaving that cost to lie where it falls. Our fundamental sense of fairness, particularly as it is embodied in the guarantee of equal protection of the law, requires us to make an effort to see that those costs are shared equitably while we continue to work for the eradication of the consequences of discrimination....

"I ... believe in the colorblind society, but it has been and remains an aspiration. It is a goal toward which our society has progressed uncertainly."

—Justice Thurgood Marshall

The problem of discrimination and prejudice in America is too deep-rooted and too widespread to be solved only in the courts, or only through the intervention of federal authority to convince the recalcitrant that justice cannot be indefinitely delayed.

See JUSTICES, page 6

THE THIRD BRANCH

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Co-editors

Alice L. O'Donnell, Director, Division of Inter-Judicial Affairs and Information Services, Federal Judicial Center. Peter G. McCabe, Assistant Director, Program Management, Administrative Office of the U.S. Courts.

Advisory Committee of Judges Completes Report Appraising Performance, Structure of Administrative Office of U.S. Courts

The Ad Hoc Advisory Committee on the Administrative Office of the U.S. Courts has submitted its final report. The committee was appointed by Chief Justice Burger in December 1985 to advise AO Director L. Ralph Mecham in his examination of the AO's effectiveness in serving the needs of the federal judiciary and court personnel. Members of the committee were Judge Edward J. Devitt (chairman) and Chief Judges James Lawrence King, Robert J. McNichols, and Jack B. Weinstein.

The committee first sought the views of the judges by mail and received responses from 185 Article III judges. Bankruptcy judges, magistrates, district and circuit executives, clerks of court, public defenders, and probation officers also responded, and 18 members of senior staff at the AO were interviewed.

The most frequent criticism was the perception by some judges and others of the absence of a cooperative attitude and helpful disposition by some AO employees in responding to requests for assistance. The committee noted, however, that Director Mecham and his associates are taking steps to make the AO more responsive to the needs of the courts and judges, with special emphasis being placed upon employee attitudes. Director Mecham has informed the committee that he has advised his staff to adopt a rebuttable presumption that whatever is asked for should be given, and to stress his "five P's": be Prompt, Polite, Professional, Positive, and Proud of your work.

The report notes that some criticism of the AO may arise from the differing expectations that individual judges, the Judicial Conference, Congress, and other agencies have for the AO. In implementing policies determined by the Judicial Conference and by Congress, "the AO, at times, finds itself caught in the middle—between the Conference and the Congress on the one hand, and the judges and others in the Judicial Branch who may fail to appreciate those requirements, on the other," the report noted.

Among the areas dealt with in the report are the increase in size of the AO and its relations with other agencies. The committee noted that the AO is operating with only 538 of its 583 authorized positions, making its size less than the 94 percent of authorized staffing level applied to the courts by a policy of the Judicial Conference. Moreover, the AO's growth has been less than that of the judiciary in general, and its

See AO, page 12

Nominations Being Accepted for Devitt Distinguished Service to Justice Award

Nominations for the fifth annual Edward J. Devitt Award for Distinguished Service to Justice are open until Dec. 31, 1986. The members of this year's selection committee are Justice William J. Brennan, Jr., Chief Judge Charles Clark (5th Cir.), and Judge Devitt (chairman). The award is given to an Article III federal judge each year by West Publishing Company to recognize accomplishments and professional activities that have contributed to the cause of justice. It is named for Edward J. Devitt, senior judge of the U.S. District Court for the District of Minnesota, who served as chief judge of that court for more than 20 years. Past recipients of the award include Judge Albert B. Maris (3rd Cir.), Judge Walter E. Hoffman (E.D. Va.), Judge Frank M. Johnson, Jr. (11th Cir.), and Judge William J. Campbell (N.D. Ill.). Chief Justice Warren E. Burger was honored by a special award in 1983, and a special posthumous award was made in 1985 in memory of Judge Edward A. Tamm (D.C. Cir.).

Nominations for the 1986 award should be submitted to Devitt Distinguished Service to Justice Award, P.O. Box 43810, St. Paul, MN 55164–0526. ■

1987–88 Judicial Fellows Program Announced

Young professionals interested in judicial administration are invited to apply for the 1987–88 Judicial Fellows Program.

Now entering its fourteenth year, and patterned after the White House and Congressional Fellowships, the Judicial Fellows Program offers unique opportunities for highly talented professionals with multidisciplinary backgrounds to work in the federal system.

Fellows will be chosen by a national commission to work at the Supreme Court in the office of the Administrative Assistant to the Chief Justice, the Federal Judicial Center, or the Administrative Office of the U.S. Courts.

Candidates should have at least one postgraduate degree, at least two years' professional experience, and preferably some familiarity with the federal judicial system. Stipends for the fellowship are based on salary history and comparable government salaries. The 1987–88 fellowships will begin in September 1987 and last one year. To ensure consideration, applications should be received by Dec. 12, 1986; selections will be made in January 1987.

An application form, information, and literature on the program are available on request from Charles W. Nihan, Executive Director of the Judicial Fellows Commission, Federal Judicial Center, 1520 H Street, N.W., Washington, DC 20005.

Bicentennial Roundup: Speakers, Law School Essay Contest Planned

The following items of interest have been announced by the Commission on the Bicentennial of the U.S. Constitution and other parties planning for the observance of the bicentennial.

• Chief Justice Warren E. Burger, chairman of the Commission on the Bicentennial of the Constitution, has submitted the commission's first full year's report, entitled *Preparation for a Commemoration*. The report discusses programs and projects initiated during the commission's first full year as well as its future plans.

• Judge Arlin M. Adams (3rd Cir.), as chairman of the Bicentennial Judicial Speakers Committee, has corresponded with all federal judges and full-time federal magistrates concerning their possible participation as speakers at events connected with the observance of the bicentennial. The judges and magistrates are being asked to indicate whether they would be willing to participate in the speakers program, and to indicate the kinds of bicentennial themes in which they are interested. The Bicentennial Commission and the FJC will be able to assist participating judges by providing resource material. (Two bibliographies on the Constitution's writing and ratification have already been prepared by and are available from the FJC). Judges wishing to participate or comment on the speakers program should write to Judge Arlin M. Adams, Federal Judicial Center, Attention: Office of the Director, 1520 H St., N.W., Washington, DC 20005.

• West Publishing Company, in cooperation with the commission, has announced its sponsorship of an essay competition for law school students. The first prize will be $10,000, second prize $2,500, and third prize $1,000. The competition is open to all students enrolled in a J.D. or LL.B. degree program in an ABA- or state-approved law school. The subject for the essay is, "Does the allocation of power between the federal and state governments and among

See BICENTENNIAL, page 12

Senate Removes Judge Claiborne from Office

Chief Judge Harry E. Claiborne (D. Nev.) was convicted by the Senate on Oct. 9 on three of the four articles of impeachment voted by the House and ordered removed from office. The Senate did not vote to convict on the article that said the judge's felony conviction on tax-evasion charges was, in and of itself, sufficient basis to impeach him.

On June 18, 1986, the Ninth Circuit Judicial Council certified to the Judicial Conference of the United States that Judge Claiborne had "engaged in conduct which might constitute grounds for impeachment," and the Judicial Conference on June 30 certified to the Speaker of the House of Representatives that consideration of the judge's impeachment "may be warranted." The House of Representatives agreed to the four articles of impeachment on July 22. ■

State Justice Institute Holds First Board Meeting

Nine of the eleven members of the State Justice Institute board took their oaths of office at the U.S. Supreme Court Sept. 29. Chief Justice Warren E. Burger, who did much to promote the establishment of this organization through public addresses and endorsements sent to Congress, administered the oaths. Pictured above with Chief Justice Burger are the board members (l. to r.): Chief Judge John F. Daffron, Jr. (12th Judicial Circuit, Chesterfield County, Va.), Lawrence H. Cooke (former chief judge of the New York Court of Appeals), Chief Justice Warren E. Burger, Larry P. Polansky (Executive Officer, District of Columbia Courts), Sandra Ann O'Connor (state's attorney for Baltimore County, Md.), Justice James Duke Cameron (Supreme Court of Ariz.), Presiding Judge Janice L. Gradwohl (County Court, Third Judicial District, Lincoln, Neb.), Resident Judge Rodney A. Peeples (Second Judicial Circuit, Barnwell, S.C.), Chief Justice Clement C. Torbert, Jr. (Supreme Court of Ala.), Prof. Daniel J. Meador (University of Virginia Law School).

Organizational plans were made at a board meeting following the Sept. 29 ceremonies. Chief Justice Torbert was elected chairman of the board and Judge Peeples vice-chairman. With an initial budget of $7.2 million for fiscal year 1987, the Institute is now operational. Two more board nominations are to be made by President Reagan.

Draft Guidelines Published, Plea Hearing Held

The Sentencing Commission published a preliminary draft of sentencing guidelines in the *Federal Register* on Oct. 1, 1986. A copy of the draft was also mailed to each member of Congress, Article III judge, chief U.S. probation officer, U.S. attorney, and federal public defender, and to hundreds of private defense attorneys, victims' advocates, criminal justice specialists, private citizens, law enforcement organizations, and interested organizations such as the NAACP and ACLU.

