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Administrative Conference Chairman Discusses Negotiated Rulemaking, ADR at Agency Level

Marshall J. Breger, Chairman of the Administrative Conference of the United States, received B.A., M.A., and J.D. degrees from the University of Pennsylvania, and a B. Phil. degree from Oxford University. He served President Reagan as Special Assistant to the President for Public Liaison in 1984–85. He is on leave from the faculty at New York Law School.

What is the role of the Administrative Conference and what is its relationship to the federal judiciary? Judges Stephen Breyer and Carl McGowan act as liaison between the Judicial Conference and the Administrative Conference, but how do the two conferences interact?

The Administrative Conference is a permanent federal advisory agency that provides advice and assistance to Congress, federal agencies, the President, and the Judicial Conference on improvements in the administrative process.

It certainly is beneficial to the Administrative Conference to have liaison representation from the Judicial Conference. For one thing, the Administrative Conference is statutorily empowered to make recommendations to the Judicial Conference on

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matters of judicial review. So, we are delighted that the federal judiciary has traditionally had a lively interest in Conference activities. The late Judge E. Barrett Prettyman chaired the 1962 Temporary Conference and was probably the moving spirit behind the creation of the Conference as a permanent body. The late Judge Harold Leventhal served with great effectiveness as liaison member. Judge Breyer and Judge McGowan, the present liaison members, are both recognized experts in administrative law and take their liaison duties very seriously. Judge McGowan, in fact, devoted an excellent lecture to the work of the Conference.

It is important for us to have this kind of participation from the judiciary because what we do, at least what we recommend, may directly affect the judiciary. If we recommend that a certain administrative action

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1987 Summer Program for Judges on Constitutional Adjudication

The Federal Judicial Center will hold a special seminar for district and appellate judges, June 14–19, at the School of Law (Boalt Hall) of the University of California at Berkeley. Like the Center's 1986 summer program, also held at Berkeley, the 1987 seminar will treat selected constitutional questions on the federal court dockets in the 1980s. In light of the constitutional bicentennial celebration, special attention will be given to historical origins and evolution of constitutional doctrine.

District and appellate judges wishing to attend the seminar should write to Russell Wheeler, Director of the Center's Division of Special Educational Services. To ensure consideration, letters should be received by Feb. 9.

Chief Justice Appoints Noel J. Augustyn Administrative Ass't

The Chief Justice has appointed Noel J. Augustyn as his administrative assistant, effective Jan. 5, 1987.

Noel Augustyn

Mr. Augustyn has since 1983 been associate executive director of the Association of American Law Schools. He is a graduate of Dartmouth College (A.B.), Stanford University (M.A.), and the University of Notre Dame Law School (J.D.). He has been an adjunct professor at Georgetown University Law Center since 1985, was assistant dean and assistant professor at Boston College Law School from 1980 to 1983, and from 1974 to 1980 practiced law with two Massachusetts-based firms. His articles on criminal law, evidence, and other subjects have been published in various legal periodicals.

The position of administrative assistant to the Chief Justice was created by Congress in 1972, and is codified at 28 U.S.C. § 677. ■

Inside ...

Three Judicial Conference Committee Chairmen, New Committee Appointed by Chief Justice

Chief Justice Rehnquist has named three new Judicial Conference committee chairmen and has appointed an ad hoc committee to review and evaluate the work of the Conference and the adequacy of its current committee structure.

Judge Morey L. Sear (E.D. La.), who had been chairman of the Advisory Committee on Bankruptcy Rules, is the new chairman of the Conference's Committee on the Administration of the Bankruptcy System. District Judge Lloyd D. George (D. Nev.), who in 1979 became the first bankruptcy judge to serve on the Center's Board, has been selected to succeed Judge Sear as chairman of the Advisory Committee on Bankruptcy Rules.

Judge Joseph F. Weis, Jr. (3rd Cir.), a member of the Conference's Advisory Committee on Civil Rules, has been named chairman of that committee.

The Judicial Conference authorized the Chief Justice to appoint the ad hoc committee to take a fresh look at the way in which the Conference operates and to evaluate the adequacy of the Conference's committee structure. The Chief Justice noted that the last time such a committee sat was in 1968, and that it was time for another look at the subject. A similar review of the Conference's committee structure was also performed in 1955. ■

Hearing Set on Proposed Fed. R. Crim. P. 12.3

The Judicial Conference Committee on Rules of Practice and Procedure has circulated a preliminary draft of a proposed Fed. R. Crim. P. 12.3, which would require a defendant to give notice of an intent to raise a public authority defense. A hearing on the rule will be held Feb. 13 at 9:00 a.m. at the National Courts Building in Washington, D.C. Those wishing to testify should contact the Committee's secretary, James E. Macklin, Jr., 30 days before the hearing by writing the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Administrative Office of the U.S. Courts, Washington, DC 20544. Those with comments or suggestions should submit them to the same address by Mar. 30. ■

200 Years Ago...

January 1787: Finding how to pay the immense War debt plagued the country long after Yorktown and presaged the struggle over the Constitution. Congress, dependent on voluntary contributions from the states, wanted a change in the Articles of Confederation to let it collect a 5 percent impost on imported goods. Unanimous consent of the states was necessary, and by January, all had agreed but New York, where Governor Clinton's supporters controlled the Assembly and opposed the increase in national power. "We are told," argued impost proponent Alexander Hamilton, "that it is dangerous to entrust power anywhere, that power is liable to abuse .... Power must be granted or a civil society cannot exist; the possibility of abuse is no argument against the thing; this possibility is incident to every species of power however placed or modified."

Clinton's forces voted down the change without even replying to Hamilton. Shortly thereafter, however, enough Clinton supporters sided with Hamilton to pass a recommendation that Congress endorse the Annapolis Convention's call the previous October for a constitutional convention to be held in Philadelphia later that year.

BICENTENNIAL OF THE U.S. CONSTITUTION

Chief Justice Approves New Guidelines On Intercircuit Assignment of Judges

Intercircuit assignment of senior judges will be permitted more readily than in the past under new guidelines recently approved by the Chief Justice. Under the guidelines, a circuit that lends active judges may not borrow from another circuit and a circuit that borrows active judges may not lend, except in emergency situations. However, this "lender/borrower rule" may now be relaxed in appropriate cases with respect to senior judges, provided the chief judge of the lending circuit is consulted to assure that circuit's needs are met first.

Among other changes to the guidelines, a visiting judge may, if deemed necessary, be accompanied by up to two staff members.

Assignment of U.S. judges to courts in other circuits or to special courts is pursuant to statutory authority. The Judicial Conference appointed the Committee on Intercircuit Assignments to assist and advise the Chief Justice in making these assignments. The changes in the guidelines followed consideration by the Chief Justice, Judge Thomas A. Flannery (D.D.C.), Chairman of the Committee on Intercircuit Assignments, and L. Ralph Mecham, Director of the AO. ■

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New Reporter of Decisions Named at Supreme Court

The Supreme Court of the United States has selected Frank D. Wagner as the new reporter of decisions. Wagner is a graduate of Cornell University and Dickinson School of Law. He has worked in legal publishing since 1972, when he joined Lawyers Co-operative Publishing Co. as an associate editor. Among other assignments, he served there as managing editor of *U.S. Supreme Court Reports: Lawyers' Edition*. Wagner joined Research Institute of America, a subsidiary of Lawyers Co-op, in 1982 as a senior editor, before becoming managing editor in 1985.

State-Federal Judicial Councils Active in Minn., Ore., W. Va.

State–federal judicial council meetings were recently held in Minnesota and Oregon, and the judiciary in West Virginia have met to reorganize their council.

Eight U.S. district court judges joined Chief Justice Douglas K. Amdahl and six other members of the Minnesota Supreme Court in St. Paul for the first meeting of that state's state–federal council in two years. At the time of the meeting, the U.S. district court for Minnesota was studying the Minnesota State Rules of Professional Conduct. The district court has now elected to adopt those state rules, although they will not become effective in the federal court until after publication requirements have been met. The council also discussed attorney discipline and related sanctions.

Chief Justice Edwin J. Peterson (Or. Sup. Ct.) chaired the fall 1986 meeting of Oregon's state–federal judicial council. The council discussed asbestos cases and the merits of certifying a statute of limitations ques-

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Brookings Institution Colloquium Examines Relationship Between Judiciary and Congress

A day-long colloquium at the Brookings Institution in November, under the cosponsorship of the Judicial Conference Committee on the Judicial Branch, was described by its organizers as the first attempt to analyze systematically and to improve the relationship between the judicial and congressional branches.

Judge Frank M. Coffin (1st Cir.), chairman of the Committee on the Judicial Branch, has directed the effort to study and improve congressional–judicial relations. Last year, in an article in the *Brookings Review*, Judge Coffin wrote that the interrelation between Congress and the judiciary has been largely unexplored, and that the condition of the relationship, "if not an acute crisis, is that of a chronic, debilitating fever."

In his introductory remarks at the conference, Judge Coffin said he hoped the session would remove misperceptions about Congress and the judiciary and begin an agenda for practical implementation of measures to improve the relationship between the branches.

Judge Coffin's observations about congressional–judicial relations were confirmed by most of the conference participants. Judge Abner J. Mikva (D.C. Cir.) said, "It is apparent that each group is totally unaware of the internal processes of the other." Judge Mikva, like Judge Coffin, is a former member of Congress.

Much of the discussion focused on the impact that legislation has on the work of the courts and on the role of the judiciary in giving meaning to the law. This prompted a lively exchange between Justice Antonin Scalia and Judge Stephen Breyer (1st Cir.) on the value of legislative history in interpreting ambiguously worded statutes.

A. Leo Levin, FJC Director, chaired a panel on judicial and legislative capacity that included Justice Scalia, Judge Breyer, and Rep. Robert W. Kastenmeier, who heads the House subcommittee that has jurisdiction over the federal courts. L. Ralph Mecham, AO Director, was a member of a panel chaired by Judge Coffin that discussed improvements in congressional–judicial relations, and that also included Emory M. Sneeden, a former Fourth Circuit judge. Judge Mikva, Judge Kenneth Starr (D.C. Cir.), and Judge Irving Hill (C.D. Cal.) were members of the panel on constitutional and prudential concerns. ■

Bicentennial Commission Extended Through 1991; Other Groups Continue To Plan Projects

The 99th Congress has extended the life of the Commission on the Bicentennial of the United States Constitution so that it can coordinate the celebration of the 200th anniversary of the writing and ratification of the Bill of Rights in 1991. The commission had originally been empowered to act through 1989, but its life has been extended through Dec. 31, 1991.

The commission has approved a mechanism for providing $3.7 million in funding for material and instruction on the Constitution for elementary and secondary teachers, and has approved the expenditure of $250,000 for the publication and distribution of nearly 2.5 million pocket-sized Constitutions.

Other bicentennial activities include the following:

- Chief Judge Howard T. Markey, Chairman of the Judicial Conference

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should be reviewable under a particular standard, we need the perspective of judges who would have the reviewing responsibility. Many practical issues could easily be ignored were the judiciary not there to put them in focus for us. Of course, this is a "one-way liaison." We don't have a complementary liaison with the Judicial Conference to let them know how what they do will affect the agencies. I sometimes think the judges, when they want to get rid of litigation in the federal courts, aren't always aware that they may be pushing it onto the agencies and building up agency adjudicative caseloads. But Judges Breyer and McGowan have been very, very helpful.

I should mention that we have developed a formal relationship with two more judges. Judge Stanley Sporkin of the District of Columbia and Judge John Walker of the Southern District of New York have both become special counsel to the Administrative Conference, and they will be helping us in developing projects in one of our "theme areas," the regulation of banking and other financial services.

What is your budget at the Administrative Conference? How many employees do you have?

Our fiscal 1987 budget is about $1.5 million. We have 20 employees, including 9 attorneys.

Is that adequate?

I suppose I would not be a proper agency chairman if I didn't say that we could always use more but, at the same time, I would not be doing my job if I did not say that we are managing well with what we have.

I think to some extent the kinds of activities that we do are dependent upon our budget. We have in the past done extensive full-scale studies of IRS procedures—seven big volumes. These took up the time of much of the office personnel.

When were these studies done?

This was in the mid seventies. Congress requested that we do them, and the IRS changed innumerable procedures as a result. Some say that we should do another IRS study, but I leave that to Congress. We did a major empirical study of the FTC's rulemaking procedure. Empirical studies take vast resources. If you don't have those resources, you have to shy away from empirical research.

Let me emphasize that in addition to the permanent staff of the Conference we hire numerous contract researchers. At any time we have approximately 30 consultants under contract. A large number of the best academics in administrative law have at one time or another been consultants for us. They do the bulk of the empirical studies that result in Conference recommendations. Indeed, most of the work on the IRS and FTC projects was performed under such contracts.

Our consultants are usually professors, but on occasion we hire attorneys in private practice who have specialized skills.

We have begun—and with some success—to get pro bono assistance from law firms. We have just completed a very successful project that was performed for us by Crowell & Moring, a very large Washington, D.C., firm. I am trying to point out to people that the federal government can be an object of charity.

Of course, we have the Conference itself, which is an unusual entity: a council of 10 appointed by the President. James C. Miller, head of OMB, is on it; Arnold Burns, Deputy Attorney General, from the Justice Department; Dan Oliver, Chairman of the Federal Trade Commission; Mark Fowler, Chairman of the Federal Communications Commission; a conference with 44 government members (usually the general counsel or agency head) and some 36 members from the public; and liaison members, including liaison members from the FJC and the AO.

Please give us an update on proposals for setting rules on government agencies' hiring outside counsel.

This is an ongoing study. We hope to have a recommendation ready for the June plenary session. The banking agencies, in particular, make extensive use of private counsel. The

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PERSONNEL

Appointments

Alex T. Howard, Jr., U.S. District Judge, S.D. Ala., Oct. 21

James R. Spencer, U.S. District Judge, E.D. Va., Oct. 27

Daniel A. Manion, U.S. Circuit Judge, 7th Cir., Oct. 29

Douglas H. Ginsburg, U.S. Circuit Judge, D.C. Cir., Nov. 10

Elevations

John J. Gibbons, Chief Judge, 3rd Cir., Jan. 1

Edward C. Reed, Jr., Chief Judge, D. Nev., Oct. 10

Resignation

Arlin M. Adams, U.S. Circuit Judge, 3rd Cir., Jan. 2

Senior Status

Ruggero J. Aldisert, Chief Judge, 3rd Cir., Dec. 31

CALENDAR

Jan. 15–16 Judicial Conference Committee on the Administration of the Bankruptcy System

Jan. 19–20 Judicial Conference Committee on Judicial Ethics

Jan. 20–22 Workshop for Judges of the Ninth Circuit

Jan. 22–23 Judicial Conference Committee on Court Administration

Jan. 22–24 Judicial Conference Committee to Implement the Criminal Justice Act

Jan. 26 Judicial Conference Ad Hoc Committee on Sentencing Guidelines

Jan. 28–30 Judicial Conference Advisory Committee on Codes of Conduct

Jan. 29 Judicial Conference Committee on Rules of Practice and Procedure

Jan. 30–31 Judicial Conference Committee on the Budget

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FDIC spends over $30 million a year hiring private attorneys; the Federal Home Loan Bank Board close to that. They have a unique set of problems in terms of their needs for private counsel, because those needs occur in crisis situations when there is a failing bank. They have developed procedures to give some regularity to their decision making. Most agencies other than the banking agencies operate on an ad hoc basis. We think that it is important that there be an effort to develop some regularity and guidelines in this area.

Do you think the Conference will accept that recommendation?

Well, I have not been Chairman long, but I have been Chairman long enough not to second-guess the members of the Conference.

Do you anticipate objections from agencies that have been using outside counsel?

We have found that many agencies did not realize that sister agencies had the same kinds of problems. This is a situation in which State thought they alone were doing it, Agriculture thought the same. Except for the banking agencies, everyone thought that these were issues unique to them. So there was a sense of relief upon learning that this is being done throughout the government, and a great desire for some regularity in approaching the hiring of outside counsel.

I think that by and large agencies welcome suggestions for improvement that are based on successful experience in other agencies, so I don't think they will resent our addressing the issue, but it is too early to say whether they will accept particular recommendations.

There are some issues that involve important policy questions. Should the hiring, to the extent that it is required, be done by the agencies themselves, or should the decision to hire outside counsel be approved by the Department of Justice?

You have said that "the development of both case law and legal culture has eroded the consensus which undergirded many portions" of the 1946 APA. Would you enlarge on that?

The APA was in large measure a product of a New Deal view of regulation as an apolitical enterprise. The view was that in the agencies there are experts and that they can solve problems with technical expertise. That view has begun to erode. The erosion can be seen very clearly in fights in the Carter administration over the Omnibus Regulatory Reform bill, which started out as procedural reforms, good-government reforms. Then different interest groups started to say, "Well, these good-government reforms will gore my ox"; "I had better oppose section 14"; "I had better oppose section 17"; and this good-government effort just collapsed. It was dead in the water, because the notion that these administrative agencies were just supplying expertise and not making political choices has eroded.

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Positions Available

U.S. Bankruptcy Judges. New positions in D. Md., E.D. Va., W.D.N.C., D.S.C.; existing positions in E.D. Va., M.D.N.C. Note: Appointments cannot be made to new positions until funds are appropriated by Congress. Applicants must complete comprehensive questionnaire. Apply by Jan. 16 to Samuel W. Phillips, Circuit Executive, U.S. Court of Appeals, 4th Circuit, P.O. Box 6G, Richmond, VA 23214.

* * *

U.S. Bankruptcy Judges. E.D. La., W.D. La., N.D. Tex., W.D. Tex., S.D. Tex. (Houston, 3 positions; Corpus Christi, 1 position). Salary $70,500. Requires law degree and requisite character, experience, and ability. For qualification standards and application form, write Lydia Comberrel, Circuit Executive, U.S. Court of Appeals, 5th Circuit, 600 Camp St., New Orleans, LA 70130. Cut-off for completed applications is Feb. 18.

EQUAL OPPORTUNITY EMPLOYERS

Series of Regional Hearings Completed

Judicial representatives from five judicial circuits were among the more than 30 witnesses who testified before the U.S. Sentencing Commission in Washington last month. That two-day session was the last in a series of regional hearings that followed the publication of the Commission's preliminary draft sentencing guidelines on Oct. 1, 1986. Previous hearings were held in Chicago, New York City, Atlanta, Denver, and San Francisco. In all, the commission has received oral and written commentary

NEWS FROM THE SENTENCING COMMISSION

from hundreds of individuals and groups concerning the preliminary guidelines.

At the conclusion of the hearings, Sentencing Commission Chairman William W. Wilkins, Jr., said he was pleased that the hearings had accomplished their objective. "The preliminary draft and regional hearings focused attention on the many difficult issues the commission must face as it seeks to develop theoretically sound and workable guidelines," Judge Wilkins said. "I am encouraged by the strong support and also the constructive criticism offered by those interested in improving our criminal justice system."

The commission will consider the commentary received in preparing a redraft of the sentencing guidelines for publication in late January, on which it will again solicit public comment. As was the case with the preliminary draft, copies will be sent to every Article III judge, U.S. magistrate, U.S. attorney, chief U.S. probation officer (with several copies to each probation office), federal public defender, and hundreds of defense attorneys and interested organizations and individuals who received the first draft. ■

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Secondly, there is now, unlike in 1946, a great deal of uncertainty about the desirability of regulation itself. During the New Deal, during World War II, the regulatory state was a "given"; in fact, it was a given good; it was always a good. Got a problem? Regulate it. What the Reagan administration has done is lay that basic question—that bottom-line, threshold question—open to re-examination. And clearly most of us would now agree that it is less than 100 percent certain that regulation is always an unmitigated good.

Thirdly, the APA, the whole regulatory apparatus of 1946, was largely an adjudication apparatus, an enterprise to dispose of particular matters under general guidelines laid down by the legislative branch. What we have seen over the last 40 years is the growth of regulation through rulemaking, of policy making through rulemaking, and this growth in rulemaking really reflects a devolvement of policy-making power to agencies in the regulatory state—a very different problem from the 1946 paradigm, within which you added to agency size and responsibility to enlarge the ambit for adjudication.

The Administrative Conference's Committee on Administration recently issued a proposed recommendation on agencies' use of alternative dispute resolution techniques. Would you comment on this proposal?

Well, Recommendation 86–3 is one we are very excited about, and it is a major theme of the Conference. We think that there is really ferment in the area of ADR. In recent years most of that ferment has been in the judiciary. Indeed, if you look at FJC publications you can track a lot of the experimentation that has been going on: in arbitration, in minitrials, in pilot mediation programs. Hardly anything has happened in the agencies. The agencies—and I always feel embarrassed saying this to the judges—the agencies must have 20 to 50 times the number of adjudications that the court system does. And there are so many more "judges"—administrative law judges, hearing examiners—so if you can have ADR in the agencies you have accomplished tremendous efficiency, tremendous savings of time and energy, and more justice (because I believe that delay in and of itself is a reduction in justice). So we are pushing this very hard.

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We are going to have a major conference in the spring on ADR at the agency level. We have some projects that we discussed at our plenary sessions in June and December 1986. Some of these projects, in fact, discuss whether or not current statutes or procedures will have to be modified. We are going to look at whether there is a need for change in the Federal Advisory Committee Act. For example, when you want to have a regulatory negotiation on rulemaking, is the caucusing that often occurs in those meetings always required to be open to the public under FACA? We don't think it is, but a lot of agencies are afraid. If they really are so afraid, would a change in the statute encourage them to experiment with regulatory negotiation?

We are considering the problem of the power of an agency to use a private arbitrator, and we have just issued some suggestions as to how agencies can go about acquiring the services of such "neutrals." We are looking at the question of settlement, the Comptroller General's rules regarding settlement authority, the fact that settlements have to be approved by the Department of Justice. That affects the settlement process. We are pushing both the alternate dispute resolution area and what we call "regulatory negotiation," which is a form of ADR, an effort to bring parties together in a negotiation before a regulation is issued in a rulemaking, in the hope that this will prevent litigation afterwards. And since 90 percent of the EPA regulations, for example, end up in court, if you can get a consensus beforehand you have prevented a tremendous waste of everyone's time and energy and money.

Where does the proposal for an independent agency to hear Freedom of Information Act disputes stand?

The Judicial Review Committee of the Administrative Conference did not agree with the proposed recommendation and sent it back to the consultant for this reason: There are 5,000 agency denials of FOIA requests a year; only 500 go to courts. There is no point in setting up an independent tribunal for 500 cases. What the committee did want to explore is whether or not the ombudsman notion for FOIA problems—which exists in New York State, in Australia, in New Zealand, and in Canada—would be useful in cutting down on the time of the FOIA case, preventing litigation, and that is what I am exploring.

Has the Administrative Conference taken a stand on the value of the Equal Access to Justice Act?

Yes. We were directed by Congress to consult with agencies on implementation of the EAJA and to assist them. We prepare model rules for the agencies, and we prepare a yearly report on EAJA agency adjudications. We get hundreds of ad hoc questions from both the small and large agencies. And we have a kind of substantial presence as an informal guardian of the EAJA. We consulted with Congress a number of times on the modi-

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fied act, and we prepared new model rules of procedures under the modified act.

As far as we can see the act has been all for the good. We have not seen the dangerous effects its opponents swore would happen. The heavens have not fallen. The public fisc is not rent (at least not by this act) and people or small businesses who have law suits with the federal government—businesses where they were in the right, where the government was not substantially justified—have been recompensed, including attorney expenses. So we think the changes are for the good. Here I must add a *mea culpa:* While in the White House, I supported the President's veto of the proposed EAJA amendments [Breger, *How Should the Equal Access to Justice Act be Rebuilt?*, 71 A.B.A. J. 40 (1985)]. The amended act as finally passed has proven most successful, however.

The Administrative Conference several years ago made a recommendation intended to deal with "races to the courthouse" in cases involving multiparty forum shopping for judicial review of administrative action, but the races continue. Would you comment, please?

I have been working very hard with Congress to enact the "Races to the Courthouse" bill, which creates an independent body to randomly select the court with venue in such situations. We proposed this in 1980, and it was included in a number of omnibus regulatory reform bills. For one reason or another, these bills never became law. In the 98th Congress we worked with the Judicial Conference, the ABA, and other interested parties to develop a generally satisfactory legislative proposal, and it was passed by the House as a separate bill, but it didn't get through the Senate. H.R. 439 finally passed the Senate in the closing days of the 99th Congress. Sen. Charles E. Grassley (R–Iowa) was very supportive of it. It passed encumbered by a number of unrelated amendments concerning, among other things, judicial pay. Due to lack of time, the amended bill never made it to conference. Having reread Aesop's fable of the tortoise and the hare, I intend to try again this spring in the 100th Congress.

"I have been working very hard with Congress to enact the 'Races to the Courthouse' bill."

It is important for your readers to understand what a race to the courthouse is all about. It is a situation where two adverse law firms can hire people to wait—to camp out in front of the clerk's office at a federal court or at an administrative agency—and keep open phones to New York and to New Orleans, for example, for weeks on end. They hire people at the other end of the phone booth to form a human chain in order, hopefully, to file an already written appeal with the clerk of a circuit court that is more favorable than another circuit court. But tremendous problems develop on the timing, because the Second Circuit uses a second hand and the Fifth Circuit does not. And in an actual case where both the Second and Fifth Circuits showed a filing at 3:01 p.m., the circuit court had to send it back to the agency to figure out who won the race.

Are you studying the so-called nonacquiescence problem, where some agencies refuse to follow one or more circuits' decisions when administering a national program?

This problem of nonacquiescence is a significant one, and it is one on which we have commissioned a study. We will review the nonacquiescence policies of all relevant federal agencies, not only the Social Security Administration. We hope that this study will be completed by the end of 1987.

Does the judiciary sometimes go too far in reviewing the factual basis of regulations, particularly in complex scientific areas?

On the narrow point of complex scientific facts, we don't think there has been that big a problem. Our *Guide to Federal Agency Rulemaking* points out that, especially when the subject matter of the rule is a technical one, judicial second-guessing is likely to be minimal. And I think that has been generally the case with technically complex facts. There is no doubt that there has been a shift in the attitude of the federal courts in the seventies. You had the "hard look doctrine" developed by Judge Skelly Wright, and now you have the *Chevron* doctrine of the Supreme Court, faithfully applied in the D.C. Circuit by Judge Kenneth Starr, for example, in *Investment Co. Inst. v. Conover*, No. 85–5029. *Chevron* points out that where the legislative history is clear, you have to follow the legislative history. Where the legislative history or the legislative directive may be uncertain, the courts should give deference to the agency. And the *Chevron* position, I think, would make clear that this would not be a major doctrinal problem.

"[N]egotiated rulemaking can change the face of rulemaking as you know it today."

Do you file amicus briefs?

Some people have suggested that the Administrative Conference should file amicus briefs, but we have never done so up to now. We may well have the legal power to file them, but doing so would only rarely advance our approach to administrative law reform—which is to create consensus for reform among impacted parties. I think we have seen our role as patiently building a con-

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sensus among the agencies and within the executive branch—a consensus that leads to improvements in agency rules and regulations. We are often consulted by the Justice Department on appeals. The Solicitor General's office consults us on matters where we have unusual expertise. And our reports and recommendations are public and are frequently cited in briefs and in judicial decisions. So I am not convinced we should jump into the amicus area unless the need is pressing and there is no one else ready to fulfill that need.

I believe that the Conference can do better work if it focuses its energies on particular themes rather than picking up projects and functions in an ad hoc manner. I try to gear our studies around a particular number of themes, such as dispute resolution, financial services, problems of user fees, and government efficiency, where with a definable amount of work we will really be the government experts in that area.

We also continue our traditional work in administrative rulemaking, adjudication, problems of administrative law judges. In 1964 when the Administrative Conference Act was passed, we were faced with the problem of fleshing out the meaning of the APA. As our *Guide to Federal Agency Rulemaking* shows, we did some of the major work in informal rulemaking. We dealt with most of the major issues concerning agency adjudication, such as procedure for discovery, subpoenas, hiring of ALJs, agency review (see our many recommendations in 1 C.F.R. pt. 305 (1986)). Since that time, we did some of the key work in agency openness as evidenced by FACA, by FOIA, by the Sunshine Act (see, e.g., our 1978 *Interpretive Guide to the Government in the Sunshine Act)*, and we developed the arguments for citizen participation in government decision making. Now you have a whole new set of issues, such as alternate dispute resolution, which have developed because of a concern about litigation overload. There are problems of government grants and contracts, the enactment of many user fees, and new substantive areas, such as financial services that are using regulations without a coherent conceptual or structural framework. So the face of administrative law is very different, and the issues, I think, are different and exciting ones.

What changes are needed in rulemaking?

The Conference has done a lot of work in this area. We think that the present APA exemptions that allow agencies to omit notice and comment procedures for rules dealing with public property, loans, grants, benefits, and contracts should be eliminated. Most agencies do provide notice and comment for such rules, in large part as the result of our recommendation. These kinds of rules were small potatoes in 1946. But with the growth of entitlement programs, they are now very big stuff.

We think that agencies often (or at least sometimes) should use additional procedures where they consider complicated or particularly important rules. They should go beyond notice and comment to advance notice of proposed rulemaking, longer periods of time for comment, holding public hearings or conferences. These are just examples. Again, different agencies have employed these procedures with good results. We think agencies should also develop appropriate procedures for handling ex parte communications that occur in rulemaking. The gist of such ex parte comments should be placed in the rulemaking record. An agency should also take care of conflicts of interest by promulgating procedures by which decisional officials involved in rulemaking abstain from participation if they have a conflict of interest or if they have prejudged facts that are in issue. And we think that in major rulemakings a regulatory analysis

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NOTEWORTHY

Second Circuit on summary judgment. The Second Circuit has encouraged litigants to use the summary judgment process, taking note of a study done by its Committee on the Pretrial Phase of Civil Litigation, chaired by Professor Maurice Rosenberg. In *Knight v. U.S. Fire Ins. Co.*, No.86-7294 (Oct. 22, 1986), Chief Judge Feinberg wrote that some litigants in the circuit were "reluctant to make full use of the summary judgment process because of a perception that this court is unsympathetic to such motions and frequently reverses grants of summary judgment. Whatever may have been the accuracy of this view in years gone by, it is decidedly inaccurate at the present time.... [From the committee's study] it is evident that grants of summary judgment are upheld on appeal in most cases [in 79 percent of the cases studied by the committee]. That figure is comparable to this circuit's 84 percent affirmance rate for appeals in civil cases generally."

* * *

PACT publishes new directory. A directory of victim–offender reconciliation and mediation programs in the U.S., Canada, and England has again been published by the National Victim–Offender Reconciliation Resource Center, which is a project of the PACT Institute of Justice, a nonprofit corrections organization. The directory lists 47 victim–offender programs that arrange meetings, in the presence of trained mediators, between perpetrators of crimes and their victims. The directory reports types of jurisdictions served, most common offenses referred, funding and referral sources, number of annual cases, and other program characteristics. *Victim–Offender Reconciliation Program Directory* is available, for $4.60 postpaid, from PACT, Box 177, Michigan City, IN 46360. ■

BREGER, from page 8

should be prepared. This is a form of cost-benefit analysis. Agencies should utilize this analysis as a tool. You make better rules by integrating analysis into the rulemaking process from the very beginning.

Last but not least, negotiated rulemaking can change the face of rulemaking as you know it today, and can be very useful in many situations. It is being used by the EPA, by the FAA, the FTC, the Department of Labor, the Department of the Interior; all very usefully with the potential of saving extensive amounts of time and money in litigation. But let me emphasize that agencies need a considerable amount of discretion in deciding whether to use additional procedures in any particular rulemaking. We have been in general reluctant to urge expansion of across-the-board statutory procedural requirements for rulemaking.

Any further comment?

I think that it is important, with all due respect, for the courts to be sensitive to the fact that they are in a partnership with both the adjudicatory and the rulemaking side of the agency activity. I think that the judiciary should become involved in the concerns of the administrative agencies, because so much of what happens there will affect the contours of the federal judiciary in the future. It is my understanding that Social Security disability cases comprise 30 percent of the caseload in many districts. Now that fact alone should focus the judiciary on the importance of understanding and discussing and working in a systemic way toward dealing with problems of agency adjudication mechanisms.

"[I]t is important ... for the courts to [realize] that they are in a partnership with both the adjudicatory and the rulemaking side of the agency activity."

The presence of Judges Breyer and McGowan has been very helpful to the work of the Conference. We look forward to further interaction with the judiciary—with the Judicial Conference, with the FJC, and with circuit judicial conferences where administrative law issues impact on caseload.

Judicial review of agency rulemaking is significantly affected by the agency rulemaking process. Judicial interest in improving that process could well reduce litigation or at least streamline the issues that are litigated. Courts should recognize the need to articulate their positions on rulemaking clearly and in ways that are sensitive to agency decisional processes. They should support efforts, such as "reg-neg," to reduce the number of final rules that are litigated. Improvements in the law have to include the law in action, and the rulemaking and adjudicatory activities of administrative agencies very often embody the law in action—the underside of the legal iceberg, one might say. In short, any effort the judiciary makes to learn more about these beasts whose rules they review and whose adjudications they oversee will do much to improve the administration of justice for both agencies and courts. ■

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.

Abramson, Leslie W. *Judicial Disqualification Under Canon 3C of the Code of Judicial Conduct.* American Judicature Society, 1986.

Childress, Steven Alan. "'Clearly Erroneous': Judicial Review Over District Judges in the Eighth Circuit and Beyond." 51 *Missouri L. Rev. 93* (1986).

Federal Court Management Statistics—1986. Administrative Office of the U.S. Courts, 1986.

Federal Offenders in the United States Courts—1984. Administrative Office of the U.S. Courts, 1986.

Goettel, Gerard L. "From the Bench: Appellate Fact Finding—And Other Atrocities." 13 *Litigation* 7 (Fall 1986).

Goldberg, Arthur J. "The Free Exercise of Religion." 20 *Akron L. Rev.* 1 (1986).

Hale, Emmette F., III. "The 'Arising Under' Jurisdiction of the Federal Circuit: An Opportunity for Uniformity in Patent Law." 14 *Florida State University L. Rev.* 229 (1986).

Hufstedler, Shirley M. "Bad Recipes for Good Cooks—Indigestible Reforms of the Judiciary." 27 *Arizona L. Rev.* 785 (1985).

Hupp, Harry L. "From the Bench: Ten Ways to Torpedo a Settlement Conference." 12 *Litigation* 7 (Summer 1986)

Levine, Murray. "The Role of Special Master in Institutional Reform Litigation: A Case Study." 8 *Law & Policy* 275 (1986).

Meador, Daniel J. "Federal Law in State Supreme Courts." 3 *Constitutional Commentary* 347 (1986).

Mikva, Abner J. "Reading and Writing Statutes." 28 *South Texas L. Rev.* 181 (1986).

O'Connor, Sandra D. "The Changing Role of the Circuit Justice." 17 *University of Toledo L. Rev.* 521 (1986).

Packel, Israel. "Congressional Power to Reduce Personal Jurisdiction Litigation." 59 *Temple L.Q.* 919 (1986).

Starr, Kenneth W. "The Shifting Panorama of Attorneys' Fees Awards: The Expansion of Fee Recoveries in Federal Court." 28 *South Texas L. Rev.* 189 (1986).

Steinberg, Robert E. "OMB Review of Environmental Regulations: Limitations on the Courts and Congress." 4 *Yale Law & Policy Rev.* 404 (1986).

Thompson, Robert S. "Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate." 59 *Southern California L. Rev.* 809 (1986).

BICENTENNIAL, from page 3

Committee on the Bicentennial of the Constitution, reports that the committee will be updating the film series *Equal Justice Under Law* and plans to make videocassettes available to all courts. Committee members will judge a law-school essay contest conducted by the national commission. While a number of other projects are under consideration, the committee sees its primary role as catalyst and information exchange center for district and circuit court committees.

• Phi Alpha Delta Law Fraternity, International, has begun a six-year bicentennial program that emphasizes outreach to communities to educate citizens about the Constitution. The program organizes intergenerational discussion groups on the National Council on the Aging's publication *The Family, the Courts and the Constitution.*

• The ABA and the Constitution Study Group of the National Archives have published a collection of essays about the Constitution. *The Blessings of Liberty: Bicentennial Lectures at the National Archives* includes lectures by prominent constitutional scholars and public figures given as part of the Archives' "Bicentennial '87" lecture series. The volume is intended as a resource for persons planning bicentennial programs, and is available from Order Fulfillment–468, ABA, 750 N. Lake Shore Dr., Chicago, IL 60611, for $4.95 plus $1.00 handling; for multiple copy orders, send $2.50 handling charge. Specify Prod. Code No. 468-0005.

• A National Center for the U.S. Constitution, devoted to scholarly study and public education concerning the Constitution, will be established in Philadelphia. A planning committee is headed by Hobart G. Cawood, superintendent of Independence National Historical Park and the director of Philadelphia's bicentennial observance. ■

COUNCILS, from page 3

tion to the Oregon Supreme Court. Chief Justice Peterson reported on judicial immunity. Council members agreed jointly to support proposals in Congress to strengthen judicial immunity, particularly in the area of attorneys' fees in injunction suits. Judge James Burns (D. Or.) asked that the council keep in mind recent filings by disgruntled litigants seeking recusals.

West Virginia plans to organize a new state–federal council and will soon hold regularly scheduled meetings. Conflicts in court calendaring—a problem for both the courts and the bar—will receive early attention. Judges and attorneys see calendaring guidelines—now in draft form—as a solution. For further information about or copies of guidelines for calendaring, contact Alice O'Donnell, FTS 633-6359, 1520 H Street, N.W., Washington, DC 20005. ■

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President's Decision on Salary Increases Falls Short of Commission's Recommendations

President Reagan has recommended increases in salaries for judicial personnel, although his recommendations do not match the increases recommended by the Commission on Executive, Legislative, and Judicial Salaries (see the table on page 4). The President's recommendations will take effect absent contrary action by Congress within 30 days. Under those recommendations, district judges will receive an annual salary of $89,500, circuit judges $95,000, claims court judges $82,500, and bankruptcy judges, magistrates, and Level V executives $72,500. The commission had recommended salaries of $130,000 and $135,000 for district and circuit judges, respectively. The President stated in submitting his recommendations, "This increase is but the first step in addressing the loss of real income documented by the ... Commission," and that he anticipates submitting another salary recommendation prior to leaving office that would be "another step toward overcoming that erosion of real income."

The salary commission made recommendations Dec. 15 concerning the compensation of more than 3,000 government positions, including the Vice President, cabinet officers, members of Congress, Supreme Court justices, and federal judges. "Since 1969, incumbents in these

See SALARIES, page 4

Chief Justice Lends Support to Salary Increases

The Chief Justice utilized his year end statement, released Jan. 1, to underscore his strong support for the recommendations of the Commission on Executive, Legislative, and Judicial Salaries. The statement said in part, "The pay of federal judges has never been comparable to the earnings of lawyers at the top of their profession in private practice, and the recommendations of the Salary Commission do not approach those figures. The Commission's recommendation would simply restore to federal judges the sort of earnings which have always made that office attractive to those who combine a desire for public service with an interest in the judicial process." The Chief Justice cited a statement of Circuit Judge Frank M. Coffin (1st Cir.), who has said that "what no judge appointed to the bench in the past two decades has ever expected to bear was an almost 40 percent reduction in his or her real compensation over the past 18 years."

The Chief Justice pointed out that "sitting judges' inevitable loss of morale, their increasing preoccupation with possible congressional rectification, and the possibility that lawyers will come to see federal judicial service not as a calling but as a stepping stone to a lucrative private practice all threaten the traditions of our inde-

See CHIEF JUSTICE, page 5

Abraham Sofaer, Former Prosecutor and Judge, On the Role of State Department Legal Adviser

Abraham D. Sofaer received his B.A. and an LL.D. degree from Yeshiva University and his LL.B. from New York University. He clerked for Judge Skelly Wright (D.C. Cir.) and for Justice William J. Brennan, Jr., and served as an assistant U.S. attorney for the Southern District of New York (1967–69). He taught law at Columbia University from 1969 to 1979, and was appointed to the U.S. District Court for the Southern District of New York in 1979. He served on the Federal Judicial Center Advisory Committee on Experimentation in the Law. In 1985 he became Legal Adviser to the State Department.

You served as a judge for six years before taking your present position. How would you compare the two jobs?

I think when you leave the bench you can understand the enormous value of having a place where you can have disputes authoritatively resolved. In diplomacy you don't have such a place. It is more difficult. You have to negotiate things out, and there are very few places where you can go for an authoritative resolution. We don't agree, for example, that the International Court of Justice

See SOFAER, page 6

Inside ...

200 Years Ago...

February 1787: With the country near bankruptcy, Shays's Rebellion ravaging New England, and Congress unable to act, many agreed that some change in the national government was necessary but few agreed about how much.

The five-state commercial convention that had met in September 1786 in Annapolis had suggested that the states appoint delegates to meet in Philadelphia in May 1787 "to devise such further provisions as shall appear . . . necessary to render . . . the federal government adequate to the exigencies of the Union." On Feb. 21, Congress offered its opinion that such a meeting would be "expedient" but only "for the sole and express purpose of revising the Articles of Confederation."

That same day, Secretary of Foreign Affairs John Jay wrote John Adams that he expected little from the proposed convention. He knew the government "was unequal to the task assigned to it" but was unsure what changes were necessary. "There is one, however, which I think would be much for the better, viz., to distribute the federal sovereignty into its proper departments of Executive, Legislative, and Judicial; for that the Congress should act in these different capacities was, I think, a great mistake in our policy."

BICENTENNIAL OF THE U.S. CONSTITUTION

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.

Vaccine Injury Act of 1986, Still Unfunded, May Be Subject of Congressional Scrutiny

A program to provide compensation in cases of injury caused by vaccinations against certain childhood diseases is being studied with an eye toward substantial changes. Due to controversy over some provisions of the program—including the role the judiciary would have in administering it—the 100th Congress may amend the program in the course of enacting an excise tax to provide funding for it. Funding from a source other than general revenue is necessary for the program to become operational.

Judicial Conference committees are considering appropriate recommendations concerning the program, which was established by the National Childhood Vaccine Injury Act of 1986 and signed into law on Nov. 14 as title III of the omnibus health bill (S. 1744). President Reagan said at the time of signing that a "serious deficiency of title III is that it would create a program administered not by the Executive Branch, but by the Federal judiciary. This is an unprecedented arrangement that represents a poor choice to ensure a well-managed and effective program."

Under the program, a claim for compensation would be made by filing a petition with the U.S. district court for the district in which the petitioner resides or in which the injury or death occurred. A copy of the petition would be served upon the Secretary of Health and Human Services. The role of the executive branch in the compensation program is limited to that of "respondent" to such petitions.

Actual administration of the compensation program would be handled by the courts according to the detailed regulation of court proceedings contained in the act. For example, the act requires the appointment of a special master in every compensation case. The special master would take evidence and prepare proposed findings of fact and conclusions of law with respect to whether compensation is to be provided and the amount of any such compensation. The record is then subject to review

See COMPENSATION, page 10

Smithsonian Symposium to Examine Constitution's Origins, Interpretation, and Impact Abroad

Constitutional Roots, Rights, and Responsibilities, the Ninth International Symposium by the Smithsonian Institution, is scheduled for May 18–23, 1987. The symposium will be chaired by A. E. Dick Howard, professor of law at the University of Virginia School of Law.

The symposium will open in Charlottesville, Va. The first day's program will feature sessions on the idea of a written constitution from historical and interpretive perspectives, including such topics as the idea of a written constitution in the thought of the American Founders, change under written constitutions, and judicial review. Participants will travel to Washington, D.C., for the remainder of the symposium.

The second day's program will examine the Old World and New World roots of American constitutionalism. Speakers from England, Scotland, and Germany, as well as American academicians and practitioners, are scheduled to give presentations.

The third day's program will be on the sources and evolution of rights and on their implementation and efficacy. A reception at the White House is planned.

The fourth day will be devoted to citizenship and citizen education and participation. The closing session of the symposium will be on the U.S. Constitution's impact abroad.

For further information, contact Neil Kotler, Office of Smithsonian Symposia and Seminars, (202) 357-2047. ■

Murder of Parole Officer Gahl Remembered as Staff Safety Training Programs Expanded

The murder of U.S. Probation Officer Thomas E. Gahl of the Southern District of Indiana in September 1986 was the most recent incident of serious violence against U.S. probation and pretrial services officers, and dramatized the risks inherent in these court employees' jobs. Michael Wayne Jackson, a former mental patient with a lengthy criminal record, shot Officer Gahl in Indianapolis during a crime spree that stretched across Indiana, Illinois, and Missouri. Gahl's death was the third employee fatality in the history of the probation and pretrial services.

Prior to Officer Gahl's death, the FJC's Management Training Branch had developed an innovative, broad-based, two-day program of staff safety training for U.S. probation officers and pretrial services officers. The program's primary emphasis is on prevention and management of crisis situations, and emergency responses. A videotape that accompanies the program includes dramatizations of potentially dangerous situations to which employees may be exposed. For example, during the "prevention" portion of the program, participants watch a video segment that depicts a staff member returning to her car in a parking garage. The viewers imagine themselves in the same situation and refer to questions in a workbook, which is provided. The questions, and follow-up discussion among the group of trainees, force them to think about pre-planning to avoid potential confrontation, and about such issues as paths of escape; what the options are (such as retreat or taking shelter); and what defensive shields or tactics might be available in the event of attack. Similar segments deal with safety in the office, bomb threats, home visits, and other commonly encountered situations. The program also teaches techniques useful in longer-term officer–client relationships, but which can also be applied to chance encounters with assailants. Several simple holds and escapes are demonstrated and practiced.

The training program includes the use of such techniques as lecturing, role-playing, criticizing of the video segments, group discussion, problem-solving exercises, and feedback and dialogue on methods the participants have found effective in coping with specific situations in both the field and office. The program does not deal with firearms or the use of deadly force.

The program is designed for all levels of probation and pretrial services staff. It is based on research conducted by the Staff Safety Curriculum Planning Committee convened by the FJC, and on the experience of practitioners in the probation system and of criminal justice agencies. The contents and methodology of the program are set forth in the *Staff Safety Instructor's Manual*, which is made available to those who present

See STAFF SAFETY, page 5

AO Starts Program for Distinguished Service

The Administrative Office has begun a program to recognize court employees for distinguished service to the judiciary. Director L. Ralph Mecham said such recognition will be made when merited by an employee whose contributions enhance the operation of the judiciary.

Nancy M. Mayer of the District Court for the District of Columbia is the first employee to be recognized under this program. Ms. Mayer's research into grand jury utilization and development of a grand juror kit have led to better management of grand juries, improvement in grand juror morale, and substantial reduction in costs.

The Judicial Conference has authorized the AO to seek legislation that would permit court employees to receive cash awards under the Incentive Awards Act. Under that act, government employees may be given cash awards for achievements that save the government money or improve government operations. The act does not apply to court employees, however.

Second Drug Aftercare Program Report Issued

The FJC has recently published *The Impact of the Federal Drug Aftercare Program*, by James B. Eaglin of the Center's Research Division.

This report presents the findings of a study of what has happened to offenders under supervision in the drug aftercare program created under the Narcotic Addict Rehabilitation Act of 1966 (18 U.S.C. §§ 4251–4255). The study was undertaken by the FJC as the second part of a two-phase evaluation of the aftercare program. (The first part has been reported by the Center as J. Eaglin, *A Process-Descriptive Study of the Drug Aftercare Program for Drug-Dependent Federal Offenders*, FJC 1984.)

A cohort of approximately 1,000 offenders from seven federal probation offices in New York, Pennsylvania, Maryland, Texas, California, and the District of Columbia was studied from July 1, 1982, to June 30, 1983, so as to produce systematic and up-to-date descriptive data on aftercare program participants and to identify significant factors that help to explain outcomes for those in the program. These outcomes are partially positive (increased employment and, for a majority of those studied, no arrests or parole violations) and partially negative (rearrests and findings of continued drug use for some offenders).

The report is prefaced with a summary of the study's results. It contains sixty-three tables outlining study findings, along with a comparison of the first and second studies.

Copies of this report can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Enclose a self-addressed mailing label, preferably franked (12 oz.), but do not send an envelope.

SALARIES, from page 1

senior government jobs have suffered severe declines in purchasing power," Commission Chairman James L. Ferguson said. The commission's data showed that for the period 1969–86, for example, U.S. district court judges have experienced a percentage loss in real income of 34 percent compared with corporate senior staff attorneys, who have seen a percentage increase in real income of 16 percent.

ABA President Eugene C. Thomas supported the commission's recommendations. "It is neither good government nor prudent management to continue to impose severe financial sacrifices on federal judges," he said. The citizens group Common Cause issued a statement saying that it strongly supports substantial pay increases for members of Congress, high-level executive branch officials, and federal judges "as necessary and in the public's best interest."

The commission noted that the level of congressional salaries has traditionally been "linked" to the levels in the other two branches of government. "The Founding Fathers intended Members of Congress to be equal to the other branches in status, prestige, ability and integrity.... Therefore, we have concluded that parity between Level II [executive branch positions], Congress and judges on the Circuit Court is important and should be maintained. However if Congress is unable to develop the courage to raise its own pay, it is better to limit the unfairness thereby caused and not impose inadequate pay levels on the two other branches," the commission's report said. ■

Excerpt from *High Quality Leadership—Our Government's Most Precious Asset*, the report of the Commission on Executive, Legislative, and Judicial Salaries, Dec. 15, 1986. After noting that the rate of federal judicial resignations has more than doubled since the beginning of the 1970s, due in large part to the level of remuneration, the report continued:

"It is hard to assess the real cost of replacing an experienced federal judge who resigns at the pinnacle of his career, but the implications for the judicial system are severe. It takes fully five years for a qualified attorney, once appointed to the federal bench, to reach peak efficiency. Early departure thus creates a gap in the system which at best cannot be filled for half a decade, but which at worst may result in a permanent diminution in the capabilities of the service.

"As new recruitment at inadequate salaries threatens to bring less qualified men and women to the bench, the real cost cannot be calculated in dollars. The real cost will be in the insidious and longer term drain imposed on the nation's judicial system, a loss we will all feel over time, if not now adequately addressed."

Recommended Salary Increases for U.S. Judicial Personnel

Position	Current Salary*	Recommended Salary	
		President's	Commission's
Chief Justice	$111,700	$115,000	$175,000
Associate Justice	107,200	110,000	165,000
Circuit Judge	85,700	95,000	135,000
District Judge	81,100	89,500	130,000
Claims Court Judge	72,300	82,500	130,000
Bankruptcy Judge	70,500	72,500	120,000
Magistrate	70,500	72,500	110,000
Level V	70,800	72,500	110,000

*As of January 1987, including the recent 3 percent increase.
SOURCE: Administrative Office of the U.S. Courts.

NOTEWORTHY

State prison population increase. The Bureau of Justice Statistics of the Department of Justice reports that the state prison population has increased from 115,314 to 415,796 between 1930 and 1984, with more than two-thirds of that increase occurring after 1975. Because the growth in prison population has been faster than the addition of new prison space, the population density in state prisons increased 45 percent during the period 1979–84.

* * *

State court clerk, deputy clerk not immune from suit. A U.S. district judge has refused to dismiss a complaint against a state court clerk and deputy clerk in a lawsuit charging them with acting in concert with a state court judge and others to deny the plaintiff his constitutional rights. The lawsuit was brought against a bank and its president, a judge in Colorado's District Court for the Sixth Judicial District, the clerk and deputy clerk of that court, and other defendants. *Pitts v. First National Bank*, Civil No. 85-1131-JB (D.N.M., Oct. 21, 1986). The complaint alleged that the clerk and deputy clerk failed to file documents. The complaint against the judge was dismissed, because all his alleged actions were within the scope of his judicial duties. The court refused to dismiss the complaint against the clerk and deputy clerk, however. Under *Henriksen v. Bentley*, 644 F.2d 852 (10th Cir. 1981), clerks are entitled to absolute immunity when performing quasi-judicial duties or acting under explicit instructions from a judge, but when performing ministerial duties, they are usually afforded only "qualified immunity." The court held that the alleged conduct complained of, failing to file documents, "is a ministerial function for which a clerk would be afforded only qualified immunity." ■

CHIEF JUSTICE, from page 1

pendent judiciary. Should the President and Congress fail to make realistic salary adjustments for judges, the present drawbacks to that honorable service will be exacerbated."

The Chief Justice praised Chief Justice Burger for his many contributions to the judiciary during his tenure as Chief Justice, stating that Chief Justice Burger had "demanded ... that we think of the administration of justice in systemic terms." He noted as being among the accomplishments marking Chief Justice Burger's tenure: circuit executives for federal courts, the American Inns of Court, the National Center for State Courts, the Institute for Court Management, the State Justice Institute, federal–state judicial councils, and an annual seminar for leaders of the three branches to exchange views.

The Chief Justice cited a number of steps taken in 1986 to meet evolving needs of the judiciary: the enactment of a Social Security law change affecting senior judges; the approval of a supplemental appropriations request that "relieved the courts of the dilemma of either extending a brief moratorium on civil jury trials or allowing such trials to proceed with no appropriated funds for juror fees"; enactment of improvements in the Judicial Survivors' Annuity System; the U.S. Sentencing Commission's release of preliminary draft sentencing guidelines as mandated by Congress; and Congress's authorization of 52 additional bankruptcy judgeships. Pointing out that "last year, our bankruptcy courts had a 31 percent increase of new case filings," the Chief Justice said, "I am confident Congress will act quickly to appropriate funds for salaries, thus allowing the courts of appeals to fill those positions."

