BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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President Reagan Signs Sentencing Reform Act, Criminal Fine Improvements Measures

The following measures pending in Congress are of interest to the judiciary.

- The Sentencing Reform Act of 1987 (see *The Third Branch*, December 1987, at 1) was signed by the President on Dec. 7.
- The Criminal Fine Improvements Act of 1987, which had been passed by the House (see *The Third Branch*, December 1987, at 5) was passed by the Senate and signed by the President on Dec. 11.
- Sen. Paul Simon (D-Ill.) and others have introduced S. 1867, the Court Interpreters Improvements Act of 1987, to amend the Court Interpreters Act of 1978, 28 U.S.C. § 1827, which required the AO to establish a program to certify interpreters and to facilitate the use of interpreters in bilingual proceedings and proceedings involving the hearing impaired. S. 1867 would require the development of certification tests in at least eight unspecified languages in addition to Spanish, for which a certification test is already used. Spanish interpretation in 1987 was required in 41,501 proceedings. Currently, the other eight languages for which interpreters are most often requested (and the number of proceedings for each) in the federal courts are Mandarin Chinese (366), Haitian Creole (354), Arabic (277), Sicilian (253), Italian (232), French (230), Thai (190), and

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Death Penalty Habeas Corpus Caseload Prompts Changes Under Revised Criminal Justice Act

An ongoing study of representation in the federal courts of defendants sentenced to death, conducted by the Judicial Conference Committee on Defender Services, has led to the adoption of two amendments to the *Guidelines for the Administration of the Criminal Justice Act*. The first amendment provides that an attorney furnished by a state or local public defender organization, legal aid agency, or other private, nonprofit organization may be appointed and compensated under the CJA in federal death penalty habeas corpus cases when the court determines that such an appointment will provide the most effective representation. The second amendment authorizes the compensation of public and private organizations that provide legal consulting services to counsel appointed in such cases. The amendments to the *Guidelines* were approved by the Judicial Conference in March of 1987.

The amendments resulted from the Committee's review of the reports of task forces established by the chief judges of the courts of appeals. In 1986, the Committee (then called the Committee to Implement the Criminal Justice Act) had asked the chief judges to establish task forces to develop information on the impact of the projected influx of death penalty cases reaching the postconviction stage in federal courts. The reports generally concluded that (1) the private bar has neither the expertise nor the resources to provide representation on a pro bono basis, (2) the resources of private nonprofit organizations are dwindling and the attorneys they have recruited are rapidly becoming "burned-out," and (3) federal defender organizations have neither the staffing nor the resources to handle a significant number of federal death penalty habeas corpus cases.

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Sentencing Guidelines Challenged in Suit By Public Defenders

The constitutionality of the sentencing guidelines that took effect Nov. 1 has been challenged in a lawsuit filed in the U.S. District Court for the District of Columbia. *Federal Defenders of San Diego, Inc. v. U.S. Sentencing Comm'n*, No. 87-3161 (D.D.C. Nov. 23, 1987).

The suit was filed on behalf of two defender organizations, Federal Defenders of San Diego, Inc., a community defender group whose attorneys annually represent approximately 6,000 individuals in the Southern District of California, and the Office of the Federal Public Defender for the Middle District of Tennessee. Plaintiffs' attorneys are from the Public Citizen Litigation Group of Washington, D.C., which filed the lawsuit that challenged the legality of the original Gramm–Rudman–Hollings legislation.

The complaint alleges that Congress made an excessive delegation of legislative authority to the Commission "since the Commission is required to make fundamental policy choices about the appropriate range of sentences for all federal criminal sentences without sufficient guidance

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Korean (154). The bill directs the AO to provide guidelines to the courts on the selection of otherwise qualified interpreters when certified ones are not available.

S. 1867 would require that judicial proceedings where interpreters are used be electronically sound-recorded at the request of a party to the case, and would expand the requirement to use certified interpreters to grand jury proceedings.

- S. 1630, a bill to enhance retirement and survivor annuities for bankruptcy judges and magistrates (see *The Third Branch*, December 1987, at 1), was ordered favorably reported by the Senate Judiciary Committee.
- A bill extending the independent counsel provisions of the Ethics in Government Act for five years was signed by the President Dec. 15. The bill reflected compromises reached in a House–Senate conference report, No. 100-452, following Senate passage of a version that differed somewhat from H.R. 2939 as previously passed by the House. The Senate's version would have allowed the independent counsel to broaden the scope of his or her investigation only after receiving approval from the attorney general. The House version would have permitted the special court that appointed the counsel to authorize such a broadened investigation. The final bill incorporated the Senate version.

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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.

Rules Committee Seeks Comments on Proposed Fed. R. Crim. P. 32 Changes

The Advisory Committee on Criminal Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States plans to revise rule 32 of the Federal Rules of Criminal Procedure. This revision is contemplated in light of the sentencing guidelines and the Probation Committee's proposed model local rule for guideline sentencing (circulated to all United States chief circuit and district judges by Judge Gerald B. Tjoflat (11th Cir.) on Aug. 28, 1987). The Advisory Committee, chaired by Judge Leland C. Nielsen (S.D. Cal.), is interested in hearing before its next meeting, May 19–20, about any perceived problems under the sentencing guidelines or under the Probation Committee's proposed local rule that could be rectified by means of a rules change. Comments may be sent to the Advisory Committee on Criminal Rules, Committee on Rules of Practice and Procedure, Administrative Office of the U.S. Courts, Washington, D.C. 20544.

- The House passed H.R. 3400, amending the Hatch Act, the act that restricts partisan political activity by executive branch employees. The bill has been referred to the Senate Governmental Affairs Committee. (Although the Hatch Act does not apply to employees of the judiciary, a long-standing resolution of the Judicial Conference adopts its intent as binding on judicial employees.)
- H.R. 3461, introduced by Rep. Jack Buechner (R-Mo.) would amend Fed. R. Crim. P. 24(a) to require the court to permit the defendant, or the attorney representing him or her, and the attorney for the government to examine prospective jurors; Rep. Buechner's H.R. 3462 would amend Fed. R. Civ. P. 47(a) to require the court to permit each side to examine prospective jurors. The bills are similar to two Senate bills introduced by Sen. Howell Heflin (D-Ala.) on which hearings were held in 1987, S. 953 and S. 954 (see *The Third Branch*, September 1987, at 5). The Judicial Conference opposes the rules amendments that would be made by Rep. Buechner's and Sen. Heflin's bills.
- H.R. 3442, introduced by Rep. E. Thomas Coleman (R-Mo.), would require groups and individuals receiving or spending more than $5,000 in support of or opposition to a Supreme Court nominee to report their activities to the Clerk of the House.
- Senator Malcolm Wallop (R-Wyo.) has introduced S. 1907, a companion measure to H.R. 3546, to amend the National Childhood Vaccine Injury Act of 1986 (see *The Third Branch*, December 1987, at 4). Both the House and Senate bills would create a new Vaccine Compensation Board to adjudicate claims for compensation, in place of the 1986 act's provision that the district courts administer the compensation program.
- The Senate Judiciary Committee ordered favorably reported S. 1134, intended to deal with the so-called "race to the courthouse" situation (see *The Third Branch*, January 1987, at 7). The House passed a similar measure, H.R. 1162, in May of 1987.
- The Senate Judiciary Committee ordered favorably reported, with an amendment, S. 952, to provide the Supreme Court with greater discretion in selecting the cases it will review.
- Sen. Edward M. Kennedy (D-Mass.) and Sen. Orrin G. Hatch (R-Utah) have introduced S. 1904, which limits the use of lie detector tests by employers. The bill forbids the use of a polygraph in preemployment testing of job applicants or in random testing of employees. The bill would not apply to governmental employers nor in certain national defense and security matters. It would permit the use of a polygraph to investigate specific economic losses, by testing em-

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Duane Lee Heads Court Admin. Division at AO; John Thomas Jones Heads Magistrates Division

AO Director L. Ralph Mecham has announced the appointment of Duane R. Lee as Chief of the AO's new Court Administration Division and the appointment of John Thomas Jones to replace Mr. Lee as Chief of the Magistrates Division.

Duane R. Lee

Mr. Lee has served as Chief of the Magistrates Division of the AO since 1982. He is a graduate of Dartmouth College and George Washington University Law School.

Mr. Jones has served as Assistant Chief of the Magistrates Division since 1983. He previously served as Director of Administration of the U.S. Army Judiciary and as Senior Judge of the U.S. Army Court of Military Review. Mr. Jones is a graduate of the U.S. Military Academy at West Point and of Columbia University Law School.

John Thomas Jones

The new Court Administration Division was created in 1987 (see *The Third Branch*, August 1987, at 1) to take over functions that had previously been 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. ■

CALENDAR

Jan. 6–8 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
Jan. 11–12 Judicial Conference Committee on Court Security
Jan. 11–13 Judicial Conference Committee on Judicial Improvements
Jan. 13–16 Judicial Conference Committee on Defender Services
Jan. 14–15 Judicial Conference Committee on Criminal Law and Probation Administration
Jan. 18–19 Judicial Conference Committee on Space and Facilities
Jan. 19 Judicial Conference Committee on Federal/State Jurisdiction
Jan. 22–23 Judicial Conference Committee on the Budget
Jan. 25–26 Judicial Conference Committee on Judicial Ethics
Jan. 25–27 Workshop for Judges of the Ninth Circuit

AMENDMENTS, from page 1

A recent study of caseload and cost projections for federal habeas corpus death penalty cases prepared at the request of the AO estimates that 304 defendants sentenced to death will be in a position to file federal habeas corpus petitions in FY88 and 340 in FY89. The study was conducted by the Spangenberg Group and sponsored by the Bar Information Program of the ABA Standing Committee on Legal Aid and Indigent Defendants. The report addresses the serious problems associated with the provision of counsel in postconviction death penalty cases in both state and federal courts and urges cooperation among bar associations, judges, federal public and community defenders, law schools, and organizations with experience in representing indigents in death penalty cases.

The task forces have also focussed local attention on what could prove to be a crisis situation in districts with large numbers of state prisoners currently on death row. As a result, a number of federal circuits and districts are actively engaged in developing cooperative resource center programs, which would provide both counsel in individual cases and guidance and support to attorneys appointed in death penalty cases.

Given this interest and activity, the AO recently proposed to conduct a death penalty resource planning meeting in Washington, D.C., to advise on the status of programs under development throughout the federal judiciary and to address common problems and share ideas on how to resolve them. A letter concerning the proposed meeting was sent to all chief judges of the courts of appeals, and it is anticipated that details relating to the meeting will be finalized in the near future.

Another recent Judicial Conference action aimed at assisting the courts in furnishing counsel in federal death penalty cases is the establishment of a special alternative maximum hourly compensation rate for representation in such cases in the four federal district courts in California. The special rate for these cases in California was set at $75 per hour for in- and out-of-court time, as opposed to the "regular" CJA hourly maximums of $60 for in-court time and $40 for out-of-court time. Judicial Conference authority to establish alternative CJA rates was provided only recently as part of the Criminal Justice Act Revision of 1986, which became effective in March 1987. The Committee and the Judicial Conference are expected to entertain additional alternative rate requests from other districts in the coming months. ■

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from Congress"; that the delegation, "even if not excessive, violates separation of powers because the Sentencing Commission is within the judicial, not the executive branch of government"; and that "the mixed composition of the Sentencing Commission, in combination with the method of appointment and the method of removal of its members, violates separation of powers."

In addition, the complaint alleges that the guidelines pose ethical problems for attorneys representing individuals who may be sentenced under the guidelines. The plaintiffs estimate that a substantial majority of their clients sentenced under the guidelines will receive longer sentences than under the prior sentencing system. The plaintiffs claim that the Sixth Amendment and the Code of Professional Responsibility obligate them to raise the claim of unconstitutionality for all their clients who would receive greater sentences under the guidelines than under the prior system. This, however, creates a potential conflict with their representation of clients who will receive lesser sentences than they would have under the prior sentencing system, plaintiffs contend. The complaint states that the plaintiffs might have to seek to withdraw from representing clients who would be injured by a ruling that the guidelines are unconstitutional. Further, the complaint states that those clients whom the plaintiffs do represent will be severely injured in the conduct of their defenses, because the uncertainty as to the guidelines' constitutionality makes it difficult for attorneys to advise clients effectively and for clients to decide how to plead and to what offense.

The plaintiffs ask the court to declare the guidelines unconstitutional and to order the Commission to send a copy of the court's judgment to all courts of the United States and to the U .S. Probation System; they also seek costs and attorneys' fees. ■

Chief Judge Wm. Terrell Hodges (M.D. Fla.) makes a point during his talk about jury instructions at the FJC seminar for newly appointed district judges in Washington, D.C., in November of 1987.

(Left to right) Judges James H. Alesia (N.D. Ill.), Richard J. Daronco (S.D.N.Y.), David S. Doty (D. Minn.), and Joseph F. Anderson, Jr. (D.S.C.) confer during the seminar.

NOTEWORTHY

Judicial immunity held applicable to judge's law clerk. The doctrine of absolute judicial immunity is available to a judge's law clerk acting within the scope of his or her duties, the District Court for the Southern District of New York has ruled. *Oliva v. Heller*, 670 F. Supp. 523 (S.D.N.Y. 1987). The court applied a "functional analysis" of the type followed in other cases construing judicial immunity and held that "law clerks are simply extensions of the judges at whose pleasure they serve," and therefore "for purposes of absolute judicial immunity, judges and their law clerks are as one," thus requiring the dismissal of plaintiff's case.

Judicial immunity bars *Bivens* actions. The doctrine of judicial immunity extends to cases alleging "direct constitutional torts" under *Bivens v. Six Unknown Named Agents*, the Ninth Circuit has held. *Mullis v. U.S. Bankruptcy Court*, 828 F.2d 1385 (9th Cir. 1987). Mullis sued numerous bankruptcy court judges and clerks, seeking monetary damages and declaratory and injunctive relief following a bankruptcy judge's denial of his motion to withdraw his bankruptcy petition and dismiss the bankruptcy case. The bankruptcy clerks allegedly filed the bankruptcy petition without providing information requested by the petitioner's wife as to which chapter of the *Bankruptcy Code* would permit the petitioner subsequently to withdraw or dismiss his petition. The clerks also allegedly did not state that they could not give legal advice, but took the petition, saying it would be filed under "the appropriate chapter."

The Ninth Circuit held the bankruptcy judges absolutely immune from a suit for damages, and held the clerks and the bankruptcy trustee immune from damages under the doctrine of absolute quasi-judicial immunity. As for Mullis's claim that prospective equitable relief was available under *Pulliam v. Allen*, the Ninth Circuit noted that a plaintiff seeking an award of equitable relief under *Pulliam* must show that he or she has an inadequate remedy at law and a serious risk of irreparable harm. "Where a federal official meets the prerequisites for judicial or quasi-judicial immunity from damages, there will invariably be an adequate remedy through either ordinary appeals or by extraordinary writ," the Ninth Circuit reasoned, holding that the *Pulliam* exception to judicial immunity is not available in a *Bivens* action.

State courts may not hear claims that filing of bankruptcy petition constitutes abuse of process. The Ninth Circuit has held that a state court has no power to decide that filing a bankruptcy petition constitutes abuse of process. *Gonzales v. Parks*, No. 86-594 (9th Cir. Oct. 20, 1987). A creditor filed a suit in a California state court claiming that the debtors' filing of a Chapter 11 bankruptcy petition constituted an abuse of process because it was used solely to delay a foreclosure sale following the debtors' default on an obligation. A default judgment against the debtors was entered in the state court. The debtors sought relief from the judgment and won a summary judgment from the bankruptcy court that the state court judgment was void as violative of the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a). The district court affirmed and the court of appeals upheld the decision. Congress's grant to the federal courts of exclusive jurisdiction over bankruptcy matters includes the implied power to protect that grant by collaterally attacking state court judgments that would threaten the uniformity of federal bankruptcy law, the appeals courts said.

En banc opinion of 1st Cir. upholds district court rule on subpoenas of lawyers. The U.S. Court of Appeals for the the First Circuit, sitting en banc, has affirmed the district court's authority to require by local rule of court that federal prosecutors obtain judicial approval before they subpoena lawyers to testify concerning their clients before grand juries. *U.S. v. Klubock*, No. 86-1413 (1st Cir. Oct. 30, 1987).

A divided panel of the First Circuit had previously affirmed the validity of the local rule (see *The Third Branch*,

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PERSONNEL

Nominations

Supreme Court of the U.S.

Anthony M. Kennedy, Associate Justice, Supreme Court of the United States, Nov. 24

District Judges

David A. Ezra, U.S. District Judge, D. Hawaii, Nov. 18

Kenneth M. Hoyt, U.S. District Judge, S.D. Tex., Nov. 24

Robert Roberto, Jr., U.S. District Judge, E.D.N.Y., Nov. 24

Rudy Lozano, U.S. District Judge, N.D. Ind., Dec. 4

Confirmations

Sam R. Cummings, U.S. District Judge, N.D. Tex., Dec. 8

Robert S. Gawthrop III, U.S. District Judge, E.D. Pa., Dec. 8

Jerome Turner, U.S. District Judge, W.D. Tenn., Dec. 8

Franklin S. Van Antwerpen, U.S. District Judge, E.D. Pa., Dec. 8

Dean Whipple, U.S. District Judge, W.D. Mo., Dec. 8

Alfred M. Wolin, U.S. District Judge, D.N.J., Dec. 8

Bankruptcy Judges Appointments

Stephen J. Covey, U.S. Bankruptcy Judge, N.D. Okla., Nov. 2

Henry H. Dickinson, U.S. Bankruptcy Judge, W.D. Ky., Nov. 16

Magistrates (Full-time) Appointments

Nancy Fiora, U.S. Magistrate, D. Ariz., Dec. 1

John T. Reid, U.S. Magistrate, D. Kan., Dec. 1

Christine A. Noland, U.S. Magistrate, M.D. La., Dec. 4

Robert Jake Johnston, U.S. Magistrate, D. Nev., Dec. 14

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July 1987, at 3). The District Court of Massachusetts had adopted as one of its own local rules an amendment to the state ethics code promulgated by the Massachusetts Supreme Judicial Court. Federal prosecutors had brought suit challenging the district court rule as conflicting with Fed. R. Crim. P. 17 and the Supremacy Clause of the Constitution.

Costs of incarceration and supervision. The sentencing guidelines provide at § 5E4.2(i) that, in addition to the fine called for in § 5E4.2(c), the court shall impose a fine that is at least sufficient to pay the costs to the government of any imprisonment, probation, or supervised release ordered. The AO has provided the following figures to chief probation officers to be used for this purpose: The average per capita cost in a Bureau of Prisons facility for FY88 is expected to be $40.14 daily, $1,221 monthly, and $14,652 yearly for incarcerated offenders; and $30.24 daily, $920 monthly, and $11,038 yearly for offenders in halfway houses. Supervision costs are $2.74 daily, $83.33 monthly, and $1,000 yearly.

Deaf juror qualified under Jury Selection and Service Act. A deaf juror for whom a qualified interpreter translated speech into sign language during voir dire, trial, and jury deliberations was a qualified juror, the Tenth Cir. has held. *U.S. v. Dempsey*, 830 F.2d 1094 (10th Cir. 1987).

American Judicature Society receives grant for education on judicial ethics. The Henry Luce Foundation has provided $100,000 to the American Judicature Society, which will be used to conduct three regional forums on judicial ethics over the next two years. The three-day seminars for groups of 20 judges from each of three regions will be taught by judicial conduct commission members, judges, and law professors.

Study of attorney discipline system urged. The National Organization of Bar Counsel (NOBC), in a committee report entitled "Nationwide Evaluation of Disciplinary Systems," is calling for a national study of the attorney discipline system, citing "significant dissatisfaction" among members of the bar and the general public with how disciplinary matters are handled. The NOBC, most members of which are state officials who serve as counsel to bar associations, contends that public confidence in the legal profession will be eroded unless steps are taken to correct perceived inadequacies in the system for attorney discipline. The organization notes such problems as inadequate (and in some cases nonexistent) procedures for reporting ethical violations, and cites as especially important the need for reciprocal arrangements for exchange of information on disciplinary actions, including expungement of records of dismissed grievances.

The NOBC's challenge may prompt action from the states. Already the Virginia legislature has mandated that as of July 1, 1988, all those newly admitted to the state's bar will be required to take a two-day course on ethics.

A 1987 survey on lawyer discipline systems published by the ABA Center for Professional Responsibility indicated that one complaint alleging lawyer misconduct is filed for every 11 dues-paying lawyers in the United States; however, only one in every 13 complaints results in a finding of probable cause to believe the lawyer engaged in misconduct. ■

Positions Available

Clerk of Court, 6th Cir. Salary to $72,500, commensurate with education and experience. Minimum requirements include 10 years' progressively responsible managerial or administrative experience (law practice may be substituted for experience; degrees in public, business or judicial administration, or law may be partially substituted for the required experience). Bachelor's, postgraduate, or law degrees desirable. Send resume with cover letter by Feb. 10, 1987, to James A. Higgins, Circuit Executive, 503 U.S. Courthouse, Cincinnati, OH 45202. Position will remain open until filled.

Judge, U.S. Bankruptcy Court, M.D. Fla. (Orlando). New position; salary $72,500. 14-year appointment. Persons with law degrees whose character, experience, ability, and impartiality qualify them to serve in the federal judiciary may request application from Norman E. Zoller, Circuit Executive, U.S. Court of Appeals, 56 Forsyth St., NW, Atlanta, GA 30303. Application deadline: Jan. 15, 1988.

Clerk, U.S. Bankruptcy Court, N.D. Ala. (Birmingham). Salary to $72,500. Requires a minimum of 10 years' progressively responsible administrative experience in public service or business, at least 3 in a position of substantial management responsibility; must have experience in personnel management; experience with computer systems helpful. The active practice of law may be substituted for the management or administrative experience requirements. Undergraduate, postgraduate, and law degrees may be substituted for up to 3, 1, or 2 years, respectively, of the required general experience. Suggested closing date Jan. 25, 1988, but open until filled. Submit in quadruplicate a resume or SF171 to Chief Judge George S. Wright, U.S. Bankruptcy Court, Northern District of Alabama, P.O. Box 3226, Tuscaloosa, AL 35403.

Chief Law Librarian, 3d Cir. Salary $32,567–45,763 (or, if can qualify, to $59,488). Under direction of circuit executive and policies established by a committee of system users, manages all aspects of law libraries created under 28 U.S.C. § 713(a) which serve the federal appellate and trial courts of the circuit. Formulates budget, administers, supervises law librarians, support staff, evaluates library programs, does long-range planning. Requirements: master's degree in library or information science, thorough knowledge of law library management concepts, and proven management and administrative skills. Law degree preferred. Submit resume by Jan. 29, 1988, to Circuit Executive, 21613 U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106.

EQUAL OPPORTUNITY EMPLOYERS

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.

Becker, Edward R., Patrick E. Higginbotham, and William K. Slate II. "Why the Numbers Don't Add Up." *A.B.A. J.*, Oct. 1, 1987, p. 83.

Block, Michael K., and William M. Rhodes. "The Impact of the Federal Sentencing Guidelines." *NIJ Reports*, Sept./Oct. 1987, at 2.

Judicial Sabbaticals Subject Of New FJC Paper

A new staff paper, *Judicial Sabbaticals*, is available from the Center. The author, Professor Ira Robbins of American University's Washington College of Law, examines the use of sabbaticals in business, industry, law firms, and government, as well as in academic and religious institutions. He reviews the limited ways in which sabbaticals have been applied to the judiciary and discusses the desirability of extending their use. Professor Robbins finds that sabbaticals have been an effective way of reducing "burn-out" for those, like judges, in high-stress occupations, and he concludes that they can be a valuable tool within the judiciary to improve efficiency and productivity, improve morale, attract highly qualified individuals to the bench, decrease attrition, and put judges more in touch with the communities whose interest they serve.

Copies of the paper can be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please send a self-addressed mailing label. Do not include an envelope.

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ployees who had access to the property under investigation and who the employer had reasonable suspicion to believe were involved in the incident. S. 1904 would establish a private cause of action in employees and prospective employees for violations of the act. The House passed a bill that would limit the use of lie detectors, H.R. 1212, in November 1987.

- Rep. Don Sundquist (R-Tenn.) introduced a joint resolution, H.J. Res. 400, to amend the Constitution to provide that "notwithstanding section 2 of Article III . . . unless the President nominates and the Senate consents to the continuance in office of a judge . . . that judge may not hold office for more than ten years after he took office, after the Senate last consented to his continuance in office, or after the ratification of this article, whichever last occurs." The proposed constitutional amendment would not apply to judges who have retired from active judicial service. ■

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Congress Cuts Judiciary's Fund Request by Five Percent, But Available Funds Greater Than in FY87

The FY88 appropriation for the judicial branch of government is $1,329,934,000. After certain "carry-over" funds are added back, and the availability of certain fees is considered, the judiciary will be approximately $50 million short in operating funds from its FY88 requirement. This represents about a 5 percent cut in the judiciary's request but also represents an increase in available funding over FY87 levels of nearly $126 million.

The appropriation includes $17,357,000 for the Supreme Court; $1,250,535,000 for the courts of appeals, district courts, and other services; $31,167,000 for the AO; $10,548,000 for the FJC; and separate amounts for the U.S. Court of Appeals for the Federal Circuit, U.S. Court of International Trade, and U.S. Sentencing Commission. The appropriation bill passed in the Senate was approximately $50 million short of the judiciary's request, and the bill passed in the House was approximately $120 million short. As a result of the budget summit between the executive and legislative branches, a $2.6 billion reduction was to be spread among all domestic appropriations. This required that approximately $50 million more had to be cut from the judiciary appropriation as its pro rata share of the reduction after the Senate and House had reached initial agreement on the differences in their bills.

The appropriations resolution includes a provision that fixes the salaries of bankruptcy judges and sets the ceiling on the salaries of magistrates at 92% of the salary of a district judge. The provision is effective Oct. 1, 1988. The enactment of the permanent salary-setting mechanism was endorsed by the Judicial Conference of the United States and follows efforts by the Committees on the Administration of the Bankruptcy and Magistrates Systems, the former Court Administration Committee, and the national associations representing the bankruptcy judges and magistrates. ■

U.S. Sentencing Commission Adopts Technical Amendments; Local Court Rules in Effect

The United States Sentencing Commission in December and early January adopted a number of amendments to its sentencing guidelines and official commentary, as distributed to the courts in April and October 1987. The Commission has mailed the amendments to recipients of its Guidelines Manual, along with illustrations developed by the Commission staff on the operation of the multiple count and criminal history sentencing guidelines.

The amendments took effect on Jan. 15, 1988. They were adopted pursuant to the Commission's temporary authority for "emergency guidelines promulgation." Commission Chairman William W. Wilkins, Jr., said the purpose of the amendments was "to clarify and to make technical and clerical corrections to the guidelines, and to make them conform to recently-enacted legislation."

Meanwhile, district courts around the country are adopting local rules of court and standing orders detailing procedures under guideline sentencing. Many of the rules are variations of the model local rule developed last fall by the Judicial Conference Probation Committee, and thus typically extend the 10-day statutory minimum

See GUIDELINES, page 3

Chief Justice's Year End Report Reviews 1987 Judicial Developments

The Chief Justice in his 1987 Year End Report described the revised committee structure of the Judicial Conference of the United States, urged the swift passage of the judgeship bill supported by the Conference, again favored the establishment of an intercircuit tribunal or national court of appeals, and called for "serious consideration" of the elimination or curtailment of diversity jurisdiction.

The Chief Justice reviewed the work of the Special Committee to Study the Judicial Conference and the adoption of recommendations that resulted in the restructuring of the Conference's committee structure, including the creation of new committees and the dissolution of five old

See YEAR END REPORT, page 6

Inside . . .

National Conference on Court Technology to be Held in Denver

The National Center for State Courts and its Institute for Court Management, the FJC, and the AO are cosponsors with more than 20 other organizations of the second National Conference on Court Technology, to be held Apr. 24-27 in Denver.

Over 60 speakers and presenters will describe and explain specific aspects of technology used by courts, and companies will exhibit their products and services. It is expected that more than 1,000 persons will attend.

Sessions will be devoted to such topics as case management; management of juries, records, and finances; court automation; how computers can support judges; commercial software; and court reporting. More than 55 sessions in 16 topical areas will be presented at least twice during the conference. It is anticipated that each attendee will be able to attend 10 to 15 program sessions.

The deadline for early registration is Feb. 15, 1988; for telephone registration, Apr. 1, 1988; and for mail-in registration, Apr. 15, 1988. The cost ranges from $255 for members of sponsoring organizations (if paid before Feb. 15), to $325 for registrations postmarked after Apr. 15 or completed on-site. Registration forms are available from the Institute for Court Management, 1331 17th St., Suite 402, Denver, CO 80202 (tel. (303) 293-3063). ■

THE THIRD BRANCH

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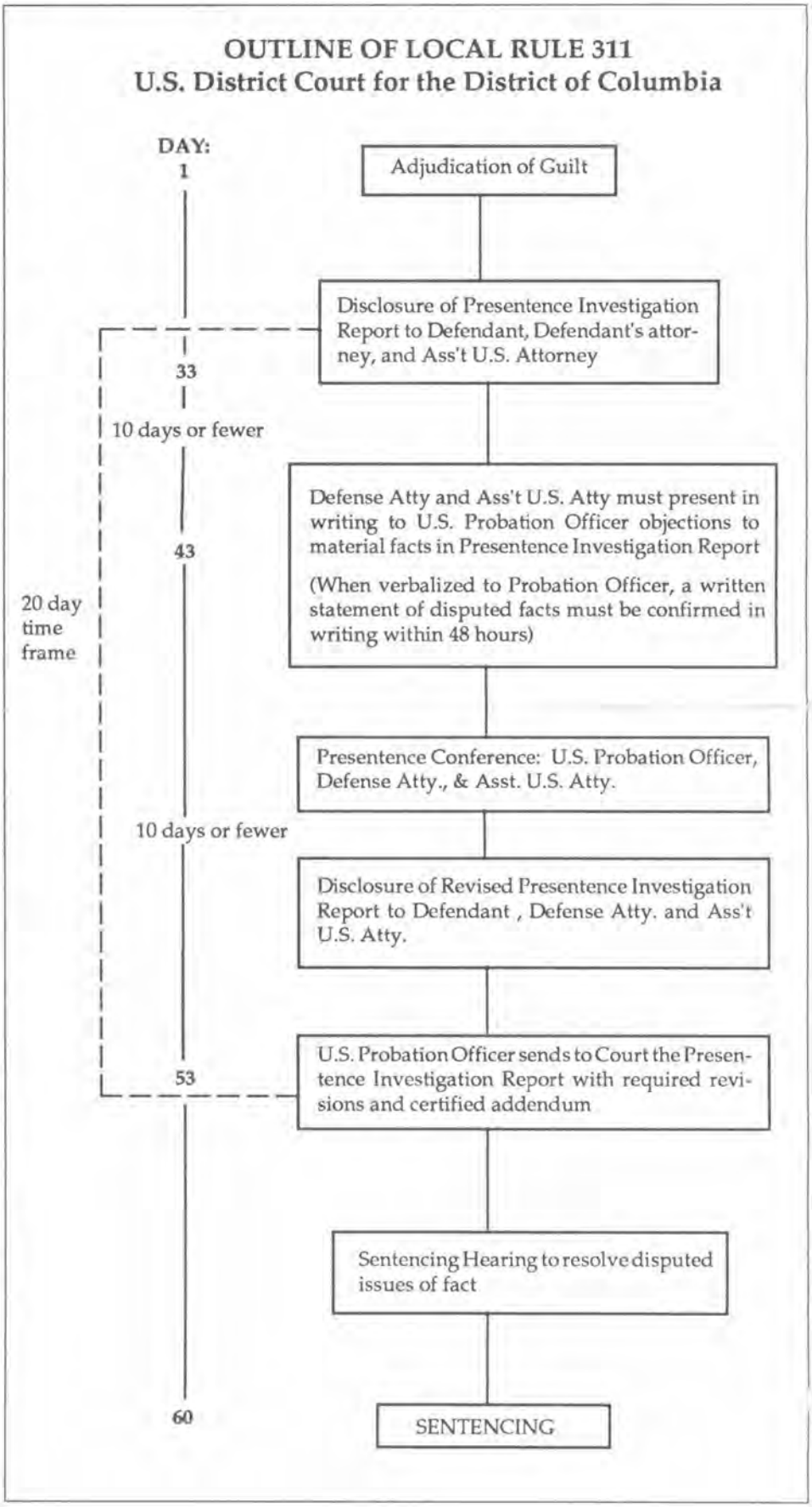
February 1988



Judge Charles R. Richey (D.D.C.) discusses application of the guidelines during the court-sponsored program for the D.C. bar.

CALENDAR

Feb. 4 Judicial Conference Committee on Rules of Practice and Procedure
Feb. 8-12 Orientation Seminar for New Probation/Pretrial Officers
Feb. 13-15 Workshop for Court Interpreters
Feb. 17 Executive Committee of the Judicial Conference
Feb. 17-19 Seminar for Magistrates of the First, Second, Third, Fourth, and D.C. Circuits
Feb. 21-26 Seminar for Newly Appointed Bankruptcy Judges
Feb. 22-24 Metro District Court Clerks and District Court Executives
Feb. 29-Mar. 3 Video Orientation Seminar for Newly Appointed District Judges
Feb. 29-Mar. 4 Orientation Seminar for New Probation/Pretrial Officers
Mar. 15-16 Judicial Conference of the United States

1987 Statistics on Grand and Petit Juror Service Released by Administrative Office

The AO has published *1987 Grand and Petit Juror Service in United States District Courts.* According to the report, the number of grand juries serving last year—787—was virtually the same as in 1986—792—but the number of sessions convened dropped from 11,364 in 1986 to 11,011 in 1987, and the average number of jurors per session dropped from 19.7 to 19.6. In 1987, 24,090 cases commenced by indictment, involving 38,322 defendants. S.D.N.Y., E.D.N.Y., S.D. Fla., D. Mass., and C.D. Cal. accounted for 29 percent of all the sessions convened during 1987.

The statistics on petit juror usage continued a five-year upward trend, with the number of jury trial days rising six percent from 41,945 in 1986 to 44,511 in 1987. Civil trial days rose 12 percent and now account for 57 percent of the total. The total number of petit juror days rose by 4 percent to 732,039. Overall, 31 percent of the jurors present for jury selection were selected while another 37 percent were challenged. Slightly more than 32 percent were not selected or challenged, an improvement of 2 percentage points over last year. During 1987, a total of 56 districts improved (i.e., reduced) their percentage of jurors in the "not selected, serving, or challenged" category. In an effort to reduce the number of jurors in this category, many courts have enacted local rules allowing the assessment of juror costs to parties who cancel a jury trial at the last minute. Such a rule discourages last-minute settlements and results in fewer unused panels. In 1987, 47 districts assessed juror costs on at least one occasion. ■

GUIDELINES, from page 1

for disclosure of the presentence report prior to sentencing. The period for such disclosure under the rules generally ranges from 20 to 30 days prior to the date set for sentencing. Typical of these rules is local rule 311 of the District Court for the District of Columbia. (A chart showing the time frames applicable under that court's rule is reproduced on page 2.)

Guidelines education programs continue. Several courts, having completed initial orientation programs for judges, probation officers, and other personnel of the district, are now presenting programs for both the trial and appellate bars. For example, the Eastern District of Pennsylvania, in conjunction with the Federal Courts Committee of the Philadelphia Bar Association, cosponsored a program for trial attorneys, and the Eastern District of New York sponsored a similar program. The U.S. District Court and the U.S. Court of Appeals for the District of Columbia presented a program for panel attorneys and members of the bar of both courts. That program included a mock sentencing hearing presided over by Judge Charles R. Richey (D.D.C.), in which prosecuting and defense attorneys examined the probation officer who had prepared the presentence report. The seminar also provided occasion to discuss the proposed court of appeals rule for handling guidelines sentences. ■

Judge Abner J. Mikva (D.C. Cir.) at the D.C. courts' recent program on the guidelines.

February 1988

Debt Collection, Habeas Corpus, Product Liability Measures on Agenda for Congress's Second Session

The following legislative items are of interest to the judiciary.

• Senators Strom Thurmond (R-S.C.), Joseph Biden (D-Del.), and Charles E. Grassley (R-Iowa) have introduced S. 1961, to enhance the remedies available to the United States for collection of debts owed to the federal government. The measure, which would create a comprehensive statutory scheme for the collection of federal debt, represents "a collaborative effort of the 94 U.S. Attorneys across this country who perform the vast majority of debt collection litigation on behalf of the United States," Sen. Thurmond noted. In Sen. Grassley's words, "Under current law, debts owed the Federal Government must be collected under a patchwork quilt of State laws where the debtor is found." Debtors can exempt more property from execution in some states than in others. The bill's sponsors say this results in inequitable and inconsistent treatment of federal debtors and impedes the effective recovery of debts owed the government (estimated at $68 billion).

• Sen. Thurmond introduced, at the request of the Reagan administration, the Criminal Justice Reform Act of 1987, S. 1970, containing titles addressing the exclusionary rule, habeas corpus, and the death penalty. Title I of the bill would codify the Supreme Court's holding in *U.S. v. Leon* that evidence obtained pursuant to a warrant that is later found to be defective will not be excluded if in executing the search the officer exhibited an objectively reasonable belief that the search was in conformity with the Fourth Amendment. The bill would also extend this exception to warrantless searches.

The habeas corpus provisions are similar to an earlier habeas corpus measure Sen. Thurmond had introduced (see *The Third Branch*, April 1987, at 9).

The death penalty provisions would provide procedures to permit the death penalty for certain federal offenses. Although various provisions of the U.S. Code by their terms authorize the death sentence for homicide, treason, and espionage, the death penalty has not been imposable under those statutes in light of procedural requirements set by subsequent

See LEGISLATION, page 7

Positions Available

Clerk of Court, D. Mass. Salary $63,135-72,500. Previous announcement of position as Clerk-Designate revised to announce position as Clerk, to commence serving upon selection or as soon as possible. Open until filled, but filing by Feb. 15, 1988, preferred. Previous applicants will be considered without reapplication. Requirements: Bachelor's degree, minimum 10 years' progressively responsible administrative experience in public service or business, including a minimum 3 years in position of substantial management responsibility. To apply, send letter with resume to Hon. 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.

Ass't Circuit Executive for Communications and Liaison, 9th Cir. Salary $33,218-60,683. Open immediately and until filled. Serves as public information officer, secretary to Executive Committee of circuit; plans and coordinates annual meeting for circuit judicial conference. Requirements: Bachelor's degree (advanced degree in law or court management preferred); 4 years' general administrative experience (specialized experience in press/bar liaison, publications, meeting management preferred). Travel required. Send letter, resume, salary history, and writing samples to Terry Nafisi, Ass't Circuit Exec. for Personnel & Training, U.S. Court of Appeals, P.O. Box 42068, San Francisco, CA 94142-2068.

Senior Civil Motions Attorney, 9th Cir. Salary $38,727-45,763; 2- to 5-year appointment. Legal and supervisory experience required; familiarity with federal practice preferred. Send resume, list of references, and short analytical writing sample to Dinah L. Shelton, Director, Office of Staff Attorneys, U.S. Court of Appeals, P.O. Box 547, San Francisco, CA 94101.

EQUAL OPPORTUNITY EMPLOYERS

PERSONNEL

CIRCUIT JUDGES

Nominations

David M. Ebel, U.S. Circuit Judge, 10th Cir., Dec. 18

Emmett R. Cox, U.S. Circuit Judge, 11th Cir., Dec. 19

Paul R. Michel, U.S. Circuit Judge, Fed. Cir., Dec. 19

Confirmations

Jerry E. Smith, U.S. Circuit Judge, 5th Cir., Dec. 19

Appointments

William D. Hutchinson, U.S. Circuit Judge, 3d Cir., Oct. 19

Clarence A. Beam, U.S. Circuit Judge, 8th Cir., Nov. 9

R. Kenton Musgrave, Judge, U.S. Court of International Trade, Nov. 13

Jerry E. Smith, U.S. Circuit Judge, 5th Cir., Jan. 7

Deaths

Carl McGowan, U.S. Circuit Judge, D.C. Cir., Dec. 21

DISTRICT JUDGES

Nominations

Jack T. Camp, Jr., U.S. District Judge, N.D. Ga., Dec. 18

Lowell A. Reed, U.S. District Judge, E.D. Pa., Dec.18

Alfred C. Schmutzer, Jr., U.S. District Judge, E.D. Tenn., Dec. 18

Vaughn R. Walker, U.S. District Judge, N.D. Cal., Dec. 18

Kimba M. Wood, U.S. District Judge, S.D.N.Y., Dec. 18

Stephen M. Reasoner, U.S. District Judge, E.D. Ark., Dec. 19

Howard E. Levitt, U.S. District Judge, E.D.N.Y., Dec. 22

Confirmations

Kenneth Conboy, U.S. District Judge, S.D.N.Y., Dec. 19

Rodney S. Webb, U.S. District Judge, D.N.D., Dec. 19

Appointments

David G. Larimer, U.S. District Judge, W.D.N.Y., Nov. 8

James A. Parker, U.S. District Judge, D.N.M., Nov. 13

Royce C. Lamberth, U.S. District Judge,

See PERSONNEL, page 7

NOTEWORTHY

Federal courts in New York seek advice on assisting unrepresented litigants. A committee representing the four federal districts in the State of New York and the Second Circuit Court of Appeals is considering ways to improve the administration of lawsuits in which one or more parties do not have assistance of counsel. Pro se cases constitute approximately 15 percent of the 17,000 federal civil cases filed in the federal district courts in New York each year. While each of the four trial courts and the Second Circuit Court of Appeals have established a small legal office to assist pro se litigants, a recent report of the New York State Bar Association indicated that the unrepresented—usually the poor and often prisoners—sometimes have not been able to obtain an adequate or expeditious hearing. Many of the pro se cases are filed by prisoners under civil rights laws, attacking conditions of confinement. Because these are generally poorly drafted, are often illegible, and are sometimes duplicative, they present difficult problems to the courts. Other prisoner cases are habeas corpus petitions attacking the conviction itself. In addition, and especially in New York City, there are many pro se civil suits filed by persons appealing Social Security determinations and by persons with trademark or patent claims.