NEWS FROM THE SENTENCING COMMISSION

The commission voted to publish a preliminary draft far in advance of any legal requirement to do so in order to allow for the widest possible public comment and analysis on possible formats, structures, and approaches in developing a guideline system. The FJC committee on education about the 1984 crime control legislation wrote separately to all judicial branch recipients, summarizing the draft's contents and urging them to review it and provide the commission whatever comments they wished.

One of the most pressing policy issues the commission must resolve is the role of plea agreements in a sentencing guideline system. Because it does not want plea agreements to undermine sentencing guidelines, Congress has directed the commission to promulgate general policy statements for consideration by federal judges in deciding whether to accept or reject plea agreements, in order to promote responsible plea agreement practices that do not perpetuate unwarranted sentencing disparities. To that end, the commission held its fifth public hearing in Washington, D.C., on Sept. 23, on the appropriate limits of judicial scrutiny in plea agreements and on related issues. Witnesses included Justice Department officials (including U.S. attorneys), representatives of defender organizations, private attorneys, and law professors. ■

NOTEWORTHY

Attorney access to argument tapes. In response to requests from members of the bar, the Ninth Circuit has changed its policy concerning cassette tapes of oral argument. Attorneys will soon be able to purchase copies of these tapes from the clerk's office. The court's previous policy had been to allow attorneys only to listen to the tapes and have them transcribed. Such tapes are not an official record of the court proceeding. (As noted in Ninth Circuit News.)

* * *

State sentencing guidelines for youths. A study financed by the Justice Department's Office of Juvenile Justice and Delinquency Prevention has recommended that states adopt sentencing guidelines for young offenders. The study was overseen by Ralph A. Rossum, a professor of government at Claremont McKenna College in Claremont, Cal. A 10-member panel of scholars and lawyers drafted the guidelines, which should be published later this year. The Justice Department has not yet formally endorsed the panel's recommendations.

* * *

More lawyers. The American Bar Foundation reports that the number of lawyers in the U.S. increased from 542,205 in 1980 to 655,191 by the beginning of 1985, an increase of 21 percent. In 1985, 70 percent of lawyers were in private practice, and less than 4 percent were employed by the judiciary. Nearly 10 percent of lawyers worked in private industry; slightly more than 8 percent worked in government; 3 percent worked for legal aid organizations, private associations, and special interest groups; and 5.5 percent were retired or inactive. ■

PERSONNEL

Nominations

Patrick J. Duggan, U.S. District Judge, E.D. Mich., Sept. 11
Douglas H. Ginsburg, U.S. Circuit Judge, D.C. Cir., Sept. 23
Alex T. Howard, Jr., U.S. District Judge, S.D. Ala., Sept. 23
Bruce M. Selya, U.S. Circuit Judge, 1st Cir., Sept. 26
Joseph F. Anderson, Jr., U.S. District Judge, D.S.C., Sept. 26
William L. Dwyer, U.S. District Judge, W.D. Wash., Sept. 26
Reena Raggi, U.S. District Judge, E.D.N.Y., Oct. 3

Confirmations

Joel F. Dubina, U.S. District Judge, M.D. Ala., Sept. 12
Alan C. Kay, U.S. District Judge, D. Hawaii, Sept. 12
Richard B. McQuade, Jr., U.S. District Judge, N.D. Ohio, Sept. 12
Diarmuid F. O'Scannlain, U.S. Circuit Judge, 9th Cir., Sept. 25
James L. Graham, U.S. District Judge, S.D. Ohio, Sept. 25
Frederic N. Smalkin, U.S. District Judge, D. Md., Sept. 25
Douglas H. Ginsburg, U.S. Circuit Judge, D.C. Cir., Oct. 8
Bruce M. Selya, U.S. Circuit Judge, 1st Cir., Oct. 8
Joseph F. Anderson, Jr., U.S. District Judge, D.S.C., Oct. 8
Patrick J. Duggan, U.S. District Judge, E.D. Mich., Oct. 8
Alex T. Howard, Jr., U.S. District Judge, S.D. Ala., Oct. 8
James R. Spencer, U.S. District Judge, E.D. Va., Oct. 8

Appointment

Ronald R. Lagueux, U.S. District Judge, D.R.I., Sept. 5

Senior Status

James Hunter III, U.S. Circuit Judge, 3d Cir., June 30
Otto R. Skopil, Jr., U.S. Circuit Judge, 9th Cir., June 30
Laughlin E. Waters, U.S. District Judge, C.D. Cal., July 6
Warren J. Ferguson, U.S. Circuit Judge, 9th Cir., July 31
Charles E. Simons, Jr., U.S. District Judge, D.S.C., Aug. 17

JUSTICES, from page 2

Securing equality requires the attention, the energy, and the sense of justice possessed by all the well-intentioned citizens of the society. They need to be assured that the government, the law, and the courts stand behind their efforts to overcome the harm bequeathed to them by the past. They need to know that encouragement and support, not criticism and prohibition, are available from those who are sworn to uphold the law. Courts must offer guidance, to the best of our ability, to the attempts by individuals and institutions to rectify the injustices of the past. We must labor to provide examples of solutions that may work, and approaches that may be tried. If we fail, then we delay or postpone altogether the era in which, for the first time, we may say with firm conviction that we have built a society in keeping with our fundamental belief that all people are created equal.

Justice Lewis F. Powell, Jr., at the Eleventh Circuit Judicial Conference, May 12, 1986, Atlanta, Georgia

I now venture some observations about capital cases in this circuit....

Although the "delay problem" ... remains serious, constructive steps have been taken in the circuit to ameliorate it. Only recently, when I mentioned that I would be here today, the Chief Justice asked me to congratulate the circuit, and Chief Judge Godbold in particular, on the way you are addressing the problem.

I mention only highlights of your action that seem to us in Washington to be so important. Both Florida and Georgia have created state–federal judicial councils—informal liaison groups of state and federal judges—to oversee this problem. It may be that Alabama has done likewise.

Perhaps the most critical need is an organized program for the representation by counsel of death row prisoners. The Florida bar is to be commended, and particularly Bill Henry, its president in 1983–84, for leadership in seeking solutions. My understanding is that, because of the inadequacy of using volunteer lawyers, the Florida legislature—at the request of the state supreme court and the bar—has created an office of "capital collateral representation," with state funding. I believe that Georgia and perhaps Alabama have followed suit.

An important state development was the amendment of Florida's rules of criminal procedure to require that a prisoner seeking collateral review must file his petition within two years after his judgment and sentence become final—with limited exceptions.

Your circuit was the first to install a computerized program for keeping all federal judges advised of the status of each case. I believe this is called the Capital Case Status Report. Also you have inaugurated the prior assignment of district court judges and court of appeals panels to particular cases....

"No higher duty exists in the judging process than to exercise meticulous care when the sentence may be, or is, death."

—Justice Lewis F. Powell, Jr.

No higher duty exists in the judging process than to exercise meticulous care when the sentence may be, or is, death. This can and should be done, preserving fully all constitutional rights, without permitting the process of repetitive—and often frivolous—review to drag on for years.

Justice William J. Brennan, Jr., at the Third Circuit Judicial Conference, Sept. 23, 1986, Princeton, New Jersey

I have lived now for several years with arguments supporting and opposing the constitutionality of capital punishment. They come in increasing numbers these days, as the population of death row increases, and executions are now being carried out by the several states....

I have read countless briefs and listened to innumerable oral presentations, and I have been persuaded and remain persuaded that death is unconstitutional. I reach that conclusion based on arguments of lawyers who I am convinced have made the better, and I mean by that the better reasoned, case. Now, this is not to suggest, of course, that underneath the robes I am not—we are all human beings with personal views and moral sensibilities, yes, and religious scruples—but it is to say that above all, I am a sitting judge, required to pass on that issue.

"I am convinced that law can be a vital engine, not merely of change, but of civilizing change."

—Justice William J. Brennan, Jr.

I am convinced that law can be a vital engine, not merely of change, but of civilizing change. That is because law, when it merits the synonym justice, is based on reason and insight. Decisional law evolves as litigants and judges develop a better understanding of the world in which we live. Sometimes, these insights appear pedestrian, such as when we recognize, for example, as we have, that a suitcase is to be treated more like a home than it is like a car.

On occasions those insights form a mens rea, such as when we finally understand that separate can never be equal. I believe that these steps which are the building blocks of progress are fashioned from a great deal more than the changing views

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of judges over time. I believe that problems are susceptible to rational solution if we work hard at making and understanding arguments that are based on reason and experience.

And with respect to the death penalty, I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies its humanity and dignity of the victim and transgresses the prohibition for that reason against cruel and unusual punishment. For me, that day will be a great day for the country and a great day for our Constitution.

Chief Justice Warren E. Burger at the Fourth Circuit Judicial Conference, June 27, 1986, White Sulphur Springs, West Virginia

Today I want to talk about the Bicentennial programs and projects that are either underway or contemplated. * * *

It seemed to me, from the outset, that we had to distinguish between the kind of celebration we had in 1976, where fireworks and parades were necessarily predominant, and the kind of programs we want for the Bicentennial of the Constitution. There may be some fireworks and there may be some parades, but the important thing here is to give ourselves—and I do not mean just voters out there, I mean all of us—a history and civics lesson about how we got this Constitution and how difficult it was to get it. * * *

[W]e are trying to reach everyone, from the kiddies in the grade schools, the high schools, and up through undergraduate colleges and law schools. We will have a national speakers bureau and every federal judge and every state judge will be invited to tell this story to the community luncheon clubs, the Rotary, the Exchange, the PTA, and the Girl and Boy Scouts. * * *

I have met with some of the leading television and press people, and I have told them, "Here's the story. We know the story. You know how to tell it. Will you please help?" * * *

Congress has given us $12 million, in contrast to the more than $200 million available for the celebration in 1976. Getting more millions in the present fiscal climate is not going to be easy; as you know, we recently had problems securing money for jury fees. For that reason, we are going to have to call on every member of the legal profession of this country to familiarize himself or herself with the details of some of these great episodes and then see to it that this story is told. ■

"It seemed to me . . . that we had to distinguish between the kind of celebration we had in 1976 . . . and the kind of programs we want for the Bicentennial of the Constitution. . . . [T]he important thing here is to give ourselves . . . a history and civics lesson about how we got this Constitution . . . ."