Looking ahead to 1987, the Chief Justice urged public officials and citizens to participate in the observance of the bicentennial of the Constitution.

The Chief Justice urged Congress to "enact appropriate legislation" to create a national court of appeals or an intercircuit tribunal, as recommended by Chief Justice Burger. Also needed, the Chief Justice said, is the elimination of "as much of the Supreme Court's mandatory jurisdiction as the Constitution permits."

"[W]e must pay careful attention to the experience of the federal district courts currently experimenting with court-annexed arbitration," the message stated, and must also welcome the continued "lively debate" among the bench and bar about the 1983 rules amendments creating "sanction power" to constrain abuse of the litigation process.

"The developments with the sentencing guidelines should be closely monitored," with a period for the judiciary and the bar to study and learn the new procedures before their implementation.

Calling it a "matter of judicial housekeeping," the Chief Justice noted his appointment of a committee of judges "to help me assess the internal structure and procedures of the Judicial Conference of the United States," with a goal of making the Conference "even more effective."

[Copies of the Chief Justice's 1986 Year End Statement are available from the FJC's Information Services Office.] ■

STAFF SAFETY, from page 3

the program.

The safety training program is designed for classes of not fewer than 15 and not more than 30 persons. Current demand for the program is so high that presentations will be scheduled through fiscal year 1988.

Questions concerning the staff safety training program can be addressed to David Leathery, Training Administrator, Division of Continuing Education and Training, FJC, 1520 H Street, N.W., Washington, DC 20005 (tel. 202/ 633-6024). ■

Written Comments On Revised Draft Guidelines Sought

The U.S. Sentencing Commission has asked to receive written comments on its revised draft sentencing guidelines no later than Mar. 16. It will send the revised draft to all U.S. district and circuit judges, magistrates, federal public defenders, chief U.S. probation officers, U.S. attorneys, and many defense attorneys, as well as other interested organizations and individuals.

NEWS FROM THE SENTENCING COMMISSION

The commission must submit the guidelines to Congress in final form by Apr. 13.

The commission describes this revised draft as differing "significantly in both form and substance" from the preliminary draft issued last September. Commission Chairman William W. Wilkins, Jr., said that "those who study the revised draft will find it more workable as well as theoretically sound and principled."

The commission noted the "thoughtful comments from hundreds of individuals" on the preliminary draft had illuminated various problems that it has addressed in the revised draft, including:

Complexity. The commission describes the revised draft as "significantly simpler and easier to understand and apply," with mathematical computations greatly reduced, and multiplication and fractions entirely

See SENTENCING, page 6

PERSONNEL

Death

Walter R. Mansfield, U.S. Circuit Judge, 2d Cir., Jan. 7

SENTENCING, from page 5

eliminated.

Cross references. Cross references within the guidelines have been eliminated.

Severity. The revised draft's numerical values for various offenses have "been extensively revised from the preliminary draft . . . in light of continuing empirical research, public comment, and commission discussion." The commission pointed out again that the values in the preliminary draft guidelines were largely to facilitate analysis and testing of its format and structure.

Discretion. The revised draft allows for the exercise of "significantly more" discretion by the judge at sentencing.

Impact analysis. The commission "fully realizes its statutory directive to determine prison impact" but regarded an impact study on the preliminary draft as "an unjustified expenditure of resources" in light of its deadlines and the tentative nature of that document. It said that executing an impact analysis on the preliminary draft would have delayed publication until early this year and severely limited the opportunity for public comment. The commission's research staff and the Bureau of Prisons are jointly developing a computer model to assess the impact a more finalized set of guidelines would have on correctional resources.

Correctional resources. The commission acknowledged that "responsible public policy must be weighed with the costs of that policy," but noted that the legislative history is explicit that its policy decisions should not be bound by existing correctional resources "in producing guidelines that best achieve the purposes of sentencing."

Probationary sentences. The revised draft provides the court "more latitude" in imposing a probationary sentence but does not make probation a viable sentencing option for every offense. "Publication of the preliminary draft last September proved extremely beneficial to the commission," said Judge Wilkins. "The revised draft offers a vehicle for extensive public comment. We again solicit your critical analysis." ■

Positions Available

Circuit Executive, 10th Cir. Salary (prior to proposed presidential/congressional salary increase) to $70,761. Position involves top-level executive functions; familiarity with accounting principles, statistics, and computerization. Law degree highly desirable. See 28 U.S.C. § 332(e) and (f) for special qualifications and general functions. Send resume by Mar. 6 to Chief Judge William J. Holloway, c/o Circuit Executive's Office, C-529, U.S. Courthouse, Denver, CO 80294 (tel. 918/581-7416).

* * *

Director, Office of Staff Attorneys, 9th Cir. Salary from $45,763 to $69,976. Two-year term commencing September 1987. Supervises 31 court attorneys and support staff. Applicants should have at least 5 years' legal experience, with academic experience preferred. For details contact Gary Widman, Director, Office of Staff Attorneys, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 547, San Francisco, CA 94101 (tel. 415/556-7361).

EQUAL OPPORTUNITY EMPLOYERS

CALENDAR

Feb. 4–6 Conference of Metropolitan Chief Judges

Feb. 5–6 Judicial Conference Committee on Administration of the Criminal Law

Feb. 6 Judicial Conference Committee to Study the Judicial Conference

Feb. 12–13 Judicial Conference Advisory Committee on Civil Rules

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is a place where we ought to be subjecting the security interests of the United States to a final determination. Eight out of the 15 judges there come from countries that don't ever take anything to that court. It is not the place where Congress, certainly, wants us to have issues of that kind resolved.

What are your responsibilities as State Department Legal Adviser?

I have a variety of responsibilities just like a lawyer would in a corporation or a major agency. I serve my boss, the Secretary. I attend various meetings in the building for the purpose of listening and ensuring that nothing is happening that might create a problem, and I suggest ideas that relate to law. I review the work of my staff on its way up to the seventh-floor principals. I also serve other principals, such as the Deputy Secretary and the Under Secretary for Political and Military Affairs. Each of these principals is assigned areas of responsibility and sometimes they need legal advice and they seek it from me. In addition to that, I have my own areas of responsibility, such as sending letters to courts suggesting the law, handling extradition negotiations, or extradition treaty negotiations, or handling relations with law enforcement agencies. But the great mass of work comes from my staff. It is generated by requests and issues that they receive from their clients around the world. I review those and tell people what I think. The work is very high quality work but occasionally it can—I hope does—benefit from my guidance.

And then there are special projects. The Secretary will say do *X* and I have had the good fortune of having certain assignments where I really took a lead role as a lawyer–diplomat to work on specific problems overseas. That kind of thing has happened to legal advisers in the past and it will happen to legal advisers in the future. It is just a question of being required for the right

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job at the right time.

How large a staff do you have to help discharge your responsibilities here and abroad?

I have a staff of about a hundred lawyers. They serve the entire State Department, including some 19 divisions, the regional bureaus, and the functional bureaus. I have three or four lawyers overseas. We have the U.S. Iranian Claims Tribunal that we work with on those plans. So it is a big office. It has been a great challenge administratively to run this office.

Would you comment on the relationship between the State Department and the Department of Justice since you have been in your present job. Do some of the responsibilities overlap?

Oh, sure. We have a lot of international antitrust issues so we confer with people in the Antitrust Division. We have many, many dealings with the Office of Legal Counsel. The relationship is very good. We work very closely with Justice. They have their agenda and we have our agenda. They see themselves as becoming increasingly involved in international affairs, and properly so.

On the other hand, we still remain responsible for assisting the Secretary of State in conducting foreign affairs and making sure that foreign affairs concerns are satisfied in connection with legal activities. Occasionally there are differences of view with the Department of Justice across the board on a variety of issues. Many of these differences of view are not differences between the legal people in each of the agencies. It will be differences of view between the head of a regional bureau here, let's say the African Bureau, and a U.S. attorney concerning a case that he or she is determined to pursue in the way one pursues an ordinary case. A regional assistant will be very concerned about the impact of some cases or some aspect of a case. We sometimes need to educate Department of Justice personnel, prosecutors and administrators, about the damage that can be done, sometimes needlessly, as a result of the normal kind of publicity-seeking activities of the prosecution.

Does it concern you when you think that you cannot possibly read every indictment?

Absolutely, it does scare me. I have had experiences where we have specifically asked to see indictments before they came down, and they have come down without our seeing them. And they have been harmful. So it does scare me. It's my job to review those kinds of papers and the U.S. attorneys resent it. I remember what it was like to be in a U.S. attorney's office and we didn't like being reviewed by anybody—not even by people in the Department of Justice in Washington. I am not at all surprised if they don't appreciate our interest in their cases.

They particularly don't want somebody from Washington coming and taking their case over?

Absolutely, but we don't try to take over their case. Sometimes you get a case like Zakharov, which was in Brooklyn, a spy case against a Soviet person in the U.N. We had our views and some people had different views. I said "some people" because I don't know the different views on what was done there. In that case, I can tell you the issues were presented to the high officials in our government and all the way up to the President. There was never a dissent of any kind from what the President decided.

You went to Israel to arbitrate a border dispute. Why were you selected?

Yes, Egypt and Israel. I went to both countries. I was actually shuttling between both countries on three different trips over the whole summer. Israel and Egypt have had a long-standing dispute about who owns Taba, which is a little piece of land that the Israelis did not give back to Egypt when they withdrew from Sinai. The dispute goes beyond Taba. There are some 13 points that are still in dispute along the Egyptian–Israeli border. I went out to help the parties develop a *compromis*, as we call it, essentially an agreement under which the dispute would be arbitrated. I didn't go out to mediate or decide the dispute but to help the parties agree on the form and content of this arbitration *compromis*. I think I was asked to do it because the issues and the whole process of developing a *compromis* are intensely legal. It is a lawyer's job in large part. We had one of the lawyers on my staff helping some of the diplomats in the department do it. They had reached a point where they weren't making any more progress, so the Secretary asked me to step in and see what I could do to make it move. The attempt to develop a *compromis* had been underway for over a year before I got involved. It had been going on and on and then finally it reached sort of a deadlock, and the Secretary asked me to go out and see what I could do. I went out there and worked with my own lawyer, an excellent fellow. I also worked with the diplomats over there, our ambassadors; I had the advice and support of our people here and political officers in each of the embassies; so we had a team.

"I was actually shuttling between [Egypt and Israel] on three different trips over the whole summer ... to help the parties agree on ... arbitration."

There is so much talent here, ready to jump in and do some interesting project. When your number is called and you get to do something like that you get a terrific team because you have these people who are talented, capable, and very supportive. You

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can contact anyone in the government; it is extraordinary. For example, in this particular instance, the Defense Mapping Agency gave us a lot of help in furnishing the technicalities of the *compromis* at the end of the process. We also got help from the Vice President. Vice President Bush played a tremendously crucial role during his trip. He personally visited there. Several issues remained unsettled, and what we needed was a great sense of urgency on the part of the parties to get those issues wrapped up. So, suddenly there was the Vice President, whom both sides respected, going out there. I went to Vice President Bush's office before this trip and we talked it through. I also talked to his staff. We prepared him to play a role in the process. His presence made a real difference, and he really moved that matter along very quickly.

Is it now settled?

The *compromis* is final and was duly ratified by both governments in early December. So the arbitration process is under way. And Egypt has now sent its ambassador back to Israel. Egypt had refused to staff its embassy with an ambassador since the Lebanon war, and the Taba *compromis* agreement was the last condition that had to be satisfied before President Mubarak would once again staff that embassy with a person of ambassadorial rank. The person who was there, Ambassador Bassiouny, was excellent. He had the rank of chargé d'affaires and was promoted to ambassador when this happened. So Egypt now has an ambassador in Israel, and he does a very good job.

In an essay in *Foreign Affairs* you argue that "law . . . has been placed very much at the service of those who embrace political violence." Do you believe that there were valid legal reasons to oppose the extradition treaty between the United States and Great Britain?

No. I think that the opposition was based on deep emotional pain that comes from the Irish/British experience. I found it very ironic to sit there and be berated by members of the Senate Foreign Relations Committee, particularly the Irish ones, for supporting the treaty. My career has somehow intersected with great American Irishmen; they have played an incredibly important part in my life, starting with Skelly Wright and William Brennan, both of whom I clerked for, Senator Moynihan, who essentially made me a judge, and a whole series of other people. It was bizarre to be accused of being anti-Irish.

Abraham D. Sofaer

"Terrorism has, through no choice of my own, been a major part of my job."

My position has always been that you can't have your favorite terrorists, and these senators know that. They issued a "Sons of Ireland" statement, which all of them had signed, in which they said violence is advancing nothing in Northern Ireland but more bloodshed and more violence. And, they said, violence is impermissible in pursuit of these objectives, whatever your objectives are. That is all we were saying in supporting the supplemental extradition treaty. The effort there was to stop the process that had begun in our courts of finding that there was some kind of a revolution in Northern Ireland that entitled people to act violently against policemen and judges, and potentially against civilians. Now the people involved in particular cases may have been charged with killing a soldier or killing a policeman, but they came from organizations that didn't limit their attention to soldiers and policemen. Furthermore, I said to the Senate Committee, how could we really make this distinction in a democracy, where we have to rely on the vote in order to bring about change? These terrorists said that they are part of a revolutionary movement—a war of national liberation as they call it—that they really are military people fighting a war, rather than criminals committing a murder. How would we like it, and how do we like it, when someone in the FALN sets off a bomb in southern Manhattan and blows up an Irish policeman? It happens that a bomb two years ago, on Christmas Day I believe, blinded an Irish-American policeman and blew the hand off another. And this was done by people here who represent 1 percent of the population of Puerto Rico, who want freedom. However honest their feelings, however warmly they espouse their cause, we just cannot as a democratic society allow people to go around killing other people. If you had a dictatorship and someone was in a revolutionary movement against it, well, then we are not going to seek to limit the political offense exception in such countries. We told the Senate that. No matter how intensely you feel about Northern Ireland and the Irish cause, the United Kingdom is not a dictatorship. There are ways of bringing about change through the democratic process, and the recent agreement that was obtained between the Republic of Ireland and the United Kingdom is an indication of that. I think that Irish Catholics and Irish Protestants can live together because we know that from the Republic.

Terrorism has, through no choice of my own, been a major part of my job. That is why I wrote my article, because I had run into so many areas

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in which I thought the law was not being used to bring about civilized order; rather, it was being used to encourage violence.

Do you believe there is now a positive trend to get away from that?

Definitely. I was with the Indian legal adviser yesterday and we were talking about this trend. People in the nonaligned nations, people everywhere, even in the Soviet Union, all understand that it went too far. Terrorism is horrible; it interferes with commerce, it interferes with progress on the issues. It would be inconceivable to me to have someone like Arafat returning to the U.N. in triumph like he did in the old days. We have learned a lot since then.

Are you optimistic that terrorism is on the wane?

Well, historically it goes in cycles. You have to be realistic about it; it goes in cycles. The chances are, even if we didn't do anything, it would slow down just because of forces and people getting sick and tired of it. I think Arabs, the Arab people of the world, overwhelmingly are sick and tired of terrorist violence. Most of the victims of the radical Palestinian groups have been Palestinians, moderate Palestinians. Some of these moderate Palestinians support Arafat. They are out there working for the Palestinian state, but they are not radical enough for other Palestinians who therefore kill them. Take the mayor of Nablus, El Musri. Nablus is the most populous Arab city of the West Bank. It is a very powerful city with a big Arab population. King Hussein approved his selection as mayor, Arafat approved his selection, and Israel approved his selection as part of a process that we have been working on to improve the quality of life on the West Bank and to create leadership in the local communities—working toward a time when the Arab population can take on more and more of their self-government. Everyone understands this is a very difficult and painstaking process; that people have to make compromises in order to bring about these little steps, such as appointing El Musri as mayor. He was a classic Palestinian nationalist who believed that his people should have their own land, but he was also a practical man, a pragmatist at the same time, a brilliant fellow of good personal qualities and who came from one of the most powerful and wealthy families in the area. He was an ideal figure to help the Palestinian cause, and yet they killed him on the streets of Nablus, just shot him in the back. It is such a waste to see a person like that come up among his people and be senselessly killed, a man who could have performed a really important role for his people, who could have helped overcome differences and built bridges to the future. He was no friend of Israel in one sense; but he was a pragmatist, a man who could work with Israel, with Jordan, with Arafat, and with everybody in the United States to improve things for his people in a way that was possible. His murder is the kind of thing that people get tired of. There is going to be some more of it, sure, particularly since guns cost so little now and bombs are so easy to make. But I think that the wheel has turned on political violence.

"There were 45,000 waivers of the McCarran Act exclusion last year ... and in only a handful of cases were waivers denied."

Do you get involved in the so-called "watch list" for foreign citizens whose entry into this country is deemed undesirable?

I am one of those people who passes on those problems, but I don't decide them finally. Generally the person who ultimately makes those decisions, absent special reasons, is Michael Armacost, the Under Secretary for Political and Military Affairs. Generally speaking the regional bureau is involved, consular affairs, human rights, possibly U.N. affairs and law (legal affairs) are all heard from on each of those issues. I try to implement the Secretary's policy. The Secretary does not believe in ideological exclusion. He has said so. The Attorney General has concurred in that and we—the top people in the administration—agree with them. We do not believe that people ought to be excluded solely for their beliefs or for their party membership. We may actually feel on the basis of some evidence—not overwhelming, not the kind of evidence we would want to take to court, but some evidence—that the person is here on a mission of some kind to collect information, or to collect money for some cause that the United States feels is not in its interest. Then the Secretary will make a determination. There were 45,000 waivers of the McCarran Act exclusion last year; 45,000 waivers, and in only a handful of cases were waivers denied. Looking at this issue in proper focus, waivers are virtually routine.

What about alien plaintiffs in the federal courts who are trying to use the federal court system as a forum for their disputes?

Well, the issue always relates to jurisdiction. If there is jurisdiction they have the right to come here and use the courts. The Constitution of the United States clearly contemplated that citizens of a foreign country, and even foreign states, could come to our courts and sue. The Constitution explicitly says the Supreme Court will have original jurisdiction over certain types of cases involving foreigners. And in our world the fact is that sometimes the United States is an important market economically, and people will sue here because of that and have a jurisdictional basis for doing it. One case that I handled, *Sharon v. Time Magazine*, is an example. Israeli General Sharon came to New York to sue an American magazine. That American magazine is

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published here in the United States, but is also distributed in Israel and around the world. I certainly raised with the parties whether they had any question about the jurisdiction of the federal courts. Cravath, Swain & Moore, who represented the defendant and who must have done millions of dollars of work in this one case, never raised a jurisdictional objection. That is the world we live in. We have very broad jurisdictional statutes.

Were you involved in the decision to bomb Libya?

I was involved in the whole process that led to that. We got to that point only after a number of lesser measures were exhausted, including our Libyan sanctions in January, which were drafted by my office. My opinion on the legality of that kind of an action was written at that time.

Have you any message for your former colleagues on the bench?

Well, that I miss the bench. I miss playing an important role in cases between people. I miss the structure and discipline of the bench. I was in a sense a big fish in a small pond in my court. You had your case, and it was *your* case. You were in charge of it as a district judge, and generally speaking 99 percent of the time that was the end of the matter.

I am very proud of the American system. In my present job I am a small fish in a big pond. There is a lot more room to swim and enjoy yourself, and you look at a lot of different issues. But it is a different world. You have far less guaranteed authority or guaranteed role. It is more exciting as a result, because you don't know what you are going to do tomorrow, and it is more interesting if you haven't done it. If I had done my present job for six years, I am sure I would find being a judge more interesting. But I absolutely believe that my former colleagues on the federal bench are doing the work of God. ■

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by the district court, which may make a de novo determination of the matter.

The Centers for Disease Control have estimated that the minimum number of claims that would be filed under the compensation program would be in excess of 9,000 annually. The act makes the filing of a petition and judgment on the petition a precondition to the right to bring a subsequent suit in state or federal court. It also permits petitions to be filed concerning some claims that were previously the subject of unsuccessful litigation.

Some observers have seen the latter feature as a threat to the finality of state and federal judgments. They are also concerned that provisions in the act allowing the petitioner an option to accept or reject the final judgment of the district court may violate the Article III prohibition against advisory opinions. ■

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THE THIRD BRANCH

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Deputy Attorney General Burns Discusses Role Of Special Masters, Caseloads, Other Concerns

Deputy Attorney General Arnold I. Burns, born in New York City, received a B.A. from Union College and an LL.B. from Cornell University. He was a partner in a New York law firm for many years. In 1986, he was appointed associate attorney general. Shortly thereafter, he became deputy attorney general.

How has the Justice Department operated during your tenure as deputy attorney general?

The policy of the department is established by the attorney general. In this Department of Justice, we have an enormous amount of collegiality. The attorney general of the United States, Ed Meese, is a very collegial man. By that I mean that he seeks out the advice and the opinions of others. So policy is really, I think, a collegial matter with a lot of debate, discussion, consideration, with the final decision resting with the attorney general.

What are your responsibilities as deputy attorney general?

As we operate today the deputy attorney general is the day-to-day chief operating officer with the Department of Justice, and the attorney general is the chairman of the board and chief executive officer, consistent with what I have said to you heretofore about the policy-making in the department. As the chief operating officer of the Department of Justice, I am responsible to the attorney general for all the civil and criminal matters in the department. Associate Attorney General Steven Trott reports

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Interim Local Rules for Bankruptcy Cases Proposed Following Enactment of New Law

The Advisory Committee on Bankruptcy Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has drafted and distributed to all district courts and bankruptcy courts interim rules that it recommends be adopted as local rules of court in light of recent legislation affecting some bankruptcy cases. That legislation, the "Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986," Pub. L. No. 99–554, took effect on Nov. 26, 1986. The act made several changes in the Bankruptcy Code, including the addition of a new chapter 12, dealing with family farmer debt adjustment. The interim local rules are intended to provide guidance to the bench and bar until new rules can be approved by the Judicial Conference, the Supreme Court, and Congress.

The interim rules will be binding only to the extent that they are adopted as local rules of court or are made applicable to a particular case by a bankruptcy judge in the exercise of the judicial function. ■

Judge Alvin B. Rubin Appointed as FJC Board Member

Judge Alvin B. Rubin (5th Cir.) has been elected by the Judicial Conference of the United States to the Board of the FJC, to fill the unexpired term of Judge Arlin M. Adams (3rd Cir.), who has resigned from the bench. Judge Rubin has been on the Fifth Circuit bench since 1977. He served as a U.S. district judge (E.D. La.) from 1966 to 1977.

A graduate of Louisiana State University (B.S., LL.B.), Judge Rubin served in the U.S. Army from 1941 to 1946. He was an arbitrator for the Federal Mediation and Conciliation Service from 1949 to 1966 and is an adjunct professor at LSU Law School.

Judge Rubin was a member of the Judicial Conference Subcommittee on Judicial Statistics, a member of the Committee on Court Administration, and chairman of the Subcommittee to Examine Possible Alternatives to Jury Trials in Complex Protracted Civil Cases. He has lectured frequently at FJC seminars and workshops and has coauthored *Law Clerk Handbook: A Handbook for Federal District and Appellate Court Law Clerks*, a second edition of which will be published this year.

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to the attorney general on criminal matters emanating from the Criminal Division, the Bureau of Prisons, and the Drug Enforcement Agency, on some FBI matters, and on matters from the U.S. Marshals Service. All of those matters I mentioned are reported to the attorney general through the deputy attorney general. As deputy attorney general, I supervise our civil litigating divisions, which include the Tax Division, the Civil Division, the Civil Rights Division, the Antitrust Division, and the Lands and Natural Resources Division, each of which has important criminal jurisdiction.

Also, the deputy attorney general supervises the U.S. bankruptcy trustee program, emerging as something more important with new legislation enacted by the 99th Congress. The new law expands and makes permanent the U.S. bankruptcy trustee program. Foreign claims settlement also comes under the deputy attorney general. The deputy attorney general is responsible for the administration of the department, which includes the budget, audit, and personnel and training and things of that nature.

What are your priorities?

The Department of Justice has an established set of priorities that have been set by the attorney general. We consider the war on drugs to be our number-one priority. With new anti-drug legislation that came out of the Congress last year, we are going to continue our "full court press"—and with added resources and larger efforts. The war against organized crime continues to be an important priority, and if one reads the press one can truly conclude that we have broken the back of organized crime in this nation. We've broken the code of silence, we've broken up Mafia families. Judge Richard Owen in New York sentenced each of a number of leading Mafia figures to a hundred years in the penitentiary. Economic crime continues to be an important priority. The enforcement of our civil rights laws continues to be an important priority. We have broken the back of the Ku Klux Klan, for example, in our enforcement of civil rights.

The war against international terrorism continues to be very important, and the incidence of terrorism here at home is way down. There were 6 incidents in the continental United States last year; that is down from more than 25 three years before. We are working effectively in the area of terrorism. The protection of the U.S. treasury continues to be an important aspect of our work in the Department of Justice. We have 205,000 pending cases with claims aggregating some 500 billion dollars, so that is very important. The government continues to be sued; it is not up dramatically, but it continues apace. We are involved in the affirmative civil litigation for the government—suing people who owe the government money—and that is important, particularly in cases involving Defense Department fraud. Not only are we interested in prosecuting crime, but we are also interested in recovering monies out of which the government has been defrauded. The enforcement of our antitrust laws continues to be an important priority, as does the protection of our environment through both civil and criminal litigation. I think you have gotten the picture.

Our plate is full and getting fuller. Three pieces of legislation alone last year have added mightily to our plates. First, I mentioned the anti-drug legislation; second, the immigration bill; and third, the bankruptcy judgeship and U.S. trustee legislation. The President has submitted a budget for 1988, and the resources that the President is asking for the Department of Justice will include substantial additional resources for our U.S. attorneys and resources for investigators in the Drug Enforcement Administration, the FBI, the Marshals Service, and INS. So we are looking forward to the implementation of those new laws and to continued effective civil and criminal law enforcement.

What have you had in mind in making managerial changes?

First, kinds of managerial priorities. The attorney general and I are very anxious to continue working to bring the Department of Justice together and to have it become more of a unified department—increasing communication and liaison between the people here in the main Justice Department building and our 93 U.S. attorneys' offices across the country.

Second, along the same lines, we are anxious to bring together the components of the Department of Justice—the Bureau of Prisons, FBI, and so forth. We see in our mind's eye greater cross-pollination with respect to personnel and communication among all of our components and the people in this main building.

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AO Memo on Anti-Drug Act Penalties Available

Federal judicial personnel interested in obtaining a copy of a memorandum prepared by the AO and previously circulated concerning provisions of the Anti-Drug Abuse Act of 1986 that redefine and increase penalties for some drug-related offenses and prescribe mandatory minimum sentences for certain violations (including mandatory terms of supervised release) may write to the FJC's Information Services Office or to the director of the AO.

THE THIRD BRANCH

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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.

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NEWS FROM THE SENTENCING COMMISSION

The U.S. Sentencing Commission has scheduled public hearings for Mar. 11–12 in Washington, D.C., to receive testimony on its revised draft of sentencing guidelines. The hearings will be held in the Ceremonial Courtroom of the U.S. Courthouse on 3rd St. and Constitution Ave., N.W.

All Article III judges, members of Congress, U.S. attorneys, federal public defenders, U.S. magistrates, chief probation officers, and U.S. probation offices were mailed copies of the revised draft early in February. Because of tight deadlines for issuing final guidelines, the commission requests that all comments on the draft be received by the commission by Mar. 16.

The commission was also considering whether to publish sentencing guidelines for federal capital offenses, following a hearing Feb. 17 held to determine the commission's responsibility concerning such guidelines. ■

Robert Feidler Is New Legislative Affairs Officer at AO

Robert E. Feidler joined the Administrative Office last month as the new head of the Legislative and Public Affairs Office. Immediately prior to joining the AO, Mr. Feidler was chief counsel and staff director of the Subcommittee on Patents, Copyrights and Trademarks of the Senate Committee on the Judiciary. From 1981 to 1986, he was chief minority counsel of the Senate Judiciary Committee's Subcommittee on the Constitution, and from 1977 to 1980, he was chief counsel of that committee's Subcommittee on Improvements in Judicial Machinery.

Mr. Feidler has worked on most bills and issues related to the federal courts over the last decade. For the last five years he has also been involved in most major antitrust and intellectual property issues. He is a major in the U.S. Army Reserve.

Paul Summitt, who has been with the AO since 1984, will be Mr. Feidler's deputy. Prior to coming to the AO, Mr. Summitt was special counsel for criminal law to the Senate Committee on the Judiciary, and he has held other jobs with that committee and with the U.S. Department of Justice. ■

1987 Circuit Judicial Conferences

First Circuit	Oct. 13–15	Danvers, Mass.
Second Circuit	Oct. 15–17	Hershey, Pa.
Third Circuit	Sept. 16–18	Philadelphia, Pa.
Fourth Circuit	June 25–27	Hot Springs, Va.
Fifth Circuit	Apr. 20–22	New Orleans, La.
Sixth Circuit	June 3–6	Grand Rapids, Mich.
Seventh Circuit	May 10–13	Chicago, Ill.
Eighth Circuit	July 16–18	Colorado Springs, Colo.
Ninth Circuit	Aug. 17–21	Waikoloa, Hawaii Island
Tenth Circuit	July 29–31	San Diego, Cal.
Eleventh Circuit	May 10–12	Birmingham, Ala.
D.C. Circuit	May 27–30	Hot Springs, Va.
Federal Circuit	May 8	Washington, D.C.

BURNS, from page 2

Third, I mentioned civil and criminal litigation. One of our emphases is to improve the coordination between the two here in this building and in the various offices of our U.S. attorneys.

Fourth, we are working very hard at streamlining and improving our budgetary process here. We have established what we call our Departmental Resources Board, which I chair. The idea is to create our budget with greater precision, with greater understanding by our leadership, understanding by the leaders of our component parts. In other words, in building a budget it is very easy to fall into a habit of working off of the prior year's numbers, to be arbitrary. I must say, I think we did a very fine job here this year, and we are looking forward to improving the process for next year.

Fifth is an increased emphasis on personnel. We are establishing a personnel board, which I will chair, the idea being to establish procedures for encouraging the development of career opportunities in the Department of Justice. When you can concentrate on career development and take a guiding hand toward the movement of people throughout the department—provide upward mobility, incentives, and training—that is very important. We want to place some new emphasis on that. We are going to do that to continue to build on a really solid core of first-rate attorneys. I am a relative newcomer to government service; I celebrated my first year in the department on Jan. 6. I came here from 33 years in the private practice of law. The thing that astonished me, coming here with the traditional, the usual biases and prejudgments about these things—what astonished me was the enormous quality of the people here and the tremendous caliber of the lawyers here. We want to keep working to improve the training.

So a sixth area of management concern is training. We do a lot of training here. We run a trial advocacy program. We have another training program in which we train lawyers outside the Justice Department, lawyers throughout the government. We have a program called the Attorney General's Advocacy Institute. Now that is trial advocacy and appellate advocacy, and we trained more than 1,600 of our 5,000 lawyers last year. During the same time our Legal Education Institute, which trains lawyers outside the department, trained roughly 5,000 of the 20,000 lawyers in other branches of government. So training is very important and we intend to continue emphasizing this.

"The civil RICO statute ... just adds to the burden of the courts."

Deputy Attorney General Arnold I. Burns

We are going to be reorganizing things to maximize efficiency, to maximize cost reduction, to facilitate the ease of administration of the department. So we are working on some reorganization changes which we intend to submit to the Congress before very much time lapses. But I can't tell you more about it yet. It is premature.

Would you comment on the role of special masters under the National Childhood Vaccine Injury Act?

When the President signed the vaccine bill he expressed some serious reservations about that aspect of the bill, but because the bill had other good points in it, he signed it. We think that the special masters provision is a major defect in the bill. We do not think that special masters working under the supervision of U.S. district court judges are the appropriate vehicle for sorting out these issues of entitlement in cases in which youngsters sustained injuries from the use of a vaccine. There are a couple of reasons why that is not a good idea. Reason one—this entitlement program—would it be administered in some uniform fashion? U.S. district court judges, who are judges and whose function ought to be limited to the adjudication of cases, are really being asked to administer a program. It raises all sorts of problems. The second thing that is wrong with it is that our judges are today overburdened and overworked in discharging the responsibilities they have in the adjudicative area. This vaccine bill will require funding, and when we go to the Congress for the funding, I think we will ask for

See BURNS, page 5

BURNS, from page 4

some amendments that will address the issue of the role of special masters under this bill.

You have made comments in the past about the role of special masters in other kinds of cases, suggesting that perhaps they have been overused.

The judicial function is an adjudicative function. It is one thing to say, "I appoint a special master to ascertain certain facts," such as whether this microphone has been properly activated and we are truly now recording this interview. I want a finding of fact, and that might be in a given case an appropriate role for a master. But the judge appoints a master to supervise the activation of all microphones in the District of Columbia for the ensuing year at every interview that should ever take place. Then we have constitutional issues that are implicated, we have serious questions raised, and the question is, who is going to pay for that master? We in the department are going to resist payment for masters who are regulating the world, as opposed to masters who are ascertaining and adjudicating facts in aid of the U.S. district court judge's adjudicative responsibility.

There are judicial procedures which we would avail ourselves of, including the right to appeal judgments or orders directing appointments of special masters. My example about microphones, of course, is hyperbole, but I can assure you that I can give you real-life examples that are much more extreme than the one that I invented on the spur of the moment—for example, masters who are monitoring on a continual basis the altitude of helicopters flying over certain lands for environmental purposes, masters who are running prisons and hospitals. And one could go on and on. There are examples one could find that are worse than the one I used.

Do you have any specific legislative goals in the 100th Congress?

Well, let's start with RICO. There has been an awful lot written and said about the civil RICO legislation. I think there is an awfully wide consensus that the civil RICO statutes have been used in a manner far beyond what Congress ever intended.

This goes back to what I said earlier about the special masters under the vaccine act superintending and administering what is essentially an entitlement program. The civil RICO statute, like that program, just adds to the burden of the courts and adds to the burden of the judges. That is why they are groaning, when they were overworked and overburdened to start with. Civil RICO has been used as a remedy in ordinary cases involving antitrust, securities law, and common-law fraud, to cite but three examples. It's been used in cases where one could bring a suit sounding in antitrust, or in any one of the other areas I mentioned, and get adequate relief. It has gotten to the point now where if you don't throw in a civil RICO count you could be guilty of malpractice. Ordinary citizens, decent, law-abiding, honest citizens—bankers, merchants, insurance company agents—are sued under the civil RICO statute. Their friends and neighbors read in the newspaper that they have been sued as racketeers, and that is a terrible thing.

So I think there is a wide consensus. That wide consensus did not break down in the last Congress. My explanation for what some see as a breakdown is that while everyone agreed that some rectification was required, they could not agree on the way to do it. From our point of view in the Department of Justice, we will be supportive of legislation that restricts the availability of the civil RICO statute to the private bar. And because there is that wide consensus, and because I don't think it is broken down, I think we will indeed get legislation in the 100th Congress. But if I were to predict what it will be, I would be either a knave or a fool.

As for other legislation, tort reform remains an important priority for us. We in the Department of Justice took a leading role in tort reform. We had an important working group on tort reform led by Assistant Attorney General Richard Willard. The attorney general, the deputy attorney general, Assistant Attorney General Willard, and others in the department crisscrossed the country speaking to groups about tort reform. We are hopeful that we will see tort reform. I hope that we will see legislation not only in Congress, but also in state legislatures around the country, addressing this important issue.

"[T]he Department of Justice ... will be supportive of legislation that restricts the availability of the civil RICO statute to the private bar."

"I hope that we will see [tort reform] legislation not only in Congress, but also in state legislatures around the country."

I think that the administration will be seeking to reintroduce our antitrust reform package. I think you will see essentially the same kinds of things that we asked for in the last session. We will seek to codify our merger guidelines. We will probably suggest a change in law regarding interlocking directorates. We will have some antitrust relief suggestions for some trade imbalance problems. The Sherman Act was passed in 1890; the Clayton Act was passed in 1914. That is a long time ago, and the world has changed. Competition in the world

See BURNS, page 6

200 Years Ago...

March 1787: Under the 1783 peace treaty, the United States had agreed that Congress would recommend "earnestly" that state legislatures "provide for the restitution of all estates, rights, and property" confiscated from British subjects and noncombatant loyalists. The British government complained of bad faith on the part of the states in implementing this and other provisions, but all Congress could do when it responded in March 1787 was remind the states that the treaty was "part of the law of the land" and urge that they observe it.

Congress's inability to act more vigorously under the Articles of Confederation was also reflected in the treatment of the many cases that foreign and domestic shipowners filed to regain vessels that American forces seized during the Revolution. State courts usually upheld the captures, and disappointed litigants appealed to Congress.

Congress heard the appeals through a standing committee until 1780, when it established the three-judge United States Court of Appeals in Cases of Capture. Although the Articles of Confederation authorized Congress to establish rules for deciding capture and prize cases, neither it nor the court had authority to compel compliance with their decisions. By 1787, the court had been undermined by the widespread refusal to honor many of its mandates.

BICENTENNIAL OF THE U.S. CONSTITUTION

CALENDAR

Mar. 2–7 Seminar for Newly Appointed Bankruptcy Judges

Mar. 17–18 Judicial Conference of the United States

Mar. 23–24 Staff Safety Training

Mar. 25–27 Seminar for Magistrates of the First, Second, Third, Fourth, and D.C. Circuits

BURNS, from page 5

has changed, and what we are looking to do is to bring the antitrust laws into the modern age and recognize that we are dealing now not with competition between Virginia and Maryland, but with global competition, global forces.

We will also reintroduce several important criminal reform bills. As in the last Congress, we will support exclusionary rule reform and habeas corpus reform. We will also press for the death penalty for certain terrorist crimes.

How does the department view the work of the U.S. Sentencing Commission, particularly as it relates to capital sentencing?

The Sentencing Commission, as you know, was established by an act of Congress and charged with the responsibility of coming up with new sentencing guidelines across the universe of crimes prescribed in all of our statutes, particularly title 18 of the U.S. Code. The Sentencing Commission has held many, many hearings. I think they should be complimented because there have been open hearings—they have solicited all kinds of opinion. We believe that the guidelines the commission is producing will go a long way towards reducing unwarranted sentence disparity that all too often prevails today.

During the course of their deliberations they asked the department what its view was as to whether or not the legislation setting up the Sentencing Commission authorized it to address the issue of guidelines for capital offenses. So we have given our opinion that the legislation did indeed authorize the commission to consider guidelines for all offenses and all punishments, including the death penalty. This is not to say that the Sentencing Commission can recommend capital punishment for crime a, b, c, d, e, or f. Congress has already prescribed the death penalty for many crimes on the statute books, and the only question here has to do not with the prescription of the penalty but with guidelines to provide for the constitutional methodology of carrying out such a penalty consistent with judicial decisions. This is something that the Sentencing Commission is charged with doing—not the Department of Justice, not the attorney general or the deputy attorney general. Now what the Sentencing Commission is going to do is something yet to be decided by the Sentencing Commission, so we will wait and see.

Is there any way to accelerate the judicial appointment process?

First, I think that sitting judges, when they decide to retire or to take senior status, ought to let the President know sooner rather than later. For example, a judge could advise the President, "Prospectively, I am planning to step down next January" (or a year from January, a year from February) "on my 65th birthday" (my 70th birthday, whatever the case may be), so that we are alerted as soon as we can be.

Second, I think we have a job here in the Justice Department of persuad-

See BURNS, page 7

Positions Available

Supervisory Staff Attorney, 8th Cir. Salary starting from $38,700 to $45,700, depending on experience. Must train new staff law clerks, serve as resource on substantive issues, and edit legal memoranda. Applicants should have progressively responsible legal work experience. Send resume, law school class rank, and writing sample by Mar. 31 to Senior Staff Attorney, U.S. Court of Appeals for the 8th Circuit, 1114 Market St., Rm. 625A, St. Louis, MO 63101.

* * *

Motions Practice Attorney, 8th Cir. Salary $32,500. Two positions in new staff unit to assist the court with substantive motion practice. Applicants must be able to communicate well in person and on telephone, work independently, and meet deadlines. Send resume and writing sample by Mar. 31 to Clerk of Court, U.S. Court of Appeals for the 8th Circuit, 1114 Market St., Rm. 511, St. Louis, MO 63101.

EQUAL OPPORTUNITY EMPLOYERS

BURNS, from page 6

ing the members of Congress to take this so very seriously and give this higher priority than it has had before and to provide us with cool, competent, qualified candidates so that we have people in the pipeline and in the hopper.

Third, again without sacrificing accuracy, we would hope to see if the FBI background checks could be speeded up. We hope that the American Bar Association procedure could be speeded up. So we are hopeful that we will proceed apace with the President's nomination of new judges after the appropriate screening process.

Do you have forms like the Senate Judiciary Committee has, which candidates are required to fill out?

Yes we do. We have a questionnaire.

Do you think the ABA screening is helpful? Some attorneys general have done away with it.

It is our view on balance that it is very helpful and that with some changes and modifications in the process, which we are talking with them about, it could be even more helpful. Yes, we do think it is good.

Do you have anything else you want to add?

Just that I want to thank you for coming and spending this time with me. It is a joy to share some thoughts with you about the Department of Justice. I also want to thank you and your readers for all that you do to help improve the administration of justice in this nation. ■

PERSONNEL

Nominations

Rena Raggi, U.S. District Judge, E.D.N.Y., Jan. 20
Michael S. Kanne, U.S. Circuit Judge, 7th Cir., Feb. 2
Edward Leavy, U.S. Circuit Judge, 9th Cir., Feb. 2
David Bryan Sentelle, U.S. Circuit Judge, D.C. Cir., Feb. 2
Bernard H. Siegan, U.S. Circuit Judge, 9th Cir., Feb. 2
Richard J. Daronco, U.S. District Judge, S.D.N.Y., Feb. 2
Ronald S. W. Lew, U.S. District Judge, C.D. Cal., Feb. 2
Malcolm F. Marsh, U.S. District Judge, D. Or., Feb. 2
Layn R. Phillips, U.S. District Judge, W.D. Okla., Feb. 2
James B. Zagel, U.S. District Judge, N.D. Ill., Feb. 2
Haldane R. Mayer, U.S. Circuit Judge, Fed. Cir., Feb. 3
James H. Alesia, U.S. District Judge, N.D. Ill., Feb. 3
David S. Doty, U.S. District Judge, D. Minn., Feb. 5
Robert N. Miller, U.S. District Judge, D. Colo., Feb. 5

Appointments

James L. Graham, U.S. District Judge, S.D. Ohio, Nov. 15
Bruce M. Selya, U.S. Circuit Judge, 1st Cir., Nov. 24
Diarmuid F. O'Scannlain, U.S. Circuit Judge, 9th Cir., Nov. 25
Richard B. McQuade, Jr., U.S. District Judge, N.D. Ohio, Dec. 1
Frederic N. Smalkin, U.S. District Judge, D. Md., Dec. 2
Joseph F. Anderson, Jr., U.S. District Judge, D.S.C., Dec. 11

Elevations

Gene E. Brooks, Chief Judge, S.D. Ind., Jan. 1
Odell Horton, Chief Judge, W.D. Tenn., Jan. 1
Robert W. Porter, Chief Judge, N.D. Tex., Jan. 1
Santiago E. Campos, Chief Judge, D.N.M., Feb. 5

Senior Status

Phillip B. Baldwin, U.S. Circuit Judge, Fed. Cir., Nov. 24
Donald S. Voorhees, U.S. District Judge, W. D. Wash., Nov. 30
Robert M. McRae, Jr., U.S. District Judge, W.D. Tenn., Dec. 31
Howard C. Bratton, Chief Judge, D.N.M., Feb. 5

Resignations

James R. Miller, Jr., U.S. District Judge, D. Md., Dec. 1
Herbert J. Stern, U.S. District Judge, D.N.J., Jan. 4

NOTEWORTHY

Bankruptcy appeals not referrable to magistrates. Federal district courts lack power to refer appeals from bankruptcy courts to magistrates, the Seventh Circuit has ruled (*In re Elcona Homes Corp.*, No. 86-1541, Jan. 23, 1987). In 1984 legislation, Congress did not reenact a specific prohibition against referrals of bankruptcy court appeals to magistrates. Nonetheless, because conditions required for appeals to a panel of bankruptcy judges are carefully specified, but no provision for courts' referring appeals to magistrates is made, the court rejected the contention that Congress intended by omitting the prohibition to allow district courts to make such referrals.

* * *

S.D.N.Y. orientation program. Chief Judge Charles L. Brieant has announced the second annual orientation program for attorneys practicing in the S.D.N.Y., to be held Mar. 7 in New York City. The program will feature the clerk and deputy clerks of the court, the district executive, other court officials, and attorneys. Topics will include filing a civil case, judgments and taxation of costs, orders and appeals, use of the audio-video unit, the Interpreters Act, records maintenance, and domestic and foreign service. For more information, call 212/791-9326.

SOURCE, from page 3

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THE THIRD BRANCH

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Levin to Retire in July After Decade as FJC Director; Search Committee Appointed

Professor A. Leo Levin, director of the Federal Judicial Center, has announced that he will retire on July 31. At the time of his retirement, Professor Levin will have served as FJC director for more than a decade—over half of the Center's lifetime.

A. Leo Levin

Professor Levin is the fourth director of the Center and was the first nonjudge to be selected for the position. He was preceded by Judge Walter E. Hoffman, Judge Alfred P. Murrah, and Justice Tom C. Clark.

In his letter of resignation to the Chief Justice, Professor Levin noted that he has been asked to be the first incumbent of a new chair at the University of Pennsylvania Law School. He stated that "[S]erving in my present position has been an enriching and enjoyable experience. This has been true in large measure because of the assistance provided by so many judges and other members of the federal judicial system, including the Center's most impressive and dedicated staff. Most of all, I am deeply indebted to the members of the Center's Board, who have offered both help and friendship .... I believe that the Center is poised, under your leader-

See LEVIN, page 5

Solicitor General Charles Fried Describes Role In Approval of Appeals, Supreme Court Cases

Solicitor General Charles Fried received his A.B. from Princeton University, bachelor's and master's degrees from Oxford University, and his LL.B. from Columbia University. He clerked for Justice John M. Harlan in 1960, then joined the Harvard Law School faculty, where he taught contracts and legal philosophy. He has served as a consultant to the Treasury Department, the White House Office of Policy Development, the Department of Transportation, and the Justice Department. He was appointed deputy solicitor general and counselor to the solicitor general in 1985, and was named solicitor general later the same year.

The solicitor general has been described as the representative of the government in the Supreme Court.

Do you take on other assignments, administrative or otherwise?

By our statutes and regulations we actually have another role which is very time-consuming: We have to approve all of the government's appeals in any court and all of its amicus filings in any appellate court.

Including 93 U.S. attorneys and their cases?

Yes, but just appeals, not their original filings—any appeal that the government takes, and that means any government agency, except some of the independent agencies which have independent litigating authority. In general, if the federal government loses a case, it cannot appeal unless my office—and that

See FRIED, page 6

Judicial Conference Elects Judges Kennedy, O'Kelley to FJC Board

Judges Anthony M. Kennedy (9th Cir.) and William Clark O'Kelley (N.D. Ga.) have been elected by the Judicial Conference of the U.S. to serve as members of the Board of the Federal Judicial Center. They replace Judge Daniel M. Friedman (Fed. Cir.) and Judge Howard C. Bratton (D.N.M.), respectively, each of whom has served as a Board member since March 1983. By statute, Board members serve four-year terms and cannot be re-elected.

Anthony M. Kennedy

Judge Kennedy, a native Californian, was appointed U.S. circuit judge for the Ninth Circuit in 1975. He received a B.A. degree from Stanford University, an LL.B. from Harvard, and attended the London School of Economics. Judge Kennedy is a member of the Judicial Conference Advisory Committee on Codes of Conduct and is chairman of the Committee on Pacific Territories.

William C. O'Kelley

Judge O'Kelley has been a district judge since 1970. He has served on

See BOARD, page 3

Chief Justice Speaks on Bicentennial, Justice Scalia on Federal Court System, at ABA Meeting

Chief Justice William H. Rehnquist addressed the American Bar Association's recent midyear meeting, reminding members of the legal profession of their obligations "to reflect on and speak about the significance" of the 200th anniversary of the signing of the U.S. Constitution.

In his first address to the ABA since becoming Chief Justice, he explained that he was not making a "state of the judiciary" report, but rather had elected to talk about the importance of observing the bicentennial.

The Chief Justice noted that "lawyers played a large part in the drafting of the Constitution and they have played an even larger part in its interpretation."

He stressed the importance of appreciating the value of "the flexibility of the substantive provisions" in the Constitution, which empower the courts to invalidate laws that do not conform to the Constitution, a protection that did not exist in England or in any European country 200 years ago. The important point is, he said, that the drafters of our Constitution recognized the importance of giving the judicial branch of our government "the final say as to how [the Constitution] should be interpreted." What we have today is a "finely tuned mechanism by which constitutional law is declared, interpreted, and on occasion changed, which is perhaps the greatest gift of the framers.... They realized that an independent judiciary was essential to give life to the conditional guarantees, and they provided for one. Dur-

See REHNQUIST, page 4

ABA House Favors Higher Diversity Jurisdiction Threshold; Approves Tort Law Resolutions

The following matters of interest to the federal judiciary were considered by the ABA House of Delegates during its recent midyear meeting:

Diversity jurisdiction. The House of Delegates approved a resolution recommending that 28 U.S.C. § 1332 be amended to provide that in diversity of citizenship cases the value of the amount in controversy must exceed $50,000. In 1789 the amount was set at $500; it was increased to $2,000 in 1887, to $3,000 in 1911, and to $10,000 in 1958. Proponents of abolishing diversity argued unsuccessfully that the amount should be much higher than $50,000, since inflation has made even the $50,000 amount unrealistic.

Tort reform. On Feb. 11, a 14-member commission of the ABA, after months of study, released an extensive report with 20 recommendations to improve the tort system in this country.

The House of Delegates accepted 18 of the commission's recommendations. The delegates voted against ceilings on the amount of money that tort-plaintiffs may recover for "pain and suffering," with a statement that "there should be no ceilings on pain and suffering damages, but instead ... the courts should make greater use of the power of remittitur or additur with reference to verdicts which are either so excessive or inadequate as to be clearly disproportionate to community expectations." [See the report on S. 426, which would cap such awards, on p. 9.] The delegates

See ABA, page 9

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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.

200 Years ago...

April 1787: Long a student of political science, James Madison readied himself for May and the Constitutional Convention by delving into works of political theory and histories of ancient and modern confederacies. Much of his reading came from books sent to him by his close friend Thomas Jefferson, then the American ambassador to France.

In April 1787, while in New York as a member of Congress, Madison's research bore fruit in an eleven-point memorandum on the "Vices of the Political System of the United States," prepared mainly for those likely to be influential at the Convention. "A sanction," he wrote, "is essential to the idea of law, as coercion is to that of Government. The federal system, being destitute of both, wants the great vital principles of a Political Constitution."

A letter the same month to Washington anticipated many of the proposals Madison would put forth in Philadelphia. He told Washington, for example, that the "national supremacy ought also to be extended ... to the Judiciary department.... It seems at least necessary that the oaths of the Judges should include a fidelity to the general as well as local constitution, and that an appeal should lie to some National tribunal in all cases to which foreigners or inhabitants of other States may be parties. The admiralty jurisdiction seems to fall entirely within the purview of the national Government."

BICENTENNIAL OF THE U.S. CONSTITUTION

FJC Reports on Two Unusual Calendaring Practices in E.D.N.C.

The Center recently published *Calendaring Practices of the Eastern District of North Carolina*, a research report by Susan M. Olson, formerly a judicial fellow in the Center's Research Division.

The report describes two unusual calendaring procedures used by the Eastern District of North Carolina. The first involves civil cases, which are assigned randomly to the judges of the court who then travel among the court's divisions to try the cases. The second procedure involves calendaring of criminal cases, which are assigned for several consecutive months to a team of one judge and magistrate, who remain responsible for the cases until final disposition.

The court has adopted these procedures in the effort to achieve several goals: increasing the court's accessibility to the public, avoiding bias in decision making, and, more generally, ensuring sound and expeditious decision making. On the basis of interviews with judges, magistrates, clerks, and attorneys practicing in the district, the author discusses the essential features of the procedures and assesses their adaptability to other district courts.

Copies of the report can be obtained from Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (5 oz.), but do not send an envelope.

BOARD, from page 1

the Judicial Conference Committee on the Administration of the Criminal Law, and currently is a member of the Advisory Committee on Criminal Rules. He was appointed to a seven-year term as a judge on the U.S. Foreign Intelligence Surveillance Court in May 1980. For three years, he was the district representative to the Judicial Conference from the Eleventh Circuit. ■

Judge Gignoux Selected as Recipient of Devitt Distinguished Service to Justice Award

Judge Edward T. Gignoux (D. Me.), a federal judge for almost 30 years, has been chosen to receive this year's Edward J. Devitt Distinguished Service to Justice Award.

Edward T. Gignoux

Judge Gignoux has for many years been associated with the work of improving judicial administration in the federal court system, mainly through the Judicial Conference of the United States. The judge has also made significant contributions to the work of state and national bar associations and is a member of the council of the American Law Institute.

Since joining the federal court system, Judge Gignoux has been a member of numerous Judicial Conference committees, whose work covered personnel, the jury system, bankruptcy, ethics, judicial conduct, judicial trial practice and technique, federal jurisdiction, and court administration. Currently the judge is chairman of the Judicial Conference Committee on Rules of Practice and Procedure, which, with its adjunct committees, is responsible for drafting all the national federal rules used in the federal courts—appellate, civil, criminal, and bankruptcy. The committee's aggregate membership is now 53. In addition, Judge Gignoux was for six years the First Circuit's district

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LEGISLATION

The following is a listing of some bills of interest to the judiciary that have been introduced in the 100th Congress. Committee action has not yet been taken on most of them.