Among the possible solutions under consideration by the committee are:

- publicizing a "scorecard" of law firms and attorneys who have been especially helpful and effective in assisting unrepresented litigants (and perhaps those who have not);
- establishing a computer hook-up among the four district courts, to help identify repetitive or frivolous litigation;
- obtaining certification of New York's prison grievance mechanisms under 42 U.S.C. § 1997(e);
- requiring lawyers to take a minimum number of pro se cases as a condition of continuing membership in the bar of a district court;
- recommending statewide adoption of a N.D.N.Y. rule that requires prisoners to pay a partial filing fee based on their prison cash account (outside N.D.N.Y., the fee is generally waived entirely for prisoners);
- improving the information and forms provided to pro se litigants;

See NOTEWORTHY, page 8

Chief Probation and Pretrial Services Officers Attend FJC Leadership Seminar

A three-day leadership seminar for 17 new chief probation and pretrial services officers was held at the FJC in December 1987. The seminar helped the new chiefs to identify the ingredients of leadership and different leadership styles, to find ways to diagnose their districts' various problems, needs, and strengths, and to establish a dialogue and ongoing support system among themselves.

The faculty for the seminar consisted of David Leathery, Chief, Probation and Pretrial Programs of the FJC; John Fagan, Chief of Staff of the Lieutenant Governor's Offices of the State of Colorado; and Robert "Bo" Ault, Deputy Chief U.S. Probation Officer of the Eastern District of Virginia. In addition to lectures and discussions, the seminar included small team sessions, in which participants analyzed problem situations, identified management tools for use in various situations, and planned application of the techniques presented.

The AO provided the new chief probation and pretrial officers with a two-day orientation program during their stay in Washington. ■

(Left to right) Chief Probation Officer William R. Sayes (W.D. La.), Chief Pretrial Services Officer R. James Behm (E.D. Mo.), and Chief Probation Officer Robert L. Brent (W.D. Mich.) during the Federal Judicial Center seminar held in December 1987 in Washington, D.C.

Eleventh Circuit Upholds House Committee's Access To Grand Jury Materials in Hastings Case

The Eleventh Circuit has affirmed a district court's order that the House Judiciary Committee was entitled to access to grand jury materials to use in the committee's impeachment inquiry in the case of Judge Alcee Hastings (S.D. Fla.). *In re Request for Access to Grand Jury Materials Grand Jury No. 81-1* (11th Cir. Nov. 24, 1987). Judge Hastings had argued that disclosure created the potential for abuse of power by making the executive branch, and perhaps the judicial branch, an arm of the legislative branch in the impeachment process.

The appeals court stated that under a proper conception of separation of powers, principles of comity require a degree of cooperation between the legislative and judicial branches, and that "the grand jury as an institution has one foot in the judicial branch and the other in the executive," necessitating "a high degree of cooperation . . . if the system is to function."

The Judicial Conference certified to the House in March of 1987 its determination that consideration of the impeachment of Judge Hastings may be warranted (see *The Third Branch*, April 1987, at 5 and November 1987, at 9). ■

FJC Summer Program for Judges

Budget reductions preclude a 1988 summer judicial seminar such as those held in recent years at the Universities of Wisconsin and California.

Depending on the outcome of subsequent budget action, the Center may be able to fund a small number of judges at the Harvard Law School's Summer Program of Instruction for Lawyers. The 1988 program begins June 12 and ends June 25. Many of the courses last only one week, and if there is Center support, such support may be restricted to one week.

Article III judges who wish to be considered for support should so indicate by letter to Russell Wheeler, Director of Special Educational Services at the Center. Letters should be received by Apr. 18.

Selection will be by random drawing if applications exceed available funds. The Center may not know whether funds will be available until well into the spring, perhaps as late as May or June.

YEAR END REPORT, from page 1

committees, some of whose functions were consolidated into existing or newly created committees. The restructuring provides "greater opportunity for conference committee service than ever before," the Chief Justice said, pointing out that 99 of the 205 Article III judges now serving on Conference committees are new appointees, and that nearly twice as many bankruptcy judges and magistrates are represented on conference committees as were previously represented. He noted the strengthening of the Conference's Executive Committee, chaired by Chief Judge Wilfred Feinberg (2d Cir.) and the formation of the Legislative Liaison Group, which will work closely with the Executive Committee in monitoring legislation. The group, chaired by Chief Judge Charles Clark (5th Cir.), will alert the Executive Committee to act between Conference sessions to ensure that the views of the Conference are made known to Congress in a timely and effective manner.

The report noted AO Director L. Ralph Mecham's efforts to provide greater service to the judiciary, including initiatives to meet the judiciary's space and facilities requirements, to promote automation, and to improve commmunications with the legislative branch and within the judicial branch.

During 1987, the report said, the Supreme Court acted on 4,340 cases, the courts of appeals on 36,010 cases, and the district courts on 279,087 cases (238,000 civil and 41,087 criminal). The report saw a likelihood that the workload of the courts would become even heavier, "not due to an influx of new cases but rather to a need to devote more judicial time to the existing volume of criminal cases," as district judges, magistrates, and probation officers adapt to the new system of guideline sentencing and given that "appellate review of sentencing has now become a reality."

The Chief Justice pointed to the presidential recommendation of pay raises for the federal judiciary, which went into effect on Feb. 5, 1987, and stated that while the judiciary no doubt welcomes this action, "a wide gap remains between federal judicial salaries and the income of established and highly skilled members of the private bar." He reiterated his belief "that the present level of compensation for federal judges may not be high enough to attract . . . 'the first-rate talent that has always been a hallmark of the federal bench.'"

The report summarizes a number of items of interest to the judiciary that have become public law or are in the legislative pipeline for consideration in 1988. The report states that, based on meetings he has had with Rep. Robert W. Kastenmeier (D-Wis.) and Sen. Howell Heflin (D-Ala.), the Chief Justice has "high expectations for a renewed legislative response to the needs of the judiciary and for an open communications flow between our branches." The judiciary "should also be grateful for the support given the judicary by the Appropriations Committees in the face of substantial cutbacks in the federal budget," the report says.

Observing that the judiciary is "presently operating with 49 vacancies nationally among Article III judgeships, including the vacancy on the Supreme Court," the Chief Justice praised "the steadfast efforts of our senior judges."

Among the legislative highlights of the past year that the Chief Justice singled out were the new parity of U.S. magistrates with bankruptcy judges in their current retirement arrangements; $66 million in additional appropriations for the judiciary for FY87, permitting the funding of the 52 new bankruptcy judge positions authorized in 1986 and permitting court staffing levels to be brought close to the judiciary's needs; improvements to the Sentencing Reform Act of 1984, easing the transition into the new sentencing guidelines system and expanding the drug aftercare program to cover psychiatric aftercare; passage of the "race to the courthouse" bill; amendment of the National Childhood Vaccine Injury Act of 1986 to remove the processing of this type of claim from Article III courts to the U.S. Claims Court; and the final continuing resolution for FY88, which included a provision raising the salary of bankruptcy judges and magistrates to 92 percent of the rate of district judges, effective Oct. 1, 1988.

The Chief Justice praised the services of retired Supreme Court Justice Lewis F. Powell, Jr., and retired FJC Director A. Leo Levin, and welcomed Judge John C. Godbold as "an able successor" to direct the FJC.

Copies of the Chief Justice's Year End Report are available from the FJC's Information Services Office. ■

ERSONNEL, from page 4

D.D.C., Nov. 16
William L. Standish, U.S. District Judge, W.D. Pa., Nov. 30
William L. Dwyer, U.S. District Judge, W.D. Wash., Dec. 1
Sam R. Cummings, U.S. District Judge, N.D. Tex., Dec. 11
Franklin S. Van Antwerpen, U.S. District Judge, E.D. Pa., Dec. 21
Rodney S. Webb, U.S. District Judge, D.N.D., Dec. 23
Dean Whipple, U.S. District Judge, W.D. Mo., Dec. 29
Robert S. Gawthrop III, U.S. District Judge, E.D. Pa., Jan. 4
Ernest C. Torres, U.S. District Judge, D.R.I., Jan. 19
Jerome Turner, U.S. District Judge, W.D. Tenn., Jan. 19

Elevations
John F. Gerry, Chief Judge, D.N.J., Oct. 1
Lucius Desha Bunton III, Chief Judge, W.D. Tex., Nov. 2
Lyle E. Strom, Chief Judge, D. Neb., Nov. 9
William C. O'Kelley, N.D. Ga., Jan. 1, 1988

Resignation
William S. Sessions, Chief Judge, W.D. Tex., Nov. 1

Senior Status
Henry Bramwell, U.S. District Judge, E.D.N.Y., Oct. 1
Clarkson S. Fisher, U.S. District Judge, D.N.J., Oct. 1
Samuel Conti, U.S. District Judge, N.D. Cal., Nov. 1

Deaths
Edward M. Curran, U.S. District Judge, D.D.C., Jan. 10
Ross N. Sterling, U.S. District Judge, S.D. Tex., Jan. 14
Edward Weinfeld, U.S. District Judge, S.D.N.Y., Jan. 17

MAGISTRATES (FULL-TIME)
Appointments
Joel B. Rosen, U.S. Magistrate, D.N.J., Dec. 10
John F. Simon, U.S. Magistrate, W.D. [illegible], Dec. 15

Retirement
Stephen W. Karr, U.S. Magistrate, W.D. Mich., Dec. 31

LEGISLATION, from page 4

Supreme Court decisions, except under a later statute involving a death in the course of an aircraft hijacking. A bill similar to S. 1970 has been introduced in the House as H.R. 3777 by Rep. George W. Gekas (R-Pa.) and others.

• Rep. William H. Gray III (D-Pa.) has introduced H.R. 3726, to enable federal judges to take senior status if they are 60 years of age and have at least 20 years of service. 28 U.S.C. §371(b) currently provides that a federal judge may retire from active service with election of senior status if the judge's attained age and years of service total 80, provided the judge is at least 65 years of age.

• Sen. Howell Heflin (D-Ala.) and Sen. Charles E. Grassley (R-Iowa) have introduced S. 1996, to amend district court jurisdiction with respect to certain actions involving citizens of the U.S. and foreign persons; the bill addresses problems that have arisen in international product liability suits. A similar bill has been introduced in the House as H.R. 3662 by Rep. Dan Glickman (D-Kan.).

Section one of S. 1996 provides federal district court jurisdiction and facilitates service of process in suits brought by U.S. citizens against foreign manufacturers, where the foreign citizen knew or should have known that the product would be sold or used in the U.S. The measure is required by the difficulties in asserting jurisdiction under some state "long-arm" statutes, Sen. Heflin says. Section two of the bill would amend 28 U.S.C. § 1441, the removal statute, to provide that any civil action brought in a state court by a foreign citizen or subject against a U.S. citizen for a product-related injury sustained outside of the U.S. may be removed by the defendant to the U.S. district court. This would include cases filed in the state of citizenship of one of the defendants (presently not removable). Section three of the bill addresses the problem of "forum shopping" by foreign plaintiffs. Under current law, the federal court in a diversity case applies the choice-of-law rules of the state in which it is located. Since not all states apply the rule that the law of the place of injury should govern, foreign plaintiffs seek jurisdictions that will apply more liberal tort standards than those in their own countries. S. 1996 would require federal courts to apply the law of the place of injury in all liability and damage issues in these actions.

• The "race to the courthouse" bill, H.R. 1162 (see *The Third Branch*, January 1988, at 2) was signed by the President Jan. 8, 1988, as Pub. L. 100-236. The measure provides for the random selection of the circuit to hear appeals from agency decisions in cases where appeals are filed in more than one circuit.

• Product liability law reform is being considered by committees in both the House and the Senate. The Commerce, Consumer Protection, and Competitiveness Subcommittee of the House Energy and Commerce Committee in December approved a measure based on H.R. 1115, sponsored by Rep. Bill Richardson (D-N.M.), which would set a federal product liability standard.

S. 666 was introduced last year by Sen. Robert W. Kasten, Jr. (R-Wis.), who has urged a uniform national standard of liability for product manufacturers and sellers. Sen. Kasten has termed the present system "a patchwork of product liability laws developed by state judges who have been basically legislating policy in this area for two decades." S. 666 includes uniform fault standards for product sellers, restrictions on the imposition of punitive damages, a workers' compensation offset to avoid double recoveries, reform of the doctrine of joint and several liability with respect to noneconomic damages, and an expedited settlement procedure.

Consideration of the product liability measures by the full House and

See LEGISLATION, page 8

LEGISLATION, from page 7

Senate could come in early 1988.

• Sen. Daniel P. Moynihan (D-N.Y.) has introduced S. 1934, to authorize the Architect of the Capitol to contract for the design and construction of a new office building for the federal judiciary. The legislation implements the findings of a report by the Architect of the Capitol and the Secretary of Transportation that was endorsed by Chief Justice Rehnquist. The office building would accommodate employees of the AO, the FJC, and other judicial branch support offices, and provide expansion space for retired Justices and other needs of the Supreme Court. The building, to be located near Union Station in Washington, would be built by a private developer but would become the property of the federal government after a 30-year lease period.

• The Budget Reconciliation Act of 1987 passed by Congress in December contained a subtitle called the "Vaccine Compensation Amendments of 1987," modifying the compensation and court jurisdiction provisions of the National Childhood Vaccine Injury Act of 1986. Petitions for compensation under the act are now to be filed with the United States Claims Court rather than with the district courts. Compensation for injuries and deaths associated with vaccines given prior to the effective date of the amendments will be made from a trust fund established under the Internal Revenue Code and authorized in the amount of $80 million per fiscal year for FY89 through FY92. Compensation for injuries and deaths associated with vaccines given after the effective date of the amendments will be subject to a ceiling on the number of awards; the ceiling is set at 150 awards per year for each of the four years after the effective date of the amendments. ■

NOTEWORTHY, from page 5

•clarifying pleading requirements and the conditions under which the court may summarily dismiss frivolous claims.

The Pro Se Committee was established because of Chief Judge Wilfred Feinberg's concern about the service of the bar and the courts to pro se litigants. Its chairman is Judge George C. Pratt (2d Cir.), and its members are Chief Judge John T. Curtin (W.D.N.Y.), Chief Judge Howard G. Munson (N.D.N.Y.), Judge Leonard B. Sand (S.D.N.Y.), and Robert C. Heinemann, Clerk (E.D.N.Y.).

The committee seeks advice on possible steps to improve the quality of justice for litigants who represent themselves and to increase the efficiency with which the federal courts handle these cases. It invites attorneys, judges, and the public to submit suggestions to Hon. George C. Pratt, Chairman, Pro Se Committee, Long Island Courthouse, Uniondale, NY 11553. ■

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THE THIRD BRANCH

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MARCH 1988

Sentencing Guidelines Ruled Invalid in Two Cases in Southern District of California

The sentencing guidelines promulgated by the U.S. Sentencing Commission were ruled invalid in two recent cases in the U.S. District Court for the Southern District of California. The court in *U.S. v. Arnold* held that the placement of the Commission in the judicial branch and the inclusion of Article III judges on the Commission violate the constitutional separation of powers doctrine. *U.S. v. Arnold*, Cr. No. 87-1279-B (S.D. Cal. Feb. 18, 1988). This reasoning was adopted in an order in *U.S. v. Manley*, No. 87-1290-R-CRIM (S.D. Cal. Feb. 18, 1988). In a related development, a civil suit challenging the guidelines has been dismissed for lack of standing by the U.S. District Court for the District of Columbia. *Federal Defenders of San Diego, Inc. v. U.S. Sentencing Comm'n*, No. 87-3181 (D.D.C. Feb. 22, 1988).

The decision in *Arnold* was on a pretrial motion in a case in which the two defendants pled not guilty. The motion was argued before seven other judges in the district, sitting in their individual capacities, who had similar issues pending in cases before them.

The court in *Arnold* found the issues ripe for decision even though the defendants might be acquitted at trial. The court found that the need for a determination was substantial and, looking beyond the two defendants before the court, "the Guidelines . . . are mathematically certain to be immediately applicable in a finite number of cases," and the public interest would be well served by a prompt resolution of the issue of the guidelines' constitutionality. Moreover, "the issues now before this court are purely legal and need no

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Judge Elmo B. Hunter (W.D. Mo.) Receives Devitt Distinguished Service to Justice Award

Judge Elmo B. Hunter (W.D. Mo.) has been selected as the recipient of the Edward J. Devitt Distinguished Service to Justice Award.

Judge Hunter was appointed to the federal bench in 1965, and served as chief judge of the Western District of Missouri in 1980. He served on the Judicial Conference Committee on Court Administration beginning in 1969, serving as chairman of its Subcommittee on Judicial Improvements from 1976 to 1978, and became the full committee's chairman in 1978.

Judge Hunter was born in Missouri and received his A.B. and J.D. degrees from the University of Missouri. Prior to his appointment as a federal judge, he was a senior assistant city counselor of Kansas City, a Missouri circuit judge, and a Missouri appellate judge.

Judge Elmo B. Hunter

He is a former chairman of the board and president of the American Judicature Society.

The Devitt award has been presented annually by West Publishing Co. since 1982 in recognition of extraordinary service to justice by a federal judge. The selection committee for this year's award consisted of Supreme Court Justice William J. Brennan, Jr., Chief Judge Charles Clark (5th Cir.), and Judge Edward J. Devitt (D. Minn.). ■

Chief Justice Speaks On State–Federal Relations

Chief Justice Rehnquist spoke about relations between the Supreme Court of the United States and the state supreme courts at the midyear meeting of the Conference of Chief Justices held in Williamsburg, Va., on Jan. 27, 1988. His remarks concerned three areas of relations between state and federal courts.

He first discussed the circumstances under which the Supreme Court will review state court decisions that arguably are premised on both federal and state grounds. *Michigan v. Long*, 463 U.S. 1032 (1983), held that in the absence of a plain statement that the holding below rested on an adequate and independent state ground, the presumption would be in favor of the Supreme Court's taking jurisdiction and deciding the case on federal constitutional grounds. The Supreme Court "chose this course over other options, particularly the option of remanding the case back to the Supreme Court of Michigan with the attendant delay and inconvenience that such an approach would cause," the Chief Justice pointed out.

He disagreed with critics of *Long* who believe that the case "reflects hostility to the resurgence of interest in the development of state constitutional

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Inside . . .

LEGISLATION

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

• The Senate passed S. 557, the Civil Rights Restoration Act, a bill intended to overrule the result reached in the Supreme Court's *Grove City College* case (see *The Third Branch*, May 1987, at 12).

• The Senate Judiciary Committee held an oversight hearing on the judicial selection process, with particular emphasis upon the Reagan administration's performance in nominating women and minorities as judicial appointees. Assistant Attorney General Stephen J. Markman of the Justice Department's Office of Legal Policy represented the administration at the hearing.

• The House Appropriations Committee's Subcommittee on Commerce, Justice, State, the Judiciary, and Related Agencies held a hearing on FY89 appropriations under its jurisdiction. Chief Judge Charles Clark (5th Cir.), Judge Richard S. Arnold (8th Cir.), and Judge Thomas J. Meskill (2d Cir.) testified on behalf of the Judicial Conference. Judge John C. Godbold, FJC Director, and L. Ralph Mecham, AO Director, testified about their agencies' budget requests.

• The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice, chaired by Senator Howell Heflin (D-Ala.), approved S. 951, a bill that would establish a Federal Courts Study Commission (see *The Third Branch*, August 1987, at 5).

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice held a hearing on H.R. 3152, an omnibus court reform bill (see *The Third Branch*, October 1987, at 1). Judge Abner J. Mikva (D.C. Cir.) and Judge Patrick Higginbotham (5th Cir.) testified in their individual capacities at the hearing.

• The Senate Governmental Affairs Committee held a hearing on H.R. 3400, a bill to amend the Hatch Act to permit more partisan political activity by executive branch employees. The House has previously passed H. 3400 (see *The Third Branch*, January 1988, at 2). Although the Hatch Act is not applicable by its terms to the judiciary, a long-standing resolution of the Judicial Conference adopted the act's intent as binding on judicial branch employees.

AO Director L. Ralph Mecham listens as Chief Judge Charles Clark (5th Cir.), Judge Richard S. Arnold (8th Cir.), Chairman of the Judicial Conference Budget Committee, and Judge Thomas J. Meskill (2d Cir.) testify on the judiciary's FY89 budget request before a subcommittee of t' House Appropriations Committee.

• Rep. Tommy F. Robinson (D-Ark.) introduced H.R. 3902, to specify that in federal civil suits alleging that overcrowded conditions in a state penal facility violate the Eighth Amendment, the plaintiff shall be required to prove the allegation by clear and convincing evidence.

• Rep. Hamilton Fish, Jr. (R-N.Y.)

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1988 Circuit Judicial Conferences

First Circuit	Sept. 26-28	Harwich Port, Mass.
Second Circuit	Sept. 8-11	Hershey, Pa.
Third Circuit	Sept. 18-20	Princeton, N.J.
Fourth Circuit	June 30-July 2	White Sulphur Springs, W. Va.
Fifth Circuit	Apr. 17-20	Jackson, Miss.
Sixth Circuit	July 6-9	Hot Springs, Va.
Seventh Circuit	May 8-10	Indianapolis, Ind.
Eighth Circuit	July 14-17	St. Louis, Mo.
Ninth Circuit	Aug. 16-19	Coeur d'Alene, Ida.
Tenth Circuit	July 6-8	Jackson Lake, Wyo.
Eleventh Circuit	May 1-4	Panama City, Fla.
D.C. Circuit	May 22-24	Williamsburg, Va.
Federal Circuit	May 13	Washington, D.C.

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Seventh Cir. Holds District Court Was Without Authority to Require Summary Jury Trial

The Seventh Circuit has held that a district court does not have the authority under Fed. R. Civ. P. 16 to require parties to submit to a mandatory nonbinding summary jury trial. *Strandell v. Jackson County*, No. 87-1559 (7th Cir. Jan. 21, 1988). In a summary jury trial, which generally lasts one day, attorneys summarize their case before a jury, which renders a nonbinding verdict. Litigants may be motivated to settle based on their estimate of how an actual jury may respond to their evidence.

The district court had estimated that trial of the plaintiff's civil rights action would last five to six weeks. Faced with a crowded docket, including a heavy criminal caseload subject to the Speedy Trial Act, the court had ordered a nonbinding summary jury trial. It based the order on a 1984 resolution of the Judicial Conference of the United States endorsing summary jury trials; on Fed. R. Civ. P. 16; on its obligations under the Speedy Trial Act; and on "the ability of a court to use its best judgment to move its crowded docket." Plaintiff's attorney claimed that a summary jury trial would require disclosure of privileged witness statements, whose production the court had refused to compel, and refused to proceed. The court held him in criminal contempt. (See *The Third Branch*, July 1987, at 4).

The Seventh Circuit vacated the contempt order, and in its recent opinion disagreed with the trial judge that rule 16(c) as amended in 1983 can be read as authorizing a mandatory summary jury trial. While agreeing that the pretrial conference under rule 16 was intended to foster settlement through the use of extrajudicial procedures, the appeals court said that the rule "was not intended to require that an unwilling litigant be sidetracked from the normal course of litigation." The Seventh Circuit emphasized that it was not ruling on how summary jury trials may be used with the consent of the parties, nor expressing a view on the effectiveness of the technique in facilitating settlements.

Requiring a mandatory summary jury trial as a pretrial settlement device would also "affect seriously the well-established rules concerning discovery and work-product privilege," the court said. Where the Supreme Court and Congress, through the rulemaking process, have addressed the appropriate balance between the needs for judicial efficiency and the rights of the individual litigant, innovation by the individual judge must conform to that balance, the court said.

Two bills introduced in Congress would expressly allow district courts to utilize summary jury trials—H.R. 473, introduced by Rep. William J. Hughes (D-N.J.), and S. 2038, introduced by Sen. Mitch McConnell (R-Ky.). Under the bills, the court could order the parties to participate in an alternative dispute resolution only upon the parties' agreement to do so, but the bills would provide sanctions for an "unreasonable refusal" to participate by either of the parties. ■

Certiorari Denied in Appeal by Judge Walter L. Nixon

The Supreme Court has denied certiorari in *Nixon v. U.S.*, No. 87-650.

Judge Walter L. Nixon, Jr. (S.D. Miss.) was convicted in 1986 of perjury before a federal grand jury, and the conviction was affirmed by the Fifth Circuit in 1987. *U.S. v. Nixon*, 816 F.2d 1022 (5th Cir. 1987). Judge Nixon's petition for rehearing and suggestion for rehearing en banc were later denied by the Fifth Circuit. Eleven of the circuit's fourteen active circuit judges recused themselves from the case. Judge Nixon had asked that the local rule requiring a majority vote of all active circuit judges in order for the case to be reheard en banc be modified in his case, but the Fifth Circuit declined to modify the rule. ■

ABA Task Force Issues Caseflow Management Report

The Lawyers Conference Task Force on Reduction of Litigation Cost and Delay of the Judicial Administration Division of the ABA has released *Caseflow Management in the Trial Court—Now and for the Future*, by Maureen Solomon and Douglas K. Somerlot. The task force was formed to implement the knowledge gained by the ABA Action Commission on Court Cost and Delay and to promote the adoption by the courts of the *Standards Relating to Court Delay Reduction*. The task force included among its members Judge Robert C. Broomfield (D. Ariz.) and Chief Judge Robert F. Peckham (N.D. Cal.), as well as state court judges, academics, and practicing attorneys. The new publication is intended to encourage the application of case management principles to the day-to-day work of lawyers and courts.

CALENDAR

Mar. 3-5 Judicial Conference Committee on the Bicentennial of the Constitution
Mar. 7-9 Seminar for Bankruptcy Chief Deputy Clerks
Mar. 13-15 Bankruptcy Case Management Workshop
Mar. 14-18 Seminar for Chief Probation/Pretrial Clerks
Mar. 14-19 Fordham Graduate Program for Probation Officers
Mar. 15-16 Judicial Conference of the United States
Mar. 21-23 Seminar for District Deputy Clerks-in-Charge
Mar. 22-25 Frontline Leadership Training of Trainers
Mar. 23-25 Workshop for Judges of the Fourth Circuit
Mar. 28-29 Conference for Metropolitan District Chief Judges
Apr. 5-8 Workshop for Docketing Supervisors
Apr. 6-8 Seminar for Magistrates of the Ninth and Tenth Circuits
Apr. 7-8 Judicial Conference Advisory Committee on Civil Rules

NOTEWORTHY

Fourth Circuit holds Virginia need not provide counsel to state habeas petitioners in death penalty cases. The Fourth Circuit has overturned a district court decision that held the Commonwealth of Virginia must provide counsel to inmates sentenced to death to assist in preparing state habeas corpus petitions challenging their convictions and sentences. *Giarratano v. Murray*, No. 87-7519 (4th Cir. Jan. 4, 1988). "Virginia fulfills its obligation under *Bounds* [*v. Smith*, 430 U.S. 817 (1977)] to provide all inmates with meaningful access to the courts, and there is no factual or legal justification for requiring a higher standard of access for death row inmates. In essence, by reading the record to support a sweeping extension of *Bounds*, the district court has, under the guise of meaningful access, established a right of counsel where none is required by the Constitution," the Fourth Circuit held. The court quoted from the Supreme Court's opinion in *Pennsylvania v. Finley*, 95 L. Ed. 2d 539 (1987), decided subsequent to the district court's decision: "We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks to their convictions, and we decline to so hold today. Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further." The appeals court found no justification for holding that the plaintiffs constitute an exception to *Finley*, nor for reading *Bounds*'s "meaningful access" to the courts to require the appointment of counsel. The Fourth Circuit upheld that part of the district court decision which held that the Commonwealth need not provide the inmates counsel to prepare federal postconviction petitions.

Virginia provides inmates with a law library and with institutional attorneys who act in an advisory capacity in preparing postconviction petitions, as well as with appointed counsel to assist in cases that require an evidentiary hearing. The Fourth Circuit disagreed with the district court's finding that the legal assistance provided by Virginia was insufficient for death row inmates.

Robert D. St. Vrain, clerk of the Eighth Circuit, speaks at a recent meeting of clerks of courts of appeals at the FJC. The courts of appeals are in the process of formulating procedures for handling appeals of guideline sentences. (At right, Robert Hoecker, Clerk, 10th Cir.)

Bankruptcy Court goes on seminar tour in E.D. Va. All four bankruptcy judges of the Eastern District of Virginia, led by Chief Judge Martin V. B. Bostetter, Jr., spoke at recent seminars in three different locations in the district. Five hundred participants attended the seminars, which were promoted under the title, "The Bankruptcy Court Comes to You." In addition to the four judges, 30 other bankruptcy court personnel participated. The seminars were sponsored by the Committee on Continuing Legal Education of the Virginia Law Foundation, in cooperation with the office of Michael M. Sheppard, Clerk of the Bankruptcy Court.

Printed materials handed out at the seminars included a detailed outline of local rules and court procedures, copies of local forms, and a copy of the new local rules of the Eastern District's Bankruptcy Court. Presentations by court personnel covered all phases of bankruptcy practice, from case filing to the procedure for obtaining information from the court on a closed case.

The seminar presentations were also used as a vehicle for training employees on the new local rules, and for further standardization of court procedures for all four bankruptcy divisions within the district.

Parole Commission conducts pilot program of monitoring parolees with electronic sensors. The U.S. Parole Commission has begun a test program to supervise certain federal parolees by means of electronic monitoring. Seven parolees in Miami and four in Los Angeles entered the program in January. A total of 200 parolees will be involved when the commission evaluates the program in 18 months.

Under the program, offenders who do not need halfway house services will be released from prison to the community up to 180 days in advance of their parole date. Parolees will wear on their ankles electronic devices that send signals to transmitters in the parolees' home telephones. During the early release period, the parolees must be home at all times except for work, authorized treatment programs, and worship services. The transmitters relay a signal to a computer, which detects any unauthorized absences of the parolees from their homes. If the parolees cannot be reached, their probation officers will personally investigate.

Electronic monitoring (see *The Third Branch*, December 1987, at 4) costs $5 a day per parolee, compared with a cost of $30 a day for parolees released to halfway houses. ■

Resolutions on Court Issues Discussed by ABA

At the ABA's midyear meeting in Philadelphia last month, the following issues of interest to the federal courts came before the house of delegates.

Evaluation of judicial performance. The ABA has adopted committee recommendations amending its judicial performance guidelines program to include federal judges. When the program was adopted in 1985 it covered only state judges. At that time the ABA took no position on the program's applicability to Article III federal judges, because of existing federal legislation on the subject and because of the federal Code of Judicial Conduct, approved by the Judicial Conference of the United States.

One-third of the states have adopted some or all of the ABA's program to date.

Standards for judicial education. An amendment to a previous ABA standard was approved to further clarify that non-judges, including law professors, attorneys, court administrators, and others, "may be utilized where their expertise will contribute to goals" of judicial education and training programs.

Subpoena of attorneys. The ABA reaffirmed the principle of prior judicial approval of subpoenas of attorneys for evidence obtained as a result of the attorney-client relationship. The new recommendation specifies the standards the ABA believes the court should apply in ruling on the prosecutor's request for such a subpoena.

Lawyers' Code of Professionalism. Attempts to draft a new Code of Professionalism for lawyers were delayed when suggested changes were withdrawn after submission to the house of delegates.

Federal habeas corpus death penalty proceedings. This resolution asked for a series of actions aimed at bringing about full implementation of the provisions of the Criminal Justice Act Revision of 1986 and the Criminal Justice Act (CJA) Guidelines amended in 1987, and acknowleges "the efforts of the federal judges to implement these provisions and guidelines." The resolution calls for a raise in the amounts paid court-appointed counsel in federal habeas corpus death penalty cases, in addition to waivers of the case compensation limit for investigative, expert, and other services court-appointed attorneys have found necessary in the past. The resolution also calls for changes in procedures followed to appoint attorneys to assure adequate representation (such as the appointment of the same attorneys in federal habeas corpus proceedings as were counsel for the defendants in state postconviction proceedings); preassignment screening of attorneys to assure that only trained and experienced attorneys are appointed; and the appointment of two attorneys in every federal habeas corpus death penalty case as counsel of record. To give further support for these requests the proposers called for creation of more regional centers to provide expert advice and assistance to these court-appointed counsel. The resolution also encouraged the federal courts, in implementing CJA plans, to "consult extensively with appropriate state criminal justice leaders to ensure the maximum extent of coordination and consistency" in the appointment of post-conviction counsel in death penalty cases. After debate and redrafting the house of delegates approved.

The Judicial Conference of the United States approved the amendments to the Guidelines in March of 1987, after having asked the chief judges in 1986 to establish task forces to develop more information on the impact of the projected death penalty cases reaching the postconviction stage in federal courts. In addition, the Judicial Conference established special alternative maximum hourly compensation rates for four federal district courts in California. (See *The Third Branch*, January 1988, at 1, 3.) The Judicial Conference at its meeting this month will further consider these and other related matters.

ABA dues. A 25 percent reduction from the regular dues was approved by the house for certain classes of members, including all full-time judges and full-time government lawyers. The new rates take effect in June. For further information and application for membership contact Ms. Suzanne Wegrzyn, Director of Membership, at (312) 988-5516, or write to the ABA at 750 N. Lake Shore Drive, Chicago, IL 60611.

Juror use and management. The ABA house of delegates did not amend standard 9(d), adopted in 1983, which relates to peremptory challenges. One amendment would have specified that the number of peremptory challenges in criminal cases "be equal for prosecution and defense where there is one defendant." Proponents said the amendments were necessary because of the Supreme Court's 1986 decision in *Batson v. Kentucky.* ■

Positions Available

District Court Executive, N.D. Ga. 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. § 332(f) prerequisite to appointment, but applications from non-certified applicants encouraged. Send resume by Apr. 1, 1988, to Ben H. Carter, District Court Executive, U.S. District Court, Northern District of Georgia, Room 2211, U.S. Courthouse, 75 Spring St., S.W., Atlanta, GA 30335.

Chief Deputy Clerk, Bankruptcy Court, D. Colo. Salary $33,218-54,907. Requirements: Bachelor's degree, minimum 6 years progressively responsible administrative experience in public or private service, including a minimum 3 years in position of substantial management responsibility. Position available June 1, 1988, or sooner. Send resume by Mar. 31 to Bradford L. Bolton, Clerk, U.S. Bankruptcy Court, 1845 Sherman, Room 400, Denver, CO 80203-1190.

EQUAL OPPORTUNITY EMPLOYERS

PERSONNEL

SUPREME COURT OF THE U.S.

Confirmation

Anthony M. Kennedy, Associate Justice, Feb. 3

Appointment

Anthony M. Kennedy, Associate Justice, Feb. 18

CIRCUIT JUDGES

Confirmation

Wade Brorby, U.S. Circuit Judge, 10th Cir., Feb. 16

Appointment

Robert E. Cowen, U.S. Circuit Judge, 3d Cir., Nov. 15

DISTRICT JUDGES

Nominations

Bernard A. Friedman, U.S. District Judge, E.D. Mich., Feb. 2

Emilio M. Garza, U.S. District Judge, W.D. Tex., Feb. 2

George M. Marovich, U.S. District Judge, N.D. Ill., Feb. 2

Thomas S. Zilly, U.S. District Judge, W.D. Wash., Feb. 16

Donald E. Abram, U.S. District Judge, D. Colo., Feb. 19

Shannon T. Mason, Jr., U.S. District Judge, E.D. Va., Feb. 22

Nomination Withdrawn

Robert N. Miller, U.S. District Judge, D. Colo., Feb. 2

Confirmations

Richard J. Arcara, U.S. District Judge, W.D.N.Y., Feb. 19

Suzanne C. Conlon, U.S. District Judge, N.D. Ill., Feb. 19

Edward F. Harrington, U.S. District Judge, D. Mass., Feb. 19

Paul V. Niemeyer, U.S. District Judge, D. Md., Feb. 19

Appointments

William L. Dwyer, U.S. District Judge, W.D. Wash., Dec. 1

George C. Smith, U.S. District Judge, S.D. Ohio, Dec. 1

Nicholas H. Politan, U.S. District Judge, D.N.J., Dec. 14

Alfred M. Wolin, U.S. District Judge, D.N.J., Jan. 4

Michael B. Mukasey, U.S. District Judge, S.D.N.Y. Jan. 7

Elevation

William C. O'Kelley, Chief Judge, N.D. Ga., Jan. 1

Senior Status

Whitman Knapp, U.S. District Judge, S.D.N.Y., Nov. 23

Mark A. Costantino, U.S. District Judge, E.D.N.Y., Dec. 1

Cristobal C. Duenas, U.S. District Judge, D. Guam, Jan. 1

Charles A. Moye, Jr., U.S. District Judge, N.D. Ga., Jan. 1

William M. Steger, U.S. District Judge, E.D. Tex., Jan. 1

Robert E. Demascio, U.S. District Judge, E.D. Mich., Jan. 16

Clarence C. Newcomer, U.S. District Judge, E.D. Pa., Jan. 19

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further factual development."

The court rejected the defendants' argument that the act establishing the Commission constitutes an invalid delegation of legislative power. The court found that "[t]he Act provides ample statements of policy and specific rules to guide the Commission's exercise of the delegated authority."

The court agreed, however, with the defendants' argument that the Commission is constitutionally defective under the separation of powers doctrine, because the statute creating the Commission places it in the judicial branch, whose power is limited under the Constitution to the resolution of cases and controversies, while the Commission's "duties and powers are distinctly nonjudicial in nature." The Commission's job of interpreting, monitoring, and enforcing the mandate of Congress constitutes an executive function, the court held.

The Justice Department argued that the court should sever the language of the act that designates the Commission as a part of the judicial branch, rather than declare the Commission unconstitutional. The court held that "striking the designating language and effectuating a *de facto* transfer of the Commission . . . to a different branch or to an independent status would appear to unduly frustrate Congressional intent." Moreover, even were the designating language to be severed, the Commission's composition itself would violate the Constitution, the court held. This would be so because the three judge-commissioners' independence and neutrality in their role as Article III judges would be impaired, and because the mandatory assignment of judges to an executive commission creates "an excessive intermingling of two branches of government" and "erodes the appearance of impartiality of the Judicial Branch."

The court held that it could not separate the Commission's work product from the fact of the Commission's unconstitutionality. "The Guidelines being promulgated and distributed by a constitutionally flawed Commission must be held invalid."

The decision and order were "certified for immediate interlocutory writ or appeal as appropriate and if available."

The orders in both *Arnold* and *Manley* provide that if it is necessary to sentence the defendants, they will be sentenced according to the law that applies to conduct occurring prior to Nov. 1, 1987.

The *Federal Defenders of San Diego* suit dismissed by the D.C. court had been filed by public defender organizations seeking a declaratory judgment that Congress's grant of authority to the Sentencing Commission was unconstitutional. Plaintiffs claimed that the guideline sentencing system poses workload and ethical problems for attorneys representing defendants who

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rules that offer greater protection of individual rights than is offered by cognate provisions of the United States Constitution." He said *Long* merely announced a rule by which the Supreme Court will decide how a decision that seems to the Court ambiguous as to grounds will be interpreted for purposes of Supreme Court review. "It does not seem to me to be in any way unfair to state courts to follow a rule that if they are to place the ruling on a ground of state constitutional law which will ensure that their decision is not reviewed by our Court, they should plainly say so," the Chief Justice said.

He next turned to the question of when federal appellate courts will certify questions of state law to the highest courts of the states under state certification procedures. The Chief Justice reviewed the abstention doctrine, by means of which federal courts may submit questions of state law to state courts for determination. He noted the dilemma faced by federal courts in cases where they are asked to rule on a state statute without a fully developed factual context and where there is little or no state case law interpreting the statute. While the abstention doctrine will apply if there is a genuinely debatable question of state law, the Chief Justice suggested that state attorneys general "are not terribly happy with it, because they, like their opponents, know that the federal court will ultimately decide any federal constitutional questions in the case, and they would prefer to get the litigation over with without the additional delays resulting from abstention." Thus, the process of certifying questions of state law to state supreme courts that are willing to accept such certified questions "is a promising tool for obviating some of the great difficulties which result when a federal court attempts to interpret a state statute which has never been interpreted by the highest court of the state," the Chief Justice said. He noted the recent case of *Virginia v. American Booksellers Ass'n*, 56 U.S.L.W. 4113 (S. Ct. Jan. 25, 1988), in which questions of state law were certified to the Supreme Court of Virginia.