—Chief Justice Warren E. Burger

THE SOURCE

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

Brennan, William J., Jr. "The Constitution of the United States: Contemporary Ratification." 27 *South Texas L. Rev.* 433 (1986).

Brennan, William J., Jr. "What's Ahead for the New Lawyer?" 47 *University of Pittsburgh L. Rev.* 705 (1986).

Cannon, Mark W., and David M. O'Brien (eds.). *Views from the Bench: The Judiciary and Constitutional Politics.* Chatham House Publishers, 1985.

Nathanson, J. Edmond. "Congressional Power to Contradict the Supreme Court's Constitutional Decisions: Accommodation of Rights in Conflict." 27 *William & Mary L. Rev.* 331 (1986).

Oliphant, Robert E. "Rule 11 Sanctions and Standards: Blunting the Judicial Sword." 12 *William Mitchell L. Rev.* 731 (1986).

Sand, Leonard B., and Steven Alan Reiss. "A Report on Seven Experiments Conducted by District Court Judges in the Second Circuit." 60 *New York University L. Rev.* 423 (1985).

Toran, Janice. "Settlement, Sanctions, and Attorney Fees: Comparing English Payment into Court and Proposed Rule 68." 35 *American University L. Rev.* 301 (1986).

Weinstein, Jack B. "From the Bench: Warning—Alternative Dispute Resolution May Be Dangerous." 12 *Litigation* 5 (Spring 1986).

Weisberger, Joseph R. "The Twilight of Judicial Independence—*Pulliam v. Allen.*" 19 *Suffolk University L. Rev.* 537 (1985).

Health Plan Open Season

An open season to enroll in or change health insurance plans will take place from Nov. 10 to Dec. 5, the AO has announced.

CALENDAR

Nov. 5–7 Workshop for Training Coordinators of the Eleventh Circuit

Nov. 10–14 Orientation Seminar for New Assistant Federal Defenders

Nov. 12–14 Seminar for Bankruptcy Judges

Nov. 17–19 Jury Management Workshop

Nov. 19–21 Workshop for Judges of the Fifth Circuit

Dec. 3 Judicial Conference Advisory Committee on Appellate Rules

Dec. 3–5 Workshop for Judges of the Eighth and Tenth Circuits

Dec. 4 Judicial Conference Committee on the Judicial Branch

Dec. 4–6 Workshop for Judges of the Sixth Circuit

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ences they bring to the federal bench.

What were your contributions to getting out the *Manual on Multidistrict Litigation?* Did you enjoy that work?

I think working on the manual was not only one of the most enjoyable jobs but actually transformed my life. I go way back to before there was a manual, when a group of judges put together a draft. It was after the *Electrical Supply Cases* and when Judge Alfred Murrah was director of the Federal Judicial Center. He sent around a draft with a letter to a group of academics, and I was then teaching at the University of Minnesota. It must go back over 20 years. I started reading this draft and I got so intrigued by it that I wrote Judge Murrah. And he must have been intrigued by my answer, because he then appointed me to a committee that worked almost as a liaison between the American Bar Association and the federal judges. I used to shuttle between the lawyer group, who were very apprehensive about the manual, and the judge group, particularly Judge William Becker (W.D. Mo.). I would shuttle back and forth and try to negotiate the lawyers' views and the judges' views. That ultimately produced the first manual; then I just sort of hung around over the years to help in the revisions.

Judge Becker is a wonderful man. He taught me more about what federal judges really do with their cases than almost anyone I know.

How many revisions were there?

I think we went through four or possibly five revisions of the first edition. And now Judge Pointer of Alabama has led the team to produce the second edition, which I must confess I have not been as active on as I was with the first edition. I think Judge Pointer is one of the paragons of the federal judiciary.

You have been a reporter for the Judicial Conference Advisory Committee on Federal Rules of Civil Procedure for several years. Would you comment on your input to the work of this committee? Do you really feel the public hearings are helpful? Do members of the Advisory Committee, the Supreme Court, and finally the Congress pay that much heed to comment received at the public hearings?

Being the reporter means that, in a sense, I am the "worker bee" of the group. It is my job to execute the wishes of the committee and to do the drafting both of the rules and the notes and the background memoranda. The reporter also affects the agenda of the committee. I had the wonderful experience of working with Judge Walter Mansfield of the Second Circuit, who is a terrific chairman and who has the respect of the entire Advisory Committee.

"I think in some limited contexts some of the local rules are a bit pushy; they butt up against the national rules."

The public hearings are really a mixed bag. Sometimes they provide very valuable insights, insights as to whether a given rule is effectively drafted, or has caused confusion, or needs some brushing up. The hearings also give insight into what the bar thinks about the work product. On the other hand, a lot of what goes on before the committee in those public hearings could just as well be done on paper without the need for the hearings. A lot of it is posturing by representatives of interested groups, but I think on balance you need the public hearings. They give a sense of life and reality to the process.

Does a lawyer sometimes appear who just wants to make a point for personal reasons?

Yes, like any public hearing you get a tremendous variety of people. So people are sometimes there for a client, or to push a pet project. Still there is enough wheat in the chaff to justify it. Psychologically it is very important to have the process open, and I think one of the reasons that the Congress is very much involved in thinking about federal rule making these days is that there have been accusations that it is a closed process. So I think psychologically and for the good of the profession that opening up the process through public hearings is a good thing.

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Illustrative Rules Governing Judicial Misconduct Published by FJC

The Center recently published *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability*, a report issued by a special committee of the Conference of Chief Judges of the U.S. Courts of Appeals, chaired by Chief Judge James R. Browning and including Judge Collins J. Seitz and Chief Judge Charles Clark. Anthony Partridge of the Center's Research Division served as reporter.

The illustrative rules, and accompanying commentary, reflect experience with the complaint procedure mandated by the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 and serve as a means of sharing both information and ideas. The special committee expressed the view that experimentation with various approaches under the statute is desirable and in conformity with congressional intent. Accordingly, the committee did not urge that the illustrative rules be adopted on a uniform basis, but rather expressed the hope that they might prove a useful reference for those working on revisions of local rules.

Copies of the illustrative rules can be obtained by writing to Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (13 oz). Please do not send an envelope.

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Do you feel there is any justification for criticism that some local rules go beyond the national rules?

I think in some limited contexts some of the local rules are a bit pushy. They butt up against the national rules. I think the issue is distorted; I think it is overstated. Some of the rules, I would say, violate the limitation on the local rule-making power. But I don't think this is a major problem. I don't think the inconsistency is as widespread as many people think it is. We've had a tremendous lack of judicial challenges to local rules. You know, we've had rules in most districts limiting the number of interrogatories, which many people say is inconsistent with federal rule 33, which contains no limitation on the number of interrogatories. There seems to be a reluctance to take the issue to the judiciary. If they challenge it, we might get some jurisprudence as to where the line between the local and the national rules is, otherwise that line is always going to be indistinct. Nobody really knows where the line is. I think the new rule 83, which was recently amended, improves the process of local rule making and should quiet some of the criticism.

When you refer to challenges to the local rules, what do you have in mind?

You very often have someone who would like to see a conflict between the local rule and the national rule because it serves his purpose. They take the position that the local rule is invalid for a litigation position. But they never seem to challenge it in court. I think I could count on the fingers of one hand the number of cases in which a local rule has been challenged as violative of the national rules. There's a lot of noise but very little action.

The Advisory Committee on Civil Rules has been called the most vocal proponent of stronger sanctions under rule 68. Bills are pending in both the Senate and the House to amend the rule, the Supreme Court has more than once upheld rule 68, and now there are movements among the bar membership to rewrite the rule. Are you of the belief that rule 68 needs to be redrafted?

Rule 68 was the most controversial subject during my tenure as reporter. In retrospect it seems to me that we got the massive changes to rules 11, 16, and 26 through in '83. And then this firestorm developed about rule 68. Our intent in the committee, and my intent as reporter, was to try and develop rule 68 into a provision that would force the litigants to consider settlement very, very seriously as early as possible in the litigation. I wish I had a dollar for every case that was settled on the courthouse steps just before trial. If it settles then, it could have settled a year or two earlier. So rule 68 was designed to be a pushing mechanism that says, "Look; think about settlement." Everyone who came in to testify about it saw phantoms. They all had horror stories. It was like Chicken Little saying "the sky is falling!" They were scared. I have never seen such a chamber of horribles paraded in my life.

"I will go the grave believing that what we tried to do in rule 68 was right."

This was at the public hearings?

Yes. I have in my office at least three feet of paper attacking rule 68.