• H.R. 742. Clarifies that the Supreme Court's amendment to Fed. R. Crim. P. 35(b) continues in effect until section 215(b) of the Comprehensive Crime Control Act of 1984 takes effect. The Supreme Court, pursuant to the Rules Enabling Act, on Apr. 29, 1985, ordered an amendment transmitted to Congress resolving an uncertainty as to whether a motion filed within the 120 days permitted by the rule also had to be ruled upon within that period. The Court's amendment required that the sentencing court determine a rule 35(b) motion "within a reasonable time" after the motion is filed. The Court's order making the amendment was to have been effective only until Nov. 1, 1986, when section 215(b) was to have gone into effect. (Section 215(b) abolishes both the defendant's ability to move to reduce sentence and the court's authority, sua sponte, to reduce sentence.) However, Congress

See LEGISLATION, page 9

Law Day—U.S.A.

May 1 is Law Day—U.S.A. This year's theme is "We the People." Law Day was conceived in 1957 by the American Bar Association and established by President Eisenhower by presidential proclamation in 1958. In 1961, May 1 was set aside for the observance of Law Day by joint resolution of Congress, and it continues to be presidentially proclaimed each year.

Larry Stoorza Leaves FJC Systems Division to Head AO's Automation and Statistics Operations

AO Director L. Ralph Mecham has announced the selection of Edwin L. ("Larry") Stoorza for the position of assistant director for automation and statistics. Mr. Stoorza was selected from a large number of applicants following a comprehensive recruiting effort. Director Mecham cited Mr. Stoorza's proven management talent, strong technical skills, and knowledge of federal court needs as important reasons for his selection.

Larry Stoorza

Mr. Stoorza currently serves as director of the FJC's Innovations and Systems Development Division. Both the Center and the AO have utilized his exceptional services in the design and, subsequently, the implementation of the new family of decentralized computer systems for appellate, district, and bankruptcy courts. Mr. Stoorza served as deputy director of the FJC's Systems Division from 1976 to 1981. He became chief of the AO's Systems Services Branch in 1981 and later became assistant director of Management Systems and Services. He rejoined the Center in 1986. His continued interest in the successful automation of the courts has benefitted both agencies, as well as the federal judiciary.

See STOORZA, page 8

REHNQUIST, from page 2

ing this year we, as lawyers, should be in the front ranks of those who are celebrating this great event."

Justice Scalia, also appearing before this group for the first time since taking office in September 1986, talked about his perceptions of the federal courts at the time he graduated from law school in 1960 and today. Justice Scalia cited statistics to support his statement that the federal courts today—with double caseloads and without a proportionate increase in judgeships—are facing serious problems that must be resolved if the federal judiciary is to function as our founding fathers intended.

The solutions, the Justice said, are not to be found solely in an increase in judgeships, in improved case processing procedures, or even in the adoption of the proposed intercircuit tribunal. Justice Scalia's suggestion to the bar membership and Congress was that they concentrate on meaningful structural changes. He suggested consideration be given to specialization through Article III tribunals (such as a national Social Security court); diversion of matters such as freedom of information requests from the courts to administrative law judges (with appeal to the federal courts only on issues of law and then only if the administrative law judge's decision is reversed by an agency); and elimination of diversity jurisdiction cases or, at a minimum, a substantial increase in the amount in controversy requirement.

He warned that if the trend in the federal court system continues as it already has for more than a quarter of a century, it will create a "nationalization of our legal system, ... a vast judicial bureaucracy, and it will inevitably [bring to the federal bench less than superior] personnel to match.... The question is not whether the federal courts should be changed, but rather whether that change, through inaction, will take the form of continuing deterioration or whether some structural alteration will preserve the essence of a valuable institution."

[Copies of the addresses of Chief Justice Rehnquist and Justice Scalia are available in the FJC's Information Services Office.] ■

Positions Available

Senior Staff Attorney, 1st Cir. Candidates should have 5 years' legal experience, strong academic credentials, management experience, and experience with appellate or federal courts. Salary from $53,830 to upper 60s, depending on experience and prior federal service, if any. Send resume and references by Apr. 13 to Dana H. Gallup, Circuit Executive, Rm. 1302, U.S. Post Office, Boston, MA 02109.

* * *

U.S. Bankruptcy Judges. Five new positions in the 11th Cir.: N.D. Ga. (2 at Atlanta), S.D. Ga. (1 at Augusta), M.D. Fla. (1 at Tampa, 1 at Orlando). Appointments will not be made to these new positions until Congress appropriates supplemental funds. Application available from Norman E. Zoller, Circuit Executive, U.S. Court of Appeals, Eleventh Circuit, 56 Forsyth St., Atlanta GA 30303. Completed application should be received by May 1.

* * *

Clerk, Bankruptcy Court (D.N.H.). Salary $45,762 to $59,491. Requires minimum of 10 years' progressively responsible administrative experience, at least 3 years in a position of substantial management responsibility. College and law degrees may be partially substituted for experience; law degree preferred. Submit resume or SF 171 by June 30, 1987, to Hon. James E. Yacos, Judge, U.S. Bankruptcy Court, Federal Bldg., 275 Chestnut St., Manchester, NH 03101.

* * *

Deputy Clerk (Automation Management), Fed. Cir. Salary to $27,172. Responsible for overseeing development and implementation of automated systems. Position open until filled. Minimum 5 years' experience; B.A., Masters, or J.D. degrees may be considered in relation to experience requirement. Submit SF 171 and resume to Francis X. Gindhart, Clerk, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, DC 20439.

EQUAL OPPORTUNITY EMPLOYERS

PERSONNEL

Nominations

Morton I. Greenberg, U.S. Circuit Judge, 3d Cir., Feb. 17

Joseph P. Stadtmueller, U.S. District Judge, E.D. Wis., Mar. 3

Robert H. Bell, U.S. District Judge, W.D. Mich., Mar. 11

Elevations

Clarence A. Brimmer, Chief Judge, D. Wyo., Jan. 17

Santiago E. Campos, Chief Judge, D.N.M., Feb. 5

Senior Status

Halbert O. Woodward, U.S. District Judge, N.D. Tex., Dec. 30

Robert L. Carter, U.S. District Judge, S.D.N.Y., Dec. 31

Joseph P. Kinneary, U.S. District Judge, S.D. Ohio, Dec. 31

James E. Noland, U.S. District Judge, S.D. Ind., Dec. 31

William E. Steckler, U.S. District Judge, S.D. Ind., Dec. 31

LEVIN, from page 1

ship, to reach new heights."

In a letter to Professor Levin, the Chief Justice wrote that he is "truly saddened" by the decision to retire as FJC director. "I know . . . that your performance as Director for ten years has been truly outstanding, and that you have made a lasting contribution to the work of the Center which will long survive your tenure as Director."

The Chief Justice has appointed a search committee consisting of Judge A. David Mazzone (D. Mass.), Chair, Judge John C. Godbold (11th Cir.), and Chief Judge William S. Sessions (W.D. Tex.) to assist in the selection of Professor Levin's successor. Judge Mazzone is a current member of the Center's Board and Judge Godbold and Chief Judge Sessions are former members of the Board. Requests for information should be directed to Judge A. David Mazzone, U.S. Court House, Boston, MA 02109. ■

Judicial Conference Certifies Consideration of Impeachment of Judge Hastings May Be Warranted

The Judicial Conference of the United States has certified to the Speaker of the House of Representatives that "consideration of impeachment may be warranted" in the matter of U.S. District Judge Alcee L. Hastings (S.D. Fla.). The certificate was signed by the Chief Justice on March 17, 1987.

The Judicial Conference had before it the Sept. 2, 1986, certification of the Judicial Council of the Eleventh Circuit that Judge Hastings "has engaged in conduct which might constitute grounds for impeachment." The Conference also had before it the report of the investigating committee appointed by the chief judge of the Eleventh Circuit and that committee's report, record, and exhibits, and a statement and report prepared by counsel for Judge Hastings filed with the Judicial Conference in response to the Conference's Sept. 17, 1986, invitation to Judge Hastings to submit a written response to the Eleventh Circuit's report (see *The Third Branch*, November 1986, p. 12). ■

NOTEWORTHY

Second Circuit issues report. Chief Judge Wilfred Feinberg (2nd Cir.) and Steven Flanders, circuit executive of the Second Circuit, have issued the eleventh Annual Report of the United States Courts for the Second Circuit, covering the statistical year ending June 30, 1986.

In 1986, the median processing time for civil cases in the Second Circuit was 6.0 months, and for criminal cases 5.5 months.

The district courts of the Second Circuit reported a 1 percent decrease in civil filings in 1986. The median time from filing to disposition in civil cases in the district courts of the circuit decreased by one month in 1986, from nine months to eight. Criminal case filings increased by 7.3 percent in 1986.

The report notes that "the largest source of regular business during the year was implementation of the Gramm–Rudman legislation."

Fifty-six misconduct complaints were filed with the clerk of the court of appeals pursuant to the Judicial Councils Reform and Judicial Conduct and Disability Act. Thirteen complaints were pending at the conclusion of the statistical year; no complaints were certified by the chief judge to a Committee on Judicial Conduct during the statistical year.

Three large responsibilities fell to the circuit executive's office for the first time in 1986: implementation of personal computer application throughout the circuit, telephone rental/purchase changeover, and numerous actions for and on behalf of the Judicial Council in connection with Gramm–Rudman–Hollings.

New reporting requirement for federal and state prosecutors. The Electronic Communications Privacy Act of 1986 became effective Jan. 20, 1987. The statute amends title III of the Omnibus Crime Control and Safe Streets Act of 1968 and results in a new reporting requirement for

See NOTEWORTHY, page 10

CALENDAR

Apr. 9–10 Frontline Leadership Management/Supervisory Training II

Apr. 20–22 Fifth Circuit Judicial Conference

Apr. 21–23 Regional Seminar for Probation and Pretrial Services Officers

Apr. 22–24 Workshop for Judges of the Fourth Circuit

Apr. 23–24 Frontline Leadership Management/Supervisory Training I

Apr. 27–May 1 Orientation Seminar for New Probation and Pretrial Services Officers

FRIED, from page 1

means in the end, I, authorize it.

What happens is that a recommendation for an appeal will be made to us by the U.S. attorney or by the relevant litigating division, and then a member of my staff will prepare an analysis and a deputy will review it. Then I will go over those memoranda and reach a decision. Mainly, the decision is favorable, although when appeal recommendations are approved, they are sometimes approved with qualifications. We say, "Don't make this argument," or "Make this argument this way rather than that way." We do that quite regularly. I think we are of some help to the lawyers by giving them suggestions and advice, and sometimes really specific instructions, on how the case is to be briefed in the appellate courts. And, of course, if they want to go en banc they need our approval. At that stage we turn them down more often. So, that's a lot of work. It does not leave time for other assignments.

A case comes to you through the divisions in the Department?

Yes. It would usually come to me through the divisions. Nevertheless, someone in my office will go through the whole file and I will study at least my office's recommendation; if they are in disagreement, I go through the whole file myself.

How large a staff do you have?

There are 22 lawyers.

Do you try to read all the opinions that come out of the circuits?

No. I read them if they are relevant to some case that I have, but not otherwise.

Do you confer with the White House on what cases to appeal?

I never have conferred with the White House. I think the system is that if the White House had a communication to make, that communication would be from the White House counsel, to the counselor to the Attorney General, and then to me. That's what Rex Lee told me the system was. But I have never heard from the White House—directly or indirectly. I have friends over there and I have had contacts at social lunches and engagements, but I have never had any business dealings with the White House at all. For a different relation, see the accounts of White House involvements in the solicitor general's positions in *Shelley v. Kraemer*, 100 Harv. L. Rev. 818–819 (1987), and *Regents v. Bakke* in Griffin Bell's *Taking Care of the Law*.

Charles Fried

What is your working relationship with Attorney General Meese? Do you arrive at a position to be taken on a given issue in a collegial way with his staff and your staff?

The relationship reflects the sort of man that he is and the sort of person I am. He is very interested in legal questions. He reads a lot. He likes to think about legal issues, and so do I. He enjoys conversation and give and take in discussion. In the course of a week, there is a morning staff meeting for all of his senior staff where things of interest are discussed. There is also a much smaller weekly luncheon where things of interest are discussed. He also has had conferences involving the leadership of the Department and outside academic speakers on issues of interest to the Department. These conferences have sometimes been weekend conferences where views are discussed. So there is a great deal of give and take. During that give and take, he certainly indicates his opinions about things, but because he is such an open and conversational person it is very clear that those expressions of opinion are just that—expressions of opinion.

The actual formal decision-making process is one which comes up from the divisions to me, and each person makes a decision. For example, the head of the Civil Division would make a formal recommendation which he would sign saying do this or do that; that would come to me, and I would study it and reach a decision. In the formal chain of command if somebody doesn't like my decision, they have the opportunity to carry an appeal to the Attorney General, because the statute indicates clearly that I am his subordinate, and he can then overrule my decision. So, he doesn't operate by giving me instructions to do things. He has, I hope, confidence in my judgment and he expects me to exercise that judgment, subject to being overruled; and that's exactly as it should be. The fact that he can overrule me is not anything that I consider threatening or disagreeable. I think, in fact, it is a very important protection, because it would be quite wrong for me to have the final say in an ultimate legal sense, and yet it's very important for me to have the say that I do have by reaching an independent conclusion which then can be overruled. So that's the formal system.

Each administration has special interests in a given area. Do you try to make selections on the cases that you want to argue at the Supreme

See FRIED, page 7

FRIED, from page 6

Court level, concentrating on certain issues?

Certainly that is an important element in deciding what cases to ask the Supreme Court to take. You have to have some criteria. Fortunately, the Supreme Court has its rules and they furnish a pretty fine filter which gets an awful lot of the "dead cats" out of there. In terms of what's left and then deciding whether, among the cases which meet the Supreme Court's stringent criteria, a particular case is worth taking—the fact that the issue is one of concern to the administration—is, of course, an important factor. Always has been and always will be.

How do you arrive at a decision on filing amicus curiae briefs?

We have to authorize every filing of an amicus brief in an appellate court anywhere in the country, including a state appellate court, if we feel that should be done. The initial impetus to file would come from some part of the government that had an interest in the case, and I would then have to authorize it. In Supreme Court cases, we would not only authorize it, we would actually brief and then argue the case.

Do you foresee going out into the federal courts of appeals to argue?

Occasionally one of our lawyers might argue an appeal in the courts of appeals, but that would be perhaps a younger lawyer who may need a little practice. I don't argue in the courts of appeals, because we have enough to do here.

How many of the amicus briefs that you have filed in the Supreme Court have been granted?

By a Supreme Court rule, every amicus brief that we file gets granted. So there's not a problem. We just file it and there it is. We do not need leave to file an amicus brief.

How about leave to participate in oral argument?

Argument is another thing because generally—almost invariably—you need to get time ceded by one of the parties, and the parties sometimes are not ready to give up their time. Even when they are, the Court may not want to allow divided argument. Generally they do. Sometimes they don't.

How do you feel about split arguments, if you have, for example, a total of 30 minutes?

I think you can get quite a lot said in 10 minutes. I have had some very good 10-minute arguments.

Were you litigating before you came here?

The first case I ever argued I argued in the Supreme Court, as a deputy, in February 1985 at the age of 50.

Do you have any pending state cases now?

I think we have one involving polio vaccine in Kansas. I think we've got a vaccine case in Ohio, and I think we've got a product liability case in California pending. There may be some others which I can't recall.

How many cases have you argued in the Supreme Court?

I have argued 14 cases.

You asked the Court to overrule *Roe v. Wade* in *Thornburgh v. American College of Obstetricians & Gynecologists*, a case in which none of the parties in the case had asked the Court to do that. This and other cases were seen as evidence that you had "politicized" the solicitor general's office. Recent press reports imply that you are now being more low-key in how far you are asking the Court to go in cases where you are participating as an amicus. Is this true?

The press loves to find trends and changes and so on. As far as I am concerned, I have not consciously adopted any different stance at all. The cases one goes into are a function of what's up there. The notion of politicizing the office is extremely ill-defined, and, if properly defined, is unfounded. If what "politicizing" the office means is using the office or the briefs for some kind of partisan political purposes, that's completely false. If what it means is that I have pointed out the proper direction which the law—constitutional law—and so on should take, then of course that is quite true. But then that's always been true. There has never been a solicitor general who was mindless enough not to have a view about the proper direction for the development of constitutional and other parts of the law, and that is something which we seek to express in our filings. If that is politicization of the office, then it is politicized. But I don't think there is anything the least bit new about it.

I think by and large the politicization claim comes from those who don't agree with the substantive positions. When Solicitor General Cox argued in the reapportionment cases, the usual suspects never said that he was politicizing the office, even though there was not a direct federal interest in the matter. I sus-

See FRIED, page 8

"We have to authorize every filing of an amicus brief in an appellate court ... including a state appellate court."

"The first case I ever argued ... I argued in the Supreme Court."

FRIED, from page 7

pect that's because they agreed with his substantive position. Philip Elman writes: "Truman's Gallup poll ratings at that time were very low.... Tom Clark was Attorney General, and both he and Perlman were political animals, very much aware of the Negro vote.... I don't know exactly what happened. Probably Tom Clark made the decision [to file in *Shelley v. Kraemer*] after checking with Truman." 100 Harv. L. Rev. 818 (1987). And Griffin Bell suggests that the solicitor general's position in the *Bakke* case was in part directed by Vice President Mondale. That's a kind of politicization I have never experienced or participated in.

What do you think of the latest law school graduates?

I am heartened by the quality of the graduates one sees. They are very excellent people, whom I enjoy interviewing. We have no dearth of applicants. We don't have any vacancies,

Charles Fried

but we have wonderful applicants. I am less encouraged by the writing that I see appearing in the law reviews.

They aren't good writers?

I don't mean the quality of the prose. The contents trouble me a bit. ■

Final Hearings Held on Revised Guidelines

NEWS FROM THE SENTENCING COMMISSION

Members of the Judicial Conference Committee on the Administration of the Probation System, as well as federal defenders, U.S. probation officers, and representatives from the Department of Justice and numerous other federal criminal justice system organizations testified at the U.S. Sentencing Commission's public hearings Mar. 11 and 12. These hearings capped the public comment period for the commission's Revised Draft Sentencing Guidelines.

The commission has already received many comments since the draft sentencing guidelines were published in the Feb. 6 *Federal Register* and distributed to over 5,000 individuals and groups.

By statute, the commission's initial set of guidelines are to be sent to Congress by Apr. 13. They will take effect Nov. 1 unless legislation is enacted changing or disapproving them, or delaying their effective date. ■

STOORZA, from page 4

In commenting on his selection, Mr. Stoorza said that he had thoroughly enjoyed his tenure with the Judicial Center and was convinced that the experience he gained would allow him to manage effectively the widespread installation of Center-developed software applications into the nationwide federal courts.

A native Texan, Mr. Stoorza is a graduate of the University of Oklahoma and holds the rank of captain in the U.S. Naval Reserve. ■

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. "Constitutional Adjudication and the Death Penalty: A View from the Court." 100 *Harvard L. Rev.* 313 (1986).

Burger, Warren E., Carl McGowan, George E. MacKinnon, *et al.* "Tribute to Edward Allen Tamm." 74 *Georgetown L.J.* 1571 (1986).

Feinberg, Wilfred. "Unique Customs and Practices of the Second Circuit." 14 *Hofstra L. Rev.* 297 (1986).

Flanders, Steven. "What Do the Federal Courts Do?" 5 *Rev. of Litigation* 199 (1986).

Higginbotham, Patrick E. "Judicial Attitudes: Pylons for the Advocate." 5 *Rev. of Litigation* 181 (1986).

Leval, Pierre N. "Dedication to Henry J. Friendly—In Memory of a Great Man." 52 *Brooklyn L. Rev.* 571 (1986).

McGowan, Carl. "The President's Veto Power: An Important Instrument of Conflict in Our Constitutional System." 23 *San Diego L. Rev.* 791 (1986).

Mikva, Abner J. "How Should the Courts Treat Administrative Agencies?" 36 *American University L. Rev.* 1 (1986).

Posner, Richard A. "Law and Literature: A Relation Reargued." 72 *Virginia L. Rev.* 1351 (1986).

√ Rehnquist, William H. "The Many Faces of the Bicentennial." Remarks Before the ABA, New Orleans, La., Feb. 15, 1987.

√ Scalia, Antonin. Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents, New Orleans, La., Feb. 15, 1987.

Smith, Loren A. "A Vision of the Exchange." 27 *William & Mary L. Rev.* 767 (1986).

Stevens, John Paul. "The Third Branch of Liberty." 41 *University of Miami L. Rev.* 227 (1986).

Warriner, D. Dortch. "Of Laws, Men, and Judges." 20 *University of Richmond L. Rev.* 451 (1986).

LEGISLATION, from page 3

delayed the effective date of section 215(b) until Nov. 1, 1987. Rep. John Conyers, Jr. (D-Mich.) introduced his bill "in hopes of foreclosing any ... litigation" over whether the Court's order continues in effect until Nov. 1, 1987.

- H.R. 938, sponsored by Rep. Norman D. Shumway (R-Cal.), would abolish the Legal Services Corp.
- S. 464. Sen. Alan Cranston (D-Cal.) sponsored this bill to amend the 1964 Civil Rights Act to prohibit discrimination on the basis of affectional or sexual orientation.
- S. 426, the Liability Insurance Reform Act of 1987, was introduced by Sen. Claiborne Pell (D-R.I.). The bill would cap pain and suffering awards at $250,000 and would mandate a staggered payment method for awards over $250,000 instead of the current lump-sum payment system. [See the ABA's recommendation against capping such awards reported on p. 2.] In addition, the bill would place a schedule system on contingency fees. This scale would allow an attorney to receive 33⅓ percent of the first $250,000 of an award; 25 percent of the amount from $250,000 to $1 million; and 20 percent of award amounts over $1 million.
- H.R. 635, the Product Liability Voluntary Claims and Uniform Standards Act of 1986, is sponsored by Rep. William E. Dannemeyer (R-Cal.). This bill would preempt conflicting state law and provide for uniform standards of liability. The most salient features of the bill include elimination of joint and several liability in favor of comparative responsibility, a cap on punitive damages to two times the amount of economic damages or $100,000, whichever is less, settlement incentives, and an alternative dispute resolution mechanism.
- S. 260, the Reform of Federal Intervention in State Proceedings Act, was introduced by Sen. Strom Thurmond (R-S.C.). The measure is intended by its sponsors to clarify in habeas corpus cases the standard of review, the effect of prior procedural defaults, time limits for bringing petitions, and the extent to which state remedies must first be exhausted.
- Representative Dan Glickman (D-Kan.) introduced, and the House Judiciary Committee's Subcommittee on Administrative Law and Governmental Relations marked up, H.R. 1162, dealing with multiple appeals to the courts of appeals—the so-called "race to the courthouse" (see the *Third Branch*, January 1987, p. 7).
- The director of the Office of Management and Budget has sent to the Speaker of the House and to the Senate a letter transmitting a draft of proposed legislation to terminate the State Justice Institute. The State Justice Institute board was sworn in in 1986 and the institute is functioning this fiscal year with a budget of $7.2 million. ■

ABA, from page 2

did approve, after considerable debate, a recommendation that relates to the issue of punitive damages. They agreed that punitive damages "have a place in appropriate cases and should not be abolished," but the scope of the damages should be limited to cases where the standard of proof to be applied should be "clear and convincing" as opposed to "preponderance of the evidence." The resolution cautioned that the courts should closely scrutinize awards and the net worth of defendants in order to stem the tide of excessive punitive damage awards.

Injunctive relief, judicial officers. The delegates approved a resolution from the ABA Appellate Judges' Conference to ask Congress to amend 42 U.S.C. §§ 1983 and 1988 to prohibit the award of injunctive relief against any judicial officer for an act committed in his or her capacity as a judicial officer and not clearly in excess of the officer's jurisdiction unless a declaratory judgment was ignored, violated, or unavailable. The resolution included a prohibition on counsel fees.

Fed. R. Crim. P. 35(b) (Reduction of sentence by a federal judge). A resolution to ask Congress to retain this rule was approved. The revised draft guidelines proposed by the U.S. Sentencing Commission would vitiate this rule. [For a related story, see the report on H.R. 742 on p. 3.]

Money laundering. A resolution was approved urging that Congress amend the Money Laundering Control Act of 1986 to exempt provisions of the law that now call for an attorney to forfeit funds accepted from a client who is subject to criminal investigation.

Civil RICO Act. The House of Delegates approved asking Congress to amend 18 U.S.C. §§ 1961–1968 to limit the availability of a private civil action under the act. Seven ABA groups joined in requesting this resolution. ■

NOTEWORTHY, from page 5

federal and state prosecuting officials.

The new requirement applies only with respect to court orders or extensions entered on or after Jan. 20, 1987. 18 U.S.C. § 2519(1)(b) now requires prosecuting officials to report to the AO whether the order denying or approving intercepted wire, oral, or electronic communications was an ordinary specificity order, which requires a particular description of the type and location of the intercept device, or was a relaxed specificity order (roving tap), which allows a less explicit description. Until such time as the states pass legislation in conformance with the federal statute that provides for roving interceptions, all state intercept orders will be "ordinary" orders.

Ruling on suspension of jury trials not vacated. The Ninth Circuit rejected a Justice Department request to vacate a June 1986 ruling that the suspension of federal civil jury trials would violate the Seventh Amendment. The Justice Department argued that the ruling became moot when Congress appropriated supplemental funding for juror fees. (See *The Third Branch*, August 1986, p. 2.) The Ninth Circuit declined to find the case moot, and also found applicable an exception to the mootness doctrine for cases involving a voluntary cessation of unlawful conduct that is likely to recur. *Armster v. United States District Court*, 806 F.2d 1347 (9th Cir. 1986).

Second Circuit construes 1978 Jury System Improvements Act. The Second Circuit recently held that Congress did not intend that compensatory damages be awarded in actions brought under the 1978 Jury System Improvements Act. An aggrieved employee-juror maintained that the "other benefits" and "other appropriate relief" allowed by the statute should permit the recovery of compensatory damages for mental pain and suffering. The Second Circuit disagreed, finding no congressional intent in the statute to provide compensatory damages. *Shea v. County of Rockland*, No. 86-7747, Jan. 21, 1987. The statute at issue, 28 U.S.C. § 1875, provides that no employer shall discharge, threaten, intimidate, or coerce any permanent employee by reason of such employee's jury service, and that an employer violating the statute shall be liable for damages for lost wages or "other benefits" and may be ordered to provide other "appropriate relief." ■

GIGNOUX, from page 3

representative to the Judicial Conference.

Since 1980, the judge has been a member of the Temporary Emergency Court of Appeals.

Judge Gignoux was appointed U.S. district judge for the District of Maine in 1957 and served as chief judge from Nov. 8, 1978, to June 1, 1983, when he took senior status. He is a graduate of Harvard Law School and served as a lieutenant in the U.S. Army. He was separated from the service in 1946.

The Devitt Award has been presented annually by West Publishing Co. since 1982 to recognize extraordinary service to justice performed by a federal judge. The selection is made by a three-member committee, which this year was Justice William J. Brennan, Jr., Chief Judge Charles Clark (5th Cir.), and Judge Edward J. Devitt (D. Minn.), for whom the award is named. Previous winners are Chief Justice Warren E. Burger and Judges Albert B. Maris (3d Cir.), Walter E. Hoffman (E.D. Va.), Frank M. Johnson (11th Cir.), and William J. Campbell (N.D. Ill.). The award was given posthumously to Judge Edward A. Tamm (D.C. Cir.) in 1986. ■

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THE THIRD BRANCH

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THE THIRD BRANCH

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Sentencing, Salary Resolutions Passed by Judicial Conference

The Judicial Conference of the United States has authorized its Ad Hoc Committee on Sentencing Guidelines to recommend appropriate Conference positions to the Conference's Executive Committee following promulgation of the sentencing guidelines by the Sentencing Commission. The Ad Hoc Committee was also asked to recommend whether, in light of substantial judicial branch opposition to the guidelines, the Judicial Conference should recommend that Congress repeal the statute creating the Sentencing Commission and requiring sentencing guidelines. The

See CONFERENCE, page 7

Inside:
Special Report on the Sentencing Commission's Guidelines

A special report on the Sentencing Commission's *Sentencing Guidelines and Policy Statements for the Federal Courts*, as submitted Apr. 13 to Senate President Bush and House Speaker Wright, begins inside on page 3.

A Message from the Chief Justice

The committee appointed to study the Judicial Conference and its committees has been hard at work since we first met last December at the Supreme Court. It was agreed then that the committee members would contact the judges in all of the circuits to obtain their views concerning possible improvements that should be made in the operations of the Conference, its committees, its subcommittees, and in the staff support to the Conference. Others in the judicial family also were asked for their views. Many responded, and I thank all those who took the time to assist us in our efforts to improve judicial governance.

The views of those who responded were presented to the full committee at our meeting last February in Phoenix. An interesting generalization emerged from the reports from the committee members. Those who are or have been chairmen or committee members feel that the system works reasonably well although it can be improved. Those who have not served tend to be more critical and at times suspicious. It is already evident, therefore, that there must be better communication of Conference deliberations and actions throughout the judiciary and that participation can be broadened.

Our next meeting will be held on May 5 at the Supreme Court. Each committee member will present detailed reports on the area to which each of them is assigned, ranging from a mission statement for the overall operations of the Conference, to terms of office, eligibility to serve, composition, and jurisdiction of Conference committees. I am well impressed with the dedication so evident in the response from each of the committee members. They have more than enough to do in their judicial pursuits but recognize the importance of the judicial governance role statutorily assigned to the Conference. The committee members are Hon. Levin H. Campbell, Hon. Wilfred Feinberg, Hon. Charles Clark, Hon. James R. Browning, Hon. Aubrey E. Robinson, Hon. John F. Nangle, Hon. Barbara B. Crabb, and Circuit Executive James A. Higgins.

It has been my pleasure to chair the committee meetings. The executive secretariat function is performed by Ralph Mecham, director of the Administrative Office, and Marion Ott, of his staff.

The goal of the committee is to present recommendations for the consideration of the full Conference in September 1987. Decisions made at that time will be implemented soon thereafter.

William H. Rehnquist

Subcommittee Chairman Weighs Court Issues, Immigration Problems

Romano L. Mazzoli has represented the congressional district that includes his native Louisville since 1971. He received a B.S. at the University of Notre Dame and a J.D. at the University of Louisville. After being admitted to the Kentucky bar, he practiced law and served in the Kentucky Senate (1967–70). He is chairman of the House Judiciary Committee's Subcommittee on Immigration, Refugees, and International Law.

The Supreme Court's decision in *Cardoza-Fonseca v. Immigration & Naturalization Service* holds that the "well-founded fear" standard to be applied in asylum cases is more generous than the "clear probability of persecution" standard that the Board of Immigration Appeals sought to apply. Do you agree with predictions of a major increase in such cases following the decision?

Romano L. Mazzoli

It is very hard to say if there will be a major increase in the number of cases that the courts will hear with respect to the question of the standard an applicant would have to reach in order to be granted asylum. But certainly the cases which have been decided under the old clear probability of persecution standard for deciding whether the individual should be returned to his or her country will have to be examined. Many of them will be reexamined, and, of course, all the new cases will come up under the more relaxed standard of "well-founded fear." So it is hard to quantify the numbers, but I do think that this will add additional workload to the Immigra-

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LEGISLATION

The following items of interest to the judiciary are pending in Congress:

- AO Director Ralph Mecham has sent to the Congress a draft of proposed legislation to provide enhanced retirement credit for U.S. magistrates under the Civil Service Retirement System and also separate legislation to establish a new retirement program for bankruptcy judges and magistrates.
- H.R. 1162, the "race to the courthouse bill" (see *The Third Branch*, April 1987, p. 9) has been ordered reported to the full House by the Judiciary Committee.
- Rep. Thomas J. Tauke (R-Iowa) introduced H.R. 1666, a bill to establish the Social Security Administration as an independent agency, to reform the appeals process, and to establish a Social Security court. The Social Security court would be a specialized court separate from the judicial branch. Social Security Administration law and regulations would be binding on it, and it would not have jurisdiction to rule on constitutional matters or the validity of regulations. Federal district courts would retain jurisdiction of

See LEGISLATION, page 12

Data Show Significant Savings Resulting From Improvements in Juror Utilization

Juror utilization rates have improved in recent years, resulting in a total savings of $730,000 for the past two-year period and lessening the inconvenience to numerous potential jurors, according to data on first-day petit juror usage maintained by the AO. A series of juror management and utilization workshops jointly developed by the FJC and AO, and sponsored by the FJC, contributed to the improved utilization rates and subsequent savings.

The AO's data reflect the percentage of jurors not selected, serving, or challenged (NSSC) on voir dire/orientation day. For the period January 1986 through December 1986, the national percentage of NSSC jurors on the first day of jury service declined by 2.41 percentage points, from 35.26 percent in the year ended December 1985 to 32.85 percent in the year ended December 1986. This decline represents a savings of $482,000, and equates to almost 10,000 potential jurors not being brought into the courthouse unnecessarily.

The Judicial Conference at its March 1984 session adopted a recommendation by the Committee on the Operation of the Jury System to encourage all courts to reduce the percentage of NSSC jurors on voir dire/orientation day to 30 percent. At that time, the national percentage of NSSC jurors was 36.50 percent. In recommending this goal, the committee stated that its primary concern was the inconvenience imposed on citizens called for jury service.

In response to the adoption of the 30 percent goal, the FJC and AO jointly developed the juror management and utilization workshops, which are sponsored by the FJC. Over the last two years, every court has been afforded at least one opportunity to have the chief judge or the judge's designee, the clerk, and the jury administrator attend a workshop. The workshops have been well received by all participants, and have already produced impressive results. Statistics for the past two-year period show that, in addition to the financial savings, almost 15,000 potential jurors were spared unnecessary appearances. ■

THE THIRD BRANCH

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200 Years ago...

May 1787: Delegates to the Constitutional Convention drifted into Philadelphia, many lodging at the Indian Queen, where, reported Virginia's George Mason, "we are charged only twenty-five Pennsylvania currency per day."

On May 25, when a majority of states were finally represented, the convention chose George Washington to preside and adopted rules, including a rule that "nothing spoken in the House be printed, or otherwise published or communicated without leave."

Debate began May 29 when Virginia Governor Edmund Randolph, coached by James Madison, proposed a government differing sharply from the Articles of Conferation. It would "be paramount to the state constitutions," based on "the republican principle," and include separate executive, legislative, and judicial branches.

The Virginia Plan's "National Judiciary," sitting in "supreme" and "inferior tribunals," would be chosen by the national legislature, hold office "during good behaviour," and receive a salary "in which no increase or diminution shall be made so as to affect" incumbent judges. Its jurisdiction would include admiralty cases, "cases in which foreigners or citizens of other States applying to such jurisdictions may be interested, or which respect the collection of the National revenue; impeachments of any National officers, and questions which may involve the national peace and harmony."

BICENTENNIAL OF THE U.S. CONSTITUTION

Special Report: Guidelines Go to Congress; August '88 Implementation Proposed

On Apr. 13, U.S. Sentencing Commission chairman William W. Wilkins, Jr., of the Fourth Circuit Court of Appeals submitted the commission's *Sentencing Guidelines and Policy Statements for the Federal Courts* to Senate President Bush and House Speaker Wright. The commission, which will distribute the guidelines more broadly after printing and binding, noted that they are "an initial set of guidelines" and stressed that it sees the "guideline-writing process as evolutionary." The commission, as a permanent agency responsible for monitoring federal sentencing practices nationally, said that it will submit

NEWS FROM THE SENTENCING COMMISSION

modifications and revisions to Congress based on "continuing research, experience, and analysis."

The October 1984 Comprehensive Crime Control Act authorized creation of the Sentencing Commission, which consists of seven voting members, whom the President nominated in September 1985, and two *ex officio* members. The statute also prescribed the basic framework for the sentencing system in which the commission's guidelines are to operate.

The commission issued two draft sets of guidelines in September and January for public review and comment. These April guidelines will become law Nov. 1, 1987, unless changed or delayed by statute.

The commission has recommended that Congress allow the guidelines to "go into effect November 1, 1987, . . . but that Congress enact legislation staying implementation of the guidelines . . . until August 1, 1988." Statutory changes keyed to guideline implementation—such as the abolition of parole and appellate review of sentences—would also be delayed until Aug. 1. This delay, however, does require a statutory enactment. If Congress does not act before Nov. 1, federal courts must then start sentencing according to the guidelines' provisions—at least with respect to offenses committed after that effective date.

The commission proposed the delay to allow it to field-test the submitted guidelines prior to implementation. During the field tests, the commission would encourage judges to apply the guidelines to cases before them in addition to exercising their regular sentencing duties. The commission would provide the judges forms on which they could advise the commission of the results of these tests, along with problems and recommendations. It will use this information to prepare technical and substantive amendments, which it would submit to Congress in early 1988, to take effect on Aug. 1, 1988.

The commission noted that the delay would also allow additional time for the training of judges and probation officers, prosecutors, and defense counsel. The FJC committee on education related to the 1984 crime control legislation, chaired by Judge A. David Mazzone (D. Mass), has begun formulating training plans for judicial branch personnel.

Sentencing Table

The guidelines contain a Sentencing Table with 43 offense levels on the vertical axis and six categories of criminal history on the horizontal axis. Offenders in criminal history category 1 would likely have little or no criminal record, while those in category 6 would likely have extensive criminal histories.

The judge would find the applicable guideline sentencing range, which the table expresses in months of imprisonment, by determining the offense level and then reading across

See SENTENCING, page 4

Carlson to Retire; Quinlan Successor at Bureau of Prisons

Norman Carlson, director of the Bureau of Prisons since 1970, will retire July 3, and J. Michael Quinlan, a career employee in the Department of Justice, will become the Bureau's new director.

Norman Carlson

Mr. Carlson is a native of Iowa. He began his career in penology as a parole officer at Leavenworth, Kan., in 1957 and held a series of positions at the Bureau of Prisons in Washington from 1960 until 1970, including four years as executive assistant to former director James Bennett.

During Mr. Carlson's tenure as director, the number of federal prisons grew from 27 to 47, and the number of inmates increased from 20,200 to about 42,000. He presided over or encouraged many developments and improvements in prison administration, including the increased professionalism of the Bureau's staff, increased employment and training opportunities for prisoners, more prisons and better design of newly constructed prison facilities, and enhanced sharing of knowledge between the judiciary and the Bureau.

J. Michael Quinlan

Mr. Quinlan is a graduate of Fordham Law School, and holds a master

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the axis to the proper criminal history category. Offense level 4, for example, which could apply to an offender convicted of theft of $100 or less, prescribes a sentencing range of 0 to 4 months for an offender in criminal history category 1, and 6 to 12 months for an offender in criminal history category 6. Offense level 38, which could apply to an offender convicted of aircraft hijacking, prescribes a sentencing range of 235–293 months for offenders in criminal history category 1, and 360 months to life for offenders in both the 5th and 6th criminal history categories.

The commission began its determination of guideline ranges "by estimating the average sentences now being served within each category" and thus believes that "guideline sentences in many instances will approximate existing practice."

Determining Offense Levels

Base offense levels. Chapter 2, "Offense Conduct," prescribes the base offense levels for approximately 170 offenses—for example, "aggravated assault" (15), "criminal infringement of copyright" (6), "renting or managing a drug establishment" (16), "insider trading" (8), "obstruction of justice" (12), and "trafficking in a United States passport" (6).

A forthcoming statutory index will direct users to appropriate guideline offense sections. For cases where there is no guideline for a specific statute, the judge is directed to apply the most closely analogous guideline offense section.

Adjustments for specific offense characteristics. In addition to the "base offense levels," chapter 2 includes various "specific offense characteristics" with which to adjust base offense levels. For example, guideline 2E2.1 specifies a base offense level of 20 for "making, financing, or collecting an extortionate extension of credit" but directs increasing that base offense level by 5 levels if a firearm was discharged, by 4 levels if a firearm or other dangerous weapon was "otherwise used," and by 3 levels if a firearm or other weapon was in the offender's possession.

Unlike the commission's January 1987 draft guidelines, the submitted guidelines contain no ranges for specific offense characteristics. For example, with respect to "larceny, embezzlement, and other forms of theft," the January draft directed the judge to increase the offense level "by 1 to 3 levels, depending upon the degree of planning and sophistication." The submitted guidelines, by contrast, provide a single number: "If the offense involved more than minimal planning, increase by 2 levels."

Other adjustments. Chapter 3 of the guidelines include a series of other adjustments.

Part A includes three adjustments—vulnerable victim, official victim, and restraint of victim—that are to be treated as specific offense characteristics and applied to any relevant offense unless the offense guideline in chapter 2 "incorporates these factors either in the base offense level or as a specific offense characteristic." The "official victim" guideline, for example, directs an increase of 3 levels if the victim was a law enforcement or corrections officer or any one of numerous public officials or their family members "and the crime was motivated by such status."

Chapter 3 also provides adjustments for "role in the offense," "obstruction," "multiple counts," and "acceptance of responsibility."

Determining Criminal History

The Sentencing Table expresses offense characteristics in levels, but it expresses criminal history in points. Chapter 4 assigns points for five items, three relating to prior sentence and two relating to sentencing status when the offense was committed. The judge is instructed, for example, to add 3 points for each prior sentence of imprisonment exceeding one year and one month. The total points for these five items translate into the offender's criminal history category for the table.

The commission noted empirical research on the correlations between various offender characteristics and recidivism but stated it "has made no definitive judgment in respect to the reliability of the presently existing data" and "will review further data insofar as it becomes available in the future."

Other Issues

Several issues have pervaded discussion and comment on the commission's September and January draft guidelines and will no doubt be scrutinized in the guidelines as submitted. They include:

"Real offense sentencing" versus "charge offense sentencing." The commission's September draft guidelines embodied a "modified real offense system," which based sentences on charged and some uncharged behavior. In the submitted guidelines, the commission has "moved closer to

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CALENDAR

June 1–5 Orientation for New Probation and Pretrial Services Officers
June 3–5 Regional Substance Abuse and Treatment Seminar
June 3–6 Sixth Circuit Judicial Conference
June 8–9 Judicial Conference Subcommittee on Judicial Statistics
June 8–14 Residential Week—Fordham Master's Program
June 15–16 Judicial Conference Subcommittee on Federal Jurisdiction
June 15–16 Judicial Conference Subcommittee on Federal-State Relations
June 25–27 Fourth Circuit Judicial Conference
June 29–30 Judicial Conference Advisory Committee on Civil Rules
June 29–July 1 National Management Seminar for Chief Probation and Pretrial Services Officers

SENTENCING, from page 4

a 'charge offense' system" but has retained what it calls "a number of real elements." It notes, for example, that the guidelines often describe generic conduct (such as "aggravated assault") because of "the hundreds of overlapping and duplicative statutory provisions that make up the federal criminal law." Also, through specific offense characteristics and adjustments, the guidelines take into account "a number of important, commonly occurring real offense elements such as role in the offense, the presence of a gun, or the amount of money actually taken."

Moreover, real offense behavior is considered "in the case of conviction by plea of guilty or *nolo contendere* containing a stipulation that specifically establishes a more serious offense than the offense of conviction." Additionally, the guidelines contain a "relevant conduct" guideline (202), which states that "to determine the seriousness of the offense conduct," the judge shall take into account "all conduct, circumstances, and injuries relevant to the offense of conviction."

Departures from the guidelines. Congress has provided that the court may depart from the guidelines when it finds "an aggravating or mitigating circumstance" that the commission did not "adequately" consider. In its opening chapter, the commission stated its intention that courts "treat each guideline as carving out a 'heartland,' a set of typical cases embodying the conduct that each guideline describes." A court may consider whether to depart from the guidelines when it "finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm."

Except for a few specific exceptions (namely, race, sex, national origin, creed, religion, socio-economic status; drug dependence or alcohol use; and personal or business financial difficulties), "the commission does not intend to limit the kinds of factors (whether or not mentioned anywhere else in the guidelines) that could constitute grounds for departure in an unusual case."

The commission, however, avers its belief "that despite the courts' legal freedom to depart from the guidelines, they will not do so very often."

Multicount convictions. This issue was not addressed in the two draft guideline documents. In the submitted guidelines, "fungible items," such as separate drug transactions or thefts of money, are aggregated across conviction offenses, and the guidelines apply to the total amount. In other kinds of multiple count cases, the guidelines provide for adding one to five offense levels to that for the most serious count, depending on offense seriousness and the distinctiveness of the harm caused.

Probation. Probation is available when the minimum term of imprisonment in the guideline range is zero. The guidelines also authorize probation when the minimum term of imprisonment in the guideline range is at least one but not more than six months, provided that community confinement is substituted for the minimum term specified. A provision new to the submitted guidelines provides that when the minimum term of imprisonment is at least one month but not more than ten months, the minimum term can be satisfied by a sentence of imprisonment of at least one-half the minimum term of imprisonment, providing that the remainder of the minimum term of imprisonment is served in community confinement as a condition of supervised release.

Plea agreements. The commission states in chapter 1 that it has not sought in these initial guidelines to "make significant changes in current plea agreement practices" and notes that the "court will accept or reject any such agreements primarily in accordance with . . . Fed. R. Crim. P. 11(e)."

Guideline 6B1.2 allows the court to

See SENTENCING, page 6

Federal Rules Amendments to Become Effective

Absent further congressional action, amendments to the Federal Rules of Civil and Criminal Procedure will become effective on Aug. 1, 1987, and amendments to the Federal Rules of Evidence will become effective on Oct. 1, 1987. The amendments were approved by the Supreme Court and transmitted by the Chief Justice to Congress in March.

The Supreme Court announced amendments to the bankruptcy rules on Mar. 30 and authorized their transmittal to Congress. The amendments to the bankruptcy rules will take effect Aug. 1, 1987, absent further congressional action.

PERSONNEL

Nominations

Royce C. Lamberth, U.S. District Judge, D.D.C., Mar. 19

Susan W. Liebeler, U.S. Circuit Judge, Fed. Cir., Mar. 23

Suzanne B. Conlon, U.S. District Judge, N.D. Ill., Apr. 2

Confirmations

Morton I. Greenberg, U.S. Circuit Judge, 3rd Cir., Mar. 20

Edward Leavy, U.S. Circuit Judge, 9th Cir., Mar. 20

Malcolm F. Marsh, U.S. District Judge, D. Or., Mar. 20

1986 Financial Disclosure Statements Due in May

All judicial officers and judicial employees in Grade 16 and above, including court reporters whose gross receipts plus regular salaries equaled or exceeded $61,296, are reminded that they are required to file a financial disclosure statement for calendar year 1986 by May 15. This includes those employees who may have only worked up to 60 days during 1986.

Annual filings are required by the Ethics in Government Act, 28 U.S.C.A. app. §§ 301–309 (Supp. 1987).

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accept a plea agreement including a charge dismissal or agreement not to pursue a charge if the court determines, on the record, that the remaining charges accurately reflect the seriousness of the actual offense behavior and that acceptance will not undermine the statutory purposes of sentencing.

It also allows the court to accept a recommended sentence, or a specific sentence agreement, if it is satisfied that the sentence is within the applicable guideline range or "departs from the applicable guideline range for justifiable reasons."

Fines. The guidelines provide that unless the offender establishes inability to pay or that payment would unduly burden dependents, "the court shall impose a fine in all cases" and "impose an additional fine amount that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered."

Further Information

When it distributes the printed and bound guidelines, the commission will submit a report to Congress further explaining its recommendations, the projected impact of the guidelines on correctional facilities and services the operation of the guidelines ir comparison with current sentencing practices, and other relevant supporting information.

Commission Vote

As required by 28 U.S.C. § 994(a), the guidelines were approved by affirmative vote of a majority of the commission's seven voting members. Commissioner Paul H. Robinson voted in the negative and will submit a written dissent. Commissioner Ronald L. Gainer, a nonvoting, *ex officio* member from the Department of Justice, stated that if he were a voting commissioner, as a personal matter, he would not have voted to support the guidelines in their current form.

Fennell Named New Director of Center's Innovations & Systems Development Division

FJC Director A. Leo Levin has announced that Richard Fennell has been named director of the Center's Innovations and Systems Development Division. Dr. Fennell has served as deputy director of that division since 1981, and as its acting director since March 1987, when the previous director, Larry Stoorza, joined the Administrative Office as assistant director for automation and statistics (see *The Third Branch*, April 1987, p. 4). From 1975 to 1981, he served the division as a senior research computer scientist.

Richard Fennell

Dr. Fennell stated, "Until now, the primary recipients of the Center's automation efforts have been the clerks' offices of circuit, district, and bankruptcy courts. We are now preparing to transfer responsibility to the AO for the operational implementation and support of our latest generation of electronic docketing and case management systems. This transfer will provide the Systems Division with an opportunity to revert to a more research-oriented role and to undertake a range of technology assessment studies and experimental evaluations that have been requested by Judicial Conference committees, judges, and members of the court family. We intend to place particular emphasis on addressing the automation needs and concerns of judges and their in-chambers staffs. We hope these studies will enable the federal courts to take full advantage of state-of-the-art automation technologies."

Dr. Fennell is a graduate of Rennselaer Polytechnic Institute and holds a Ph.D. in computer science from Carnegie-Mellon University. He is the author and coauthor of numerous articles in professional journals.

Daniel Skoler, the director of the FJC's Continuing Education and Training Division, has announced that Steven Wolvek has been appointed deputy director of that division. Dr. Wolvek received his Ph.D. in sociology–criminology from UCLA, and came to the staff of the Center from the private sector in 1986. ■

NOTEWORTHY

Suit challenges pay raise mechanism. A suit challenging the legality of the mechanism that resulted in increased congressional and judicial salaries is pending in D.D.C. *Humphrey v. Baker*, No. 87-128. The plaintiffs include Sen. Gordon J. Humphrey (R-N.H.), five members of the House of Representatives, and Ralph Nader. The suit asks for a declaratory judgment that the procedures established by 2 U.S.C.A., ch. 11, for determining the compensation of senior federal officials are unconstitutional because they constitute an excessive delegation of the powers of Congress and violate the requirement of Art. I, § 6, that the compensation of members of Congress be "ascertained by law," and violate the separation of powers. In the alternative, plaintiffs seek a declaration that Congress properly disapproved the President's pay recommendations by means of a Senate resolution on Jan. 29, 1987, and a resolution in the House on Feb. 4, 1987.

Deductions of IRA contributions by petitioner judges allowed. Because judges are not "employees" as that term is used in section 219(b)(2)(A)(iv) of the Internal Revenue Code, they are not "qualified participants" in a plan established by the United States for its employees, and the Commissioner of Internal Revenue must allow them deductions for contributions to individual retirement accounts, the U.S. Tax Court has ruled. *Porter v. Commissioner of Internal Revenue*, 88 T.C. No. 28 (Mar. 5, 1987). ■

CONFERENCE, from page 1

Conference directed the Ad Hoc Committee to consult with the Committees on the Administration of the Criminal Law and the Probation System in making its recommendations.

In other business, the Conference also:

- Concurred in the determination of the Judicial Council of the Eleventh Circuit that consideration of the impeachment of Judge Alcee L. Hastings may be warranted and authorized the Chief Justice to certify to that effect to the Speaker of the House, as provided by 28 U.S.C. § 372(c)(8) (see *The Third Branch*, April 1987, p. 5).

- Endorsed "immediate" action by Congress to raise the salaries of bankruptcy judges and magistrates.

- Approved new salary classification schemes for clerks of court and chief probation and pretrial services officers.

- Reaffirmed, with minor amendments, the March 1982 Conference proposal on retirement of fixed-term judicial officers, whereby bankruptcy judges, magistrates, and territorial judges would receive a full annuity equal to the salary of office after 14 years of service, payable at age 65.

- Reaffirmed the Executive Committee's action raising bankruptcy noticing fees; approved increases in appellate, district court, Claims Court, and bankruptcy miscellaneous fees, *excluding* a proposal to establish a new fee for filing a suggestion for a rehearing en banc by a court of appeals; and recommended that Congress increase Claims Court filing fees from $60 to $120.

- Approved an amendment to the regulations governing the recall to service of retired bankruptcy judges. The amendment provides that when a retired bankruptcy judge is recalled to active service, the judicial council recalling the judge can certify that adequate support cannot be provided by existing resources, and the director of the Administrative Office may provide the necessary space, facilities, and equipment for the recalled judge.

- Adopted new regulations for the recall to service of retired magistrates, patterned on the Conference's regulations for bankruptcy judges.

- Approved increases in the salaries of law clerks and legal assistants, payable only if Congress appropriates the necessary additional funds.

- Authorized two pay increases for all part-time magistrates: the 3 percent cost-of-living adjustment recently granted to federal employees generally, retroactive to Jan. 1, and an increase proportionate to the 2.8 percent salary increase granted to full-time magistrates under the Federal Salary Act of 1967.

- Recommended that the circuit judicial councils and national courts substantially adopt on an experimental basis the *Illustrative Rules Governing Complaints of Judicial Misconduct and Disability* (see *The Third Branch*, November 1986, p. 8), and requested each judicial council and national court to report to the Court Administration Committee by September 1987 on its experience with local judicial discipline rules.

- Recommended that Congress abolish the Temporary Emergency Court of Appeals.

- Gave district court security committees the responsibility of designating "high-risk crime areas" for parking purposes.