The Chief Justice then discussed what the relationship should be between state-court review of a death sentence and federal habeas review. He commented on the increasing number of people on death row and identified a need for "some sort of regularization of the procedures which now attend last minute appeals and requests for stay of execution." Given "the sort of chaotic conditions that often develop within a day or two before an execution is scheduled," the Chief Justice urged that "the possibility of imposing some reasonable regulations" on the situation be explored. Stating that he did "not have any particular remedy in mind," he announced that he intends to ask an appropriate committee of the Judicial Conference to look into the matter.

Copies of the Chief Justice's speech are available from the FJC's Information Services Office. ■

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Retirement

George Leighton, U.S. District Judge, N.D. Ill., Dec. 1

Frank J. McGarr, U.S. District Judge, N.D. Ill., Jan. 5

Death

Marion S. Boyd, U.S. District Judge, W.D. Tenn., Jan. 9

BANKRUPTCY JUDGES

Appointments

E. Stephen Derby, U.S. Bankruptcy Judge, D. Md., Dec. 9

Frank D. Howard, U.S. Bankruptcy Judge, W.D. Wash., Dec. 22

Jo Ann C. Stevenson, U.S. Bankruptcy Judge, W.D. Mich., Dec. 23

John A. Rossmeissl, U.S. Bankruptcy Judge, E.D. Wash., Dec. 28

Ronald S. Barliant, U.S. Bankruptcy Judge, N.D. Ill., Jan. 1

Richard T. Ford, U.S. Bankruptcy Judge, E.D. Cal., Jan. 1

John H. Squires, U.S. Bankruptcy Judge, N.D. Ill., Jan. 1

Sidney B. Brooks, U.S. Bankruptcy Judge, D. Colo., Jan. 4

Judith A. Boulden, U.S. Bankruptcy Judge, D. Utah, Jan. 5

Edward J. Lodge, U.S. Bankruptcy Judge, D. Idaho, Jan. 7

Linda B. Riegle, U.S. Bankruptcy Judge, D. Nev., Jan. 11

Nancy C. Dreher, U.S. Bankruptcy Judge, D. Minn., Jan. 25

S. Martin Teel, Jr., U.S. Bankruptcy Judge, D.D.C., Feb. 8

Christopher M. Klein, U.S. Bankruptcy Judge, E.D. Cal., Feb. 9

Brett J. Dorian, U.S. Bankruptcy Judge, E.D. Cal., Feb. 16

MAGISTRATES (FULL-TIME)

Appointments

Ann E. Vitunac, U.S. Magistrate, S.D. Fla., Nov. 30

Nancy Fiora, U.S. Magistrate, D. Ariz., Dec. 1

John T. Reid, U.S. Magistrate, D. Kansas, Dec. 1

Christine Ann Noland, U.S. Magistrate, M.D. La., Dec. 4

Robert Jake Johnston, U.S. Magistrate, D. Nev., Dec. 14

Robert M. Stone, U.S. Magistrate, C.D. Cal., Jan. 20

Robert M. Holter, U.S. Magistrate, D. Mont., Jan. 21

Paul W. Greene, U.S. Magistrate, N.D. Ala., Jan. 21

Joseph W. Scoville, U.S. Magistrate, W.D. Mich., Jan. 28

Charles F. Eick, U.S. Magistrate, C.D. Cal., Jan. 29

Sue L. Robinson, U.S. Magistrate, D. Del., Feb. 1

Barbara A. Lee, U.S. Magistrate, S.D.N.Y., Feb. 4

G.R. Smith, U.S. Magistrate, S.D. Ga., Feb. 8

Retirements

James J. Penne, U.S. Magistrate, C.D. Cal., Jan. 19

Spence Grayson, U.S. Magistrate, S.D. Ga., Jan. 27

Resignation

N. Richard Powers, U.S. Magistrate, D. Del., Jan. 27

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may be sentenced under the guidelines (see *The Third Branch*, January 1988, at 1).

The court, while agreeing that a "prompt resolution" of the constitutionality of the guidelines "is crucial to maintaining the orderly functioning of our criminal justice system," said that it would not "stretch traditional standing principles to accommodate this particular case."

The court's memorandum opinion accompanying its order dismissing the suit concluded that "the harm alleged by plaintiffs . . . essentially boils down to their perception that their workload will be more complex and will markedly increase. . . . That sort of 'harm' or 'injury' is no different from the 'harm' that the passage of the Tax Reform Act of 1986 caused for tax lawyers, or . . . than the 'harm' caused for criminal lawyers by the passage of the Bail Reform and Speedy Trial Acts. . . . In addition, the fact that plaintiffs believe their clients will be harmed by the Guidelines does nothing to compensate for their lack of standing in their own right. . . . To accept plaintiffs' argument would mean that specialized sections of bar associations throughout the country would be able to sue without regard to whether or not they are representing an identifiable client with a specific grievance."

Challenges to the constitutionality of the guidelines have also been raised in several other districts. ■

LEGISLATION, from page 2

introduced H.R. 3867, to amend Fed. R. Evid. 803 to provide an explicit hearsay exception in certain child abuse cases.

• The Subcommittee on Water Resources, Transportation, and Infrastructure of the Senate Committee on Environment and Public Works held a hearing Feb. 3 on S. 1934, the bill to construct a new office building in Washington to house agencies of the judicial branch and retired justices of the Supreme Court (see *The Third Branch*, February 1988, at 8). Retired Chief Justice Warren E. Burger, AO Director L. Ralph Mecham, and George M. White, the Architect of the Capitol, testified in favor of the bill.

The new judiciary building would be constructed by a private developer, with the government providing no funds for construction costs. The government would pay a reduced rental rate while the developer would pay a commensurately lower rate for the ground lease. Ownership of the land would remain with the government at all times, and ownership of the building would revert to the government at the end of a 30-year period. A hearing on the judiciary building bill was held before the House Public Works and Transportation Committee's Subcommittee on Public Buildings and Grounds last year.

• As previously reported, legislation was enacted raising the salaries of U.S. bankruptcy judges and full-time U.S. magistrates to 92 percent of that of a U.S. district judge effective Oct. 1, 1988 (see *The Third Branch*, February 1988, at 1). The Budget Committee of the Judicial Conference considered and agreed unanimously to recommend a supplemental appropriations bill that would implement the salary measure effective Apr. 1. This action was approved by the Executive Committee of the Judicial Conference on Jan. 13. The funding request has been presented to the House Appropriations Committee. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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Court Decisions in S.D. Cal., E.D. La. Uphold Constitutionality of Sentencing Guidelines

Recent court decisions in the Southern District of California and the Eastern District of Louisiana have upheld the guideline sentencing scheme. Both decisions rejected challenges that the guidelines are unconstitutional, and the Louisiana court also rejected a challenge on statutory grounds. *U.S. v. Ruiz-Villanueva*, No. 87-1296-E (S.D. Cal. Feb. 29, 1988); *U.S. v. Chambless*, No. 87-609 (E.D. La. Mar. 9, 1988). In both *Ruiz-Villanueva* and *Chambless* the courts rejected arguments that the guidelines constitute an excessive delegation of legislative power and violate the separation of powers doctrine. In rejecting the delegation argument, both courts found that the power delegated to the Commission was sufficiently limited to meet the standard for a proper delegation. In rejecting the separation of powers argument, they found that the presence of judges on the Commission does not compromise the impartiality of the judiciary as a whole in applying the guidelines, and noted that individual judge-commissioners could resolve questions of their own impartiality through recusal.

Addressing the separation of powers arguments, the *Ruiz-Villanueva* court found that the Sentencing Reform Act "does not unconstitutionally expand the power either of the three Article III judges who are members of the Commission or of the judicial branch as a whole." The court found that "Congress expressly created an 'independent commission'—a body that . . . would assist in the primarily judicial task of sentencing without itself exercising the judicial power." This does not exceed the scope of the judicial power, the court found, because "it is well settled that Congress may authorize judges to perform tasks that aid in the performance of their judicial functions." Defendants

See GUIDELINES, page 4

Judicial Conference of United States Endorses Legislation, Approves Videotaping of a Trial

The Judicial Conference of the United States at its biannual meeting in Washington last month endorsed jurisdictional provisions contained in a bill pending in the House of Representatives, approved a recommendation that an upcoming trial be videotaped, and transmitted to the House of Representatives a certificate stating that "consideration of impeachment may be warranted" against Judge Walter L. Nixon, Jr. (S.D. Miss.).

The Fifth Circuit Judicial Council certified to the Judicial Conference on Feb. 11, 1988, that Judge Nixon had "engaged in conduct which might constitute one or more grounds for impeachment." The Council premised its certification "entirely upon the judgment of conviction" of two counts of perjury in the Southern District of Mississippi, affirmed by the Fifth Circuit. The Supreme Court declined review Jan. 19, 1988 (see *The Third Branch*, March 1988, at 3). Any further action in this case is now within the discretion of the House.

The Conference passed two recommendations endorsing proposed changes in federal jurisdiction contained in H.R. 3152, an omnibus court reform bill. It endorsed the creation of multi-party, multi-forum jurisdiction that is intended to consolidate actions involving personal injury or property damage arising out of a single-event disaster. It also reaf-

See JUDICIAL CONFERENCE, page 2

Judges Clifford Wallace, David D. Dowd, Jr. Elected to FJC Board

The Judicial Conference of the United States has elected Judge J. Clifford Wallace of the Ninth Circuit and Judge David D. Dowd, Jr., of the Northern District of Ohio to the Board of the Federal Judicial Center.

Judge Wallace

Judge Wallace fills the position held by Justice Anthony M. Kennedy, who was elevated to the Supreme Court of the United States on Feb. 18, 1988. Judge Wallace came to the federal court system as a district judge in 1970 and in May 1972 was nominated by President Nixon for appointment to the Ninth Circuit. His service to the federal courts includes membership on such Judicial Conference committees as the Subcommittee on Federal Jurisdiction and the Committee to Consider Standards for Admission to Practice in the Federal Courts.

Judge Dowd

A prolific writer, Judge Wallace has published many articles on the courts in legal periodicals, and he has lec-

See BOARD MEMBERS, page 4

Inside . . .

Center Studies Judges' Use of Experts Under Rule 706

Federal judges more frequently appoint experts under rule 706 of the Federal Rules of Evidence than generally recognized. A search of the case law reveals few instances in which such appointments are discussed. In a survey of active federal district court judges, however, the Federal Judicial Center's Research Division found that approximately one in five judges has appointed an expert under the authority of this rule. Of these, about half have appointed an expert on more than one occasion. The survey also asked judges to indicate the types of cases in which such assistance is likely to prove helpful. Patent cases were most frequently noted, followed by product liability and antitrust cases. In the coming months the Center will be contacting some judges by telephone seeking more information about the nature of the court appointment and how this procedure may be improved. Some judges who have not appointed experts also will be contacted to learn their views on such appointments.

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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.

April 1988

Dana H. Gallup, First Circuit's Executive, Retires

Dana H. Gallup, Circuit Executive of the First Circuit, has retired after serving with the First Circuit for over 40 years.

Dana H. Gallup

Chief Judge Levin H. Campbell termed Mr. Gallup's departure "a major loss to the courts," and praised him as "the model of everything an excellent court administrator and a devoted public servant can be.... I know of no single individual—administrator or judge—who has contributed more than Dana H. Gallup to the reputation and strength of the federal courts in this region."

Mr. Gallup began his court career in 1947 when he was appointed Court Crier of the First Circuit. He later became the circuit's Deputy Clerk and Chief Deputy Clerk. He was named Clerk in 1970, and in 1983, became the first person to serve as Circuit Executive of the First Circuit. He is a graduate of Suffolk University and Northeastern University School of Law and a member of the Massachusetts bar.

Grace Carey, presently Assistant Circuit Executive in the First Circuit, will be Acting Circuit Executive until Mr. Gallup's successor assumes the office.

JUDICIAL CONFERENCE, from p. 1

firmed its support for raising the required amount in controversy necessary for diversity jurisdiction from $10,000 to $50,000, a provision of H.R. 3152.

The Conference also approved a recommendation endorsing the provision of H.R. 3152 that would alter the definition of corporate citizenship for diversity purposes. That provision would amend 28 U.S.C. § 1332(c) to provide that (in addition to being a citizen of any state by which it has been incorporated) a corporation would be deemed a citizen of "any State in which it does business" rather than of "the State where it has its principal place of business."

The Conference approved a recommendation that the trial of *In re Washington Public Power Supply Sys. Securities Litig.*, No. MDL 551, be videotaped. The case, trial of which is expected to start in Tucson this year, involves more than 125,000 plaintiffs, multi-billion dollar claims, more than 200 defendants, and the expected presence in the courtroom of more than 100 attorneys. Since the trial will necessarily be protracted and some jurors or counsel may therefore miss a portion of it due to health reasons or emergencies, they will be given access to the videotapes for the times they were absent, but the videotape will not be made public.

Among other actions, the Conference

- approved the selection of four courts to participate in a pilot project under which the courthouse buildings would be managed by the courts instead of by the GSA. The four courts are N.D. Ala., S.D. Fla., W.D. Wash., and the 11th Cir.
- voted to endorse the concept of abolishing the Board of Certification and the certification process that has been required in qualifying applicants to circuit executive positions.
- approved a resolution encouraging district courts to transfer jurisdiction of offenders on supervised release to the district courts where such persons are being supervised, particularly when a violation of supervised release has occurred.
- re-endorsed an amendment to 18 U.S.C. § 3563(a) that would provide exceptions to the requirement that probation is imposed for a felony, the sentence must include a fine, restitu-

See JUDICIAL CONFERENCE, page 8

Senate Passes Magistrates and Bankruptcy Judges Retirement Bill; House Version Amended

The Senate has passed S. 1630, a bill to provide enhanced retirement and survivors' annuities for bankruptcy judges and magistrates. The bill provides that a bankrupcty judge or magistrate with 14 years of service would receive a pension equal to the salary at the time of leaving office; the pension could not be drawn until age 65. The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice has marked up the counterpart measure, H.R. 2586, the Retirement Annuities for Bankruptcy Judges and Magistrates Act of 1987 (see *The Third Branch*, November 1987, at 10 and October 1987, at 1). The House amended its bill to require a 3 percent contribution for 15 years and to penalize those who leave the bench before age 65 by reducing the pension by 2 percent for every year one is under age 65 when one leaves the bench.

The Senate Judiciary Committee's Courts Subcommittee, chaired by Sen. Howell Heflin (D-Ala.), held hearings on S. 1482, the Judicial Branch Improvements Act (see *The Third Branch*, August 1987, at 5). Judge Elmo B. Hunter (W.D. Mo.), the former chairman of the Judicial Improvements Committee of the Judicial Conference of the United States and Chief Judge Richard M. Bilby (D. Ariz.), current chairman of the Judicial Improvements Committee, testified on behalf of the Judicial Conference. Among the subjects the bill treats are the Supreme Court's mandatory jurisdiction; court-annexed arbitration in a number of district courts; permitting clerks of court to grant temporary excuses to jurors faced with "undue hardship or extreme inconvenience"; judicial immunity; the phasing out of the Temporary Emergency Court of Appeals; and the creation of a Federal Judicial Center Foundation to accept gifts on behalf of the Center. Since S. 1482 was introduced, the Judicial Conference has approved a number of items that it recommends be added to the bill, including a provision to create a multi-party, multi-forum federal jurisdiction to consolidate in federal court cases involving personal injury or property damage arising out of a single event disaster. Such a provision is contained in H.R. 3152, on which hearings have been held.

Senator Howell Heflin (D-Ala.), Judge Elmo B. Hunter (W.D. Mo.), Robert M. Landis of the ABA's Standing Committee on Federal Judicial Improvements, and Chief Judge Richard M. Bilby (D. Ariz.) prior to the recent hearing on S. 1482.

The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held hearings on S. 1608, to revise the federal judicial code with respect to the administration of the U.S. Claims Court and the salaries and benefits of Claims Court judges.

The Senate passed H.R. 1212, a bill that would limit the use of polygraphs in private industry, after amending it to contain the text of S.

See LEGISLATION, page 7

Center Releases Publication on Nonargument Appeals

Most of the federal appellate courts now have specialized procedures for selecting some cases for disposition without argument, and the debate about these procedures continues. The fundamental question of the debate is whether appeals decided without arguments are receiving adequate attention. By helping to clarify the procedures involved in selecting cases for nonargument disposition, a new report released by the FJC provides a partial answer to this question.

Deciding Cases Without Argument: An Examination of Four Courts of Appeals, by Joe S. Cecil and Donna Stienstra, discusses the role of staff attorneys and special judicial panels in the selection of cases for nonargument disposition in the federal appellate courts. Based on an examination of administrative records and on interviews with clerks, senior staff attorneys, and judges, the report describes the criteria and methods used in selecting nonargument cases. It also presents the judges' views concerning the role of oral argument.

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 (16 oz.), but do not send an envelope.

GUIDELINES, from page 1

also argued that the act violates the principle of separation of powers by vesting in the President the power to remove members from the Commission. The court held that while the Commission itself is "not an exclusively judicial entity," it "performs a primarily judicial function . . . in which all three branches must necessarily remain interested." Because the sentencing function "has never been regarded as exclusively judicial," the court said, "the power of the President to remove members of the Commission does not infringe upon an exclusively judicial function."

Ruiz-Villanueva is contrary to earlier rulings in the same district holding the guidelines invalid on separation of powers grounds. *U.S. v. Arnold*, No. 87-1279-B (S.D. Cal. Feb. 18, 1988); *U.S. v. Manley*, No. 87-1290-R (S.D. Cal. Feb. 18, 1988) (adopting reasoning of *Arnold*); *U.S. v. Rivera-Huerta*, No. 87-1329-K (S.D. Cal. Mar. 2, 1988) (also adopting *Arnold*) (see *The Third Branch*, March 1988, at 1).

In *Chambless*, the defendants attacked the constitutionality of the Sentencing Reform Act of 1984 on three grounds: that Congress unlawfully delegated its authority to fix criminal penalties; that the presence of judges on the Commission violates the separation of powers doctrine; and that the President's power to remove commissioners constitutes an impermissible control by the executive over the judiciary.

Chambless rejected all of these constitutional arguments. The delegation of power by Congress is not excessive, as Congress has provided the Commission with "explicit instructions" and "intelligible principles" to guide its work. The presence of judges on the Commission does not violate separation of powers because constitutional history and case law demonstrate that "individual judges may exercise extra-judicial power while courts may not." The court also rejected the argument that the impartiality of the entire judiciary would be adversely affected by the service of three fellow judges on the commission. Noting that "[i]t is no secret that judges disagree with each other constantly," the court found it unlikely that federal judges would be affected by the fact that other judges serve on the Commission.

As to the argument that the President's removal power over commissioners violated separation of powers or due process principles, the court held that while the Commission is situated in the judicial branch, Congress has delegated legislative power to the Commission, and "the exercise of that delegated authority in rulemaking is an executive, not judicial, function." The President's power to remove the members of a commission charged with such an executive function does not amount to an unconstitutionally impermissible control by the executive branch over the judiciary, the court said.

In addition, the defendants in *Chambless* argued that the guidelines are inconsistent with the Sentencing Reform Act—because, e.g., the guidelines require that a term of supervised release be imposed in all felony cases. They also argued that submissions to Congress by the Commission and the General Accounting Office were not timely or adequate so as to trigger the Nov. 1, 1987, effective date. The court rejected these arguments.

The government in *Chambless* contended that the defendants lacked standing unless the court determined initially that they would have received a heavier sentence under the new sentencing law than before. The court disagreed, finding that even if the guideline sentences would not be longer, defendants had a "personal stake" because the actual time served under the guidelines would likely be greater due to the abolition of parole. Moreover, under the new sentencing law each defendant "faces a period of supervised release to which he would not otherwise be subject." ■

BOARD MEMBERS, from page 1

tured at several law schools. He is a graduate of the University of California at Berkeley School of Law.

Judge David D. Dowd, Jr., will fill the position on the Board previously held by Judge A. David Mazzone (D. Mass.), whose term has expired.

Judge Dowd was nominated by President Reagan for appointment to the District Court for the District of Northern Ohio in 1982. He has ten years of service as a state prosecutor, having served eight years as an assistant prosecuting attorney, and two as the Prosecuting Attorney for Stark County, Ohio. His prior judicial experience includes five years on Ohio's Fifth District Court of Appeals and one year as a justice of the Supreme Court of Ohio.

After graduating from the College of Wooster with a B.A. degree in 1951, Judge Dowd earned a J.D. degree in 1954 at the University of Michigan Law School. ■

CALENDAR

Apr. 5-8 Workshop for Docketing Supervisors
Apr. 6-8 Seminar for Magistrates of the Ninth and Tenth Circuits
Apr. 7-8 Judicial Conference Advisory Committee on Civil Rules
Apr. 13-15 Seminar for Bankruptcy Judges of Northeastern States
Apr. 17-20 Fifth Cir. Judicial Conference
Apr. 18-22 Orientation Seminar for New Probation/Pretrial Officers
Apr. 20-22 Seminar for Bankruptcy Judges of Western States
Apr. 25-26 Judicial Conference Subcommittee on Statistics
Apr. 25-27 Seminar for Judges of the First and Third Circuits
Apr. 25-29 Orientation Seminar for New Probation/Pretrial Officers
Apr. 25-29 Financial InvestigationsTrainers' Workshop
Apr. 27-28 Judicial Conference Committee on the Administrative Office
May 1-4 Eleventh Cir. Judicial Conferenc
May 2-6 Supervisory Skills Seminar for Probation and Pretrial Officers
May 3-6 Workshop for New Training Coordinators

NOTEWORTHY

Sanctions imposed on plaintiff for failure to improve his position at trial after rejecting mediation board's recommendation. An unsuccessful plaintiff has been ordered to pay attorney's fees and some expenses of expert witnesses after he proceeded with his lawsuit following a mediation board's rejection of his claim. In *Tiedel v. Beech Aircraft Corp.*, 118 F.R.D. 54 (W.D. Mich. 1987), plaintiff was ordered to mediation under local rule 42 of the Western District of Michigan. A hearing was held before a mediation panel, which returned a unanimous decision that plaintiff had no cause of action. Plaintiff rejected the panel's decision and the case proceeded to trial for 14 days before a jury. The jury returned a verdict of "no cause of action." Defendant filed its taxed bill of costs and motion for attorneys' fees, and defendant's motion was granted and judgment entered in its favor, awarding costs and fees in the amount of $110,993.11.

Plaintiff filed a motion to vacate the order and judgment, challenging the constitutionality and propriety of the imposition of sanctions under the local mediation rule, claiming that the rule exceeds the inherent authority of the court to promulgate rules, and that it is in violation of the right to trial by jury. He stressed that 28 U.S.C. § 2071 provides that "the rules adopted by district courts must be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court." As to the cost-shifting provisions of local rule 42, plaintiff argued that in imposing the prevailing party's actual costs on the losing party, the rule is inconsistent with the Federal Rules of Civil Procedure and with 28 U.S.C. § 1920, because neither the federal rules nor the statute contain any provision for including as "costs" the prevailing parties' actual expert witness fees or attorneys' fees.

The court upheld local rule 42 as "a valid exercise of the Court's inherent power." As to the award of attorney's fees, it pointed out that in diversity cases, state law controls the imposition of attorneys' fees, including those imposed as costs. Because Michigan's mandatory mediation scheme provides that attorneys' fees may be awarded as costs if a party fails to recover a verdict greater than that awarded by the mediation panel, the court reaffirmed the award of attorneys' fees to Beech.

The court reduced the amount of the award for witness fees in light of *Crawford-Fitting Co. v. J.T. Gibbons*, 107 S. Ct. 2494 (1987), which held that absent an express statutory basis or other authority, the taxation of such costs in excess of the statutory limits is not permitted. (28 U.S.C. § 1821 provides for a $30 per day limit.)

Court taxes inmate with costs of frivolous appeal, conditions further appeals. The Fifth Circuit has upheld a district court's dismissal of a lawsuit by a prisoner, and has taxed the costs of the frivolous appeal against the inmate and barred him from filing further appeals *in forma pauperis* until the inmate has paid the appellate costs taxed, unless the district court certifies the appeal to be in good faith. *Lay v. Anderson*, No. 87-3778 (5th Cir. Feb. 12, 1988). The district court had ordered the inmate to exhaust prison remedies, but he failed to do so, and the district court dismissed the action.

The appeals court upheld the dismissal and stated its reasons for imposing additional sanctions: "This court, like the district courts in our circuit, has recently witnessed a significant increase in the number of pro se, usually prisoner, civil rights actions. . . . The large majority of these cases are without even arguable legal footing. The judicial time and resources they command are astonishingly large and divert considerable attention from other matters on our dockets. Moreover, there is a serious threat that legitimate pro se petitions will drown in the cacophony of the groundless ones. Taxing costs against an unsuccessful in forma pauperis litigant at the conclusion of his appeal is one way to defray the judicial and social burden imposed by these lawsuits." The appeals court noted that the inmate had filed at least six petitions for habeas corpus and several prisoner civil rights cases, and that during the course of the instant case he had "besieged the federal court with pleadings" over a 15-month period, including two previous abortive interlocutory appeals. As a consequence of his other cases, the appeals court had dealt with at least three other unsuccessful appeals. The inmate had previously been warned that his litigious-

See NOTEWORTHY, page 6

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, 1520 H St., N.W., Washington, DC 20005.

Administrative Office of the U.S. Courts. *The Selection and Appointment of United States Magistrates.* 1987.

Bazelon, David L. *Questioning Authority: Justice and the Criminal Law.* Knopf, 1988.

Bégué, Yvette, and Candace Goldstein. "How Judges Get into Trouble: What They Need to Know About Developments in the Law of Judicial Discipline." 26 *Judges' J.* no. 4 at 8 (Fall 1987).

✔ Brennan, William J., Jr. "The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises." Address, Law School of Hebrew University, Dec. 22, 1987.

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See SOURCE, page 6

NOTEWORTHY, from page 5

ness must be controlled. Therefore, until the inmate pays the costs taxed against him in the case, the appeals court bars him from any further appeal *in forma pauperis*, unless the district court expressly certifies that his appeal is in good faith. As funds accumulate in the inmate's prison account or he receives any other income, prison officials must forward the money to the Clerk of Court to pay the $105 in court of appeals fees, the court ruled.

U.S. Claims Court receives award for ADR program. The Center for Public Resources Awards Program for Excellence and Innovation in Alternative Dispute Resolution has given an award for "Significant Practical Achievement" to the U.S. Claims Court for its ADR initiatives. In April 1987 the Claims Court instituted a program featuring the use of settlement judges and minitrials (see *The Third Branch*, June 1987, at 1). Chief Judge Loren A. Smith and Judge Lawrence S. Margolis of the Claims Court attended the midyear meeting of the Center for Public Resources's Legal Program to accept the Claims Court's award. ■

SOURCE, from page 5

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O'Malley, Kevin F. "The Assessment of Costs in Federal Criminal Prosecutions." 31 *St. Louis University L.J.* 853 (1987). ■

Positions Available

Assistant to Circuit Executive, 8th Cir. Salary to $46,679, based on experience and qualifications. Assists with financial and case management, including statistical compilation and evaluation; special research projects; space and facilities; other duties as assigned. Good written communication skills a must. Degree or experience in judicial administration or law desirable. Position located in St. Paul, MN. Send resume to Circuit Executive, Box 75428, St. Paul, MN 55175. Open until filled.

Attorney-Adviser (General), Defender Services Division, Administrative Office. Salary $27,716—51,354. Assists in administering federal appointed-counsel program consisting of federal public defender and community defender organizations and CJA panel attorneys. Reviews existing and pending legislation, rules, and regulations pertaining to CJA or defender services; drafts memoranda, opinions, and legislative proposals; conducts legal research; responds to telephone and written inquiries from judges, magistrates, clerks, federal defenders, CJA panel attorneys, and public concerning the appointment and payment of counsel and experts in federal criminal cases and the operation of federal defender organizations; assists district courts with plans for implementing the CJA. Must have law degree from ABA- or AALS-accredited school, be bar member, and have 1 year professional experience post-J.D. Send SF171 for vacancy announcement 88-39, most recent annual performance appraisal (letter of recommendation for nonstatus applicant), and writing sample to Administrative Office of the U.S. Courts, Personnel Division, Room 701, Washington, DC 20544. Open until filled.

Clerk of Court, U.S. Bankruptcy Court, D. Mass. Salary $54,907-71,377. Requires 10 years progressively responsible administrative experience in public service or business, at least 3 in a position of substantial management responsibility. Undergraduate education may be partially substituted for maximum of 3 years of required general experience; law degree may be substituted for an additional 2 years. Submit resume or SF171 to Mrs. Jean Bates, U.S. Bankruptcy Court, 1101 Thomas P. O'Neill Federal Building, Boston, MA 02222-1074, marked Confidential, by May 16, 1988.

EQUAL OPPORTUNITY EMPLOYERS

LEGISLATION, from page 3

1904 (see *The Third Branch*, January 1988 at 2). The House passed H.R. 1212 in November 1987.

The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held hearings on § 614 of S. 1482, and on S. 1512 and S. 1515, bills intended to address the issue of judicial immunity from liability for attorneys' fees in actions seeking declaratory and injunctive relief, an area of concern since the Supreme Court's *Pulliam v. Allen* decision. George E. Danielson, an associate justice of the California Court of Appeal and a member of the Committee on Federal-State Jurisdiction of the Judicial Conference of the United States, testified.

The House Judiciary Committee's Subcommittee on Civil and Constitutional Rights held an oversight hearing on the National Crime Information Center.

The House passed a bill previously passed by the Senate, S. 557 (see *The Third Branch*, March 1988, at 2), which is intended to overturn the Supreme Court's *Grove City College* decision, which had limited the reach of title IX of the Education Amendments of 1972, § 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964 to the specific program receiving federal funds. President Reagan vetoed the measure Mar. 16, and Congress overrode the President's veto on Mar. 22.

Rep. Patricia Schroeder (D-Colo.) introduced H.R. 4064, to authorize the appointment of an additional bankruptcy judge in each of the districts of Colorado and Kansas.

Senator John F. Kerry (D-Mass.) introduced S. 2109, a bill to amend title 18 of the U.S. Code to protect the civil rights of individuals from discrimination on the basis of affectional or sexual orientation.

Rep. Robert Kastenmeier (D-Wis.) introduced H.R. 4021, the Federal Prison Industries Reform Act of 1988, a bill to amend title 18 of the U.S. Code to permit Federal Prison Industries, Inc., to borrow from the Treasury. Federal Prison Industries is a wholly-owned, self-sufficient government corporation formed by an act of Congress and executive order in 1934. It operates 75 factories in 42 federal correctional institutions and provides employment and training opportunitites for inmates. It has traditionally funded all capital expenditures from retained earnings. "Because of the unprecedented growth of the inmate population . . . and the concomitant demand for additional industrial programs," the program has undertaken an expansion program in recent years, according to Rep. Kastenmeier. Expansion requires steady cash flows, which can be provided by conferring borrowing authority, he said.

Sen. Alan Dixon (D-Ill.) introduced S. 2059, to make international parental abduction of children a felony. He observed that the legislation would enable the United States to extradite parental child abductors in many cases where extradition treaties apply, and would strengthen the State Department's hand in negotiating for the return of abducted children.

The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held hearings on S. 1347, to facilitate implementation of the Hague Convention on the Civil Aspects of International Child Abduction. The Senate has already ratified the Hague Convention; the legislation would set specific procedures to implement provisions of the Convention, which was written in general terms to take into account the different legal systems of the signatory countries. The legislation provides for concurrent original jurisdiction in state and federal courts to hear return proceedings arising under the Convention and the legislation; places the burden of proving an exception to the return obligation on the person opposing return; and specifies docu-

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PERSONNEL

CIRCUIT JUDGES

Confirmation

Paul R. Michel, U.S. Circuit Judge, Fed. Cir., Feb. 29

Death

Luther M. Swygert, U.S. Circuit Judge, 7th Cir., Mar. 16

DISTRICT JUDGES

Nominations

Alex R. Munson, U.S. District Judge, Northern Mariana Islands, Feb. 25

John C. Lifland, U.S. District Judge, D.N.J., Feb. 29

James R. McGregor, U.S. District Judge, W.D. Pa., Mar. 14

Confirmations

Rudy Lozano, U.S. District Judge, N.D. Ind., Feb. 25

Stephen M. Reasoner, U.S. District Judge, E.D. Ark., Feb. 25

Malcolm J. Howard, U.S. District Judge, E.D.N.C., Feb. 25

Appointment

Malcolm J. Howard, U.S. District Judge, E.D.N.C., Mar. 11

BANKRUPTCY JUDGES

Appointment

Peter W. Bowie, U.S. Bankruptcy Judge, S.D. Cal., Mar. 2

Law Day To Be Observed May 1

May 1 is Law Day. This year's theme is "Legal Literacy," encouraging citizens to increase their knowledge and understanding of the law.

The American Bar Association is national coordinator of Law Day USA, and offers a detailed planning guide to assist individuals and organizations conducting Law Day programs. In addition, the ABA makes available many promotional and educational materials. Further information is available from Law Day USA, American Bar Association, 8th Floor, 750 N. Lake Shore Dr., Chicago, IL 60611 (tel. 312/988-6134).

JUDICIAL CONFERENCE, from p. 2

tion, community service, or any combination of the three.

• adopted a resolution encouraging the district courts to continue their guideline training efforts and to sponsor programs that will also educate the bar, whose knowledge of sentencing guidelines procedure is essential to effective implementation.

• approved the establishment of the recommended "special" and "general" alternative attorney compensation rates under the Criminal Justice Act, effective with respect to services performed on or after the date of the Judicial Conference action and subject to the availability of funds.

• approved sustaining grants for fiscal years 1988 and 1989 for the four proposed death penalty resource center/community defender organizations, subject to the availability of funds. The approval was also contingent upon each proposed organization obtaining the state and other nonfederal funds that the organization has indicated are necessary to finance the state component of its proposed activities, and also contingent upon final approval of all necessary CJA plan amendments. (The four proposed death penalty resource center/community defender organizations would be in Mississippi, Tennessee, North Carolina, and Georgia).

• voted that any judicial vacancy lasting longer than 18 months will be considered a judicial emergency, and urged all judges nearing retirement to notify the President and the AO as far in advance as possible of an anticipated change in job status. (As of Mar. 15, 1988, there were 37 vacancies on the district courts and 11 vacancies on the courts of appeals).

• reaffirmed its opposition to requiring counsel's participation in voir dire examination.

• took the following positions on certain provisions of S. 1867, proposed amendments to the Court Interpreters Act, 28 U.S.C. § 1827: opposed the proposed requirement that eight unspecified languages be certified; opposed categorical requirement of electronic sound recording of interpretations; approved prepayment for interpreting services at the court's discretion; and approved providing a uniform fee schedule for services.

• approved memorial resolutions honoring the late Judge Carl McGowan (D.C. Cir.) and the late Judge Edward Weinfeld (S.D.N.Y.).■

LEGISLATION, from page 7

ments that need not be authenticated or legalized. In the House, Rep. Tom Lantos (D-Cal.) has introduced H.R. 3971 and H.R. 3972, bills to facilitate the implementation of the Convention. The Judicial Conference in March 1986 recommended that litigation under the Convention be exclusively in state courts. ■

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THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

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MAY 1988

Center Surveying Personal Computer Use in Chambers, Compiling Software Catalog

The Innovations and Systems Development Division of the Center is conducting a survey of the use of personal computer software in the federal courts, with emphasis placed on the current and anticipated uses of personal computers in chambers. Information sought from the survey includes: 1) identification of commercially available programs found to be particularly beneficial to the operation of the chambers; 2) identification of software packages developed in chambers or elsewhere in the court that might be of interest to others; and 3) areas in which there is a need or potential for the application of personal computer technology that would be beneficial to the operation of chambers. In addition to these areas, the survey will solicit information about training and support requirements for the efficient use of personal computers and the programs used. A written questionnaire will be distributed in May to the Clerk of each district and circuit for use in collecting the information from chambers.

The results of the survey will be used to create a catalog of personal computer software resources used in the federal courts that might be of interest to other members of the judiciary. It is anticipated that the initial publication of the catalog will be distributed widely within the judiciary and that periodic updates will be provided. The catalog will also be made available as a computer data base to allow automated searching of the descriptions of the software packages identified. In addition to providing this clearinghouse function for personal computer software, the Center will provide limited copying and distribution services for court-developed software that is submitted by a court and requested by a member of the federal judiciary for use in the court or in chambers. ■

Rules Would Implement Law Ending "Race to Courthouse"

Judicial Panel on Multidistrict Litigation Seeks Comments on Multicircuit Appeals Rules

The Judicial Panel on Multidistrict Litigation, chaired by Judge Andrew A. Caffrey (D. Mass.), has proposed new rules relating to multicircuit appeals under the new law passed by Congress to deal with the "race to the courthouse" situation, and is accepting comments on these proposed rules until May 31. The new law, Pub. L. 100-236, provides for random selection of the circuit in which an appeal will be heard when appeals from an agency decision are filed in more than one circuit. It was signed by the President on Jan. 8, 1988 (see *The Third Branch*, February 1988, at 7).

The proposed new rules include rules providing for the filing of a notice of multicircuit petitions for review with the Clerk of the Panel on Multidistrict Litigation; for the service of notices; for the form of such notices; and for the method of random selection of the circuit by the Clerk of the Panel or a designated deputy.

Copies of the proposed multicircuit appeals rules can be obtained from the Clerk of the Judicial Panel on Multidistrict Litigation, 1120 Vermont Ave., N.W., Suite 1002, Washington, DC 20005. They can also be found at 840 F.2d no. 2 at ci-cxvii. Comments on the rules must be submitted in writing (in original form with 13 copies), and received no later than May 31, 1988, at the above address. ■

Courts' Local Rules on Sentencing Guidelines Have Varied Emphases

Almost half of the district courts have so far implemented local rules, orders, and policy statements to accommodate the special needs of guideline sentencing. Some of these documents have not been formally adopted, pending review by the bar or for other reasons. Local procedures for guideline sentencing vary from one district to another.

Several procedures for sentencing are prescribed by statute or federal rules. Although the Sentencing Reform Act of 1984 did not significantly change the nature of sentencing proceedings, it does provide that the presentence report is to be disclosed at least 10 days prior to the date set for sentencing, unless the defendant waives this minimum period (18 U.S.C. § 3552(d)). Federal Rule of Criminal Procedure 32 imposes other requirements, some of which were added by the Sentencing Reform Act. The Advisory Committee on Criminal Rules of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is considering further revision of rule 32 in light of guideline sentencing and has solicited comments (see *The Third Branch*, January 1988, at 2).

In formulating procedures for guideline sentencing, most courts have generally adopted the approach of the

See LOCAL RULES, page 2

Inside . . .

LOCAL RULES, from page 1

proposed model local rule for guideline sentencing that was circulated last August to all U.S. circuit and district judges by the former Probation Committee of the Judicial Conference (see *The Third Branch*, January 1988, at 2).

The Sentencing Guidelines also contain guidelines for sentencing procedure in Part 6A and policy statements for accepting guilty pleas and plea agreements in Part 6B. The Probation Committee's commentary accompanying the model local rule took the position that judges were free to follow the procedures of the local rule rather than those of the guidelines because "the Sentencing Reform Act does not authorize the Commission to prescribe procedural rules." Some districts' rules, however, adhere closely to the Part 6A guidelines. Some courts have adopted modified versions of the local rule, or have blended the approach of the model rule with that of Part 6A.

The major difference between the approach of the guidelines and the approach of the Probation Committee's model local rule lies in the role of the probation officer. The model local rule assigns the probation officer a more active role in assisting the court in identifying disputed issues among the parties over facts or the application of the statutes and guidelines to those facts. Thus, the model local rule directs the officer to consider objections of the parties to the preliminary presentence report, to revise the presentence report as warranted by the parties' objections, and to submit a revised presentence report to the court. The model local rule also provides for an addendum to the presentence report, in which the officer identifies those parts of the report still disputed by either of the parties and that provides the officer's comments.

Part 6A of the Sentencing Guidelines contemplates that, in addition to the presentence report filed by the probation officer, the parties will present unresolved disputes over sentencing facts and factors directly to the court. Guideline § 6A1.3 further contemplates that the court may provide the parties with its tentative findings on disputed matters, perhaps prior to the date of sentencing.

All of the rules increase the statutory minimum number of 10 days between the disclosure of the presentence report and sentencing. Many courts have adopted the 20-day minimum recommended by the model local rule—10 days for the parties to communicate objections to the officer and an additional 10 days for the officer to revise the report after receiving those objections.