I will go to the grave believing that what we tried to do in rule 68 was right; that the only way you are going to get lawyers to evaluate their cases seriously is if you put a little bit of a gun to their head. And that is what rule 68 was designed to do.

Set a trial date?

Set a trial date; make an estimate of your case and if you are really, really way off the track—if it looks as if you are playing dog in the manger—then you should pay the expenses of your opponent.

Do you believe the language of rule 16(c)(7) is sufficient authority for the institution by the district court of an experimental court-annexed arbitration program?

When we drafted rule 16(c)(7) in the Advisory Committee, part of our intention was to encourage what we call interim, extra-judicial dispute resolution techniques. We wanted to give the courts authority to use this almost smorgasbord of alternative dispute resolution techniques that have been developed in recent years. So we thought that the rule coupled with the inherent power of the federal courts would be enough to develop arbitration mechanisms. That was our intention.

You have written extensively on class actions and rule 23. There were proposals to restate rule 23 eight years ago, but the committee decided to wait because it appeared that Congress might legislate in this area. Does it now seem timely to restate rule 23? If it does, in what way?

I think it is time to go back to rule 23. Rule 23 has been like a religious war for many, many years. It is one of those subjects in which you get incredible cleavage and disagree-

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ment between the plaintiff's bar and the defense bar. And the rhetoric and the emotion of the late '60s and the early '70s always struck my funny bone as being a religious war between the plaintiff's bar and the defense bar. I think a lot of the hysteria about the rule has quieted down. And I think it is time to lift the moratorium, and go back to rule 23 and take the more than 20 years' experience we have had under it and see if we can't build a better mousetrap. I think there are ways of improving the rule in terms of the notice requirement, in terms of describing what are proper class actions, improving descriptions of subclassing and the judicial powers in class actions. And I think that the Supreme Court's decision a year ago in *Phillips Petroleum v. Shutts* requires some rethinking of what the rule should say. (I must drop a footnote here and say I am a little bit crazed about this, since I argued the case.) I think we have now hit the point where we can make a reasonable reevaluation of class actions.

"Rule 23 has been like a religious war for many, many years."

Do you believe that the traditional teaching methods used by most law professors and law schools are still those best suited to today's curriculum? Which teaching methods work best?

I have always believed that there is no one teaching method. The best teacher is the teacher who teaches in a style comfortable to himself or herself. There is no magic in the Socratic method or the problem method or the lecture method. Different suits fit different people. I am fairly clear that the days of the pure Socratic method are over. That was fine in a world in which everything was common law and in which everything was case law. I don't think you can teach purely Socratically. I don't teach purely Socratically. There are things that I lecture on, there are things that I use the problem method on. There are things I will teach through "moot courting" within the class. So everybody should do his or her own thing. What I do feel very strongly about, however, is that the classroom experience should be an intense experience. Our job as law teachers is to teach and develop professionals. The life of the professional is one of intensity. It is one of high drama. It is one in which you can't say "I am unprepared" to a judge or to your client or to the person with whom you are negotiating.

I must say, at the risk of being accused of being an old fuddy-duddy and Attila the Hun and all of that, that a law school environment that is preoccupied with sensitivity—to the exclusion of building strong, dynamic, intense professional instincts of preparation, of thought, of responsibility, of analysis—is just an education system that is off the track. I know it is fashionable these days, since most younger academics come out of the student revolution period, to do it in a very relaxed manner and I certainly wouldn't want a faculty of 70 people who all behaved like Attila the Hun. But I think a mixture of people who treat their classroom as if it is a courtroom and those who are more gentle and on a first-name basis and wear turtleneck sweaters is probably a good idea. I really and truly mourn the loss of intensity and direction and drive in the classrooms of many American law schools.

I think in retrospect it is better to say that in my earlier years as a teacher, in the mid '60s, I was very much like Kingsfield. I insisted on preparation. There were times when I would literally throw somebody out of class for being unprepared.

What caused the change?

You roll with the times. What was acceptable in the '60s in terms of pressure and intensity, after the student revolution became unacceptable, so you have to make a deci-

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Center Publishes Paper on Taxation of Attorneys' Fees

In response to a call for study of alternative means of managing the increasing number of attorney fee petitions in the federal courts, the Center recently published *Taxation of Attorneys' Fees: Practices in English, Alaskan, and Federal Courts*, by Alan J. Tomkins and Thomas E. Wilkins. The report describes the distinctive approaches to taxation of attorneys' fees that have evolved in the English, Alaskan, and U.S. federal court systems.

In England, where fee shifting from the losing to the winning party is the norm, taxing masters and a large clerical staff undertake the calculation and assessment of attorneys' fees from a centralized office in London, in addition to whatever taxing of attorneys' fees is done locally. In Alaska, with a pervasive statutory system of fee shifting, the use of fee schedules and relatively informal procedures allows judges to make quick, often intuitive judgments about fees without a major investment of resources. To manage the growing number of fee petitions in federal courts, these courts have developed a diverse set of innovative approaches to fee taxation.

After outlining the approaches of the three systems, the authors examine further possible applications of the various approaches to the federal system, focusing on three primary issues: whether procedures should be standardized, whether new fee decision makers should be substituted for the judicial officer who hears the case, and whether the taxation function should be centralized.

Copies of this report can be obtained by writing to Information Services, 1520 H St., N.W., Washington, D.C. 20005. Please enclose a self-addressed mailing label, preferably franked (16 oz.), but do not include an envelope.

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sion about maintaining your own effectiveness as a teacher. If you push too hard, if you hit people too hard, they will just go away; they will close down. So, instead of the hammer I went to the rubber mallet—not quite the velvet glove. I try to maintain the intensity by telling everybody, "It is a collaborative, intense process. Let's work hard. Let's share." So, I just felt that by backing off a little bit I could stay in tune with the sensitivity that followed.

You are doing a study for the American Law Institute. Please tell us about that.

The American Law Institute has commissioned a preliminary study to look at complex litigation—*big* cases—to see if there are things we can do with a wide range of subjects: the federal rules, the subject-matter jurisdiction principles we live with, venue principles, removal. The chairman of the advisory committee is Justice Wilkins of Massachusetts. Our job is to determine the feasibility of, in effect, building a better mousetrap for complex cases and to recognize that we need more intersystem cooperation. A jet plane goes down and you end up with 50 cases. A product failure produces hundreds of pieces of litigation—like the asbestos cases. Can we devise better procedures, better subject-matter jurisdiction rules, better cooperation between courts, state and federal, new notions of choice of law to handle these monstrous—and that's what they are—cases? They are like millstones on the back of our judicial system.

And they cause bankruptcies.

That's right. Tying up judges for years and years and years. And we know asbestos is not a unique situation. Today's asbestos will be tomorrow's toxic dump phenomenon. Our job is to spend two years to prepare a report to give to the Institute so that the Institute can decide whether to commission a full project that might produce something like the ALI study in the late '60s on the division of jurisdiction between the state and the federal courts. In a curious way this project might be thought of as "son of the old division of jurisdiction study"—which was a brilliant study.

Do you have the feeling your students are a little bit frightened of you at first? Do you get them first year?

Yes. I have, and always have had, the experience of teaching a big, full-year course in civil procedure to, now, one-fourth of the first-year students at the Harvard Law School. There is a cult about me that I am Kingsfield from the "Paper Chase" program. The cult is perpetuated by upper-class students who love to terrorize the first-year students. In other words, a first-year student, by the time that student walks into my class, has been told by a third-year student it is going to be "blood and guts" in there, and I am amused by it because I am nothing like that. I'm a pussycat. One of the things that bugs me is when students of mine from 10 to 20 years ago come to the law school to do interviewing for hiring, and they sneak into the back of my class and they watch me teach today. At the end of the class, they come up to me and they are furious. They say, "You have become a Casper Milquetoast. You are too gentle; you are too nice. The reason I remember civil procedure, the reason I am a litigator, is because you forced me to learn. You created an environment in which it was literally easier for me to study and be prepared than to go through the emotional risk of being unprepared and being embarrassed."

You mean the 10-volume Charles Alan Wright jurisdiction study?

Yes. That was by Charles Alan Wright and Dick Field, and it is a brilliant piece of work that never was actualized. There was not enough pressure in Congress to do anything about it. This time there is such recognition that we are in crisis on the civil side with these new types of cases that maybe something can be done.

An ABA commission chaired by Justin Stanley released a report in August that concludes that many aspects of the practice of law in this country should be changed. Do you agree?

I think these are bad days for the American legal profession. I think the image of the American lawyer today is the image of people flocking to Bhopal, flocking to the crash of Delta 191 in Texas. I think the profession has got to get ahold of itself. We have got to clarify some of the rules about professionalism. You can't pick up any of the legal journals, any of the legal newspapers, any of the major newspapers in this country without seeing an article about law becoming a business—because of the scale, the stakes and the money, the masses of young people being churned out by the law schools and then chewed up by the big firms, and the escalation in starting salaries. I think it is a good time to step back and take a very close look at who we are, because I think we are in danger of losing our way. ■

AO, from page 3

share of the judiciary's staffing and budget levels has declined substantially over the last few years.

The report recommends that the AO take a more active role in helping the courts in dealing with the General Services Administration, that it be freed from the "bureaucratic red tape" imposed by civil service laws and the Office of Personnel Management, that it continue to work openly and cooperatively with the U.S. Marshals Service to improve court security, and that it improve its relationships with members of Congress to see that Judicial Conference-recommended legislation is introduced promptly and pursued vigorously. The committee also suggested that the future relationship between the AO and the FJC may require further study by the Conference.