- Urged Congress to act promptly to narrow significantly the scope of civil RICO actions, 18 U.S.C. § 1964(c).

- Urged Congress not to fund and to reconsider the National Childhood Vaccine Injury Act of 1986 [see Rep. Mazzoli's comments on the act, p. 11].

- Reiterated strong support for the State Justice Institute. ■

AO Appoints Karam Assistant Director For Administration

Raymond A. Karam has joined the Administrative Office to fill the newly created position of assistant director for administration, AO Director L. Ralph Mecham has announced.

Raymond A. Karam

Mr. Karam served as the acting assistant secretary at the U.S. Department of Transportation and, immediately prior to joining the AO, was deputy assistant secretary for budget and programs. Mr. Karam has worked in various key management positions at the Department of Transportation since February 1981. He has also served in the U.S. Department of the Interior, the Executive Office of the President, and the U.S. Air Force, and is a member of the Virginia bar. ■

Fed. Cir. Conference To Be Held on May 8

The Fifth Annual Judicial Conference of the U.S. Court of Appeals for the Federal Circuit will be held in Washington, D.C., on May 8 from 9:00 to 5:00 at the Washington Hilton Hotel. Chief Judge Howard T. Markey will give the state of the court address, and Chief Justice Warren E. Burger will be the luncheon speaker.

There will be separate "breakout sessions" devoted to the Claims Court, Court of International Trade, Merit Systems Protection Board, and patents and trademarks.

It is expected that a total of 2,000 lawyers and judges will attend. ■

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tion & Naturalization Service and potentially to the courts thereafter. The work of the Subcommittee on Immigration is oversight, so we would expect at some point to have some opportunity to oversee exactly how this is being handled in practice once the new interpretation of "well-founded fear" becomes the standard.

H.R. 1120 would amend the Immigration and Nationality Act (INA) to provide religious sanctuary as a defense, in certain cases, to the criminal offense of harboring or transporting aliens. Does *Cardoza-Fonseca* affect the perceived need for this bill?

The subcommittee in the 100th Congress has not really organized yet, and I wouldn't have any way of knowing how all my colleagues feel, but I would think that there would not be a majority view that persons offering sanctuary, however laudable their goal and however noble their inspiration, should be somehow insulated from the law making it a crime intentionally to harbor an alien.

On the one hand, I think that, with respect to *Cardoza-Fonseca*, if, as we surmise, the new standard is somewhat looser and a little bit easier to attain, then it is possible that some of the very people who are now seeking a kind of sanctuary would be less likely to seek it because they would have a more proximate remedy in the handling of the asylum petition. On the other hand, I dispute to some extent whether or not everyone involved in the sanctuary movement is really complaining against the standards which are being applied in asylum cases. I think many of them are using this as a means to express their disaffection with overall government policy in Central America. So I am not sure whether or not *Cardoza-Fonseca* will have a direct effect on the sanctuary movement. It is possible, to the extent that it would provide a more likely remedy for asylum seekers. And that would lessen their need to go to the more radical solution of sanctuary.

Do you favor amending the INA so that aliens will no longer be excludable on ideological grounds?

Certainly those cases shock a person who reads about them—that advocating certain views, without advocating overthrow of the government or some harm to individuals, would qualify a person for exclusion or for deportation or for non-entry. My recollection is that in the 99th Congress, and possibly the 98th, we had hearings on the question of revamping all the 33 exclusions which are currently in the INA. Congressman Barney Frank has been very active in this and we do plan to have hearings this year. There are a lot of grounds, not just ideological views, that currently could exclude a person from becoming a legal resident or from entering the country for a visit, and those will all be examined.

"[W]e are probably not taking into the country through the legal immigration mechanism enough people with labor talents or with special skills and aptitudes."

Do you favor the creation of a specialized corps of asylum adjudicators separate from the Board of Immigration Appeals, as in some earlier versions of proposed immigration reform bills?

I do favor the creation of such a specialized corps. Unfortunately, in order to get a bill passed in the 99th Congress we had to drop that section from the draft, but it was put in, according to my recollection, in the 98th Congress or even the 97th, when the bill first began. I felt then, as I feel today, that some opportunity to have trained people make these findings and these adjudications would work for the benefit of the government as well as of the applicant. These people would be trained, they would have some knowledge of conditions in the country from which the applicant fled. These special adjudicators would have a kind of independence from government policy that in some cases maybe current examining officials don't have. We felt on the whole that this move would be a salutary move, but the practicalities overtook us. We had to drop it along with other sections in order to provide for the 99th Congress a sort of "slimmed-down" immigration reform bill. I wouldn't be at all surprised if the subcommittee takes another look at the possibility of changing the whole approach to the grant of asylum and to the question of who will hear these cases. So that may well be something for this or perhaps a succeeding Congress.

The Immigration Reform and Control Act of 1986 (IRCA) set up a special counsel's office in the Department of Justice, to handle claims of alleged discrimination in employment raised by "intending citizens." Some opposed this. How is this part of the IRCA working so far?

That's an interesting question because it relates to one of the core elements of our immigration reform bill: If the employer sanction section worked as we thought it would—which meant that employers could no longer with impunity hire people who don't have papers to work in this country—then there would have to be some mechanism to give legal protection to certain of the aliens in order that they might have their employment rights protected and in effect be protected against any unintended discrimination that could flow from the imposition of employer sanctions. This was a central element, highly controversial, passionately argued for and against. Today as we are taping this interview, I have just been served with the proposed regulations from the Justice Department which would flesh out the Office of Special Counsel. I have not frankly had a chance to go over them. Staff is supposed to brief me this after-

See MAZZOLI, page 9

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noon or tomorrow on them. We will have an oversight hearing in April with respect to all of the proposed regulations that have been issued. Not just for the Office of Special Counsel but for employer sanctions, legalization, the agricultural sections as well. And so I am very confident that whatever is in these regulations regarding the special counsel will be looked at with real scrutiny at that hearing and gone over with a fine-tooth comb. At this point they are not really in effect, and therefore we don't have any inkling of how they work, but we drafted the bill carefully with the help of Congressman Barney Frank, whose genius produced this, and we hope it will work as intended to protect the rights of the people who might somehow be the victims of some unintentional discrimination.

The IRCA dealt primarily with illegal immigration. But there is also a system of preferences for would-be legal immigrants. What are the prospects for legislation affecting issues in legal immigration?

We began last year in the 99th Congress with a few days of hearings on the whole question of legal immigration and what changes we should make in that category. I think that we can safely assume that we have now dealt in a pretty comprehensive fashion with illegal entry. And we had a very interesting series of hearings. We developed some information which was handled by our subcommittee staff and which itself will provide the matrix for further hearings in the 100th Congress. It is obviously controversial, because since 1965, when the last major change in the immigration laws took place, we have seen that certain parts of the world seem to have used up, in the process of reuniting their families, most of the total of 270,000 visas available annually for all of the six basic preference categories under the law.

Romano L. Mazzoli

The other day, under the 1986 immigration bill, some 10,000 visa numbers were made available to nations which have been somehow underrepresented since 1965, nations which in earlier eras of our country provided quite a few people—particularly western Europe. It was conducted as a lottery, and millions of pieces of mail came to the United States for those 10,000 visa numbers. This indicates that people around the world with talents, people with skills, people with imagination, people with visions of the future have a built-up, pent-up feeling that their whole future lies in the United States. Not all of them are highly educated, but they want to work.

The "fifth preference" category permits the immigration of brothers and sisters of a petitioning U.S. citizen. There is such a backlog of fifth preference petitions that petitions filed 5 or 6 years ago are only now being acted on, and those filed today may take 10 to 12 years to be decided. Will this be changed?

Actually, the times you quote probably are a very conservative estimate. It is probable that some of these cases will not come up for *more* than 10 to 12 years, and you are probably talking about hundreds of thousands of people who are in those categories. But as I indicated, we will broaden our inquiry to take into consideration other questions on legal immigration too. For example, we are probably not taking into the country through the legal immigration mechanism enough people with labor talents or with special skills and aptitudes. Those categories are practically dried up by the family unifications; brothers, sisters, parents, children take most of the available 270,000 numbers that are provided for the six basic preference categories in the current legal immigration system. So we will examine questions of the fifth preference for brothers and sisters, but also go all across the gamut—family preferences as well as preferences dealing with labor, talent, investors, retirees, and all the various categories which currently seem to be basically non-factors under the current immigration law.

Some earlier immigration reform bills would have given the courts of appeals rather than the district courts jurisdiction over actions by aliens

See MAZZOLI, page 10

Immigration Law Study Published by FJC

Major Issues in Immigration Law, a monograph by Professor David A. Martin of the University of Virginia School of Law, has recently been published by the Center.

The monograph presents the major features of the relevant substantive and procedural law, highlighting the areas of controversy that judges are most likely to encounter. Among the topics discussed are the constitutional framework of the immigration laws, admission categories, grounds for exclusion and deportation, political asylum, and judicial review. The final chapter is devoted to the Immigration Reform and Control Act of 1986 and includes discussion of the amnesty provisions for aliens who have been in the United States illegally since Jan. 1, 1982, new employer sanctions, an antidiscrimination provision, and special provisions for agricultural workers.

Copies of the monograph can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (9 oz.), but do not send an envelope.

MAZZOLI, from page 9

seeking review of exclusion orders. Did you favor such a provision?

I still favor such a provision. I am not sure exactly whether it can be attained, but the feeling we had was in line with the reality of the situation. An exclusion case is when an individual is apprehended at the border. A deportation is when they are in the United States and are later apprehended. The current practice is that an excludable alien applies to the district court, where review proceeds according to the usual standards for habeas corpus. But in either a deportation or an exclusion case the individual usually is not detained. So a habeas corpus case is really sort of a legal fiction—the body is not really being detained. But that is the only way that the courts have found in this sophisticated, and somewhat convoluted, process to actually try the question of whether or not a person ought to be excluded. And we think the better forum is the circuit court, which currently hears the cases on deportation. I think all of these matters will probably be before the subcommittee for review as part of our oversight function.

The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice, of which you are a member, held hearings last Congress on H.R. 4341, concerning court-annexed arbitration. What are the prospects for such a bill in the 100th Congress?

Last Congress, H.R. 4341 was introduced by Congressman Kastenmeier, who is chairman of the Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The bill would have extended and expanded the program of court-annexed arbitrations which are currently in some of the federal districts around the country. I support that approach. I think it was born of discussions held at the conferences which the Brookings Institution and the two judiciary committees of Congress and the Justice Department have held for the last 10 years on trying to find alternatives to traditional litigation to solve disputes. I would expect that Congressman Kastenmeier will reintroduce a bill similar to H.R. 4341, and since he is devoted to the idea of finding alternatives that he would push it, and I would certainly support him in that effort.

"It is almost an article of doctrinal faith in the minds of some lawyers that you have to have diversity on the books or you have lost a major pillar of jurisprudence. I respectfully disagree."

Meantime, I have introduced a piece of legislation, H.R. 1929, the Federal Courts Study Act, a sort of brainchild of Judge Clifford Wallace of the Ninth Circuit in California. Judge Wallace, at the behest of former Chief Justice Burger, made a long and painstaking study of ways to improve the administration of justice, including arbitration and other forms of settlement. Judge Wallace believes, and I concur, and I hope that the Congress will at some point, that a commission should be established with members appointed by the various branches of government to make a long study—a 10-year study with interim reports—on what the state of the law and justice and the courts will be in the year 2000 and thereafter. We might also have a little bit of a head start on trying to formulate methods by which we can avoid clogging the courts.

Do you favor legislation to eliminate diversity of citizenship as a basis of federal court jurisdiction?

Sometimes people say that is a litmus test of whether you are a lawyer or not: Do you favor abolishing diversity? Even though I am a lawyer, I do favor that. I have in the past and I still do. I realize some of the problems in abrupt, total dismantling of diversity. Congressman Kastenmeier has in the past couple of Congresses formulated alterations in the current diversity provision. Under that provision, about half of the cases tried before the federal courts are there because they involve matters between individuals who reside in different states, not because there is an actual federal question. And, of course, half of the courts' time is a tremendous amount of time.

Now the antecedents of diversity are well known to most lawyers. It was to protect against local bias, so that you had a chance to go to a federal court if you felt that locally you would be given somehow biased or unfavorable treatment. The state courts have improved by light years from what they used to be. They are as competent as the federal courts, and they are as objective and impartial as are the federal courts. And you just don't have that evidence of bias like you used to have. Now it may be that you have a more disciplined court setting in the federal courts. It could be you have certain rules of procedures in the federal courts that are better than they have in the states. But those can be changed and altered by various mechanisms, rather than loading

"[The National Childhood Vaccine Injury Act of 1986] was adopted by Congress without the kind of review that would be brought to it by the Judiciary Committee."

See MAZZOLI, page 11

MAZZOLI, from page 10

down the federal courts with hearing a lot of accident cases.

But having said that, I would expect that the degree of opposition would not be any less strong and passionate this time around than it has been for the last two or three Congresses. It is almost an article of doctrinal faith in the minds of some lawyers that you have to have diversity on the books or you have lost a major pillar of jurisprudence. I respectfully disagree, but I recognize that that will be the basic battleground, and so I expect that the question will come up again this year. I would be hesitant to predict exactly the outcome.

The National Childhood Vaccine Injury Act of 1986 was enacted without coming before the Judiciary Committee, although it sets up a compensation program that would, if funded, in effect be administered by the federal courts. As a member of the committee, what is your view of this program and of Reagan administration proposals to seek changes in it before it is funded?

The fact that a bill like this was adopted by Congress without the kind of review that would be brought to it by the Judiciary Committee is, of course, an argument in favor of having a constant sequential or joint referral of bills where they affect two or three committees. Somehow this one must have slipped through. I think that this argues on behalf of letting committees like the Committee on the Judiciary look at the bills as they come through, because we can offer certain suggestions with respect to the vaccine bill. Under it, people would go to the courts, which would administer this kind of no-fault payment situation by means of special masters. If the individuals involved are dissatisfied with the special master's decision, then of course they can appeal to the district courts and have a de novo trial. So you can have actually two shots here, which doubles the workload. This may be just another immense hurdle for the federal courts to surmount in order to try to become effective and handle their other litigation in a more timely fashion. So although I am not quite sure that the adminstration should come in and try to change a bill before it becomes effective, I do think that good-faith questions have been raised about whether or not it will work for the federal courts to become a kind of special master. I would expect, since this bill has not yet been funded, that before the program is started up we might have a review which might have some modifying changes.

"[T]hese calls to abolish the Legal Services Corporation come up just like the crocuses every spring and, just like the crocuses, pretty soon they lose their flowers and they go back into hiding."

What are your views on recent calls to abolish the Legal Services Corporation?

Well, these calls to abolish the Legal Services Corporation come up just like the crocuses every spring and, just like the crocuses, pretty soon they lose their flowers and they go back into hiding.

I would say that the LSC needs constantly to assess where it is going, because I have faulted it often in the past for getting too far afield from its real mission, which is to help the poor and the underprivileged and the people who don't have access to the courts of law. But they go off on these sometimes half-baked and fruitless efforts to upset the apple cart and change the course of human history, sometimes forgetting the people that most need their help. I have always supported the LSC in the past. I always voted for the money and I always shall intend to, but I do think that constant vigilance is needed to be sure that it stays alive.

You have been in Congress since 1971. What perspective has that given you on the work of the judiciary?

Judge Pierce Lively is a very dear friend of mine and a very respected member of the bench, not just in Kentucky but around the country. I probably had my first inkling of the challenges and also the rewards and the fulfillments of the bench from Pierce and from some members of the Sixth Circuit panels with whom I have visited over the years, including once at one of their conferences which took place in Nashville. I would say that I probably have higher respect for members of the federal bench than for just about anyone. I say that because of the training that it takes, because of the hard work—and it is hard work—and because of the ability they have to really secure for people the fulfillment of their rights and redress of their grievances.

I mentioned earlier the conferences held under the auspices of the Brookings Institution and of the two judiciary committees of Congress and the Justice Department and the court system, where in one room at one time can come people from the Chief Justice to freshman members of Congress to talk about the administration of justice and how to improve it—you come away from that with a very solid view of the federal bench. You see the kind of men and women who are appointed, and you see the need for Congress to provide them the tools they need—not just the dollars it takes, the clerks in the courtrooms, and the computers, but also the dispute resolution mechanisms that would allow them shortcuts to achieve justice with more economies and with less time consumed. So I think it means that Congress (and this member, because I serve on those committees) has a responsibility to stay very close to the subject and to be careful that we provide for the courts exactly what they need. ■

Position Available

Chief Probation Officer, E.D. Wis. Starts July 6, 1987. Salary to $69,976. Requirements include 4 years' experience in a helping profession, with 1 year's experience as supervisor; advanced degree in appropriate social science preferred. Send resume by May 29 to Sofron B. Nedilsky, Clerk, U.S. District Court, Eastern District of Wisconsin, 362 Federal Building, Milwaukee, WI 53202.

EQUAL OPPORTUNITY EMPLOYER

LEGISLATION, from page 2

constitutional issues and validity of regulations issues. As in the Tax Court, qualified nonattorneys could represent claimants upon certification by the special court, or claimants could represent themselves.

• The Senate Labor and Human Resources Committee held hearings on S. 557, the Civil Rights Restoration Act of 1987, which would broaden the coverage of certain civil rights statutes beyond their applicability as interpreted in the Supreme Court's *Grove City v. Bell* decision. In the House, Reps. F. James Sensenbrenner, Jr. (R-Wis.) and Charles W. Stenholm (D-Tex.) have introduced H.R. 1881, the Civil Rights Act of 1987, which would reverse the *Grove City* decision by making educational institutions and public school districts receiving any federal assistance subject to four existing civil rights statutes.

• H.R. 1333, introduced by Rep. Daniel E. Lungren (R-Cal.) would establish, with certain exceptions, a one-year statute of limitations period for the filing of habeas corpus petitions by state prisoners, which would run from the time of exhaustion of state remedies. Among the bill's other provisions, it would vest in appellate court judges the sole authority to issue certificates of probable cause for appeal in habeas corpus proceedings, and would allow federal courts to deny a habeas petition on the merits without requiring prior exhaustion of state remedies.

• Senator Arlen Specter (R-Pa.) introduced S. 824, the Torture Victims Protection Act of 1987, cosponsored by Sen. Patrick J. Leahy (D-Vt.). The bill would establish clearly a federal right of action by aliens and U.S. citizens against persons engaging in torture or extrajudicial killings in foreign countries. Only persons acting "under actual or apparent" governmental authority would be liable, and courts could decline jurisdiction over such suits if it were shown by "clear and convincing evidence" that the claimant had not exhausted "adequate and available remedies" in the nation where the alleged violations took place. ■

PRISONS, from page 3

of law degree from George Washington University. He joined the Bureau of Prisons as an attorney in 1971. In 1975, Mr. Quinlan was named executive assistant to Mr. Carlson, a position he held until 1978, when he was named superintendent at the Federal Prison Camp, Eglin Air Force Base, Fla. He became warden at the Federal Correctional Institution in Otisville, N.Y., in 1980, and became a deputy assistant director of the Bureau five years later. ■

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Chief Judge Sessions Discusses Federal Court Automation, Management

Chief Judge William S. Sessions has served in the Western District of Texas since December 1974, and has been chief judge since 1980. Judge Sessions was born in Arkansas and received his B.A. and LL.B. degrees from Baylor University. He was a section chief in the Criminal Division at the Department of Justice (1969–71) and U.S. Attorney for the Western District of Texas (1971–74). He currently chairs the Judicial Conference Subcommittee on Judicial Improvements, and has served on the Implementation Committee on Admission of Attorneys to Federal Practice and the Special Ad Hoc Court Reporters Study Committee. He is a former FJC Board member (1980–84).

William S. Sessions

Would you explain the work of the Subcommittee on Judicial Improvements, which is now made up of three circuit judges, two district judges, one bankruptcy judge, and one magistrate.

The subcommittee is one of five of the Committee on Court Administration of the Judicial Conference of the United States. It meets twice yearly, generally in May and December, and deals with matters referred to it by the Judicial Conference or the parent committee. These matters include such diverse items as automation, court security, court design, travel regulations for justices and judges, arbitration, places of holding court, legislation concerning United States mar-

See SESSIONS, page 6

Circuit Judge John C. Godbold Selected as Fifth Director of Federal Judicial Center

Circuit Judge John C. Godbold from Alabama, a judge of the U.S. Court of Appeals for the Eleventh Circuit, has been named the new director of the Federal Judicial Center.

John C. Godbold

Judge Godbold's appointment was announced by Chief Justice William H. Rehnquist, chairman of the Center's governing Board. In announcing that the Board had unanimously elected Judge Godbold, the Chief Justice said:

"We are very fortunate to have persuaded Judge Godbold to come to Washington to serve as the Center's director. He has been a distinguished and courageous jurist for over two decades. In addition, he has served with distinction as a circuit chief judge, a member of the Judicial Conference of the United States, and a member of the Center's Board."

Judge Godbold will succeed A. Leo Levin, who will retire on July 31 after more than a decade as the Center's director.

Judge Godbold, who lives in Montgomery, Alabama, was appointed judge of the U.S. Court of Appeals for the Fifth Circuit in 1966. He served as chief judge of that circuit for most of 1981, and later that year became the first chief judge of the newly created

See GODBOLD, page 3

D.C. Cir. and U.S. Claims Court Introduce ADR Programs to Promote Case Settlement

The U.S. Claims Court and the U.S. Court of Appeals for the District of Columbia Circuit have recently implemented programs using various alternative dispute resolution (ADR) techniques.

The Claims Court has notified counsel that it will utilize two ADR techniques: settlement judges and minitrials. Participation by litigants is voluntary. When counsel for both parties agree to employ either technique, they will notify the presiding judge, who will consider counsels' request. If ADR is considered appropriate, the clerk's office will assign the case to a Claims Court judge, who will preside over the procedure.

If the settlement judge method is used, the settlement judge will act as a neutral adviser, giving a judicial assessment of the parties' settlement positions, without jeopardizing their

See ADR, page 9

Inside . . .

AO Releases Statistical Reports on Sentencing Variations, 1986 Judicial Workload

The AO's Statistical Analysis and Reports Division (SARD) has released two publications, *U.S. District Courts: Sentence Comparison Reports*, and *Federal Judicial Workload Statistics—December 1986*.

U.S. District Courts: Sentence Comparison Reports analyzes data for the two-year period ended June 30, 1986. The purpose of the report is to present data "to show variation in sentencing while attempting to explain some of the reasons for it."

The publication is a joint project of SARD, the Systems Services Division and the Probation Division of the AO, and the Research Division of the FJC. More than 2,000 federal probation officers and statistical clerks collected, coded, and transmitted the data to SARD.

Among the significant findings reported in *Federal Judicial Workload Statistics—December 1986* is that in 1986, the twelve regional courts of appeals reported a record 34,724 filings, up 3 percent from the previous year. The largest increases were in state prisoner petitions (up 19 percent) and federal prisoner petitions (up 9 percent).

Civil filings in the U.S. district courts declined 13 percent during 1986 compared to filings in 1985—from 278,778 cases filed in 1985 to 243,495. Much of the decline is a result of decreased filings for recovery of overpayments of veterans' benefits (VA) cases, recovery of defaulted student loans, and Social Security disability cases. The aggregate total of filings in these three categories was down 50 percent from 1985.

As in previous years, criminal cases filed, terminated, and pending in the district courts increased during the year. The number of persons under the supervision of the Federal Probation System climbed 7 percent from 67,844 to 72,416.

A total of 530,008 bankruptcy petitions were filed during 1986, up more than 28 percent over filings in 1985. Nonbusiness filings increased 32 percent while business filings rose 14 percent. ■

200 Years Ago...

June 1787: James Madison's Virginia Plan for a new Constitution, presented to the Convention in late May, would have combined the President and a few federal judges as a "council of revision" that could veto national or state legislation. "Annexing the wisdom and weight of the Judiciary to the Executive," he argued on June 6, would avoid "laws unwise in their principle, or incorrect in their form."

Rufus Gorham (Mass.) objected: Judges do not "possess any peculiar knowledge of the mere policy of public measures." At most, he would authorize the President "to call on Judges for their opinions." Co-delegate Elbridge Gerry opposed "making Statesmen of the Judges" and Luther Martin (Md.), noting that "the Constitutionality of laws . . . will come before the Judges in their proper official character," did not want to give them a "double negative."

"Laws," replied James Wilson (Pa.), "may be unjust, may be unwise, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect." George Mason (Va.) also endorsed this "further use" of the judges, who "are in the habit and practice of considering laws in their true principles, and in all their consequences."

The proposal lost 8–3 on June 6 and 4–3 on July 21, with two states divided. Council opponent Charles Pinckney (S.C.) later proposed to authorize the President and Congress to seek advisory opinions from the judges, a provision the Committee of Detail did not include in its draft of the Constitution.

BICENTENNIAL OF THE U.S. CONSTITUTION

LEGISLATION

An omnibus bill proposing several improvements in the judicial branch has been transmitted to Congress by AO Director L. Ralph Mecham, and is expected to be introduced in the near future. Mr. Mecham has also submitted to Congress separate draft legislation to eliminate diversity of citizenship jurisdiction and to create additional district and appeals court judgeships.

The omnibus bill, entitled the Judicial Branch Improvements Act of 1987, embodies many recommendations made by the Judicial Conference of the United States over a period of several years. These include substantially eliminating the mandatory jurisdiction of the Supreme Court, permitting district courts with 8 or more permanent judges to appoint a district court executive, and authorizing experimental arbitration programs in the district courts.

Also included in the bill are provisions that would:

- Make adjustments in certain provisions governing jury selection and service.
- Repeal 28 U.S.C. § 1393, which presently provides for divisional venue in civil cases.

See LEGISLATION, page 5

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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.

NOTEWORTHY

Attorney's letter warranted disbarment. An attorney's letter accusing a magistrate of incompetence and/or religious bias warranted the attorney's disbarment from further practice in the district court, the Fourth Circuit has held. *In re Evans*, 801 F.2d 703 (4th Cir. 1986).

After a magistrate wrote a report recommending that a case be dismissed for lack of subject matter jurisdiction, the district judge conducted a de novo review and issued an opinion adopting the magistrate's report. The lawyer representing the party whose case was dismissed wrote a letter to the magistrate accusing him of incompetence or bias. He also filed a complaint against the magistrate with the Judicial Council for the Fourth Circuit, which was dismissed. A district judge wrote to the attorney on behalf of the district court's disciplinary committee, stating that the attorney's conduct was arguably in violation of three rules of professional responsibility: DR 1–102(A)(5), which forbids conduct prejudicial to the administration of justice; DR 7–106 (C)(6), which forbids conduct discourteous and degrading to a tribunal in which one appears in one's professional capacity; and DR 8–102(B), which forbids making accusations against a judge or other adjudicatory officer that one knew or should have known to be false. In two later letters to that district judge, the attorney repeated his charges that the magistrate was either incompetent or biased. A third judge of the district court entered an order requiring the attorney to show cause why he should not be disciplined for writing the letter to the magistrate. The court ultimately entered an order of disbarment signed by eight of the district judges. The district court held that the attorney's repeated assertions warranted disbarment. On appeal,

See NOTEWORTHY, page 10

PERSONNEL

Nominations

Paul V. Gadola, U.S. District Judge, E.D. Mich., Apr. 23
Robert F. Kelly, U.S. District Judge, E.D. Pa., May 1
David G. Larimer, U.S. District Judge, W.D.N.Y., May 5
Larry J. McKinney, U.S. District Judge, S.D. Ind., May 5
Philip M. Pro, U.S. District Judge, D. Nev., May 5
Rodney S. Webb, U.S. District Judge, D.N.D., May 5

Confirmations

James B. Zagel, U.S. District Judge, N.D. Ill., Apr. 21
Richard J. Daronco, U.S. District Judge, S.D.N.Y., May 7
David S. Doty, U.S. District Judge, D. Minn., May 7
Ronald S. W. Lew, U.S. District Judge, C.D. Cal., May 7
Reena Raggi, U.S. District Judge, E.D.N.Y., May 7

Senior Status

Spencer M. Williams, U.S. District Judge, N.D. Cal., Feb. 23

Deaths

Gus J. Solomon, U.S. District Judge, D. Or., Feb. 15
John K. Regan, U.S. District Judge, E.D. Mo., Mar. 9
James E. Doyle, U.S. District Judge, W.D. Wis., Apr. 1
Ross T. Roberts, U.S. District Judge, W.D. Mo., Apr. 24

Temporary Emergency Court of Appeals

Reynaldo G. Garza, Chief Judge, Apr. 30

GODBOLD, from page 1

Eleventh Circuit, serving in that position until September 1986.

Judge Godbold, speaking at a meeting of senior staff of the Federal Judicial Center shortly after his election by the Board, said: "As a circuit chief judge, I woke up every morning asking 'how can we do our jobs better?' I think a philosophy of constant reappraisal is compatible with the Center's philosophy of trying to see if there are better ways for the judiciary to meet its responsibilities."

Prior to his appointment to the bench, Judge Godbold was in private practice in Montgomery for 18 years. Two of his former law partners have also served as federal judges, Judge Richard T. Rives, who served as a judge of the Fifth Circuit Court of Appeals, and later of the Eleventh Circuit Court of Appeals, from 1951 until his death in 1982, and Judge Truman M. Hobbs, who was appointed to the bench in 1980 and currently is chief judge of the Middle District of Alabama.

Judge Godbold is a graduate of Auburn University and Harvard Law School. His law school career was interrupted by military service during World War II in the United States Army. In 1982, he received the Auburn University Alumni Award for Achievement in the Humanities.

Judge A. David Mazzone of the District of Massachusetts, chairman of the search committee, stated: "Judge Godbold is an outstanding and vigorous jurist. He has an established record of administrative ability and a commitment to judicial education and research. We are delighted that he has agreed to accept this important position."

Levin, who will return to the faculty of the University of Pennsylvania Law School as the first Leon Meltzer Professor of Law, praised the selection of Judge Godbold, noting the important contributions Judge Goldbold had made to the Center's work over the last decade. "He has been helpful, creative, and thoughtful, leaving a lasting imprint on the Center and its programs," Levin said. "This is truly a historic day for the Center."

The Center's first director was former Supreme Court Justice Tom C. Clark. Judges Alfred P. Murrah and Walter E. Hoffman also preceded Levin, who was appointed the Center's fourth director in 1977. ■

AO Recognizes Distinguished Service of 11th Cir. Employee in Bankruptcy Automation

AO Director L. Ralph Mecham has recognized the distinguished service of R. Ward Mundy of the Eleventh Circuit Court of Appeals for his exceptional accomplishment in the field of computerization in the bankruptcy courts. Mr. Mecham publicly recognized Mr. Mundy's contribution to the federal bankruptcy system during the Eleventh Circuit's Judicial Conference in May.

Mr. Mundy contributed to conceiving, accomplishing, installing, and maintaining a microcomputer system used in more than 60 federal bankruptcy courts. The system, the Bankruptcy Users Microcomputer System, provides automated support to small and medium-sized bankruptcy courts in advance of the BANCAP computer system designed by the FJC. ■

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.

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Positions Available

Director, Staff Attorneys Office, 5th Cir. Salary $53,830–69,976. Responsible for recruitment, personnel, and management decisions in 16-attorney office. Must be graduate of accredited law school (class standing upper third, or law review), with 5 years' legal experience, management experience, or demonstrated interpersonal skills. Apply immediately by sending resume and references to Steven A. Felsenthal, Director, Staff Attorneys Office, Rm. 116, 600 Camp St., New Orleans, LA 70130.

* * *

Chief Probation Officer, N.D. Ohio (Cleveland). Salary $45,763–72,500. Responsible for probation, parole, and pretrial services programs in the district (see 18 U.S.C. §§ 3654–3655). Requirements: college education (advanced degree preferred), 4 years' experience in personnel work in a helping profession in appropriate setting. Send letter of application and resume by June 4 to James S. Gallas, Clerk, U.S. District Court, 102 U.S. Courthouse, Cleveland, OH 44114.

* * *

Administrative Assistant for Space and Facilities to Circuit Executive, 5th Cir. Maximum grade: JSP–14. Position responsible for all facets of facilities planning, design, coordination, scheduling, and construction for circuit, district, and bankruptcy courts of the circuit, in conjunction with AO and GSA. Requires minimum 3 years' professional experience and undergraduate degree. Experience in developing floor plans and office layouts desirable. Extensive travel required. Send resume and salary history by June 30 to Lydia G. Comberrel, Circuit Executive, U.S. Court of Appeals, 600 Camp Street, New Orleans, LA 70130.

* * *

Circuit Librarian, 5th Cir. Maximum grade: JSP–14. Manages staff of 14; responsible for administration of law library in New Orleans and satellite locations. Requires 3 years' specialized experience in law library management, and M.L.S. or J.D. Send resume and salary history by July 15 to Lydia G. Comberrel at address in notice above.

EQUAL OPPORTUNITY EMPLOYERS

LEGISLATION, from page 2

- Amend 28 U.S.C. § 1332(c), concerning removal and diversity jurisdiction in cases involving legal representatives of estates of decedents and legal representatives of infants or incompetents. The AO indicated in its submission to Congress that in proposing this revision of diversity jurisdiction, it did not intend to detract from the separate legislation proposing the abolition of diversity jurisdiction, as recommended by the Judicial Conference.
- Ratify the long-standing treatment of bankruptcy judges and U.S. magistrates as officers not subject to the provisions of the Federal Leave Act (5 U.S.C. §§ 6301–6323), and explicitly exempt from the act's provisions law clerks for judges on the circuit courts of appeals, district courts, and Claims Court and for bankruptcy judges and magistrates.
- Amend 28 U.S.C. § 371 to permit senior judges to receive military retired or retainer pay to which they would be entitled on the basis of regular or reserve military service.
- Amend 28 U.S.C. § 2254 to expressly provide that an application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the state.
- Make certain amendments needed to mesh provisions of 28 U.S.C. with the newly enacted Federal Employees' Retirement System Act of 1986.
- Remedy a specific problem that has arisen as a consequence of existing disqualification requirements and their application in class action cases in which it is discovered that the judge's spouse, for example, owns a small amount of stock of one of the corporate parties to the litigation. Under the proposed revision, judges would be permitted to weigh the public interest in completing the litigation in determining whether to recuse themselves. A waiver of disqualification would also be permitted. Recusal would continue to be automatic and not waivable if the judge, judge's spouse, or a minor child residing in the judge's household had an interest in the controversy that could be substantially affected by the outcome.
- Charge the director of the AO with establishing a program of incentive awards for designated employees of the courts.
- Add to the U.S. Arbitration Act a provision clarifying the appeals doctrine in the area of appeals of orders relating to arbitration, generally denying immediate appeals from orders giving arbitration precedence over litigation, and permitting immediate appeals from orders giving litigation precedence over arbitration.
- Abolish the Temporary Emergency Court of Appeals.
- Repeal section 140 of Pub. L. 97–92, which has excluded judges from the Executive Salary Cost-of-Living Adjustment Act provisions applicable to other high-level federal officers (see *The Third Branch*, Oct. 1986, p. 1).

The omnibus bill also contains the following provisions relating to the FJC:

- Creates a Federal Judicial Center Foundation to accept gifts to be used by the FJC for the purpose of aiding its work. None of the members of the Foundation's board could be sitting judges, and no gift funds could be used to pay or supplement the salaries of FJC officers or employees.
- Directs the FJC Board to conduct, coordinate, and encourage programs to collect, preserve, and make available materials relating to the history of the federal judicial branch.
- Permits expenditure of FJC funds on training of nongovernment personnel who would improve the operation of the judicial branch. Such nongovernment personnel might include individuals training as mediators or arbitrators, or who agree to represent indigent defendants.

Judgeships and diversity elimination. Director Mecham submitted draft legislation to create 56 district court judgeships and 13 court of appeals judgeships. In submitting at the same time the draft bill to eliminate diversity of citizenship jurisdiction, Mr. Mecham estimated that if Congress eliminated diversity jurisdiction, the number of additional district

See LEGISLATION, page 10

FJC Publishes Report On 1984 Bail Reform Act

The Bail Reform Act of 1984, by Deirdre Golash, the most recent of the Center's publications designed to provide information on the Comprehensive Crime Control Act of 1984, is now available.

The work summarizes appellate court decisions interpreting provisions of the Bail Reform Act from Oct. 12, 1984, its effective date, to Jan. 13, 1987. An appendix reproduces the act, as amended by the Criminal Law and Procedure Technical Amendments Act of 1986.

Copies of the report can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (7 oz.), but do not send an envelope.

Paper on Rule 11 Sanctions Available

Achieving Balance in the Developing Law of Sanctions, a staff paper by A. Leo Levin and Sylvan A. Sobel, is now available from the FJC. The article, reprinted from the current issue of the *Catholic University Law Review*, examines recent appellate treatment of the sanctions provisions of rule 11 of the Federal Rules of Civil Procedure, describing patterns that are emerging as a result of the 1983 amendments.

Copies of the staff paper can be obtained from Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (4 oz.), but do not send an envelope.

SESSIONS, from page 1

shals, dispute resolution, consolidation of Central Violations Bureau sites, and any other matter on which the Judicial Conference or the Committee seeks information or guidance.

The Five-Year Plan for Automation in the U.S. Courts has been an important part of the comprehensive effort to automate the federal courts. In the four years the plan has been in effect, has it functioned well?

Because the plan is a "living" plan and continues to evolve and change each year to meet the needs of the courts and benefit from new technologies and circumstances, I believe it has functioned well, notwithstanding the difficult budgetary restraints imposed by the Gramm–Rudman–Hollings legislation. The strength, flexibility and viability of the plan is demonstrated by two tremendous adjustments made within the last year: First, adding office and chambers automation and telecommunications to data processing and communications, and second, being able to react to the tremendous pressures brought on by the increase in bankruptcy filings throughout the United States necessitating the priority to complete the software for automation in the bankruptcy courts.

The role of the FJC in developing bankruptcy court applications from software systems for appellate and district courts has been a tremendous achievement, demonstrating the absolute necessity of careful research and development prior to implementation of projects.

In your opinion, what areas of federal court operations are likely to benefit most from use of automation?

It seems to me that any area of federal court operations that *can* be automated *will* benefit. The Central Violations Bureau concept has proven that with very few employees and good automated equipment it is possible to efficiently manage, from eight locations, the entire traffic violation and ticketing process, from ticket issuance to hearing before a magistrate, with great cost effectiveness and amazing results.

Giving the bankruptcy court the ability to have automated noticing, docketing, and full and complete case management reports will greatly enhance the bankruptcy court's ability to meet the mushrooming caseload.

In any court—appellate, district, magistrate, or bankruptcy—electronic docketing enhances the flow of information, enabling judges, courtroom deputies, clerks, and supervisors to efficiently manage case flow and reporting in a fashion not possible without automation.

William S. Sessions

Financial automation has revolutionized the courts' abilities to deal with jury vouchers, travel, and reporting.

Last summer, your subcommittee approved expansion of computer-assisted legal research (CALR) to courts with three judicial officers, and CALR is now available to courts with only two judicial officers. What benefits are likely to result from this expansion?

More and more judges recognize the great benefits to be derived from the most convenient access to CALR, in chambers if possible. This capability, I predict, will revolutionize the manner in which judges and law clerks research the law. The ability to "punch up" as opposed to "dig out" the law, and to Shepardize quickly and efficiently, and to have access in the workplace, is a capability which will generate phenomenal results and in a few years will be the norm.

How has expanded use of automation affected the Western District of Texas?

The Western District has seven, far-flung divisions, and comprises the largest geographic area of any district court in the continental United States. It includes San Antonio, the tenth largest city in the country, and four other smaller cities, Austin, El Paso, Waco, and Midland–Odessa. The district consistently maintains one of the largest criminal caseloads per judge in the United States. With limited judge power, the automation of the criminal system with terminals available in all divisions will allow constant and easy monitoring by the judges and court personnel.

Automated case management reports for both civil and criminal dockets are available monthly or upon request, as well as special reports from the civil calendars concerning every phase of case management.

Every deputy clerk has some type of experience with automated systems, and we are now installing the new civil docketing system, which will allow judges to have access to all information on civil cases in each division. Automation is now a way of life in the Western District of Texas.

Is there a CALR pilot program in your court and in Judge Bilby's court in Tucson?

That is correct. There are two pilot programs which are presently under way. Judge Bilby's will be the first to be installed. It has the same components that the Western of Texas will have, with one exception. It will have secretaries with personal computers for word processing purposes; the law clerks will have PCs for word processing purposes, and for CALR there will be an in-chambers PC to make it possible to have access to the data bases. In addition, in the Western of Texas I will have a courtroom PC which will

have access to the clerk's data base. This PC will not have word processing capability or CALR capability. All of these will be tied in so that information can be exchanged—records from the clerk's office to judges' chambers and to the courtrooms.

Our work towards providing automation capability for all judges tends to make me focus my attention principally on what is available now. The advance in technology in the past five years has been dramatic, and I predict that in the next 20 years it will be stunning. As Alvin Toffler suggests in *The Adaptive Corporation*, "Today's rapid and massive changes I see as a 'third wave' that is creating a wholly new civilization based on high technology, information, and new ways of organizing for economic purposes." The challenge to the judiciary is to be able to discern which technologies will be of the greatest benefit to the federal courts and then to find appropriate applications.

"The advance in technology in the past five years has been dramatic, and I predict that in the next 20 years it will be stunning."

Why did they need the PCs right in the courtroom?

The judge's need for complete and current docket and motion information in the courtroom can be satisfied immediately if the PC is there. The judge's notes, taken during the course of motions hearings and trial, can be entered directly into the computer for recall at any time. The charge to the jury, if it is on the personal computer, can be changed and corrected at will. I am confident that judges will find many other uses for the personal computer in the courtroom.

Do you find your colleagues receptive to automation?

Generally speaking, yes. In January of 1983, when Judge Weis of the Third Circuit, Bankruptcy Judge McGuire of New York, and I were asked to serve a two-year term as an ad hoc Automation Committee attached to the Judicial Improvements Subcommittee, I was presented with my first opportunity to become aware of the nationwide reaction of judges to automation. I find all of them are curious, and most of them are receptive to being persuaded on the value of automation. My favorites are those who eagerly and impatiently await enhanced automation in their own courts, not only through CALR capability but courtwide through case management reporting and access to the clerk's data bases.

What advances in automation and court procedures do you see in the federal courts five years from now, or ten to twenty years from now?

As I mentioned, we are conducting pilot projects providing for chambers to have access to the clerk's data base for case management purposes on a day-to-day basis, together with CALR for judges and law clerks. These systems will have an intra-chambers network, providing capabilities never available before in judges' chambers. At the turn of the century, all judges' chambers will routinely have that capability.

"The challenge to the judiciary is to be able to discern which technologies will be of the greatest benefit to the federal courts and then to find appropriate applications."

Public access to court data bases for use by attorneys and the public will be routine. Eventually, attorneys, by use of personal computers or other devices in their offices, will have direct access to the clerk's data base and will be able to file documents directly from the attorney's offices into the clerk's data base. All this will make for a "paperless" exchange of information. High-speed readers and printers of all descriptions will facilitate a free flow of information between courts, attorneys, clerks, and the public, including the media.

Can the state and federal court systems learn from each other in coping with their caseloads, in development of automation or in other areas?

Beginning in the late 1960s, the Law Enforcement Assistance Administration provided substantial sums to the states and the communities for development of law enforcement related systems. In many parts of the country, computer systems were developed to enhance the capability of law enforcement as well as state courts at various levels. As a result, the states—and I emphasis the states—made great strides and can provide leadership to the federal courts. Many state courts presently make information available to attorneys and the public, providing for a freer flow of information. I believe great benefits will be derived in the future from broad cooperation between state and federal courts in the areas of automation. I certainly encourage the sharing of information about new technologies, processes, and procedures which can be mutually beneficial to the state and federal systems.

Did you find that your experience as a member of the FJC Board gave you a better insight into the entire federal court system?

My good fortune in being allowed to serve as a member of the Board from 1980 to 1984 provided me the opportunity to be associated with some of the most perceptive and knowledgeable judges in the federal

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courts. The Board was led by the most innovative and dynamic Chief Justice in the history of the United States, supported by the sterling leadership from Director A. Leo Levin and then-Director William Foley of the Administrative Office. This association over those years gave me an introduction to the scope and magnitude of problems confronting the judiciary across the country and emphasized the absolute necessity of designing and maintaining continuing education and training programs for the judiciary and court family. The leadership of the FJC in providing new and innovative approaches for education and training, involving new methods and concepts, continues to be essential in meeting the needs of the judges and the courts.

Based on your experience in the federal courts over a period of almost 13 years, what developments do you anticipate for the system?

The continuing eruption of litigation and increased responsibilities thrust upon the third branch by legislation has put the courts in jeopardy unless and until ways are found to support the judiciary in a fashion which will allow judges to dispense justice and decide cases and issues free of the unceasing press of administration and caseload. I am hopeful that continued, meaningful liaison with Congress and the Judicial Conference will eventually bring about procedures which will place some adjudicative responsibility, including appeal, on other administrative bodies and provide for selection and replacement of judges, including housing and support staffs, in a timely fashion. I am also hopeful that Congress will provide the mechanism to assure that judicial salaries achieve a reasonable parity with professional incomes to help assure that the judicial branch will not slowly slip from its position as an acknowledged first-rate judiciary. Should we fail, the constitutional imperative of government under law will be seriously, and possibly irrevocably, eroded.

How has your management style changed in the years you have served as chief judge?

I do not know that my management style has changed. Either a chief judge is willing to share and delegate responsibilities or is not. I believe that each head of a court family agency must have a strong, hands-on management style which will build and maintain a first-rate operation in that agency's area of responsibility. I believe in close, daily if possible, contact and discussion with those agency heads. With resident judges sitting in five of the seven divisions, it is difficult to delegate areas of responsibility; however, I believe it is important for all judges to recognize that they constitute a "court" and have the responsibility for overseeing various aspects of the court's operation for all of the judges.

"I don't believe that any one chief judge can decide that there is a 'proper managerial role' for every chief judge. The role . . . is, in great part, dictated by the configuration and size of the court."

What do you see as the proper managerial role of a chief judge? At what level of detail should a chief judge become involved in managing his or her court?

I don't believe that any one chief judge can decide that there is a "proper managerial role" for every chief judge. The role of the chief judge as a manager is, in great part, dictated by the configuration and size of the court. The geographical size of the district, the number of judges, as well as the number of magistrates, divisions, support offices, etc. tend to determine the appropriate management of the chief judge. If judges are stationed throughout a number of divisions, it will require a different style of management than in those districts where all judges are centrally located. A central location facilitates regular judges' meetings, which are not feasible if they are dispersed.

An effective manager must adapt his style to the circumstances of the court. The judges of the Western District of Texas are extremely patient with my never-ending flow of memos, on a daily basis, reflecting my action or requesting their input in connection with the myriad activities of the district. In the truest sense, they share the office of the chief judge. I simply happen to have the title.

Based upon the amount of time devoted to chief judge activities in a seven-judge court, I believe it would be extremely difficult for the chief judge of a major metropolitan court to be involved in the minutiae and detail of the everyday operation of that court. Great reliance must be placed on a competent and innovative clerk; an effective, efficient, first-class probation officer; and on wise, efficient, and energetic magistrates, with each of the activities monitored by a liaison judge representing and reporting to the court.

There is an unusual program in the San Antonio division of the Western District of Texas permitting court-appointed attorneys to satisfy their pro bono obligations to the court by appearing in civil rather than in criminal cases. How is this working out?

The current Plan for Appointment of Counsel in Criminal and Civil Cases in the San Antonio division was adopted in August of 1985. The plan provides an opportunity for attorneys less experienced in criminal defense to assist lead counsel as second-chair counsel under the direction of lead counsel. The plan further allows magistrates to assign law students to assist appointed counsel in criminal cases and to report to the appropriate law school authorities concerning the stu-

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SESSIONS, from page 8

dent's support activities. The plan also allows any attorney to satisfy the appointment obligation by accepting civil case appointments compatible with the attorney's expertise.

It works very well. Probably in the last year there have been a total of 15 appointments of lawyers in civil cases. One aspect of the rule is interesting. We have taken from our non-appropriated fund—which is the fund that is built from the fees paid by attorneys admitted to the court—and have provided for a payback of up to $300 in unreimbursed expenses incurred by counsel in representing clients in civil cases.

What are your views on proposals to have a specialized federal court to handle Social Security cases?

I think Justice Scalia is extremely perceptive. The idea that he proposes may be an idea whose time has come. I believe there is no compelling reason why many of those matters cannot be decided in the administrative law courts with a limited right of appeal. ■

CALENDAR

June 1–5 Orientation for New Probation and Pretrial Services Officers
June 3–5 Regional Seminar for Probation and Pretrial Services Officers
June 3–6 Sixth Circuit Judicial Conference
June 8–9 Judicial Conference Subcommittee on Judicial Statistics
June 11–12 Judicial Conference Subcommittee on Supporting Personnel
June 15–16 Judicial Conference Subcommittee on Federal Jurisdiction
June 15–16 Judicial Conference Subcommittee on Federal–State Relations
June 25–27 Fourth Circuit Judicial Conference
June 29–30 Judicial Conference Advisory Committee on Civil Rules
June 29–July 1 National Management Seminar for Chief Probation and Pretrial Services Officers

ADR, from page 1

ability to go to trial should settlement not be reached.

As summarized by the Claims Court in its notice to counsel, minitrials should be employed only in cases that involve factual disputes and are governed by well-established principles of law, and normally before significant discovery commences. If minitrial is used, each party will present an abbreviated version of its case to a neutral adviser—a judge other than the presiding judge—who will then assist the parties in negotiating a settlement.

The procedures governing minitrials provide that each party should be represented by an individual with settlement authority and that any discovery conducted should be expedited and limited in scope. According to the court, although minitrials will be tailored flexibly to the requirements of each case, in most circumstances the entire process should conclude within one to three months. The parties will meet with the minitrial judge for a prehearing conference, at which they will exchange brief written submissions summarizing their positions and narrowing the issues. Hearings will be informal—the rules of evidence and procedure will not apply—and should generally not exceed one day.

The court welcomes comments from the bar and public on its ADR plan, and will consider such comments and initial experience under the order in its continuing effort to further the effective administration of justice.

D.C. Circuit mediation program. Chief Judge Patricia M. Wald of the D.C. Circuit has announced that the court is implementing a civil mediation program on an experimental basis, utilizing distinguished senior members of the bar as mediators.

Pending civil cases, as well as cases filed in the future, were to be selected at random for assignment to mediation beginning May 8, pursuant to an en banc order. Under that order, pro se cases and cases involving multiple parties or intervenors will not be included. One of the key components of the court's program is its emphasis on maintaining confidentiality regarding the mediation process. Accordingly, program management has been placed in the Circuit Executive's Office, which will be responsible for case selection, program evaluation, development of procedures, and liaison between mediators and the court.

The impetus for the program arose in the context of the court's extensive revamping of procedures under its 1986 Case Management Plan. Judge Laurence H. Silberman was named chairman of the Subcommittee on Mediation, and was assisted by the court's Advisory Committee on Procedures, headed by attorney Daniel Gribbon.

The court's program will stress case settlement, although partial settlement of some issues or procedural streamlining of cases will also be considered successful outcomes. Throughout the settlement process, normal case processing will continue independently in the Clerk's Office, placing some pressure on counsel to arrive at a settlement decision before briefing begins, while simultaneously guaranteeing that a mediation case will not lose its oral argument slot if mediation fails. If necessary, arrangements can be made to extend briefing schedules or oral argument dates.

Under the terms of the court's en banc order, counsel will be required to provide some case documents to the mediator, to prepare a short "position paper" describing the case, and to attend the initial mediation session. Parties must be represented by someone with authority to enter into a settlement agreement during the session. Clients may attend, but are not required to do so.

A list of the mediators selected by the court and further information about the program can be obtained from Karen M. Knab, Circuit Executive, (202) 535-3340. ■

LEGISLATION, from page 5

court judgeships that would be needed could be reduced from 56 to 15.

The creation of the 13 permanent court of appeals positions and 40 permanent and 16 temporary district court positions was recommended by the Judicial Conference at its September 1986 meeting. The Conference's recommendations were the result of a nationwide survey of all federal courts of appeals and district courts conducted by the Conference's Court Administration Committee between September of 1985 and July of 1986.

In a letter to the chairman of the House Judiciary Committee, Director Mecham stated, "In formulating this set of recommendations in September of 1986, the Conference deliberately limited its request for additional judicial positions to that number believed to be absolutely essential; additional positions have been requested for individual courts only in those instances in which the Conference believes that those courts would be unable to serve the public adequately in the immediate future."

In other congressional action:

- Rep. Robert Kastenmeier (D-Wis.) has introduced H.R. 2127, to amend 28 U.S.C. to encourage prompt, informal, and inexpensive resolution of civil cases in U.S. district courts by the use of arbitration. He has also introduced H.R. 2128, to amend 9 U.S.C. to improve the appellate process in federal courts of appeals with respect to arbitration. (H.R. 2128 is identical to the arbitration provisions in the omnibus bill noted above.)
- The House Post Office Committee approved legislation designating Sept. 17, 1987, as a legal public holiday marking the bicentennial of the Constitution.
- Sen. Charles E. Grassley (R-Iowa) introduced S. 1134, identical to the "race to the courthouse bill" reported to the full House (H.R. 1162) last month by the House Judiciary Committee (see *The Third Branch*, April 1987, p. 2). Cosponsoring S. 1134 with Sen. Grassley are Sens. Strom Thurmond (R-S.C.) and Dennis DeConcini (D-Ariz.). ■

NOTEWORTHY, from page 3

the attorney argued that his conduct was protected by the First Amendment, that he was deprived of his right to a hearing, and that there were procedural irregularities in the conduct of the disbarment proceeding in the district court. The Fourth Circuit disagreed with all of these contentions and affirmed the disbarment order, stating that an appellate court owes substantial deference to a district court in matters of disbarment or suspension.