The commentary accompanying the model rule recommended that the presentence report be made part of the record of the case, but that it be placed under seal "in accordance with the long-standing practice of treating presentence reports as nonpublic in view of the sensitive and often confidential information they contain." Neither the model local rule itself, however, nor the Sentencing Guidelines include any specific provision on copying or further disclosure of the report.

It would appear that a majority of the courts' local rules do not specify whether copying of the report is permitted, or what further disclosure may be made. A minority of the local rules in force prohibit the copying of the presentence report and provide that parties must return the report to the probation officer.

Under the old pre-Guidelines system, the presentence report was not included in the record on appeal unles the presentence report was at issue. Section (c)(2) of 18 U.S.C. § 3472 now requires that it be included in the record whenever a criminal appeal includes a challenge to the guideline sentence. At least one circuit, the Fourth, has adopted a policy according to which the district court, if it wishes the presentence report to be treated as a confidential document, must transmit the report to the Court of Appeals under seal, and under which a party wishing the report to be treated as confidential must move the Court of Appeals to seal it.

Some districts set a time period for the preparation of the presentence re-

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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.

May 1988

Vincent R. Johnson and Lane V. Sunderland Chosen As Judicial Fellows for 1988-1989

Vincent R. Johnson and Lane V. Sunderland have been chosen as Judicial Fellows for 1988-1989. Vincent R. Johnson is a professor of law at St. Mary's University School of Law in San Antonio, Texas. He received a B.A. from St. Vincent College in 1975, a J.D. from Notre Dame Law School in 1978, and an LL.M. from Yale Law School in 1979.

Vincent Johnson

Mr. Johnson clerked for Judge Bernard S. Meyer at the New York Court of Appeals from 1978 to 1980 and for Chief Judge Thomas E. Fairchild at the Seventh Circuit from 1980 to 1982. Since 1982, he has taught at St. Mary's University School of Law. The primary focus of his work has been tort law. He has also become involved in the field of legal ethics, teaching a course on professional responsibility and lecturing to judges throughout Texas on judicial ethics. Mr. Johnson is a cofounder and faculty member of St. Mary's summer law program at the University of Innsbruck, Austria. He has served as the national chairman of the Teaching Methods Section of the Association of American Law Schools.

Lane Sunderland

Lane V. Sunderland is Chairman of the Department of Political Science and International Relations at Knox College in Illinois. He holds a B.A. from Kansas State University (1967), an M.A. in political science from the University of Washington (1968), and a Ph.D. in government from Claremont Graduate School (1972). From 1972 to the present, Mr. Sunderland has held various positions at Knox College, including Pre-Law Advisor and Associate Dean of the College of Academic Affairs. His scholarly interests have focused on constitutional theory and the significance of the Supreme Court in American government, and he has published numerous articles on these subjects. He served as Director of Educational Programs for the Commission on the Bicentennial of the United States Constitution in 1986, resigning that position in 1987 to return to teaching at Knox. Mr. Sunderland has traveled to Europe to lecture on the Constitution under the sponsorship of the Council of Europe and the Atlantic Council.

Patterned after the White House and Congressional Fellowships, the Judicial Fellows Program offers opportunities for highly talented professionals with multidisciplinary backgrounds to contribute to the federal system. ■

CALENDAR

May 1-4 Eleventh Circuit Judicial Conference
May 2-6 Supervisory Skills Seminar
May 3-6 Workshop for New Training Coordinators
May 8-10 Seventh Circuit Judicial Conference
May 13 Federal Circuit Judicial Conference
May 13-14 Judicial Conference Advisory Committee on Bankruptcy Rules
May 16-18 Jury Utilization Seminar
May 16-18 Workshop for Assistant Circuit Executives
May 16-20 Seminar for Chief Probation/Pretrial Clerks
May 18-20 Seminar for Bankruptcy Judges
May 19-20 Judicial Conference Advisory Committee on Criminal Rules
May 22-24 D.C. Circuit Judicial Conference
May 23-27 Orientation Seminar for New Probation/Pretrial Officers
May 27 Judicial Conference Committee of the Pacific Territories
June 2-3 Judicial Conference Committee on Administration of the Bankruptcy System

LEGISLATION

The following measures before Congress are of interest to the judiciary.

• Rep. Robert W. Kastenmeier (D-Wis.) introduced H.R. 4340, the amended version of his earlier bill, H.R. 2586, to provide for enhanced retirement and survivors' annuities for bankruptcy judges and U.S. magistrates (see *The Third Branch*, April 1988, at 3).

• Rep. James M. Jeffords (R-Vt.) introduced H.R. 4309, a bill that would make retroactive the survivor annuity program improvements in Pub. L. 99-336, the Judicial Improvements Act of 1985 (see *The Third Branch*, September 1986, at 9). That law set a floor for judicial survivors' benefits, but applied only to survivors of judges who qualified after Oct. 1, 1986. H.R. 4309 would include as beneficiaries of Pub. L. 99-336 surviving spouses of federal judges who qualified before that date. Because the number of affected persons is small, the bill would "provide substantial assistance to the surviving spouses . . . at very little cost to the public," Rep. Jeffords stated. He had previously introduced a similar bill in the 99th Congress.

• S. 951, as amended, the bill to establish the Federal Courts Study Commission, was ordered favorably reported by the full Senate Judiciary Committee.

• The House has authorized the Committee on the Judiciary to spend $725,000 for investigations and studies of the two judicial impeachment proceedings presently before the Committee. Those proceedings involve Judge Alcee L. Hastings (S.D. Fla.) and Judge Walter L. Nixon, Jr. (S.D. Miss.).

As previously reported, the Judicial Conference of the United States in March certified that Judge Nixon has engaged in conduct that might constitute one or more grounds for impeachment (see *The Third Branch*, April 1988, at 1). On Mar. 17, following receipt of the Judicial Conference's certification,

See LEGISLATION, page 6

NOTEWORTHY

Judicial immunity for judge's law clerk upheld on appeal. The Second Circuit has affirmed a district court decision that a judge's law clerk is entitled to the protection of judicial immunity. *Oliva v. Heller*, 839 F.2d 37 (2d Cir. 1988) (see *The Third Branch*, January 1988, at 5).

House Judiciary Committee Chairman Rodino to retire. Rep. Peter W. Rodino, Jr. (D-N.J.) has announced that he will retire at the end of his current term in Congress. First elected to the House in 1948, Rep. Rodino became chairman of the House Judiciary Committee in 1973.

Rep. Rodino

Fifth Circuit holds district courts not authorized to refer appeal from bankruptcy court to magistrate. The Fifth Circuit has held that 28 U.S.C. § 636 does not authorize the district courts to refer to a magistrate an appeal of a bankruptcy court decision. *Minerex Erdoel, Inc. v. Sina, Inc.*, No. 86-1449 (5th Cir. Mar. 3, 1988). The court reviewed the legislative history of the 1984 Bankruptcy Amendments and Federal Judgeship Act of 1984, and concluded that Congress provided an intricate, balanced, and elaborate scheme for bankruptcy appeals in 28 U.S.C. § 158. Under that scheme, appeals could be taken either to the district court or to a panel of bankruptcy judges. No other kind of appeal was recognized or permitted under the scheme, nor does the legislative history indicate that any other type of appeal was contemplated, the court said. If Congress had meant for its appeal scheme to include the potential for a reference to a magistrate, it would have expressly so provided, the court said.

Fourth Circuit holds public, press have right of access to names on jury venire list. The public and press have a right to the names and addresses of jurors selected for a trial, as well as the names of the venirepersons from whom the jury was selected, the Fourth Circuit has held. *In re Baltimore Sun*, No. 87-1207 (4th Cir. Feb. 19, 1988). A newspaper covering a criminal trial in a district court requested access to the venire list prepared by the clerk of court. The list was used by the parties to the trial in exercising their peremptory strikes during jury selection. The list contained information on all jurors who were part of the venire; information other than names was included on the list for the convenience of the attorneys and parties, but was apparently not required by any statute or rule. The information was taken from questionnaires filled out by the jurors. The district court denied the newspaper's request for the list, and the newspaper applied to the Fourth Circuit for a writ of mandamus. The Fourth Circuit held that the information on the jury venire list is protected from disclosure by 28 U.S.C. § 1867(f), because the section protects the "contents of records or papers used by . . . the clerk in connection with the jury selection process." After the jury has been selected, however, the Fourth Circuit held, the names and addresses of those jurors are a part of the public record, and the names and addresses of those who have been stricken or otherwise not seated are likewise a matter of public record. The Fourth Circuit noted that it was not basing its holding on either the First Amendment or the Sixth Amendment, but rather on the discussion of the jury system in *Press-Enterprise Co. v. Superior Court of Cal.*, 464 U.S. 501 (1984), which held that the voir dire examination of prospective jurors should ordinarily be open to the public and the press, and on *Press-Enterprise Co. v. Superior Court of Cal. ("Press-Enterprise II")*, 106 S. Ct. 2735 (1986). ■

Positions Available

Chief Deputy Clerk, D. Mass. Salary to $54,907. Applicant must have a minimum of 6 years progressively responsible administrative experience in public service or business. Bachelor's degree in judicial administration, public or business administration, political science, criminal justice, law, management, or related fields highly desirable. Send resumes by June 1 to Clerk, U.S. District Court, 1525 U.S. Courthouse, Boston, MA 02109 Attention: CDC-88.

Chief Deputy Clerk, 2d Cir. Salary $54,907 to $71,377. Responsible to Clerk for overall administration of office; acts for Clerk in her absence. Requires undergraduate degree in management; judicial, business, or public administration; criminal justice; or political science. Minimum of six years administrative or appropriate professional experience in public service or business, demonstrated leadership ability, management skills. Graduate degree in law, public or business administration may be substituted for up to two years of experience. Send resumes by May 30 to Elaine B. Goldsmith, Clerk, U.S. Court of Appeals, 1702 U.S. Courthouse, 40 Foley Square, New York, NY 10007.

U.S. Magistrate, W.D. Mo. Salary $72,500. Jurisdiction specified in 28 U.S.C. § 636. Applicant must be member in good standing of the bar of the highest court of Missouri; have been engaged in the active practice of law for at least 5 years (some substitution possible); be less than 70 years old; not be related to a judge of the W.D. Mo.; reside in the general vicinity of Kansas City, Mo. Applications due June 3. Application forms and further information available from R.F. Connor, Clerk, U.S. District Court, Room 201, 811 Grand Avenue, Kansas City, MO 64106.

Assistant Director for Planning and Evaluation, Administrative Office of the U.S. Courts (Announcement No. 88-S46). Salary $72,500. Principal advisor to AO Director on program evaluation, assessment, improvements, and planning. Applicants must have managerial and technical qualifications and experience sufficient for the job. For additional information, call (202) 633-6116. Closing date May 20. Applicants must submit completed SF-171 (no resumes) and one or more work-related letters of reference and/or most recent annual performance appraisal to Administrative Office of the U.S. Courts, Personnel Div., Rm. 701, 811 Vermont Ave., N.W., Washington, DC 20544. Attn: Stanley E. Riggenbach.

EQUAL OPPORTUNITY EMPLOYERS

Defendant Ordered to Pay Costs, Fees After "Sham" Participation in Court-Ordered Arbitration

A district court has ordered the defendant airline in a civil suit to reimburse the plaintiffs for all costs and fees they incurred in preparing for and participating in the court's compulsory arbitration program, following a finding by the arbitrator that the airline's participation in the arbitration was a "sham." *Gilling v. Eastern Airlines, Inc.*, No. 85-4917 (D.N.J. Mar. 2, 1988).

The plaintiffs sued the airline on a variety of civil counts after being removed from their flight during a stopover after incidents on board. General Rule 47 of the District of New Jersey required referral of the matter to compulsory arbitration. The airline appeared at the arbitration through counsel, but no witnesses for the airline appeared. The arbitrator found for the plaintiffs. Within the 30 days allotted by rule 47(G)(1), the airline moved for a trial de novo. Plaintiffs opposed the motion, contending that the airline's failure to participate meaningfully in the arbitration should cost it the right to demand a trial de novo. The court remanded the case to the arbitrator for a factual finding on the question of the meaningfulness of the airline's participation in the arbitration. The arbitrator found that the airline's attorney merely "went through the motions," reading a few interrogatories and parts of deposition transcripts, and that 95 percent of her participation was stating position and fact summaries.

General Rule 47(E)(3) provides that "in the event that a party fails to participate in the arbitration process in a meaningful manner, as determined by the arbitrator, the Court may impose appropriate sanctions, including, but not limited to, the striking of any demand for a trial de novo filed by that party."

The court found that the rule "appears to place the determination of meaningfulness entirely in the hands and discretion of the arbitrator," without setting any standard of review of the arbitrator's findings. The court concluded that the arbitrator's finding that the airline's participation in the arbitration was not meaningful "was supported by substantial evidence and was not clearly erroneous."

The airline argued that denying its demand for a trial de novo would deprive it of its constitutional right to a jury trial and conflict with the Federal Rules of Civil Procedure. The court held that it need not reach that constitutional claim, noting that while the "extreme sanction [of striking a demand for a trial de novo] may be appropriate where a party absolutely refuses to participate in or even attend arbitration, . . . the court declines to deprive defendants of their day in court because of their limited performance at arbitration, without in any way condoning it." The court ordered the airline to reimburse plaintiffs for all costs and fees incurred in preparing for and participating in the arbitration, as well as those incurred in opposing the demand for a trial de novo. "[C]ounsel should be on notice that a trial de novo will not be automatically permitted in those cases in which the party seeking it views the arbitration proceeding merely as a meaningless interlude in the judicial process," the court said. ■

THE SOURCE

The publications listed below may be of interest to readers.

Bonventre, Vincent Martin. "A Classical Constitution: Ancient Roots of Our National Charter." 59 *New York State Bar J.* no. 8 at 10 (Dec. 1987).

Brazil, Wayne D. "From the Bench: Making the Opening Settlement Offer." 14 *Litigation* no. 2 at 3 (Winter 1988).

Bremer, Celeste F., and W. Scott Simmer. "One Day in Court: Suggestions for Implementing Summary Jury Trials in Iowa." 36 *Drake L. Rev.* 297 (1986-1987).

Carroll, Stephen J., et al. *Assessing the*

See SOURCE, page 7

Center Releases Report on Jury's Role in Lengthy Civil Trials

Concern over the role of the jury in lengthy civil trials has focused on the characteristics of the jurors, the burdens of lengthy jury service, and the ability of jurors to deal with massive amounts of evidence. A new report by the FJC, *Jury Service in Lengthy Civil Trials*, by Joe S. Cecil, E. Allan Lind, and Gordon Bermant, addresses the differences in the characteristics and experiences of jurors serving in lengthy civil trials and jurors serving in similar trials of shorter duration.

The report indicates that jurors serving in lengthy trials were more likely to be unemployed or retired, to be unmarried, to be women, and to lack a college education. While statistically significant, these differences in demographic characteristics were small in magnitude. Although the jurors in both long and short civil trials indicated some disruption in their normal lives, more than 80 percent indicated that they would be willing to serve if they were called for jury service again. Jurors found the evidence difficult to understand at times, and jurors in long trials were more likely to report experiencing difficulty with the evidence. Jurors in long trials also were more likely to indicate difficulty with the jury instructions. Despite these differences, it appears that jurors in lengthy civil trials experience less burden than expected, find the evidence to be difficult but manageable, and deliberate in a manner that is conducive to arriving at a reasoned and principled decision.

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.

CALR Guidelines for Computer Use by Judges in Chambers Approved

The Judicial Conference recently approved new guidelines for the expansion of computer assisted legal research (CALR) into chambers. The Conference approved access to LEXIS in chambers for judges and magistrates who have LEXIS-compatible PC equipment and who are willing to cancel at least $1,000 of their annual library costs.

Under the guidelines, CALR will be offered to those judicial officers who have existing equipment in chambers capable of accessing LEXIS without upgrading or replacing equipment, except for modems and data communication lines.

Although the *Five-Year Plan for Automation of the U.S. Courts* envisions providing CALR in all chambers, it cannot be done at this time because of budget constraints.

PERSONNEL

CIRCUIT JUDGES

Nomination

Judith R. Hope, U.S. Circuit Judge, D.C. Cir., Apr. 14

Confirmations

Emmett R. Cox, U.S. Circuit Judge, 11th Cir., Apr. 15

David M. Ebel, U.S. Circuit Judge, 10th Cir., Apr. 19

Resignation

Robert H. Bork, U.S. Circuit Judge, D.C. Cir., Feb. 5

DISTRICT JUDGES

Nominations

William H. Erickson, U.S. District Judge, D. Colo., Mar. 23

Karl S. Forester, U.S. District Judge, E.D. Ky., Mar. 30

Simeon T. Lake III, U.S. District Judge, S.D. Tex., Mar. 30

William G. Cambridge, U.S. District Judge, D. Neb., Apr. 13

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LEGISLATION, from page 3

Rep. Peter Rodino, Jr. (D-N.J.), Chairman of the House Judiciary Committee, joined by Reps. Don Edwards (D-Cal.), Hamilton Fish, Jr. (R-N.Y.), and F. James Sensenbrenner, Jr. (R-Wis.) as cosponsors, introduced H. Res. 407, calling for the impeachment of Judge Nixon. Judge Nixon is presently in prison serving concurrent sentences for conviction on two counts of perjury, and has indicated that he will not resign. Prior to receiving the Judicial Conference's certificate concerning Judge Nixon, the House had authorized the expenditure of $350,000 by the Committee on the Judiciary for impeachment investigation and study. On Mar. 29 the Subcommittee on Accounts of the House Administration Committee reviewed Rep. Rodino's justification for additional funding for impeachment investigation and studies, and on Mar. 30 the House passed H. Res. 408, as amended, authorizing an additional $375,000 to be provided to the Committee on the Judiciary for such purposes. According to Rep. Joseph M. Gaydos (D-Pa.), the additional $375,000 "should enable the Judiciary Committee to hire temporary staff and to meet necessary travel, witness, telephone, supply, and equipment expenses" arising out of the Nixon investigation.

• The Senate passed S. 952, a bill to provide the Supreme Court with greater discretion in deciding which cases it will review. The bill would substantially eliminate the Court's mandatory jurisdiction. The majority of cases subject to mandatory jurisdiction are those in which (1) a lower federal court invalidates an act of Congress in proceedings in which the United States is a party; (2) a court of appeals holds a state statute invalid because it violates the Constitution, treaties, or laws of the United States; and (3) the highest court of a state has either held a treaty or statute of the United States invalid or upheld the validity of a state statute in the face of a constitutional challenge. S. 952 would provide for review of such cases by certiorari. An omnibus court reform bill pending in the House, H.R. 3152, also contains a provision to eliminate the Court's mandatory jurisdiction (see *The Third Branch*, October 1987, at 1). The concept of affording the Court greater discretion in deciding which cases it will review has been supported by Chief Justice Rehnquist and former Chief Justice Burger, the Judicial Conference, the Department of Justice, and the ABA. Efforts to enact such a measure have been made periodically for almost a decade.

• The House has passed H.R. 3971, an act to establish procedures for implementing the 1980 Hague Convention on the Civil Aspects of International Child Abduction (see *The Third Branch*, April 1988, at 7-8). The Senate also passed the bill, after amending a section of it to make clear that state and U.S. district courts will have concurrent original jurisdiction over actions arising under the convention. During debate on the Senate amendment, Sen Alan Dixon (D-Ill.) stated that the bill has been carefully drafted to avoid the possibility "that these cases would embroil the Federal courts in deciding child custody matters." He noted that a section of the bill provides that "the [Hague] convention and this act empower courts in the United States to determine only rights under the convention and not the merits of any underlying child custody claims." Sen. Orrin Hatch (R-Utah) noted that the Judicial Conference, the Conference of Chief Justices, and the Justice Department favor vesting in the state courts exclusive jurisdiction of all legal actions under the Hague Convention. He pointed out that while "child custody has traditionally been a State court matter, the interpretation of treaties with foreign countries is a responsibility of the federal courts under section 2 of article III of the Constitution," and that "the issues of treaty interpretation and child custody are inseparably combined." Sen. Paul Simon (D-Ill. and Sen. Dixon noted that the Hague

See LEGISLATION, page 8

PERSONNEL, from page 6

Richard A. Schell, U.S. District Judge, E.D. Tex., Apr. 13

Confirmations

Bernard A. Friedman, U.S. District Judge, E.D. Mich., Mar. 31

Kenneth M. Hoyt, U.S. District Judge, S.D. Tex., Mar. 31

Jack T. Camp, Jr., U.S. District Judge, N.D. Ga., Apr. 19

Bernard A. Friedman, U.S. District Judge, E.D. Mich., Apr. 19

Emilio M. Garza, U.S. District Judge, W.D. Tex., Apr. 19

Lowell A. Reed, U.S. District Judge, E.D. Pa., Apr. 19

Kimba M. Wood, U.S. District Judge, S.D.N.Y., Apr. 19

Thomas S. Zilly, U.S. District Judge, W.D. Wash., Apr. 19

Elevations

James DeAnda, Chief Judge, S.D. Tex., Mar. 21

Thomas C. Platt, Jr., Chief Judge, E.D.N.Y., Mar. 31

Retirement

John L. Kane, Jr., U.S. District Judge, D. Colo., Apr. 4

Deaths

Raymond E. Plummer, U.S. District Judge, D. Alaska, Dec. 26

Fred M. Taylor, U.S. District Judge, D. Idaho, Feb. 16

William Harold Cox, U.S. District Judge, S.D. Miss., Feb. 25

Nomination Withdrawn

Alfred C. Schmutzer, Jr., U.S. District Judge, E.D. Tenn., Mar. 28

BANKRUPTCY JUDGES

Appointments

Arthur M. Greenwald, U.S. Bankruptcy Judge, C.D. Cal., Mar. 9

Robin L. Riblet, U.S. Bankruptcy Judge, C.D. Cal., Mar. 30

Alan M. Ahart, U.S. Bankruptcy Judge, C.D. Cal., Apr. 4

Kathleen T. Lax, U.S. Bankruptcy Judge, C.D. Cal., Apr. 4

Leslie J. Tchaikovsky, U.S. Bankruptcy Judge, N.D. Cal., Apr. 14

Lynne Riddle, U.S. Bankruptcy Judge, C.D. Cal., Apr. 15

Vincent P. Zurzolo, U.S. Bankruptcy Judge, C.D. Cal., Apr. 18

AO Director Mecham Announces Establishment Of Office of Planning and Evaluation

Director L. Ralph Mecham has announced the establishment within the AO of the Office of Planning and Evaluation. The essential purpose of the new office will be to assist in the delivery of support services to the judiciary through enhanced planning, coordination, and resource management. In addition, the new office will conduct periodic reviews of the AO's ongoing programs and will help to develop and implement the judiciary's work measurement systems.

"Both prior to, and since my appointment as Director of the Administrative Office, a number of Judicial Officers and employees have suggested that the Administrative Office needed to improve its planning and evaluation capability. I, too, recognized the desirability of such a capability. . . . Given the present shortage of resources, and the expectation that resource constraints will continue, establishment of a strong planning capability is essential if the Administrative Office is to continue to provide adequate service to the Judiciary," Director Mecham said.

Recruitment to fill the position of Assistant Director for Planning and Evaluation will commence immediately, Mr. Mecham said. Pending the selection of a permanent director of the office, Clarence "Pete" Lee will serve as Acting Assistant Director for Planning and Evaluation and will lead a task force to implement the reorganization. (For position announcement describing application procedure, see page 5). ■

SOURCE, from page 5

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LEGISLATION, from page 7
Convention and the implementing legislation leave custody decisions concerning abducted children to local courts and authorities, while providing a mechanism for the child's prompt return to the country of the child's habitual residence.

• Rep. Rodino introduced H.R. 4243, to implement the International Convention on the Prevention and Punishment of Genocide.

• Rep. Kastenmeier introduced H.R. 4238, to authorize appropriations for carrying out the activities of the State Justice Institute for FY 1989, 1990, and 1991, with authorization levels of $15 million, $15 million, and $20 million, respectively. He noted that the Institute's program guideline for both FY1987 and 1988 designated projects that would "improve the administration of justice in the State courts and at the same time . . . reduce the work burdens of the Federal courts" as being of "special interest" to the Institute. The guideline cited the following areas as particularly suited for such projects: state court civil cases where a party is also subject to a federal bankruptcy proceeding; the adjudication of federal law questions by state courts; and better allocation of judicial burdens between state and federal courts. Rep. Kastenmeier noted that the Institute, in its first round of FY1987 funding, funded a number of projects that should be of "substantial value to the Federal courts," and that many of the proposals in its final FY1987 funding round also seek to conduct research or demonstration projects in state courts that would benefit the federal courts,

• The House passed the Federal Employee Leave Transfer Act, H.R. 3757, a bill that would permit federal employees to donate annual leave to co-workers who face a prolonged absence from work due to a personal emergency. ■

LOCAL RULES, from page 2
port. The period between plea or verdict and sentencing varies from no more than 60 days in some districts to no less than 90 days in one district. Almost all of the rules authorize the judge to modify the time period for good cause.

Rules differ in the various procedures they establish for the form and manner of filing objections to the presentence report; in setting out a standard of proof; in the disposition to be made of the presentence report after sentencing or if an appeal is taken; and on other matters.

The legislation authorizing and giving effect to the Sentencing Guidelines significantly expands the grounds for appellate review of criminal sentences. A future *Third Branch* article will discuss rules, orders, and procedures adopted by the courts of appeals for handling appeals from guideline sentences. ■

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Congress Weighs Impeachment Study Bill, Bankruptcy Judges' and Magistrates' Benefits

The following measures before Congress are of interest to the judiciary.

• Rep. Robert Kastenmeier (D-Wis.) introduced H.R. 4393, the Judicial Discipline and Impeachment Reform Act of 1988, a bill to amend provisions of 28 U.S.C. relating to judicial discipline. The bill would establish a 13-member commission to study for one year the constitutional issues involved in the impeachment of an Article III judge and then to report on whether changes are needed. (A joint resolution introduced in the House in 1987, H.R.J. Res. 364 (see *The Third Branch,* November 1987, at 3) proposes amending the Constitution to permit bodies in the judicial branch to remove judges for cause.)

• H.R. 4340, providing enhanced retirement and survivors' benefits for bankruptcy judges and magistrates (see *The Third Branch*, May 1988, at 3), was reported by the House Judiciary Committee.

• H.R. 3971, establishing procedures to implement the 1980 Hague Convention on the Civil Aspects of International Child Abduction, was signed by the President on Apr. 19 as Pub. L. 100-300.

• S. 952, a bill giving the Supreme Court greater discretion in deciding what cases it will review, was reported by the House Judiciary Committee.

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice, chaired by Rep. Kastenmeier,

See LEGISLATION, p. 2

Center Prepares Additional Materials for Guideline Training of Court Personnel, Bar

The Federal Judicial Center is developing additional resources for use in guideline sentencing training in the district courts. These include video programs depicting a presentence report conference between a probation officer and counsel and the subsequent sentencing hearing in the same fictitious case. A set of these video programs and related written material was shipped in mid-April to each district court, in care of the probation office.

In cooperation with the Defender Services Division of the Administrative Office, the Federal Judicial Center is also producing a training package especially for defense attorneys that district courts may use in sponsoring seminars for panel attorneys and other members of the defense bar in their districts. AO Director L. Ralph Mecham recently provided chief judges more information about the dissemination of this package, which consists of four video programs, written materials, and suggestions for the materials' use. The video programs cover Statutory Changes, Basic Guidelines Application and Departures, Multiple Counts and Criminal History, and Appeals.

The Judicial Conference of the United States adopted a resolution on Mar. 15, 1988 that encourages district courts to "continue their guideline training efforts and to sponsor programs that will also educate the bar, whose knowledge of sentencing guideline procedures is essential to effective implementation." About 5,000 judges, probation officers, other court personnel, and members of the bar participated in over 200 in-district guideline orientation programs from October 1987 through March 1988. ■

Judge Richard J. Daronco Slain at Home in New York

Judge Richard J. Daronco (S.D.N.Y.) was fatally shot at his home in Pelham, New York, on May 21. Immediately after the slaying, the killer, the father of a litigant in a case that had been before Judge Daronco, committed suicide.

Judge Daronco's death marked the second time this century that a federal judge has been assassinated. District Judge John H. Wood, Jr., (W.D.Tex.) was slain in May of 1979.

Don Hogan Charles/NYT PICTURES

Judge Daronco, nominated by President Reagan Jan. 2, 1987, took his seat on the bench June 8, 1987. Prior to becoming a federal judge, he served in the state judiciary of New York—from 1971 to 1974 as a family court judge, and from 1974 to 1979 as a county judge on the Westchester County Court. From 1979 he was a Supreme Court Justice for the Ninth Judicial District of New York.

Judge Daronco was born in New York City in 1931 and graduated from Providence College and Albany Law School. He served in the U.S. Army, and then was engaged in the practice of law in White Plains, N.Y. from 1958 until 1971.

Judge Daronco is survived by his wife, Joan O'Rourke Daronco, and five children. ■

LEGISLATION, from page 1

continued markup of H.R. 3152, the Court Reform and Access to Justice Act of 1987 (see *The Third Branch*, October 1987, at 1). The bill includes numerous features that have been proposed by the Judicial Conference in the past. Among the bill's features are court-annexed arbitration provisions, pay raises for circuit executives, elimination of the Board of Certification for Circuit Executives, a number of proposals affecting jury selection, provision for the establishment of a foundation that could accept gifts on behalf of the Federal Judicial Center, and other amendments relating to the FJC. The subcommittee approved an amendment by Rep. Benjamin L. Cardin (D-Md.) that would eliminate federal diversity jurisdiction. This amendment replaced a provision in the bill that would have raised the jurisdictional amount in diversity cases from the present $10,000 to $50,000.

• The Criminal Justice Subcommittee of the House Judiciary Committee held hearings regarding the impeachment resolution in the matter of Judge Alcee L. Hastings (S.D. Fla.) (see *The Third Branch*, November 1987, at 9).

• Rep. Lynn M. Martin (R-Ill.) introduced H.R. 4576, to amend title VII of the Civil Rights Act of 1964 to prohibit in the legislative or judicial branches of the federal government employment discrimination based on race, color, religion, sex, handicap, national origin, or age. The bill would establish an employment review board composed of senior federal judges, which would have authority to adjudicate claims regarding such discrimination.

• Sen. Pete Wilson (R-Cal.) introduced S. 2251, a bill to provide the death penalty for the killing of any federal, state, or local law enforcement officer or corrections officer involved in drug law enforcement.

• Rep. Thomas J. Manton (D-N.Y.) introduced H.R. 4278, to amend the Controlled Substances Act to provide for the imposition of the death penalty for the intentional killing of a law enforcement officer and for certain continuing criminal enterprise drug offenses. The bill would provide the death penalty for the murderer of a law enforcement officer and for the "drug kingpin" who orders the killing of any individual. Sen. Alphonse M. D'Amato (R-N.Y.) introduced a companion measure, S. 2206.

• Rep. Don Sundquist (R-Tenn.) introduced H.R. 4289, to amend title 18 to provide penalties for knowingly engaging in conduct that is likely to transmit AIDS.

• The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice held hearings on S. 1961, to establish a uniform system of procedures to facilitate the collection of debts owed to the United States.

• The Senate Committee on Veterans Affairs held hearings on S. 11, the Veterans Administration Procedure and Judicial Review Act, introduced by Sen. Alan Cranston (D-Cal.). The bill would authorize judicial review of certain financial decisions of the Administrator of Veterans' Affairs and provide for the payment of reasonable attorneys' fees in Veterans Administration cases. The Committee also held hearings on S. 2292, introduced by Sen. Frank H. Murkowski (R-Alaska), which would provide for judicial review of rulemaking by the Veterans' Administration and would allow attorneys' fees.

Judges Stephen S. Breyer (1st Cir.) and Morris S. Arnold (W.D. Ark.) testified at the hearing on behalf of

See LEGISLATION, page 6

CALENDAR

June 2–3 Judicial Conference Committee on the Administration of the Bankruptcy System

June 3 Judicial Conference Committee on Intercircuit Assignments

June 6–10 Financial Investigations: Training-for-Trainers

June 6–12 Fordham Graduate Program for Probation Officers

June 7–8 Judicial Conference Committee on Judicial Resources

June 12–25 National Criminal Defense College Trial Practice Institute, Session I

June 13–14 Judicial Conference Committee on Space and Facilities

June 13–15 Workshop for Clerks of District Courts

June 13–17 Seminar for Pretrial Chiefs and Supervisors

June 15–17 Judicial Conference Committee on Defender Services

June 16 Seminar for Sr. Staff Attorneys

June 19–24 Orientation Seminar for Newly Appointed Bankruptcy Judges, Section II

June 20–21 Judicial Conference Committee on the Administration of the Magistrates System

June 20–23 Video Orientation Seminar for Newly Appointed District Judges

June 22–24 Judicial Conference Committee on Criminal Law and Probation Administration

June 22–24 Seminar for Magistrates of the Sixth, Seventh, and Eighth Circuits

June 23 Judicial Conference Committee on the Judicial Branch

June 27–28 Judicial Conference Committee on Court Security

June 27–28 Judicial Conference Committee on Federal–State Jurisdiction

June 27–29 Judicial Conference Committee on Judicial Improvements

June 27–29 Training Coordinators for Fourth and Tenth Circuits

June 30–July 2 Fourth Circuit Judicial Conference

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Summary Jury Trial Requirement Upheld by E.D. Kentucky

The district court has the power under a local rule to order parties to participate in nonbinding summary jury trials, the Eastern District of Kentucky has held. *Williams v. Hall,* No. 84-149 (E.D. Ky. Apr. 5, 1988). The decision is contrary to the recent opinion of the Seventh Circuit in *Strandell v. Jackson County,* 838 F.2d 884 (7th Cir. 1988) (see *The Third Branch,* March 1988, at 3).

The plaintiffs in *Williams* claimed that the defendant company had discharged them due to their unwillingness to cooperate in schemes that amounted to the bribery of foreign officials. The case was set for a six-week trial. Over the plaintiffs' objection, the court ordered a five-day summary jury trial under local rule 23 of the Joint Local Rules for the U.S. District Courts of the Eastern and Western Districts of Kentucky. That rule provides that "[a] judge may, in his discretion, set any civil case for summary jury trial or other alternative method of dispute resolution." After the Seventh Circuit's decision in *Strandell,* the *Williams* plaintiffs moved for reconsideration of the order setting their case for summary jury trial.

The court found that the local rule was intended to authorize mandatory summary jury trial. Fed. R. Civ. P. 83 authorizes district courts to adopt local rules consistent with the federal rules. The Supreme Court has upheld the validity of local rules that are not outcome-determinative, the court noted. Thus, case law has upheld the validity of local rules requiring mandatory arbitration, and even of a local rule requiring mandatory mediation and providing for sanctions in the event a party did not better its position at trial by 10 percent over the evaluation set by the mediators. "A

See SUMMARY JURY, page 8

Senate Judiciary Committee Approves Bill Banning Weapons in Federal Courthouses

15,000 Illegal Weapons Found at Federal Courts' Doors in '87

The Senate Judiciary Committee recently approved legislation proposed by the U.S. Marshals Service that would prohibit the possession of firearms and other dangerous weapons in federal courthouses. The measure was included by the committee as a part of S. 2180, the Undetectable Firearms Act of 1988.

Stanley E. Morris, Director of the U.S. Marshals Service, said that the legislation was proposed to help "combat a disturbing trend" in the number of dangerous weapons discovered by court security officers at courthouse entrances. Last year alone, Marshals Service court security officers prevented more than 75,000 weapons—over 15,000 of which were illegally possessed—from being carried into federal courtrooms, according to Mr. Morris. "These figures are especially ominous in light of the increasing frequency of highly sensitive federal trials involving major drug traffickers, terrorists, and other extremely dangerous criminals," Mr. Morris said.

> ***"These figures are especially ominous in light of the increasing frequency of highly sensitive federal trials involving major drug traffickers, terrorists, and other extremely dangerous criminals."***
>
> **Stanley E. Morris, Director, U.S. Marshals Service**

There is currently no federal criminal statute that specifically prohibits the possession of a dangerous weapon in a federal courthouse. The only federal law relating to the subject is a General Services Administration regulation that prohibits the possession of weapons on federal property. The maximum penalty for violating that regulation is only 30 days' incarceration and a $50 fine. For an appropriate criminal sanction to apply given "the absence of meaningful federal law," Mr. Morris said, persons attempting to carry weapons into federal courtooms must be arrested and charged under state law. "This resort to state law makes for a lack of uniformity among the 94 federal judicial districts which the Marshals serve, both in terms of the procedures our personnel must follow upon detecting a weapon and the certainty and severity of punishment for offenders," Mr. Morris said.

S. 2180 would make the carrying or attempted carrying of a firearm or other dangerous weapon, such as a bomb or long-bladed knife, into a federal courthouse punishable by up to one year in jail and a $100,000 fine. Possessing, or attempting to possess, such a weapon in the courtroom itself or in offices or areas that provide administrative or operational support for the court—including the judge's chambers, clerk's office, and U.S. Attorney's and Marshal's offices—would be a felony punishable by imprisonment for up to two years and a fine of up to $250,000. Possession of a firearm or other dangerous weapon in a courthouse with intent to use the weapon to commit a crime would be punishable by up to five years' imprisonment and a felony-level fine. ■

NOTEWORTHY

Seventh Circuit holds that judge need not recuse himself because of son's representation of party in unrelated matter. The Seventh Circuit has held that a district judge properly refused to recuse himself in a case where the judge's son, a lawyer, had represented the petitioners' insured for about a month on an unrelated matter. *In re National Union Fire Ins. Co. of Pittsburgh*, 839 F.2d 1226 (7th Cir. 1988). After the judge refused to recuse himself, counsel for insurers filed a petition for a writ of mandamus, seeking his removal on the ground that his "impartiality might reasonably be questioned" under 28 U.S.C. § 455(a). The judge's son had been hired by the petitioners' insured, a bank, to represent it in a transaction other than the matter before the judge. The Seventh Circuit noted that the judge's son had recently represented another bank in a similar transaction and had been hired to avoid the time and expense of educating the bank's regular counsel about the "unusual" type of transaction involved, the son's firm had not been hired at a greater rate than it usually charged, and the son's engagement did not create a likelihood of his doing significant future work for the client. The Seventh Circuit held that the engagement of the judge's son on a single matter "is not similar in quality or quantity to the sort of disqualifying interests listed in § 455(b), and therefore does not call for disqualification under § 455(a)."

Tenth Circuit offers "Dial-a-Ruling" service. Tape recordings of recent rulings of the Tenth Circuit and a brief explanation of the legal reasoning of the decisions can be heard by telephone in Denver. Two phone answering machines are used, each with a seven-minute capacity, according to Clerk of Court Robert Hoecker. The judge who writes the ruling prepares the telephone synopsis, which is kept on the tape for seven days. Lawyers and news reporters use the service instead of trying to speak with an individual in the clerk's office. The service is believed to be the only one of its kind in the federal system.

District court authorizes plaintiff newspaper to seek costs and fee from defendant state judge. A U.S. district court in New York has held that a county judge's action in closing pretrial proceedings in a criminal case violated the public's qualified right of access to the courts and has permitted the plaintiff to recover costs from the judge. *Johnson Newspaper Corp. v. Morton*, No. CIV-85-1168E (W.D.N.Y. Mar. 3, 1988). A county judge in New York, concerned about the possible prejudicial effect of pretrial publicity, ordered pretrial proceedings in a criminal case closed to the public and the press. Plaintiff newspaper brought suit in federal district court under 42 U.S.C. § 1983, claiming that the judge's action had deprived the newspaper of its First and Fourteenth Amendment rights. It sought a declaration that the order violated its right of access to the courts. It also sought prospective relief directing the judge, when considering future motions for closure of hearings, to refrain from ordering closure unless such a step is necessary, is the least restrictive available remedy, and there exists no other reasonably available venue in the state where a fair trial could be conducted. The defendant judge in recognition of the holding in *Pulliam v. Allen*, 466 U.S. 522 (1984), did not claim judicial immunity, but did raise Eleventh Amendment, mootness, and abstention arguments. The district court held that the action for prospective relief was not precluded by the Eleventh Amendment, that the issue was not moot because it was capable of evading repetition yet would likely evade review in the future, and that abstention was not appropriate.

The district court further found that the judge's order closing the hearing to the press had violated the public's qualified constitutional standards, relying in part on *Press-Enterprise Co. v. Superior Court of Cal. ("Press-Enterprise II")*, 106 S. Ct. 2735 (1986), whose decision postdated the county judge's ruling that was at issue.

The district court granted the plaintiff's motion for summary judgment declaring the judge's action unconstitutional, but did not issue a permanent injunction, saying that to do so would be "intrusive and unworkable." The district court's order permits the plaintiff to apply for fees and costs under 42 U.S.C. § 1988 and to recover them from the defendant judge.

Three bills pending in the Senate, S. 1512, S. 1515, and S. 1482, address the issue of judicial immunity in the wake of *Pulliam v. Allen*. A Senate Judiciary Committee subcommittee held a hearing on the bills recently (see *The Third Branch*, April 1988, at 7).