The committee concluded that "no fundamental change in the structure of the office is needful or wise." The committee did find, however, "that there is demonstrated need for a more efficient and responsive administration of the responsibilities of the AO." The committee expressed its belief that "Mr. Mecham has a full understanding of this need," and that he "has already taken action to effect remedies in many areas." ■

CONFERENCE, from page 1

• Approved the transmittal to the Supreme Court of amendments to the bankruptcy, civil, and criminal rules, and recommended Supreme Court approval and transmittal of them to Congress; also approved amendments to the civil, criminal, and evidence rules to eliminate all gender-specific language.

• Directed the AO to study the possibility of the judicial branch's undertaking its own building design, leasing, construction, and maintenance.

• Voted to oppose any change in 28 U.S.C. § 569, which provides that U.S. marshals "may, in the discretion of the respective courts, be required to attend any sessions of court."

• Authorized a temporary increase in court reporters' transcript rates for transcripts not paid for by the government.

• Agreed to numerous changes in official duty stations and places of holding court for bankruptcy judges.

• Reviewed a report of the Judicial Council of the Court of Appeals for the Eleventh Circuit concerning Judge Alcee L. Hastings and invited Judge Hastings to submit a written response.

Congressman Neal Smith (chairman of the House Appropriations Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies), Congressman Robert W. Kastenmeier (chairman of the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice), and Attorney General Edwin Meese III addressed the Conference. ■

BICENTENNIAL, from page 4

the branches of the federal government contribute to the preservation of individual liberty and the functioning of our government?" All entries must be postmarked by Apr. 15, 1987. Entry forms and rules are available from Education Program, Commission on the Bicentennial of the U.S. Constitution, 736 Jackson Place, N.W., Washington, DC 20503.

• The American Judicature Society has put out a call for manuscripts to be published in *Judicature* for a symposium issue devoted to the Constitution. The topic suggested is "the relationship between the Constitution and the judicial system, with particular reference to Article III and Amendments IV through VIII." Other subjects such as judicial independence and judicial federalism are acceptable, however. Publication is planned for the August–September 1987 issue, and manuscripts should be submitted by Mar. 15, 1987, to the AJS office, 25 E. Washington St., Chicago, IL 60602. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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THE THIRD BRANCH

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Chief Justice Sends Holiday Message; Notes Progress, Challenges

I am delighted to take this opportunity to extend a holiday greeting to my colleagues on the federal bench and to our extended "court family." I am still in the process of getting my feet wet in my job as Chief Justice, and I owe much to Chief Justice Burger for his gracious assistance in "showing me the ropes." My appointment as Chief Justice has surely not lessened the bond I feel with my fellow judges; indeed, by assuming the office of Chief Justice my opportunities and obligations to maintain the health and welfare of the federal judiciary have dramatically increased. I cheerfully accept that responsibility, and look forward to working with other judges, the Administrative Office, and the Federal Judicial Center in meeting the challenges that face our courts. I ask for your wise counsel, your help, and your patience as I begin.

Under the leadership of Chief Justice Burger, progress has been made over the last year on a number of fronts. The Judicial Survivors' Annuities Reform Act was signed by the President on June 19, providing a floor of financial security to spouses and children of deceased federal judges. We all will be watching closely the progress of the recommendations of the Commission on Executive, Legislative, and Judicial Salaries, which will be submitting its report to the President by Dec. 15. Thanks are due to Judge Coffin and the other members of the Committee on the Judicial Branch for their extra efforts in support of the work of the Commission. In October, Congress authorized an increase in the number of bankruptcy judges from 232 to 284. As soon as an appropriation is added to this authorization, our hard-working corps of bankruptcy judges can look forward to some relief.

As the new Chairman of the Judicial Conference, I shall be open to suggestions as to how the work of the Conference can be furthered. The Conference has authorized me to appoint a committee to review the way the Conference operates and to evaluate the adequacy of the current committee structure. The last time such a committee sat was in 1968, and I thought it was time for another look at the subject.

Mrs. Rehnquist and I wish you and your families—wherever you may be throughout our broad land—a joyful holiday season and a healthy and productive New Year.

Sincerely,

William H. Rehnquist

Judge Wisdom on Courts' "Federalizing" Role, Judicial Independence, and Size of Circuits

Judge John Minor Wisdom was born in New Orleans, received his A.B. from Washington & Lee University and his LL.B. from Tulane Law School, and practiced law in New Orleans from 1929 to 1957. From 1938 to 1957, with an interruption for military service, he also taught law at Tulane. The judge served in the U.S. Army during World War II and was separated from the Army in 1946 with the rank of lieutenant colonel.

Nominated to the Fifth Circuit in 1957, Judge Wisdom has served as a member of the Judicial Panel on Multidistrict Litigation (1968–79), and as the panel's chairman (1975–79), and for three years on the Advisory Committee on Appellate Rules. He has also served since 1975 on the Special Court organized under the Regional Rail Reorganization Act of 1973. Judge Wisdom is the author of numerous scholarly publications and the recipient of a number of honorary degrees and awards, in-

See WISDOM, page 4

New Drug Act Will Have Impact Upon Courts' Caseload

The Omnibus Drug Enforcement, Education, and Control Act of 1986, passed by Congress (H.R. 5484) and signed by the President as P.L. 99-570 on Oct. 27, includes a number of provisions either directly affecting the judiciary or of interest to it. The legislation:

- Authorizes $17 million for FY 1987 for the U.S. Marshals Service.
- Authorizes an additional $124.5 million for the federal prison system in FY 1987.
- Authorizes $2 million for the Justice Department's Bureau of Justice

See DRUGS, page 9

FY 1987 Appropriation Authorizes 3 Percent Cost-of-Living Raises, Filing Fee Increases

The federal courts' fiscal year 1987 appropriation provides a total of $1,192,592,000 in budget authority for the judiciary, an increase of $161,435,000 over FY 1986. The budget includes $37,500,000 appropriated under a separate title, the Omnibus Drug Supplemental Appropriation Act of 1987. (See story on omnibus drug legislation, p. 1.) It also provides for a cost-of-living salary increase of 3 percent, effective as of the first day of the first pay period commencing on or after Jan. 1. Justices and judges of the United States will also receive this increase.

Several separate appropriations for the salaries and operations of the court system have been consolidated into a single appropriation, "salaries and expenses," which will provide flexibility to reprogram funds between personnel and general operating expenses when needed.

The FY 1987 budget authorizes 540 additional positions for clerks' offices and probation and pretrial services offices (with total staffing still capped by Congress at 94 percent of the Judicial Conference-approved formula allowances), 7 new full-time magistrates and their supporting staffs, and 124 other supporting personnel.

Fees collected for the preparation and mailing of bankruptcy case notices will be used to offset the salaries and expenses incurred in providing these services. Since the FY 1987 estimate for such fees totals $3 million, a reduction of $3 million was made to "expenses of operation and maintenance of the courts."

Filing fees. The legislation has doubled the fee for filing civil cases from $60 to $120, and has raised the fee for filing in bankruptcy court from $60 to $90. The Judicial Conference Committee on the Budget last March had proposed consideration of an increase in filing fees. Although the Judicial Conference Committee on the Budget had made its recommendation with the expectation that the increased fees could go into a special account for use by the courts, these increases will be

See BUDGET, page 8

JSAS Reminder

Article III judges are reminded that from now through March 1987, a one-time Judicial Survivors' Annuities System (JSAS) "open season" is being held, during which new coverage may be elected or existing coverage may be withdrawn.

Judges presently covered by JSAS who wish to retain their coverage need take no action. Judges who previously waived the right to elect coverage under JSAS within six months of assuming judicial office or subsequent marriage may now elect such coverage. This is a one-time election opportunity, and such election is irrevocable. A completed AO Form 162, *Election to Participate in the Judicial Survivors' Annuities System*, must be received by Mar. 31, 1987, by the AO, JSAS Section, Washington, DC 20544.

Judges currently participating in JSAS who now wish to revoke such election may do so. This is a one-time opportunity to revoke election to participate. Revocation must be in writing and received by the director of the AO no later than Mar. 30, 1987 (no special form is required; a letter is sufficient).

Judges are reminded that before making a final decision concerning JSAS, they should consider life insurance coverage offered either by private companies or through the federal employees' program, as an addition or alternative to JSAS.

More detailed information about the open season is provided in a Sept. 26 memorandum from AO Director Mecham to all Article III judges.

Sixth Cir. Hosts Innovative State-Federal Meeting

The Sixth Circuit, in a variation on the usual format of state–federal judicial council meetings, held a meeting that included judges from all of the states embraced by the circuit. Chief Judge Pierce Lively invited judges from Kentucky, Michigan, Ohio, and Tennessee to a one-day meeting in Cincinnati with four appellate and four district judges.

Chief Justices Frank Celebrezze (Ohio) and Ray Brock (Tenn.) and Associate Justices Donald Winterscheimer (Ky.) and James H. Brickley (Mich.) were accompanied by six state intermediate appellate and trial judges. The heart of the agenda was a presentation on recent habeas corpus developments by Professor Ira Robbins of the Washington College of Law at the American University.