Bankruptcy trustee entitled to derived judicial immunity. A bankruptcy trustee was held to be entitled to derived judicial immunity absent evidence that he acted outside the limits of such immunity. *Lonneker Farms, Inc. v. Klobucher*, 804 F.2d 1096 (9th Cir. 1986). ■

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Judge Martin Bostetter Discusses Educational Needs, Recent Changes in Bankruptcy System

Judge Martin V. B. Bostetter, Jr., was born in Baltimore, and received his A.B. and LL.B. degrees from the University of Virginia. He was appointed a U.S. bankruptcy judge for the Eastern District of Virginia in 1959 and has been a member of the FJC Board since 1984.

Martin V. B. Bostetter, Jr.

In recent years there have been momentous changes in the bankruptcy system—the Supreme Court's 1982 opinion in *Northern Pipeline*, the bankruptcy amendments to the federal judgeship act of 1984, and major legislation in 1986. Have these events, plus ever-increasing caseloads, transformed the life of a bankruptcy judge?

The original feeling was that the *Northern Pipeline* case would bring about substantial changes and reduce the caseload in the bankruptcy courts. My experience has been that this is not true. The caseload here has continued to increase dramatically and this appears to be the situation nationally.

See BOSTETTER, page 6

Pending Bill Would Expand FJC Role; Magistrates' Retirement Bill Clears Congress

A bill that amends the governing statute of the FJC has been introduced in the House by Rep. Robert W. Kastenmeier (D-Wis.). The bill, H.R. 2467, would create a Federal Judicial Center Foundation with authority to accept and receive gifts for the Center, authorize the Center to implement a history program for the judicial branch, provide limited authority for training for persons outside the judicial branch, and provide for the appointment and compensation of the deputy director of the Center. These amendments were unanimously recommended by the Center's Board.

The proposal to establish a foundation with authority to receive gifts for the Center was developed by a committee chaired by former judge Philip W. Tone. The foundation would be directed by a board, none of whose members would be sitting judges. The provision was fashioned in this way so that the Center and its governing body would be sufficiently insulated from any procedure for accepting gifts from private sources to safeguard both the independence and the appearance of independence of the judiciary.

FJC Director A. Leo Levin testified in support of the proposed amendments to the Center's statute at an oversight hearing of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The subcommittee also welcomed Judge John C. Godbold, who has been elected to succeed Professor Levin as FJC director, and who will take office on Aug. 1. Deputy Director Charles Nihan also participated in the hearing.

Other developments on Capitol

See LEGISLATION, page 2

Chief Justice Urges National Appeals Court, Repeal of Court's Mandatory Jurisdiction

In his recent speech to members of the American Law Institute, Chief Justice Rehnquist has urged that the remaining mandatory jurisdiction of the Supreme Court be abolished, thus giving the Court more latitude in choosing which cases to decide each year. He also reiterated his support for a national court of appeals, stating his preference for a new court whose judges would be nominated by the President and confirmed by the Senate.

The Chief Justice noted that the last major revision of the jurisdiction of the Supreme Court was in 1925. Since then, the number of decisions turned out by the federal courts of appeals and by the highest courts of the states has increased dramatically. The Court has been able to decide up to about 150 cases each term on the merits, the Chief Justice said, but this "really is the maximum."

"Today we decline to review cases involving important questions of federal law not previously decided by our Court, cases which the Court would have unquestionably heard

See REHNQUIST, page 5

Inside . . .

NEWS FROM THE SENTENCING COMMISSION

The Sentencing Commission in June distributed draft worksheets for sentencing guidelines application to Article III judges, U.S. attorneys, public defenders, U.S. magistrates, chief U.S. probation officers, and U.S. probation offices. The worksheets are part of a packet that includes several examples applying the guidelines to actual cases.

Feedback on these draft worksheets, designed to enhance understanding the guidelines' operation, will be helpful to the commission in developing final worksheets for use when the guidelines are implemented. The draft worksheets and illustrative cases are the first steps in developing a comprehensive workbook for probation officers, judges, attorneys, and others to use in applying the guidelines.

The commission is also disseminating a supplementary report that further explains its guidelines and policy statements; details the effects on federal prison population of the guidelines, the 1986 Anti-Drug Abuse Act, and the career offender provisions of the Sentencing Reform Act; analyzes disparity in sentencing; and addresses a variety of other topics. ■

LEGISLATION, from page 1

Hill of interest to the judiciary include these:

- H.R. 1947, to provide enhanced retirement credit for U.S. magistrates, to be equal to the benefits provided bankruptcy judges, was passed in both the House and Senate and was signed by the President on June 18 as Pub. L. No. 100-53.
- Rep. Robert Kastenmeier introduced H.R. 2586, which would provide a new retirement system for magistrates and bankruptcy judges, similar to that of the territorial judges.
- Rep. James A. Traficant, Jr. (D-Ohio) introduced H.R. 2227, to make the salaries of bankruptcy judges equal to those of Article III federal district judges; the bill is before the House Judiciary Committee.
- AO Director L. Ralph Mecham has transmitted to Congress a draft of proposed legislation to make improvements in the federal court interpreter program.
- The House passed H.R. 1162, providing for random selection of a court of appeals to hear appeals in the so-called "race to the courthouse" situation (appeals to multiple circuits, filed with respect to the same agency order). The bill is awaiting Senate action.
- The Civil Rights Restoration Act of 1987, S. 557, was ordered reported favorably (with amendments) to the full Senate by the Senate Labor and Human Resources Committee. The bill is in response to the Supreme Court's 1984 *Grove City College* decision, and would broaden the coverage of certain civil rights statutes beyond the scope accorded them by *Grove City.*
- Rep. John Conyers, Jr. (D-Mich.) has introduced H.R. 2515, to amend 18 U.S.C. ch. 215 to allow counsel to accompany a witness into a grand jury room, and the House Judiciary Committee's Subcommittee on Criminal Justice has held a hearing on the measure.
- Sen. Howell Heflin (D-Ala.) has introduced S. 1248, a bill to make technical amendments to the State Justice Institute Act of 1984. One provision of S. 1248 would create a new section in the act to protect the confidentiality of information made available to persons conducting research under a grant from the Institute. ■

200 Years Ago...

July 1787: What became Article III of the Constitution took substantial shape from July 18 to 21, as the Convention voted to create a "supreme tribunal" and authorize the legislature to create "inferior tribunals." It agreed on presidential nomination and senatorial confirmation of the judges, despite George Mason's fear that "appointment by the Executive . . . might even give him an influence over the Judiciary department itself."

The convention unanimously endorsed tenure during good behavior but struggled over a prohibition against lowering *or* increasing judges' salaries. Benjamin Franklin would have allowed increases because "Money may not only become plentier, but the business of the department may increase as the Country becomes more populous." Madison, though, worried that allowing Congress to raise salaries could create a judicial dependence on the legislature. If members of Congress were parties to federal litigation, "the Judges will be in a situation which ought not to [be] suffered." The problem of an inflated currency could be avoided "by taking for a standard wheat or some other thing of permanent value." But the convention, six votes to two, sided with Gouverneur Morris: "The value of money may not only alter but the State of Society may alter. . . . The Amount of salaries must always be regulated by the manners & the style of living in a Country. . . . Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited."

BICENTENNIAL OF THE U.S. CONSTITUTION

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.

Ninth and Tenth Circuit Courts of Appeals Appoint Bremson, Murret as Circuit Executives

Eugene J. Murret has been elected circuit executive for the Tenth Circuit Court of Appeals by the Judicial Council of the circuit and will enter on duty Aug. 1, 1987. Mr. Murret succeeds Emory G. Hatcher, who retired last December.

Eugene J. Murret

For the past sixteen years Mr. Murret served as the judicial administrator for the Supreme Court of Louisiana. He holds a B.A. from Loyola University of New Orleans, a J.D. from Loyola Law School, and an LL.M. from New York University School of Law. Mr. Murret has been active in the ABA, has taught law at Loyola University School of Law, and has served as an instructor in judicial administration at Tulane University.

Francis L. Bremson

Francis L. Bremson entered on duty as circuit executive for the Ninth Circuit on March 27. Previously Mr. Bremson served as executive director of the Alaska Judicial Council;

See BREMSON, page 8

Administrative Orientation Programs Initiated for Chief Bankruptcy Judges

The AO and the FJC have initiated a program of orientation sessions for chief bankruptcy judges. Three chief bankruptcy judges attended the first-ever such session in April, and a second orientation session was held in June for another group of judges.

The sessions, which are similar to those for newly appointed chief judges of circuit and district courts, are designed to provide the judges with background information to assist them in discharging their administrative responsibilities as chief judges. Meetings were held with the director and deputy director of the AO, with each assistant director, and with various division and branch chiefs who manage the individual programs that provide support to the bankruptcy courts. Briefings on programs and services of the FJC were provided by key FJC officials.

The FJC is presently preparing a *Desk Book for Chief Judges of the United States Bankruptcy Courts.*

NOTEWORTHY

Local rule on judicial approval of prosecutors' subpoenas of lawyers upheld. The First Circuit Court of Appeals has upheld a local rule adopted by the U.S. District Court for Massachusetts that requires a prosecutor to obtain prior judicial approval to subpoena an attorney to a grand jury for evidence about a client of the attorney. *United States v. Klubock*, No. 86-1413 (1st Cir. Mar. 25, 1987). The district court in 1986 amended its local rules to include such a requirement, which had already been adopted by Massachusetts's Supreme Judicial Court. The district court's local rule was challenged by the United States and various federal prosecutors. They claimed that the local rule violated the supremacy clause of the Constitution because it allegedly conflicted with the Federal Rules of Criminal Procedure, and was therefore invalid as both a state court rule and as a local federal court rule.

The First Circuit found the supremacy clause argument moot. The prosecutors had claimed that as members of the state bar, they might be vulnerable to state disciplinary charges for actions taken outside of Massachusetts. The court took note of the state bar counsel's announced policy that the rule would not be applied against any federal prosecutor for any action taken extraterritorially, and held that while such a policy is in effect, there is no supremacy clause case or controversy. As to the federal district court's rulemaking power, the appeals court held that the rule "is a reasonable regulation of the dynamics that underlie the adversarial process," and a "limited, reasonable response to what appears to be a mounting professional problem."

Local rule concerning discovery in prisoners' pro se petitions held invalid. A local rule of the U.S. District Court for the Eastern District of Arkansas, requiring leave of court before allowing invocation of discovery processes in cases of pro se prisoners' petitions brought under section 1983, has been held invalid. *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987). The rule was held to be in conflict with the Federal Rules of Civil Procedure.

Plaintiff may not withdraw consent to trial before magistrate. There is no absolute right to withdraw validly given consent to a trial before a magistrate, the Fifth Circuit held in an appeal of an employment discrimination lawsuit. The plaintiff had sued her employer under title VII, and the parties opted for trial before a magistrate under 28 U.S.C. § 636(c). Shortly before trial, the plaintiff attempted to withdraw her consent to trial before a magistrate. The magistrate denied the motion and at trial found against the plaintiff on the merits. The plaintiff appealed both the decision on the merits and the refusal to permit her to withdraw her consent to trial before a magistrate. She did not deny that her consent was valid when made, but alleged that she had a "right" to withdraw her consent. "We find nothing in the statute . . . that would allow a party to express conditional consent to a reference [of a case to a magistrate], thereby obtaining what amounts to a free shot at a favorable outcome or a veto of an unfavorable outcome," the Fifth Circuit held. *Carter v. Sea Land Services*, 816 F.2d 1018 (5th Cir. 1987).

S.D.N.Y. report. Chief Judge Charles L. Brieant (S.D.N.Y.) has released the *1986 Court Report* detailing various aspects of the court's business during 1986. During the statistical year July 1, 1985, to June 30, 1986, there was a 5.5 percent increase in the number of civil and criminal filings, to a total of 11,828. The combined number of terminations rose 13 percent to 11,531.

See NOTEWORTHY, page 5

AO Director Mecham Recognizes Group's Efforts Resulting in Cost Savings on Computer Purchase

AO Director L. Ralph Mecham has presented the Director's Special Award to a group of employees whose efforts resulted in substantial savings in a computer purchase contract. Receiving the award were Ellen Bartelt, Cristin Birch, and Judy Steele of the AO and John Brinkema of the FJC for their work on the procurement of computer systems for the Federal Court Automation Project (FEDCAP) from December 1984 through April 1986.

Ms. Bartelt, Mr. Birch, and Mr. Brinkema defined, developed, and refined the specifications for computer equipment and systems software. They then served as the technical evaluation committee that ultimately selected and awarded the FEDCAP contract. Ms. Steele served as the contract specialist and the contact point for all vendor inquiries, participated in nationwide equipment performance evaluation tests, and completed the cost evaluation portion of the selection process. Their combined efforts resulted in a contract enabling the courts to buy up to 120 computers at a price 40 percent lower than had originally been anticipated. ■

Judge Holds Attorney in Contempt for Refusal to Proceed with Summary Jury Trial

The U.S. District Court for the Southern District of Illinois has held an attorney in criminal contempt for failure to comply with the court's order that he participate in the selection of a jury for a summary jury trial. *Strandell v. Jackson County*, Civ. No. 85-4159 (S.D. Ill. Apr. 17, 1987). According to a final pretrial order in the case, a trial of the matter would have taken 20 to 25 days. The court, citing its heavy caseload, including a number of criminal cases subject to the Speedy Trial Act, ordered the parties to proceed with a nonbinding summary jury trial. Plaintiff's counsel objected to the procedure and filed a motion claiming that the court was powerless to compel the parties to engage in it. The court concluded that its authority to require participation in the procedure derived from Fed. R. Civ. P. 1, 16(a)(1), 16(a)(5), and 16(c)(11), the court's inherent power to manage and control its docket, and a 1984 resolution of the Judicial Conference, and fined plaintiff's counsel $500 for his contempt. ■

1987 Audiovisual Media Catalog Available from FJC

The Center recently published the *1987 Catalog of Audiovisual Media Programs*, a revision of the 1985 catalog. This new edition has been updated with new audiocassettes, videocassettes, instructional software, and films available for loan to federal judicial personnel only from the media library of the Center's Information Services.

Catalog items are grouped by subject matter and include recordings of Center seminars and workshops, specially produced Center media programs, and programs from commercial sources and other government agencies. The catalog does not list all, or even most, presentations at Center seminars; programs have been selected on the basis of their topicality and level of past use.

The catalog's introduction describes the organization of the materials listed and includes directions for requesting items, a reproducible request form, and a checklist for use in setting up a VCR.

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 St., N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (5 oz.), but do not send an envelope.

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.

Committee on Federal Courts. "Remedying the Permanent Vacancy Problem in the Federal Judiciary: The Problem of Judicial Vacancies and Its Causes." 42 *Record of the Association of the Bar of the City of New York* 374 (1987).

✓ Marshall, Thurgood. "Remarks at the Annual Seminar of the San Francisco Patent and Trademark Law Association in Maui, Hawaii, May 6, 1987."

✓ Pieras, Jaime, Jr. "Judicial Economy and Efficiency Through the Initial Scheduling Conference: The Method." 35 *Catholic University L. Rev.* 943 (1986).

✓ Rehnquist, William H. "Boston University Commencement Address, May 17, 1987."

✓ Rehnquist, William H. "Remarks at the Sixty-Fourth Annual American Law Institute Meeting, May 19, 1987."

Rosenberg, Maurice. "Chief Judge Wilfred Feinberg: A Twenty-Fifth Year Tribute." 86 *Columbia L. Rev.* 1505 (1986).

von Hirsch, Andrew, Kay A. Knapp, and Michael Tonry. *The Sentencing Commission and Its Guidelines*. Northeastern University Press, 1987 [analysis and suggestions for state sentencing guidelines efforts, based on the experiences of Washington, Pennsylvania, and Minnesota].

Wilkinson, J. Harvie, III. "Address at the FBA Fourth Circuit Court of Appeals Conference Banquet." 34 *Federal Bar News & J.* 109 (1987).

CALENDAR

June 29–July 1 National Management Seminar for Chief Probation and Pretrial Services Officers

July 6–9 Video Orientation Seminar for Newly Appointed District Judges

July 8–10 Seminar for Magistrates of the Sixth, Seventh, and Eighth Circuits

July 8–10 Judicial Conference Committee on the Administration of the Probation System

July 9 Judicial Conference Committee on Rules of Practice and Procedure

July 12–25 Summer Trial Practice Institute (Session 2) (for new assistant defenders)

July 13–14 Judicial Conference Committee on the Administration of the Criminal Law

July 13–15 Workshop for Personnel Officers

July 14–15 Staff Safety Program (W.D. Mo.)

July 14–17 Workshop for New Training Coordinators

July 16–18 Eighth Circuit Judicial Conference

July 20–21 Judicial Conference Committee on Court Administration

July 20–24 Orientation for New Probation and Pretrial Services Officers

July 21–22 Staff Safety Program (N.D. Tex.)

July 23–24 Judicial Conference Committee on Judicial Ethics

July 29–31 Tenth Circuit Judicial Conference

Aug. 3–4 Judicial Conference Committee on the Operation of the Jury System

Aug. 3–5 Circuit Case Initiation and Processing

Position Available

Staff Director, U.S. Sentencing Commission. Salary to GS-18. Substantial experience in criminal law or criminal justice required. Principal responsibilities include staff supervision and coordination of all commission activities, including guideline promulgation and research. Apply to William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission, Suite 1400, 1331 Pennsylvania Ave., N.W., Washington, DC 20004.

EQUAL OPPORTUNITY EMPLOYER

REHNQUIST, from page 1

and decided as little as thirty years ago," the Chief Justice said. "[W]e are simply unable to take and decide many cases which raise important and undecided issues under the Constitution and the statutes of the United States."

Noting the "debate and . . . considerable opposition" that have surrounded previous proposals for a national court of appeals, the Chief Justice said that he nonetheless remains "confident that in due course we will have" such a court.

When Chief Justice Burger first proposed a plan for a national court of appeals, he suggested that the body be created on a temporary basis and constituted with presently sitting judges of the various courts of appeals around the country. Chief Justice Rehnquist noted that that proposal "poses knotty problems of how these judges are to be chosen." Thus, while he could accept "any sensible proposal" for choosing the judges, he believes that "eventually we must recognize that the need is for a new court whose judges should be nominated by the President and confirmed by the Senate."

The proposal to repeal the Court's mandatory jurisdiction, the Chief Justice said, has "all nine members of our Court . . . solidly behind it, and so far as I know there is little or no opposition to it in any segment of the legal community." The Chief Justice estimated the benefit to the Court that abolition of mandatory jurisdiction would have, using as an example the last five terms of court. During those terms, the cases decided on the merits that came by way of appeal, rather than by way of certiorari, averaged about 35 per term. Were mandatory jurisdiction to be abolished, even assuming that the Court would have granted certiorari in half of those 35 cases, the abolition of mandatory jurisdiction could still be expected to give the Court 15 or 20 new "slots" for other important cases to be reviewed, the Chief Justice observed. ■

PERSONNEL

Nominations

Jerry E. Smith, U.S. Circuit Judge, 5th Cir., June 2

John D. Tinder, U.S. District Judge, S.D. Ind., June 2

Confirmations

Richard J. Daronco, U.S. District Judge, S.D.N.Y., May 7

David S. Doty, U.S. District Judge, D. Minn., May 7

Ronald S.W. Lew, U.S. District Judge, C.D. Cal., May 7

Reena Raggi, U.S. District Judge, E.D.N.Y., May 7

Haldane R. Mayer, U.S. Circuit Judge, Fed. Cir., June 11

Layn R. Phillips, U.S. District Judge, W.D. Okla., June 11

Appointments

Edward Leavy, U.S. Circuit Judge, 4th Cir., Apr. 8

Malcolm F. Marsh, U.S. District Judge, D. Or., Apr. 16

David S. Doty, U.S. District Judge, D. Minn., May 8

Senior Status

William C. Conner, U.S. District Judge, S.D.N.Y., Mar. 31

James E. Barrett, U.S. Circuit Judge, 10th Cir., Apr. 8

Death

Noel P. Fox, U.S. District Judge, W.D. Mich., June 3

NOTEWORTHY, from page 3

The number of filings per authorized judgeship increased from 415 to 438. In 1986 there were two vacancies in the court's complement of judgeships, and there were four additional positions authorized by Congress that had not been filled at the time of the report's release. "Filling these vacancies is critical if this overworked court is to discharge its responsibilities," Judge Brieant wrote in the *Report*'s introduction. The *Report* also summarizes the work of the court's various committees, and of the District Court Executive's Office, Clerk's Office, Probation Department, Pretrial Services Agency, and Bankruptcy Clerk's Office. ■

BOSTETTER, from page 1

One of the factors is the ever-increasing use of the bankruptcy code as a major implementation in reorganization cases. For instance, since the *Bildisco* case, labor contracts have been involved in the bankruptcy courts' jurisdiction, and more creative use of the bankruptcy laws by the bar—in particular by knowledgeable, sophisticated attorneys in the larger areas—has brought about a very, very great increase. We have seen a more and more liberal interpretation of what a core proceeding is. If the matter is a core proceeding, there is no question that a bankruptcy court has jurisdiction to hear it. The related matters can also be heard by the bankruptcy court. What is a related matter also has been interpreted broadly. Taken together with holdings that objections to jurisdiction must be raised early in the proceeding, there is no question but that this tends to give more work to the bankruptcy courts.

I think the general conclusion would be that there has been an ever-increasing workload, caused not just from the standpoint of numbers of cases filed but also by the breadth of jurisdiction. I find that I am essentially handling the same types of cases that I handled prior to the *Northern Pipeline* decision but that the caseload is much heavier.

The Administrative Office reports that during 1986 bankruptcy petition filings were up 28 percent above 1985. How does this increase in filings make itself felt on a day-to-day basis?

There are several aspects here that we have to consider. Number one, when you get additional heavy filings, that causes a backlog, and until you get the people authorized, hired, and trained, you really aren't starting to cut into the backlog. The AO is now reviewing the situation quarterly, which is very helpful, so that if we get heavy increases in filings in a given quarter it alerts them to the situation and they are able to grant authorization more quickly. The hiring and training process, however, takes about six months. During this time it is necessary to divert other personnel from their duties to help train, and that can create an even greater backlog, so it is a very difficult problem. During the training period you can choose to reduce certain services to the public—for example, some courts only answer the telephone during certain periods of time. Another possibility is to eliminate certain functions that are accomplished in the clerk's office. This usually results in case closings being neglected, but that many times is the only alternative. So the overall effect is a reduction in services to the public as well as a reduction in the functions of the clerk's office itself.

"One of the things we are trying to do at the Center with bankruptcy education is weave in more case management and control of calendar techniques."

Some of the courts have begun maintaining a hiring register on which they keep the names of eligible persons. They maintain these names so that they can hire a new person as soon as possible.

In this regard, under the direction of Mr. Mecham, the AO has become more and more helpful and cooperative, not only in personnel matters but in matters generally. The attitude is very, very good. I think the relationship between the bankruptcy courts and the Administrative Office is the best that I have ever seen in my 28 years in the bankruptcy court.

Congress authorized the creation of 52 new bankruptcy judgeships in 1986; funding has passed both houses of Congress and the supplemental appropriation measure is now before a conference committee. Will this help significantly?

Ultimately it will certainly help. However, it will take some time before we will feel the impact. The period of selection is only the first step and that can take anywhere from three to six months. After the selection, there must be an FBI clearance, and the IRS is required to check the nominee as to any tax problems. Then the period from the time he is sworn in until there is really some benefit to the public depends on the experience of the person that has been appointed. I would say that the minimum period before the judge is comfortable in the position is about six months. One of the things we are trying to do at the Center with bankruptcy education is weave in more case management and control of calendar techniques, because this seems to be the area where we can make our judges, especially new judges, most proficient more quickly. If they attain proficiency in this area it will really help them attain maximum efficiency.

Will salary increases for the bankruptcy judges help stabilize the bankruptcy court system?

Yes. In order to attract well-qualified individuals, you have to offer proper compensation, and if you consider that a majority of the judges still have children who are either going into college before long or are presently in college, and if there are two or even three in college at the same time with the present salary, it virtually becomes impossible to live within the standard to which you should be entitled. In recent years, bankruptcy judges have been paid from 86 percent to almost 92 percent of the district judges' salaries. Under the recent recommendation, however, bankruptcy judges' salaries were increased by only 2.8 percent this year, and this fell disproportionately to only 81 percent of a district judge's salary. With the cost of living, it is just impossible to attract well-qualified people who could be out making $250,000 or more in private practice.

Another factor to be considered is that a proper salary not only attracts well-qualified applicants but helps keep them in the system. This, in addition to a good retirement system, is absolutely essential to a stable system. There is presently a retirement

bill pending which would be non-contributory and, I think, vest at 14 years. This is the type of retirement bill that should be enacted and is equally as important as salary for obvious reasons.

What has been the experience of the bankruptcy courts since the new Chapter 12 dealing with the family farmer?

My court is not in a rural area, so I have had very few Chapter 12s. I understand, however, that in at least one other court they have had approximately 150 filings, and have confirmed about 80 percent of them; that there is very good cooperation from the Farmers Home Administration and it appears to be working very well.

An interesting sidelight to that is that in some of the other courts the debtor's indication that he might file a Chapter 12 case has increased the possibility of working out the situation outside of the court. In other words, it has encouraged the creditors to go along with the debtor's plan that he proposed without going through a formal court proceeding, so even the threat of a Chapter 12 has had some effects also.

From what I understand, the system seems to be working. One of the issues that has arisen is eligibility—what are agricultural products. There is also the issue whether or not you can convert from a Chapter 11 to a Chapter 12. The courts seem to be just about evenly divided on whether or not there can be a conversion.

As a member of the Court Administration Committee of the Judicial Conference, would you propose that the Conference suggest the legislation be amended to clarify Congress's intent on conversion?

There is a Bankruptcy Committee subcommittee that I would think would want to propose that. If I were a member of that committee I would certainly suggest it.

The U.S. trustee system is now in the Department of Justice. Do you think this is a good change?

Well, if we remember the initial premise, which was that the trustees should have independence from the bankruptcy courts, then it seems to me that the legislation is proper from that standpoint. The independence of the U.S. trustee removes the trustee panel from control of the court. The court having control is in direct opposition to the concept of having such an independent trustee system, and it is impossible to give the appearance of total independence when the court is appointing and supervising the trustees.

On the whole, I think the change is a good one. I know that there is a wide variety of opinions as to whether or not it is a good system. However, I speak from the pilot system that we had here, which combines the Eastern District of Virginia with the District of Columbia. I felt and still feel that our pilot trustee program here has worked very well. One of the problems has been underfunding. Congress took away, or the U.S. trustee system lost, a lot of their funding, and they had to reduce many of the services. It is hard to judge whether or not a machine is running well if you don't spend sufficient monies to maintain it properly. This makes it very difficult to judge its overall quality. But I would say that the trustee system is definitely one that can be utilized as an important part of the bankruptcy court system, which includes, among other things, examination of requested fees. The U.S. trustee in this district examines applications by attorneys and other professional persons for compensation as counsel for the debtor and the like. In addition, they have been very helpful in monitoring Chapter 11 cases to see that they move along on a proper basis, to assure that, among other things, debtors file their monthly reports on time. Thus, given the proposition that the trustees should be independent, the system, if properly utilized and properly funded, I think can be a very good one.

"[T]here is very good cooperation from the Farmers Home Administration [on family farmer cases] and it appears to be working very well."

You recently assisted the Center by chairing the seminar held at Hershey and attended by 50 new bankruptcy judges. What were some of the concerns of the judges?

The principal reason for my attending these seminars and sharing my ideas with other judges is that I want to get feedback from the judges as to what subjects and presentations are most helpful to them. I want to be sure that we are really helping them; to find out how we can improve; and in what areas they need help that they are not getting. There are two things to learning: One is the teaching and the other is the learning. The presentation by the lecturer can be a very crucial part. The lecturer should give a live presentation in an understandable way, so that the recipient can assimilate what is being presented. When people write down their evaluations about the presentations, they have trouble being critical and putting it in writing.

They are anonymous, aren't they?

Well, you are supposed to put down what court you are from. But there is still some psychological impact there, and I find that eyeball to eyeball, so to speak, you really learn how people feel; how was the topic presented; was it helpful. At this last seminar we received a lot of good comments on case management and calendaring. We want to give more emphasis to this area.

In connection with new judges, we now try to have a video seminar as soon as possible after appointment. This is usually in groups of five or six new bankruptcy judges. We gather them together in one place for a video presentation. There is a discussion leader who leads the discussion and answers questions after each video.

See BOSTETTER, page 8

BOSTETTER, from page 7

Then, as soon as we have a sufficient number of new judges, usually 50, we bring them together and present a live seminar.

How long is it before you try to reach a new bankruptcy judge with an educational experience?

Ideally, for a video seminar, which includes case management and calendaring as well as some basic substantive matters, within two or three months, but certainly within six months. The sooner the better. Then the live seminar, ideally within twelve months, which covers a very wide variety of topics. Unfortunately, because of the requirement of presenting the live seminar to a minimum of 50 new judges, they have been held every other year. The FJC Board has just authorized an additional live seminar for bankruptcy judges, however, because of the large number of judges authorized by the new legislation but, as I indicated, we usually hold them every two years. In addition, I am trying to encourage the judges to assist each other in the area of exchange of new ideas and procedures, which also can be beneficial.

Is automation in the bankruptcy courts helping?

Yes. When computerization first came along there was a misconception spawned that within a short period of time it would cut down on the number of personnel. That is not true. In some instances additional personnel are required initially until the system is in place and operational. However, the ultimate advantage is that a better product plus more workload can eventually be handled by the same number of people. Its efficiency is proven.

We are presently using the BANS system, which is the bankruptcy noticing system. Some courts have a bankruptcy users' microprocessors system, referred to as BUMS, which is simply an IBM-compatible computer with which they can not only notice but can maintain a docket and utilize other programs for which software is available. Also presently under development is the BANCAP system, which has created a kind of internal struggle. The AO has turned its resources, and I think quite rightly so, to this third system called the BANCAP system, which is a complete system: It will notice, it will take care of docketing, and will really give us an overall product. The problem is, though, as to how much money should be spent to keep in place the things that you already have—the BANS system and the BUMS system—or should you use all of your money to establish the BANCAP system. Recently, BANCAP has been given the go-ahead. It is presently in force in three courts. My understanding is that they are New York Western, Washington Western, and Texas Western as a pilot project. Of course, ultimately it will be expanded. We expect to have it in place next year in the Eastern District of Virginia. This, I think, will be an excellent solution to the many problems of noticing and docketing.

Now, I might interject one other thing here. I understand the Justice Department has been authorized for a relatively short period of time to develop a system, which presumably the bankruptcy clerks could use. The success of this remains to be seen. ■

BREMSON, from page 3

as a regional director for the National Center for State Courts; and as project director for a comprehensive court management project for the courts of Cuyahoga County, Ohio. He has published and lectured extensively on a variety of topics on judicial administration. He is a graduate of Hobart College and Georgetown University Law Center, and in 1980 graduated from the Institute for Court Management. ■

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AO Director Mecham Announces New Court Administration Division

AO Director L. Ralph Mecham has announced that he is establishing the Court Administration Division in the Administrative Office of the U.S. Courts effective Oct. 1, 1987. The new division will provide basic program assistance, support, and coordination to district court executives, clerks of court (appellate, district, and bankruptcy), court reporters, court interpreters and librarians. It will take over the functions currently performed by the Clerks Division, the Office of Court Reporting and Interpreting Services, the Office of Library and Legal Research Services, and the Office of the Special Assistant for Jury and Speedy Trial Matters. The staff of these organizations will be transferred to the new division.

Mr. Mecham stated he expected that by consolidating existing functions and resources in one division, he will be able to provide a greater range of services and assistance to clerks of court and other supporting personnel. Recruitment of a chief for the new division began immediately on a nationwide basis. In addition, action was being taken to fill several other professional positions in the new division. Mr. Mecham also said that he is

See AO, page 5

Seminar Scheduled for New District Judges

Judge John C. Godbold, FJC Director, has announced that the next seminar for newly appointed district judges will be held Nov. 16–21. All sessions will be held at Dolley Madison House in Washington, D.C., including a reception for the judges and their families on Nov. 15 at six o'clock.

The program includes a dinner at the Supreme Court on Nov. 17.

Justice Lewis F. Powell, Jr., Retires; Members of Judiciary Join in Tribute

Lewis F. Powell, Jr.

On June 26, Justice Lewis F. Powell, Jr., announced his retirement from the U.S. Supreme Court after more than 15 years of service. Tributes to Justice Powell from within the judiciary as we went to press include the following:

Chief Justice William H. Rehnquist

Justice Powell came to the Court after an illustrious career of private practice and public service bespeaking the best traditions of the legal profession. He has now capped that career with 15 years of able and devoted service as a justice of this court. We shall miss his wise counsel in our deliberations, but we look forward to being the continuing beneficiaries of his friendship.

Retired Chief Justice Warren E. Burger

Having served for 14 years as a colleague of Justice Powell, and having worked with him for many years before in programs for the improvement of justice, I have high appreciation of his service to the country. Throughout his entire private career he was making significant contributions to the public at the local and state, as well as national, level, both in education for better citizenship and in the law. I salute him.

Judge John C. Godbold, FJC Director

Justice Lewis Powell has exemplified intellectual integrity, a deep sense of fairness, and a full measure of common sense. He has served well

See POWELL, page 4

Chief Judge Winter Shares Views on Caseload, Settlement Roles, Opinion-Writing Practices

Chief Judge Harrison L. Winter was appointed to the Fourth Circuit in 1966 and became chief judge in 1981. He had previously served over four years as U.S. district judge for the District of Maryland, and had also served as assistant attorney general and deputy attorney general for Maryland, and as city solicitor for Baltimore. He has served as a member of the Judicial Conference Committee on the Operation of the Jury System.

What are your main concerns today as to processing cases in the Fourth Circuit?

My principal concern at the appellate level is in having the requisite number of judges to hear and decide the cases promptly. Presently the court of appeals is terribly understaffed. For many months in the court year I need five panels of judges, and in the other months four panels. When you consider that we have only eleven active judges and two seniors (who, fortunately, work a very large percentage of the time) you can see what my concern is. I am constantly in the process of borrowing and recruiting help. For the last year the situation has been made more acute because Judge Wilkins, the chairman of the

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New York State Bar Survey of Lawyers, Judges Finds Strong Support for Rule 11 Sanctions

A study released by a committee of the New York State Bar Association shows that lawyers and judges in the federal courts in New York strongly support sanctions under Fed. R. Civ. P. 11.

More than 1,400 lawyers and 43 judicial officers responded to the survey conducted by the state bar's Committee on Federal Courts. The survey was sent to 8,000 attorneys throughout New York State specializing in a wide range of areas, with equal attention to counsel for plaintiffs and defendants; 20 percent of the attorneys responded. All federal judicial officers in New York were invited to participate, and more than 40 percent did so.

Seventy-five percent of the lawyers and 93 percent of the federal judicial officers responding feel that sanctions are necessary. Eighty-seven percent of the judicial officers think that rule 11 serves a useful purpose and should be retained in its present form.

The current practice of permitting a court to compel the loser to pay the winning attorney's fees in a variety of circumstances is accepted by 90 percent of the bench and bar, according to the survey. Half of the lawyers and one-third of the judges surveyed suggested requiring the loser to pay the winner's attorney's fees even more frequently than at present. However, 90 percent of the bar and two-thirds of the bench oppose adoption of the English system, which requires the loser to pay all costs and attorneys' fees.

The report provides data on the amount of time spent on sanctions (less than 5 percent in 80 percent of

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200 Years Ago...

August 1787: With the Constitution's structural outlines in place, the Convention turned to such issues as congressional control over the slave trade.

Gouverneur Morris (Pa.) "never would concur in upholding domestic slavery. It was . . . the curse of heaven on the States where it prevailed." To Mason (Va.), the slave trade concerned "not the importing States alone but the whole Union." Slavery "discourages art and manufactures. The poor despise labor when performed by slaves." Slaves "bring the judgment of heaven on a Country. As nations cannot be rewarded or punished in the next world they must in this."

To Rutledge (S.C.), "religion and humanity had nothing to do with this question. Interest alone is the governing principle. . . . The true question is whether the Southern States shall be parties to the Union." Georgia, said Baldwin, would resist "an attempt to abridge one of her favorite prerogatives."

In the end, the Convention retained the slave trade for 20 years (as part of a late August compromise involving commercial regulation), along with the three-fifth's clause for representation and protection for fugitive slave laws.

Some slavery opponents thought, as did Gerry (Mass.), that the problem would go away. "As population increases, poor laborers will be so plenty as to render slaves useless. Slavery in time will not be a speck in our Country."

Others, perhaps with Gerry's erroneous prediction in mind, saw the concessions as necessary for union. They accepted the view that the slave trade could not "be excluded without encountering" what Madison thought were "greater evils."

BICENTENNIAL OF THE U.S. CONSTITUTION

NEWS FROM THE SENTENCING COMMISSION

Guideline education. The Sentencing Commission and the FJC's Committee on Guideline Sentencing Education, chaired by Judge A. David Mazzone (D. Mass.), have established a working relationship to implement the committee's plan on guideline education announced in Judge Mazzone's May 12 memorandum to chief judges, chief probation officers, and federal defenders. Commission Chairman William W. Wilkins, Jr., said that "we look forward to working closely with Judge Mazzone and his colleagues, and the Center staff, to ensure that the training plan meets its goals."

Testing the sentencing guidelines. The commission is currently field testing its guidelines in four sessions around the country, with the help of small groups of U.S. probation officers from 10 districts. These sessions, as well as in-house clinical testing programs with commission staff, will help the commission correct deficiencies and ambiguities in the guidelines, commentary, and draft worksheets.

Supplementary report. The commission's *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* has been widely distributed within the judiciary and elsewhere. It includes a detailed study of the projected impact on federal prison population of the guidelines, the Anti-Drug Abuse Act of 1986, the Career-Offender Provisions of the Sentencing Reform Act, and the baseline growth in federal convictions. ■

THE THIRD BRANCH

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LEGISLATION

The House of Representatives recently passed legislation that, if enacted into law, would revise the procedure by which amendments to federal rules are drafted and take effect, and is intended to increase participation in the rulemaking process by all segments of the bench and bar. The legislation, title II of H.R. 2182, is virtually identical to a bill passed by the House in the 99th Congress (H.R. 3550, the Rules Enabling Act), except that the bill has been amended to permit the rules process to supersede amendments to the rules made by act of Congress, thereby satisfying the only remaining objection to the bill by the Judicial Conference.

H.R. 2182 is entitled the Criminal Law and Procedure Minor Substantive and Technical Amendments Act of 1987. The act's title II is identical to H.R. 1507, introduced in this Congress by Rep. Robert W. Kastenmeier (D-Wis.) to provide a vehicle to reconsider the 99th Congress's H.R. 3550, which the House passed unanimously in 1985 after a review of the Rules Enabling Act process by the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice (see *The Third Branch*, Feb. 1986, at 3).

H.R. 2182 requires, in part, that the membership of the Judicial Conference committees that work on federal rules of practice, procedure, and evidence be fully representative of the bench and bar; that reasonable notice be given so that interested persons will have adequate opportunity to comment upon proposed rules and amendments; and that meetings of the Judicial Conference committees that work on rules be open unless a committee votes to close a meeting. It sets forth procedures for ensuring the consistency of local rules with the national rules.

Title II would, in part, repeal the supersession provisions in existing law, which provide that all laws in conflict with the federal rules shall be of no further force or effect after such rules take effect. Those supersession provisions, which originated with the enactment of the original Rules Enabling Act of 1934, are regarded by the bill's sponsors as no longer necessary as a practical matter with respect to statutory enactments outside the rules.

The bill provides that local rules established by federal district courts would be reviewed for consistency with the national rules by the judicial council of the appropriate circuit, and that local rules established by the courts of appeals would be reviewed for consistency with the national rules by the Judicial Conference. The language of H.R. 2182 broadens the language that was contained in the bill in the 99th Congress (H.R. 3550), to provide for Judicial Conference review of local rules of the U.S. Claims Court and the U.S. Court of International Trade.

Title I of H.R. 2182 amends 18 U.S.C. § 4247(b), which deals with a psychiatric or psychological examination ordered under 18 U.S.C. ch. 313, *Offenders with Mental Disease or Defect*. Section 142 of the bill passed by the House would authorize a licensed or certified psychologist to conduct such an examination, enlarging the number of qualified persons from whom a court may draw when ordering such a mental examination. Section 142 is consistent with the ruling in *Massey v. Manitowoc Co.*, 101 F.R.D. 304 (E.D. Pa 1983), that a mental examination under Fed. R. Civ. P. 35(a) could be conducted by a licensed psychologist who is not a physician. Rep.

See LEGISLATION, page 5

1988 Seminar for Appellate Judges Announced

A national seminar for all judges of the U.S. courts of appeals will be held in Washington, D.C., Oct. 24–26, 1988.

The seminar was proposed by the FJC's Committee on Appellate Judicial Education, chaired by Judge Richard S. Arnold of the Eighth Circuit, and was approved by the Center's Board earlier this year.

1988 marks the 200th year of the Judiciary Act of 1789, the pivotal legislative decision that the national government would establish its own court system. The seminar will provide an opportunity to take stock of federal appellate judging on the eve of the federal judiciary's third century, and to treat standard topics of law and procedure and special developments.

PERSONNEL

Nominations

Ernest C. Torres, U.S. District Judge, D.R.I., June 23

William D. Hutchinson, U.S. Circuit Judge, 3d Cir., June 26

Anthony J. Scirica, U.S. Circuit Judge, 3d Cir., June 26

Clarence A. Beam, U.S. Circuit Judge, 8th Cir., July 1

T.S. Ellis III, U.S. District Judge, E.D. Va., July 1

George C. Smith, U.S. District Judge, S.D. Ohio, July 1

William L. Standish, U.S. District Judge, W.D. Pa., July 1

Jerome Turner, U.S. District Judge, W.D. Tenn., July 1

Charles R. Wolle, U.S. District Judge, S.D. Iowa, July 1

R. Kenton Musgrave, Judge, U.S. Court of International Trade, July 1

Robert H. Bork, Associate Justice, U.S. Supreme Court, July 7

James A. Parker, U.S. District Judge, D.N.M., July 10

Confirmations

Robert F. Kelly, U.S. District Judge, E.D. Pa., June 25

Robert H. Bell, U.S. District Judge, W.D. Mich., July 1

Appointment

Haldane Robert Mayer, U.S. Circuit Judge, Fed. Cir., July 9

Retirement

Lewis F. Powell, Jr., Associate Justice, U.S. Supreme Court, June 26

POWELL, from page 1
the law, the Supreme Court, and our country. Moreover, his courtesy to and concern for his fellow members of the federal judiciary have been models for all judges.

A. Leo Levin, FJC Director Emeritus

Justice Lewis Powell has been widely and justly acclaimed for his exemplary service as an associate justice of the U.S. Supreme Court. The Nation owes him much. In addition, Justice Powell and his wife, Jo—wonderful human beings, considerate and thoughtful—have enriched any number of Center functions, adding significantly to our already immense debt to them.

L. Ralph Mecham, Director, Administrative Office, and FJC Board Member

A measure of the man is the high regard of his friends who know him best. I have been greatly impressed with the genuine affection which Justice Powell enjoys among the judges and staff of his home circuit, the Fourth, and in the Eleventh Circuit, in which he has served as circuit justice. He has represented his Nation admirably.

Tributes from Chief Judges of the Circuits

Chief Judge Levin Campbell (1st Cir.)

Justice Powell was a paradigmatic judge who endeavored to determine and apply the law wherever it led. Few will dispute that he exemplified, both in character and ability, many of the finest judicial qualities.

Chief Judge Wilfred Feinberg (2d Cir.)

He was a judge without preconceived notions. His opinions made clear in each case that he wrestled with his conscience, disciplined by the forces of reason and precedent. The phrase "a scholar and a gentleman" was obviously meant for him.

Chief Judge Harrison L. Winter (4th Cir.)

The Fourth Circuit views Justice Powell's resignation with great regret but accepts it as a decision that he alone should make. We have always affectionately viewed him as our "second" circuit justice. We thank him for his superb and devoted service to the Court and hope that he will sit with the Fourth for many years.

Chief Judge Charles Clark (5th Cir.)

Nature has combined in Lewis Powell its highest qualities of scholar and gentleman. No matter who his successor may be, the Court will miss him, justice will miss him, America will miss him.

Chief Judge Pierce Lively (6th Cir.)

Justice Powell had a distinguished career as a practicing attorney. This experience appeared to enable him to resolve each case solely on the procedural and substantive issues presented. This quality engendered confidence in the work of the Court.

Chief Judge William J. Bauer (7th Cir.)

Justice Powell was a quiet, studious man who made a great impact on the law. He made a tremendous contribution to the law and his profession. He will be sorely missed.

Chief Judge Donald P. Lay (8th Cir.)

American law has been greatly enhanced because of Justice Lewis Powell, and all of us who have been privileged to know him have been greatly rewarded through his friendship.

Chief Judge William J. Holloway, Jr. (10th Cir.)

Justice Powell's impact will be a lasting one. His contributions are memorable due to his keen sense of justice, his strength of intellect, and his dedication to vigorous protection of individual rights.

Chief Judge Paul H. Roney (11th Cir.)

Justice Lewis F. Powell has been the circuit justice for the Eleventh Circuit since its inception in 1981. He has been a constant inspiration to the judges of our circuit, both professionally and personally. Justice Powell exemplifies all the finest qualities of a great judge. He has been a warm, concerned, and wise friend, and we cherish the relationship he has had with our circuit.

Chief Judge Patricia Wald (D.C. Cir.)

Justice Powell was the kind of judge before whom any advocate could argue with absolute trust that her case would be fairly heard—a fine jurist and a lovely man.

Tributes from FJC Board Members

Judge Alvin B. Rubin (5th Cir.)

Justice Powell has served this Nation nobly. Having been an able lawyer as well as a leader in the organized bar, he was a splendid member of the Supreme Court. His wisdom, integrity, and dignity as a justice made him a model for the district and circuit judges of the United States. He has helped to educate all of us.

Judge A. David Mazzone (D. Mass.)

Justice Powell will be missed. His opinions were helpful because they were context-specific. They were thoughtful, careful and disciplined, supported by analogy.

Judge William C. O'Kelley (N.D. Ga.)

Justice Powell's retirement is received with great remorse. We of the trial bench viewed him as a great jurist, lawyer, and above all, a wonderful man. He was the circuit justice for our circuit and he will be missed there. We wish him much happiness in retirement.

Judge Anthony M. Kennedy (9th Cir.)

Justice Powell has made a vast and scholarly gift to our jurisprudence, but even more important is the example he has set for every judge. His belief that the law becomes rich from the case system of adjudication, his warmth and compassion, and his absolute probity all consist with the great traditions of the judiciary of the United States.

Bankruptcy Judge Martin V. B. Bostetter, Jr. (E.D. Va.)

Justice Powell's dedication as a scholar and servant of the law leaves a heritage of which we can all be proud.

LEGISLATION, from page 3

Dan Glickman (D-Kan.) noted in an analysis of H.R. 2182 that in deference to the Rules Enabling Acts, no change is being made by the bill in rule 35(a), but urged the Judicial Conference's Advisory Committee on Civil Rules to address whether rule 35(a) should be amended to include licensed or certified psychologists.

Title I of H.R. 2182 also makes a minor change concerning the temporary release of a person who is hospitalized following an acquittal by reason of insanity for a serious offense. Another amendment permits the transmittal of wagering information from a state where gambling is legal to a foreign country in which gambling is legal.

In other legislative developments

- Senator Howell Heflin (D-Ala.) introduced S. 1482, the Judicial Branch Improvements Act of 1987 (see *The Third Branch*, June 1987, at 2).

- Senator Heflin also introduced S. 951, entitled the Federal Courts Study Act. The bill, like its companion measure in the House, H.R. 1929, would establish a Federal Courts Study Commission, which would, in part, study the jurisdiction of the federal courts, evaluate their "procedures, personnel, business and administration," and "develop a long-range plan for the future of the Federal Judiciary." The commission would have fourteen members, four to be appointed by the President, two to be Senate members, two to be House members, four to be appointed by the Chief Justice, and two to be appointed by the Conference of Chief Justices. The Senate Committee on the Judiciary's Subcommittee on Courts and Administrative Practice held a recent hearing on the measure, at which Judge J. Clifford Wallace (9th Cir.) testified for the bill. Then-director of the FJC A. Leo Levin also testified in an individual capacity before that subcommittee.

- The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice approved H.R. 2553 for full committee action; it authorizes $325 million for the Legal Services Corp. in fiscal year 1988, an increase of about $19.5 million over the current authorization.

- S. 1250, legislation to reauthorize the State Justice Institute for an additional four years, through FY 1992, has been introduced by Sen. Joseph D. Biden and seven members of the Senate Judiciary Committee, Sens. Howell Heflin (D-Ala.), Edward Kennedy (D-Mass.), Howard Metzenbaum (D-Ohio), Dennis DeConcini (D-Ariz.), Patrick Leahy (D-Vt.), Paul Simon (D-Ill.), and Arlen Specter (R-Pa.). The SJI is requesting an appropriation of $12,892,000 for FY 1988.

- A bill that restricts the use of lie detector tests in employment by most private employers cleared the House Education and Labor Committee by a vote of 25 to 9. The bill, H.R. 1212, was introduced by Rep. Pat Williams (D-Mont.), and has 179 cosponsors. The bill would prohibit the use of the tests as a condition for getting or keeping a job, but would not apply to federal, state, or local government employees, nor to persons doing counterintelligence work. H.R. 1212 sets civil penalties for employers who violate the act. Several amendments were offered while the bill was before the committee. Various amendments proposed would have permitted the use of polygraph testing by "security services" businesses, such as the armored-car industry, and by the pharmaceutical industry, day-care centers, and other businesses. The amendments were rejected by the committee, but the full House is expected to consider adding exemptions to the bill's coverage. ■

AO, from page 1

interested in attracting persons to these positions who have had first-hand experience in court operations.

Robert J. Pellicoro, present chief of the Clerks Division, will remain in his present position until Oct. 1, when he will be reassigned. Thereafter he will assist in establishing the division on a sound basis and will also advise senior management in the AO on planning and policy matters.

Director Mecham also announced the appointment of David A. Sellers as public information officer for the AO. Mr. Sellers will be a part of the Legislative and Public Affairs Office, which is headed by Robert E. Feidler. He will handle all media inquiries regarding administration of the federal court system and the activities of the Judicial Conference of the United States.

"Dave brings to the office a solid background in legal journalism as well as a knowledge of the federal court system, which should combine to make him a valuable addition to our office," Mr. Mecham said.

Mr. Sellers spent the past five years with *The Washington Times*. Previously he served as editor of *Bar Report*, the official newspaper of the District of Columbia Bar, and as a public information specialist for the Pennsylvania Department of Justice. ■

CALENDAR

Aug. 3–4 Judicial Conference Committee on the Operation of the Jury System

Aug. 3–5 Circuit Case Initiation and Processing

Aug. 9–11 Judicial Conference Committee on the Budget

Aug. 17–21 Ninth Circuit Judicial Conference

Aug. 19–21 Seminar for Magistrates of the Fifth and Eleventh Circuits

Aug. 24–25 Staff Safety Program

Aug. 24–26 Workshop for Personnel Officers

Aug. 24–28 Orientation for New Probation and Pretrial Services Officers

Aug. 27–28 Staff Safety Program

Aug. 31–Sept. 4 Orientation of New Magistrates

Sept. 8–11 Seminar for Newly Appointed Appellate Judges

NOTEWORTHY

Scope of judicial immunity doctrine. The proper scope of the doctrine of judicial immunity continues to figure in recent court decisions involving personnel decisions of both federal and state judicial officers, and the Supreme Court has granted certiorari in one such case, *Forrester v. White*, 792 F.2d 647 (7th Cir. 1986), *cert. granted*, 107 S. Ct. 1282 (1987). That case poses the issue whether the doctrine of judicial immunity bars a civil action against a judge for demoting and discharging an employee, allegedly because of her sex. The Seventh Circuit in *Forrester* held that the official duties of an Illinois probation officer are inextricably tied to discretionary decisions considered to be judicial acts, and therefore the state judge's decision to discharge the probation officer was entitled to absolute judicial immunity from a sex discrimination claim.

In *Guercio v. Brody*, 814 F.2d 1115 (6th Cir. 1987), the former personal secretary of a bankruptcy judge brought an action for wrongful termination, alleging that she had been discharged in violation of her First Amendment free speech rights. The district court dismissed the case on the basis of absolute judicial immunity. The appeals court, stating that "[t]his case requires us to draw a line between the administrative and the judicial acts of federal judges," held that the actions of the bankruptcy and district court judges in firing the secretary "clearly fall outside a protected judicial act."

In *Ohse v. Hughes*, 816 F.2d 1144 (7th Cir. 1987), Illinois state judges who investigated a chief probation officer's request to discharge a probation officer were held to be involved in a "judicial act" and entitled to judicial immunity. The judges conducted a hearing for the employing court, as required by Illinois statute in cases involving the suspension of probation officers. The hearing "had all the elements of a judicial proceeding," the appeals court noted. The judges conducting it for the court had no interaction with the plaintiff other than that initiated by the plaintiff. Moreover, an Illinois statute expressly provided that probation officers shall be removable in the discretion of the courts appointing them. The opinion, by Senior Judge William J. Campbell, relied on the Seventh Circuit's earlier holding construing the scope of judicial immunity in *Forrester*.