Ninth Circuit Historical Society launches new journal. The Ninth Judicial Circuit Historical Society has published the first issue of *Western Legal History*. The journal, to be issued twice yearly, will contain illustrated articles, annotated reviews of historical documents, book reviews and notices, and other information relating to all aspects of the history of law in the American West. The Society has more than 1,500 members, including individuals, universities, law schools, law firms, and libraries. The Society occasionally publishes books, produces exhibits, collects oral histories, and in other ways preserves the West's legal history. In 1987 it gathered the oral histories of a number of eminent lawyers and judges, and will publish in book form an edited collection of excerpts from some of the interviews. It is also working on a guide to legal

See NOTEWORTHY, page 7

Court Technology Conference Co-sponsored by AO, FJC, and Other Organizations Held in Denver

The Second National Conference on Court Technology, co-sponsored by the National Center for State Courts and its Institute for Court Management, the FJC, the AO, and more than 20 other organizations, was held in Denver, Colorado, Apr. 25–27. Almost 1,500 persons attended the conference, including nearly 100 persons from the federal courts. Over 55 different sessions were conducted during the conference on topics ranging from desktop publishing to litigation support, video arraignments, optical disk storage of court records, and court security. Among the topics that received the most attention were alternative records storage strategies, public access to court information, and successful approaches to designing, funding, and acquiring automated court management systems at the local level.

Of particular interest was a session entitled "Ten Technology Solutions for Judges," which was conducted by Judges David L. Phares (Maricopa Cty., Ariz.) and R. Ryan Reinhold (Navaho Cty., Ariz.). In this session attendees learned about opportunities for judges to use automation in chambers to improve the quality of their work product and to manage their workload better. During the second half of the session attendees were paired to work directly on personal computers using software that the presenters had identified as being very useful to judges. At the end of the session the attendees were given copies of all of the software used during the session to take home with them and use in their courts.

John Greacen, Clerk of the U.S. Court of Appeals for the Fourth Circuit, made a presentation at two sessions entitled *Federal Automated Case Management Software: Is There Anything Here for State and Local Courts?* He reviewed the development and the far-reaching capabilities of the electronic docketing system used in many federal courts and planned for national expansion in the next few years. The federal software and documentation is in the public domain, he noted, and available at a nominal cost to state and local courts that might want to implement it. Although no federal support could be provided to any recipient court, Mr. Greacen recommended strongly that courts considering the development and im-

See TECHNOLOGY, page 8

Applications for 1989–1990 Judicial Fellows Program Invited

The Judicial Fellows Commission invites applications for the 1989–90 Judicial Fellows Program. The program seeks to attract and select outstanding individuals from a variety of disciplinary backgrounds who have an interest in judicial administration and who show promise of making a contribution to the judiciary.

Two fellows will be chosen to spend a year, beginning in September 1989, at the Supreme Court of the United States or the Federal Judicial Center. Candidates should be familiar with the federal judicial system, have at least one postgraduate degree, and two or more years of successful professional experience. Fellowship stipends are based on salaries for comparable government work and on salary histories of the fellows but will not exceed the GS 15, step 3 level (presently $58,567).

The Judicial Fellows program was established in 1972 and is patterned after the White House and Congressional Fellowships.

Information about the program and on application procedures is available from Noel J. Augustyn, Executive Director, or Vanessa Yarnall, Associate Director, Judicial Fellows Program, Supreme Court of the United States, Washington, D.C. 20543. (202) 479-3374. Applications should be submitted by Nov. 15, 1988.

Administrative Office Releases Data on Courts' 1987 Workload

The Administrative Office has released *Federal Judicial Workload Statistics December 1987*, a report containing a statistical summary of the business of the courts for the twelve-month period ending Dec. 31, 1987.

During 1987, filings and terminations reached record high levels in the 12 regional courts of appeals. Total annual filings rose 3 percent, to 35,700 appeals, up from 34,753 appeals in 1986. Most of the increase occurred in federal and state prisoner petitions, which combined increased by more than 1,100 cases. The number of dispositions increased by 4 percent, from 33,936 appeals in 1986 to 35,276 in 1987. This growth in dispositions reflects increases both in terminations on the merits after submission on briefs (up 11 percent) and in procedural terminations by staff (up 7 percent). For the past two years, merit dispositions after submission on briefs have grown steadily and each year comprised a larger portion of the overall termination workload in the regional courts of appeals. Due to the large number of terminations, the overall pending caseload grew less than 2 percent, to 26,894 appeals. The increase for cases pending in 1987 represents the lowest numerical and percentage growth in the regional courts since 1982.

During 1987, a total of 233,292 civil cases were filed in the district courts, a 4 percent decrease from the 1986 filings. The largest decrease in civil filings occurred in VA cases, which dropped from 24,516 to 17,122. Filings in Social Security disability insurance cases increased from 8,542 to 11,275 and prisoner civil rights petitions from 22,553 to 24,082. Social Security supplemental security income case filings rose from 2,155 to 2,935 and ERISA filings from 5,777 to 6,468. ■

LEGISLATION, from page 2

the Judicial Conference of the United States. Judge Breyer is the Judicial Conference's representative to the Administrative Conference of the United States. Judge Arnold is a member of the Committee on Federal–State Jurisdiction of the Judicial Conference. The Judicial Conference opposes judicial branch review of veterans' claims for benefits as contained in S. 11. If Congress deems review of veterans' claims to be absolutely necessary, the judges suggested, such review should remain with the Board of Veterans Appeals or be conferred upon a new Article I executive branch court. "Judicial review should be limited to the review of constitutional issues and statutory interpretations, as is contemplated in S. 2292. Appellate-type review could be had either in the district court on the limited basis of reviewing the record, as is done in Social Security cases, or in the court of appeals, as contained in S. 2292. The Judicial Conference will oppose any provisions requiring judicial review of any factual determination of the Veterans Administration," Judge Arnold testified.

• An amended version of S. 1934, a bill authorizing the construction of a building for federal judicial agencies and retired Supreme Court justices, was reported by the Senate Committee on Environment and Public Works. The amended version, introduced by Sen. Daniel Patrick Moynihan (D-N.Y.) would limit the height of the building to 80 feet, rather than the 94 feet previously proposed. The amended version would also specify that space not used as judiciary offices must be rented to other government agencies rather than to private tenants.

• Rep. Joseph J. DioGuardi (R-N.Y.) introduced H.R. 4406, a bill to amend 18 U.S.C. to provide for mandatory random drug testing of federal probationers.

• Rep. Jim Olin (D-Va.) introduced H.R. 4464, a bill to amend the Federal Rules of Civil Procedure with respect to sanctions for the violation of rule 11. The bill would amend the last sentence of rule 11 to read: "For a wilful violation of this rule, an attorney may be subjected to appropriate disciplinary action." The amendment would restore language that was in the rule prior to its 1983 amendment. The bill "will allow judges to impose sanctions at their discretion but no longer *requires* them to impose sanctions," Rep. Olin said. In his view, the current rule 11 "has not had the desired effect" of limiting the number of frivolous lawsuits, but has "added to the problem, adding new cases to the judges' dockets" in the form of litigation over rule 11.

• The House Foreign Affairs Subcommittee on Human Rights approved H.R. 1417, a bill that would permit torture victims who live in the United States to bring civil suits against their torturers. ■

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, 1520 H St., N.W., Washington, DC 20005.

Aspen, Marvin E. "Some Thoughts on the Historical Origins of the United States Constitution and the Establishment Clause." 21 *John Marshall L. Rev.* 239 (1988).

"Constitutional Scholarship: What Next?" (Symposium, including Richard A. Posner). 5 *Constitutional Commentary* 17 (1988).

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Ross, William G. "The Questioning of Supreme Court Nominees at Senate Confirmation Hearings: Proposals for Accommodating the Needs of the Senate and Ameliorating the Fears of the Nominees." 62 *Tulane L. Rev.* 109 (1987).

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Strauss, Peter L. "One Hundred Fifty Cases per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action." 87 *Columbia L. Rev.* 1093 (1987).

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Western Legal History. Winter/Spring 1988. Ninth Judicial Circuit Historical

Bankruptcy court clerks George B. Cauthen (D.S.C.) and Beth A. Dick (N.D. Ohio) discuss the development of a long-range training plan for bankruptcy court personnel at a recent meeting of the Bankruptcy Education and Training Committee.

NOTEWORTHY, from page 4

history resources to aid researchers. The Board of the Society is chaired by Chief Judge James R. Browning (9th Cir.). For further information, contact Chet Orloff, Director, Ninth Judicial Circuit Historical Society, P.O. Box 2558, Pasadena, CA 91102-2558 tel. (818) 405-7059).

Presentence report released to third party where presumption of confidentiality overcome. A defendant's privacy interest in presentence report does not survive his death, and third-party petitioners overcame the presumption of confidentiality and were entitled to the release of such a report, the Ninth Circuit recently held. *U.S. v. Schlette*, No. 87-1106 (9th Cir. Mar. 31, 1988). Schlette, while on probation, killed the state district attorney who had successfully prosecuted him many years before, then committed suicide. The estate of the murder victim and a newspaper applied to the district court for release of Schlette's presentence investigation report. The government opposed disclosure on the grounds of confidentiality. The district court denied disclosure under both FOIA and Fed. R. Crim. P. 32(c). The estate and the newspaper sought a writ of mandamus ordering the district court to release the report.

The Ninth Circuit noted the strong presumption in favor of confidentiality and also noted that no reported cases had found disclosure of such a report to a third party necessary to serve the ends of justice. The court discussed a Federal Judicial Center study of rule 32(c) that led to a 1983 amendment of the rule to further increase disclosure of reports to defendants. The court noted that while privacy concerns may militate against disclosure in a given case, when the defendant is dead this ground for nondisclosure is foreclosed, as privacy interests do not survive death. The newspaper argued that both the First Amendment and the public interest supported disclosure. Without reaching the First Amendment argument, the court held that the common-law right of access to judicial records was sufficient to warrant disclosure here, where no legitimate reason for preserving secrecy had been articulated by the district court or by the government.

The estate argued that it required access to the presentence report and related documents so that it could determine whether it had a cause of action for negligence based upon the probation service's failure to warn the former prosecutor of the threat posed to him by Schlette. "We express no opinion on whether the estate may state a claim based upon this theory," the court wrote, but since "the requested documents are relevant to a contemplated claim and . . . the information . . . in them cannot be obtained elsewhere," the estate had made a sufficient showing of need for disclosure of the presentence report, and the psychiatric and postsentence probation reports. The Ninth Circuit remanded the case to the district court to redact information from the documents, "consistent with this opinion, which the district court determines is the kind of information . . . which should remain confidential." ■

PERSONNEL

CIRCUIT JUDGES

Nomination

Pamela A. Rymer, 9th Cir., Apr. 26

Confirmations

Emmett R. Cox, 11th Cir., Apr. 15
David M. Ebel, 10th Cir., Apr. 19

Elevation

Albert J. Engel, Chief Judge, 6th Cir., Apr. 1

Nomination Withdrawn

David C. Treen, 5th Cir., May 10

DISTRICT JUDGES

Nominations

Norwood C. Tilley, Jr., M.D.N.C., Apr. 26
Charles R. Butler, Jr., S.D. Ala., Apr. 28
Fern M. Smith, N.D. Cal., May 9
Jan E. DuBois, E.D. Pa., May 10

Confirmations

Jack T. Camp, Jr., N.D. Ga., Apr. 19
Bernard A. Friedman, E.D. Mich., Apr. 19
Emilio M. Garza, W.D. Tex., Apr. 19
Lowell A. Reed, E.D. Pa., Apr. 19
Kimba M. Wood, S.D.N.Y., Apr. 19
Thomas S. Zilly, W.D. Wash., Apr. 19

Appointment

Stephen M. Reasoner, E.D. Ark., Apr. 9

Deaths

Burnita Shelton Matthews, D.D.C., Apr. 25
Robert Van Pelt, D. Neb., Apr. 27
Caleb R. Layton, D. Del., May 6
Richard J. Daronco, S.D.N.Y., May 21

BANKRUPTCY JUDGES

Appointments

Leslie J. Tchaikovsky, N.D. Cal., Apr. 14
Lynne Riddle, C.D. Cal., Apr. 15
Vincent P. Zurzolo, C.D. Cal., Apr. 18
Louis M. Phillips, D. La., May 2

Elevation

Ray Reynolds Graves, Chief Judge, E.D. Mich., Apr. 14

MAGISTRATES (FULL-TIME)

Appointments

William G. Hussmann, Jr., S.D. Ind., Apr. 4
Kenneth R. Fisher, W.D.N.Y., Apr. 20
Paul Taylor, W.D.N.C., Apr. 29

SUMMARY JURY, from page 3

summary jury trial is far less intrusive . . . than the local rules upheld by the above authorities. No presumption of correctness attaches to the verdict of the summary jury, nor is any sanction imposed for failure to accept its advisory verdict. It is merely a useful settlement device." Thus, as a summary jury trial "is essentially nonbinding arbitration with an advisory jury instead of arbitrators," local rule 23 must be held valid.

The court distinguished the case before it from *Strandell* on the grounds of the existence of the local rule expressly providing for the use of summary jury trials; no such local rule existed in *Strandell*. The district court in *Strandell* had held the use of the summary jury trial procedure to be authorized by Fed. R. Civ. P. 16, the court's inherent authority, and a resolution of the Judicial Conference of the United States endorsing the experimental use of the procedure. *Strandell v. Jackson County*, 115 F.R.D. 333 (S.D. Ill. 1987). The *Williams* court "respectfully disagreed" with the Seventh Circuit's opinion in *Strandell*, finding that the district court opinion in *Strandell* expresses "the better view" on the court's authority to order summary jury trial. Williams expressed support for the view that even where there is no local rule expressly providing for the use of summary jury trials, requiring the procedure would be properly within the court's discretion, for the reasons given by the district court in *Strandell*.

TECHNOLOGY, from page 5

plementation of records-replacement electronic docketing systems examine the federal software before proceeding with their own development. Demonstrations of the appellate (New AIMS) and district court (CIVIL) versions of the software were provided to interested attendees using the computer and courtroom facilities at the federal courthouse in Denver. Almost 100 persons attended the demonstrations of the federal case management systems.

Over 30 vendors were represented at the conference, who demonstrated the latest technology for the courts, ranging from case management and other computer software systems to electronic scanners and video conferencing systems. ■

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THE THIRD BRANCH

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Courts of Appeals Adopting Rules and Procedures for Sentencing Appeals

A number of the courts of appeals have adopted special rules or specified in their internal operating procedures or in "notices to counsel" the procedures to be followed in appealing sentences under the guideline sentencing system. Other appeals courts are presently handling such appeals under their existing procedures, with the option of implementing special rules or procedures at a later time.

Docketing statements and transmittal sheets. Some appeals courts have adopted new criminal appellate docketing statements, which are to be filed in the clerk's office of the appeals court at the same time as or shortly after the notice of appeal is filed in the district court. These statements assist the appeals courts in identifying cases under the guidelines and the issues raised on appeal. For example, the docketing statement adopted by the Eleventh Circuit requires counsel to indicate whether the appeal challenges the conviction, the sentence, or both. Where the appeal challenges the sentence, or the conviction and sentence, counsel in the Eleventh Circuit indicate whether the appellant claims errors in the district court's findings of fact or in its application of the guidelines. Counsel must show on the docketing statement which guidelines the district court applied and which guidelines the appellant contends the court should have applied. These designations by counsel generally track the language of 18 U.S.C. § 3742(d), which specifies the standard for reviewing guideline sentences. (A proposed amendment to this and other sections of the sentencing statute is contained in S. 2485, a bill recently passed by the Senate. See story on legislation, p. 5). Some courts' docketing statements already required the parties to set forth the issues that will be raised on appeal; these statements have not been modified. The Fourth Circuit, for example, did not amend its docketing statement, but in order to help the appeals court identify pre- and post-guidelines cases, it amended the transmittal sheet that is completed by the district court staff when the notice of appeal is transmitted to the court of appeals.

Expedited appeals. Some appeals courts have adopted rules or procedures permitting counsel to move for an expedited appeal where there is a risk that a short sentence would already have been served before the ordinary appeals process had run its course. For example, the Eleventh Circuit's "Notice Concerning Appeals from Criminal Convictions" informs counsel that appeals from sentences or from convictions and sentences pursuant to 18 U.S.C. § 3742 "will generally proceed in the same manner as other appeals and will not automatically be expedited or given preference." However, when the appeal is only from the sentence imposed, "the court will consider impo-

See APPELLATE RULES, page 2

FJC Announces Seminar for District Judges

Judge John C. Godbold, FJC Director, has announced that a seminar for newly appointed district judges will be held in Washington, D.C., starting Nov. 28 and concluding Dec. 2, 1988. All sessions will be at Dolley Madison House, the Center's headquarters.

A reception for the new judges and their families is scheduled for Sunday, Nov. 27, and a dinner will be held at the Supreme Court on Nov. 30.

Sup. Court to Consider Constitutionality of Guidelines Next Term

On June 13 the Supreme Court granted the Solicitor General's and the defendant's petitions for writs of certiorari before judgment in a case raising the issue of the constitutionality of the Sentencing Guidelines. *U.S. v. Mistretta*, No. 87-1904, *Mistretta v. U.S.*, No. 87-7028. The defendant in the case pled guilty but challenged the constitutionality of the guidelines on delegation and separation of powers grounds. The district court upheld the constitutionality of the guidelines. *U.S. v. Mistretta*, 682 F. Supp. 1033 (W.D. Mo. 1988).

The Solicitor General's petition noted the split among the district courts that have decided the issue. Until the Supreme Court resolves the constitutionality issue, the petition said, Congress's intent to avoid unwarranted sentencing disparity "will be frustrated as individual district judges independently decide whether to sentence defendants under the pre- or post-Act sentencing system."

The petitions for certiorari identify the questions presented by the case as whether the Sentencing Guidelines are invalid because the Sentencing Commission is constituted in violation of separation of powers principles; whether they are invalid because the Sentencing Reform Act of 1984 improperly delegates legislative authority to the Sentencing Commission; and whether, if they are invalid, the 1984 amendments to the statutes

See GUIDELINES, page 8

Inside . . .

APPELLATE RULES, from page 1
sition by the lower court of a 'short' sentence of incarceration or probation (under six months in duration) as a basis for expedited consideration provided that appellant otherwise demonstrates that he will be injured if the appeal is not expedited." The appellant should seek expedited consideration by motion after filing the notice of appeal, but "[p]arties are cautioned that the court disfavors bifurcation of issues concerning sentencing from those concerning conviction and generally will consider all issues on appeal together."

Similarly, in the Sixth Circuit the bifurcation of verdict and sentence appeals will be discouraged. Where separate appeals are filed from the conviction and sentence, they will be consolidated and processed as a single unit, with the exception of appeals that challenge sentences of incarceration of less than one year. Such cases will be closely proctored in the clerk's office to ensure an accelerated disposition.

In the D.C. Circuit, expedited treatment will be given to appeals from sentences for a term of eight months or less where the defendant is in custody pursuant to the sentence appealed; such expedited appeals from the sentence imposed will be heard separately from the appeal of the underlying merits in the D.C. Circuit.

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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.

The Fifth Circuit's rule governing appeals raising Sentencing Guidelines issues provides that if the appeal is from the sentence only, the docketing statement will serve as the brief on appeal unless the appellant elects otherwise.

The rule adopted in the Tenth Circuit provides that where the sentence is less than one year and neither probation nor release pending appeal is granted, the appellant may move for an expedited appeal. The Tenth Circuit's docketing statement is designed to permit this motion to be made on the docketing statement itself by affirmatively responding to one of the questions on the statement.

Preparation of the transcript of the sentencing hearing. 18 U.S.C. § 3553(c) requires the court at the time of sentencing to state the reasons for its imposition of the particular sentence and to state its reasons for departing from the guidelines if this is done. The relevant district court proceedings, such as the sentencing hearing, must be transcribed and made part of the record on appeal. Under the regular procedures in the Third Circuit, transcripts in criminal appeals are required to be filed within 30 days of the completion of the transcript purchase order. Adhering to this 30-day time period would delay an expedited case, so the Third Circuit's Judicial Council entered an order authorizing the clerk of the court of appeals to enter any order appropriate to ensure expedited transcription. Under the Judicial Council's order, the clerk of the court of appeals can order court reporters to give priority to the transcript of the sentencing proceeding. This order would require the completion of the pertinent transcripts within 14 days, the filing of appellant's brief within 14 days of the filing of transcripts, the filing of appellee's brief within 14 days of appellant's brief, the filing of any reply brief within 14 days of appellant's brief, and the filing of any reply brief 10 days thereafter. Similarly, the Sixth Circuit's internal operating procedures now provide that the court of appeals may direct the preparation of a transcript "out of the order otherwise prescribed by rule."

Presentence report. Under the pre-guideline system, the presentence report was not included in the record on appeal unless the presentence report was at issue. Section 3742(c)(2) of 18 U.S.C. now requires it to be included in the record whenever a criminal appeal includes a challenge to the guidelines sentence. Some local rules of the district courts do not specify whether copying of the presentence report is permitted, and some local rules prohibit the copying of the presentence report. In some circuits, the presentence report must be transmitted under seal from the district court to the court of appeals. For example, internal operating procedures adopted in the Sixth Circuit provide that both the presentence report and any objections to it shall be placed under seal by the district court and forwarded to the court of appeals, "which shall maintain the seal." Review of these documents by the court of appeals is conducted in an in camera manner "to ensure the confidentiality of the report, and no copying or viewing by counsel shall be had except by order of the court." The Fifth Circuit's "Rule Governing Appeals Raising Sentencing Guidelines Issues" provides that the presentence report transmitted to the court of appeals "shall be transmitted separately from other parts of the record on appeal and shall be labeled as a sealed record if sealed by the district court." Presentence reports filed in the Fifth Circuit as part of a record on appeal "will be treated as matters of public record except to the extent that the report . . . has been sealed by order of the district court." Counsel may file a motion for access to sealed presentence reports in the Fifth Circuit; if the motion is granted, counsel may not duplicate the report, and must return it to the court. ■

Active Article III Judges Surveyed on Salaries, Other Issues by Judicial Conference Committee

The Judicial Conference Committee on the Judicial Branch, chaired by Judge Frank M. Coffin (1st Cir.), has surveyed federal judges concerning their length of service, their attitudes toward their office, their compensation, and the considerations entering into their choice to accept a judgeship. The anonymous responses to the survey questionnaire will be tabulated and the results presented to the 1988 Commission on Executive, Legislative, and Judicial Salaries.

The survey, which was sent to all 710 active Article III judges, was conducted with the assistance of the Office of the General Counsel of the Administrative Office of the U.S. Courts. More than 600 responses had been received by mid-June. ■

Updated FJC Study of Issues in Job Bias Cases Released

The FJC has published *Major Issues in the Federal Law of Employment Discrimination* (2d ed.) by Professor George Rutherglen of the University of Virginia School of Law. An update of Professor Rutherglen's previous monograph for the Center, the book is in three sections. The first two sections survey the substantive and procedural provisions of title VII of the Civil Rights Act of 1964; the third discusses other federal remedies for employment discrimination. The book also includes an annotated bibliography of books, articles, and student comments and notes on the subject.

Copies of the monograph may be obtained from Information Services, 1520 H St., N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (8 oz.). Do not send an envelope.

Judge Joseph Hatchett (11th Cir.), chairman of the Judicial Conference's Magistrates Committee, and three U.S. magistrates met recently with the Chief Justice to discuss items of mutual interest concerning the operation of the federal magistrate system. From left, John Thomas Jones, Chief, Division of Magistrates, AO; Harvey E. Schlesinger, U.S. Magistrate, M.D. Fla. (Jacksonville); John Paul Godich, U.S. Magistrate, S.D. Ind. (Indianapolis); Judge Hatchett; Ila Jeanne Sensenich, U.S. Magistrate, W.D. Pa. (Pittsburgh).

Guidelines' Effect on Pretrial Services Under Consideration by JCUS Subcommittee

Pursuant to a recommendation of the Subcommittee on Pretrial Services of the Judicial Conference's Criminal Law and Probation Committee, the pretrial services "advice of rights" form was provisionally amended earlier this year in light of the Sentencing Guidelines. The Subcommittee has considered the overall impact of the guidelines on the implementation of the Pretrial Services Act of 1982, and will make further recommendations in the near future.

The "advice of rights" form signed by defendants at the time of pretrial services interviews was amended because of the possibility that information disclosed by a defendant during such an interview may later be used in the computation of the defendant's sentence under the sentencing guidelines system. The amended form now includes the language, "In the event I am found guilty, the information I provide will be made available to a U.S. Probation Officer for the purpose of preparing a presentence report and may affect my sentence."

Information provided during pretrial services interviews is used by the court to determine whether and under what conditions a defendant will be released or detained pending trial. Such information is not used against defendants on the issue of guilt in any judicial proceeding (except prosecutions for perjury or false statements made in the course of obtaining release and prosecutions for failure to appear at the criminal proceeding for which pretrial release was granted).

Under the Sentencing Guidelines, information disclosed during a pretrial services interview pertaining to the defendant's drug use, prior criminal history, and financial data could become part of a guideline computation. For certain offenses, such as property crimes, tax crimes, fraud, and drug crimes, the guidelines that apply are determined with reference to the quantity of money or drugs involved in the case. Behavior that was not included in the offense of conviction or even in the charging

See PRETRIAL, page 8

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, 1520 H St., N.W., Washington, DC 20005.

A Survey of State Judicial Fringe Benefits. ABA, Judicial Administration Division (1988).

Crump, Susan. "Jury Misconduct, Jury Interviews, and the Federal Rules of Evidence: Is the Broad Exclusionary Principle of Rule 606(b) Justified?" 66 *North Carolina L. Rev.* 239 (1988).

Dunn, Mark T. "Chapter 12 of the U.S. Bankruptcy Code: Recent Issues and Cases." 76 *Illinois Bar J.* 376 (1988).

Easterbrook, Frank H. "The Role of Original Intent in Statutory Construction." 11 *Harvard J. of Law & Public Policy* 59 (1988).

Edwards, Harry T. "The Future of Affirmative Action in Employment." 44 *Washington & Lee L. Rev.* 763 (1987).

"Essays on the Supreme Court Appointment Process." 101 *Harvard L. Rev.* 1146 (1988).

Furlow, David A., and Charles W. Kelly. "Removal and Remand: When Does a Federal District Court Lose Jurisdiction Over a Case Remanded to State Court?" 41 *Southwestern L.J.* 999 (1987).

Garner, Joel H. "Delay Reduction in the Federal Courts: Rule 50(b) and th. Federal Speedy Trial Act of 1974." 3 *J. of Quantitative Criminology* 229 (1987).

Ginsburg, Douglas H. "The Appropriate Role of the Antitrust Enforcement Agencies." 9 *Cardozo L. Rev.* 1277 (1988).

Grunin, Susan Krup, and Jud Watkins. "The Investigative Role of the United States Probation Officer Under Sentencing Guidelines." 51 *Federal Probation* 43 (Dec. 1987).

Jensen, Erik M. "Monroe G. McKay and American Indian Law: In Honor of Judge McKay's Tenth Anniversary on the Federal Bench." 1987 *Brigham Young University L. Rev.* 1103.

Komesar, Neil K. "A Job for the Judges: The Judiciary and the Constitution in a Massive and Complex Society." 86 *Michigan L. Rev.* 657 (1988).

Kozinski, Alex, and J. D. Williams. "It Is a Constitution We Are Expounding: A Debate." 1987 *Utah L Rev.* 977.

Marshall, Thurgood. "The Constitution: A Living Document." 30 *Howard L.J.* 623 (1987).

Mosk, Stanley. "The Common Law and the Judicial Decision-Making Process." 11 *Harvard J. of Law & Public Policy* 35 (1988).

Motley, Constance Baker. "Massive Resistance: America's Second Civil War." 41 *Arkansas L. Rev.* 123 (1988).

Parness, Jeffrey A. "More Stringent Sanctions Under Federal Civil Rule 11: A Reply to Professor Nelken." 75 *Georgetown L.J.* 1937 (1987).

Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (1988).

Sloviter, Dolores K. "Perceptions of the Legal Profession."10 *Western New England L. Rev.* 175 (1988).

Wasby, Stephen L. "Technology and Communication in a Federal Court: The Ninth Circuit." 28 *Santa Clara L. Rev.* 1 (1988).

Weaver, George M. "The Precedei tial Value of Unpublished Judicia Opinions." 39 *Mercer L. Rev.* 477 (1988). ■

PERSONNEL

CIRCUIT JUDGES

Nominations
Richard L. Nygaard, 3d Cir., May 25

Appointments
Paul R. Michel, Fed. Cir., Mar. 8
Wade Brorby, 10th Cir., Mar. 31
Stephen Trott, 9th Cir., Apr. 19

Elevations
Alfred T. Goodwin, Chief Judge, 9th Cir., June 15

Death
Oscar H. Davis, Fed. Cir., June 19

DISTRICT JUDGES

Nominations
Herbert J. Hutton, E.D. Pa., May 17
Robert P. Patterson, Jr., S.D.N.Y., June 14
Robert C. Bonner, C.D. Cal., June 15
Adriane J. Dudley, D. V.I., June 20
Lewis T. Babcock, D. Colo., June 23
Melinda Harmon, S.D. Tex., June 23

Confirmations
David A. Ezra, D. Haw., May 19
John C. Lifland, D.N.J., May 19
William G. Cambridge, D. Neb., May 27
Richard A. Schell, E.D. Tex., May 27

Appointments
Kenneth Conboy, S.D.N.Y., Feb. 3
Edward F. Harrington, D. Mass., Feb. 29
Rudy Lozano, N.D. Ind., Mar. 27
Paul Niemeyer, D. Md., Mar. 31
Kenneth M. Hoyt, S.D. Tex., Apr. 12
Thomas Zilly, W.D. Wash., Apr. 30
Lowell Reed, E.D. Pa., May 6
Jack T. Camp, N.D. Ga., May 27
Richard Arcara, W.D.N.Y., June 1
Bernard Friedman, E.D. Mich., June 1

Elevations
Harold L. Ryan, Chief Judge, D. Idaho, May 2
David V. O'Brien, Chief Judge, D.V.I., May 15
Neal P. McCurn, Chief Judge, N.D.N.Y., June 30

Senior Status
G. Wix Unthank, E.D. Ky., June 14

Deaths
Jack Roberts, W.D. Tex., Feb. 27
Lloyd H. Burke, N.D. Cal., Mar. 15
Valdemar A. Cordova, D. Ariz., June 18

BANKRUPTCY JUDGES

Appointments
Mitchel R. Goldberg, C.D. Cal., June 1
Randall J. Newsome, N.D. Cal., June 1
Marilyn Morgan, N.D. Cal., June 16

President Signs Supreme Court Docket Bill; Congress Considers Government Pay Raise

Congress has taken action this summer on legislation concerning the Supreme Court's discretion over its appellate docket, salary increases, a new building for the judiciary in Washington, and other matters of interest to the judiciary.

• S. 952, a bill to abolish the Supreme Court's mandatory appellate jurisdiction, was passed by the House and Senate and signed by President Reagan. Chief Justice Rehnquist, in a letter to Rep. Robert W. Kastenmeier (D-Wis.) dated May 11, 1988, thanked Rep. Kastenmeier for his role in expediting the bill's passage. Rep. Kastenmeier chairs the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. The Chief Justice in his letter characterized the effective elimination of the Supreme Court's mandatory jurisdiction that S. 952 would provide as "the primary legislative goal of the Court."

• As part of its general governmental appropriations bill, the House voted a 4 percent pay raise for federal government employees, but the raise would not apply to high-level executives or judges. The Senate has approved a 4 percent raise that would include the executives and judges. A conference committee will now take up the matter.

• S. 1934, to provide for a building for agencies of the judiciary and retired Supreme Court Justices in Washington, D.C. (see *The Third Branch*, June 1988, at 6), passed the Senate. The bill authorizes the Architect of the Capitol and a commission representing the Supreme Court, House, and Senate to oversee a design competition for the building, to select the successful bidder, and to enter into an agreement to construct the building. The bill as passed provides that the judiciary will initially occupy about two-thirds of the building, with plans to occupy more space as time passes. The remaining space will be offered first to other federal government tenants (other than congressional committee staff or the personal staff of Senators and Representatives). Only if there are insufficient government tenants will space be offered to private tenants.

The 12-member commission responsible for supervising the design, construction, maintenance, and security of the building will include two persons to be appointed by the Chief Justice from among the Justices of the Supreme Court and federal judges. The commission will also include members of the House Office Building Commission (or their designees); the majority leader and minority leader of the Senate (or their designees); the chairman and ranking minority member of the Senate Committee on Rules and Administration (or their designees); the chairman and ranking minority member of the Senate Committee on Environment and Public Works (or their designees); and the chairman and ranking minority member of the House Committee on Public Works and Transportation (or their designees).

• H.R. 3152, the omnibus or "housekeeping" bill containing numerous provisions called for by the Judicial Conference of the United States (see *The Third Branch*, June 1988, at 2) was reintroduced as a new bill, H.R. 4807.

• S. 2485, the Minor and Technical Criminal Law Amendments Act of 1988, was passed by the Senate. Title I of the bill would make numerous corrections to existing criminal statutes. One section would create three additional RICO predicates: murder-for-hire; sexual exploitation of children; and fraud in connection with credit cards, electronic banking cards, and similar "access devices." Other sections of title I would permit Federal Prison Industries, Inc., to borrow funds from the Treasury to finance capital expansion; would increase the penalty for possession of explosives in a federal building; and would amend Fed. R. Crim. P. 11(c) to require a federal district court, before accepting a plea of guilty or nolo contendere, to advise the defendant of the possible imposition of a period of supervised release after imprisonment (as authorized by 18 U.S.C. § 3583) effective as to crimes committed on or after Nov. 1, 1987. Rule 11 currently requires advice as to the effect of any possible term of special parole.

Title II of the bill, the Ancillary Debt Collection Amendments Act of 1988, is intended to be a supplement to the Debt Collection Act, which was previously introduced as S. 1961 (see *The Third Branch*, February 1988, at 4).

Title III of S. 2485 would amend 18 U.S.C. pertaining to sentencing procedures under the Sentencing Guidelines. Section 311 of title III would

See LEGISLATION, page 6

CALENDAR

June 30-July 2 Fourth Circuit Judicial Conference
July 6-8 Tenth Circuit Judicial Conference
July 6-9 Sixth Circuit Judicial Conference
July 7-8 Judicial Conference Advisory Committee on Bankruptcy Rules
July 11-15 Orientation Seminar for New Probation & Pretrial Officers
July 14-17 Eighth Circuit Judicial Conference
July 17-20 Judicial Conference Committee on Judicial Ethics
July 17-30 National Criminal Defense College Trial Practice Institute, Sess. II
July 18-19 Judicial Conference Committee on Rules of Practice and Procedure
July 18-19 Judicial Conference Committee on Codes of Conduct
July 25-27 Workshop for Administrative Managers
July 28-29 Judicial Conference Committee on the Bicentennial of the Constitution
July 29-30 Judicial Conference Committee on the Budget
Aug. 1-5 Orientation Seminar for New Probation/Pretrial Officers

NOTEWORTHY

Marshal properly removed from office; office not "quasi-judicial." The fact that the judiciary benefits from the law enforcement activities of U.S. marshals does not make their office quasi-judicial and limit the President's plenary power to remove them from office, the Third Circuit has held. *Chabal v. Reagan*, 841 F.2d 1216 (3d Cir. 1988). A marshal was removed from office by the President. He brought suit against the United States, President Reagan, the Department of Justice, the U.S. Marshals Service, and several other federal officials. He alleged that the President had removed him in violation of the First and Fifth Amendments and sought declaratory relief, reinstatement, back pay, and damages. After remand from the court of appeals, the district court transferred one of the plaintiff's claims for money damages to the U.S. Claims Court and dismissed the remaining claims for failure to state a claim on which relief can be granted. *Chabal v. Reagan*, 633 F. Supp. 1061 (M.D. Pa. 1986). On appeal, the Third Circuit affirmed, observing that officers exercising purely executive powers are removable at will by the President. The marshal claimed that because marshals provide a variety of services for the judiciary, some of them arguably essential to the functioning of the courts, the office of marshal is not merely executive but quasi-judicial as well, and that this limits the President's removal power. The court of appeals rejected this argument, stating that it "confuses the question of who benefits from the marshals' law enforcement activities with the question of whether those activities involve executive power." 841 F.2d at 1221. The conclusion that Congress has not attempted to restrict the President's removal power is reinforced by Congress's express decision to subject marshals to the supervision and direction of the Attorney General, the court noted.

D.C. Cir. upholds constitutionality of Federal Salary Act. The 1967 act that established the Commission on Executive, Legislative, and Judicial Salaries is constitutional, the D. C. Court of Appeals has ruled. *Humphrey v. Baker*, No. 87-5310 (D.C. Cir. May 31, 1988). The law had been challenged on separation of powers and other grounds by several members of Congress (see *The Third Branch*, May 1987, at 6).

Bureau of Justice Statistics reports comprehensive data on crime. The Justice Department's Bureau of Justice Statistics has released a comprehensive report on crime, *Report to the Nation on Crime and Justice*. According to the report, in 1985 violence or theft touched about one fourth of all American households. A violent crime by strangers or a burglary struck 8 percent of all households in 1985. The chance of being a victim of a violent crime, with or without injury, is greater than that of being hurt in a traffic accident. More than 1.5 percent of the adult population in the United States is under some form of correctional sanction, but three out of four adults under correctional care or custody are not incarcerated. Over the past several years, probation populations have increased by more than 18 percent, compared with about 15 percent in jail and prison populations and nearly 13 percent in the number of parolees. ■

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clarify language in 18 U.S.C. that imposed certain recordkeeping requirements on trial courts. Under 18 U.S.C. § 3553(c), a court must state "the reasons" for its imposition of a particular sentence, and a transcript of every statement of reasons must be prepared and transmitted to the Probation Service and, where a term of imprisonment is imposed, to the Bureau of Prisons. An analysis of S. 2485 provided by Sen. Robert Byrd (D-W.Va.) concluded that the present statutory requirement that transcripts be prepared in every case "places a tremendous burden on court personnel, especially court reporters. The requirement may impede the efficient preparation and transmittal of transcripts in those cases in which transcripts would be valuable . . . ." Thus, under § 311 of the bill, the sentencing court would still be required to state publicly the reasons for imposing a particular sentence, and the statement of reasons would still be transmitted to the appropriate agencies. The amendment would permit the court to determine whether a transcript is the most suitable form of transmittal in a particular case, or if a different form of transmittal is appropriate.

Section 312 of title III would clarify 18 U.S.C. § 3742, *Appellate Review of Sentences*. One provision of § 312 would specify the standard to be applied by the court of appeals in reviewing the district court's determination of mixed questions of law and fact.

Another provision of title III addresses a concern related to the time limits for appeals set forth in Fed. R. App. P. 4(b). Rule 4(b) provides that in a criminal case a defendant has 10 days in which to file an appeal and the government has 30 days. In both cases the time period runs from the entry of the judgment. A defendant who received a light sentence could allow the 10-day period to lapse without filing an appeal, only to find that the government later chose to file an appeal within its 30-day limit. In such a case a defendant would be foreclosed from filing a cross-appeal. The amendment proposed by § 320 would permit either party to start counting the period for filing an appeal on the day an appeal is filed by the opposing party.

• H.R. 2182 passed the House on June 22 and is pending before the Senate Judiciary Committee. One title

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of the bill 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 (see detailed description in *The Third Branch*, August 1987, at 3).

• S. 2455, a bill that would authorize the death penalty in drug-related killings, was passed by the Senate June 10. S. 2455 is based on provisions of two previously introduced bills: S. 2206, Senator Alfonse M. D'Amato's bill to provide the death penalty for the murder of a law enforcement officer and for "drug kingpins" who order the killing of any individual; and S. 2251, the Law Enforcement Officers' Protection Act, introduced by Sen. Pete Wilson (R-Cal.), to provide the death penalty for the killing of any law enforcement officer or corrections officer involved in drug law enforcement (see *The Third Branch*, June 1988, at 2). S. 2455 would provide for the possible imposition of the death penalty on the killers of judges and prosecutors as well as law enforcement and corrections officers.

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice marked up H.R. 4021, the Federal Prison Industries Reform Act of 1988 (see *The Third Branch*, April 1988, at 7). The bill would permit Federal Prison Industries, Inc., to borrow from the Treasury.

• The House Judiciary Committee's Subcommittee on Civil and Constitutional Rights, chaired by Rep. Don Edwards (D-Cal.), held hearings in the inquiry into the conduct of Judge Walter L. Nixon, Jr. (S.D. Miss.). Rep. Peter W. Rodino, Jr. (D-N.J.) had introduced H. Res. 407, calling for the impeachment of Judge Nixon, on Mar. 17, 1988, following certification by the Judicial Conference of the United States that Judge Nixon had engaged in conduct that might constitute grounds for impeachment (see *The Third Branch*, April 1988, at 1). Judge Nixon was convicted of two counts of perjury in the Southern District of Mississippi.