On a related matter, prisoner civil rights suits, Chief Judge Lively called the group's attention to the provisions of 42 U.S.C. § 1997e, which allows federal judges to continue prisoner § 1983 filings for 90 days to allow exhaustion of prison grievance procedures if those procedures have been determined, either by the Attorney General or the district judge in the case, to be "in substantial compliance with minimum acceptable standards."

The FJC continues to provide funding for federal judges' attendance and for some programs at state–federal council meetings. ■

THE THIRD BRANCH

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Ninety-ninth Congress Ends Session with CJA, Bankruptcy and Immigration Changes

The following legislative items, enacted in the closing days of the 99th Congress, are of interest to the judiciary. (See also related stories on the budget, p. 2, and on omnibus drug legislation, p. 1.)

Criminal Justice Act. H.R. 3004, amending the Criminal Justice Act (CJA), has been signed by the President. The bill amends the CJA provisions relating to fees for court-appointed attorneys in criminal cases, and the provisions relating to the recall to service of certain judges and magistrates.

House Judiciary Committee members Robert Kastenmeier (D-Wis.) and Carlos Moorhead (R-Cal.) cosponsored the legislation amending the CJA, which was introduced at the request of the Judicial Conference. The bill retains current law authorizing hourly rates of up to $40 an hour for out-of-court representation and $60 an hour for in-court representation under the CJA. The bill allows payment of up to $75 per hour if the Judicial Conference determines a higher rate is justified for a particular district or circuit. The new general maximums per case would be $3,500 for a felony, $1,000 for a misdemeanor, $2,500 for appeals, and $750 for other cases—modest increases over the previous amounts. These maximums can be waived by the chief judge of the circuit or his or her designee. The bill also makes other technical changes in the CJA requested by the Judicial Conference.

The bill as passed also provides for the recall to service of U.S. magistrates who have retired. (Similar authority already existed to recall to service bankruptcy judges and judges of the U.S. Claims Court.) The bill also enhances the system for the recall of magistrates, bankruptcy judges, and judges of the Claims Court.

In the past, bankruptcy judges and Claims Court judges recalled to service were effectively required to "punch a time clock" for the first time in their careers; for the hours that such an official was working, retirement annuity was deducted from the official's pay, with the result that the judge provided full-time service for part-time pay. Moreover, there was no guarantee that such an official would be recalled for more than one assignment, creating uncertainty as to the amount of income he or she could anticipate.

The bill improves the situation by providing that the circuit judicial council, or the chief judge of the Claims Court, can certify that an officer recalled to service will perform "substantial service" during a five-year period of recall. During the five years, the judge or magistrate will receive the difference between the retirement annuity and the salary of the position. The Judicial Conference is authorized to promulgate regulations necessary to implement the new system.

Bankruptcy judgeship legislation. The bankruptcy legislation passed by Congress, H.R. 5316, and signed by the President on Oct. 27, authorizes the creation of 52 new bankruptcy judgeships, although it provides no funds to implement the new judgeships. The bill also provides significant farm bankruptcy reform. (See the budget story, p. 2, for additional information about this bill.)

Immigration bill. The major overhaul of immigration legislation, S. 1200, was signed by the President on Nov. 6. The bill includes both civil and criminal sanctions against employers knowingly hiring illegal aliens, an increase in the penalties for document fraud, and provisions for improving the documentation used to verify employment authorization. The bill provides an amnesty for illegal aliens who can prove that they have been resident in the United States since 1982, as well as for certain agricultural workers.

An office of special counsel will be established within the Department

See LEGISLATION, page 9

Spanish/English Interpreting Test To Be Given

The written test for Spanish/English federal court interpreters will be given on Mar. 7, 1987, the only time the test will be given in 1987. All applications must be postmarked no later than Dec. 31, 1986. An oral test for candidates successful in the written test will be given in the summer of 1987. Persons who successfully complete these tests will be placed on an eligibility list from which court interpreters may be selected.

The written and oral tests are given only in certain cities. The fee is $25, and the tests are being administered by the University of Arizona Federal Court Project, Federal Court Interpreters Certification Project, Modern Language Building, Room 456, University of Arizona, Tucson, AZ 85721, Tel. 602/621-3687.

200 Years Ago...

December 1786: Rebellion broke out across New England as angry farmers closed down courts, ordering judges in one Massachusetts county "not to open said courts, at this time, nor do any kind of business whatsoever" lest their judgments "by reason of the great scarcity of cash . . . fill our gaols with debtors." The farmers, beset by creditors and tax collectors and angry at the state's suspension of the writ of habeas corpus, were caught up in a larger crisis caused partly by the lack of any central authority to regulate foreign trade and by the dearth of hard currency throughout the states. Shays's Rebellion was quelled by June, but not before casting what John Marshall called "a deep shade over the bright prospect which the revolution in America and the establishment of our free governments had opened up.... I fear that we may live to see another revolution."

BICENTENNIAL OF THE U.S. CONSTITUTION

WISDOM, from page 1

cluding the Tom C. Clark Equal Justice Under Law award, given by Phi Alpha Delta.

In the recent tribute to you in the *Tulane Law Review*, Judge Elbert Tuttle states that you turned down an offer of a circuit court judgeship four years prior to accepting a judgeship. Why did you decline that first offer from President Eisenhower?

Frankly, in 1953 I was in the distasteful position of having a lot of unfulfilled political commitments I had to take care of before accepting a judgeship. I led the fight for Eisenhower in Louisiana in 1952, just as Elbert Tuttle did in Georgia.

You may recall that the decisions on the convention contests in Georgia, Louisiana, and Texas determined the nomination of Eisenhower. Eisenhower supporters in Georgia and Texas had their preconvention troubles, but we had a longer, more difficult struggle to dislodge the old-line Taft Republicans because of rigged Louisiana laws designed to keep the Republican Party small. Anyway, I had lunch with Elbert before talking with Herb Brownell, then attorney general, who was the real political genius in the Eisenhower nomination. I explained my reasons for declining a judgeship and highly recommended Elbert. My recommendation was unnecessary, except to show that I did not regard the judgeship as Louisiana's seat on the court. Herb was well aware of Elbert Tuttle's qualifications. Elbert was then general counsel for the Treasury Department, so it was some time before he could leave that position.

It was an act of God that Elbert was the first Eisenhower appointee to our court. He made a much better chief judge during the critical years of civil rights turmoil than I would have made. And I am not just trying to be modest. I consider Elbert Tuttle and Henry Friendly two of the finest judges on the federal bench during my lifetime. Alvin Rubin is right up there too. That's a long, circuitous answer to a simple question.

Was the court of appeals, rather than the district court, your first choice?

The court of appeals was my only choice. I would not have made a good trial judge. I do not like to shoot from the hip, and in the course of a trial a district judge has to shoot from the hip. I prefer taking my time over a case, sometimes too much time. I like to write and rewrite and then rewrite. I admire good trial judges. I respect them and I consider experience as a trial judge a very valuable asset for an appellate judge. It is not only valuable for the judge but it is good for the morale of the system for federal trial judges to be promoted to the court of appeals. There should be more district judges promoted to the courts of appeals. But I was just not cut out to be a trial judge.

Specialized courts in the federal system have been the subject of discussion for many years. Do you favor the concept of having special courts, or do you adhere to the concept that the federal judges are and should remain generalists?

Well, I believe in a generalist concept for most courts, including the courts of appeals; however, the Special Railroad Court was an absolute necessity. The litigation was massive. You have no idea how massive it was. I guess I had 30 or 40 shelf feet of briefs and other Railroad Court legal material. A special court was necessary for that type of litigation.

I do not object to a special court for tax law, for patents, and for a few other subjects, including Social Security cases. It is a bit ridiculous for the courts of appeals to have to review appeals on Social Security cases which have already gone through the agency system and the district court. Although I feel that appellate judges must become generalists, if they are not already, I feel certain that a good lawyer will make a good judge, regardless of how specialized his practice might

See WISDOM, page 5

PERSONNEL

Appointments

Joel F. Dubina, U.S. District Judge, M.D. Ala., Sept. 18

Charles R. Simpson III, U.S. District Judge, W.D. Ky., Oct. 15

Elevations

Robert W. Warren, Chief Judge, E.D. Wis., Sept. 1

William J. Bauer, Chief Judge, 7th Cir., Sept. 29

Charles L. Brieant, Chief Judge, S.D.N.Y., Oct. 1

Frank H. Freedman, Chief Judge, D. Mass., Oct. 18

Senior Status

John W. Reynolds, U.S. District Judge, E.D. Wis., Aug. 31

Constance Baker Motley, U.S. District Judge, S.D.N.Y., Sept. 30

Andrew A. Caffrey, U.S. District Judge, D. Mass., Oct. 17

William J. Ditter, Jr., U.S. District Judge, E.D. Pa., Oct. 19

Robert R. Merhige, Jr., U.S. District Judge, E.D. Va., Nov. 30

Deaths

Ben C. Duniway, U.S. Circuit Judge, 9th Cir., Aug. 23

Charles E. Wyzanski, Jr., U.S. District Judge, D. Mass., Sept. 3

Edwin A. Robson, U.S. District Judge, N.D. Ill., Oct. 21

CALENDAR

Dec. 3 Judicial Conference Advisory Committee on Appellate Rules

Dec. 3–5 Workshop for Judges of the Eighth and Tenth Circuits

Dec. 4 Judicial Conference Committee on the Judicial Branch

Dec. 4–6 Workshop for Judges of the Sixth Circuit

Dec. 11–12 Judicial Conference Committee on Administration of the Magistrates System

Dec. 15–16 All Judicial Conference Subcommittees of the Committee on Court Administration: Supporting Personnel, Judicial Statistics, Federal–State Court Relations, Judicial Improvements, Federal Jurisdiction

WISDOM, from page 4

have been. Judge John Brown, for example, specialized in admiralty, but he has been an exceptionally fine, versatile judge.