Presentence investigation reports subject to disclosure under FOIA. Two prisoners requested copies of their presentence investigation reports under the Freedom of Information Act. In separate summary judgment motions, the Districts of Arizona and Northern California ordered release of the reports. On appeal of the consolidated cases, the Ninth Circuit affirmed, holding that the reports were "agency records" when they were in the

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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 that ended March 1987.

The report shows that both filings and terminations increased in the 12 regional courts of appeals, with filings nationwide rising by 2 percent to a record high of 34,761 appeals.

The number of civil cases filed in U.S. district courts fell nearly 9 percent compared to the previous 12 months. The reduction in filings has resulted primarily from decreases in two types of actions—suits filed by the U.S. government to recover on defaulted student loans and overpayments of veterans' benefits, which fell by almost 46 percent during the year, and Social Security disability filings, which decreased by 26 percent. Data from recent months, however, have shown that Social Security disability case filings are again on the rise. Asbestos product liability filings rose by nearly 50 percent to 7,786 cases. Petitions filed by state and federal prisoners rose by nearly 11 percent.

The number of criminal cases filed rose by nearly 5 percent to 42,949.

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.

Positions Available

District Executive, S.D. Fla. Salary to $72,500, depending on experience. Provides top-level direction and supervision over personnel and staff coordination, space and facilities, budgeting and accounting, statistics, court security, and office automation. Degree in business, public administration, or law desirable. Submit resume and cover letter by Sept. 14 to Chief Judge James Lawrence King, U.S. District Court, 301 N. Miami Ave., Federal Courthouse Square, Miami, FL 33128.

* * *

Clerk, W.D. Ark. Salary to $53,830. Requires 10 years' administrative experience in public service or business, at least 3 in substantial management position; college or law degree may be substituted for experience. To apply, send 2 copies of resume by Aug. 15 to Clerk of Court, P.O. Box 1523, Ft. Smith, AK 72902.

* * *

Administrative Office of the U.S. Courts.

Chief, Court Administration Div., GS-301-15. Salary from $53,830 to high 60s, depending on experience and prior federal service, if any. Promotion potential to GS-16. Serves as member of the AO's senior staff. Must have experience organizing and directing an organization consisting of multiple functions. *Selective factor:* Knowledge of theories, principles, and functions of court management.

Chief, Clerks Operations Branch, Court Administration Div., GS-301-15. Salary from $53,830 to high 60s depending on experience and prior federal service, if any. Serves as a first line supervisor for a small staff of professionals involved in providing support to clerks' offices. *Selective factor:* knowledge of theories, principles, and functions of court management.

Senior Clerks Administrator (BK), GS-301-12/13/14.

Senior Clerks Program Specialist, GS-301-12/13/14.

Clerks Administrator (General), GS-301-11/12/13.

Please contact Joyce Stanley, (202) 633-6116, for copies of vacancy announcements and application procedures. All applications must be received by Personnel, Administrative Office of the U.S. Courts, by close of business Aug. 21, 1987.

EQUAL OPPORTUNITY EMPLOYERS

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Sentencing Commission, has to devote at least half of his time to the work of the commission, and one other active judge on the court has had a protracted illness and has been able to participate very little.

In what category are most of your criminal cases?

Most are drug cases. We have a *large* number of these. I suppose any circuit in states that have a coastline has some of these massive drug operations. We certainly get a lot in South Carolina; we get them from Maryland, North Carolina, and Virginia also. These are places for importation. I am not prepared to say that there are more than in the Eleventh, or even in the Fifth, but we certainly have enough.

When you have a heavy drug case docket, do you get extra judicial help, as they did in Florida?

No, not from outside the circuit. Our help has always been intracircuit, where we get judges to come from another district. When you couple cases of this type with the Speedy Trial Act, the fact is that the civil docket suffers from inattention, and inescapably so in a lot of cases. It is unfortunate, but I do not know what the answer is except to have more judges.

In general I approve the concept of the Speedy Trial Act. The difficulty is that it has given priority to a given group of cases, and if you get many of these cases in an area where you do not have too much judge power, then the other parts of the docket suffer.

Statistics from the AO show that although the number of appeals filed in the Fourth Circuit increased by more than 4 percent in 1986 over 1985, the number of appeals pending declined by 4.8 percent. To what do you attribute this?

We have a remarkable record, but I am afraid it is not one that we are going to be able to perpetuate. Within this period we had a planned resignation. Judge Sneeden, who had been a member of the court for only a brief period of time, announced some months in advance that he would resign for personal reasons. By that time he had participated in a number of appeals, and he had a number of opinions in various cases assigned to him. We made an extraordinary effort to get him to complete the opinions in cases which were assigned to him and to have the other judges submit opinions to him in the cases in which he was a co-panelist, to avoid the necessity of having to rehear the cases in the event of disagreement between the other two judges. But this was an extraordinary effort, and it is not something which judges can sustain over a long period of time. We had been making an extraordinary effort before, for several years, to keep abreast of a mounting caseload with an inadequate number of active circuit judges to hear the cases. But, here again, I worry that this effort cannot be sustained for too long a period.

"I think that a judge should confine himself to a very limited role in seeking settlements."

Do you and the other judges in your circuit press for settlement and alternative dispute resolution?

Only to a limited extent, and I would like to amplify the reasons for this. I have not pressed vigorously for this, because I think that a judge should confine himself to a very limited role in seeking settlements. Perhaps I am a bit gun-shy from my experience over the years. As a practicing lawyer I had some bad experiences, and resented greatly what I considered to be improper pressure from a judge to settle a case. So when I first came on the court as a district judge, I felt very strongly that while a judge should ask counsel if they had discussed settlement, and require that they at least explore the possibility, he ought not to implicate himself or involve himself into the basis on which a case should be settled or the price to be put on a case and the like. So while I encourage settlements in the abstract, I did not encourage settlements in the concrete.

How much should the judge be involved in settlements?

Harrison L. Winter

I know that some judges have a reputation among the bar as improperly pressing for settlements and in some instances, I regret to say, I think that the reputation is well deserved. The judge should do no more than making sure that counsel have made a genuine effort to reach agreement. He should not set forth the basis on which a case should be settled.

You have been talking about settlements on the trial level. How about the circuit level?

Turning to the appellate level, we have not in the Fourth Circuit done anything or adopted any procedures which are directed to settlement and alternative dispute resolution. I think one of our problems is that, as a circuit where the lawyers are widely dispersed and where transportation is not the easiest in the world, we have considered it impractical or op-

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pressive to bring counsel in a large number of cases before a judge to explore the possibility of settlement. I understand that some courts are doing this by conference call, and I admit that this is a possibility which we have not really considered. I am aware that some courts claim an impressive record on settlement of cases even at the appellate level. Interestingly enough, we have a lot of cases which settle at the appellate level, and I think it is a result of the fact that we monitor filings and pay close attention to scheduling. It is a matter of judgment, of course, not something that one can prove, but I am inclined to think that the marked success with settlement in some of the other circuits results in large part from the fact that there is demonstrated the interest of the judicial officer in what's going on in the case. We do about the same thing, but we do it through the clerk's office by fixing a tight briefing schedule and requiring that parties adhere to the schedule. We supervise very closely the court reporters, so that our transcripts are filed when they are due. In other words, we try to adhere strictly to the time schedule set forth in the appellate rules, and we think this in turn stimulates and encourages settlement.

My basic feeling is that once a case has advanced to the appellate level, the likelihood of settlement is fairly remote. I would think that the chances of settling a case are much greater before final judgment at the trial level, so I do not really think that there is as much demand or need for settlement procedures at the appellate level.

So you feel that a judge should not impose his personality into settlement at all; that it might be interpreted as a little pressure upon counsel?

My experience has been that it is not just a "little" pressure; it is a great deal of pressure, and what I consider to be improper pressure. This is why I am so leery about the idea of having a judge press for settlement. It is a very narrow path that he can follow, and it is very easy for him to over-step it and unduly or improperly influence one of the parties to accept a disposition.

Some judges have suggested the creation of a special court to handle Social Security cases. Do you favor such a court? If created, would it significantly cut down on the Fourth Circuit caseload?

My answer is yes and no as to whether I favor such a court.

On the yes side, I would say that it would have a very favorable impact on our caseload, because we have a high percentage of Social Security cases and black lung cases. However, I would temper my approval with a statement that approval is conditioned upon how the court is created and how the judges are to be selected. At the appellate level, at least in our circuit, there is no doubt about the fact that the Secretary of Health and Human Services—through the appeals council, of course, or through the administrative law judges in Social Security cases—does what appears to be a perfectly miserable job. Not all of these errors are corrected by the district courts, and we have the highest reversal rates for these types of cases of any type of case which comes to us. This has been true for the roughly 20 years that I have been a member of the court. When you talk about a special court, if it is to be an administrative court within the Department of Health and Human Services, I would be very, very strongly opposed. If it were set up as a court something like the U.S. Tax Court, I would be in favor of the proposal. I would not insist that the judges be Article III judges, but they must be completely independent of the executive department and carefully chosen.

"I think it most desirable to have a national court, short of the Supreme Court of the United States, which could decide nonconstitutional conflicts between the circuits."

There is no doubt about the fact that if such a court were created, it would significantly cut down our caseload. The Fourth Circuit gets a fair number of what we call "black lung" cases; that is, coalminers who are claiming benefits because of pneumoconiosis. These are in West Virginia, western Virginia, and some in western Maryland. We also get out-and-out Social Security cases, such as claims for disability benefits from former laborers and textile workers. We have a not inconsiderable Social Security practice and the reversal rate has been tremendously high. So a Social Security court would help us, because obviously to reverse you must not only hear the case, but also write a reasoned opinion as to why the case is reversed, and this takes time.

Do you favor a national court of appeals?

Here again, mine is a yes and no answer. In concept, I favor the idea, because I think it is important, when we have a national government and we supposedly have one set of rules which apply throughout the Nation, that there be a tribunal which can decide conflicts between the circuits. I fully recognize that in this day and age, the Supreme Court of the United States can no longer do this, especially with regard to nonconstitutional conflicts. So from that standpoint, I think it most desirable to have a national court, short of the Supreme Court of the United States, which could decide nonconstitutional conflicts between the circuits. Constitutional conflicts, it seems to me, are more appropriately for the Supreme Court, even in the first instance.

My reservation about the proposed court is, how are the judges going to

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be selected? I am not so concerned about whether they are selected by the Chief Justice or whether they are selected by the President or whether they are selected in some other way, as I am about the fact that they not be selected from the present circuit judges—at least, the circuit judges of the Fourth Circuit—because we are so shorthanded at the moment that I do not think that we could continue to function if we were required to give up one more judge even on a part-time basis.

Have you asked for more judgeships?

We have asked for more. The Judicial Conference of the United States has recommended that we receive four more and the legislation to authorize them has been introduced and is pending before Congress. However, I do not expect anything to happen for the next year or so.

What are your views of the guidelines promulgated by the Sentencing Commission and now before Congress for review? Did you or other judges in your circuit offer criticism when the commission had public hearings?

I know, of course, that the original report of the commission was widely criticized, at least informally, by the judges, and particularly the district judges of the circuit, primarily on the grounds that it removed too much of their discretion in adjusting a sentence to fit a particular situation. I, of course, agree that a sentencing judge should have a fair amount of discretion in this regard, and certainly it is my impression that the final report—that is, the proposal which is now pending before the Congress—restores a great deal of that discretion. I know, nevertheless, that the proposal is also being criticized by some of the district judges in the circuit, again on the ground that too much of their discretion is removed, that the formula for determining a sentence in a particular case is too complicated, and the like. To me, the overall objective of Congress in setting up the commission, in trying to eliminate disparity in sentencing, is a thoroughly commendable one. I have often felt, particularly in the area of prisoner's rights, in cases which have come up under the jurisdiction to issue a federal writ of habeas corpus, that some bad law has been made by some

very tough, very difficult cases, because of exorbitant sentences imposed by state judges, and there is a natural inclination on the part of somebody who views the situation compassionately to find some relief for such an unjust sentence. I do think if the Congress approves the guidelines that there should be a greater delay than November of this year in putting them into effect, because I think all judges are going to need a lot more education, demonstration, and practice on how to apply them properly than we can hope to achieve between now and November.

How do you feel about taking on all the extra work of reviewing the sentences that will now come to the courts of appeals?

Well, I am not asking for additional work, but I have always been in favor of appellate review of sentences. I think that appellate review of sentences can avoid some of the disparity that we are all upset about. I do not welcome the extra duties, but I certainly welcome the authority to review a sentence, particularly where the sentence appears to be out of line for one reason or another.

Fourth Circuit opinions are circulated to all members of the court, including those who did not hear argument, a procedure not followed in all circuits. How long have you had this procedure in effect?

It has been in effect ever since the court grew from three members to five in 1961. It had existed, however, even when there was a court of only three judges, back in the days when I was a law clerk, when there was a senior judge who participated in the work of the court from time to time. So in essence, when you ask me how long has it been in effect, the answer is it has always been in effect.

There are two justifications for the practice at least that I can identify. The first and perhaps the more important one is that it is an effort to achieve continuity in the opinions in the court. And with the court's growth, it is now possible to have two panels of the court presented with the same

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questions to be sitting concurrently without a single judge on either panel being on the other. One of the reasons for circulating the opinions is to avoid the possibility that one panel will decide a question one way and another panel will decide the same question another way. This, I think, I have noticed in viewing opinions, say, of the Ninth Circuit and of the Second Circuit, where this practice has not been followed.

some are not formally briefed and many are decided on the papers, simply on an informal brief from the parties. The opinions in those cases used to be circulated to all of the judges. We found, however, that we had to discontinue our circulation there. We could not keep up with what each other was doing and still do our own work. Circulation is now limited to cases which are put on the calendar for argument.

I am concerned about whether, if

"We recognize the right of . . . judges [who did not sit on the panel] to comment [on opinions], and this is a right which is freely exercised in this circuit and is a very valuable one."

The other reason for doing it is, many times a non-sitting judge, one who is not a co-panelist on the case, will have some thoughts on the subject and will have a legitimate criticism, or somebody who is not thoroughly familiar with the case will find an obscurity in the opinion which he wants to call to the attention of the author. We recognize the right of non-sitting judges to comment, and this is a right which is freely exercised in this circuit and is a very valuable one. For the most part, the comments of non-sitting judges are extremely helpful to those who are charged with the responsibility of deciding the case.

In some of the circuits the opinions are not circulated until they are filed. It is much more difficult to resolve an inconsistency, say, by rehearing a case en banc, and a lot more wasteful to do it that way, than to spot an inconsistency at the deliberations level and attempt to work out some accommodation before any opinion is released.

To comment further on this matter of circulating opinions to all judges, let me say that we initially did it in all cases, including prisoner cases—that is, mostly habeas corpus cases or motions under 18 U.S.C. § 2255, where

and when we ever become a court of 15, we will be able to continue the practice. I would not be a bit surprised if, at that time, the volume might become so great that it will be necessary to sacrifice consistency for expediency and efficiency in deciding cases. When we grow it may be impossible for each of us to keep up with everything that everybody else is doing and still do our own work. Perhaps at that time we may have to limit circulation of opinions to all members of the court to those which will be published, as distinguished from those which are to be unpublished and which under our rules are not supposed to be considered as a precedent.

Roughly what percentage of your opinions are published in a year?

Only about 23 percent are being published at the present time, but that is within the range of the other circuits. The significance of publication is that under our rules an unpublished opinion is not to be cited as authority. It can, however, be referred to by counsel if a copy of it is attached as a supplement to the brief. We are not supposed to cite unpublished opinions, but at times we will make reference to an unpublished opinion in a footnote to indicate the rule that we are now formally deciding on a precedential basis is consistent with what we did in the past.

Although the majority of the court does not share my view, I think that anything that the court does has some precedential value, and parties ought to be free to cite whatever the court does. However, I would draw a line between having great persuasive value and having only minor persuasive value. Thus I would think that an unpublished opinion could be overruled if a later panel in a true adversary proceeding concludes that the previous case was wrongly decided, without the need to convene an en banc court. But as I have said, mine is the minority view on the court and I conform to what the majority has decided.

To what do you attribute the large criminal case filings in the Fourth Circuit district courts—the second highest nationally?

There is an explanation for this which is not apparent on the face of it. We are much higher in the area of misdemeanors, not felonies, and the reason is that first of all we have at

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the cases); the percentage of cases involving sanctions applications; and the practices of courts regarding hearings on sanctions (31.6 percent routinely hold an evidentiary hearing; 73.7 percent routinely hear oral argument).

The report will be distributed by the state bar to all federal judges in New York State. The chair of the subcommittee that produced the report is Shira A. Scheindlin, a former magistrate in the Eastern District of New York, currently in private practice.

Copies of the report, *Sanctions and Attorneys' Fees*, are available by contacting the association at One Elk Street, Albany NY 12207, tel. (518) 463-3200. ■

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least two areas in which misdemeanors frequently occur. Half of the Baltimore–Washington Parkway is a federal road, and as a consequence, if you are guilty of reckless driving or speeding or another serious traffic offense, you are guilty of a federal offense. The same is true of the Eastern District of Virginia where National Airport is located. We even have appeals in a certain number of cases of fights between taxi drivers and the police at National Airport. Also, we have all the military installations in the Eastern District of Virginia, North Carolina, and South Carolina where crimes become federal statistics. Another significant factor is that Virginia, where a lot of these misdemeanors are prosecuted under the Assimilated Crimes Act, classifies as misdemeanors many offenses that other states would treat as petty offenses. So that when you look at our misdemeanor statistics, it does not really mean that we have significantly more misdemeanor cases than our counterparts elsewhere throughout the country. It simply means that we call more things misdemeanors, at least for statistical purposes, than they do. I think you will find that aside from the large criminal cases our criminal load is really not any different from the criminal load in the other circuits. ■

NOTEWORTHY, from page 6

possession of the U.S. Parole Commission, and rejecting the contention of the government that the reports are per se exempt from disclosure under FOIA exemptions three and five (5 U.S.C. §§ 552(b)(3) and 552(b)(5)). While finding that portions of the report may be withheld from disclosure, the Ninth Circuit held that the Parole Commission has a duty under FOIA to release any nonexempt, segregable portions of a presentence investigation report when the request is made by the subject of the report. *Julian v. United States Dep't of Justice*, 806 F.2d 1411 (9th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3831 (June 15, 1987). ■

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New Bureau of Prisons Director Encourages Judges' Interest

J. Michael Quinlan became director of the Bureau of Prisons in July. A Fordham Law School graduate, he holds a master of law degree from George Washington University and joined the Bureau of Prisons as an attorney in 1971. He has been executive assistant to the former director, Norman Carlson; superintendent of a federal prison camp; warden of the Federal Correctional Institution in Otisville, N.Y.; and deputy assistant director and deputy director of the Bureau.

J. Michael Quinlan

Did the position of director bring any surprises with it when you took office?

I have been with the agency for 16 years. I had the opportunity, through Norm's guidance, of not only working for him for three and a half years as executive assistant, but also working for him the last 15 months as deputy director. I have had a good exposure to the major issues facing the Bureau of Prisons and feel very fortunate that I have had that foundation and am inheriting an agency that is in outstanding shape.

During these last 15 months, Norm gradually exposed me to managing the Bureau of Prisons and gave me more and more authority. For example, I recently sat in on some National Institute of Corrections committee meetings. Even though I knew Norm attended a lot of meetings, I wasn't cognizant of the extent of involvement of the director of the Bureau of Prisons.

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House Subcommittee on Criminal Justice Hears Testimony on Sentencing Guidelines

Possible delay of the Nov. 1 implementation date for the U.S. Sentencing Commission's sentencing guidelines was a major issue at recent hearings before the House Judiciary Committee's Subcommittee on Criminal Justice, chaired by Rep. John Conyers, Jr. (D-Mich.).

The commission transmitted its guidelines to Congress Apr. 13. They will take effect Nov. 1 unless Congress enacts a delay. The Executive Committee of the Judicial Conference has proposed a delay until November 1988 to allow more time for testing and education. The Administrative Office has transmitted to Congress the text of a proposed amendment that would delay the effective date of the guidelines by one year and solve any "ex post facto" problem by specifying that the guidelines apply only to cases in which the criminal conduct was committed after their effective date.

Members of the Sentencing Commission, including its three judicial members—Chairman William W. Wilkins, Jr. (4th Cir.), Stephen Breyer (1st Cir.), and George E. MacKinnon (D.C. Cir.)—testified July 23 in support of the commission's guidelines, but repeated the commission's proposal to delay their implementation until Aug. 1, 1988. Judge Jon O. Newman (2d Cir.) testified July 22 in favor of the guidelines, suggesting that a six-month, or at most a nine-month, delay in their implementation was enough, stating that a longer delay period was "not advisable."

See GUIDELINES, page 2

Judiciary Celebrates Bicentennial of United States Constitution

The federal judiciary is engaged in a "regular kaleidoscope" of projects and activities to mark the bicentennial of the Constitution, in the words of Chief Judge Howard T. Markey (Fed. Cir.), chairman of the Judicial Conference Committee on the Bicentennial.

The many forms that the judiciary's observance of the Bicentennial has taken include various circuit judicial conferences focusing on the Constitution, including the Third Circuit Fiftieth Judicial Conference in conjunction with the major celebration in Philadelphia Sept. 16–18; special naturalization ceremonies; poster-bearing kiosks in courthouse lobbies; cassettes of the five-film series "Equal Justice Under Law" shown in courthouses to waiting jurors and attorneys; a judge-authored opera; judges speaking and conducting mock trials in schools and courtrooms; debates on constitutional interpretation; speeches at service clubs; court-sponsored essay contests; recorded constitutional messages played in court lobbies and on TV; and distribution of copies of the Constitution.

Chief Judge Markey said that these and other activities reflect the wide variety of efforts under way within the judiciary as it participates in what Chief Justice Warren E. Burger (ret.), chairman of the national Commission on the Bicentennial of the U.S. Constitution, has described as a national "civics lesson" from which all can learn.

The Judicial Conference Committee and local court committees have worked with the national commission, for example, in connection with the traveling exhibition on the Magna Carta.

On Celebration of Citizenship Day, Sept. 16, President Reagan, Chief Justice Burger (ret.), Supreme Court Justices, Senators, Representatives, and District of Columbia area school children will gather on the steps of the Capitol. Through nationwide hook-ups, courts, state legislatures, and private businesses will be joining in national ceremonies and conducting their own local programs honoring the Constitution on Celebration of Citizenship Day.

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Other witnesses, such as Judges Gerald W. Heaney (8th Cir.) and Gilbert S. Merritt (6th Cir.), expressed serious reservations about the guidelines.

Commission members Ilene H. Nagel, Judge William W. Wilkins, Jr. (chairman), and Helen G. Corrothers (left to right) listen to the testimony of fellow commissioner Judge George E. MacKinnon.

Judge Heaney questioned whether the guidelines would eliminate sentencing disparity but suggested they would increase the federal prison population, appellate workload, and plea bargaining. Judge Merritt favored a delay in the implementation of the guidelines, during which a pilot project of field-testing them would be conducted.

Judges Gerald B. Tjoflat (11th Cir.) and A. David Mazzone (D. Mass), members of the Judicial Conference Ad Hoc Committee on Sentencing Guidelines, appeared before the subcommittee to present the Judicial Conference Executive Committee's request for a 12-month delay.

Judge Tjoflat, chairman of the Committee on Administration of the Probation System of the Judicial Conference and a member of the FJC Committee on Sentencing Guidelines Education, stressed to the subcommittee that "the probation officer will play a significantly different and more time-consuming role" under the new law, thus requiring "extensive" training.

Judge Mazzone, chairman of the FJC Committee on Sentencing Guidelines Education, described the extent of the education and training that will be required for probation officers, judges, magistrates, staff attorneys, and federal public defenders. He pointed out that each district will have to amend its local rules to provide a procedure for the sentencing hearing, and that a way will have to be found to ensure that the courts of appeals get transcripts in non-Criminal Justice Act cases. In addition, he pointed out that the courts of appeals will need an expedited procedure for processing appeals, lest the sentence expire prior to appellate review. Judge Mazzone also expressed concern about the potential strain on judicial resources as a result of the guidelines.

Judge Edward R. Becker (3d Cir.), also a member of the Committee on Sentencing Guidelines Education, shared many of Judge Mazzone's views, calling for a nine-month implementation delay.

Samuel J. Buffone, a representative of the ABA, urged a 24-month delay in implementation of the guidelines to allow for their refinement and for education of the bench and bar.

Judges Gilbert S. Merritt, Gerald W. Heaney, and Jon O. Newman join former judge Marvin E. Frankel and Rep. John Conyers, Jr. (left to right) in a discussion prior to the hearing.

The subcommittee also heard testimony from former District Judge Marvin E. Frankel of New York, who supported the guidelines process, and from other witnesses. Judge Thomas A. Wiseman, Jr. (M.D. Tenn.) has also testified before the subcommittee, and Judge G. Thomas Eisele (E.D. Ark.) is scheduled to testify at a later date.

Senator Alan J. Dixon (D-Ill.) has separately introduced a bill to extend by 18 months the effective date of the sentencing guidelines. ■

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LEGISLATION

Prior to its August recess, Congress considered or voted on a number of measures of interest to the judiciary.

- The House passed H.R. 2763, the FY 1988 appropriations bill that includes the judiciary. The appropriations for the courts of appeals, district courts, and other judicial services were cut from $1,374,378,000 to $1,288,660,000, a 6 percent reduction. Before passing H.R. 2763, the House also voted in favor of an additional 2.4 percent cut in the $14 billion measure. The cuts in their entirety are being appealed to the Senate Appropriations Committee.
- Although the House Appropriations Committee approved a provision to abolish diversity of citizenship as a basis of federal court jurisdiction, the full House struck the provision from H.R. 2763 (see above) on a procedural point against including policy-changing legislation in an appropriations measure. Rep. Robert W. Kastenmeier (D-Wis.), chairman of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice, stated that his subcommittee will try to report legislation on diversity jurisdiction, similar to the legislation that was stricken by the House.
- New language amending Fed. R. Crim P. 30 and Fed. R. Civ. P. 51 became effective Aug. 1. The rules changes provide that a "court may instruct the jury before or after the arguments are completed or at both times." The language modifying the rules was transmitted to Congress Mar. 9 by the Chief Justice on behalf of the Supreme Court, and under the rules amendment process was scheduled to take effect Aug. 1 unless Congress voted otherwise. The House Judiciary Committee's Subcommittee on Criminal Justice held an oversight hearing in July on the proposed changes, at which Stephen A. Saltzburg, the reporter of the Judicial Conference's Advisory Committee on Federal Rules of Criminal Procedure, testified that the proposed amendments would provide judges with enhanced flexibility in instructing jurors. An ABA

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200 Years Ago...

September 1787: On Sept. 8, the convention elected a "Committee of Style" to write a final draft of the Constitution from the draft it had been debating since early August. The five-member committee, whose chief pen probably belonged to Gouverneur Morris (Pa.), worked numerous stylistic changes and two of a more substantive nature.

First, the preamble reported in August would have proclaimed that "We the people of the States of New Hampshire [etc., listing all thirteen] do ordain, declare and establish the following Constitution for the government of ourselves and our posterity." As the convention had since decided that any nine states could ratify the Constitution, it was necessary to omit mention of the individual states in favor of "We the people of the United States . . . ," to which Morris added an itemization of constitutional goals.

Second, the committee's draft in Art. I, § 10, prohibited the states from passing "laws altering or impairing the obligation of contracts," a provision the convention approved with slight change—even though it had rejected such a provision in late August.

On Sept. 17, the convention approved the Constitution, which Washington sent to the Congress, requesting that it be submitted for ratification and noting that it was "the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable."

BICENTENNIAL OF THE U.S. CONSTITUTION

Center Invites Courts to Report Innovations in Judicial Management

In meeting its statutory mandate that it further "the development and adoption of improved judicial administration in the courts of the United States," 28 U.S.C. § 620(a), the Center at times brings together one court with a problem and another court that has found a solution to that problem.

Center efforts in this regard take a number of forms. They include Research Division reports on court innovations, with specific details on the operation and administration of such programs. *Partial Payment of Filing Fees in Prisoner In Forma Pauperis Cases in Federal Courts: A Preliminary Report* (1984) covered the Northern District of Ohio's requirement of partial payment of filing fees to discourge frivolous filings by prisoners; the report, including locally produced forms, serves as a kind of how-to-do-it manual for other courts. *The Joint Trial Calendars in the Western District of Missouri* (1985) is another example of similarly documented experience, reporting on a joint trial calendar used there to avoid or reduce calendar congestion.

Staff of the Research Division who learn how individual courts are dealing with particular problems can serve as valuable sources of information to other courts within the system. Moreover, information on locally generated responses to problems is also conveyed through the Center's Information Services Office in response to specific information requests.

For the Center to disseminate information about innovative approaches developed by courts in areas of court administration and management, it must first learn of innovations that have been tried and proved successful. The Center, therefore, invites all members of the judicial family to report innovations that have been effective in resolving problems that might affect other courts. ■

Boadwine Named Circuit Executive for 8th Circuit

Ms. Boadwine is sworn in by Chief Judge Lay.

Chief Judge Donald P. Lay (8th Cir.) has announced that the Judicial Council of the circuit has appointed June L. Boadwine of St. Paul, Minn., as circuit executive.

Ms. Boadwine is a native of Watertown, S.D. She served as an assistant and office manager for a Watertown law firm and then as executive secretary to Judge Myron H. Bright (8th Cir.). In 1983, she became administrative assistant to Chief Judge Lay, and in October 1985 was appointed acting circuit executive. Ms. Boadwine is a graduate of the Institute for Court Management.

PERSONNEL

Nominations

David C. Treen, U.S. Circuit Judge, 5th Cir., July 22
Michael B. Mukasey, U.S. District Judge, S.D.N.Y., July 27
William L. Dwyer, U.S. District Judge, W.D. Wash., July 28
Sam R. Cummings, U.S. District Judge, N.D. Tex., July 31
Richard L. Voorhees, U.S. District Judge, W.D.N.C., July 31
Wade Brorby, U.S. Circuit Judge, 10th Cir., Aug. 7
Robert E. Cowen, U.S. Circuit Judge, 3d Cir., Aug. 7
Stephen S. Trott, U.S. Circuit Judge, 9th Cir., Aug. 7
Richard J. Arcara, U.S. District Judge, W.D.N.Y., Aug. 7
Nicholas H. Politan, U.S. District Judge, D.N.J., Aug. 7

Confirmations

Larry J. McKinney, U.S. District Judge, S.D. Ind., July 17
Philip M. Pro, U.S. District Judge, D. Nev., July 22
William D. Hutchinson, U.S. Circuit Judge, 3d Cir., Aug. 5
Anthony J. Scirica, U.S. Circuit Judge, 3d Cir., Aug. 5
T. S. Ellis, III, U.S. District Judge, E.D. Va., Aug. 5
Charles R. Wolle, U.S. District Judge, S.D. Iowa, Aug. 5
John D. Tinder, U.S. District Judge, S.D. Ind., Aug. 7

Appointments

Michael S. Kanne, U.S. Circuit Judge, 7th Cir., May 21
Reena Raggi, U.S. District Judge, E.D.N.Y., May 26
Ronald S. W. Lew, U.S. District Judge, C.D. Cal., May 29
Joseph P. Stadtmueller, U.S. District Judge, E.D. Wis., June 1
Richard J. Daronco, U.S. District Judge, S.D.N.Y., June 8

Resignation

Susan Getzendanner, U.S. District Judge, N.D. Ill., Sept. 30

Senior Status

Donald R. Ross, U.S. Circuit Judge, 8th Cir., June 13

Deaths

H. Kenneth Wangelin, U.S. District Judge, E.D. Mo., June 10
William Ray Overton, U.S. District Judge, E.D. Ark., July 14

NOTEWORTHY

Supreme Court strikes down district court bar residency requirement. The Supreme Court has invalidated local rules of the Eastern District of Louisiana that required residence or the maintenance of an office in Louisiana as a condition of admission to and continued membership in the bar of the district court. *Frazier v. Heebe*, 55 U.S.L.W. 4877 (June 19, 1987). Frazier, who lived in and maintained his law office in Mississippi, petitioned for a writ of prohibition from the Fifth Circuit, alleging that the restrictions contained in the local rules were unconstitutional. The Fifth Circuit remanded to the Eastern District, all the judges of which recused themselves. The matter was assigned to Judge Edwin Hunter (W.D. La.), who denied Frazier's petition for extraordinary relief and dismissed the suit after a one-day bench trial. The Fifth Circuit affirmed, finding that the discrimination at issue did not warrant heightened scrutiny, and holding that the exclusion of such attorneys was rationally related to the district court's goal of promoting lawyer competence and availability for hearings. The Supreme Court reversed. Pursuant to its supervisory authority, it invalidated the local rules, finding that both the residency and in-state office requirements were "unnecessary" and arbitrarily discriminated against out-of-state practitioners.

Third Circuit task force on rule 11 sanctions. Chief Judge John J. Gibbons (3d Cir.) has established a task force to study the implication of sanctions under Fed. R. Civ. P. 11. The group is chaired by Chief Judge John P. Fullam (E.D. Pa.). University of Pennsylvania Law Professor Stephen B. Burbank is the reporter. Other members include Judge Alan N. Bloch (W.D. Pa.); FJC Director Emeritus A. Leo Levin of the University of Pennsylvania Law School; Third Circuit Executive William K. Slate II; New York University Law Professor Linda Joy Silberman; Melville D. Miller, Jr., director of New Jersey Legal Services; and attorneys from Delaware, New York, Pennsylvania, New Jersey, and Illinois. Persons interested in bringing rule 11 issues to the attention of the task force are invited to contact Mr. Slate. The task force will also consider the effect of sanctions under Fed. R. Civ. P. 26(g).

See NOTEWORTHY, page 5

LEGISLATION, from page 3
representative testified in opposition to the proposed changes. Following the hearing, Congress took no action to prevent the rules changes from taking effect as scheduled.

The House Judiciary Committee's Subcommittee on Criminal Justice also held an oversight hearing on amendments to the RICO chapter of 18 U.S.C.

- A hearing was held on two Senate bills introduced by Sen. Howell Heflin (D-Ala.), chairman of the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice, which would provide counsel the opportunity to question prospective jurors in both civil and criminal cases. S. 953 would amend Fed. R. Civ. P. 47(a) and S. 954 would amend Fed. R. Crim. P. 24(a) to require the federal courts to permit counsel to participate in voir dire. The Judicial Conference opposes the proposed amendments, while the ABA and the National Association of Criminal Defense Lawyers support them.

- Three bills have been introduced that are intended to reverse or limit *Pulliam v. Allen*'s effect on judicial immunity. Sen. Heflin and Sen. Orrin Hatch (R-Utah) introduced S. 1515, intended to address both the attorneys' fees and injunctive relief aspects of *Pulliam*. The bill would amend 42 U.S.C. § 1988 and 42 U.S.C. § 1983. Another bill, S. 1512, was introduced by Sen. Hatch with Sen. Strom Thurmond (R-S.C.) and Sen. Heflin as cosponsors. It addresses only the attorneys' fee issue raised by *Pulliam*, by proposing to amend § 1988.

Finally, § 614 of S. 1482, the Judicial Branch Improvements Act of 1987, would also limit the *Pulliam* holding as to attorneys' fees, as recommended by the Judicial Conference. The act also incorporates a number of other Judicial Conference recommendations (see *The Third Branch*, June 1987, at 2, and August 1987, at 5).

- S. 548, passed by the Senate, includes a provision amending the 1986 bankruptcy legislation (Pub. L. No. 99-554) to make clear that bankruptcy cases filed under Chapter 11 by family farmers prior to the enactment of the 1986 act can be converted from Chapter 11 to Chapter 12 filings (see *The Third Branch*, July 1987, at 7).

- H.R. 3002, to amend ch. 215 of 18 U.S.C. to provide certain rights for persons who are subject to grand jury investigation, was introduced by Rep. Harold Ford (D-Tenn.).

- During consideration of funding for the National Childhood Vaccine Injury Act (see *The Third Branch*, Feb. 1987, at 2), lawmakers at the subcommittee level of the House Committee on Ways and Means expressed reservations about funding the act beyond the extent of cases in which the injury has already occurred. ■

NOTEWORTHY, from page 4

Judicial immunity. The doctrine of judicial immunity applies to a board of bar examiners and a character and fitness committee, the Sixth Circuit affirms. An unsuccessful applicant to admission to the bar in Kentucky brought an action under 42 U.S.C. § 1983 against the Kentucky Committee on Character and Fitness, its members, two of its employees, a member of the Board of Bar Examiners, and the chief justice of Kentucky's Supreme Court. The plaintiff alleged, inter alia, that his substantive and procedural due process rights had been violated. He alleged that when he was first a candidate for admission to the Kentucky bar, an associate member of the character and fitness committee who had interviewed him addressed a letter to the State Board of Bar Examiners stating that the applicant was not possessed of the requisite character and fitness. The applicant claimed to have no knowledge of this recommendation, and proceeded to take the bar exam four times.

The district court concluded that the functions of the Board of Bar Examiners and the character and fitness committee "cannot be divorced from the actions of the Supreme Court of Kentucky," that their activities were "clothed with judicial immunity," and dismissed the complaint. The Sixth Circuit affirmed, both as to the chief justice and as to the non-judge defendants. "The act of considering an application to the bar is a judicial act. And it is no less a judicial act simply because it is performed by nonjudicial officers . . . on behalf of the judiciary," the Sixth Circuit held. *Sparks v. Character & Fitness Comm.*, 818 F.2d 541 (6th Cir. 1987). ■

New FJC Study Finds Decrease in Summary Judgments

The number of summary judgments under Federal Rule of Civil Procedure 56 appears to have decreased in recent years, at least prior to three recent Supreme Court decisions clarifying the standards for summary judgment. A study recently published by the Center, *Summary Judgment Practice in Three District Courts*, by Joe Cecil and C. R. Douglas, found that although summary judgment motions were filed in approximately the same percentage of cases in early 1986 as in 1975, the percentage of cases terminated by summary judgment decreased by approximately one-half over the 11-year period examined.

The study also found that summary judgment motions by defendants are far more common than summary judgment motions by plaintiffs and are especially common in multiparty cases. Approximately one-third of the motions are granted in whole or in part, one-third are denied, and no action is taken by the court in the remaining third. A review of findings in other studies indicated that summary judgments are reversed on appeal at a rate that closely approximates the overall rate of reversal for all civil appeals.

After these data were collected, several decisions by the Supreme Court clarified the standards for summary judgment in a way that may result in an increase in summary judgments. The findings presented in this 12-page paper provide a measure against which any such change may be assessed.

Copies of the paper can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed unfranked mailing label, but do not send an envelope.

QUINLAN, from page 1

Did you have any specific changes in mind when you became director?

Norm has left the agency in great shape, to build upon, not to really change. Some of the things that I am emphasizing in my early days as director would have changed even if Norm were still here. He was part of the process and very much supported these changes.

My biggest concern is the growing inmate population. In 1981, our population was 24,000; today it is 44,000. The Bureau of Prisons has grown 83 percent in six and a half years and is now 58 percent over its design capacity. The projections with the sentencing guidelines and the Anti-Drug Abuse Act indicate that there may be as many as 100,000 people in federal prisons by 1997. What we are trying to do is not only ensure that we have the resources to house these people, but more importantly to ensure that we have the best staff to manage the facilities we will have to operate. My major initiative since becoming director, and part of the time as deputy director, has been a new emphasis on human resource development—emphasizing new techniques in recruitment, new programs for training, and, most importantly, new career development programs that will enable the Bureau of Prisons to identify at the earliest possible stage the potential managers and leaders of tomorrow, give them training opportunities and cultivate them to the point where they can become leaders. Most of our training is done in Glynco, Ga., at the Federal Law Enforcement Training Center. We have excellent instructors that train all new employees for three weeks—three weeks of training for every new employee in the Bureau of Prisons, whether they be a correctional officer, a doctor, a chaplain, a teacher, a secretary. This training includes self-defense, firearms, and training in interpersonal relationships.

What continuing training do employees get?

Every year employees receive 40 hours of training at their institution. There are also other training programs offered—supervision courses for new managers and specialty training for case managers, unit managers, and security officials.

Our primary emphasis is on security, obviously. We can't become complacent about our initial responsibility to deal with the security and safety of institutions. But we also must train people, as they move up the ranks, in how to manage, how to develop, how to motivate, how to encourage and train other people to do the kinds of things that are necessary in an institution to make it safe and humane.

Did you have an opportunity to have some input into the sentencing guidelines?

Norm had an opportunity to testify on the guidelines process. He was generally supportive of the process, but concerned that prisons be reserved for those most needing confinement: the violent and those who commit the most serious crimes. I had an opportunity to testify before the commission on the issue of the death penalty, which we support for those inmates already serving multiple life sentences who murder again while in prison.

We have also had a dialogue on almost a weekly basis with Judge Wilkins, Michael Block, Helen Corrothers, and other members of the commission on different issues that relate to the Bureau of Prisons, particularly the impact of the guidelines on our population, the kinds of prisons that might be needed, and things of that nature. We also have a staff member detailed to the commission on almost a full-time basis to work on the issue of population projections.

"My biggest concern is the growing inmate population. In 1981, our population was 24,000; today it is 44,000."

What is your stand on privatization?

We have been involved in privatization for a long time in terms of private operation of halfway houses. We have 3,200 federal prisoners currently serving time in privately run halfway houses. We also have been using private contracts for a number of years for housing specialty-type offenders—females, juveniles, sentenced aliens. We combine our efforts with those of the Immigration Service in Texas and Colorado for the housing of

sentenced aliens, and we contract out certain functions such as medical and food services.

We have had mixed experiences in both of these areas, but we are willing to pursue privatization further. One of the initiatives that the administration is looking at and analyzing is the services offered by the private sector. At this point, no one has any experience doing what we do in terms of providing medium or maximum security prison operations. All of the efforts in privatization have been at the lower end of the security spectrum, at the minimum security level. And the analyses that we have done have shown that we can do it more cost-effectively because of our staff to inmate ratio. The cost of feeding is very low; we average about $2.35 a day per inmate in institutional feeding. We have found that comparing all the costs, including capitalization, depreciation, staff retirement, and overhead cost in the central and regional offices—when you add all those in, we are still 20 percent under the costs available in the private sector. So, in looking at privatization, we have found that nobody is yet ready or able to compete with us in a cost-effective manner.

There are some very serious policy questions involved in the privatization issue: whether it is legal, whether, as a policy initiative, we want to do it. American University Professor Ira Robbins has been studying the privatization of corrections as part of the ABA Criminal Justice Committee, and we expect a report some time later this year.

What is the Bureau's relationship to the National Institute of Corrections?

The National Institute of Corrections, as a part of the Bureau of Prisons, is able to provide training to a couple of different target groups—primarily to mid-level managers as they become potential leaders of state and local correctional agencies. They also focus on training trainers, so that state personnel can go back and train others. They have a technical assistance responsibility by which they provide an expert to a state or local government to improve, for example, security, case management, unit management, or prison design. They have been focusing a lot of their attention most recently on two very critical issues—AIDS and overcrowding.

How much input does the Bureau have in designating the place of incarceration of a convicted defendant?

We—the attorney general and the director of the Bureau of Prisons—have the authority to designate where a prisoner is going to serve his or her sentence. Many times judges call before sentencing and they make recommendations. They say, "If I sentence this fellow to 15 years, and he's got this kind of a history, where would you want to put him?" or "Would you mind if I recommended that he go to Fort Worth?" We look at the case and call the judge back and say, "Fort Worth would be fine," and the judge will recommend Fort Worth. But generally speaking, most judges will not call first; all they will do is make a recommendation, which we will always try to fulfill and honor. But there are cases in which we cannot do that. There may be people at the prison recommended by the judge who would be a threat to that prisoner, or the prison may not provide enough security based on our analysis of the prisoner's security needs, or there may be a medical problem that needs to be addressed in one of our medical facilities. If we cannot honor the court's recommendation, we will write the judge and explain our reasons.

Will the Bureau be recommending that more prisons be built?

The Department of Justice will be recommending to the Office of Management and Budget and to the Congress additional building to meet the overcrowding that we have. We have already received new resources to cope with the problem of growth. In fact, since 1981, we have added 4,500 beds to our capacity. In addition, we

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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.

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See SOURCE, page 10

QUINLAN, from page 7

have 7,000 beds currently under construction, including 7 new institutions, and we have 2,400 additional beds in our FY 1988 budget request pending before the Congress.

For the most part, our cells are designed for one person; however, almost universally around the federal prison system, there are now two people in those rooms except at the highest level security facilities, such as Marion, and at other penitentiaries.

Part of the FJC orientation program for newly appointed judges includes a day at a federal correctional facility. Does the Bureau make other arrangements for judges to visit prisons?

Well, there are a number of judges who really are very active in visiting federal institutions. I would like to encourage judges to visit more of our institutions, in addition to those they are exposed to when attending Sentencing Institutes. I would like to encourage judges to take the time because I think a very important part of the relationship between the federal judiciary and the Bureau of Prisons is their understanding of exactly what our role is, how we carry out our duties and responsibilities and how the prisoners are living in terms of the sentences that they impose. I think that it is very important that judges have a comfortable feeling about how the prisoners are being housed.

I would say that for the most part people in general do not understand what prison life is like, particularly life in federal prison. Our reputation, and the expectation, I suppose, of what prison is like is based solely on television and movie depictions of correctional institutions. Sometimes correctional staff are depicted in a very negative way, and it is important that we show as many people as possible, particularly federal judges, what a professional organization this is and how proud we are of the job we do.

I intend to write to all new federal judges and invite them to come and visit our institutions. I also intend to send at the end of each year a "state of the Bureau of Prisons" report to all federal judges, or at least to those who express an interest in having that kind of report, in which I can bring them up to date on where we are in terms of our population, in terms of the problems, in terms of AIDS, in terms of drug programming and things of interest to the court, study and observation cases—how many we have done, etc.

"I would like to encourage judges to visit more of our institutions."

We also have, through the Sentencing Institutes that we participate in with the Judicial Center, active involvement in trying to meet as many members of the judiciary as possible. We encourage them to call us if they have questions or concerns.

The press sometimes refers to "country club" incarceration. Is there such a thing?

I have been superintendent of a facility in Florida known as Eglin Air Force Base Federal Prison Camp, and people have called Eglin a "country club." But I never met a prisoner who served time in that facility, nor have I ever heard from anyone, who said that they wanted to come back. I think inmates respect the fact that we treat them as human beings and that they are given an opportunity to work and to have recreation and to participate in education programs. The environment may look good, but deprivation of freedom is central to what prison and removal from society is all about—and nobody volunteers to come in.

How has AIDS affected the Bureau's mission?

First of all, AIDS has not been a major problem thus far, although from all projections, it is going to become a greater problem in the future. Since 1981, when statistics were first kept on inmates with AIDS, we have had a total of about 80 people in federal prisons who have had AIDS, most of whom have subsequently died or been released. We have now about 25 men and women in federal prison who have AIDS. We also have an additional group who have AIDS-Related Complex (ARC), and we also have prisoners who have been tested and have been found positive for the HIV virus [the virus suspected of causing AIDS]. That group—the ARCs and the positives for the virus—amounts to about another 200 prisoners out of the 44,000 total in the system.

As of June 15, we began testing all newly received sentenced prisoners and all prisoners 60 days before release. The results of those tests are just starting to come in, so we do not have any data yet. However, it is expected that we will continue the tests on all newly received sentenced prisoners through the end of September and that we will then evaluate whether we should continue that program.

At this point, we only separate those prisoners who have the full-fledged illness. If they are male, they are housed at our medical center in Springfield, Mo., and if they are female, at the medical center in Lex-

ington, Ky. All of the prisoners who have the virus, or those who have ARC (which means that they have had a symptom of the disease but it is now in remission) are kept in the prison where they first developed the problem. If it is a security problem in terms of it being too widely known that they have the disease, then they are transferred to another facility. At this point we are maintaining that those prisoners should be kept in the mainstream of the prison population. We do not advertise the fact that they are positive or that they have ARC. We keep it confidential except from the doctor, the captain, the warden, and other key staff. We also will tell the probation officer and the community program manager when the prisoner is about to be released. For the most part we have not had a problem. We have had a couple of isolated cases where an inmate has bitten a staff member—one such prisoner was recently convicted of assault.

There is always new information on how many prisoners are infected. We are successful now in mainstreaming, but we may at some time get to the point where we have to do more in terms of separation. One of the things I would like to point out is that of all the AIDS and ARC cases that we have had thus far over 90 percent have been related to drugs and not homosexuality. The reverse is true in the community at large, where only a small percentage have been related to intravenous drug abuse, and the majority has been related to homosexual or bisexual activity. When you think of AIDS in prison, you have to recognize the fact that over 50 percent of the people who are coming into federal prisons these days have drug histories. And many of them have prior IV drug histories, where they used drugs through needles. That's where we are going to face our biggest challenge, in dealing with these prisoners.

We developed over a year ago a mandatory AIDS training program. Every staff member and every inmate is shown this 30-minute videotape about how AIDS is transmitted, and how it can be prevented. When we find prisoners are infected with the disease we offer counseling from two perspectives: We want to record their progress and counsel them from a medical and psychological perspective.

Up until recently we did not test inmates for AIDS when they entered prison. But if a prisoner was being treated in a hospital for a cold that would not go away, the doctor might say, "I am very suspicious, this cold has been with you for two months. I am going to test you for AIDS." At that point, if the tests came back positive, the doctor and the psychologist would start counseling that individual. They would make sure he was aware of the kinds of things that must be done from a medical standpoint: how you can prevent transmission, how it could be transmitted to others, how to deal with it from a mental health and psychological standpoint, and how to cope with the fact that you have the disease or may get it. We emphasize counseling because there is no treatment.

"As of June 15, we began testing all newly received sentenced prisoners [for AIDS] and all prisoners 60 days before release. . . . When you think of AIDS in prison, you have to recognize the fact that over 50 percent of the people who are coming into federal prisons these days have drug histories."

But of the 44,000-plus prisoners, would it be true that the vast majority have never been tested for AIDS?

A year and a half from now, the vast majority *will* have been tested if we continue, which I expect we will, this testing program. I am not saying we *are* definitely going to do it.

If a prisoner has a positive test result, nothing really has changed. There is no treatment provided; you can only counsel the individual. But you run the risk when you identify the person of making that individual a possible victim. If it becomes known that he is virus-infected, he could become a victim of attack or assault. These are the dilemmas we are trying to anticipate and prevent. ■

SOURCE, from page 7

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CALENDAR

Sept. 8–11 Seminar for New Appellate Judges

Sept. 14–18 Orientation for New Probation & Pretrial Services Officers

Sept. 15–16 Staff Safety Program

Sept. 16–18 Third Circuit Judicial Conference

Sept. 16–18 Bankruptcy Case Management

Sept. 21–22 Judicial Conference of the U.S.

Sept. 28–30 Workshop for Judges of the Seventh Circuit

Oct. 4–6 Claims Court Conference

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OCTOBER 1987

Assistant Attorney General Willard Discusses Settlement, Tort Reform, Administration Policies

Richard K. Willard is a graduate of Emory University and Harvard Law School. He was in private practice in Texas before coming to the Justice Department in 1981 as counsel for intelligence policy. After one year's service as deputy assistant attorney general, he was appointed assistant attorney general in charge of the Civil Division in 1983.

Richard K. Willard

You attended the conference on alternative dispute resolution sponsored by the Administrative Conference of the U.S. How enthusiastic are you about negotiated rulemaking and other innovations for achieving settlements?

We have been very open to innovations along these lines and have tried to be cooperative. A lot of people don't realize that there is already a good bit of alternative dispute resolution in some areas of our litigation. For example, there is an elaborate administrative process under the Federal Tort Claims Act in which many claims are resolved before litigation ever results. We have also promulgated guidelines for the use of minitrials in some of our commercial disputes, and we certainly are interested in trying other approaches to the problem.

Sometimes people will raise questions as to why we do not settle more

See WILLARD, page 6

Congress Returns to Agenda That Includes Omnibus Court Reform, Possible RICO Changes

The following legislative items of interest to the judiciary were introduced before Congress recessed in August:

- Rep. Robert W. Kastenmeier (D-Wis.) introduced H.R. 3152, the Omnibus Court Reform Act of 1987. Certain features of the bill are parallel to some sections of the Judicial Branch Improvements Act of 1987, S. 1482 (see *The Third Branch*, August 1987, at 5). The bill would, in part

abolish the mandatory appellate jurisdiction of the Supreme Court;

increase the jurisdictional amount for federal diversity jurisdiction purposes from $10,000 to $50,000, allow certain multi-state/multi-party cases to be heard in federal courts, and modify the definition of citizenship for diversity cases for corporations;

reduce civil filing fees from $120 to $90, and impose the fee on the U.S. government; the Judicial Conference would be authorized to set fees every five years, provided that increases are no more than one-third of then-existing rates;

eliminate the requirement for mandatory annual circuit judicial conferences; and

authorize pilot court-annexed arbitration programs for five years.

- Sen. Howell T. Heflin (D-Ala.) introduced S. 1630, a bill to provide for enhanced retirement and survivor's annuities for bankruptcy judges and magistrates and for other purposes. The bill is similar to H.R. 2586, which

See LEGISLATION, page 10

ABA Acts on Judicial Screening Committee, Grand Jury Principle

A number of issues were discussed at the American Bar Association annual meeting that are of interest to the federal judiciary.