• In the matter of the resolution calling for the impeachment of Judge Alcee L. Hastings, the House Judiciary Committee's Subcommittee on Criminal Justice concluded its hearings. Judge Hastings was found not guilty in 1983 on charges of conspiring to receive a bribe. After an investigation by the Investigating Committee of the Judicial Council of the Eleventh Circuit, the Circuit Judicial Council certified to the Judicial Conference of the United States that Judge Hastings had "engaged in conduct which might constitute grounds for impeachment." The Judicial Conference in March 1987 certified to the Speaker of the House that "consideration of impeachment may be warranted" (see *The Third Branch*, April 1987, at 5).

• H.R. 1212, a bill limiting polygraph use by forbidding private employers to use such tests in preemployment testing of job applicants and setting certain restrictions on the testing of employees, was cleared for signature by the President. H.R. 1212, as passed, incorporated S. 1904 and represents a compromise with the Senate on some issues. The bill does

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Positions Available

Clerk, E.D. Tenn., Knoxville. Salary $54,907-$71,377. Requires minimum 10 years' progressively responsible administrative experience in public service or business, at least 3 in position of substantial management responsibility; thorough understanding of court management. Attorneys in active practice of law in public or private sector may substitute active practice on a year-for-year basis for experience requirement. Education may be substituted for experience on following basis: bachelor's degree for 3 years; postgraduate degree in public, business, or judicial administration for 1 additional year. Law degree may be considered as qualifying for 2 additional years' experience. Law degree, legal practice, and training or experience in judicial administration highly desirable. Send 4 copies of cover letter and resume by Sept. 15 to Chief Judge Thomas G. Hull, Room 221, U.S. Courthouse, 101 Summer St. W., Greeneville, TN 37743.

Chief Deputy Clerk, U.S. Bankruptcy Court, N.D. Ga., Atlanta. Salary from $27,716-$54,907, depending on experience. Serves as office manager; responsible to clerk for administration and supervision of office. Must be high school graduate or equivalent and have 3 years' progressively responsible general experience (administrative, professional, investigative, technical, or other) and 3 years' progressively responsible specialized experience in administrative, supervisory, managerial, or professional work. Open until filled. Submit resume or typed SF171 to Clerk, U.S. Bankruptcy Court, 1340 U.S. Courthouse, 75 Spring Street, S.W. Atlanta, GA 30303, Attention: Linda Cooke, marked "Confidential."

EQUAL OPPORTUNITY
EMPLOYERS

PRETRIAL, from page 3

document can be taken into account in applying the guidelines. For example, if a defendant is convicted of a drug trafficking offense, all evidence of drug sales or usage—such as admissions made during a pretrial services interview or to a probation officer about how heavy the defendant's drug use had been over a certain period of time—could be factored in.

In addition, one of the factors determining the applicable guideline range is the defendant's conviction record as a juvenile or adult. Prior criminal history information volunteered by the defendant but not appearing in official records—such as an admission of a conviction that the probation officer would not otherwise be aware of—could thus conceivably affect the defendant's sentence.

Similarly, Section 4B1.3 of the Sentencing Guidelines, the "criminal livelihood" provision, in essence prohibits probation for an individual convicted of an offense that was part of a "pattern of criminal conduct from which he derived a substantial portion of his income." A defendant's statements about his or her finances made during the pretrial interview could be used in assessing whether this provision applies.

In light of the Sentencing Guidelines, some defense attorneys have advised clients against answering certain pretrial services questions, while others have advised against answering any questions. ■

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not apply to governmental employers or to employers offering security services. In cases involving economic loss, tests could be administered to employees with access to lost property and to those whom the employer reasonably suspects of theft. The bill establishes a civil penalty of up to $10,000 for violations.

• Sen. Rudy Boschwitz (R-Minn.) introduced S. 2428, to amend title VII of the Civil Rights Act of 1964 to prohibit employment discrimination in the legislative or judicial branches of government, which are not covered by the act. The bill is a companion measure to the previously introduced H.R. 4576 (see *The Third Branch*, June 1988, at 2). ■

GUIDELINES, from page 1

governing parole and "good time" credits are severable and thus should apply to defendants sentenced for crimes committed after Nov. 1, 1987.

The Solicitor General's petition also noted that the longer the question of the constitutionality of the guidelines remains unsettled, the greater will be the number of defendants who may have to be resentenced. The Sentencing Commission has estimated that the costs of resentencing to the federal courts, the U.S. Attorneys' offices, counsel appointed under the Criminal Justice Act, the U.S. Marshals Service, and the Probation Service will be millions of dollars. The Solicitor General's petition also noted the impact resentencing hearings will have on district court calendars.

Appeals raising the constitutionality issue have been filed in all of the regional circuit courts of appeals except the First and D.C. Circuits. ■

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Magistrates' and Bankruptcy Judges' Retirement and Survivors Bill Closer to Passage

A bill to provide enhanced retirement and survivors' annuities for bankruptcy judges and magistrates, H.R. 4340, was passed by the House on July 11. The same day, the House amended S. 1630, the Senate version of the bill, to contain the language of H.R. 4340 as passed, and passed S. 1630. The bill will now be taken up by a House-Senate conference.

Two bills to provide enhanced retirement and survivors' annuities were introduced in 1987—H.R. 2586, by Rep. Robert W. Kastenmeier (D-Wis.), and S. 1630, by Sen. Howell T. Heflin (D-Ala.). Representatives of the Judicial Conference of the United States testified at congressional hearings in support of those bills (see *The Third Branch*, December 1987, at 1). The bills as originally introduced would not have required contributions by the bankruptcy judges or magistrates; the House version was later amended to require contributions and reintroduced as H.R. 4340; the Senate version passed in its original form (see *The Third Branch*, April 1988, at 3).

The bill as passed by the House July 11 would require contributions of 3 percent of salary by bankruptcy judges or magistrates; would vest full retirement benefits after 15 years; and would provide that retirement benefits are to equal 100 percent of the bankruptcy judge's or magistrate's salary, but that an individual who leaves office before age 65 has his or her pension reduced by 2 percent per year for each year under 65 he or she was at the time of leaving office. The bill would provide that cost-of-living increases shall not be paid to those retired magistrates and bankruptcy judges who are practicing law and thus not eligible for recall to judicial service. Annuities for retirees with 8-14 years of service would be computed proportionally by dividing the years of service by 14, and would be payable at age 65 for life. The bill would also permit bankruptcy judges and magistrates to participate in the Judicial Survivors' Annuity System (JSAS).

Rep. Kastenmeier, presenting what he termed the "fiscally realistic package" of H.R. 4340, stated that

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Rep. Carlos J. Moorhead (R-Cal.), Chief Judge Charles Clark (5th Cir.), and Chief Justice Rehnquist at a reception at the Supreme Court to mark the signing into law by President Reagan on June 27 of S. 952 (Pub. L. 100-352), giving the Supreme Court more control over its docket through greater discretion in selecting the cases it will review. More photographs on pages 4-5.

Bankruptcy Courts in Three Districts Use Computer-Synthesized Voice System for Calls

Bankruptcy courts in three federal districts are now able to answer telephone inquiries for case information by means of a new computer service, the Voice Case Information System (VCIS), a computer-generated synthesized voice that answers callers' questions. Personnel from the FJC's Innovations and Systems Development Division installed VCIS this summer in the Western District of Washington (which includes Seattle and Takoma), the Western District of New York (which includes Buffalo and Rochester), and the Western District of Texas (which includes San Antonio and Austin).

Callers dial the special VCIS telephone number, using any touch-tone telephone, and enter the name of an individual or organization. Names are entered by pressing the telephone keys that correspond to the letters in the debtor's or party's name. The caller then presses the "pound" key ("#") to indicate that the name has been entered. The voice synthesizer responds a few seconds later with such information as the case number; which chapter of the Bankruptcy Code is the basis for jurisdiction; the debtors' names (and if an adversary proceeding, names of principal adversaries); the debtor's attorney's name, telephone number (if avail-

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able), or city; the trustee's name; the presiding judge's name; the case status; the date and location of the 341 creditor meeting (if available); and the discharge and closing dates. All updates to existing cases are instantaneously available upon entry by court personnel. The system is accessible seven days a week.

VCIS saves staff time and offers an inexpensive way to obtain case information. There is no charge to callers for using the service. The number of calls to the VCIS systems in the Western District of Washington and the Western District of Texas has been averaging over 400 per day. Charles W. Vagner, Clerk of the Western District of Texas, said that use of VCIS has reduced calls for bankruptcy information taken by staff by "more than half," and that the calls the staff has continued to receive are now referred to the new number, so that a further reduction in calls is expected. Lewis P. Stephenson, Bankruptcy Clerk in the Western District of Washington, said, "Thus far the results have been most promising in giving better public access to bankruptcy information. The system has significantly reduced the time spent by the court phone receptionist in anwering these routine calls and allowed a more thorough response to non-routine calls."

VCIS operates as part of the BANCAP software package developed by the Center for use by the bankruptcy courts. BANCAP is part of the Integrated Case Management System (ICMS) developed by the Center. ICMS also includes the CIVIL program, used by the district courts, and NewAIMS, used by the appellate courts. For more information about VCIS, call Michael Greenwood or John Hillenbrand of the Center's Innovations and Systems Development Division at (202) 633-6400.

The Center will further evaluate and refine this service for the remainder of 1988. Over time, VCIS may be made available to other bankruptcy courts installing the BANCAP system.

VCIS is the first of several technologies the Center is evaluating that may improve public access to court information. Future issues of *The Third Branch* will describe the Center's evaluation of other useful technologies such as dial-in access to information, electronic bulletin boards, touch-screen information access by court visitors, and electronic filing of documents. ■

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August 1988

PERSONNEL

CIRCUIT JUDGES

Nominations

John M. Duhe, Jr., 5th Cir., June 28
Jacques L. Wiener, Jr., 5th Cir., June 28

DISTRICT JUDGES

Nominations

Marvin J. Garbis, D. Md., July 6

Appointment

Lowell A. Reed, E.D. Pa., May 6

Senior Status

Daniel H. Huyett III, E.D. Pa., May 1

BANKRUPTCY JUDGE

Appointment

Bernice B. Donald, W.D. Tenn., June 27

MAGISTRATES (FULL-TIME)

Appointment

John W. Primomo, W.D. Tex., July 18
Deborah A. Robinson, D.D.C., July 18

Retirement

Jamie C. Boyd, W.D. Tex., June 30

CALENDAR

Aug. 1-5 Orientation Seminar for New Probation and Pretrial Officers
Aug. 15-17 Workshop for Case Managers
Aug. 15-19 Seminar for Chief Probation and Pretrial Clerks
Aug. 16-19 Ninth Circuit Judicial Conference
Aug. 17-19 Seminar for Magistrates of the Fifth and Eleventh Circuits
Aug. 21-23 Workshop for Problem-Solving
Aug. 22-26 Supervisory Skills Seminar

ABA, Administrative Office's Defender Services Division Hold Death Penalty Conference

A national death penalty resource planning conference, intended to help develop permanent ways of ensuring effective representation in postconviction capital cases, was held recently in Oakland, Cal. The conference was presented by the ABA's Postconviction Death Penalty Representation Project in cooperation with the Administrative Office's Defender Services Division.

Approximately 125 judges, professors, practitioners, and other interested persons from the federal court system and from states with the death penalty shared specific information and guidance on the development, funding, and implementation of death penalty resource centers and other sources of support. The Judicial Conference of the United States has determined that funding can be made available under the Criminal Justice Act to death penalty resource centers that can provide counsel in individual cases, as well as guidance and support to appointed attorneys in death penalty cases.

Judge Stephanie K. Seymour (10th Cir.), Chair of the Defender Services Committee of the Judicial Conference, and Robert D. Raven, President-elect of the ABA, welcomed conferees to the two-day meeting.

Chief Judges Odell Horton (W.D. Tenn.) and Lawrence K. Karlton (E.D. Cal.) and Judge Eugene P. Spellman (S.D. Fla.) participated in a presentation on coordination between the federal judiciary and the state systems and coordination within federal circuits in providing representation to persons sentenced to death.

The conference also included workshops on securing state and private funding; federal funding policies and procedures; building support for death penalty case resources on the state level; and the role of the federal judge. Participants were provided with materials for death penalty resource planning, such as sample resource center proposals, a "model addendum" for use in amending district CJA plans to designate resource centers as community defender organizations, and the grant terms and conditions that death penalty resource centers would be expected to meet in order to receive sustaining grants.

In 1986, a committee of the Judicial Conference began a study of the impact of the projected influx of death penalty cases reaching the postconviction stage in federal courts. In 1987, the Judicial Conference approved changes in the Guidelines for the Administration of the Criminal Justice Act in light of that committee study and of reports of task forces established by the chief judges of the courts of appeals (see *The Third Branch*, January 1988, at 1). The ABA's Postconviction Project was established in 1986 because of the ABA's concern about the growing need for counsel in death penalty cases. ■

Linda Finkelstein, John Hehman Chosen As Circuit Executives

Linda J. Finkelstein has been appointed Circuit Executive for the Court of Appeals for the District of Columbia, and John P. Hehman has been appointed Circuit Executive for the Third Circuit.

Linda J. Finkelstein

Finkelstein previously served as director of the Multi-Door Dispute Resolution Program of the D.C. Superior Court, a program she developed, and as director of that court's Division of Research, Evaluation, and Special Projects. The

John P. Hehman

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Appeals Up, Civil Filings Down, AO Data Show

The AO's Statistical Analysis and Reports Division has released the report *Federal Judicial Workload Statistics—March 1988*, summarizing the workload of the courts for the year ended Mar. 31, 1988. During that period, filings in the 12 regional courts of appeals rose more than 6 percent to 36,871. Much of the increase occurred in appeals of federal and state prisoner petitions, which rose by more than 1,000 cases. Dispositions of appeals rose 5 percent during the year, and terminations of appeals on the merits rose 6 percent.

The number of civil filings in U.S. district courts dropped 2 percent from the previous year, to 236,459 cases, continuing a trend of reduction that began approximately two years ago. For the one-year period, there was a drop in U.S. plaintiff filings for recovery of overpayments of veterans' benefits from 22,925 in 1987 to 15,595 in 1988. Cases involving claims of personal injury product liability decreased by 1,910 filings. Claims for disability insurance and for supplemental security income rose, as did prisoner civil rights suits and Employment Retirement Income Security Act cases. Pending civil cases in the district courts increased by 1 percent for the year. Criminal cases filed in the district courts increased 4 percent.

Bankruptcy petitions filed increased 7 percent, and bankruptcy terminations increased 27 percent.

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, 1520 H St., N.W., Washington, DC 20005.

Blackmun, Harry A. "John Jay and the Federalist Papers." 8 *Pace L. Rev.* 237 (1988).

Bloomenstein, Adam H. "Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure." 21 *Akron L. Rev.* 289 (1988).

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Bucklo, Elaine E. "Can a Party Be Required to Attend Trial?" 14 *Litigation* No. 3 at 33 (Spring 1988).

Coffin, Frank M. "Judicial Balancing: The Protean Scales of Justice." 63 *New York University L. Rev.* 16 (1988).

Cooper, Philip J. *Hard Judicial Choices: Federal District Court Judges and State and Local Officials.* Oxford University Press, 1988.

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DiPippa, John M. A. "Suspending Imposition and Execution of Criminal Sentences: A Study of Judicial and Legislative Confusion." 10 *University of Arkansas at Little Rock L.J.* 367 (1987-88).

Guynes, Randall, and Neal Miller. "Improving Court Productivity: Two New Jersey Experiences." *NIJ Reports*, March/April 1988, at 2.

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Marsel, Robert S. "The Constitutional Jurisprudence of Justice Potter Stewart: Reflections on a Life of Public Service." 55 *Tennessee L. Rev.* 1 (1987).

Mello, Michael. "Facing Death Alone: The Post-Conviction Attorney Crisis on Death Row." 37 *American University L. Rev.* 513 (1988).

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Mikva, Abner J. "Jumping at Constitutional Questions Is Risky Business." 14 *Litigation* No. 3 at 5 (Spring 1988).

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"chances of the measure . . . [to] be enacted would be enhanced," and that because the Senate-passed version contained the originally introduced formula, "any compromise in conference would be even more generous" than H.R. 4340.

The following measures pending before Congress are also of interest to the judiciary.

• The Senate passed S. 11, which would authorize judicial review of decisions of the Administrator of the Veterans Administration on claims for benefits and would repeal the prohibition on fees in excess of $10 for attorneys representing veterans in benefit claim cases. A separate bill passed the same day by the Senate, S. 533, would establish a Cabinet-level Department of Veterans Affairs.

• Sen. Howell Heflin (D-Ala.) introduced S. 2601, a bill to amend 28 U.S.C. § 371 to allow a federal judge who is at least 60 years of age and has completed 20 years of service to take senior status. Sens. Dennis DeConcini (D-Ariz.), Edward M. Kennedy (D-Mass.), and Arlen Specter (R-Pa.) are cosponsors of the bill. S. 2601 would permit election of senior status by a judge between the ages of 60 and 65 if the judge's age and years of service equal 80. Sen. Heflin said that his bill would be "more equitable for those judges who enter judicial service at an earlier age." A similar measure, H.R. 3726, has been introduced in the House (see *The Third Branch*, February 1988, at 7).

• The House Judiciary Committee July 26 ordered reported H. Res. 499, impeaching Judge Alcee L. Hastings (S.D. Fla.). The full House is scheduled to consider the resolution on Aug. 3.

• H.R. 4842, an anti-drug bill, was introduced by Rep. Robert Michel (R-Ill.). The bill also contains provisions that would abolish diversity jurisdiction and enlarge the rule of *U.S. v. Leon*, 468 U.S. 897 (1984), to warrantless searches. *Leon* established a "good faith" exception to the Fourth Amendment exclusionary rule where police act in objective good faith and in reliance on a warrant. H.R. 4807, the renumbered "clean bill" based on H.R. 3152, also contains provisions that would essentially abolish diversity jurisdiction (see *The Third Branch*, June 1988, at 2).

• The Subcommittee on Public Buildings and Grounds of the House Public Works Committee held a hearing on S. 1934, the bill that would provide for construction of an office building for federal judicial agencies and retired Supreme Court Justices in Washington, D.C. The subcommittee approved S. 1934, as amended, for full committee action. S. 1934 has already passed in the Senate (see *The Third Branch*, July 1988, at 5).

• A House committee approved H.R. 1115, a bill to establish a federal standard in products liability cases.■

The Supreme Court hosted a reception for legislators and other guests at the Court to mark the signing into law by President Reagan on June 27 of S. 952 (Pub. L. 100-352), an act giving the Court greater discretion in selecting the cases it will review by eliminating mandatory review in several areas (see *The Third Branch*, May 1988, at 6). Among those in attendance were (from left) ABA President Robert MacCrate; Justice Antonin Scalia; Justice Lewis F. Powell (ret.); Sen. Howell Heflin (D-Ala.); Chief Justice William H. Rehnquist; Sen. Dennis DeConcini (D-Ariz.); Justice Anthony Kennedy; Rep. Robert Kastenmeier (D-Wis.); Justice John Paul Stephens; and Rep. Carlos Moorhead (R-Cal.). Chief Justice Rehnquist had previously described the bill's passage as "the primary legislative goal of the Court" (see *The Third Branch*, July 1988, at 5).

Rep. Robert Kastenmeier (D-Wis.), Chairman of the House Judiciary Committee's Subcommittee on Courts, Civil Liberties and the Administration of Justice, and Sen. Howell Heflin (D-Ala.), Chairman of the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice, principal cosponsors of the bill that became Pub. L. 100-352, at the reception.

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NOTEWORTHY

Rule 16 does not authorize court to require represented parties to appear at settlement conferences, Seventh Circuit says. Fed. R. Civ. P. 16(f) does not provide the authority for a district court to order represented parties to appear at settlement conferences, the Seventh Circuit held recently. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, No. 86-3118 (7th Cir. June 13, 1988). Both the magistrate and the district court found authority in rule 16 to order defendant Oat to send someone other than its counsel to the conference. Oat sent its attorney to the settlement conference, but he had authority to settle only if Oat would not be required to pay money as a condition of settlement. The magistrate conducting the settlement conference decided that Oat had violated his order that each party be represented at the conference by counsel *and* by a representative having full authority to settle. The magistrate sanctioned Oat under rule 16(f), and after a hearing ordered Oat to pay the expenses incurred by other parties in attending the conference, including attorneys' fees. Oat asked the district court to reconsider the magistrate's order. The district court upheld the sanctions, reasoning that it needed the ability to conduct productive settlement conferences to manage its caseload effectively, and that settlement conferences without the parties present are not productive. *G. Heileman Brewing Co. v. Joseph Oat Corp.*, 107 F.R.D. 275 (W.D. Wis. 1985).

On appeal, the Seventh Circuit noted that "Rule 16(f) does not state that the court may actually order a represented party to appear. Rule 16(a), however, specifically addresses who the district court may order to appear. Rule 16(a) states that those people are attorneys and unrepresented parties. . . . But nothing in Rule 16(f) specifically authorizes a district court to order a represented party to appear at a settlement conference." The Seventh Circuit said that this result was "consistent with other cases from this circuit indicating that Rule 16's specific language limits a court's authority over pretrial proceedings," including *Strandell v. Jackson County*, 838 F.2d 884 (7th Cir. 1988), which held that district courts do not have the authority to order litigants or their attorneys to participate in summary jury trials (see *The Third Branch*, March 1988, at 3).

Court may require parties to participate in summary jury trial, M.D. Fla. rules. A district court in the Middle District of Florida has held that it is within the court's powers under the Federal Rules of Civil Procedure and Article III of the Constitution to require parties to participate in a summary jury trial. *Arabian American Oil Co. v. Scarfone*, 119 F.R.D. 448 (M.D. Fla. Apr. 4, 1988). Defendants, in support of their motion to be excused from participation in the summary jury trial, cited the Seventh Circuit's *Strandell* decision (see item above). One defendant also stated that he lived and worked abroad and that it would be very expensive for him to attend the summary jury trial. The court did not find *Strandell* persuasive; it noted that the district has a backlog of cases awaiting trial and has used the summary jury trial device since 1985. The summary jury trial would take two days, while the parties had estimated that the actual trial of the case would require seven weeks. The court pointed to Fed. R. Civ. P. 16 as one basis for summary jury trials, noted that Fed. R. Civ. P. 1 requires courts to secure to litigants just, speedy, and inexpensive determination of their claims, and stressed the court's inherent authority under Article III to perform the task of administering justice. Moreover, the court noted, if the summary jury trial does not lead to settlement, the parties are still entitled to all of their substantive rights, including the right to a binding trial. The court left open the possibility that defendants could be excused from participating in the summary jury trial due to inability to appear for financial reasons, saying that such reasons should be addressed by the magistrate before whom the summary trial was scheduled.

At least one other district court, also disagreeing with *Strandell*, has upheld a requirement that parties participate in a summary jury trial. *Williams v. Hall*, No. 84-149 (E.D. Ky. Apr. 5, 1988) (discussed in *The Third Branch*, June 1988, at 2).

Successor judge must retry case when previous judge had not yet made findings of fact and conclusions of law. Where a district judge recused himself before making findings of fact or issuing any rulings, the successor judge could not make necessary credibility determinations and therefore was required to retry the case, the Eleventh Circuit has held. *Emerson Electric Co. v. General Electric Co.*, 846 F.2d 1324 (11th Cir. 1988). In a contract action, the district judge conducted a bench trial and took the case under submission. Before making any findings of fact or issuing any rulings, the judge recused himself because he owned stock in one of the parties. The case was reassigned to a different judge, who issued a memorandum opinion and entered judgment in favor of Emerson on the basis of the trial transcript. General Electric filed a motion for new trial or, in the alternative, to alter or amend the judgment, asserting that the district court had been required to resolve an issue of credibility without having had the opportunity to observe the demeanor of witnesses. The district court denied the motion, and General Electric appealed.

The Eleventh Circuit discussed Fed. R. Civ. P. 63, which does not explicitly cover instances in which the presiding judge recuses himself before filing findings of fact and conclusions of law. Courts have, however read into rule 63 the inference that if the presiding judge in a civil case has

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yet to issue findings of fact and conclusions of law, a successor judge must retry the case, the court noted. Two exceptions to this interpretation have developed: where all parties consent to the successor judge's making findings of fact and conclusions of law based on the trial transcript; and where the trial transcript serves essentially as "supporting affidavits" for summary judgment purposes and no credibility determinations are required. Since both parties had not consented to resolution based on the transcript, and credibility determinations were required, the case must be retried, the Eleventh Circuit held.

Judge not present during trial may impose sentence where sufficient familiarity with trial existed. A judge who was not present during the trial and who had been unable to review the trial transcript prior to sentencing could nonetheless impose sentence in a complex criminal case where he was sufficiently familiar with the trial, the Eleventh Circuit has held. *U.S. v. Caraza,* 843 F.2d 432 (11th Cir. 1988). Defendants were convicted of violating federal drug laws. They were sentenced by a judge other than the one who presided over the trial. At the time of the sentencing hearing, the trial transcript was unavailable. On appeal, defendants argued that a judge who was not present during the trial of a complex case may not impose sentence without first having read the trial transcript. The court of appeals noted that the sentencing judge was quite familiar with the trial. He had ruled on numerous pretrial motions while the case was pending before him. He met with the presiding judge to discuss the trial during its progression. The district court's order noted that the sentencing judge would consult with the presiding judge before the imposition of sentence. The Eleventh Circuit distinguished the case relied on by the appellants, in which the record disclosed nothing to indicate that the sentencing judge had familiarized himself with the trial. In the instant case, there was "ample evidence that [the sentencing judge] was familiar enough with the trial to impose sentence," the court held. 843 F.2d at 437.

Magistrate may preside over jury selection, Second Circuit holds. It is permissible for a magistrate to preside over jury selection in a felony trial, the Second Circuit has held, thus reaching a conclusion different from that of the Fifth Circuit. *U.S. v. Garcia,* No. 87-1243 (2d Cir. June 1, 1988); *contra, U.S. v. Ford,* 824 F.2d 1430 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 741 (1988) (see *The Third Branch,* October 1987, at 2). A magistrate presided over jury selection, and a trial of defendants was held before a district judge on various narcotics charges. On appeal, defendants argued that 28 U.S.C. § 636 precludes the delegation of jury selection to a magistrate, and that such a delegation contravenes Article III of the Constitution. The court of appeals rejected these arguments. Jury selection delegation is within the scope of 28 U.S.C. § 636(b)(3) and is consistent with the Federal Magistrates Act, and such delegation is permissible even absent a defendant's consent, the Second Circuit held. Moreover, such a delegation does not violate Article III where the district court affords de novo review of unsustained challenges to jurors for cause. ■

EXECUTIVES, from page 3

Multi-Door Dispute Resolution program offers a variety of alternatives to litigation and is a national model project of the ABA. Finkelstein was also involved in other dispute resolution programs at the D.C. Superior Court, including Settlement Week. She has also worked at the White House, the U.S. Department of Education, and the Office of Personnel Management. She is a graduate of Simmons College and did graduate work at Boston College.

Hehman had served as Clerk of the Court of Appeals for the Sixth Circuit since 1974. He is a graduate of the U.S. Air Force Academy and Salmon P. Chase College of Law, and a fellow of the Institute for Court Management. He has served on the Board of Directors of the American Judicature Society and as a member of the Advisory Council of the Institute for Court Management. He chaired the U.S. Appellate Courts Clerks' Standing Committee, chaired the New AIMS users group, and has served as a member of the Steering Council of the Federal Court Clerks Association. ■

SOURCE, from page 5

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Positions Available

Clerk of U.S. Bankruptcy Court, D-Vt., Rutland. Starting salary to $46,679. Appointed pursuant to 28 U.S.C. § 156. Requires bachelor's degree; graduate degree in public or business administration or law desirable. Must possess executive ability demonstrated by progressively responsible administrative experience. Starting date Nov. 1, 1988. Submit cover letter addressing scope of the applicant's managerial achievement, and resume (in triplicate, showing size of current organization's budget, and number and composition of personnel) by Aug. 31, 1988, to Selection Committee, c/o Hon. Francis G. Conrad, U.S. Bankruptcy Court, P.O. Box 6648, Rutland, Vt 05701-6648.

Special Master, U.S. Claims Court, Washington, DC. Salary $54,907 to $72,500 (subject to funding; statute under which work is to be performed becomes effective Oct. 1, 1988). Special master to serve as adjunct to the court under the National Childhood Vaccine Injury Act of 1986. Must be member of bar with at least 5 years' active practice of law; time spent as a judge, judicial law clerk, attorney for federal or state agency, and other qualifying legal experience may count toward the 5 years. Send resume to Gary Golkiewicz, Esq., Chief of Staff, U.S. Claims Court, 717 Madison Place, N.W., Washington, DC 20005.

Clerk/Court Executive Officer, N.D. Cal. Entry level salary $64,397 per year. Provides all administrative support services required by the court; supervises a staff of 107 employees and provides support services to over 300 judicial officers and staff. Must have 10 or more years' progressively responsible management experience, thorough understanding of automation concepts and applications, and undergraduate degree, preferably in public or business administration or related area; law degree or graduate degree in court or public administration desirable and may be substituted for 2 years of the required experience. To obtain application write to William L. Whittaker, Clerk, U.S. District Court, 450 Golden Gate Ave., San Francisco, CA 94102 (415) 556-2338. Applications must be received by Sept. 15, 1988; incumbent to retire in March 1989.

Chief Deputy Clerk, U.S. Court of Appeals, Sixth Cir. Salary $27,716 to $54,907. Requirements: 6 years' progressively responsible managerial or administrative experience, law degree from accredited law school; degree in public, business, or judicial administration or in law may be partially substituted for the required experience. Send resume with cover letter by Sept. 1, 1988, to Leonard Green, Clerk, 538 USPO & Courthouse Building, Cincinnati, OH 45202. Open until filled.

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THE THIRD BRANCH

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Retired Chief Justice Warren Burger Reflects on Developments in the Judiciary During His Tenure

Warren E. Burger was appointed Chief Justice of the United States by President Nixon in 1969. He retired from the position in 1986 to serve full time as Chairman of the Commission on the Bicentennial of the U.S. Constitution. In the following interview, he discusses some of the changes in the federal judiciary during his years in service, accomplishments in the field of judicial administration, and unfinished items on his agenda for the courts.

One hallmark of your tenure as Chief Justice was your sustained attention to the administrative aspects of the judicial system—State and Federal. Were the changes you sponsored starting in 1969 part of a program that you had in mind before you became Chief Justice or did they evolve as you went along?

I can't say that I had any preconceived plan because my appointment came as a total surprise. But I was convinced that the system was not working as well as it should. I'd been saying that as early as 1957 when I spoke at the New York University Law School about "The Courts on Trial." And I had been a close friend of Warren Olney since we served together in the Justice Department. When he was Director of the Administrative Office of the Courts, I worked with him on some of the projects he began to sponsor such as experimenting with seminars for new judges.

My view of the system and its needs also came from observations in private practice and the cases I argued in various circuits over the years. Then, while on the D.C. Court of Appeals, I sat as a visiting judge in a number of circuits. That gave me a valuable opportunity to see how our system was working.

Warren E. Burger

But didn't you bring a series of specific proposals to the American Bar Association meeting in Dallas a few weeks after your appointment?

Yes, and we should be grateful for the ABA's work. It immediately acted on those proposals and others later on.

What were those 1969 proposals?

One was to create an organization to train court administrators. In 1969 there was only a handful of people in the country that could be considered professional and qualified court administrators. And they were self-trained; there were no training facilities. I put the question to the Institute of Judicial Administration breakfast meeting —"Court Administrators: Where Would We Find Them?"—and proposed creation of the Institute for Court Management. Bernard Segal, the ABA's incoming President, got the corporation organized within 90 days. Former Attorney General Herbert Brownell became Chairman of the Institute and the Institute sessions began in Denver with a full-time, one-year program funded largely by L.E.A.A. and foundation grants—including the American Bar Association, the American Judicature Society, and the Institute of Judicial Administration. The upshot is that today hundreds of ICM graduates are working in the courts—mostly

See BURGER, page 5

Center to Conduct Time Study of Bankruptcy Judges' Work

Acting on a request from the Committee on the Administration of the Bankruptcy System of the Judicial Conference of the United States, the Federal Judicial Center will conduct a thorough study of the work of bankruptcy judges. The purpose of the study is to improve the formula for determining the required number of bankruptcy judgeships.

Every bankruptcy judge will be asked to keep careful records of work day activities, using special diary forms supplied by the Center for that purpose. Both case-related and non-case-related time will be recorded, so that the full range of judicial activity can be described.

The study will be conducted in five waves of 10 weeks each, with approximately one-fifth of the judges being asked to participate in each wave. Multi-judge courts will be represented in several waves. The first wave of the study is scheduled to begin in the second week of October, with requests for participation going out approximately one month earlier. The starting dates for the second through the fifth waves are Dec. 26, Mar. 6, May 15, and July 31.

By collecting information over an entire year, and by having each region

See TIME STUDY, page 11

Inside . . .

LEGISLATION

The following measures before Congress are of interest to the judiciary.

• The House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice held a hearing on a number of bills to revise the geographical or organizational configuration of individual judicial districts; on H.R. 3726, a proposal to revise the "rule of eighty" applied to eligibility for senior judge status; and on bills that would establish a Federal Courts Study Commission.

Chief Judge Alexander Harvey II (D. Md.) and Judge Edward R. Becker (3d Cir.) testified on behalf of the Judicial Conference at the hearing, and addressed the relevant statutory provisions of title 28 and Judicial Conference policies. The proposed changes in the configuration of individual judicial districts would affect the Districts of N.J., W.D. Ky., Md., M.D. Fla., S.D. Fla., and E.D. Pa., and ranged in scope from the addition of a statutorily designated location for the holding of court in a given district to the creation of a new division. Judges Harvey and Becker's testimony pointed out that statutorily designating a community in 28 U.S.C. §§ 81-131 is not a necessary prerequisite to a court's sitting in a community, but is a prerequisite to building a courthouse there or leasing commercial space for courtrooms, chambers, and offices. Noting that there are currently "dozens of courthouses that are utilized less than 30 days per year," the judges pointed out the costs of building unnecessary courthouses and leasing unneeded commercial space, which can be avoided by not "statutorily designating" a community unless there is "strong evidence of a great deal of court work to be done there." They summarized the Judicial Conference's policies on changing districts' configurations, and noted that the Conference has a "general record" of approval of consolidation of district court divisions and of reduction of numbers of places of holding court.

H.R. 3726 would permit federal judges between ages 60 and 64 to take senior status if they have been on the bench for 20 years or more. The Judicial Conference has long supported the concept embodied in the bill. A similar bill, S. 2601, is pending in the Senate. Judges Harvey and Becker testified that H.R. 3726 would encourage younger people to accept judgeships and to remain on the bench, and would augment the federal judiciary by creating a small group of federal judges who could take senior status from one to five years earlier than is currently allowed. (A judge's assumption of senior status creates a vacancy in the judgeship for which the President may nominate a successor.) H.R. 3726 would affect only eligibility for senior status under 28 U.S.C. § 371(b), and would not change current law that applies to a retirement from office under 28 U.S.C. § 371(a).

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Center Releases Bankruptcy Mediation Report

Alternative Dispute Resolution in a Bankruptcy Court: The Mediation Program in the Southern District of California, by Steven Hartwell of the University of San Diego School of Law and Gordon Bermant of the Center's Research Division, is now available. The publication reports on California Southern's mediation program for adversary proceedings and contested matters, which was established in 1986.

The authors describe and analyze the program as it developed through the assignment of its first 80 adversary proceedings to mediation. The report is based on interviews with 26 participants in the program and on study of the case files, which the authors describe and from which they draw inferences.

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 (8 oz.), but do not send an envelope.

AO Task Force Revises Bankruptcy Forms

The Administrative Office has released two new manuals containing procedural forms issued under the authority of Bankruptcy Rule 9009, instructions for using the forms, and other bankruptcy-related materials. Volume I, *Forms and Instructions for the Courts*, is designed for court use. Volume II, *Forms and Instructions for the Public*, an abridged version of Volume I, is designed to assist the general public.

Volume I contains copies of the Official Bankruptcy Forms promulgated by the Judicial Conference, statistical reporting forms that the bankruptcy clerks submit to the AO, internal clerk's office forms, procedural forms issued under Bankruptcy Rule 9009, and other materials. Volume II is intended to be kept at the intake counter so that it may be consulted and photocopied by the public. Instructions are provided for each form, tailored to meet the needs of the expected users. Frequent citations are made to the applicable Bankruptcy Rules and Bankruptcy Code sections. Procedural hints are offered where appropriate. Both volumes contain indices with extensive cross-references.

The revised forms are the product of a special task force of bankruptcy judges and clerks and AO staff, chaired by Peter G. McCabe, Assistant Director for Program Management of the AO. J. Ted Donovan, Assistant Chief of the Bankruptcy Division, edited the forms and prepared the instructions with the assistance of visiting estate administrators.

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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.

District Court in District of Columbia Using Touch-Screen Computer to Inform Court Visitors

A touch-screen system that allows court visitors to obtain information from the computer system maintained by the court was installed in the District Court for the District of Columbia earlier this summer by Federal Judicial Center personnel. The system is part of a pilot program of testing technologies that also includes the computer-synthesized voice system being used in three bankruptcy courts (see *The Third Branch*, August 1988, at 1), and a project allowing computer users to dial in for access to information.

The touch-screen system consists of a screen attached to a personal computer that contains a copy of the court's database. The screen is divided into zones and displays some graphics. Visitors touch the portion of the screen display offering the desired information, and the next screenful of information appears in response to the touch. A visitor knowing a case number can quickly access the short title of the case, the cause of action, the nature of the suit, the judge's name, the filing date, the case's termination date, and the reopening date. A visitor who knows only the name of a party can enter that name into the system, which will then display an indexed list of all parties, giving the role in the case of that party and the case number. The inquirer will then be able to access case information. The touch-screen system is designed for use by members of the public who may not have much experience in requesting information from the courts. It is located in the public area of the clerk's office.

"Everybody who has used the system likes it," according to Civil New Case Clerk Yvonne Estrada-Perez. "Attorneys who have computers themselves like the fact that the courts are coming around to the type of technology they have."

Persons who would like more information about the touch-screen system may contact Mike Greenwood or Robert Borochoff of the Center's Innovations & Systems Development Division, (202) 633-6400.

Yvonne Estrada-Perez, Civil New Case Clerk (left), and Mary Thomas, secretary to Clerk of Court James F. Davey, inspect the touch-screen system in use in D.D.C.

Ninth Circuit Holds Sentencing Guidelines Unconstitutional

The Ninth Circuit has affirmed two lower court holdings that the Sentencing Guidelines are unconstitutional on separation of powers grounds because the Sentencing Reform Act places the Commission in the judicial branch and requires that three Article III judges serve as members of the seven-person Sentencing Commission that drafted the guidelines. *Gubiensio-Ortiz v. Kanahele*, No. 88-5848 (9th Cir. Aug. 23, 1988). The Supreme Court has already granted certiorari before judgment in a district court case raising the constitutionality issue, and will hear arguments in that case Oct. 5 (see *The Third Branch*, July 1988, at 1).

ABA Discusses Resolutions on Federal Court Issues at Annual Meeting Held in Toronto

Several issues relating to the federal courts were discussed at this year's annual meeting of the American Bar Association, held last month in Toronto, Canada. Some resolutions presented in the House of Delegates and actions taken thereon are listed below.

Changes to 28 U.S.C. Three major resolutions to change 28 U.S.C., all from the Committee on Federal Judicial Improvements, were submitted to the House of Delegates. One was a resolution requiring certification by a district court that a judgment or order is a final decision (except for taxation of costs and enforcement proceedings). This resolution was sent back to the Committee for reconsideration.

The second resolution, which was withdrawn, would have modified the definition of corporate citizenship for diversity jurisdiction purposes; included in this second proposal was a proviso that the citizenship of a legal representative of an estate of a decedent, an infant, or an incompetent must be deemed to be in the home state of the decedent, the infant, or the incompetent. These changes are part of a bill pending in Congress, H.R. 4807. (The last ABA action on diversity jurisdiction was taken in 1987, when the House approved a recommendation to increase the amount in controversy requirement to $50,000.)

A third resolution recommended that Congress create a new multiparty, multiclaim jurisdiction in diversity of citizenship cases. This was also referred back to the Committee.