Going back to the Railroad Court, most of our time was spent on constitutional questions and statutory interpretations. For administrative law questions, we had a great authority in Henry Friendly. For a time Carl McGowan served on the court. He is extremely well informed on railroad law, besides being an outstanding judge.

The Special Court was created under the Regional Rail Reorganization Act of 1973. You became a member of this court in 1975, and presiding judge last April. Did you raise any objections to taking on this additional assignment? Why did you elect not to use special masters?

> **"I strongly disapproved of splitting the Fifth Circuit . . . in the '60s . . . . I disapproved of it in 1981. I disapprove of it now."**

We considered using special masters, but decided that the use of masters—studying their reports—would double the time we would have to spend on the work. All of the judges on the court and most of the lawyers who were involved think that it was a wise decision.

So you became a specialist yourself.

Not really. No one could feel like a specialist in the presence of Henry Friendly, who had so much special and, for that matter, so much general knowledge of the law.

Was your routine workload reduced to accommodate this extra activity?

The Special Court was a lot of work but I did not reduce my routine work until I assumed senior status. I still sit more often than the active judges. For example, I will sit nine times (four-day weeks of twenty cases) this term, not counting hearings of the Special Court. Active judges in the Fifth Circuit sit seven times. But I don't do as much work as they do, because they handle screening, administrative orders, en banc hearings, and other matters which I do not handle. And I manage to get in a little bridge at lunch.

You have written approvingly about the important role played by federal courts in your circuit in ensuring the rights of defendants in state criminal proceedings. You have also said that the "only sensible solution to the problem of overloaded [federal] courts is a major reduction in federal jurisdiction." Did you have specific statutes in mind?

I feel strongly that Congress some day will have to face up to the fact that the question of overloaded federal courts cannot be solved by adding judges and splitting circuits. What must be done is to greatly reduce federal jurisdiction, but I would not do so to any major extent in criminal proceedings. I must say, however, that I am strongly opposed to the ongoing process of extending *Younger v. Harris*. I would curtail the expansion of *Younger v. Harris* and its progeny. Abstention is out of hand. The proper applicability of section 1983 (which was the main part of the Civil Rights Act of 1871) seems to have been lost in the glorification of states' rights. Our (with a little *o*) federalism works because of the supremacy of what is called "federal law" but is really national law. I do not like to see it whittled down. The views of some persons suggest that they think that the country is still operating under the Articles of Confederation.

I would get rid of diversity jurisdiction. It has long outlived its usefulness. There is nothing wrong with our state courts, and there is no reason why they shouldn't handle diversity cases. It is downright silly, for example, for a panel of three Texas judges, as sometimes happens, to make an educated guess on the meaning of an article in the Louisiana Civil Code. Certification is not a good solution, because it is cumbersome, time-consuming, and increases litigation costs. Sometimes, too, a state supreme court tells us that we asked the wrong question or that we should decide the question ourselves. I know that many say that it is politically unrealistic to talk about abolishing diversity jurisdiction, but I hear that objection about many legislative reforms.

Is it the trial lawyers who stop it in Congress?

That is probably true. They have

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WISDOM, from page 5

some very persuasive advocates, some very distinguished lawyers—John Frank, for example.

Aside from the burden of the caseload, one of the troubles is that the civil jury in diversity cases has run wild. (I am aware of opinion to the contrary.) But far be it from me to slander a system sanctified in this country; mistakenly linked with Magna Carta, but abolished in England in 1933.

Among other things you have served on the Judicial Panel on Multidistrict Litigation. Over the years have you seen progress made in procedures for complex litigation and how the work of this panel has developed? Do you have suggestions for further improvements?

I served on the Multidistrict Panel for about 10 years and succeeded Al Murrah for a number of years as chairman or presiding judge. Let us not forget the transferee judges, the judges to whom these cases are transferred for trial. These cases are burdensome and often very complicated. The early heroes were Al Murrah, Bill Becker, Ed Robson, Hubert Will, Joe Estes, and a few others I could mention, especially those who worked on the first *Manual for Complex Litigation*. Sam Pointer has recently done a monumental job in revising the *Manual*. The practical value of the *Manual* and the examples furnished by the transferee judges who have handled these complicated cases and exchanged ideas cannot be overestimated as a substantial step forward in our procedural process.

They were the pioneers when so many of the electrical equipment cases were filed all over the country.

Yes, they got the idea together, and there are some of these and, later, other judges whose names I have omitted. Ed Weinfeld was a tower of strength on the panel. He is a tower of strength on any court, committee, or whatever he does.

It is an important part of federal court history.

Yes. Somebody should do a good law review article on the Multidistrict Panel, and somebody should do a good law review on the Railroad Court. I discussed the Railroad Court briefly in an article I wrote as a tribute to Henry Friendly in the *Pennsylvania Law Review*, and Henry discussed it in a recent issue of the *Tulane Law Review*. Each deserves a study in depth.

"[W]e have too many en bancs . . . . En bancs undermine the force and legitimacy of panel decisions."

You have written that you consistently disapproved the splitting of the Fifth Circuit, and you referred in this context to the "federalizing function" that a circuit court fulfills. Would you elaborate, please.

Well, you touched a nerve there. I strongly disapproved of splitting the Fifth Circuit some years ago, back in the '60s, when it was a ploy to reduce the authority of our court in civil rights cases. I disapproved of it in 1981. I disapprove of it now. I disapprove of it on principle, wholly aside from civil rights. Federal judges are appointed to carry out judicially national and federal policies. The broader the base on which their selection rests the less exposed they will be to what I call parochial prides and prejudices, many of them deep in our subconscious. We are able to perform our federalizing function better if we have a broad base for the selection of judges. I consider our federalizing function more important than our dispute-settling function. This was a function that was especially important in the '60s and '70s and is important at all times. The only good reason—but I don't consider it a good enough reason for splitting the circuit—is the resultant unwieldy character of an en banc hearing when you have a large number of judges on a court. But we have too many en bancs anyway. En bancs undermine the force and legitimacy of panel decisions. A large court need not be unmanageable. Take the Ninth Circuit, for example: Jim Browning and the other judges on that court are doing a superb job, regardless of the number of judges on the court. There is nothing wrong with having a large number of judges on a court. You get a better mix of judicial and nonjudicial backgrounds. It is a good thing. I would not object to a circuit composed of noncontiguous states of different sizes; the improvement of transportation facilities makes this idea feasible. The cross-fertilization of ideas is good for federal courts. What I am fearful of is the prospect of further subdivision of circuits. Perhaps one day we shall have single circuits for New York, Texas, California, and Florida. Should that ever take place, God forbid, you can kiss Madison's federalism good-bye.

What about the extra costs incurred in a large circuit?

The cost is really infinitesimal compared with the advantages of not splitting circuits.

Maybe the judicial branch should be more demanding of Congress.

Well, I really don't know. I am sure that we could all use more money, whether it is the Administrative Office or the judges. I had a law clerk last year who was ashamed to tell me how much he was making, just starting as a law-

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yer, because his salary was larger than mine.

You have written about "dual federalism." Would you comment on this.

Well, I have thought a lot about this from time to time. I taught a short summer course on comparative federalism, considering Canada, Australia, and the United States. Europeans generally, and lawyers in other countries, have never understood why we have a dual *judicial* system. They have workable federalisms with essentially one judicial system, and I suppose we could too. But considering the structure of our government and not just the literal text of the Constitution, we have effected a reasonable compromise of centrifugal and centripetal forces based on the idea that the states should maintain a measure of sovereignty. We cannot get away from that, nor should we. I feel very strongly, however, that the primary function of federal courts is to protect federally guaranteed and federally created rights. This is not the place to expound a thesis, but please do not associate me with the term "dual federalism" as some writers use that term. "Dual federalism" hit its peak in the *Dred Scott* case. If I have a consistent theme in my attitude toward federalism, it is that we enjoy Jeffersonian rights and liberties in a world projected by Alexander Hamilton and the James Madison of the Constitution (none of the other Madisons), to whom I go back for my understanding of federalism.

"I feel very strongly . . . that the primary function of federal courts is to protect federally guaranteed and federally created rights."

Court history records that you have served in many courts of appeals outside the Fifth Circuit. Since procedures vary from circuit to circuit, did you observe some that you felt should be adopted nationally or at least recommended to other circuits?

Well, I have a hard time answering that question. The screening process in the Fifth and the Eleventh Circuits, by which 50 percent or more of the cases are disposed of without oral argument, is a good system for disposing of frivolous and semifrivolous cases and the many cases which are just not worth argument. It saves the litigant money, too. It saves the expense of a lawyer coming all the way, say, from El Paso to New Orleans. And it saves court time. An effective general staff of law clerks, headed by a competent chief counsel, is indispensable to making screening workable.