The Standing Committee on the Federal Judiciary, the group that investigates and rates candidates for Article III judgeships, has been increased from 14 to 15 members to include a representative from the Federal Circuit. Traditionally this committee has had one member for each of the circuits (plus a second member for the Ninth Circuit and one at large) but until now there has been no member for the Federal Circuit. In making the request the committee cited increased workloads.

A resolution of the Section on Patent, Trademark, and Copyright Law was approved asking that nominees for appointment to the U.S. Court of Appeals for the Federal Circuit "reflect consideration of the Court's exclusive appellate jurisdiction over all patent cases; the number, size, and complexity of the patent cases before the Court, and the time spent by the Court's judges on patent cases."

The ABA House of Delegates also:

- Adopted a principle related to alleged grand jury abuse. For many years the ABA has taken stands on

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Inside . . .

Fifth Circuit Holds En Banc That Magistrates Cannot Preside Over Felony Jury Selection

A magistrate may not preside over the selection of the jury in felony cases under 28 U.S.C. § 636(b)(3), the Fifth Circuit has held. *U.S. v. Ford*, No. 86-1098 (5th Cir. Aug. 11, 1987) (en banc). The local rules of the Northern District of Texas provide that a magistrate can preside over jury selection "with consent of the parties and the District Judge," but make no explicit provision for review of any of the magistrate's rulings during voir dire. Neither the government nor defense counsel expressly consented or objected to the magistrate's presiding over jury selection. On appeal, the defendant argued as one of her grounds that the district court erred in directing the magistrate to preside over jury selection. A panel of the Fifth Circuit affirmed the conviction, finding that Congress, in granting to district judges the power to give magistrates additional duties, had included the power to direct magistrates to preside over jury selection in felony cases. *U.S. v. Ford*, 797 F. 2d 1329 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 964 (1987).

The court sitting en banc did not find that Congress intended such a grant of power to district judges. The court also rejected the reasoning of the three-judge panel, and held that jury selection is an essential component of the felony trial, which itself may not be delegated to a magistrate. Even were jury selection to be viewed as a pretrial matter, the court stated that the difficulties of review by an article III judge of a magistrate's rulings in jury selection—and the absence of a statutory procedure for that review—left it unconvinced that Congress intended to allow delegation of felony jury selection. Since the magistrate had conducted the voir dire without objection and the trial was fundamentally fair, however, the court stated that the error was harmless.

The First, Second, and Ninth Circuits have permitted a magistrate to

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200 Years ago...

October 1787: Submitting the Constitution to state ratification conventions triggered a torrent of pamphleteering to influence the elections of delegates and their deliberations. The authors used pseudonyms with indigenous references ("Federal Farmer," "Old Whig") or names from antiquity ("Aggripa," "Brutus").

The best known of these efforts first appeared in the New York press on Oct. 27, addressed "to the people of the state of New York," a reference to the universal (manhood) suffrage for electing delegates to the New York's 1788 ratification convention. Its authors wrote under the name "Publius"—probably a reference to Publius Valerius Publicola, about whom Plutarch wrote—and were in fact Alexander Hamilton and James Madison, with John Jay as a minor contributor.

Publius's essays were published in book form as *The Federalist* in March 1788, even before all of its 85 essays appeared serially in the press.

Although the essays clearly had an immediate, partisan goal, *The Federalist* has a cohesive form and theory. On one level, it explicates the thinking of the Constitution's authors and is "entitled to great respect in expounding the Constitution," said Chief Justice Marshall in *McCulloch*. The Supreme Court has cited it over 206 times. On a deeper level, Publius was a spokesman for what he called a new "science of politics," and *The Federalist* is by now regarded as a classic of modern political theory.

BICENTENNIAL OF THE U.S. CONSTITUTION

Nominations for Devitt Distinguished Service to Justice Award Being Accepted

Nominations for the annual Edward J. Devitt Award for Distinguished Service to Justice are being accepted until Dec. 31, 1987. This year's selection committee consists of Justice William J. Brennan, Jr., Chief Judge Charles Clark (5th Cir.), and Judge Devitt. West Publishing Co. confers the award each year to an Article III federal judge in recognition of accomplishments and professional activities that have contributed to the cause of justice. The award is named for Edward J. Devitt, senior judge of the U.S. District Court for the District of Minnesota, who was chief judge of that court for more than 20 years. Previous recipients of the award include Judge Albert B. Maris (3d Cir.), Judge Walter E. Hoffman (E.D. Va.), Judge Frank M. Johnson, Jr. (11th Cir.), Judge William J. Campbell (N.D. Ill.), and Judge Edward T. Gignoux (D. Me.). Chief Justice Burger received a special award in 1983, and the late Judge Edward A. Tamm was honored with a special posthumous award in 1985.

Nominations for the 1987 award should be submitted to Devitt Distinguished Service to Justice Award, P.O. Box 43810, St. Paul, MN 55164-0526. ■

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.

Dominick, Pearson, and Sloan Selected as Judicial Fellows for Program's 1987–88 Year

Mary F. Dominick, Albert M. Pearson, and Judy B. Sloan have been selected as the Judicial Fellows for 1987–88.

Ms. Dominick received her B.A. and J.D. degrees from Vanderbilt University and an LL.M. from the Parker School of Foreign and Comparative Law at Columbia University. She has most recently been a lecturer and research associate at the Max Planck Institute for Comparative Public Law and International Law at Heidelberg, Germany. Her duties there included reporting on current legal developments in the United States, writing for the *Encyclopedia on Public International Law,* and teaching a course on American private law at the University of Heidelberg. Ms. Dominick also has worked in the Netherlands, Switzerland, Belgium, France, and the United States, concentrating on the institutional aspects of legal and political systems. She will be assigned to the AO.

Mary Dominick

Albert Pearson

Professor Pearson is a professor of law at the University of Georgia, where he has taught since 1974. He received his B.A. from Birmingham-Southern College and his J.D. from Vanderbilt. Professor Pearson clerked for Judge Walter P. Gewin (5th Cir.) and then taught at Boston College Law School. He has worked as reporter in drafting projects for the ABA and the National Conference of Commissioners on Uniform State Laws, and as codirector of the annual trial advocacy program of the Georgia Institute of Trial Advocacy. Professor Pearson has also done trial and appellate litigation and was an issues adviser to a candidate for the U.S. Senate. He will be as-

Judy Sloan

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Applications Sought for 1988–89 Fellowships

The Judicial Fellows Commission invites applications for the 1988–89 Judicial Fellows Program from persons interested in judicial administration. The program, established 15 years ago, is patterned after the White House and Congressional Fellowships.

Fellows will be chosen by the commission to spend a year, beginning in September 1988, in Washington, D.C., at the Supreme Court, the Federal Judicial Center, or the Administrative Office of the U.S. Courts.

Candidates should be familiar with the judicial system, have at least one postgraduate degree, and two or more years of professional experience. Stipends for the fellowship are based on salary history and comparable government salaries.

Information about the Judicial Fellows Program and on application procedures is available upon request from Vanessa M. Yarnall, Associate Director, Judicial Fellows Program, Supreme Court of the United States, Rm. 5, Washington, DC 20543, tel. (202) 479-3374. Application materials should be submitted by Nov. 30, 1987.

PERSONNEL

Nomination

Malcolm J. Howard, U.S. District Judge, E.D.N.C., Sept. 10

Paul V. Niemeyer, U.S. District Judge, D. Md., Sept. 11

Frank S. Van Antwerpen, U.S. District Judge, E.D. Pa., Sept. 11

Confirmation

David B. Sentelle, U.S. Circuit Judge, D.C. Cir., Sept. 9

Appointments

Morton I. Greenberg, U.S. Circuit Judge, 3d Cir., June 18

H. Robert Mayer, U.S. Circuit Judge, Fed. Cir., June 19

Layn R. Phillips, U.S. District Judge, W.D. Okla., June 22

James H. Alesia, U.S. District Judge, N.D. Ill., July 1

Elevation

Barbara J. Rothstein, Chief Judge, W.D. Wash., Oct. 1

Senior Status

Walter T. McGovern, U.S. District Judge, W.D. Wash., Oct. 1

Deaths

Robert L. Taylor, U.S. District Judge, E.D. Tenn., July 11

Bryan Simpson, U.S. Circuit Judge, 11th Cir., Aug. 22

CALENDAR

Oct. 4–6 U.S. Claims Court Judicial Conference

Oct. 7–10 Metropolitan District Chief Judges Conference

Oct. 12–14 Workshop for Judges of the Sixth Circuit

Oct. 13–15 First Circuit Judicial Conference

Oct. 15–17 Second Circuit Judicial Conference

Oct. 21–23 National Conference of Bankruptcy Judges

Oct. 25–28 Workshop for Judges of the Eleventh Circuit

Nov. 11–13 Workshop for Judges of the Fifth Circuit

Investigation of Judge Hastings by House Subcommittee on Criminal Justice Continues

Judge Alcee L. Hastings (S.D. Fla.) has sent a letter to Rep. John Conyers, Jr. (D-Mich.), chairman of the House Judiciary Committee's Subcommittee on Criminal Justice, protesting efforts by the subcommittee to obtain grand jury records related to the subcommittee's investigation of him.

Judge Hastings was acquitted of criminal charges in 1983. The Eleventh Circuit Court of Appeals later conducted its own investigation pursuant to 28 U.S.C. § 372(c). The Judicial Council of the Eleventh Circuit certified to the Judicial Conference that Judge Hastings "has engaged in conduct which might constitute grounds for impeachment," and the Judicial Conference then certified to the Speaker of the House that "consideration of impeachment may be warranted" in the matter (see *The Third Branch*, April 1987, p. 5).

Judge Hastings was invited to submit a written response to the Eleventh Circuit's report, which he did through counsel. Judge Hastings's counsel has been given access to the report, but the report has not been made public, a fact Judge Hastings has protested. ■

NOTEWORTHY

Statistics on federal offenders published. The Administrative Office of the U.S. Courts has published *Federal Offenders in the United States Courts 1985*, a presentation and analysis of data for defendants convicted in the U.S. district courts during the 12-month period ended June 30, 1985. During this period, approximately 65 percent of the 53,060 defendants in the U.S. district courts were charged with offenses under the Drug Abuse Prevention and Control Act, fraud, traffic violations under the Assimilative Crime Statute, larceny, or theft. The number of defendants in the district courts charged with immigration offenses decreased to only 5 percent of all defendants, compared with 6 percent in 1984. Nearly three-fourths of the filings for immigration offenses were in the Southern and Western Districts of Texas; the Southern Districts of California and Florida accounted for 18 percent.

Of the 46,584 defendants with cases closed, 18 percent were not convicted. Eighty-four percent of the cases without convictions were dismissals, while 16 percent were acquittals.

The percentage of sentenced defendants given terms of imprisonment decreased to 39 percent.

Probation officer entitled to judicial immunity. A probation officer is entitled to absolute immunity from a civil suit for damages, the Second Circuit has held. *Dorman v. Higgins*, 821 F.2d 133 (2d Cir. 1987). Plaintiff Dorman sought damages and injunctive relief against a U.S. probation officer for the preparation of an allegedly false presentence report on Dorman. Dorman alleged that false statements appeared in the report as the result of a conspiracy between the probation officer and the prosecuting attorney and due to the probation officer's failure to make an adequate investigation of the relevant facts. Dorman alleged that his sentence of five years' imprisonment and a $1,000 fine for mail fraud was caused by these allegedly false statements, and requested money damages and an injunction against any further use of the report. Chief Judge Constance Baker Motley (S.D.N.Y.) dismissed the complaint, ruling that a probation officer preparing presentence reports is performing a quasi-judicial function and is entitled to absolute immunity from suit for damages for their improper preparation. On appeal, the Second Circuit affirmed, holding that the probation officer had absolute immunity from the entire claim for damages. "[G]iven the propensity of prisoners to file lawsuits . . . , we perceive a need for the probation officer to have absolute immunity from a civil suit for damages," the Second Circuit held, seeing "little danger" in according such immunity, particularly given that the report is "subject to adversary scrutiny and at least two layers of judicial review." 821 F.2d at 138.

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Federal Probation Celebrates Fifty Years

Federal Probation, the journal published by the Probation Division of the AO, marks 50 years in print this year. The quarterly began as a mimeographed newsletter geared towards persons working in the federal probation system but quickly expanded to satisfy "the divergent interest and needs [of] a class of readers engaged in various federal, state and local preventive and corrective activities in the field of delinquency and crime." The journal became an outlet for research findings and opinions, as well as a source of information on innovations of interest to criminal justice and corrections professionals. Currently, *Federal Probation* is sent without charge to interested U.S. probation officers, federal judges, and Bureau of Prisons, Parole Commission, and other federal government employees. Others may subscribe to it (at an annual rate of $5) through GPO.

In celebration of *Federal Probation*'s golden anniversary, the June 1987 issue reprinted some of the most outstanding articles, book reviews, and news items from past issues. The editors also recently issued a five-year cumulative index for 1982–86, which includes alphabetical listings of articles and authors and a subject index. To obtain a copy of the index, or to inquire about subscriptions, write to Editor, *Federal Probation*, Administrative Office of the U.S. Courts, Washington, DC 20544.

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preside over voir dire in felony cases. The Ninth Circuit cases have expressly held that delegation of jury selection to a magistrate is constitutional. The First and Second Circuits have held that magistrates may preside over such jury selection if the defendant fails to make a contemporaneous objection to the practice. ■

Chief Judge Paul H. Roney (11th Cir.), Chief Judge Pierce Lively (6th Cir.), and Judge Richard S. Arnold (8th Cir.) at the recent FJC seminar for newly appointed appellate judges.

At the seminar, Prof. Ronald M. Levin (Washington Univ. School of Law) talks with Judge John C. Godbold, FJC Director. (Background, Judge Frank X. Altamari (2d Cir.) talks with Columbia Univ. Law School Prof. Maurice Rosenberg.)

NOTEWORTHY, from page 4

As to the claim for injunctive relief, the Second Circuit noted that under *Pulliam v. Allen*, 466 U.S. 522 (1984), an official's entitlement to absolute immunity for damages does not bar the granting of injunctive relief, but the court affirmed the district court's dismissal of Dorman's claim for injunctive relief, noting that such users of probation reports as the Parole Commission and the Bureau of Prisons were not named as defendants, and that the allegations of imminent danger of harm were insufficient in any case.

Update on caseload in S.D. Fla. In 1982, the caseload of the U.S. District Court for the Southern District of Florida required the court to ask for assistance from 48 visiting judges, but in 1986, the district was able to eliminate its visiting judge program, and is now able to perform its work without this "formerly needed and much appreciated assistance," Chief Judge James Lawrence King reported to the Eleventh Circuit Conference earlier this year.

Chief Judge King's report for 1986, based upon data from the AO's Statistical Analysis and Reports Division, showed that during the calendar year 1986 the Southern District of Florida was confronted with the heaviest criminal caseload of any district court in the country. The district's judges conducted more criminal trials, put in more criminal hours in court, tried more felony criminal cases, and tried more felony criminal defendants than any court in America. In that year the district also had more felony defendants under probation supervision than any court in America.

Despite the fact that criminal case filings increased by 13.45 percent from 1985 to 1986, the district's disposition rate increased by 35 percent, with 1,426 cases terminated in 1986 compared with 1,089 terminated in 1985.

During 1986, the Southern District of Florida averaged 53.2 jury trials per judge, and had nearly 40,000 jurors reporting for service. ■

Positions Available

Circuit Executive, 3d Cir. Salary to $72,500. Works under direction of judicial council pursuant to 28 U.S.C. § 332(e) and other statutes and rules. Must have bachelor's degree in management or related field, experience in administration or equivalent. Legal training preferred but not required. Certification pursuant to 28 U.S.C. § 322(f) prerequisite to appointment, but applications from qualified noncertified applicants encouraged. Send resume by Oct. 15, 1987, to William K. Slate II, 21613 U.S. Courthouse, 601 Market St., Philadelphia, PA 19106.

Chief Deputy Clerk, 1st Cir. Salary to $53,830. Must be a member of the bar and have a minimum of 6 years' progressively responsible administrative experience in public service or business. Applications with resumes due by Nov. 2, 1987, in Clerk's Office, U.S. Court of Appeals, 1606 John W. McCormack Post Office & Courthouse, Boston, MA 02109.

Clerk, D.C. Cir. Open until filled. Send resume to Mark Langer, Chief Staff Counsel for the D.C. Circuit, 3429 U.S. Courthouse, Washington, DC 20001.

Clerk, U.S. Bankruptcy Court, M.D. Tenn. Salary to $69,976. Requires minimum of 10 years' progressively responsible administrative experience in public service or business, at least 3 years in a position of substantial management responsibility. College and law school education can be partially substituted for experience. Submit resume or application to Hon. Keith M. Lundin, Judge, U.S. Bankruptcy Court, 701 Broadway, 223 Customs House, Nashville, TN 37203.

Chief Pretrial Services Officer, M.D. Fla. Salary $38,727–69,976. Statutory position, responsible for pretrial services and pretrial diversion in district (see 18 U.S.C. § 3152). Requires college degree, 3 years' experience in personnel work with at least 1 year at level of probation officer or equivalent in correctional setting. Send resume by Nov. 13, 1987, to Donald M. Cinnamond, Clerk, U.S. Dist. Ct., Attn.: Chief Pretrial Services Officer, P.O. Box 53558, Jacksonville, FL 32201.

EQUAL OPPORTUNITY EMPLOYERS

WILLARD, from page 1
of our cases. In fact, we do settle many cases. But the Civil Division wins close to 90 percent of the cases that we litigate. That suggests to me that we are probably not missing a lot of good settlement opportunities, and that some of the criticism of the government for not being willing enough to settle comes from parties whose legal position is not very strong in the first place. Generally speaking, we do not burden the courts by litigating cases in which we are unlikely to prevail.

What has been the department's experience as a participant in court-annexed arbitration?

Our experience has been that this approach can be very helpful in cases involving very specific kinds of factual inquiries. Such fact-intensive cases will often arise under the Federal Tort Claims Act, the Longshoremens Act, or the Miller Act. On the other hand, this kind of procedure will not be very helpful if you have a claim for equitable relief or where legal issues predominate. No one would suggest, for example, that court-annexed arbitration should be employed if someone is suing to have a statute declared unconstitutional. So as long as programs like this recognize that some kinds of government litigation really are not suitable for arbitration, we are very happy to cooperate.

You chaired the administration's Tort Policy Working Group. Where do its proposals stand today?

This has been a major priority, and I believe that it has paid off. Since we issued our original report in February 1986, over two-thirds of the states have adopted one or more of our recommended changes in their tort law. Very rarely do you get this many states adopting a particular kind of legislation in such a short time span, especially legislation making such far-reaching changes in a major area of the law. This has been a phenomenally successful legal reform movement.

Will the Tort Policy Working Group be issuing additional reports?

The group is ongoing, and I suspect that as the need arises we will make other reports. I should point out that our group does not do empirical research or that kind of thing. We help develop the administration's position on these issues, but we are not a think tank. We draw heavily on the work of scholars and think tanks such as the Rand Corporation.

"[O]ver two-thirds of the states have adopted one or more of our recommended changes in their tort law."

Are you pleased that so many of the tort reform initiatives have been at the state level rather than the federal?

Yes, this has been a key part of our strategy. We opposed efforts to federalize tort law across the board, believing that it should remain primarily a state responsibility. We did support federal tort reform legislation in limited areas where we thought it was appropriate, such as products that are sold nationwide, or in defining the liability of the federal government itself or its contractors. But beyond those limited areas, we always felt that tort reform is a job for the states. And, to the extent tort reform at the state level succeeds, it lessens the need for federal legislation.

"We opposed efforts to federalize tort law across the board, believing that it should remain primarily a state responsibility."

What is your position on the compensation program of the National Childhood Vaccine Injury Act?

The administration is strongly opposed to this title, and it was very reluctantly approved by the President last year only because it was attached to legislation that contained a number of other very desirable provisions. Since he does not have a line item veto, he had to either accept it all or reject it all. He decided to accept it, partly because the vaccine title does not go into effect unless and until funding legislation is passed. We tried to make it very clear that substantial changes in this legislation are necessary before the administration could agree to any funding proposal. We have been particularly outspoken about the fact that the existing legislation would saddle the courts, for the first time, with the responsibility for administering a welfare entitlement program rather than simply conducting judicial review of an executive agency's decisions.

Now a lot of people say, "Oh well, this will be a very small program." But we have learned from our experience with the black lung program and others that confident predictions that entitlement programs will remain small frequently turn out to be wrong. Of course, the number of children who are actually injured by vaccines is believed to be quite small. However, given the large number of children who receive vaccines each year and who later are found to suffer from various kinds of mental and neurological problems, I think that potentially we could see tens of thousands of claims a year being filed under this program.

What is your position on drug testing?

I have been heavily involved in the administration's policy in this area. I participated in drafting Executive Order 12,564, which mandates drug testing for government employees in sensitive positions. In the Civil Division we have been handling litigation all over the country about this issue. So far we have won all of the cases at

the court of appeals level. The result at the district court level has been more mixed, although lately we have won several significant cases. I think this is one of the leading federal constitutional issues that is currently being litigated.

Is there a trend in who files such cases?

Most of the litigation seems to be brought by government employee unions, although some cases are brought by individuals.

What is your view on the various proposed RICO changes?

We believe that the civil RICO remedy has turned into something far different from what was originally envisioned. It is rarely used as a way of attacking organized crime, and instead seems to have turned itself into an all-purpose federal fraud statute, which is used primarily to seek treble damages in business and commercial disputes. The result has been a mushrooming number of cases including civil RICO allegations. For example, there is one case currently being litigated in which former President Marcos of the Philippines has been sued on a civil RICO theory, the allegation being that under his presidency the government of the Philippines was a racketeer-influenced corrupt organization. This illustrates how strange some of the theories are. We do not think that this is what Congress intended, and the administration favors legislation that would greatly restrict the ability of private parties to bring civil RICO actions.

You supervise about 130 tort lawyers who defend the federal government in tort litigation. You have approved or recommended to the deputy attorney general that about one-half billion dollars of taxpayer money be spent on settling tort cases. Do you have a position on the proposals that have been made for amending rule 68 of the Federal Rules of Civil Procedure, with the goal of putting more "teeth" into it?

We certainly support the goal of trying to create incentives for people to avoid frivolous litigation and to settle cases that ought to be settled. However, I do not believe we should discard the basic American rule on attorneys' fees without a great deal of thought and study. We should be careful that any change in rule 68 is not designed in a way that will result in virtually automatic fee shifting. In addition, the department's position is that a sweeping change in rule 68 should be considered through legislation rather than as a rules amendment.

Richard K. Willard

Some tort reform efforts appear to be couched in terms of issues about the role of juries and their discretion. What is your view of this aspect of tort reform?

My view is that the proper role of the jury is to decide the facts, not to make public policy. If the standard of tort liability is so broad that it allows each jury to decide without real legal constraint when liability should be imposed, then the jury moves out of the fact-finding realm and into the policymaking realm. Such policymaking is more appropriately the job of elected representatives. I think juries are very good for finding facts, and I am very comfortable assigning them that role. But I do not think juries are well suited to decide questions of economic and regulatory policy in the guise of tort litigation.

The United States brought a civil suit in France against a terrorist who was implicated in a 1982 shooting, and the U.S. won a symbolic monetary award.

Do you coordinate the filing of civil suits against foreign nationals or in foreign jurisdictions with the State Department legal adviser or any other officials?

We have an Office of Foreign Litigation in the Civil Division, which is responsible for litigation in foreign courts. It is basically a coordination office, since the actual conduct of litigation is assigned to attorneys in the foreign countries involved. Currently the office is handling about 800 cases in 50 countries. We customarily retain foreign counsel, since our lawyers are not licensed to practice in foreign countries. In most major countries, we have established relationships with attorneys that represent the U.S. We do work closely with the State Department on matters of foreign litigation to make sure that foreign policy considerations are fully reflected in our position. This was our approach, for example, in this French terrorist case. We retained a French advocate to represent the United States as a civil party in that criminal proceeding, which is a form of participation that is available under the laws of France. Civil Division attorneys, working with the State Department, assisted the advocate in obtaining a successful resolution of the case.

What has the Civil Division done about litigation over Social Security disability benefit claims?

We had a crisis in Social Security disability litigation several years ago, brought about by a number of factors. In 1980, Congress passed legislation requiring the Social Security Admin-

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istration to review disability cases to see whether benefits should continue. As a result of that review process, a lot of people were taken off the disability rolls, and they then sought review of that action. This produced a heavy wave of litigation and a lot of tension between SSA, the Justice Department, and the courts. By 1984, for example, our success rate in Social Security cases had dropped to an all-time low, with the government being affirmed by the court only about 38 percent of the time (not counting the cases that were remanded).

We did several things to try to turn that situation around, and I think it is a lot better now. One, we worked with Congress to pass the 1984 reform legislation providing clear guidance to the courts and to SSA on how to handle some of these issues that had been creating problems. Second, we changed the so-called nonacquiescence policy in 1985, so that SSA now complies with circuit precedent rather than ignoring it. Third, we took administrative steps to improve the handling of the cases in terms of filing answers and transcripts of the administrative proceeding. I understand that now an answer and transcript are filed within 60 days in about 83 percent of those cases. This is a great improvement on the timeliness of those filings. Finally, we have instituted with HHS a supplementary review process, so that after lawsuits are filed we take a careful look at the cases. If we think the decision may not comply with applicable legal requirements, then we will voluntarily seek a remand before the court's time and effort are wasted on a case that may not be defensible. Over 1,900 cases have been taken back voluntarily under that program.

All of these efforts have been aimed at improving the credibility of the government in litigating these cases, and I think those efforts have been paying off. In 1986 our affirmance rate, exclusive of remands, was up to 62 percent. It still is not as high as I would like to see it, but I think that as a result of these and other efforts, we will be presenting stronger cases.

Do you favor a special court to handle Social Security cases?

We have looked at the possibility of creating a specialized Article I tribunal for Social Security cases. We support the general idea, and I have been working with members of Congress and others to develop interest in it. I think that it is going to require a long-term effort to achieve such a court, and we will have to deal with the political sensitivities of the Social Security program. We will need to assure people that this is not an effort to downgrade the protection given to Social Security claimants and that a specialized court of this nature can be a high quality court that provides fair treatment. If we can meet these concerns, then there is a chance that this kind of specialized court would be set up.

"[W]e have a choice to make . . . . Either [our Article III judiciary] will become a vast bureaucracy like many European countries have, or we will have to cut back sharply on the kinds of cases that come into the system."

In a *Third Branch* interview last year, Chief Judge Lively commented on the large number of Social Security cases in the Sixth Circuit.

I understand his concern. However, the Article III judiciary sits at the top of a very broad pyramid. About two million claims a year are filed for Social Security disability benefits and only about 25,000 lawsuits are filed by people who are denied benefits and seek judicial review. So the courts may think it is a tidal wave of cases, but if you consider the two million cases that originally come in, 25,000 is not a high percentage. Also, these 25,000 cases are not a representative sample. The government never seeks review in cases where benefits are granted. And even of the cases where benefits are denied, presumably those claimants who have stronger cases are more likely to seek judicial review.

Have you taken a stand on the proposal for an intermediate national court of appeals? Chief Justice Burger had proposed that the incumbent members of the courts of appeals should serve on such a panel; Chief Justice Rehnquist suggests a new national court of appeals constituted by Article III judges specifically appointed to this court.

I think that we have a choice to make about the nature of our Article III judiciary. Either it will become a vast bureaucracy like many European countries have, or we will have to cut back sharply on the kinds of cases that come into the system. My preference would be to restrict the caseload, so that the federal judiciary can retain its distinctive character as an elite branch of the government which handles the kinds of cases that are significant enough to require the attention of an Article III court. Routine and repetitive litigation should be placed either in state courts or in specialized federal courts.

Unfortunately, Congress is going the opposite direction, as in the childhood vaccine program. Congress seems intent upon putting more and more kinds of routine entitlement cases into the federal courts. We have proposals, for example, to provide for judicial review of Veterans Administration benefit determinations, which would certainly increase the caseload. We cannot have it both ways. We cannot constantly expand the caseload of the federal courts and at the same time expect the judiciary to remain a small, high-quality, non-bureaucratic institution.

Would you favor elimination of diversity jurisdiction cases in the federal courts?

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I would certainly favor legislation, and I think it would not be very controversial, to eliminate federal jurisdiction for automobile accident cases, regardless of the amount of controversy. These days, simply raising the amount of controversy would not eliminate many cases, since it is not hard to allege $100,000 or more in pain and suffering even in a routine tort case. I would also favor eliminating diversity jurisdiction in cases where you have an in-state plaintiff. It is hard to see why an in-state plaintiff should be entitled to select a federal forum, since such a plaintiff is presumably not likely to be the subject of prejudice in his own local state court. Those two steps alone would eliminate perhaps half of the diversity cases. Other measures may be justified as well, but I think the time has come to find ways to reduce the number of diversity cases without treating the issue as an all-or-nothing proposition.

Do you have any special ideas or any message for the federal judges?

Well, I have a couple of ideas. One is that district judges should be more receptive to motions to dismiss or motions for summary judgment, and that appellate courts should be more willing to affirm those decisions. A lot of litigation really is not meritorious, and yet it drags on. It consumes time and resources of the parties and the courts. I think that parties need to be more aggressive in filing dispositive motions when warranted. I think that some judges will not face up to a tough legal question in the hopes that the case will go away or get settled. This is not true of all judges, by any means, but there are some judges who are very reluctant to dismiss cases without allowing discovery, without letting the case "percolate" around for a while. Similarly, I think a lot of appellate courts are too willing to be "Monday morning quarterbacks" and reverse a summary judgment by finding a lurking fact issue. And after that happens a few times, a trial judge becomes understandably gun-shy. And yet if judges would be more forthright—and appellate courts more understanding—in dismissing cases on legal grounds, that would help get rid of litigation that is not going to be successful and discourage the filing of unmeritorious lawsuits.

"We cannot constantly expand the caseload of the federal courts and at the same time expect the judiciary to remain a small, high-quality, non-bureaucratic institution."

Here in Washington we also see a lot of what I call political lawsuits—lawsuits that have no real prospect of success but which are a good way to generate publicity. Usually there is a big headline when the suit is filed, and maybe bare mention on the back page when the case is ultimately dismissed. I think courts should be more vigilant in not allowing themselves to be used as a vehicle for such political theater. We intend to seek more aggressive use of rule 11 in situations where people file cases for their impact in Congress or in the media rather than because there is any realistic prospect of prevailing. ■

ABA, from page 1

grand jury procedures, state and federal, and the ABA's Section of Criminal Justice has drafted a Model Grand Jury Act and over 30 Grand Jury Principles. The principle adopted this year, No. 32, relates to pretrial disclosure to indicted defendants of "all relevant matters occurring before the grand jury." The Federal Rules of Criminal Procedure and 18 U.S.C. § 3500 permit substantial disclosure, but with certain qualifications. The need for this additional grand jury principle, the ABA contends, stems partly from the Supreme Court's decision in *U.S. v. Mechanik*, 475 U.S. 66 (1986).

- Approved additions to the ABA Standards for Criminal Justice on mental health standards entitled "Competence and Capital Punishment." Previously the criminal justice standards have not addressed the subject of posttrial mental competence. *Ford v. Wainwright*, 477 U.S. 399 (1986) and other recent capital cases have prompted the ABA to recommend this standard.
- Supported reauthorization of independent counsel provisions of the Ethics in Government Act of 1978, revised to provide for limited judicial review of the Attorney General's decisions not to seek appointment of independent counsels and to clarify that the court has power to expand the scope of an independent counsel's investigation.
- Urged Congress to increase the salaries of U.S. bankruptcy judges and magistrates.
- Urged amendment of Federal Rules of Civil Procedure and state civil procedural rules relating to pleading and discovery of net worth relative to punitive damages.
- Supported a resolution on pending legislation to close loopholes in the premerger notification reporting requirements of title II of the Hart-Scott-Rodino Antitrust Improvements Act of 1976.
- Supported legislation to amend the existing federal statute relating to judicial disqualification. The legislation would make disqualification discretionary when a judge or a member of the judge's family has a financial interest that may be substantially affected by the outcome of a case, but would provide that another, disinterested judge be appointed to determine whether the disqualification is warranted.

See ABA, page 10

LEGISLATION, from page 1

Rep. Kastenmeier introduced in the House in June of this year (see *The Third Branch*, July 1987, at 2).

• Sen. Howard M. Metzenbaum (D-Ohio) introduced S. 1523, to amend the civil provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO). The bill would amend the across-the-board award of automatic treble damages under civil RICO and provide different remedies depending on the circumstances of the case: (1) "general purpose" units of government, including federal, state, and municipal entities, as well as plaintiffs suing defendants previously convicted of a RICO violation or of an underlying criminal act, would still be able to recover automatic treble damages; (2) consumers and "special purpose" units of government would be entitled to recover up to two times the amount of their actual damages in most cases; (3) other plaintiffs, including business plaintiffs, would be able to recover actual damages, costs, and attorneys' fees; and (4) in securities litigation, certain special provisions would apply to small investors. The bill would also remove the "racketeer" label and provide for limited retroactivity.

• Rep. Rick Boucher (D-Va.) introduced H.R. 2983, a RICO reform bill identical to S. 1523 except for the provisions relating to small investors and retroactivity. Rep. Boucher's bill is virtually identical to a bill which failed to pass in the 99th Congress as H.R. 5445 (see *The Third Branch*, Oct. 1986, at 7).

• Rep. Peter Rodino, Jr. (D-N.J.) introduced H.R. 3227, to create a Federal Courts Study Commission. ■

FELLOWS, from page 3

signed to the Supreme Court.

Professor Sloan is an associate professor at the University of Toledo College of Law. She received her B.A. from the University of Chicago and a J.D. from the University of Maryland. She worked as an Asper Fellow to Judge R. Dorsey Watkins (D. Md.). She has taught commercial law, contracts, sales, and secured transactions. She has also studied international law at The Hague, the philosophical and underpinnings of the Constitution, and the Chinese legal system. She has written articles on antitrust enforcement and the confidentiality of psychotherapeutic records. Professor Sloan will be assigned to the FJC's Research Division. ■

ABA, from page 9

• Urged Congress to repeal provisions of the National Vaccine Injury Compensation Program of 1986, which is seen by some critics as requiring federal courts to render advisory opinions and to perform inappropriate administrative functions. Legislation has been passed establishing the compensation program, but Congress has not yet funded the program.

• Disapproved a resolution that recommended the establishment of the U.S. Court of Military Appeals as an Article III court.

• Withdrew a resolution submitted by the Antitrust Law Section calling for amendment to Fed. R. App. P. 35(a), which relates to en bancs in the federal circuits.

For further information on these or other matters considered at the meeting, call Alice O'Donnell at the FJC (FTS 633-6359). ■

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THE THIRD BRANCH

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House of Representatives Votes Not to Delay Effective Date of Sentencing Guidelines

The House of Representatives voted 231 to 183 on Oct. 6 not to delay the Nov. 1, 1987, effective date for the guidelines of the U.S. Sentencing Commission. Delay of the implementation date would have required a two-thirds vote.

The House Judiciary Committee had approved by voice vote a measure that would have required a 9-month delay. A bill was also pending in the Senate to delay implementation of the guidelines for 12 months. The Judicial Conference had called for a 12-month delay in the effective date (see story on Judicial Conference, p. 3).

Proponents had stated that delaying the effective date would allow additional time for training judges, probation officers, and attorneys in the use of the guidelines; permit testing of the guidelines for problem areas; and enable the Commission to respond to comments about the guidelines, including those made during hearings before the House Judiciary Committee's Subcommittee on Criminal Justice (see *The Third Branch*, Sept. 1987, at 1). Opponents contended that the courts would be fully prepared to implement the guidelines on Nov. 1 and that no delay was necessary.

The bills in the House and Senate to delay the effective date also would clarify that the guidelines do not apply to offenses committed before the effective date and would create a procedure for expedited judicial consideration of any constitutional challenge to the guidelines. They provide that actions challenging the constitutionality of the guidelines would be commenced in the District Court for the District of Columbia and heard by

See SENTENCING, page 2

Bankruptcy Judge Robert E. Ginsberg Elected to FJC Board

Bankruptcy Judge Robert E. Ginsberg (N.D. Ill.) was elected to the Board of the FJC at the fall meeting of the Judicial Conference, replacing Chief Bankruptcy Judge Martin V. B. Bostetter, Jr. (E. D. Va.), whose term expired.

Robert E. Ginsberg

Judge Ginsberg, a native of Cambridge, Mass., was appointed a U.S. bankruptcy judge on June 7, 1985. He is a graduate of Brown University and American University's Washington College of Law, and he holds an LL.M. degree from Harvard Law School.

Judge Ginsberg was a trial attorney with the U.S. Securities and Exchange Commission, 1969–1972, and was special counsel to the Commission, 1972–1973. From 1974 to 1985, he taught at DePaul University College of Law, in Chicago, in the areas of debtor/creditor relations, corporations, and bankruptcy, and for a part of that time was associate dean. Judge Ginsberg became a full professor at DePaul in 1981. He has also been a lecturer in law at New England School of Law and a visiting professor at the University of Illinois. ■

Vacancies, Automation, Certification of State Law Issues Discussed by Chief Judge Holloway

Chief Judge William J. Holloway, Jr. (10th Cir.), a native of Oklahoma, is a graduate of the University of Oklahoma and Harvard Law School. During World War II, he served in the U.S. Army and attained the rank of first lieutenant. He entered on duty as a circuit judge in 1968 and became chief judge in 1984. Prior to entering the federal court system, Judge Holloway served in the Department of Justice's Civil Division in Washington and spent 16 years in private practice in Oklahoma City.

The Tenth Circuit currently has five vacancies—three in the district courts, two in the court of appeals. Given these constraints on your judge power, is the crunch of cases being felt?

Very much. Probably the most critical situation is in the district court in the District of Colorado, which has seven judgeships authorized and has only five active district judges. So they are waiting hopefully for judges to be appointed. One nomination has been submitted to the Senate, but there are no hearings scheduled. One of the vacancies has existed for over three years, so that is critical. The District of New Mexico is more fortunate. There,

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INSIDE . . .

FJC to Conduct Time Study of Caseload Demands on District Judges and Magistrates

In November the Federal Judicial Center will launch the largest research project it has ever undertaken—a comprehensive study of caseload demands on the time of district court judges and magistrates. The study, which will rely on the cooperation of all district court judges and magistrates, their staff, and personnel from clerks' offices, has been initiated at the request of the Judicial Conference Committee on Court Administration. Findings will be used both for creating up-to-date case weights and for arriving at administrative and policy decisions affecting the courts. The last study of judicial time allocation was conducted eight years ago.

A new approach will be used in this research to avoid drawbacks of previous time studies. In the past, participating judges kept meticulous records of the time spent on every case before them during a three-month period. That approach helped to account for variations in the demands arising from different types of cases, but it imposed substantial record-keeping burdens on the judges and spanned only a portion of the life of most cases. The new study minimizes the burden on individual judges, and it follows cases from filing to termination. Every case filed in a court during a two-week period (different periods for different courts) will be flagged "time-study case" under a monitoring procedure established by the clerk. Judges and magistrates will then be asked to record time expenditures until disposition of the case.

See TIME STUDY, page 4

Siegel Named to Head New AO Office

Karen K. Siegel has been appointed chief of the AO's new Office of the Judicial Conference Secretariat. She will be assisted by Marion Ott, formerly staff assistant to the Director of the AO.

Ms. Siegel's primary duty will be to ensure that the Judicial Conference and all its committees receive proper support from the AO. In that capacity, she will be the AO's staff coordinator to the Conference and will report directly to the Director, who by law serves as secretary to the Conference.

Ms. Siegel has been with the AO for the last five and a half years. She worked in the Office of Legislative Affairs briefly before being named special assistant to Deputy Director James E. Macklin, Jr., in 1982. In 1987, she spent eight months as acting chief of the AO's Office of Audit and Review. Ms. Siegel has provided staff support to the Conference's Committee on Court Administration and its Subcommittee on Judicial Improvements, and has assisted the Director in preparing the report of the biannual Judicial Conference sessions.

Ms. Siegel received her B.A. and J.D. degrees from the University of Miami. She worked for the Justice Department for nearly 10 years, as a trial attorney, attorney-adviser, and deputy legislative counsel in the Office of Legislative Affairs.

LEGISLATION

The following are items under consideration by Congress that are of interest to the judiciary.

• Rep. Gerald D. Kleczka (D-Wis.) proposed an amendment to the Constitution that would permit Congress to authorize bodies in the judicial branch to remove judges for cause. Rep. Kleczka stated that the impeachment process is too time-consuming and causes a delay in the consideration of "vital national issues." The proposed amendment was introduced as a joint resolution, H.R.J. Res. 364, by Rep. Kleczka, Rep. Barney Frank (D-Mass.) and Rep. Bill Frenzel (R-Minn.), and was referred to the House Judiciary Committee.

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice held a hearing on H.R. 3152, the Court Reform and Access to Justice Act, introduced by Rep. Robert W. Kastenmeier (D-Wis.) (see *The Third Branch*, Oct. 1987, at 1). The bill includes many provisions that have been recommended by the Judicial Conference. Those recommendations are also contained in S. 1482, the Judicial Branch Improvements Act of 1987 (see *The Third Branch*, Aug. 1987, at 5). Although H.R. 3152 and S. 1482 overlap considerably, they are not identical.

Among H.R. 3152's provisions are abolishment of the Supreme Court's

See LEGISLATION, page 9

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SENTENCING, from page 1

a three-judge court in accordance with 28 U.S.C. § 2284. The bills also provide that such cases would be expedited "to the greatest possible extent" and that orders issued in such cases would be reviewable by appeal directly to the Supreme Court.

Pursuant to a provision of the Sentencing Reform Act, the Comptroller General of the United States has transmitted to the House Judiciary and Government Operations Committees a report on the Sentencing Commission's guidelines. ■

Judicial Conference of U.S. Restructures Committees; Executive Comm.'s Duties Expanded

The Judicial Conference of the United States has approved a plan to reorganize its committee structure and to expand the duties of its Executive Committee. These and other recommendations contained in the report of the Committee to Study the Judicial Conference, which had been appointed by the Chief Justice in December 1986, were adopted at the Conference's meeting in September.

The committee reported its fundamental conclusion that the Conference and its committees are sound but that structural and procedural revisions were necessary to enable the Conference to operate more expeditiously, to enable the committee structure to deal more effectively with matters of budget and resource allocation, and to improve communications among the Conference, Conference committees, the courts, judges, supporting personnel, and the Administrative Office.

The strengthened Executive Committee will provide the Conference with the capability to implement its policies between sessions. The Chief Justice named the following seven judges to the new Executive Committee: Chief Judge Wilfred Feinberg (2d Cir.), chairman; Chief Judge Paul H. Roney (11th Cir.); Chief Judge Levin H. Campbell (1st Cir.); Chief Judge Charles Clark (5th Cir.); Chief Judge Aubrey E. Robinson, Jr. (D.D.C.); Chief Judge John F. Nangle (E.D. Mo.); and Chief Judge Robert F. Peckham (N.D. Cal.).

In reorganizing committee membership, the Conference decided that committee members who have served six or more years would be asked to resign, but may be reappointed. In

See COMMITTEES, page 5

Retirement Provisions for Judges and Other Court System Personnel Explained

Several retirement systems are applicable to employees of the judiciary. The following outlines some of the complicated provisions of the systems.

Article III judges. There are several major differences between retirement from active service with election of senior judge status under 28 U.S.C. § 371(b) and retirement from office under § 371(a). Both actions provide the individual with a lifetime annuity and free the judgeship for nomination by the President. The following are some major distinctions between the two courses of action:

- A senior judge retains a valid commission and may be designated to perform judicial duties. In contrast, a judge who retires under § 371(a) forfeits the legal authority to act as a judge, but gains the freedom to pursue other professional pursuits.
- A senior judge receives all postretirement increases in judicial pay, whereas a judge retiring under § 371(a) does not.
- A senior judge who performs substantial services is entitled to retain office space and supporting personnel whose salaries are paid from government funds. A judge retiring under § 371(a) is not.

Otherwise, both classes of retirees receive similar benefits and annuities. Both may continue to hold federal health insurance and Federal Employees' Group Life Insurance (FEGLI), and participate in open seasons for each of these programs. All retired judges also receive full credit for deposits made to the Judicial Survivors' Annuity Fund during their years of retirement. Although the annuities paid to both types of retirees are subject to federal income tax as well as income taxes in most states, they are not subject to FICA taxes. In addition, the Department of Health

See RETIREMENT, page 9

CALENDAR

Nov. 11 Workshop for Judges of the Fifth Circuit

Nov. 15–21 Seminar for Newly Appointed District Judges

Nov. 18–20 Seminar for Bankruptcy Judges

Nov. 19–20 Judicial Conference Advisory Committee on Criminal Rules

Nov. 19–20 Judicial Conference Advisory Committee on Civil Rules

Trends in Asbestos Litigation Published by FJC

Trends in Asbestos Litigation, by Thomas E. Willging of the Center's Research Division, is an examination of the methods the federal courts have developed for dealing with the burden of asbestos cases. The report describes techniques that have worked and some that have not. Many of the lawyers and judges cited report that asbestos cases are no longer complex but have become routine, yet the problems remain acute because the number of filings has increased so dramatically.

Because of the unique convergence of several factors—the widespread use of a highly toxic product during an extended latency period, the suppression of information about its dangers, the clarity of general causation and the lack of clarity of causation-in-fact, and the numbers and concentrations of cases—there are no direct parallels in superficially similar toxic tort litigation. Because of these same factors, the author predicts that no other toxic tort cases will follow the case-filing pattern of asbestos cases. He also reports the belief of many lawyers in the field that the major wave of asbestos cases is cresting now, and that reduced use of asbestos in the 1970s should lead to fewer filings in the future.

Copies of the report can be obtained from Information Services, 1520 H St., N.W., Washington, DC. Please send a self-addressed mailing label, preferably franked (10 oz.). Do not send an envelope.

NOTEWORTHY

Ninth Circuit holds bankruptcy judges lack statutory authority to issue civil contempt orders. The Ninth Circuit Court of Appeals has held that in giving bankruptcy judges authority over core proceedings, Congress did not also give them contempt power in those proceedings. *Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 827 F.2d 1281 (9th Cir. 1987). Since bankruptcy judges do not derive their power from Article III, they have jurisdiction to exercise the contempt power only if they have a statutory basis for that authority. There is no express statutory authority granting the contempt power to bankruptcy judges. In the 1978 Act, Congress impliedly granted the bankruptcy court the power of civil contempt. Congress's general jurisdictional grant to the bankruptcy courts in the 1978 Act was held unconstitutional by the Supreme Court in *Northern Pipeline* in 1982. When Congress amended the Act, it withdrew its grant of contempt power. The United States intervened in *Plastiras* to argue that 28 U.S.C. § 157 and 11 U.S.C. § 105 impliedly confer the contempt power on bankruptcy judges. Section 157 was designed to segregate those "core" proceedings over which a bankruptcy judge could exercise plenary authority from "related" proceedings that could constitutionally be disposed of only by Article III judges. The court rejected the United States's position that the contempt order must be treated as "core" because it is part of the underlying cause. The court held that when Congress repealed the jurisdictional sections with the references to the bankruptcy court's contempt power in response to *Northern Pipeline*, Congress did not impliedly confer the contempt power through other sections. Those sections do not contain any of the limitations on the contempt power that Congress would have spelled out had it intended by those sections to confer the contempt power, the court reasoned.

Ford Foundation funds dispute resolution research program. The Ford Foundation will fund a $3 million research program on dispute resolution. The program, to be called the Fund for Research on Dispute Resolution, will be administered by the National Institute for Dispute Resolution. The fund will invite proposals from researchers and will be governed by a council chaired by Sanford M. Jaffe, the director of the Center for Negotiation and Conflict Resolution at Rutgers University.

Masters in Judicial Studies offered at University of Nevada. For the second year a degree program leading to a masters in judicial studies is offered at the University of Nevada, Reno, in conjunction with the National Judicial College and the National Council of Juvenile and Family Court Judges. Candidates must be graduates of

See NOTEWORTHY, page 10

Report of the Director Released by AO

The Administrative Office has released the report of the director, which summarizes the business of the courts and the activities of the AO for the 12-month period ending June 30, 1987.

The report shows that bankruptcy case filings rose more than 17 percent during the 12-month period. There were 473,014 nonbusiness bankruptcy filings and 88,264 business filings.

Criminal case filings over the period rose 4 percent, to 43,292. Prosecutions under the Drug Abuse Prevention and Control Act rose 12 percent, to 8,869, and now account for 21 percent of all criminal case filings and approximately 30 percent of all criminal defendants. As of March 31, 1987, the Drug Aftercare Program was serving 8,889 clients, an increase of 30 percent over the same period in 1986.

Prosecutions of fraud, drunk driving, and other traffic offenses rose significantly. There were 146 homicide cases, 1,215 bank robbery cases, 1,305 income tax prosecutions, and 1,632 criminal immigration cases brought.

The number of civil cases declined 6.2 percent, to 238,982. The decline was concentrated in cases in which the United States was a party. Prisoner petitions increased by 3,551, asbestos-related personal injury and product liability suits by 2,311, and foreclosure cases by 911 over the previous year's figures.

Diversity of citizenship cases increased 5 percent in 1987, to 67,071; they now account for 28 percent of all civil filings.

TIME STUDY, from page 2

On average, every judge will be asked to deal with approximately 20 to 30 time-study cases, though experience indicates that only about half of those cases will result in expenditure of judge time. When completed, the project will have gathered extensive information on nearly 12,000 cases.

In addition to assistance from staff of the district court clerks' offices, the study's success will rely on help from judges' and magistrates' staff. Because time-study cases will constitute only a small proportion of cases active in a court, staff can alert judicial officers when a designated case is before them and assist in recording time expenditures. With the help of five district courts, procedures have been developed and tested to minimize burdens and maintain accurate records. These courts report that the burden on judicial officers is substantially less than that in earlier studies and that the burden on staff is minor.

The main benefit of the study is that it will establish, with increased precision, case weights that take account of variations in the burdens imposed by different features of cases. These case weights are important because they are used in computing, for each district, a weighted filings statistic that figures prominently in the allocation of new judgeships.

The study will also permit investigation of matters affecting the administration of justice. For example, no data on the amount of time that judges spend on cases involving awards of attorneys' fees currently exist, yet the matter has recently generated great concern. Concerns have also been expressed about the time required by summary judgment motions, the time spent by judges on discovery issues, and the savings of time resulting from case management. Questions about these and other practices can be addressed with the data collected in the study. ■

COMMITTEES, from page 3

addition, judges will no longer be required to serve five years before becoming a member of the Conference.

The Conference also adjusted its committee structure. The Chief Justice will make all committee appointments, and he will be assisted in this task by an advisory committee. Additionally, each federal judge will be asked to express his or her interest in serving on a Conference committee. Five Conference committees and their subcommittees will be dissolved, and seven new committees will be created, including a Committee on the Administrative Office, a Committee on Court Security, and a Committee on Space and Facilities. Every five years each committee will recommend either its abolishment or continuance to the Executive Committee.

The Conference also

- Expressed its support for a one-year delay in the effective date of the U.S. Sentencing Commission's sentencing guidelines (see story on House vote on guidelines, p. 1).
- Approved the recommendations of the Committee on Court Administration that the salary ceiling for bankruptcy judges and magistrates be 92 percent of a district judge's salary, and that the salaries of circuit executives and of the deputy directors of the AO and FJC be increased. A draft bill incorporating these recommendations will be sent to Congress.
- Approved revised position descriptions for probation and pretrial services positions.
- Approved revisions to the qualification standard for principal secretaries to federal judges, from "four years as a secretary in a federal court, three of which must be at the JSP-10 level" to "one year of legal secretarial experience at the JSP-10 or equivalent level."
- Approved revisions to the qualification standards for career law clerks.
- Adopted recommendations, as amended, of the Ad Hoc Committee on Court Reporters, including requiring court reporters to keep their financial, attendance, and transcript records on standardized forms.
- Assigned the responsibility for oversight of court automation to the new Committee on Judicial Improvements.
- Determined not to object to the creation of an Article I Claims Court outside the judicial branch.
- Supported enactment, with amendments, of the Court-Annexed Arbitration Act of 1987 (H.R. 2127, 100th Congress).
- Supported enactment, with amendments, of the Federal Courts Study Act (S. 951, H.R. 1929, and H.R. 3227, 100th Congress).
- Recommended that Congress amend 28 U.S.C. § 1292(a)(1), relating to interlocutory appeals.
- Recommended that Congress amend 28 U.S.C. § 1391(c), relating to corporate venue.
- Reaffirmed its March 1987 recommendation that Congress promptly take steps to narrow significantly the civil RICO provisions in 18 U.S.C. § 1964(c).
- Approved a resolution noting with sadness the death of Wade H. McCree, Jr., formerly a judge on the Sixth Circuit Court of Appeals and a member of the first Board of the FJC.
- Made a number of other recommendations pertaining to various personnel, committee, and legislative matters. ■

Health Plan Open Season

An open season to enroll in or change health insurance plans will take place from Nov. 9 to Dec. 11, the AO has announced.