Resolutions from Criminal Justice Section. The Criminal Justice Section submitted several resolutions for ABA endorsement. One related to electronically monitored home confinement. This resolution recommended that three conditions be met when such a sentence is imposed: (1) that the judge find, on the record, that such electronically monitored home confinement is the least restrictive alternative that can be imposed consistent with the protection of the public and the gravity of the offense; (2) that the judge or a probation office not automatically require electronic monitoring as a condition of probation; and (3) that an individual's abil-

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PERSONNEL

CIRCUIT JUDGES

Nominations
Guy G. Hurlbutt, 9th Cir., Aug. 11

Appointment
David M. Ebel, 10th Cir., Apr. 20

DISTRICT JUDGES

Nominations
Robert Leon Jordan, E.D. Tenn, July 25
D. Brooks Smith, W.D. Pa., July 28
Jay C. Waldman, E.D. Pa., Aug. 3

Confirmations
Jan E. Dubois, E.D. Pa., July 26
Karl S. Forester, E.D. Ky., July 26
Fern M. Smith, N.D. Cal., July 26
Herbert J. Hutton, E.D. Pa., Aug. 11
Simeon Timothy Lake III, S.D. Tex., Aug. 11

Appointments
George M. Marovich, N.D. Ill., April 1
Kimba M. Wood, S.D.N.Y., Apr. 20
David A. Ezra, D. Haw., May 20
John C. Lifland, D.N.J., May 20
William G. Cambridge, D. Neb., June 6
Richard A. Schell, E.D. Tex., June 6
Karl S. Forester, E.D. Ky., July 27

Senior Status
William R. Collinson, W.D. Mo., Apr. 1
Hiram H. Ward, M.D.N.C., Aug. 19

Resignation
Gabrielle K. McDonald, S.D. Tex., Aug. 14

Nomination Withdrawn
Robert Roberto, Jr., E.D.N.Y., July 26

BANKRUPTCY JUDGES

Appointments
Walter Shapero, E.D. Mich., July 15
David F. Snow, N.D. Ohio, July 25
Lionel H. Silberman, M.D. Fla., July 27
James R. Grube, N.D. Cal., Aug. 12

Elevations
Irvin N. Hoyt, Chief Bankruptcy Judge, D.S.D., July 1

U.S. MAGISTRATES (FULL-TIME)

Resignation
Richard H. Ralston, W.D. Mo., Aug. 1

AO to Update Work Measurement Formulas

In light of significant changes in the work performed by court staff, the Budget Committee of the Judicial Conference has asked the AO's Office of Planning and Evaluation to give priority to updating the work measurement formulas that are used in allocating positions to the clerks, probation, and pretrial services offices and in making budget projections and allocating resources. Accordingly, beginning in January 1989, that office will initiate a three-year project to reevaluate the current staffing formulas.

Approximately 13,800 positions in the budget projection for the judiciary for fiscal 1989 are based on work measurement formulas. Several of the formulas have not been significantly altered since the early 1980s. In the meantime, factors such as varying local rules and management practices, workload changes, introduction of automation, and new legislation and Judicial Conference mandates have had an impact on the processes and levels of effort required of court personnel. There has been growing concern within the judiciary regarding the present formulas, and Congress has expressed concern about their accuracy and credibility.

The three-year formula reevaluation project will be conducted by AO staff, court personnel, and contractors, using advisory committees, questionnaires, and on-site visits to selected courts. ■

Positions Available

Librarian, Supreme Court of the United States. The librarian is responsible for the management of the Supreme Court Library. Responsibilities include general supervision of 22 employees, management of a collection of approximately 250,000 volumes, budgeting, procurement, space planning, and management of automated information systems. Law degree and advanced degree in library science preferred. A minimum of 6 years of progressively more responsible law library experience is required. Management experience, competence with automated information systems, strong interpersonal skills, and budgeting experience are all required. Salary commensurate with qualifications and experience. Closing date Oct. 14, 1988. Send SF 171 to Personnel Office, Supreme Court of the United States, Room 3, Washington, DC 20543. Tel. 202/479-3404.

Clerk of Bankruptcy Court, S.D.N.Y. Salary $46,679-$72,500. Requires minimum of 10 years' progressively responsible administrative experience, at least three in a position of substantial management responsibility. The active practice of law may be substituted on a year-for-year basis for experience. Education may be substituted as follows: bachelor's degree equals 3 years; postgraduate degree in public, business, or judicial administration equals 1 additional year; law degree may be considered as qualifying for 2 additional years. Law degree, legal practice, and training or experience in judicial administration are highly desirable. Send 3 copies of cover letter and resume by Oct. 7 to Chief Bankruptcy Judge Burton R. Lifland, U.S. Custom House, One Bowling Green, New York, NY 10004-1408.

Chief Deputy Clerk, W.D. Wash. Salary $39,501-$54,907. Responsible to the Clerk for the supervision and management of 40 court employees. Must possess bachelor's degree and minimum of six years' administrative or supervisory experience in business or a public organization, three years of which must have been progressively responsible, culminating in a responsible management position, preferably in a federal, state, county, or local court. Favorable consideration given to automation experience and to advanced degree in management, law, public administration, or criminal justice. Send comprehensive resume and cover letter, thoroughly specifying work experience, education, skills, abilities, accomplishments, and salary progression to Mrs. F.D. Fields, Chief Deputy Clerk, U.S. District Court, 308 U.S. Courthouse, Seattle, WA 98104. Applications must be received by Sept. 23, 1988.

Supervisory Deputy Clerk, Court of Ap-

EQUAL OPPORTUNITY EMPLOYERS

BURGER, from page 1

in the state courts, since there are only about 18 Federal Circuit and District Court positions. We need at least 40.

Did you think the Federal Courts also needed court administrators?

Definitely. We really need about 40. Congress authorized 11 Circuit Executives in 1971. Initially we tried to get Congress to provide similar positions for all metropolitan district courts, but that was not done. Later Congress gave us six such positions, on a temporary basis. Every district having more than eight or ten judges needs an administrator to keep things moving. The problems in the large districts like New York, Los Angeles, Atlanta, or Chicago are very different from those in the smaller districts of Minnesota or Kansas. Court administrators deal essentially with "traffic management" problems.

What were the State–Federal Councils that began in 1969?

At the 1969 ABA Annual Meeting I spoke to the Conference of Chief Justices and asked each State Chief Judge to meet with the ranking Federal judge in each state to create a small, informal group to iron out tensions between the two systems—for example coordinating trial calendars and jury calls. These councils were especially important for the large states. There are about 35 such councils now, and new methods of cooperation have also developed.

Weren't prisons on your 1969 agenda at the ABA?

Yes, and the Association created a commission of lawyers and members of other professions—Dr. Karl Menninger of the famous Menninger Clinics, for example. Chief Justice Hughes of New Jersey was the first Chairman, and they came up with some valuable proposals. Part of the value was developing a national interest.

You've had a long-standing interest in prisons, haven't you?

I've said for 30 years that it makes no sense to put people in prison and not train them to do something constructive—and make them better human beings while there and when they get out. We need "factories with fences," not human warehouses. We need to train them in some marketable skills. Also that every prison should have a grievance procedure along the lines that labor unions have to resolve prisoner complaints. When this was done there was a sharp drop in Federal cases on minor grievances.

"I've said for 30 years that it makes no sense to put people in prison and not train them to do something constructive."

What are some of the other changes you urged?

I think it would be more beneficial to talk about the failures I encountered—what still needs to be done.

We can get to those, but what about the accomplishments?

The National Center for State Courts, like the Institute for Court Management, was long overdue. Now that the State Justice Institute is in place, it will also provide assistance to the state courts.

Why were you concerned with the state courts?

That is where more than 90 percent of all litigation arises. The State and Federal Courts are simply different pews in the same church. I first came to see the need in 1957 when I was involved in helping develop an idea conceived by then Justice Fred Hamley of the Supreme Court of Washington (later on the Ninth Circuit Court of Appeals) and Russell Niles, Dean of the New York University Law School. I worked on the faculty of the New York University Seminar for Appellate Judges from 1957 to 1969 and learned from the State Supreme Court Justices some of their problems.

How did the National Center for State Courts come about?

In 1971 we convened a Conference on the Judiciary at Williamsburg and there proposed that the Center be created along the lines of the Federal Judicial Center. The National Center for State Courts now has a $4-5 million headquarters at Williamsburg and has made enormous contributions to improving the work of the State Courts. That conference was developed by a team that included Justice Tom Clark, Justice Paul Reardon of the Supreme Judicial Court of Massachusetts and Justice Louis Burke of the Supreme Court of California.

What else?

I think we made some progress, at least in some districts, in countering this idea that any new lawyer can walk out of a law school with a degree, pass the state bar exam, and then walk into any federal court in the country and be admitted, very often engaging in on-the-job training at the expense of their clients and the system as a whole. The Judicial Conference created a special committee chaired by Judge Edward Devitt made up of trial judges, lawyers with trial experience, and law teachers which studied that whole problem. Because of their work, at least in some of the courts, new lawyers must show they have a basic knowledge of the Federal procedural rules and the rules of evidence. Every Federal court should require some kind of minimal examination for admission.

"I would say . . . that—more so now than 20 years ago—judges and lawyers tend to view the judicial process as a system, and to realize that we all have an obligation to the consumers of our legal system and the taxpayers who support it."

What were other projects?

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NOTEWORTHY

ABA Committee role in judicial selection not subject to Federal Advisory Committee Act, D.D.C. holds. The District Court for the District of Columbia has held that although the ABA Standing Committee on the Federal Judiciary is an advisory committee "utilized" by the Department of Justice within the meaning of the Federal Advisory Committee Act (FACA), 5 U.S.C. App. II, that act cannot be applied to the ABA Committee without violating the separation of presidential and Congressional powers specified in Article II of the Constitution. *Washington Legal Found. v. Department of Justice* (D.D.C. Aug. 4, 1988). The plaintiff, Washington Legal Foundation, and plaintiff-intervenor Public Citizen sought a declaratory judgment that the Department of Justice's use of the 14-member ABA committee for evaluations of the qualifications of judicial nominees violates FACA. The plaintiffs requested that if the Department of Justice continued to solicit advice from the ABA Committee, that the Department be enjoined to comply with FACA requirements such as filing an advisory committee charter, providing advance public notice of committee meetings, opening meetings to the public, assigning a federal official to attend all meetings, maintaining and providing public access to the committee's records, and having a "fairly balanced" membership in terms of points of view.

The Department of Justice has relied on the ABA Committee's investigation and evaluation of the professional qualifications of potential nominees for federal judgeships since 1952, the court noted. It held that the ABA committee's "historically lengthy, direct, and significant relationship with DOJ in the evaluation process" supports the conclusion that the committee falls within Congress's definition of "advisory committee" as that term is used in FACA. The court analyzed the roles in the nomination, confirmation, and appointment processes as provided for in Article II of the Constitution and held that "Congress cannot impose FACA in this case because of the specific limitations on the role of the legislature as expressed in Article II." The application of FACA to the ABA Committee "would potentially inhibit the President's freedom to investigate, to be informed, to evaluate and to consult during the nomination process," the court said. Moreover, the purpose furthered by FACA—public accountability—is satisfied through the confirmation proceedings, where the Senate Judiciary Committee has the opportunity to question a representative from the ABA committee and to request additional information, and in which other groups and individuals have an opportunity to present views different from those of the ABA committee. Thus, "no overriding congressional interest has been demonstrated that outweighs FACA's intrusion on the nomination power of the President." The court entered judgment against the plaintiffs and in favor of the Department of Justice and dismissed the action.

Seventh Circuit, voting en banc, vacates panel decision in *Heileman Brewing* case on requiring parties to attend settlement conferences. The decision of the panel in *G. Heileman Brewing Co. v. Joseph Oat Corp.*, No. 86-3118 (7th Cir. June 13, 1988), has been vacated by the court voting en banc and rehearing ordered for Sept. 27. The panel decision, summarized in NOTEWORTHY last month (see *The Third Branch*, August 1988, at 6), had held that Fed. R. Civ. P. 16 does not authorize the court to require represented parties to appear at settlement conferences.

Fourth Circuit, sitting en banc, affirms district court decision on Virginia's obligation to provide counsel to state habeas petitioners in death penalty cases. The Fourth Circuit, sitting en banc, has affirmed a district court decision that held that the Commonwealth of Virginia, in order to satisfy its obligation to provide death row inmates with meaningful access to the courts, must provide appointment of counsel upon request to such inmates filing state habeas corpus petitions. *Giarratano v. Murray*, 847 F.2d 1118 (4th Cir. 1988). A Fourth Circuit panel had earlier reversed the district court decision as to this issue and held that Virginia met its obligation to provide meaningful access with its system of law libraries, institutional attorneys who act in an advisory capacity in preparing postconviction petitions, and appointed counsel in cases requiring an evidentiary hearing. *Giarratano v. Murray*, 836 F.2d 1421 (4th Cir. 1988) (discussed in *The Third Branch*, March 1988, at 4). The district court opinion, the Fourth Circuit panel opinion, and the en banc opinion all held that the right of meaningful access to court does not require the appointment of counsel for federal habeas corpus and certiorari petitions. ■

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I don't believe it helps much to dwell on all this. I would say, though, that—more so now than 20 years ago—judges and lawyers tend to view the judicial process as a system, and to realize that we all have an obligation to the consumers of our legal system and the taxpayers who support it. And this change in attitude, if it occurred, occurred during a time of tremendous growth in the Federal judiciary—growth made necessary by a steady increase in filings and new Federal jurisdictions.

When I took office, there were about 300 district judges and we had about 100,000 civil and criminal cases. Now there are well over 500 judges and over 275,000 cases. There were about 90 circuit judges and 10,000 appellate cases. Now we have around 160 circuit judges and over 35,000 cases. The increase in filings vastly exceeds the increase in judgepower. Given this tremendous growth, I think the system has held together very well. That is why we had to create the Magistrate Courts, which are working very well.

What about the Supreme Court's caseload?

Now we're getting to my "failure agenda."

Failure to keep the caseload down?

No—failure to get a mechanism in place to deal with the expanding caseload. In my last years on the Court of Appeals, the Supreme Court issued around 70 to 90 signed opinions annually. By the early 1970's it grew to about 120. It is now around 150. The same is true for cases filed: 1,200 or 1,300 in the early 1950's to over 3,000 by the late 1960's and now it is around 5,000 each year. In other words, a steady increase in the work but no increase in the number of Justices, and I don't think an increase in the number of Justices would help.

How long has this subject been discussed?

More than 40 years ago Professors Felix Frankfurter, Henry Hart and others raised this issue, stating that 100 signed opinions a year was the maxi-

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mum the Supreme Court could handle it was to maintain proper quality.

So what was the answer you saw in 1969?

I didn't have the answer, but I knew it needed study. We created the so-called Freund Committee in 1971 under the auspices of the Federal Judicial Center, which was just getting under way then. That committee, with Paul Freund, Alexander Bickel, and others, represented a wealth of Supreme Court experience. They recommended creation of an intermediate court between the Court of Appeals and the Supreme Court.[1]

That recommendation ran into a lot of opposition. Were you surprised?

It was what I expected. It takes time for any development of this kind; the legal mind tends to cling to old ideas "because we've always done it that way." For that matter, I certainly wasn't convinced that this intermediate court was the answer. But something had to be done to start towards an answer, and his committee report was only a beginning.

In fact, the next step was a proposal in one of my early State of Justice Reports to the ABA that Congress create a commission to study what to do about the appellate problem. This commission[2]—Senator Roman Hruska chaired it and Professor Leo Levin served as Executive Director—heard testimony around the country and put in several years of study and came to about the same conclusion as the Freund Committee.

It wasn't exactly the same, was it?

No it wasn't. But it did agree with the Freund Committee on the case overload. The Hruska proposal put a lot more emphasis on the problem of conflicts among the circuits. It is wholly inappropriate for a particular question to be decided one way in one circuit and another way in a different circuit, or at least to let that difference stand for very long. Some conflict is tolerable for a while, but not very long if we are to have a reasonably uniform quality of justice in this country. One objection was the absurd proposition that the increase in caseload is the Court's fault for accepting too many cases, instead of leaving them to the Courts of Appeals. If a Court of Appeals openly disregards holdings of the Supreme Court, or if a conflict arises, the only proper action is review and reversal. Countless new statutes over the past 20 to 30 years created new Federal jurisdiction.

Another independent committee, studying both state and federal appellate procedure, supported the findings of the Freund and Hruska Reports. That committee was chaired by Professor Maurice Rosenberg of Columbia University, a former Assistant Attorney General.

Didn't you present an alternative proposal to a permanent intermediate court?

Yes. About three or four years ago, I suggested that in place of creating a permanent court, we try a temporary experiment for three to five years. The Supreme Court would create a panel by selecting one judge from each circuit and from that group draw a panel of nine who would come to Washington—or Chicago—perhaps twice a year to hear cases. The Supreme Court would refer statutory interpretation cases—not constitutional questions—to the panel. If it didn't work out, we could say we tried the experiment and drop it.

Haven't some objected to an intermediate court because it would place too much of a burden on the Courts of Appeals?

That point has been raised, but it is without any substance. Under this experiment a panel of nine circuit judges would sit perhaps twice a year for a week each time. Since these conflicts arise at the circuit level, the circuit court judges should be given the chance to rectify the problems as they do with en banc hearings—and my preference would be to draw primarily on Senior Circuit Judges. This panel would address only issues of statutory construction—not constitutional cases. A minority of Federal judges opposed this idea from the start and Congress never really got to the heart of the problem.

Incidentally, one of the principal problems of statutory interpretation in the last 25 or 30 years has been the cloudy language of many statutes. Careful statutory draftsmanship is almost a lost art, with staffers and lobbyists getting so involved in the drafting process.

How much relief would this intermediate court give the Supreme Court?

Possibly up to one third of its load.

Has the experimental proposal gone anywhere?

Not very far. Apathy and inertia seem to surround proposals for improving the administration of justice unless there's a driving force behind them. The legal profession is just not very interested in the Court's caseload.

Is the Supreme Court functioning as efficiently as it should?

I have difficulty thinking how the Court could work more efficiently than it has for the 35 years that I've watched it closely. In 1970 the Court reduced the oral argument time from one hour to 30 minutes so we heard 12 cases each week instead of eight; it has reduced the time devoted to reading lengthy announcements of opinions from several hours on a given day to 10 or 15 minutes; and the

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CALENDAR

September 7-11 Workshop for Bankruptcy Clerks
September 8-11 Second Circuit Judicial Conference
September 12-16 Orientation Seminar for New Probation/Pretrial Officers
September 14-15 Judicial Conference of the U.S.
September 14-16 Workshop for Operations Managers
September 18-20 Third Circuit Judicial Conference
September 23-24 Advisory Committee on Bankruptcy Rules
September 25-26 Claims Court Judicial Conference
September 26-30 Orientation Seminar for New Probation/Pretrial Officers
September 26-28 First Circuit Judicial Conference

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Court has eliminated the requirement that every person admitted to the Bar be present in the Courtroom. Those steps saved a large amount of judge time.

Would it be an improvement to have a true Supreme Court Bar—that is, a group of specialists who would argue most of the cases before the Court?

I am not sure. There is no "Supreme Court Bar" as the term is understood in the profession, as there probably was a century ago or even 50 years ago. One exception is the professional career staff of the Solicitor General's office—they are consistently very good. The advocacy in most court cases is very good, and I believe it improved during my 17-year tenure. We sponsored a helpful program to assist state advocates with brief work and a practice or "moot" run of a case supervised by the Conference of State Governments.

At some point you advanced the idea of a Tenth Justice for Administration. Where does that stand?

That was another long-range proposal to stir up some debate. Professor Dan Meador at the University of Virginia later had a seminar on this and the result was a recommendation for a "Chancellor" to do what I had in mind for the Tenth Justice for Administration. That gave substantial support for the basic idea but the title of "Chancellor" could cloud the function. It is an obsolete title fitting for the Smithsonian or an ancient university, but not in the courts of our day.

How would the Tenth Justice be selected?

I would have the selection made by the Chief Justice. He would choose from among the Article III Federal Judges then in office to serve an indefinite term and then to return to his or her status as a Circuit or District judge. This would really be an assignment process. The Chief Justice could do it now with respect to a Federal Judge eligible for senior judge status but he couldn't really give that judge the title of "Tenth Justice for Administration." In fact in August 1969 I asked the late Third Circuit Judge William Hastie, then a senior judge, to move to Washington to do something along those lines but he preferred to stay with judicial work. In addition to Judge Hastie, 30 years ago Judge Albert Maris would have worked, and more recently Judge Edward Tamm. Tom Clark in retirement would have fit. Of course there are others.

"There is too much 'judge shopping' in this country in both the Federal and State courts. This is particularly true in criminal cases . . . ."

What would be the duties of this Tenth Justice and why would that title help?

The title and status would be very important in carrying out the function. He or she would carry a good deal of the work of dealing with the Judicial Conference of the United States. Perhaps even presiding as a sort of "vice chairman." This would also be true with respect to the Federal Judicial Center, whose Board of Directors is chaired by the Chief Justice. The Tenth Justice would closely follow the work of the Judicial Conference Committees, act as Congressional liaison, and oversee the programs of the Federal Judicial Center. It would be an almost full-time job to attend even the meetings of the major Judicial Conference Committees.

Aren't these duties performed by the Administrative Assistant to the Chief Justice?

In part, yes, but not to the extent the Tenth Justice would do it. The prestige of being an Article III judge and the title of Justice would make the situation quite different. Moreover, an experienced Article III judge selected for this position would bring an added dimension of background and knowledge of how the courts work. The function would be a matter of evolution.

What if a Chief Justice were to find that this concept was not working?

Then he could drop the idea. This is another good example of the need to try out new ideas.

Do other countries have such a position?

Yes, in a sense. In England, our nearest systemic ancestor, these people do what the Chief Justice of the United States is called upon to do by Congress. The Lord Chancellor does some of what our Chief Justice does; the Lord Chief Justice does some presiding over the Court of Appeals for criminal cases. The Master of the Rolls presides over the Court of Appeals, reviewing civil and administrative law cases. In France there are three Courts and three Chiefs doing what the United States Chief Justice is assigned to do. It is simply unrealistic to ask our Chief Justice to function under a system set down in 1789 in the Judiciary Act, when there were only 13 Federal judges and six Supreme Court Justices. And many state courts have a judge assigned full-time to administration. New York is but one example.

What are some of the other things you wish you could have seen to completion?

I didn't have much success convincing the district courts to establish case assignment systems that took account of the complexity and difficulty of the case as well as the background and experience of the judge. That would apply to only a small percentage of the cases, but it is crucial to any rational judicial system. If a multiple defendant criminal case comes along, or a complex antitrust case, the Chief Judge or the assigning committee of the court should not let that go by a random draw to a brand new judge who may have limited litigation experience and perhaps none in antitrust.

Has that been tried in American courts?

Very little and not enough. A problem has been that even when the system has proven its value, when a new Chief Judge comes along he or she may not follow through. In one instance a new

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Judicial Conference Standing Committee Releases Proposed Rules Changes

The Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, chaired by Judge Joseph F. Weis, Jr. (3d Cir.), has released proposed federal rules amendments, one proposed new rule, and one proposed new form. The changes originated in the Judicial Conference Advisory Committees on the Federal Rules of Appellate Procedure, the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Bankruptcy Procedure. The changes are being circulated to the bench and bar and to the public generally for comment. The Standing Committee on Rules of Practice and Procedure has not approved these proposals, nor have they been submitted to the Judicial Conference or the Supreme Court. Comments and suggestions on the proposals are requested as soon as possible, and not later than Dec. 31, 1988. No hearings are planned at this time by the Advisory Committees.

Proposed changes include these:

• *Appellate Rules.* Repeal of current rule 6 and replacement with a rule recognizing that parties have a right to appeal; a change in rule 26(a)'s method of counting time when intervening weekends and legal holidays are involved; and new rule 26.1, requiring a party to disclose corporate affiliates so a judge can ascertain whether he or she has any interests in any of the party's related entities that would disqualify the judge from hearing the appeal.

• *Criminal Rules.* Rule 11 would be amended in light of guideline sentencing, particularly with respect to notice of guidelines to defendants. Rule 32 would be amended to adjust the rule to the requirements of guideline sentencing, especially with respect to defense access to presentence reports, and rule 32(c)(E) would be abrogated. The recommended abrogation of subdivision (E) reflects the following facts under guideline sentencing: that there will be cases in which the defendant has a need for the presentence report during the preparation of or response to an appeal; that district courts may find it desirable to adopt portions of the presentence report when making findings of fact under the guidelines; and that the Supreme Court's decision in *U.S. v. Julian*, 108 S. Ct. 1606 (1988), suggests that defendants will routinely be able to secure their presentence reports through FOIA suits. The proposed amendment is intended to prevent unnecessary FOIA litigation. Rule 41 would be amended to facilitate return of seized property while protecting legitimate law enforcement interests in such property, and to eliminate confusing language from the rule. Rule 45 presently provides that intervening weekends and legal holidays shall not be counted in computing time when the time period prescribed or allowed is less than 11 days. The proposed change in rule 45 would exclude weekends and legal holidays when the time prescribed for action is less than eight days.

• *Civil Rules and Bankruptcy Rules.* The time calculation under Fed. R. Civ. P. 6 and Fed. R. Bankr. P. 9006(a) concerning the exclusion of intervening weekends and legal holidays would be amended from 11 to 8 days to conform with the proposed changes to Fed. R. App. P. 26(a) and Fed. R. Crim. P. 45(a).

• *Evidence Rules.* Rule 609(a) would be amended to remove from the rule the limitation that evidence of a witness's conviction of a crime may only be elicited during cross-examination, and would resolve an ambiguity as to the relationship of rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant.

Address communications concerning the proposals to: Committee on Rules of Practice and Procedure, Administrative Office of the U. S. Courts, Washington, DC 20544. ■

FJC Releases Publication on Patent Law

Patent Law and Practice, by Professor Herbert Schwartz of the University of Pennsylvania School of Law, the most recent publication in the Center's Education and Training Series, is now available. A précis of American patent law, the book traces the steps followed in obtaining a patent, explains the conditions required for a patent, and discusses the defenses against and remedies for patent infringement. It is designed to provide an overview of this specialized field in the law. The author has included an annotated bibliography of sources on the topic.

Copies of the publication are available from Information Services, 1520 H Street, N.W., Washington, DC 20005. Please enclose a self-addressed mailing label, preferably franked (6 oz.), but do not send an envelope.

Supreme Court Studies Automated Opinion Access

The Supreme Court has taken the first step toward making its opinions available via computer by inviting legal publishers, legal research database providers, and news wires to submit preliminary proposals for how they would handle electronic dissemination of the Court's decisions. The invitation is based on a study of possible problems and alternative approaches conducted over the last 18 months by a group of Court staff members headed by James R. Donovan, the Court's Director of Data Systems.

The Court's action was in response to numerous inquiries from legal organizations, news agencies, and others seeking electronic access to decisions immediately after release by the Court.

The invitation was sent to organizations that have shown an interest in distributing Supreme Court opinions, but the opportunity to participate is open to any organization with the qualifications to fulfill the Court's considerations and objectives. To explain the project and to answer questions from interested parties, the Court will conduct a meeting on Sept. 29, 1988. Attendance will be restricted due to limited seating. For information, contact James R. Donovan, Director of Data Systems, Supreme Court of the United States, Washington, D.C. 20543. ■

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Chief Judge declined to continue the assignment method of his predecessor, maintaining that "every judge is entitled to an equal chance to a front page case." My response was that this was a totally new principle of judicial administration.

This assignment method is a common practice in some systems. The nearest parallel we have are the British courts. The Chief Judge or presiding judge takes the background and experience of a judge into account in assigning special cases. And, of course, they have specialized courts.

How are cases categorized?

Cases are assigned specific categories, such as admiralty, family and divorce, equity court, and criminal. English judges are generalists as a good judge should be but they are also specially skilled in certain areas.

You see a lot in the British system worth emulating, don't you?

I've been accused of being an Anglophile, even though I've said repeatedly that we shouldn't try to duplicate the British system here. We couldn't even if we wanted to. But I can't see any great harm in studying what they do well. In some of the Anglo-American exchanges that have been going on for 25 years, the members of the American team were astonished to see cases tried in one or two days that regularly take one or two weeks—or more—to try in the United States. In civil cases in England—except in a few categories such as slander and libel—juries were abolished a half century ago. A British civil case may be finished before we would pick a jury. In some American courts, the judges tend to let the lawyers run the show. Some lawyers like that, but it's dead wrong. Jury selection that takes weeks—sometimes it takes even more—is a perversion of justice. The Bar and Bench over there are appalled to see the time wasted on jury selection here.

What other judicial "failures" have you addressed?

There is too much "judge shopping" in this country in both the Federal and State courts. This is particularly true in criminal cases and perhaps is most objectionable in connection with guilty pleas. Assignment of judges to take guilty pleas should be done so that there is a genuine random assignment to prevent a lawyer from either rushing or delaying his case in order to get a more "lenient" judge.

You certainly weren't silent about the compensation of judges.

Silence would have been the height of irresponsibility. My regret is that we weren't able to break this linkage between Congressional salaries and judges' compensation. That linkage is completely without rational foundation. Federal judges understand that they're not going to have the same earning power as in private practice, but that's no excuse for letting their earning power—in real dollars—decline each year. According to an analysis of the top thousand corporations in *Fortune* magazine, the average salary of chief corporate executives is $590,000. The presidents of the World Bank and the International Bank, as well as the Secretary of the Smithsonian Institution, are compensated substantially more than Supreme Court Justices, who receive slightly over $100,000 a year. The day has come when men and women who are truly capable of serving as Federal judges just won't do it, and once we have lost that, I'm afraid we'll never get it back. More Federal judges have resigned on economic grounds in the past 20 years than in the previous 180 years. The Federal judges as a whole make a great sacrifice to serve.

Throughout these developments beginning in 1969 there seems to be a pattern of working with the ABA, the state courts, and others, even in situations where you have initiated the program. Do you care to comment on that?

A one-man show does not get results. Most good things are the result of teamwork, and a combination of both ideas and execution. If I learned anything under President Eisenhower, it is that a person can accomplish a great deal more if other people get the credit. The Conference on the Judiciary at Williamsburg, for example, was something I had discussed with Tom Clark and a great many others. Clark was a major part of this planning. Most of these programs were matters that had been discussed with various members of the Judiciary in order to develop a consensus. When it was necessary, I had no hesitation in communicating with whoever occupied the Office of Attorney General, or the Chairman of the House or Senate Judiciary Committee, or the Chairman of the Subcommittee on Appropriations.

Anything else?

One more thing comes to mind—the matter of a Federal Judiciary Building so that the Administrative Office and the Judicial Center wouldn't be scattered all over town, as they are now. The Supreme Court needs some extra space as well. This has been one of my objectives for 15 years, and if a Judiciary Building had been built in 1970 or 1972, the rent used for the Center and the AO could have paid for it—and more. But that's in the past. Things seem on track now for the building in Washington by Union Station. Construction will begin on that building within a year.

Are you really out of active service?

In the judicial sense I am, but the Bicentennial of the Constitution is everything I expected it to be in the way of work and more. There is a great deal of satisfaction from helping to tell the great story of our Constitution to the country and to the world. And there's much more to be done. We are now focusing on primary schools, high schools, colleges and universities.

1/ The Study Group on the Caseload of the Supreme Court: Professor Paul A. Freund (Chairman), Professor Alexander M. Bickel, Peter D. Ehrenhaft, Dean Russell D. Niles, Bernard G. Segal, Robert L. Stern, and Professor Charles Alan Wright.

2/ Commission on Revision of the Federal Court Appellate System: Senator Roman L. Hruska, Judge J. Edward Lumbard, Senator Quentin N. Burdick, Senator Hiram L. Fong, Senator John L. McClellan, Honorable Emanuel Celler, Dean Roger C. Cramton, Francis R. Kirkham, Judge Alfred T. Sulmonetti, Congressman Jack Brooks, Congressman Walter Flowers, Congressman Edward Hutchinson, Congressman Charles E. Wiggins, Judge Roger Robb, Bernard G. Segal, and Professor Herbert Wechsler. ■

ABA, from page 3

ity to pay for the use of an electronic monitoring device not be considered in determining whether to require the use of such a device. The resolution was approved.

A second resolution asked for approval of "Guidelines Governing Restitution to Victims of Criminal Conduct." These Guidelines were written to provide assistance to practitioners in the criminal law area, but should be of interest to all judges, prosecutors, and defense lawyers when they are considering either court orders or recommendations for court orders aimed at assuring that a victim is fairly compensated. This resolution was approved.

A third resolution, also approved, asked that the ABA approve additions to Chapter 7 of the Criminal Justice Mental Health Standards, entitled *Competence and Confessions*. The additions relate to the admissibility and voluntariness of statements by mentally ill or retarded persons. This final product is the result of over three years' study, after the involvement of a special interdisciplinary task force appointed in 1985, consultation with at least 24 organizations, and final recommendations to the Criminal Justice Section by a special seven-member task force.

The drafters point out that many states have still not resolved the complex procedural issues arising since the U.S. Supreme Court's decision in *Colorado v. Connelly* in 1986. These additions, therefore, are offered as an assistance particularly to the states.

Jurisdiction in child custody disputes. The House of Delegates approved a resolution asking Congress to pass legislation clarifying that the federal district courts do have power to resolve the issue of conflicting state claims to jurisdiction over child custody disputes. In 1980 the Parental Kidnapping Prevention Act was passed to avoid jurisdictional competition and conflict between state courts. Since then four circuits have held that the federal courts have jurisdiction in such cases. One circuit, however, has held that the act did not create a cause of action in a federal court. Last January the Supreme Court held that the Kidnapping Act does not provide an implied cause of action in federal court. However, the opinion contained language to the effect that "Congress may choose to revisit the issue."

Sabbatical leave. Although sabbatical leave for judges is a concept adopted by other countries, it is in use in the U.S. in only one state, Oregon. The House of Delegates has now endorsed a resolution that recommends adoption of legislation to provide sabbaticals for judges, either for six months at full salary or for one year at half salary.

All reports and resolutions submitted for the 1988 annual meeting are available at the Center. For this or other information write Alice O'Donnell at the Center or call (FTS) 633-6359. ■

Justice Powell Speaks on Death Penalty at ABA Annual Meeting

Retired Justice Lewis F. Powell addressed the Criminal Justice Section of the ABA last month at the annual meeting in Toronto. Speaking on the habeas corpus process in capital cases, he called upon Congress and state legislators to review existing procedures with a view to making improvements. Years of delay and repetitive appeals all the way to the Supreme Court, often on the eve of the execution date, the Justice said, are almost routine, place heavy burdens on the courts, and often prevent "mature and thoughtful consideration." He quoted Chief Justice Rehnquist, who has said that the system is "disjointed and chaotic."

Justice Powell summarized his comments by saying "[T]here are no easy answers to the problems of our murder rate . . . but I do not think we should accept these problems as inevitable . . . . I adhere to the view that the death penalty lawfully may be imposed . . . . My concerns relate to the way the system malfunctions, and to the shocking murder rate that prevails in our country . . . [which] appears to be the highest among the democracies."

Chief Justice Rehnquist has appointed Justice Powell Chairman of a newly formed Judicial Conference Special Committee on Habeas Corpus Review of Capital Sentences. The other committee members are Chief Judges Charles Clark (5th Cir.), Paul H. Roney (11th Cir.), and Wm. Terrell Hodges (M.D. Fla.), and Acting Chief Judge Barefoot Sanders (N.D. Tex.).

TIME STUDY, from page 1

of the country represented in each of the five waves, the study should largely avoid the misleading results that might arise from seasonal and regional differences in bankruptcy filing rates or other aspects of bankruptcy court activity.

This time study follows the procedure the Center has used in earlier studies of caseload in appellate, district, and bankruptcy courts. The key feature of the methodology is the relating of time spent on specified cases to the types and ages of the cases. When all the information has been collected, the analysis will show how much time is spent on each case type during each period in the life of the case.

By summing up the amounts of time spent at each time period for each case type, a case weight for each case type can be specified. Case weights can be calculated for any case type that can be routinely identified on the basis of information supplied by the courts to the Administrative Office. An earlier time study of the bankruptcy courts provided case weights for more than a dozen case types, ranging from Chapter 7 cases with no assets to large Chapter 11 cases. Weights for adversary proceedings can be calculated and reported separately or included as part of the weights of the case types out of which the proceedings arise.

When case weights have been established for each case type, weighted caseloads can be calculated for each court based on the volume and case-type mix of the court's filings. These weighted caseloads can guide the courts and the Judicial Conference in their consideration of requests for new bankruptcy judgeships. ■

LEGISLATION, from page 2

S. 2601 would extend the sliding scale in current law so that eligibility for senior status would begin at age 60 with 20 years of service as in H.R. 3726, but S. 2601 would reduce the years of service one year for each year beyond 60, so that a judge could take senior status with 19 years of service at age 61, 18 years of service at age 62, and so forth. Under H.R. 3726 the years of service requirement to take senior status would remain 20 years from age 60 to 65, when it would drop to 15.

The Subcommittee also heard testimony on H.R. 1929 and H.R. 3227, bills that would establish a Federal Courts Study Commission. H.R. 1929 contains a sunset provision that would limit the Commission's life to 10 years; H.R. 3227 contains a two-year sunset provision. The Judicial Conference has urged favorable consideration of a bill to create a temporary commission to study the judiciary. Judge J. Clifford Wallace (9th Cir.) provided a written statement to the Subcommittee detailing the history of the idea for such a study commission, and endorsing the concept contained in H.R. 1929 of a commission that would have two years to study problems and develop long-range goals and eight years to make annual recommendations to Congress and the President.

The Subcommittee also considered H.R. 4309, which would make surviving spouses of judicial officials who died before Oct. 1, 1986, eligible for increased annuities that became effective as of that date (see *The Third Branch*, May 1988, at 3).

• The House of Representatives voted to impeach Judge Alcee L. Hastings (S.D. Fla.). The House Judiciary Committee had approved an impeachment resolution following hearings. The House also appointed six of its members as managers to appear before the Senate to try the impeachment.

• The House Judiciary Committee ordered reported the Court Reform and Access to Justice Act of 1988, H.R. 4807, with amendments. The bill, originally introduced as H.R. 3152, contains a number of provisions supported by the Judicial Conference (see *The Third Branch*, June 1988, at 2).

• The Senate Judiciary Committee ordered reported, with amendments, S. 1867, to amend the Court Interpreters Act of 1978, 28 U.S.C. § 1827 (see *The Third Branch*, Jan. 1988, at 1).

• The Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice approved for full Committee consideration, with an amendment, S. 1961, the Federal Debt Collection Act (see *The Third Branch*, February 1988, at 4).

• Rep. Robert Kastenmeier (D-Wis.) introduced H.R. 5161, a bill to provide Claims Court judges pay equality with judges of the U.S. Tax Court, and to provide retirement and survivors' annuities for Claims Court judges. ■

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THE THIRD BRANCH

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THE THIRD BRANCH

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Judicial Conference Asks for More Judgeships, Approves New Marshals Service Security Plan

The Judicial Conference of the United States, meeting in Washington in September, asked Congress to create new judgeships and approved three measures relating to the use of video equipment for certain limited purposes related to court business.

The Conference voted to ask Congress to create 14 new court of appeals judgeships and 37 permanent and 22 temporary district court judgeships. This request supersedes the Conference's 1986 request to create 40 permanent and 16 temporary district court judgeships and 13 permanent court of appeals judgeships (see *The Third Branch*, November 1986, at 1, and June 1987, at 5). If diversity jurisdiction were to be eliminated, the Conference request would be reduced.

The Conference also acted on the following measures:

• Approved a proposal of the U.S. Marshals Service to improve judicial security by installing video equipment in certain courtrooms. The equipment will be installed in approximately 10 or 12 courtrooms in order to monitor the proceedings in high-risk trials, with the approval of the presiding

See JUDICIAL CONFERENCE, page 8

Omnibus Court Reform Bill Supported by JCUS, Similar Bill Under Senate Consideration

H.R. 4807, an omnibus court reform bill introduced by Rep. Robert Kastenmeier, was passed by the House. The bill, a revised version of an earlier bill, contains numerous provisions requested by the Judicial Conference of the United States (see *The Third Branch*, October 1987, at 1). Before the vote on the bill, Rep. Kastenmeier read a letter from Chief Justice Rehnquist expressing both the Judicial Conference's and his personal support for H.R. 4807.

Among the bill's provisions are titles that would

• amend the rulemaking process;

• expressly authorize court-annexed arbitration in N.D. Cal., D. Conn., M.D. Fla., W.D. Mich., W.D. Mo., D.N.J., E.D.N.Y., S.D.N.Y., M.D.N.C., W.D. Okla., E.D. Pa., S.D. Tex., W.D. Tex, and in 10 additional judicial districts that will be approved by the Judicial Conference. The title also contains limitations on the type of actions that may not be referred to arbitration without consent of the parties; authorization of the taxation of arbitrator fees and attorneys' fees as costs to the party demanding a trial de novo, subject to certain conditions; standards for the certification of arbitrators; and a requirement that the Federal Judicial Center conduct an impact analysis of the court-annexed

See LEGISLATION, page 7

U.S. Magistrate Robert B. Collings (D. Mass.) speaks on civil litigation at the FJC seminar for newly appointed magistrates in Washington, D.C. See page 4 inside.

Chief Justice Addresses Australian Bar on Evolution of Legal Profession in the U.S.

Chief Justice Rehnquist, in a speech to the Australian Bar Association, discussed changes that have taken place in the legal profession during the last 35 years, stating that the "tremendous increase in terms of real dollars in the cost of litigation in our country during that period of time, while perhaps a boon to the profession in the short run, is not a positive development." He suggested that simpler, less time-consuming procedures than the full-scale jury trial, "while they may lose something in the pursuit of a totally accurate reconstruction of events, may more than make up for this lack by the reduction of costs and delays."