I like the First Circuit system of not having rebuttal in their oral argument. That is a general rule. The court will allow rebuttal if the appellant's lawyer is taken by surprise. But generally speaking there is no rebuttal in the First Circuit. I find a rebuttal is just a rehash of the original argument, or, what is worse, the appellant's rebuttal brings up a point not previously raised. And I like the system in the Seventh Circuit of rotating judges. Ideally, there should be argument in all cases, but what is attainable or almost attainable in the Second Circuit is not possible in the Fifth, the Ninth, and Eleventh Circuits.

How do I come out? I come out with the view that we should let each circuit work out rules suitable for its circuit.

We are not ready to nationalize yet?

No, we are not ready to nationalize all procedures, especially our argument procedures.

Regarding the nomination and appointment of federal judges: Are you satisfied that we have the best system for putting a judge on the federal bench? What characteristics should be stressed for a judgeship?

That is a very, very difficult question. I am satisfied that the best system for performing our federalizing function is one that removes a judge as far as possible from the regional or local pressures we would get if judges were elected. That means life tenure. California has shown that even a long term and a vote on retention of office threatens the independence of judges. Even if some appointees are subject to criticism because of legal, political, or economic bias, there is a short—to the point of nonexistence—statute of limitations that runs on the obligations supposedly generated by that bias.

"There is no substitute for judicial independence."

There is no substitute for judicial independence. A judge's performance on the bench is something that is not as predictable as laymen might think. Oliver Wendell Holmes, for example, surprised Theodore Roosevelt. It is a good thing to have courts of highly individualistic judges holding strong views. It is a good thing to have on the same court judges who differ widely in their views.

Do you believe the Senate (especially the Senate Judiciary Committee) process is handled well?

It certainly is an essential part of our system, and I approve of such a high-level committee. The committee takes a responsible attitude. There is necessarily a certain amount of politics in any senatorial committee, but it is fair to say that the Judiciary Committee has taken a responsible attitude towards its constitu-

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tional duties to the nation. Perhaps it has been a little too tough on some nominees, but not too tough on aspiring nominees generally.

Is it valuable to have the ABA's involvement in the process, including their ratings?

I strongly approved the ABA's involvement. The ABA has a member of the selection committee from each of the circuits. Every single Fifth Circuit representative I have talked with over the years, and I have talked with a great many, was a lawyer of experience and integrity. And often they do not represent "the Establishment."

One cannot predict with any degree of certainty how judges will perform on the bench. I repeat myself, but I wish to emphasize that there is not necessarily a correlation between a judge's performance on the bench and his background or supposed bias. A judge's ability, knowledge, maturity of judgment, and compassion all improve with exposure to the realities of life which unfold in the cases he hears. It did in my case—I think.

If you could make procedural or other changes in the federal court system, what are some of the things you would put high on your list?

I feel that the federal system is healthy now and is in good shape except for the fact that it is overloaded. The highest priority for our courts is the reduction of that load by a comprehensive new statute redefining and narrowing our jurisdiction, certainly including the elimination of diversity jurisdiction.

Could one of your reasons be that you feel that the size of the system dilutes the importance of the federal judiciary?

Yes, that is true, but it is of lesser significance than other reasons.

"A judge's ability, knowledge, maturity of judgment, and compassion all improve with exposure to the realities of life which unfold in the cases he hears."

There is no doubt that the importance of our decisions is being diluted by inconsequential cases. A Social Security case, for example, which means so much to each individual—perhaps the difference between a tolerable and an intolerable existence—in terms of the overall functioning of the federal court system is not meaningful.

Today in the district courts and the courts of appeals, there are about 1,000 federal judges (including the senior judges who continue to serve). Are you saying that we have too many judges because we have too many cases?

We have too many judges. I would rather see our federal jurisdiction cut down and the number of judges held within more reasonable limits. Judges would improve in quality and their opinions would then engender more respect.

What is the biggest change you have observed in the federal court system during your career?

Probably the practice of law. The size of law firms has increased enormously. That means that the individual lawyer is not as much of a generalist as he used to be. He tends to be more of a skilled specialist. I do not really like that. The whole business of research has changed since I used to have to pull down volume after volume of the *Digest* to search for the law. Now you punch a button in LEXIS or WESTLAW and out comes a printout with all the cases. The quality of lawyer, however, is better today than I have ever seen it before. These young lawyers, especially our law clerks, are just about as bright as they can be. They are becoming good lawyers and, speaking generally, law schools are turning out better lawyers—at all law schools. The top student at a relatively minor law school might have done as well at one of the so-called major law schools. Better lawyers

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BUDGET, from page 2

deposited to special funds in the Treasury, where they will act as an offset against the courts' regular appropriations. (The Bankruptcy Judgeship Act provides that effective Nov. 27, 1986, the increase in the bankruptcy filing fee will be set aside for the U.S. trustee program.)

AO, FJC, and court security. The AO appropriation of $29,500,000 is $1,556,000 above the sum appropriated in FY 1986, although $2,600,000 less than the amount requested. The increased funding provides for an additional 17 positions authorized by Congress. Congress appropriated $9,600,000 to the FJC for FY 1987, an increase of $413,000 over the amount that was available to the Center in FY 1986 after the reduction resulting from Gramm–Rudman–Hollings.

The budget also provides $36,000,000 for court security, which will provide 226 additional contract security officers to be phased in during the year, for a total of 1,114 officers by the end of FY 1987.

Need for future appropriations. Recent legislation authorizes 52 new bankruptcy judgeships and establishes a pilot bankruptcy administrator program in Alabama and North Carolina. However, no money to fund these judgeships has yet been appropriated by Congress. Requests for supplemental funds and staff to support this legislation have been prepared and will be forwarded to Congress shortly, as will a Judicial Conference-approved supplemental request for 400 deputy clerks to handle a generally increasing bankruptcy filing workload.

The 3 percent cost-of-living increase to become effective in January 1987 is to be funded by means of a supplemental appropriation. That supplemental is also to pay for the cost of funding the new Federal Employees Retirement System. ■

WISDOM, from page 8

mean better judges. We have on the whole a very superior group of judges on the federal bench, at all levels.

How do you stand on state–federal court relations?

I have a very strong feeling that there is a better rapport between federal and state judges now than ever before. That is an extremely healthy thing. It is taking place all over the country. Of course, we do not have the problems in the '80s that we had in the '60s. You see it in law review articles commenting on the liberalism shown by the state courts. Justice Brennan has an interesting article on the subject, for example, and there are other articles. It is certainly apparent to anybody who has been on the court very long. Just now I am in between two halves of my professional life. I practiced law for 29 years and I have been on the court for 29 years. So I am right in the middle, but on the court long enough to see this happen. I am very happy about this development. ■

DRUGS, from page 1

Assistance for a pilot program on prison capacity.

• Establishes mandatory minimum sentences for various crimes and authorizes courts, upon the prosecution's motion, to impose less than a minimum mandatory sentence if a defendant provides substantial assistance in the investigation or prosecution of another person for a narcotics offense.

• Adds serious drug offenses to those triggering mandatory minimum sentences under the "armed career criminal" provisions of the 1984 Omnibus Crime Control Act (P.L. 98-473).

Budget consequences of new omnibus drug enforcement legislation for the courts. The new drug enforcement legislation necessitated the appropriation of additional funds to the courts in connection with an anticipated increase in drug-related cases. Thus, a supplemental appropriation of $37.5 million provided funds to the judiciary for contractual services and expenses related to the supervision of federal drug- and alcohol-dependent offenders ($12 million), for anticipated increases in demand for representation under the Criminal Justice Act ($18 million), and for the anticipated increased juror usage ($7.5 million).

AO Director L. Ralph Mecham had estimated that the drug enforcement legislation would have a "substantial impact on the criminal caseload of the federal courts at both the trial and appellate levels," and that in FY 1987 an extra 4,000 criminal cases, involving more than 8,000 defendants, would result from the legislation.

The projected increased drug-related caseload will require the submission of an additional budget request to provide for 326 probation and pretrial services officers and supporting staff, and 60 additional deputy clerks. ■

Positions Available

Assistant Circuit Executive, U.S. Court of Appeals for the 9th Cir. Salary $31,619–44,430. Requires minimum 3 years' court management experience; education and experience in budgeting, finance, cost control; legal education helpful. Open until position filled. Apply to Circuit Executive, U.S. Court of Appeals, Box 42068, San Francisco, CA 94142-2068.

* * *

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* * *

Pre-Argument Conference Attorney, U.S. Court of Appeals for 6th Cir. Salary $31,619–41,105. Minimum 3 years' litigation experience or in position involving structured conflict. Send resume by Dec. 8 to Robert W. Rack, Jr., Senior Conference Attorney, U.S. Court of Appeals for the Sixth Circuit, Rm. 527, U.S. Post Office & Courthouse Bldg., Cincinnati, OH 45202.

EQUAL OPPORTUNITY EMPLOYERS

LEGISLATION, from page 3

of Justice to investigate and prosecute claims of employment discrimination. Sanctions, including fines and granting of back pay, may be imposed against offending employers. The legislation expands the coverage of title VII of the Civil Rights Act of 1964 to include claims of employment discrimination based upon citizenship, and such claims may be made against employers of as few as four persons. Senator Orrin Hatch (R-Utah), who opposed the bill, predicted that these provisions "will bring about a tidal wave of litigation that the employers and that the courts can ill afford." ■

THE SOURCE

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