PERSONNEL

Nominations

Dean Whipple, U.S. District Judge, W.D. Mo., Sept. 14

Alfred M. Wolin, U.S. District Judge, D.N.J., Sept. 14

Edward F. Harrington, U.S. District Judge, D. Mass., Sept. 18

Stuart A. Summit, U.S. Circuit Judge, 2d Cir., Sept. 23

Robert S. Gawthrop III, U.S. District Judge, E.D. Pa., Sept. 30

Appointments

Robert F. Kelly, U.S. District Judge, E.D. Pa., July 17

Larry J. McKinney, U.S. District Judge, S.D. Ind., July 22

Philip M. Pro, U.S. District Judge, D. Nev., July 24

Robert H. Bell, U.S. District Judge, W.D. Mich., Aug. 7

Steven A. Felsenthal, U.S. Bankruptcy Judge, N.D. Tex., Aug. 24

William R. Greendyke, U.S. Bankruptcy Judge, S.D. Tex., Sept. 1

Douglas O. Tice, Jr., U.S. Bankruptcy Judge, E.D. Va., Sept. 3

Eugene R. Wedoff, U.S. Bankruptcy Judge, N.D. Ill., Sept. 16

Joyce Bihary, U.S. Bankruptcy Judge, N.D. Ga., Sept. 17

John C. Minahan, Jr., U.S. Bankruptcy Judge, D. Neb., Sept. 17

John C. Cook, U.S. Bankruptcy Judge, E.D. Tenn., Sept. 18

Erwin I. Katz, U.S. Bankruptcy Judge, N.D. Ill., Sept. 25

Wm. Thurmond Bishop, U.S. Bankruptcy Judge, D.S.C., Oct. 9

Elevation

Barbara J. Rothstein, Chief Judge, W.D. Wash., Oct. 1

Senior Status

Irving R. Kaufman, U.S. Circuit Judge, 2d Cir., July 1

John T. Elfvin, U.S. District Judge, W.D.N.Y., July 1

Joseph T. Sneed, U.S. Circuit Judge, 9th Cir., July 21

Joseph H. Young, U.S. District Judge, D. Md., Aug. 1

Walter T. McGovern, U.S. District Judge, W.D. Wash., Oct. 1

Death

John F. Ray, Jr., U.S. Bankruptcy Judge, N.D. Ohio, Oct. 1

Appointment Date Correction

James H. Alesia, U.S. District Judge, N.D. Ill., June 24

HOLLOWAY, from page 1

a replacement for Senior Judge Howard Bratton, a former FJC board member, has been nominated and a hearing has been held.

On the court of appeals, we are waiting. One of our vacancies is over two and a half years old; the other one is six months old. One nomination has been made but no hearings are set. The problem is serious and causes long-range impacts. We had five vacancies in early 1985 with only five active circuit judges for a court of ten authorized judgeships. You can imagine the desperation that we had then in trying to form panels. You build up a backlog and you have to work and work to get that out. And our backlog is unfortunate—we regret it, but I have no apology. Our judges are working strenuously.

It was shocking to Chief Justice Burger when he inquired in March of 1985 at the Judicial Conference how many vacancies different courts had and I said, "five, half our full complement." And I know he and the other conference members were astounded. But, the other circuits have been very kind to try to help us.

How many staff attorneys does your circuit have?

We have 10. As you may know, the formula generally is based on a ratio of one staff attorney to each active judge. However, that does not mean that the staff attorneys are assigned to individual judges. They are not. They are a unit working for the court under the direction of our fine Senior Staff Counsel, Jack Kleinheksel, and our Supervising Staff Attorney, Betty Page. They and the other eight do a very important job for us. I think their most important and helpful contribution at this time is their intense work on our summary dispositions.

In our court, as in many courts, after an appeal is noticed, the appeals expediters, Kathleen Clifford and Ellen Rich, who are deputy clerks in the clerk's office, single out cases that look as though they might be candidates for summary disposition because of a jurisdictional defect or because the case is not a substantial one due to controlling Supreme Court precedent or Tenth Circuit precedent which makes the claim very unsubstantial. Those appeals are then referred to the staff attorneys. Memorandum briefs are ordered in quickly from both sides in typewritten form,

William J. Holloway, Jr.

and the staff attorneys work from those briefs and the records. They study those intensely and recommend to us those which they think can be summarily disposed of. They prepare two important documents for us—a dispositional memorandum giving an outline in detail of the record and their legal research, and a proposed order and judgment. In 1986 there were 464 cases submitted to panels by this process and 434 were decided by these two- or three-page orders and judgments.

These summary dispositions are not handled just in the mail and quickly and with any lack of concentration. The records and these memorandum briefs are sent out to the panel of judges in advance some two or three weeks before they come to Denver. In Denver they confer with the staff attorney who presented that case, and they direct the staff attorney what to do. If any one judge decides the case is substantial, he can blow the whistle and put it back on track for full briefing and argument; or the panel may decide they want to direct the staff attorney to make some revisions in the proposed order. He does it through the word processor, brings it back in a few hours, they adopt it, perhaps, and they are ready to issue. At these conference terms, which are every other month, they are disposing of 80 to 90 cases each term, each of these panels of three judges.

You use the word *unsubstantial*. Are you using it in the same sense that we use *frivolous*?

I somewhat dislike using the term *frivolous* because I think it might be deemed a derogatory term by the litigants and I shy away from it. More often I say *unsubstantial* and I favor that terminology. I realize *frivolous* is in the statutes and rules, but I prefer not to use it. These are people's cases, and I don't like to have them think we treat them as frivolous.

The Tenth Circuit is the only circuit to have its own print shop. Was that in place when you became chief?

Yes. It had been in place for a long time. I've been on the court almost 19 years, and it was there before my time. Chief Judge Orie Phillips and Chief Judge Alfred Murrah both favored it very strongly. We have always felt that it is a very substantial saving to the government, and Dewey Heising, chief of the Financial Management Division at the Administrative Office, has confirmed that. We have Xerox 9500 equipment. We produce all of the opinions that are filed by the court. Each judge who authors an opinion sends his opinion to the clerk with directions to lock it in the vault where it is held for security; then when the concurrences in the case are received we inform the clerk to file the opinion. Within one hour an opinion of 20 pages can be reproduced with the 300 copies we need, and they can be filed that day and distributed. We find it rapid, efficient, and very economical for the government. Last year we filed and reproduced them this

way, some 368 opinions, 318 orders and judgments—up to 3, 4, even 10 pages; and about 9,400 copies of a new version of our rules of the court of appeals. I know others differ, but from our standpoint I see no reason for the cost of a printing contract.

Colorado and Oklahoma have been economically depressed in recent years. How has this been reflected in the Tenth Circuit's bankruptcy filings?

They have risen dramatically. Yesterday the announcement was made that the bank at Mustang, Oklahoma, had failed the day before, which was the sixty-third bank failure in Oklahoma since the Penn Square Bank failure in July 1982. This gives you a perspective on the extent of the economic conditions in Oklahoma that we are suffering. The First National Bank of Oklahoma City and the First National Bank at Enid are two of the victims, and there is a large increase in the filings in bankruptcy in the Western District of Oklahoma. For example, from just July 1986 through June 30, 1987, 9,315 bankruptcy cases were filed in the Western District of Oklahoma. Of course that does not, in any way, tell it all. Included in that number were 257 Chapter 11 reorganization cases, which involve extraordinary work, 8,374 were Chapter 7 liquidation cases, and then smaller numbers of the others.

How many of those cases involved the oil business?

Quite a large amount. And of course agricultural cases under the Chapter 12 provisions, the new provisions that Congressman Synar and others sponsored. In Colorado just from January 1, 1986, to December 31, 1986, they had total bankruptcy filings of 12,760 cases and there were 445 Chapter 11s. Other courts are helping us. Chief Judge Lively told me that he signed an order to allow a bankruptcy judge from the Sixth Circuit to come to help us. Chief Judge Lay and his circuit have helped us. We have recalled retired bankruptcy judges to help.

Is the oil industry in your circuit in a very bad situation?

Oh, yes; it is a severe situation. Of course, the West Texas crude figure is the index we watch, and the price is not favorable yet. It's been a little better than it was when it was down to $13 or a little less. Now it is up; I would say the oil industry is showing signs of some rebirth, but it will depend strictly on the reasonableness of the importation that is made of oil. If there can be a reasonable limit on that without harming consumer interests and we can have increased production and exploration domestically, then we can have a rebirth of the Oklahoma, Colorado, and Kansas oil industries. It hit all the states in the Tenth Circuit heavily—including New Mexico, Utah, and Wyoming.

"I somewhat dislike using the term *frivolous* because I think it might be deemed a derogatory term by the litigants and I shy away from it. . . . These are people's cases, and I don't like to have them think we treat them as frivolous."

The supply companies have had enormous bankruptcy filings. The companies owning the drilling rigs have taken heavy losses. The producers—the large and small producers—have suffered terrible losses because of the depressed price of crude oil. And, it is sort of a double whammy for the farmers—they are affected because not only are we suffering an agricultural depression, but the farmers in large areas depend on royalty income and their royalties are way down because of the decrease in production of oil and gas.

They own the mineral rights under their farm lands and when they make an oil and gas lease they are entitled to, and have in the lease generally, a one-eighth royalty. And so when the royalty income of the farmer is depressed because the gas and oil takes are so much less, the income off of them is less. The farmers suffer not only because their agricultural income is down but because their supplementary royalty income is reduced.

What about your automation activity?

Well, we are doing a great deal. We were a pilot circuit and are now completely on the AIMS system for the entry of all cases filed in the Tenth Circuit Court of Appeals. We did that over a year ago, so all of the data is able to be accessed by the computer. It is stored in the computer, accessed from the computer, and maintained there for the benefit of the judges, and for the important usage of the Clerk's Office. Our Judge John Moore is able to access the information from his Denver chambers for the use of himself and his staff. He can, through automation, pull up the style of the case, the names of counsel involved, the controlling issues that are summarized under an indexing system, and other data that the judge may need.

In the district courts, the clerks' offices are presently using the Personal Computer (PC AT equipment) for a number of programs including financial applications and case status information. The district courts are also using these PCs for administrative programs and for personnel and furniture. William King is developing additional applications for the district courts' use in the near future. In the district of Colorado their Central Violations Bureau is using completely automated records on the violations. The district of New Mexico has the so-called four-phase system allowing them to keep track of potential jurors for service, and they generate also by computer the vouchers and compute the pay due and issue checks. The district of New Mexico also keeps track of cases entered for each judge and creates indices of the parties in-

See HOLLOWAY, page 8

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volved in their cases. They run Speedy Trial Act reports through their computers.

The bankruptcy courts, I think, are one of the most critically important areas for the use of automation because of the enormous volume of work. The bankruptcy courts in the Tenth Circuit are experiencing a large growth in filings, as I said, and they are dealing with this by utilizing the personal computers in providing statistical information to the Administrative Office. The district in Wyoming is the only Bankruptcy Court that I believe now uses a modified so-called NIBS BUMS system for full docketing.

Are there any innovations in bankruptcy case management in your circuit?

Well, one thing that is being examined by us again—we have considered it before and didn't adopt it—are the appellate bankruptcy panels. They are in use for the Ninth Circuit, and I understand that Chief Judge Browning feels that they are most useful. These are special panels of bankruptcy judges where parties have the option to either carry their appeal to the federal district courts and then up to the court of appeals or through bankruptcy appeals panels. That is a procedure we are going to reconsider very shortly.

What has been your circuit's experience with certification of state law questions to the highest courts of the states?

This is one of my very strong interests. It is not, I will have to admit, a mechanism that is a large-volume solution to problems of the appellate courts, but I think it is a very important device that has not been appreciated fully. As you may know, the first certification statute was adopted in 1945 in Florida. In *Clay v. Sun Insurance Co.* the Supreme Court in 1960 commended the rare foresight of the Florida legislature in adopting a statute permitting reference of questions to the Supreme Court of Florida from the federal courts. Since then, 24 states and the Commonwealth of Puerto Rico have adopted either statutes or rules. Every state in the Tenth Circuit has authorization for their Supreme Court to answer. Justice Marian Opala of our Oklahoma Supreme Court tells me that the Oklahoma Supreme Court deems it an honor to be asked to respond to a question.

But they don't all feel that way?

That's true, they may not. Secondly, Justice Opala says they give certified questions priority. Third, they have never declined to answer a certified question, which, of course, is their right and within their discretion. The point is that there is a failure, I feel, to realize the usefulness of this procedure. This not only is a mechanism available in diversity cases but in Federal Tort Claims Act cases. That statute incorporates state law, and it is very often a controlling question. We had one about a statute of limitations under a new statute relating to medical malpractice in Colorado. It was terribly important to get a decision. A question of state law in Kansas also arose in the federal tax case field. We certified a question under Kansas probate law, on which the case actually turned, although it was a federal tax refund suit. We got a decision from the Kansas Supreme Court and promptly were able to dispose of the case ourselves without guessing on state law. But, I think it is most important in cases such as one involving a question we certified to the Supreme Court of Wyoming. That case involved the construction and application of the state securities laws, the question of whether an oil and gas investment of a certain type was a security within the meaning of that statute. Why should the federal court try to decide basic questions of state policy of such importance? We certified the question to the Supreme Court of Wyoming in that case over the objection of both sides. But we think we handled this right.

What objections were raised?

Of course, one side had already won. They didn't want it to be reheard. I think the other side thought perhaps there would be a delay. They feel there is delay. I don't. I think there is not delay because the state courts do give priority to the cases. They answer the question and we proceed. In a matter of months we will have the response from the state court, not only for us but for all—for all the federal district judges in Wyoming, and for all the panels of the court of appeals that may have similar questions. Justice Douglas concluded in the *Lehman Brothers* case that certification in the long run saves time; that it is a judicial economy; and that it helps build a cooperative judicial federalism. ■

"We are now completely on the AIMS system for the entry of all cases filed in the Tenth Circuit Court of Appeals."

"The bankruptcy courts . . . are one of the most critically important areas for the use of automation . . . ."

RETIREMENT, from page 3

and Human Services recently reversed an earlier position and now holds that senior judges are entitled to primary health insurance coverage from Medicare.

One variation on the judicial authority of a senior judge arises in connection with in banc proceedings. Section 46(c) of title 28 provides that a court in banc "shall consist of all circuit judges in regular active service . . . except that any senior circuit judge . . . shall be eligible to participate . . . as a member of an in banc court reviewing a decision of a panel of which such judge was a member."

Magistrates and bankruptcy judges. Bankruptcy judges and magistrates who were appointed before Jan. 1, 1984, are covered by the Civil Service Retirement System (CSRS); those appointed after that date, with some exceptions, are covered by the Federal Employees Retirement System (FERS), which is applicable to federal employees generally. The Magistrates Retirement Parity Act of 1987, Pub. L. No. 100-53, amended Chapter 83 of 5 U.S.C. to include magistrates and bankruptcy judges in the category of employees who receive a CSRS annuity computed at an enhanced rate of 2.5 percent of average annual pay for the years of creditable service. This credit is given for service as a referee in bankruptcy, a bankruptcy judge, a U.S. magistrate, or a U.S. commissioner, and up to five years of military service. No additional contributions are required for this retroactive annuity benefit, but future contributions will be at the rate of 8 percent of basic pay. (Bankruptcy judges have been paying this 8 percent rate since Jan. 1, 1984.)

Under the Act, magistrates and bankruptcy judges under CSRS now have the same retirement options. They may retire at age 62 after completing 5 years of civilian service or at age 60 after completing 10 years of service as magistrate or bankruptcy judge. Under 28 U.S.C. § 8336, they may also be entitled to an immediate annuity after becoming 55 years of age with 30 years of service. The Act applies to all magistrates and bankruptcy judges covered by CSRS who were holding office on Oct. 1, 1987. Magistrates and bankruptcy judges appointed after that date will receive these benefits if they are covered by CSRS. The Act does not apply to magistrates or bankruptcy judges who are covered mandatorily by the new FERS or to those who elected to withdraw completely from CSRS.

Probation and pretrial services officers. The Office of Personnel Management (OPM) has issued regulations concerning the treatment of law enforcement officers under FERS. Law enforcement officers pay larger contributions to the retirement system than other employees and receive a more generous annuity, but are subject to a maximum age for entry on duty as well as a mandatory retirement age. In addition, the agency contribution for law enforcement officers is larger than its contributions for other employees. The OPM regulations delegate to the Director of the AO the authority to certify which positions in the judicial branch are to be treated as law enforcement officers under FERS. In essence, the Director has designated the positions covered as law enforcement positions under CSRS as also covered as law enforcement officer positions under FERS. These positions include probation and pretrial services officers and probation officer assistants.

Other judicial employees. Federal employees who entered on duty on or after Jan. 1, 1984, including bankruptcy judges, magistrates, judges of the U.S. Claims Court, and all other

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mandatory jurisdiction; abolishment of the Temporary Emergency Court of Appeals; improvement of the administrative operation of the jury system by allowing judges to authorize the clerk of court to grant temporary excuses to jurors; changes in the rulemaking procedures for federal court rules; and statutory authorization for experimental court-annexed arbitration in 13 districts, with an additional 10 districts to be approved by the Judicial Conference. The bill also contains provisions that have not been addressed by the Judicial Conference. Judge Elmo Hunter (E.D. Mo.) testified on H.R. 3152 on behalf of the Judicial Conference with respect to the provisions that the Conference recommended.

ABA President Robert MacCrate also testified concerning H.R. 3152.

• The House Subcommittee on Criminal Justice met in executive session to continue to discuss the inquiry into the possible impeachment of Judge Alcee L. Hastings (S.D. Fla.). The full House voted to release the report on Judge Hastings prepared by an investigating committee of five federal judges and submitted to the 11th Circuit Judicial Council. The Judicial Council certified to the Judicial Conference of the United States that it had determined that Judge Hastings had engaged in conduct that might constitute one or more grounds for impeachment, and the Judicial Conference certified to the House its determination that consideration of impeachment may be warranted. The Judicial Conference transmitted the report of the investigating committee and other materials to the Speaker of the House on Mar. 17, 1987. 28 U.S.C. § 372(c)(14)(A) authorizes the House to release material "which is believed necessary to an impeachment investigation or trial of a judge." Under the House Resolution, the report of the investigating committee is to be made public, and all other papers, documents, and records of proceedings transmitted to the House in the matter are to be released "to the extent ordered by the Committee on the Judiciary." ■

RETIREMENT, from page 9

judicial employees (but not Article III judges), have been covered by FERS since Jan. 1, 1987, unless they had five years of creditable civilian service on Dec. 31, 1986. Employees not mandatorily covered under FERS have until Dec. 31, 1987, to elect to participate in FERS. Information about FERS has been sent to all employees to assist them in making this decision.

The annuity under FERS (1 percent of annual salary times years of service) is supplemented by Social Security benefits and the voluntary 401(k)-type thrift savings plan. An employee may contribute up to 10 percent of salary to the plan, subject to IRS limitations. The government automatically contributes 1 percent of salary annually and matches employee contributions up to a total of 5 percent of salary annually.

Pending legislation. As endorsed by the Judicial Conference, S. 1482, the Judicial Branch Improvements Act of 1987, would amend 28 U.S.C. § 371 to permit senior judges and judges retiring under § 371(a) to receive military retired or retainer pay they would be entitled to on the basis of regular or reserve military service.

With the endorsement of the Judicial Conference, bills have been introduced in each house of Congress that would provide a retirement annuity for all bankruptcy judges and full-time magistrates, equal to the full salary of office after 14 years of service, payable at age 65. The bills are H.R. 2586 and S. 1630, the Retirement and Survivor Annuities for Bankrutpcy Judges and Magistrates Act of 1987. The right to an annuity would vest after 8 years of service. Annuities for retirees with 8–14 years of service would be computed proportionally by dividing the years of service by 14.

Rep. Sonny Montgomery (D-Miss.) has introduced H.R. 3358, a bill to amend 28 U.S.C. § 376 to allow cost-of-living adjustments in judicial survivors annuities and to increase existing annuities by 10 percent. ■

Position Available

Clerk, U.S. Bankruptcy Court, S.D. Ill. Salary $53,820–69,976. Responsible for managing the administrative activities of the court. Requires minimum 10 years' progressively responsible administrative experience in public service or business, at least 3 years in a position of substantial management responsibility. College education may be substituted for up to 3 years of general experience, law degree may be substituted for 2 additional years. Submit application by Nov. 16, 1987, to Thomas M. Crain, Clerk, U.S. Bankruptcy Court, 750 Missouri Ave., 1st Floor, East St. Louis, IL 62201.

EQUAL OPPORTUNITY EMPLOYER

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an ABA-accredited law school and must be in active service; course work must be completed in two six-week summer sessions (though this work may also be spread over a six-year period in two- to four-week segments); and a thesis is required. Thirty-nine candidates from nineteen states are already enrolled for the 1988 term.

Through a grant from the State Justice Institute, 60 scholarships of up to $1,000 per judge will be awarded for the 1988 calendar year. For further information contact Neal Ferguson, MJS Program, 335 College Inn, University of Nevada, Reno, Nevada 89557. ■

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A Holiday Message from the Chief Justice

I send holiday greetings to my fellow judges and all of the Federal Judicial family who have worked loyally and ably in the administration of justice this past year. After a little more than a year as Chief Justice, I have a renewed appreciation of the need to work together to maintain the efficiency and responsiveness of the "Third Branch." In this—the 200th year of our Constitution—we should remind ourselves that equal justice under law is an ideal towards which all of our efforts must be continually directed.

William H. Rehnquist

No individual exemplified the commitment to justice under law better than Justice Lewis F. Powell, who retired from the Court in June of this year. His fifteen years of distinguished service as Associate Justice capped a truly distinguished career as a lawyer, private citizen and public servant. His colleagues will miss the presence of this wise, reflective and gentle man; we wish Lewis Powell and his wife, Jo, a retirement blessed with good health.

A special note of appreciation is due to retired Chief Justice Burger for his distinguished service as head of the Bicentennial Commission. The national observance of the 200th year of our Constitution has been a splendid celebration of what British historian J. R. Pole described as "the gift of government."

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Congress Weighs Enhanced Retirement Coverage For Bankruptcy Judges and Magistrates

The following measures are among those in the House and Senate that are of interest to the judiciary.

Retirement and survivor annuities for bankruptcy judges and magistrates. Subcommittees of both the House and Senate Judiciary Committees held hearings on bills that would provide for enhanced retirement and survivor annuities for bankruptcy judges and magistrates. The House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice, chaired by Rep. Robert W. Kastenmeier (D-Wis.) held a hearing on H.R. 2586, the Retirement and Survivor Annuities for Bankruptcy Judges and Magistrates Act of 1987. The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held a hearing on S. 1630.

Judge Morey Sear (E.D. La.), chairman of the Judicial Conference's Committee on the Administration of the Bankruptcy System, and Judge Otto R. Skopil, Jr. (9th Cir.), chairman of the Conference's Committee on the Administration of the Federal Magistrates System, testified in support of the bills. Judge Robert R. Merhige, Jr. (E.D. Va.), a member of the Conference's Committee on the Administration of the Bankruptcy System, also testified in support of the bills.

The bills provide that bankruptcy judges and magistrates will receive an annuity payable at the rate of 1/14 of salary at the time of retirement for

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Congress Passes Amendments to Sentencing Act

Congress has passed S. 1822, as amended, the "Sentencing Act of 1987," amending the Sentencing Reform Act to make clear that the guidelines apply only to conduct committed on or after Nov. 1. S. 1822 also originally contained a title modifying criminal fine provisions. The House has passed a criminal fine improvements bill, H.R. 3483 (see "Criminal fines," p. 5.) The Senate had passed a similar criminal fines measure in an earlier version of S. 1822, but the House felt it would be better for all sentencing amendments to be in one bill and all fine provisions in a separate bill.

S. 1822 as passed clarifies the standard for departure from the sentencing guidelines under 18 U.S.C. § 3553(b), stating that "in determining whether a circumstance was adequately taken into consideration [by the Sentencing Commission], the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission."

Other provisions of the Sentencing Act of 1987 concern review of a sentence for which there is no applicable guideline; supervised release; the determination of guideline sentencing for prisoners transferred pursuant to treaty from foreign countries; the elimination of the requirement for

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petty offense guidelines; and the authority of the director of the AO to contract for psychiatric aftercare for probationers and parolees.

Some of the provisions contained in S. 1822 had been requested by witnesses at a Senate Judiciary Committee hearing held shortly before the Nov. 1 effective date. At that hearing, the committee heard testimony from Judges Edward R. Becker (3d Cir.), A. David Mazzone (D. Mass.), and Gerald B. Tjoflat (11th Cir.). Judges Becker and Mazzone represented the Judicial Conference. Judges Tjoflat and Mazzone are members of the Judicial Conference Ad Hoc Committee on Sentencing Guidelines, and Judge Mazzone is chairman and Judges Becker and Tjoflat are members of the FJC Committee on Sentencing Guidelines Education. Also appearing before the committee were six of the seven members of the Sentencing Commission, Assistant Attorney General William Weld, and representatives of the ABA and the Federal Probation Officers Association.

Judges Becker and Mazzone expressed concern that, given the short time remaining before the guidelines took effect, there would be problems in conducting adequate training. Although the judicial branch was doing its best to prepare all judicial personnel for guideline sentencing, the judges said, "we can expect significant uncertainty." The judges were also concerned about funds for transcripts of sentencing hearings, preparation of local rules, and the impact of guideline sentencing on appellate courts. Accordingly, the judges asked on behalf of the Executive Committee of the Judicial Conference for a delay of three months "to give these guidelines the best possible chance of becoming a milestone in sentencing reform." They also urged that Congress clarify the question of the guidelines' applicability only to conduct committed on or after the Nov. 1 effective date.

Judiciary Committee Chairman Sen. Joseph R. Biden, Jr. (D-Del.) issued a statement saying that he was "eager for the guidelines to go into effect as soon as possible."

Assistant Attorney General Weld expressed the Department of Justice's "strong support" for the guidelines and opposed any delay in their effective date. He presented a draft bill, jointly worked out among the staffs of the AO (pursuant to amendments approved by the Judicial Conference), the Sentencing Commission, and the Justice Department, which served as the basis for S. 1822.

Tommaso D. Rendino, a U.S. probation officer in the District of Vermont and president of the Federal Probation Officers Association, stated that "the guidelines mean more work for us, both quantitatively and qualitatively," because "the presentence investigation phase of the process will take more hours to complete and the level of responsibility placed on probation officers will be increased." Describing the probation service as "the key element in the new guideline sentencing," he pointed to the importance of the intensive training already under way. ■

Judges Gerald B. Tjoflat (11th Cir.), Edward R. Becker (3d Cir.), and A. David Mazzone (D. Mass.) (left to right) testify before the Senate Judiciary Committee hearing on the sentencing guidelines.

Training on Guidelines

Since late October, federal judges, probation officers, magistrates, federal defenders, and others have been attending guideline sentencing orientation programs held at the local level and administered primarily by the district court probation offices. The Federal Judicial Center, in cooperation with the U.S. Sentencing Commission, sponsored three regional seminars in October to prepare at least one probation officer and one district judge from each court to provide others in their court with an initial orientation to the guidelines.

The Center adopted this basic approach, first announced last May, in order to provide the courts with maximum flexibility in meeting their guideline training needs, and because the approach could be cancelled quickly if Congress enacted a last-minute delay in the guidelines' effective date.

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1987 Circuit Judicial Conferences Focus on Bicentennial of United States Constitution

Bicentennial themes were the focus of the 1987 circuit judicial conferences.

The First Circuit Judicial Conference was held in Danvers, Mass. A panel including Judge Pierre N. Leval (S.D.N.Y.), a private practitioner, and a journalist discussed "The Press, the Bar, and the Courts," and a panel moderated by Judge Rya W. Zobel (D. Mass.) and including Chief Judge Jack B. Weinstein (E.D.N.Y.) discussed the use of experts in civil and criminal cases. Solicitor General Charles Fried spoke, and Judge John C. Godbold, director of the FJC, gave the luncheon address. Judges Stephen G. Breyer (1st Cir.) and A. David Mazzone (D. Mass.) discussed the sentencing guidelines.

The annual Judicial Conference of the Second Circuit met in Hershey, Pa. Chief Judge Wilfred Feinberg reported on the work of the circuit, and Justice Thurgood Marshall, the circuit justice, spoke. The conference included panel presentations on first amendment topics and workshops on several issues. The panels, introduced by Judge James L. Oakes (2d Cir.), chairman of the conference, considered defamation issues, "equalization" of free speech opportunities, and commercial free speech. Yale University President Benno C. Schmidt, Jr., was the dinner speaker. Judges and conferees elected to participate in one of several workshops, on the topics of separation of powers, sexual equality, and the framers' intentions as to the functioning of the federal courts.

The 50th Annual Third Circuit Judicial Conference was held in Philadelphia in conjunction with the celebration of the bicentennial in the Constitution's city of origin. Chief Judge John J. Gibbons presided over a program that included such special events as a private showing of 40 original documents from the Constitutional Convention. A panel discussion on the Constitution's past featured Columbia University Law School Dean Barbara A. Black, former Secretary of Transportation William T. Coleman, Jr., and Judge John T. Noonan, Jr. (9th Cir.). A discussion on the Constitution's future featured Anthony Lester, Q.C., from the United Kingdom; Anthony Lewis of the *New York Times;* former Judge Edmund B. Spaeth, Jr.; and Chief Judge Patricia M. Wald (D.C. Cir.). Chief Judge Gibbons and Judge Ruggero J. Aldisert (3d Cir.) gave "a toast to the Constitution and to visiting chief circuit judges," and Chief Judge Gibbons made special remarks honoring retired Justice Lewis F. Powell, Jr.

Chief Judge Harrison L. Winter welcomed conferees to the 57th Judicial Conference for the Fourth Circuit, held in Hot Springs, Va. Chief Justice William H. Rehnquist, the circuit justice, addressed the conference. Professor A. E. Dick Howard of the University of Virginia Law School spoke on "Roots of the American Constitution," Professor Irving Younger spoke on "*Ulysses* in Court," and a panel of professors reviewed major Supreme Court decisions of the October 1986 term.

Chief Judge Charles Clark opened the 44th Annual Judicial Conference of the Fifth Circuit, held in New Orleans, La. Attorney General Edwin Meese III and business leader H. Ross Perot addressed the conference. Panels considered such topics as the fraternity of courts and lawyers; judgments without trials; recent Supreme Court decisions; sanctions; and new developments in bankruptcy. Duke University Law Professor Walter E. Dellinger III spoke on "The Summer of 1787."

The 48th Annual Conference of the Sixth Circuit, held in Grand Rapids, Mich., was devoted to the theme "The Living Constitution: Into the Third Century." Chief Judge Pierce Lively welcomed the conferees, and Justice Antonin Scalia, the circuit justice, addressed the conference. Panel discussions were devoted to such constitutional topics as search and seizure, the commerce clause, and the roles of the President and Congress in foreign affairs. Former President Gerald R. Ford served as one of the commentators on the foreign affairs panel.

At the Seventh Circuit Judicial Conference in Chicago, Chief Judge

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University of Virginia Announces 1988 Degree Program for Judges

The University of Virginia Law School is currently receiving applications for its Graduate Program for Judges, scheduled to begin in the summer of 1988. The program is designed for federal and state appellate judges. U.S. district judges will be considered for admission, although only a few places are available for trial-level judges. Total enrollment is limited to 30.

The program is taught mainly by full-time law faculty members at the University of Virginia. Its focus is on historical, jurisprudential, interdisciplinary, and comparative material. Judges who successfully complete the program receive the degree of Master of Laws in the Judicial Process.

The program requires attendance at two consecutive summer resident sessions of six weeks each at the law school in Charlottesville. The 1988 and 1989 sessions will both run from June 29 through Aug. 9. The deadline for applications is Jan. 29, 1988; preference may be given to applications submitted earlier.

Application forms and full information can be obtained by calling or writing the Program Director, Professor Daniel J. Meador, University of Virginia Law School, Charlottesville, VA 22901, (804) 924-3947. Professor Meador advises that funds in the program are sufficient to cover all expenses of federal judges who are enrolled.

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each year of service up to 14 years. Thus, upon reaching 65 years of age, a bankruptcy judge or magistrate with 14 years of service could retire on full salary. The annuity benefit would vest after 8 years of service. Judge Sear noted that attracting and retaining the most qualified individuals to serve as judges depends upon offering "the promise of adequate financial protection upon reaching age 65." Since the *Bankruptcy Code* became effective on Oct. 1, 1979, 52 bankruptcy judges have resigned from office; Judge Sear testified that in addition to being fair to bankruptcy judges, "the legislation should also have the practical effect of keeping judges on the bench for longer periods of time."

Judge Skopil said that "the present retirement system renders it virtually impossible for a magistrate appointed in mid-career to earn a suitable pension" and threatens "to reverse the important strides made in the development of the [magistrate] system." Since the 1979 amendments to the Federal Magistrates Act, he noted, nearly 60 full-time magistrates have left office prior to attaining their retirement eligibility.

Appointment of independent counsel. The House of Representatives passed H.R. 2939, reauthorizing for five years, with minor changes, the procedure providing for the appointment of independent counsel. The Senate has passed a similar measure; the bills will now go to conference.

Vaccine injuries. Rep. Norman F. Lent (R-N.Y.) and Rep. John J. Duncan (R-Tenn.) have introduced H.R. 3546, to amend the National Childhood Vaccine Injury Act of 1986. That act set up a no-fault compensation program for vaccine injuries, which was to be administered by the district courts. However, by its terms, the program was not to take effect until specially funded (see *The Third Branch*, Sept. 1987, p. 5, and October 1987, p. 6 (comments of Assistant Attorney General Richard Willard)).

The House Energy and Commerce Committee recently approved modifications to the original program. The modifications would provide separate funding for future and past cases: children injured before Oct. 1, 1988, would receive compensation for all medical expenses from appropriations authorized by the Energy and Commerce Committee; those injured after Oct. 1, 1988, would be compensated from a trust fund financed by a new excise tax. The modified plan would limit the number of cases paid from the trust fund to an average of 150 every 12 months. If more than 150 awards were paid, the Secretary of Health and Human Services would be required to notify Congress and close the program to new applications after six months. Subsequent to these Energy and Commerce Committee modifications to the plan, the House Ways and Means Committee authorized creation of the trust fund and authorized the special excise taxes for a period of only four years.

H.R. 3546 would retain the basic provisions of current law regarding eligibility for compensation and the types of economic injuries to be compensated, but would establish a new Vaccine Compensation Board to adjudicate claims for compensation. The compensation scheme would be

See LEGISLATION, page 5

Study on Home Confinement Released by FJC

The use of home confinement (also termed *house arrest* or *home detention*) is on the rise. A newly available FJC report, *Home Confinement: An Evolving Sanction in the Federal Criminal Justice System*, by Paul Hofer and Barbara Meierhoefer of the Center's Research Division, found 12 districts where offenders have been sentenced to home confinement as a condition of probation. Other districts have used home confinement as a condition of pretrial release, and the Bureau of Prisons and the Parole Commission have included it as the main feature in the curfew parole program of supervised early release from prison.

For electronic monitoring of those sentenced to home confinement, offenders are telephoned intermittently by computer or required to wear radio transmitters to verify their presence at home. This has been used by only one federal district so far but is planned for the near future in four more districts. The features of state programs and supervision plans in federal districts not using electronic monitoring are described by the authors to help districts develop a program suited to their needs.

Although home confinement programs and electronic monitoring are still new, the authors conclude from this preliminary study that low-risk offenders can be identified and safely controlled in the community.

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

CALENDAR

Dec. 4 Judicial Conference Committee on the Judicial Branch

Dec. 7–8 Judicial Conference Committee on Administration of the Magistrates System

Dec. 8–9 Judicial Conference Committee on Judicial Resources

Jan. 6 Workshop for Judges of the Eighth and Tenth Circuits

Jan. 7–8 Judicial Conference Committee on Administration of the Bankruptcy System

Jan. 8–9 Judicial Conference Advisory Committee on Bankruptcy Rules

As this issue goes to press the composition and membership of several committees are not final. However, tentative dates have been set for meetings in anticipation of the Mar. 15–16, 1988, Judicial Conference session. Committee chairmen and members will be notified personally to confirm the arrangements for their respective meetings.

LEGISLATION, from page 4

based on the worker's compensation model; vaccine manufacturers would be required to purchase insurance, or to self-insure, and the cost of securing the insurance would be a function of the manufacturer's prior experience in paying compensation for vaccine injuries. In introducing the bill, Rep. Lent noted constitutional concerns that have been raised about the National Childhood Vaccine Injury Act of 1986. He stated that "by vesting, as it does, the responsibility for administering the compensation program in the district courts, the law runs afoul of" Article III's "case or controversy" requirement.

Criminal fines. The House of Representatives has passed H.R. 3483, as amended, known as the Criminal Fine Improvements Act of 1987, and the Senate had passed essentially the same provisions in S. 1822 (see story on amendment of the Sentencing Reform Act, p. 1). H.R. 3483 reflects an agreement between the Department of Justice and the AO as to how criminal fines shall be collected. During a 12-month transition period, it returns the responsibility for the receipt of fines to the clerk of court. Under the present practice, the U.S. Attorney's office is responsible for receipt of fines. Collection functions incident to the judicial enforcement of fines remain with the Justice Department. H.R. 3483 also amends the Sentencing Reform Act to conform its fine provisions with the Criminal Fine Enforcement Act of 1984, which was developed independently of and enacted after the Sentencing Reform Act of 1984. The Criminal Fine Enforcement Act was the product of the House and Senate Judiciary Committees, the Department of Justice, the AO, and the U.S. Parole Commission. These parties agreed that the act's fine provisions were superior to the criminal fine provisions of the Sentencing Reform Act, but there was not enough time near the end of the 98th Congress to merge the two bills.

Marshal's Service. Rep. Robert Kastenmeier (D-Wis.) has introduced H.R. 3551, a bill to amend titles 18 and 28 of the *U.S. Code* with respect to U.S. marshals. The bill, known as the U.S. Marshals Service Act of 1987, is intended to modernize and consolidate existing statutory provisions and to provide a clear statutory basis for the Marshals Service's current responsibilities. The bill would formally establish the Marshals Service as a Bureau of the Department of Justice (the Service currently exists only by order of the Attorney General). The bill also explicitly authorizes the Marshals Service to provide personal protection to judges, U.S. attorneys, and other federal officials, and retains the existing language of 28 U.S.C. § 569(a) relating to the presence of marshals at sessions of court.

Hatch Act. H.R. 3400, a bill to reform the Hatch Act, which governs participation in partisan politics by executive branch employees, was approved by the House Post Office and Civil Service Committee. The bill has more than 280 cosponsors. (Although the Hatch Act does not apply to employees of the judiciary, a long-standing resolution of the Judicial Conference adopted its intent as binding on judicial employees.) ■

PERSONNEL

Nomination

Kenneth Conboy, U.S. District Judge, S.D.N.Y., Nov. 5

Confirmations

William L. Dwyer, U.S. District Judge, W.D. Wash., Nov. 5
David G. Larimer, U.S. District Judge, W.D.N.Y., Nov. 5
James A. Parker, U.S. District Judge, D.N.M., Nov. 5
William L. Standish, U.S. District Judge, W.D. Pa., Nov. 5
Ernest C. Torres, U.S. District Judge, D.R.I., Nov. 5

Appointments

Charles R. Wolle, U.S. District Judge, S.D. Iowa, Aug. 12
Thomas S. Ellis III, U.S. District Judge, E.D. Va., Aug. 28
John D. Tinder, U.S. District Judge, S.D. Ind., Sept. 10
Anthony J. Scirica, U.S. Circuit Judge, 3d Cir., Sept. 11
Stephen A. Stripp, U.S. Bankruptcy Judge, D.N.J., Sept. 15
Joyce Bihary, U.S. Bankruptcy Judge, N.D. Ga., Sept. 17
Erwin I. Katz, U.S. Bankruptcy Judge, N.D. Ill., Sept. 25
Daniel J. Moore, U.S. Bankruptcy Judge, D.N.J., Sept. 30
Irwin N. Hoyt, U.S. Bankruptcy Judge, D.S.D., Oct. 2
Thomas E. Baynes, U.S. Bankruptcy Judge, M.D. Fla., Oct. 6
William Thurmond Bishop, U.S. Bankruptcy Judge, D.S.C., Oct. 9
William H. Brown, U.S. Bankruptcy Judge, W.D. Tenn., Oct. 9
John S. Dalis, U.S. Bankruptcy Judge, S.D. Ga., Oct. 14
J. Wendell Roberts, U.S. Bankruptcy Judge, W.D. Ky., Oct. 16
Margaret H. Murphy, U.S. Bankruptcy Judge, N.D. Ga., Oct. 19
John TeSelle, U.S. Bankruptcy Judge, W.D. Okla., Oct. 19
M. Dee McGarity, U.S. Bankruptcy Judge, E.D. Wis., Oct. 26
Judith K. Fitzgerald, U.S. Bankruptcy Judge, W.D. Pa., Oct. 30
Russell J. Hill, U.S. Bankruptcy Judge, S.D. Iowa, Nov. 2

Resignation

William S. Sessions, Chief Judge, W.D. Tex., Nov. 1

Retirement

Luther B. Eubanks, U.S. District Judge, W.D. Okla., Sept. 1

Senior Status

Carl O. Bue, Jr., U.S. District Judge, S.D. Tex., Sept. 2
John C. Godbold, U.S. Circuit Judge, 11th Cir., Oct. 23

Death

Robert M. Hill, U.S. Circuit Judge, 5th Cir., Oct. 19

CIRCUIT CONFERENCES, from page 3

William J. Bauer spoke on the state of the circuit, and Justice John Paul Stevens, the circuit justice, reported on the work of the Supreme Court. Charles Fried, solicitor general of the United States, also addressed the conference. Following a long-standing tradition, the annual meeting of the Seventh Circuit Bar Association was held in conjunction with the conference.

The Eighth Circuit Judicial Conference, held in Colorado Springs, Colo., was opened by Chief Judge Donald P. Lay. Justice John Paul Stevens spoke on "Liberty Under the Constitution." A panel chaired by Judge Diana E. Murphy (D. Minn.) and including Judges Constance Baker Motley (S.D.N.Y.) and Ruth Bader Ginsburg (D.C. Cir.) addressed the topic "Women and the Constitution." Eighth Circuit judges and other conferees presented a one-act play, *Signers of the Constitution—200 Years Later*. CIA Director William H. Webster, a former judge on the Eighth Circuit Court of Appeals, gave a report on his new position and the implications of "Intelligence and Separation of Powers." Constitutional scholar Bruce E. Fein and Stanford Law School Dean Paul A. Brest conducted a panel discussion on the doctrine of original intention in constitutional adjudication. Former Attorney General Griffin Bell and Justice Stevens responded to comments of the panelists.

The Ninth Circuit Judicial Conference, in Waikoloa, Hawaii, joined the national celebration of the bicentennial by examining the subjects of federalism and the courts' role in constitutional interpretation. Justice Sandra Day O'Connor, the circuit justice, spoke on the Constitution, and Attorney General Meese and Sen. Howell T. Heflin (D-Ala.) addressed the conference. In addition to presenting programs on the Constitution, the conference continued the Judicial Council's three-year examination of the management practices of the courts.

Chief Judge William J. Holloway, Jr., presided over the opening of the Tenth Circuit Judicial Conference in San Diego, Cal. The conference featured programs entitled "A Visit from Supreme Court Justices of the Past" and "The Constitution: Conversations with Thomas Jefferson," in which an attorney portraying Jefferson appeared. Justice Byron R. White, the circuit justice, and Attorney General Meese addressed the conference. Other programs dealt with separation of powers and the Constitution's impact on education.

The Sixth Annual Judicial Conference of the Eleventh Circuit was held in Birmingham, Ala. Chief Judge Paul H. Roney delivered a state of the circuit address, which reported on filings and dispositions in the circuit, Criminal Justice Act and capital cases, and administrative matters. Sen. Heflin and AO Director L. Ralph Mecham addressed the meeting, and Justice Lewis F. Powell, Jr., the circuit justice, reviewed cases decided during the last term of the Supreme Court. The bicentennial presentation included a talk by Judge Thomas M. Reavley (5th Cir.) on lessons that can be drawn from the way in which the framers of the Constitution reached

See CIRCUIT CONFERENCES, page 7

Positions Available

Circuit Executive, 1st Cir. Salary to $72,500. Works under direction of judicial council pursuant to 28 U.S.C. § 332(a) and other statutes and rules. Must have B.A. in management or related field, experience in administration or equivalent. Legal training preferred but not required. Certification pursuant to 28 U.S.C. § 322(f) prerequisite to appointment, but applications from qualified noncertified applicants encouraged. Send resumes by Jan. 15, 1988, to Dana H. Gallup, Circuit Executive, U.S. Court of Appeals, 1302 J.W. McCormack Post Office & Courthouse, Boston, MA, 02109.

Assistant Circuit Executive, 7th Cir. Starting salary to $45,763, depending on experience and qualifications. Works closely with the circuit executive and judges of the circuit on administrative and legal court matters. Familiarity with DOS computer systems and a law degree not essential, but will be important considerations in the hiring decision. Open until filled. Position description and salary information available from Circuit Executive's Office, United States Court of Appeals, 219 South Dearborn Street, 27th floor, Chicago, IL 60604.

Technical Assistant, Fed. Cir. Salary: JSP-11-13. Assists in reviewing panel-approved opinions, reviewing briefs, preparing evaluation reports, and advising judges and law clerks on legal or technical matters; conducts technological and legal research; prepares memos; performs other duties as directed by senior technical assistant. Requirements: undergraduate degree in or relating to biological sciences and law degree; bar admission and work experience in intellectual property law, engineering, or technology desirable. Send SF-171 by Apr. 2 to address below.

Deputy Clerk (Case Initiation), Fed. Cir. Salary to $22,458. Receives, reviews, analyzes, and initiates the processing of new cases. Requires responsible clerical or administrative experience; B.A., M.A., or law degree may be considered in place of general experience requirement. Position open until filled. Send SF-171 and resume to Clerk, U.S. Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, DC 20439.

Clerk-Designate of Court, D. Mass. $63,135 to $72,500. Person selected as Clerk-Designate is expected to succeed to position of Clerk of the Court upon the retirement of the incumbent clerk on Sept. 30, 1988, and during the transition period will function in the role of chief operations officer. Requirements: Bachelor's degree, minimum of 10 years of progressively responsible experience in public service or business, including a minimum of 3 years in a position of substantial management responsibility. To apply, send a letter with resume by Jan. 4, 1988 to Honorable Frank H. Freedman, Chief Judge, U.S. District Court, U.S. Court House, Post Office Square, Boston, MA 02109. Attn: Ms. Lillian Di Blasi, Room 306.

EQUAL OPPORTUNITY EMPLOYERS

CIRCUIT CONFERENCES, from page 6
agreement, and remarks by Duke University Law Professor William W. Van Alstyne on the present Constitution and its future.

The 48th Annual Judicial Conference of the D.C. Circuit was held in Hot Springs, Va., with Chief Judge Patricia M. Wald presiding. The subject of sentencing reform was addressed by a panel of participants: Judge Ruth Bader Ginsburg (D.C. Cir.); Judge Louis F. Oberdorfer (D.D.C.); Suzanne Conlon, executive director of the U.S. Sentencing Commission; U.S. Attorney Joseph diGenova; and Cheryl Long, chief of the Public Defender Service. Other panels made presentations on problems arising under the independent counsel law, the religion clauses, constitutional adjudication and the intention of the framers, and sanctions.

The Fifth Annual Judicial Conference of the Federal Circuit was held in Washington, D.C. Chief Judge Howard T. Markey gave the state of the court address. Judge Robert H. Bork (D.C. Cir.) and Yale University Law Professor Harry H. Wellington discussed constitutional interpretation, and Chief Justice Warren E. Burger (ret.) spoke. Separate breakout sessions were held on the work of the Court of International Trade, the Claims Court, Merit Systems Protection Board cases, and patents and trademarks.

The United States Claims Court held its first judicial conference in Williamsburg, Va. The conference's 85 participants held small- and full-group sessions that analyzed the litigation process in the court. Topics of discussion included summary judgment and other pretrial motions practice, the question of developing small claims procedures in the Claims Court, and the effectiveness of rules and standard pretrial procedures. Other sessions reviewed occurrences and trends in the areas of contracts and pay cases; tax cases; and takings, Indian claims, and patents. A full-group session looked at legislation affecting the court. ■

House Panel Hears Corrections, Parole Officials Discuss AIDS Policies for Prisoners, Parolees

Federal prison and parole officials discussed the effect of acquired immune deficiency syndrome (AIDS) on such issues as the testing of inmates and conditions of parole at a recent hearing of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. J. Michael Quinlan, director of the Bureau of Prisons, and Benjamin F. Baer, chairman of the U.S. Parole Commission, were among those testifying. Donald L. Chamlee, chief of the Division of Probation of the AO, submitted a statement.

In June, it was announced that the Bureau of Prisons would begin a program of testing newly sentenced inmates and all inmates about to be released from prison for antibodies to the HIV virus (the suspected cause of AIDS). The Parole Commission began considering what actions, if any, are appropriate in the case of parolees whom the Commission knows to be antibody-positive. Among the approaches considered were counseling infected individuals; reporting that parolees tested antibody-positive; releasing medical information to the probation officer; requiring as a condition of parole that the parolee disclose his or her condition prior to engaging in behavior that is high-risk for transmission; and other disclosures as directed by the probation officer. Following its July meeting, the Commission published in the *Federal Register* for public comment a series of general questions (52 Fed. Reg. 158 (1987)), and also solicited comments from the Bureau of Prisons, the Probation Division of the AO, the National Institute on Drug Abuse, the President's Commission on AIDS, the Surgeon General, the Department of Justice, and the American Civil Liberties Union.

At the Subcommittee hearing, Mr. Baer discussed the Parole Commission's recent deliberations concerning its policy toward parolees who have AIDS or have tested positive for exposure to the HIV virus. He described the tension between the Commission's desire to protect persons from exposure to AIDS and its concern that it respect the privacy rights of parolees and stay within its legal authority. Noting that the Parole Commission's statute authorizes it to impose conditions of parole on a parolee that are reasonable "to protect the public welfare," Mr. Baer said the Commission had concluded that this legislative phrase charges the Commission with protecting the public from criminal acts, but does not permit it to impose a condition that is only designed to protect the public from the noncriminal spread of a disease. Accordingly, "the Commission does not view itself, under its statute, as having the power to take action directed solely to protecting the public from the spread of AIDS, at least to the extent that activity which would spread AIDS is not also criminal activity," Mr. Baer testified.

Mr. Quinlan testified on the prevalence of AIDS among inmates and on the Bureau's AIDS policy. A pilot program of testing newly sentenced prisoners and all inmates within 60 days of release was begun June 15, 1987. The testing of all incoming inmates was discontinued Sept. 30, 1987, but a 5 percent sample of incoming inmates will be tested. All releasees will continue to be tested, as will those inmates who exhibit any clinical indications of the virus; those who ask to be tested; those who are going to be involved in community activities; and those who have exhibited "predatory and promiscuous behavior." Of 8,832 newly committed prisoners tested, 216 (or 2.44 percent) have tested antibody-positive. Of the 4,430 prisoners tested prior to release, 114 (or 2.57 percent) tested positive. The tested group of newly admitted inmates will be retested to give the Bureau

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information about the risk of acquiring the infection during confinement.

Of a total inmate population of 44,000, the Bureau has 31 inmates with "end-stage AIDS," Mr. Quinlan testified. He noted that inmates who have tested antibody-positive but have no disease symptoms will be continued in the general prison environment; inmates who are going to participate in community activities will be required to notify their spouses of positive test results; and "infected inmates who are sexually active homosexuals or intravenous drug users may require separation from the regular inmate population." Based on interviews of prisoners who have tested positive, intravenous drug use is the high-risk behavior dominant among antibody-positive inmates, Mr. Quinlan said; Bureau efforts aimed at curbing the illicit use of drugs within prison have "shown significant progress in the last two years."

Mr. Chamlee's statement noted the "enormously complex problems regarding the proper criminal justice response to what is, in our view, essentially a public health problem." It described an AIDS workshop that the Probation Division held, with the sponsorship of the FJC, at the National Conference for Chief and Deputy Chief U.S. Probation and Pretrial Services Officers in June, and noted that the Division has held meetings and established dialogues with various agencies concerned, including the Parole Commission, and expressed hope that such communication will enable the Division and the Commission "to develop unified supervision policies" in addressing its responsibilities. ■

REHNQUIST, from page 1

About a year ago I appointed a committee of the Judicial Conference to look into the structure and operation of that body. The Committee met several times and prepared a report with recommendations which were adopted by the Judicial Conference at its September meeting. The thrust of these recommendations was to authorize the appointment by me of a notably strengthened Executive Committee, to streamline the Conference's committee structure and to make committee assignments more readily available to those judges who are interested in having them. I have appointed Chief Judge Wilfred Feinberg of the Court of Appeals for the Second Circuit as Chairman of the Executive Committee, and have appointed Judges Levin H. Campbell, Charles Clark, Paul H. Roney, Aubrey E. Robinson, John F. Nangle, and Robert F. Peckham as members of the Committee.

I wish I could say we had been equally successful in our dealings with the Executive and Legislative Branches of the government; unfortunately we have not. The President drastically scaled down the recommendations to Congress made by the Salary Commission, and Congress did not disapprove them. A modest pay raise for judges thereby went into effect, but I still believe that the salaries of federal judges fall considerably short of what they ought to be.

On November 1, 1987, Congress accepted the United States Sentencing Commission's recommended sentencing guidelines. The Judicial Conference and the Commission had both requested that Congress delay the effective date of these guidelines, but Congress declined to do so. All of us in the Judiciary now must turn to the task of putting these new standards into operation.

Fortunately, enjoyment of the holiday season need not depend on how well the Judicial Branch fared at the hands of the Legislative and Executive Branches. I extend to each of you and your families the very best wishes for a Merry Christmas and a Happy New Year. ■

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