The last 35 years have seen the evolution of the practice of law from a profession to a business, the Chief Justice remarked. When he began to practice law, there were slightly over 200,000 lawyers practicing in the United States, whereas now there are about 700,000, he observed. Such growth has been "out of all proportion to the growth of population in our country." Developments have resulted in a profession "far more open to women and minorities" than it formerly was, that has become more

See CHIEF JUSTICE, page 3

Inside . . .

New Method for Computerized Access to Case Information Via Telephone Tested in D.D.C.

A method for permitting the public to have remote access to computerized case docket information via telephone is being tested in the U.S. District Court for the District of Columbia. Installation of the public dial-in access package, which was developed by Federal Judicial Center staff, recently began. During the initial phase of testing, Center staff and the Clerk of Court invited a limited number of law firms and other interested parties to use this service; use by larger numbers of persons will follow.

The system, called PACER (Public Access to Court Electronic Records), permits users to look up a case by either litigant name or case number and retrieve the full electronic docket for the case. Users must have either a 1200 or 2400 baud modem and a terminal or personal computer (or other computer). They may save the electronic dockets on their own computers or print them out in their own offices.

Users can retrieve the entire electronic docket of a typical case in less than 30 seconds. They can also find out in less than a minute if anything has happened to a case and can research case involvements by name—for example, locating all cases in which ABC Manufacturing is a litigant. Before installation of the system, users were only able to access electronic docket information by visiting the court in person to use one of two public terminals at the court.

"This project has tremendous promise for improving the way that attorneys have access to court data. I see enormous potential benefits not only for attorneys but for the court," said James F. Davey, Clerk of Court of the U.S. District Court for the District of Columbia.

The PACER system will be implemented in the D.C. court in two phases. During Phase I, access will be afforded during normal business hours and participation will be limited to a small group of users; analysts from the FJC will be in contact with each user to get immediate feedback, answer any questions, and watch for and correct technical problems with the software. During Phase 2, the system will be opened to a larger group of users and will be available almost 24 hours a day. The court provides users with documentation and an ID/password, and use of the system is presently offered free of charge.

"This project has tremendous promise for improving the way that attorneys have access to court data." *James F. Davey, Clerk of Court, D.D.C.*

PACER includes an "idle time" limit that causes the system to "complain" if the user pauses for too long without doing anything. During the initial phase of testing, PACER also limits sessions to 10 minutes, in fairness to other users of the system's single line. At the D.C. court, civil cases opened before 1986 are generally not available with this service; criminal case dockets will be added early next year.

PACER will be tested on a pilot basis in additional district, bankruptcy, and circuit courts later this year or next year. The FJC will review user comments and suggestions in refining the system for possible nationwide distribution. Further information about PACER is available from John Hillenbrand or Mike Greenwood of the Center's Information and Systems Development Division, tel. 202/633-6400.

PACER is part of several pilot projects under way at the FJC. Following the completion of development of several large-scale court automation systems (AIMS, BANCAP, and CIVIL), the FJC has turned its attention to exploring and testing ways to provide the information collected in the court to information users. Projects currently being tested include a computer-generated voice-synthesis system (the Voice Case Information System) that is answering 120,000 information requests annually in three bankruptcy courts (see *The Third Branch,* August 1988, at 1) and a touch-screen system in use in the District of Columbia (see *The Third Branch,* September 1988, at 3). ■

Center Releases Publication on Revision of Local Court Rules

The Center has announced the publication of *A Practical Guide to Revision of Local Court Rules* by Jeanne Johnson Bowden. The paper was written to facilitate the rules revision process in other trial courts by sharing the experiences that the Northern District of Georgia had in revising its rules. That district undertook the total revision of its local court rules in January 1983. The project, led by the court's rules committee, lasted two years and involved all judges and magistrates on the court, the clerk of court, his deputy clerks, and his assistants. The rules were reviewed by court personnel, government and private attorneys, and the Administrative Office.

The paper is intended to be a "how-to-do-it" presentation. It does not address the philosophical considerations that influence the content of specific rules in the nation's trial courts. Separate sections are devoted to such topics as the decision to revise rules, organizing the rules committee, meetings, organization of court rules, drafting the rules, and printing and publishing them.

Copies of the paper are available by writing Information Services, 1520 H St., N.W., Washington, DC 20005. Please send a self-addressed, franked mailing label, but do not send an envelope. The report weighs 9 oz.

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THE THIRD BRANCH

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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.

PERSONNEL

CIRCUIT JUDGES
Nomination
Ferdinand E. Fernandez, 9th Cir., Sept. 16
Nomination Withdrawn
Bernard H. Siegan, 9th Cir., Sept. 16

DISTRICT JUDGES
Elevation
Richard C. Erwin, Chief Judge, M.D.N.C., Aug. 20

CHIEF JUSTICE, from page 1

representative of the whole population. While there is "no question that legal services are available to many people today to whom they were not available 35 years ago, particularly poor people and criminal defendants," the system as it exists today "particularly ill-serves the large middle class" because of the dramatic rise in the cost of legal services in the United States and because of delays, the Chief Justice said.

"Those concerned with the administration of justice are coming increasingly to realize that a full-dress jury trial is a costly form of justice, perhaps well suited on the criminal side to the adjudication of serious felony charges and perhaps well suited on the civil side to litigation between two corporate giants." For small businessmen, divorcing couples, and "parties to numerous other disputes who are not sufficiently poor to receive the benefit of legal assistance and not sufficiently well-off to be able to pay the going rate for attorney's fees," alternative dispute resolution procedures such as arbitration, mediation, and summary jury trial can provide a "far simpler, less expensive procedure which, while lacking some of the virtues of the adversary system of justice as practiced in our courts, has some very significant virtues of its own," the Chief Justice said.

Copies of the Chief Justice's speech are available from Information Services, 1520 H St., Washington, DC 20005. Please send a self-addressed mailing label, but do not send an envelope. ■

JCUS Committee on the Bicentennial of the U.S. Constitution Asks Each Circuit Judicial Conference To Make Bicentennial a Principal Theme

The Judicial Conference Committee on the Bicentennial of the Constitution, chaired by Judge Damon J. Keith (6th Cir.), is urging that the celebration of the "200th Birthday of the Federal Courts" and the adoption of the Bill of Rights be the principal themes at each circuit judicial conference in 1989. The Committee has obtained a bibliography of the Judiciary Act of 1789, which created the first federal court system, and hopes to assemble a roster of speakers who will be available to address the circuit judicial conferences on the history and future of the federal courts and the Bill of Rights. The Committee also encourages other local programs commemorating these bicentennials and the display of "200th Birthday" banners on federal courthouses in 1989.

Pictured above are the Committee members and staff who attended the July meeting in Charlottesville, Va. (Front row, left to right) William R. Burchill, Jr. (General Counsel, Administrative Office), Judge Dolores Sloviter (3d Cir.), Judge Damon J. Keith, Chairman (6th Cir.), Judge Helen Nies (Fed. Cir.), Judge James Noland (S.D. Ind.), Judge J. Harvie Wilkinson III (4th Cir.); (Rear, left to right) Christopher Reynolds, Esq., John Chastain (Assistant General Counsel, Administrative Office), Judge W. Brevard Hand (S.D. Ala.), Judge Jaime Pieras (D.P.R.), Judge Adrian Duplantier (E.D. La.). Judge Kenneth Starr (D.C. Cir.) attended but is not pictured.

Other committee members are Supreme Court Justice Harry A. Blackmun, Retired Chief Justice Warren E. Burger, Judge Arthur L. Alarcon (9th Cir.), Judge Frank X. Altimari (2d Cir.), Chief Justice Edward F. Hennessey (Supreme Judicial Court of Mass.), Judge Patrick F. Kelly (D. Kan.), Judge James H. Meredith (E.D. Mo.), and Chief Judge Robert C. Murphy (Md. Court of Appeals). ■

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, 1520 H St., N.W., Washington, DC 20005.

Brazil, Wayne D. "Protecting the Confidentiality of Settlement Negotiations." 39 *Hastings L.J.* 955 (1988).

"Criminal Defense for the Poor, 1986." Bureau of Justice Statistics, 1988.

Elliott, Philip C. "A Judge's Thoughts About Criminal Instructions." 5 *Cooley L. Rev.* 23 (1988).

Grunes, Allen P. "Exclusion of Plaintiffs from the Courtroom in Personal Injury Actions: A Matter of Discretion or Constitutional Right?" 38 *Case Western Reserve L. Rev.* 387 (1987-88).

√Kastenmeier, Robert W. "Remarks on Presentation of the Justice Award." American Judicature Society, Toronto, Canada, Aug. 5, 1988.

Katzmann, Robert A. (ed.). *Judges and Legislators: Toward Institutional Comity.* Brookings Institution, 1988.

Laurence, Robert. "Martinez, Oliphant and Federal Court Review of Tribal Activity Under the Indian Civil Rights Act." 10 *Campbell L. Rev.* 411 (1988).

Mallen, Ronald E. "Judicial Sanctions 1988." 17 *Memphis State University L. Rev.* 483 (1987).

Martineau, Robert J. "Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse." 1988 *Brigham Young University L. Rev.* 1.

Mills, Richard H. "Commentaries: To the New Lawyer." 12 *Southern Illinois University L.J.* 285 (1987).

1988 Survey of Books Relating to the Law. 86 *Michigan L. Rev.* 1067 (1988).

Noseda, James D. "Limiting Off-Bench Expressions: Striking a Balance Between Accountability and Independence." 36 *DePaul L. Rev.* 519 (1987).

√Powell, Lewis F., Jr. "Capital Punishment." Speech to the Criminal Justice Section, ABA, Toronto, Canada, Aug. 7, 1988.

Prentice, Robert A. "Reforming Punitive Damages: The Judicial Bargaining Concept." 7 *Rev. of Litigation* 113 (1988).

"Proceedings—Center for Public Resources Legal Program, May 1988." 6 *Alternatives to the High Cost of Litigation* 131 (August 1988).

√Rehnquist, William H. "The Old Order Changeth." Remarks before the Australian Bar Association, Sydney, Australia, Sept. 3, 1988.

Rosenberg, Maurice. "Resolving Disputes Differently: Adieu to Adversary Justice?" 21 *Creighton L. Rev.* 801 (1987).

Schiller, Stephen A., and Peter M. Manikas. "Criminal Courts and Local Legal Culture." 36 *DePaul L. Rev.* 327 (1987).

Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-87. 76 *Georgetown L.J.* 521 (1988).

Untereiner, Alan E. "A Uniform Approach to Rule 11 Sanctions." 97 *Yale L.J.* 901 (1988).

Wright, R. George. "Judicial Responses to Long-Term Societal Decline." 30 *Arizona L. Rev.* 271 (1988). ■

The Center held an orientation seminar for U.S. magistrates at the Dolley Madison House last month. Among those magistrates in attendance were (first row, left to right) Robert Holter (D. Mont.), Paul Greene (N.D. Ala.), Timothy Greeley (W.D. Mich.), James Graham (S.D. Ga.); (second row, left to right) Deborah Robinson (D.D.C.), Sue Robinson (D. Del.), Joseph Scoville (W.D. Mich.), John Simon (W.D. La.), and G.R. Smith (S.D. Ga.).

NOTEWORTHY

Nonparty witness may not invoke statute providing for disqualification of judge. Nonparty witnesses who sought to have a judge recused had no standing to invoke 28 U.S.C. § 455, the disqualification statute, the Third Circuit has held. *U.S. v. Sciarra*, 851 F.2d 621 (3d Cir. 1988), *rehearing and rehearing en banc denied*. The petitioners who sought the judge's recusal were former members of the executive board of a local union that was put under trusteeship pursuant to a 1984 decision of the U.S. District Court for the District of New Jersey. In 1987 the government, relying on the 1984 judgment and on RICO, sought to depose the petitioners. The government stated that the petitioners' testimony might form the predicate for additional relief necessary to prevent future racketeering violations involving the local union. The petitioners argued that the district court did not have authority to compel them to submit to oral depositions given their compliance with the 1984 judgment and that the judge should be disqualified pursuant to 28 U.S.C. § 455(a) and (b)(1). The judge denied the motion for recusal and held that the petitioners could be required to give testimony.

On appeal, the Third Circuit held that petitioners were, at this point, only nonparty witnesses to an investigation rather than parties to an actual case or controversy; that the district court's discovery order was appealable under 28 U.S.C. § 1291 notwithstanding petitioners' failure to incur a contempt order; that the government had standing to seek petitioners' depositions; and that the district court had power to compel them as nonparty witnesses to submit to oral depositions absent the institution of a criminal or civil proceeding. As to the issue of petitioners' standing to challenge the judge's impartiality under 28 U.S.C. § 455, the appellate court reviewed the case law and legislative history and read the section as applying to the judge's participation in decisions affecting the substantive rights of litigants to an actual case or controversy. Since there was "no pending action before [the district judge] in which the rights of the petitioners are at issue," the appellate court held that "the petitioners have no standing to invoke section 455 in their capacity as non-party witnesses." The petitioners "have not sustained an 'actual injury' within the meaning of Article III," it said. Moreover, the depositions were not in the context of a substantive proceeding against a third party, nor were the petitioners being asked to provide privileged information. Should an adversarial action before the district judge be instituted that is designed to modify or alter the substantive rights of the petitioners, petitioners could then invoke section 455, the appellate court said.

Newspaper–intervenor cannot compel party to terminated case to provide access to documents no longer within district court's supervisory power, Third Circuit holds. Where exhibits admitted into the judicial record during a trial were restored to their owner after a case was terminated, a newspaper could not compel the owner to give it access to the documents, as the documents were no longer in the district court's "supervisory power," the Third Circuit has held. *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3d Cir. 1988). The materials were initially discovered under the aegis of a protective order under Fed. R. Civ. P. 26(c) requiring confidentiality and were later admitted into evidence at an open civil trial of a products liability action. A jury found the defendant liable for the plaintiff's injuries. The defendant settled the case before trial of the damages issue, and the settled action was dismissed. The original exhibits and deposition transcripts introduced at trial were returned to defense counsel after the settlement, in accordance with the court's administrative practice and in conformance with the protective order.

A newspaper subsequently filed a motion for intervention in the action and sought access to the trial record after the defendant refused to make available any evidence designated confidential under the protective order. The district court permitted the newspaper to intervene and granted it access to the judicial record, which was held to include depositions and

See NOTEWORTHY, page 6

JCUS Advisory Committees On Civil and Criminal Rules Meet in November

The Judicial Conference Advisory Committee on Civil Rules will meet Nov. 17–19 and the Advisory Committee on Criminal Rules will meet Nov. 17–18. Both meetings will take place in the courthouse of the Fifth Circuit Court of Appeals at 600 Camp St. in New Orleans. The Advisory Committee on Criminal Rules will meet in the East Robing Room (Room 228) and the Advisory Committee on Civil Rules will meet in the West Robing Room (Room 258). Meetings will start at approximately 9 a.m.

The public will be admitted to the meetings as observers, but will not be permitted to participate. Oral comments will not be received from visitors.

CALENDAR

Oct. 2–4 Metropolitan District Chief Judges Conference
Oct. 3–5 Workshop for Judges of the Sixth Circuit
Oct. 12–14 Workshop for Judges of the Eleventh Circuit
Oct. 17–19 Workshop for Judges of the Seventh Circuit
Oct. 17–21 Orientation Seminar for New Probation/Pretrial Officers
Oct. 24–26 National Seminar for Judges of U.S. Courts of Appeals
Oct. 31–Nov. 2 Workshop for Judges of the Fifth Circuit
Oct. 31–Nov. 3 Workshop for New Training Coordinators

NOTEWORTHY, from page 5

exhibits that had been admitted into evidence. The district court held, and the appellate court affirmed, that the defendant had waived whatever rights to confidentiality the protective order had created by failing to object to the documents' admission into evidence at trial. The defendant argued that the exhibits admitted into evidence lost their status as judicial records when they were returned to their owner after the case had been closed. The district court held that the fact that the exhibits and depositions were withdrawn by counsel after trial and settlement did not destroy their character as public records.

On appeal by the defendant in the products liability suit, the appellate court noted that at the time the newspaper first sought access to the judicial record, the underlying case had long been settled, no appeal was pending, and the contested exhibits had been returned to counsel. Moreover, under a local rule of court, if the exhibits had not been returned, they would already have been subject to destruction by the district court clerk. "Must a court be forever burdened with the responsibility of maintaining, supervising the possession of, or adjudicating access rights to, such documentary exhibits? We believe not. This is an unreasonable burden to inflict upon courts, particularly at a time when litigation continues to grow more complex and voluminous." Thus, on these facts, the exhibits were "no longer judicial records within the 'supervisory power' of the district court [citation omitted]. Neither the first amendment nor the common law right of public access empowers the district court to require that litigants return such exhibits to the court for the purposes of copy and inspection by third parties." The appellate court emphasized that the newspaper did have a right of access to "items that properly remained part of the judicial record, such as the deposition testimony read into evidence at trial or exhibits or portions thereof transcribed and made part of the official transcript." 851 F.2d at 683.

Press does not have First Amendment right to attend summary jury trial, Sixth Circuit holds. *Cincinnati Gas & Electric Co. v. General Electric Co.*, No. 87-3950 (6th Cir. Aug. 18, 1988). Three electric utility companies undertook jointly to build a nuclear power plant. They sued General Electric and an engineering firm over a contract dispute. The parties negotiated a comprehensive protective order applying to much of the material produced in discovery, which the magistrate approved. The district court issued an order requiring the parties to participate in a summary jury trial closed to the press and public. A newspaper moved to intervene in the action for the limited purpose of challenging the order closing the summary trial. The court denied the motion, holding that there is no First Amendment right of access because there is no tradition of access to settlement devices, including summary jury trials, and public access would not be significant to the functioning of the nonbinding summary trial. Following the summary trial, the parties settled. The newspaper appealed the district court's order concerning confidentiality of the summary jury process, arguing that the summary jury proceeding is analogous to a trial on the merits and therefore should be subject to the First Amendment right of access, and that public access would play a significant positive role in the functioning of the judicial system and summary trials.

The Sixth Circuit rejected the newspaper's arguments and affirmed the judgment of the district court. There is no historically recognized right of access to summary jury trials, the appellate court held. Moreover, the summary jury trial is "designed to facilitate pretrial settlement of the litigation, much like a settlement conference," and "does not present any matter for adjudication by the court." "[W]here a party has a legitimate interest in confidentiality, public access would be detrimental to the effectiveness of the summary jury trial in facilitating settlement," and thus, "public access to summary jury trials over the parties' objections would have significant adverse effects on the utility of the procedure as a settlement device," the appellate court held. "[T]he public would have no entitle-

See NOTEWORTHY, page 7

Positions Available

Librarian, Supreme Court of the United States. The librarian is responsible for the management of the Supreme Court library. Responsibilities include general supervision of 22 employees, management of a collection of approximately 250,000 volumes, budgeting, procurement, space planning, and management of automated information systems. Law degree and advanced degree in library science preferred. A minimum of 6 years of progressively more responsible law library experience is required. Management experience, competence with automated information systems, strong interpersonal skills, and budgeting experience are all required. Salary commensurate with qualifications and experience. Closing date Oct. 14, 1988. Send SF 171 to Personnel Office, Supreme Court of the United States, Room 3, Washington, DC 20543. Tel. 202/479-3404.

Clerk of Court, S.D. Ill., East St. Louis, IL. Salary from $54,907 to $71,377. Under direction of Chief Judge, manages administrative activities of the office and oversees performance of the office's statutory duties. Applicants must have a minimum of 10 years of progressively responsible administrative experience in public service or business, at least 3 in a position of substantial management responsibility. Bachelor's degree may be substituted for 3 years of the required experience; postgraduate degree in public, business, or judicial administration for 1 additional year of experience; and law degree for 2 additional years. Law practice may be substituted year for year for the required management or general experience. Applications accepted until position filled; starting date Mar. 20, 1989. Submit applications and resumes to A. Marvin Helart, Clerk, U.S. District Court, Southern District of Illinois, P.O. Box 249, East St. Louis, IL 62202.

EQUAL OPPORTUNITY EMPLOYERS

NOTEWORTHY, from page 6

ent to observe any negotiations leading to a traditional settlement, . . . and the parties would be under no constitutional obligation to reveal the content of the negotiations. Thus, the public has no first amendment right to access to the summary jury trial." ■

LEGISLATION, from page 1

arbitration conducted under the act.

• amend 28 U.S.C. to create a federal multiparty, multiforum basis for jurisdiction; this provision is intended to help in consolidating mass disaster litigation;

• amend 28 U.S.C. to adjust the amount required for diversity jurisdiction from $10,000 to $50,000;

• amend the Federal Judicial Center statute, including the creation of a Federal Judicial Center Foundation that would be authorized to accept gifts or services for the purpose of aiding the work of the Center;

• expand the availability of court interpreter services to grand jury proceedings and authorize circuit judicial councils to identify the need for certification of a language on a regional basis;

• affect jury selection and service procedures, and include provisions making it easier for the clerk or his or her designate to excuse jurors;

• make procedural reforms to the charter of the State Justice Institute, and reauthorize the Institute for one additional year;

• eliminate the Board of Certification procedure for circuit executives.

In a related matter, the Senate Judiciary Committee's Subcommittee on Courts and Administrative Practice met to mark up S. 1482, a bill introduced by that subcommittee's chairman, Sen. Howell Heflin. S. 1482 is similar in some respects to H.R. 4807 (see *The Third Branch*, August 1987, at 5).

The following measures before Congress are also of interest to the judici-

• Sen. Orrin Hatch (R-Utah) introduced S. 2747, which would provide federal court authority to enforce rights secured by the Indian Civil Rights Act of 1968. Sen. Hatch said that his bill "strikes a legitimate balance between the interests of the tribal governments in exercising their powers of self government and the rights which Congress extended to individuals through the 1968 Indian Civil Rights Act."

From 1968 to 1978, the Indian Civil Rights Act was routinely enforced in both tribal and federal courts, but federal court review came to an end with the Supreme Court's decision in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), which held that the act does not provide for a waiver of sovereign immunity and that it fails to provide a private right of action for individuals in federal court. Sen. Hatch quoted from decisions of the Eighth and Tenth Circuits and the District of Montana expressing concerns over the failure of some tribal governments to adequately enforce rights, and noted reports of serious complaints that have gone unreviewed by the federal courts due to the *Santa Clara* holding. S. 2747 would provide for federal court review and enforcement after an individual has exhausted his or her tribal remedies and would prohibit the defense of sovereign immunity in civil rights cases. Whenever a question of tribal law is at issue, the federal court would be required to "accord due deference" to the tribal court's interpretation of tribal laws and customs.

• Rep. Bill Grant (D-Fla.) introduced H.R. 5217, which would reform the procedures for collateral review of criminal judgments. The bill would establish a three-year time limit for criminal defendants to apply for writs of habeas corpus in federal court, but only if the defendant has had access to private counsel or an approved state-funded legal assistance program.

• The House on Sept. 22 passed H.R. 5210, the Omnibus Drug Initiative Act, as amended. The House had voted Sept. 8 in favor of an amendment offered by Rep. George W. Gekas (R-Pa.) to the bill that would permit imposition of the death penalty on anyone who kills in the course of a violation of federal drug laws. Under the amendment, if judges did not impose the death sentence on convicted defendants, they would be required to impose a sentence of 20 years to life. The Senate has previously approved a bill that would provide for the possible imposition of the death penalty in drug-related killings of law enforcement officers and in cases where "drug kingpins" order killings (see *The Third Branch*, July 1988, at 7).

The House in considering H.R. 5210 also approved an amendment offered by Rep. Daniel E. Lungren (R-Cal.) that would expand the exclusionary rule "good faith" exception to warrantless searches in drug cases. The House also voted in favor of a "user accountability" provision that would deny to convicted drug users certain federal benefits, such as student loans and occupancy in public housing.

• The House Veterans' Affairs Committee held a hearing on H.R. 639, the Veterans' Administration Adjudication Procedure and Judicial Review Act; S. 11, the Veterans' Administration Adjudication Procedure and Judicial Review Act; and S. 2292, the Veteran's Judicial Review Act. A bill was then reported by the House Veterans' Affairs Committee and referred to the House Judiciary Committee for further consideration. If this bill is ultimately signed into law without amendment, it would create an Article I court. Judge Morris S. Arnold (W.D. Ark.) testified on behalf of the Judicial Conference. Judge Arnold and Judge Stephen S. Breyer (1st Cir.) have previously testified before the Senate Committee on Veterans' Affairs that the Conference supports judicial review of constitutional issues and statutory interpretations only and opposes judicial review of any factual determinations of the Veterans' Administration (see *The Third Branch*, June 1988, at 2).

• The House passed S. 1934, the bill to provide for a judiciary office building that will house the Administrative Office of the U.S. Courts and the Federal Judicial Center and provide chambers for retired Supreme Court Justices. ■

JUDICIAL CONFERENCE, from page 1

judge. No tape recordings will be made.

• Approved an experimental program of videotaping as a means of taking the official record of court proceedings, and designated the Chair of the Committee on Judicial Improvements to seek approval of the Director of the Federal Judicial Center to design, conduct, and evaluate the program.

• Approved an experimental program of videoconferencing of prisoner civil rights and habeas corpus cases.

• Approved recommendations of the Committee on Defender Services, including budget authorizations for certain Federal Public Defender Organizations; sustaining grants to 12 death penalty resource center/community defender organizations; use of funds for certain expert services; and the incorporation into the guidelines for administration of the Criminal Justice Act of several measures contained in the recent American Bar Association resolution concerning representation in death penalty federal habeas corpus cases.

• Endorsed H.R. 4358 (the Federal Employees Liability Reform and Tort Compensation Act of 1988) and H.R. 4612 to make the Federal Tort Claims Act the exclusive remedy for common-law tort claims against federal officers and employees.

• Approved recommended priorities for funding death penalty resource centers/community defender organizations and other CJA programs.

• Delegated to the Defender Services Committee authority to approve revised grant requests of death penalty resource center/community defender organizations in limited amounts.

• Established a "special" alternative rate for death penalty habeas corpus cases in three districts.

• Authorized the Committee on Criminal Law and Probation Administration to promulgate guidelines for probation and pretrial services officers in relation to investigating and supervising offenders who have been exposed to the human immunodeficiency virus (HIV) or who have contracted AIDS. ■

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THE THIRD BRANCH

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Judicial Improvements Bill Raises Diversity Amount, Creates Court Study Committee

Congress has passed the Judicial Improvements and Access to Justice Act, H.R. 4807, which, if signed by President Reagan, will bring some significant changes to the federal courts. Some of those changes are as follows:

Diversity jurisdiction. The amount in controversy in diversity cases is raised from $10,000 to $50,000.

For purposes of establishing diversity, the representative of an estate of an infant or an incompetent shall be deemed to be a citizen only of the same state as the infant or incompetent.

For diversity purposes, an alien admitted to the United States for permanent residence shall be deemed to be a citizen of the state in which he or she is domiciled.

Federal Courts Study Committee. The Act creates a committee to study the future of the federal judiciary. The committee's purpose is to examine special issues before the courts, to develop a long-range plan with emphasis on alternative dispute structure and on administration of the federal courts, and other related matters. It will make a report to the President, the Chief Justice, the Judicial Conference, Congress, the Conference of Chief Justices, and the State Justice Institute, who will use it to consider, evaluate, and recommend possible revisions of specific federal laws. The report is to be transmitted by Mar. 31, 1990.

The committee will be composed of 15 members, to be appointed by the Chief Justice by Jan. 10, 1989. He is to designate the chairperson of the committee and all members are to serve at his pleasure. The committee is authorized to hold hearings.

See COMMITTEE, page 6

New Judiciary Office Building Legislation Signed by President Reagan

President Reagan has signed the Judiciary Office Building Development Act, Pub. L. No. 100-480, authorizing construction of a judiciary office building adjacent to Union Station in the District of Columbia. This new 520,000 square foot building will permit consolidating into one location closer to the Supreme Court building over 700 personnel of the Administrative Office of the U.S. Courts, Federal Judicial Center, and others of the judicial branch now in eight Washington, D.C., locations.

In addition to the AO and the FJC, space in the building is designated for retired Supreme Court Justices and for other offices necessary to the judicial branch. The Chief Justice is authorized to decide how to use any space in excess of judicial requirements.

The new building will be constructed at the builder's expense on land already owned by the federal government and space will be provided to the judiciary under a 30-year lease. At the end of the lease term, title to the building will revert to the government. Rentals under the lease are expected to save around $500 million compared to present and projected commercial space alternatives.

The Act establishes a 13-member Commission to supervise the design, construction, care, and security of the building. The Architect of the Capitol, under the supervision of the Commission, is directed to select among five competing development proposals within 90 days of the Act. The Chief Justice is given final au-

See JUDICIARY BUILDING, page 8

President Signs FY89 Judiciary Appropriation

Judiciary's FY89 appropriation bill passed the House and Senate on Sept. 27 and was signed by the President on Sept. 30. The judiciary had requested $1,721,933,000; Congress approved $1,398,973,000, a reduction of $322,960,000 from the request but an increase of $69,039,000, or 5.2 percent, over FY88. At the budget summit, which took place in fall 1987, the executive branch and the legislative branch committed themselves to limit appropriations in FY89 over FY88 to only a 2 percent increase. The judiciary fell far short of its request and significantly short of an increase of $168,000,000 needed to fund judiciary operations at current levels with no provision for workload increases.

On May 21, the full House Appropriations Committee reported out the FY89 appropriations bill for Commerce, Justice, State, the judiciary and related agencies, and gave the judiciary an increase of $128,712,000, or 10 percent, over the FY88 appropriations. The Senate Appropriations Committee met on June 18 and approved only a $30 million increase over the FY88 appropriations enacted. The Conference Committee met Sept. 23 and

See APPROPRIATIONS, page 8

Inside . . .

First National Appellate Judicial Conference Held

Almost 170 judges of the U.S. courts of appeals, including 90 percent of those in active status, convened in Washington, D.C., Oct. 24 to 26, for the Federal Judicial Center's national conference on the federal appellate judiciary in the third century of the United States. Judge John C. Godbold, FJC Director, announced the meeting as a conference "to examine the role of the federal appellate judiciary and to consider ways in which that role might be performed in the future." The event marked the first time in the history of the Republic that all federal appellate judges were able to meet with one another.

The conference emphasized topics of federal appellate jurisdiction allocation, of jurisdiction between the federal judicial system and the state courts and administrative agencies. There was discussion of internal appellate operating procedures, judicial governance, and relations with the political branches.

Chief Justice William H. Rehnquist opened the conference. Justice Byron R. White participated in the session on maintaining uniformity in federal law in the future. Justice William J. Brennan, Jr. closed the meeting.

The FJC's Appellate Education Committee, which planned the conference, is comprised of Judges Jon O. Newman (2d Cir.), *Chairman;* Daniel M. Friedman (Fed. Cir.); James K. Logan (10th Cir.); and Kenneth W. Starr (D.C. Cir).

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Co-editors

Alice 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.

FJC Reports Preliminary Results of Survey On Personal Computer Use in Federal Courts

The Center's Innovations and Systems Development Division has conducted a survey of personal computer usage in the federal courts. This survey sought to

- identify the tasks being performed on PCs;
- identify software packages being utilized;
- identify functions not yet automated but which the courts feel should be automated; and
- assess the courts' need for PC training and support.

The survey was sent to the chief judge and the clerk of each federal court, and through them to each chambers and each support office (e.g., staff attorney, library, probation, and public defender) within the court.

A total of 973 survey responses were received from 165 different courts: 680 from chambers, 163 from clerks, and 130 from other offices.

The average respondent reported that availability of a PC is "very important" and that PCs provide "great benefit" to the court.

The volume of the response indicates the courts' high degree of interest in personal computer utilization. The average respondent reported that availability of a PC is "very important" and that PCs provide "great benefit" to the court.

Tasks performed on court PCs. The responses indicate that the courts' PCs are currently being widely used for word processing, accessing other automated systems such as LEXIS and WESTLAW, case management, and calendar management. They are also being used for property inventory control, personnel information, jury management, financial management, and many other functions.

Software utilized on court PCs. Respondents reported nearly 100 commercial software packages that are being used in the courts and approximately 125 additional PC software packages specially developed by or for the courts.

Recommended commercial software packages include 16 utility packages (disk maintenance, backups, etc.), 14 word processing packages, 12 database packages, plus local area network packages, communications packages, and spreadsheet packages.

Of the 14 word processing packages recommended, WordPerfect received 231 recommendations whereas the next most popular package received only eight.

Court-developed systems include 28 case management systems, 18 financial management systems, 13 calendar systems, 10 personnel and leave systems, 10 property inventory systems, 10 index systems (e.g., case list, attorney list), plus statistical reporting systems, jury systems, and federal records center systems.

Commercial products in each category do not share equal popularity in the courts. For example, of the 14 word processing packages recommended, WordPerfect received 231 recommendations whereas the next most popular package received only eight.

The AO's soon-to-be-awarded PC procurement for the courts includes the selection of one word processing package, one database package, one communications package, and one spreadsheet package. Those selections should lead to an increased standardization of commercial software packages used in the courts.

See PC SURVEY, page 7

Bankruptcy Judges, Magistrates Gain New Benefits; New Bankruptcy Judgeships Created

Culminating two years of effort, the House adopted S. 1630, the Retirement and Survivors Annuities for Bankruptcy Judges and Magistrates Act of 1988, on Oct. 19, 1988. The Act's provisions include the following:

- One may retire at full salary at age 65 after 14 years of service;
- Leaving office before age 65 reduces benefits by 2 percent per year, up to a total reduction of 20 percent, and the pension still could not be drawn until age 65;
- For those with more than eight but less than 14 years of service, the pension is reduced proportionally;
- A contribution of 1 percent of salary per year for 14 years is required;
- Retirement for disability after five years qualifies for 40 percent of benefits; after 10 years the benefit is proportioned in relation to the 14-year predicate;
- Retirees forfeit annuities if they subsequently practice law, but by first notifying the AO of their intention to do so they can preserve the annuity less future COLAs;
- COLAs are available, not to exceed the pay of sitting judicial officers;
- Benefit options include annuities and lump-sum disbursement; incumbent judicial officers will wish to explore the alternative options under title 5 and § 377 of title 28;
- There is no survivor's pension, but one can buy into a survivor's annuity program;
- Survivors of annuitants will receive lump-sum balances if the principal dies before receiving the annuity or before the annuity totals the lump-sum amount, and thereafter they will receive the accrued and owing amount;
- A thrift savings plan has been created, permitting judicial officers covered by 28 U.S.C. § 377 to contribute up to 5 percent of their base pay;
- The AO Director is charged to report to Congress in five years on the financial operation of the annuity program, the contributions, and the need for continuing deductions.

In support of the Act, Rep. Carlos Moorhead reminded the House that, since the Bankruptcy Reform Act of 1978, bankruptcy judges and magistrates had been losing ground both on salary and on retirement benefits, prompting a high rate of turnover. Rep. Moorhead stated that, as the ideal federal judicial officer was a veteran of considerable legal practice and experience, it was necessary to augment the rewards for such service to attract appointees later in their legal careers and to discourage early retirement in contemplation of subsequent legal practice.

On a related matter, on Nov. 3 the President signed H.R. 4064, which authorizes seven new bankruptcy judgeships, four of them recommendations of the Judicial Conference, to respond to greatly increased caseloads. They are in the Districts of Alaska, Colorado, Kansas, Arizona, the Eastern District of Kentucky, and the Eastern District and Western District of Texas.

Effective Oct. 1, bankruptcy judges and full-time magistrates received salary increases from $72,500 to $82,340, which will first appear in the November paycheck. ■

CALENDAR

Nov. 2–4 Federal Circuit Court Librarians

Nov. 2–4 Video Orientation for Newly Appointed District Judges

Nov. 14–16 Seminar for Bankruptcy Judges

Nov. 14–16 Seminar for District Deputies-in-Charge

Nov. 27–Dec. 2 Seminar for Newly Appointed District Judges

Nov. 29–Dec. 2 Workshop for Docketing Supervisors

PERSONNEL

CIRCUIT JUDGES

Confirmation

John M. Duhe, Jr., 5th Cir., Oct. 14

DISTRICT JUDGES

Confirmations

Lewis T. Babcock, D. Colo., Oct. 14

Paul V. Gadola, E.D. Mich., Oct. 14

Robert Leon Jordan, E.D. Tenn., Oct. 14

Alex R. Munson, N. Mar. I., Oct. 14

Norwood Carlton Tilley, Jr., M.D.N.C., Oct. 14

Richard L. Voorhees, W.D.N.C., Oct. 14

Jay C. Waldman, E.D. Pa., Oct. 14

Appointments

Simeon Timothy Lake III, S.D. Tex., Sept. 2

Jan E. Dubois, E.D. Pa., Sept. 6

Herbert J. Hutton, E.D. Pa., Sept. 6

Fern M. Smith, N.D. Cal., Sept. 12

Chas. R. Butler, Jr., S.D. Ala., Nov. 1

D. Brooks Smith, W.D. Pa., Nov. 1

Senior Status

G. Wix Unthank, E.D. Ky., June 14

Hiram H. Ward, M.D.N.C., Aug. 20

Robert F. Peckham, N.D. Cal., Nov. 10

Deaths

William J. Campbell, Senior District Judge, N.D. Ill., Oct. 19

Edward T. Gignoux, Senior District Judge, D. Me., Nov. 4

BANKRUPTCY JUDGES

Appointment

Ronald B. King, W.D. Tex., Oct 1

Elevation

Larry E. Kelly, W.D. Tex., Oct. 1

Resignation

R. Glen Ayers, Jr., W.D. Tex., Sept. 30

MAGISTRATES—FULL-TIME

Appointments

John T. Maughmer, W.D. Mo., Sept. 29

James H. Payne, E.D. Okla., Oct. 1

David M. Cohen, D. Minn., Oct. 11

Congress Approves Arbitration in Selected Districts; AO, FJC to Report on Implementation

Provisions of the Federal Courts Improvements and Access to Justice Act, H.R. 4807, authorize ten U.S. district courts to use arbitration. Authorized courts are N.D. Cal., M.D. Fla., W.D. Mich., W.D. Mo., D.N.J., E.D.N.Y., M.D.N.C., W.D. Okla., E.D. Pa., and W.D. Tex. The Act is awaiting the President's signature.

The Act stipulates that these districts may authorize arbitration of any civil action (including any adversary proceeding in bankruptcy) if the parties consent, and may require arbitration of any civil action (except an alleged violation of a constitutional right or one based on jurisdiction under 28 U.S.C. § 1343) if the relief sought consists only of money damages not in excess of $100,000, or a lesser amount the district court may set (exclusive of interest and costs). Ten additional judicial districts may be approved by the Judicial Conference of the United States to authorize arbitration of any civil action if (and only if) the parties consent.

The district court is to establish procedures by local rule; including those for the exemption, sua sponte or on motion, of cases where complex or novel legal issues are involved or where legal issues predominate over factual issues.

Each district court participating in the arbitration program is to establish standards for the certification of arbitrators.

Within 30 days after the filing of an arbitration award with a district court any party may file a written demand for a trial de novo, and upon such a demand the action shall be restored to the docket.

A further provision states that the district court shall provide by local rule that the contents of any arbitration award shall not be made known to any judge who might be assigned to the case. There are three exceptions: (1) when it is necessary for the court to determine whether to assess costs or attorney fees; (2) when the district court has entered final judgment in the action or the action has been otherwise terminated; and (3) when it is necessary to use the information to compile the Annual Report of the Director of the AO.

The Judicial Conference may develop model rules relating to procedures for arbitration.

The AO Director is to include in his Annual Report statistical information about the implementation of this program. The FJC, no later than five years after the date of enactment, is to submit to Congress a report on the implementation of the program, including (1) a description of the program; (2) a determination of the "level of satisfaction"; (3) a summary of program features that can be identified as being related to acceptance within and across judicial districts; (4) a description of the levels of satisfaction relative to the cost per hearing; and (5) recommendations to Congress whether to terminate or continue this or alternative arbitration procedures. ■

Judges from China Visit AO and FJC

A delegation from the Chinese Training Center for Senior Judges visited the Administrative Office of the U.S. Courts and the Federal Judicial Center last month as part of a Ford Foundation program on U.S.–China relations. The delegation will be visiting several cities and law-related institutions to secure a better understanding of the American judicial system at the federal, state, and local levels. Their interests covered a broad area of court administration and the role of the U.S. Department of Justice, with primary emphasis on observing and discussing judicial training.

China's Judicial Training Center was started in early 1988 as the country's principal institution for the preparation of judges for the bench.

Pictured above are (l. to r.) Zhao Zhenjiang, Professor and Dean, Peking University Law School, Beijing; Wang Zenong, State Commission on Higher Education and member of the Committee of the Training Center for Senior Judges at Beijing; Zhou Daoluan, Justice of the Supreme People's Court of the People's Republic of China and leader of the delegation; Gu Chun De, Dean of the Department of Law, People's University of China; and Wang Chenguang, Deputy Dean of the Law Department, Peking University.

Rules Enabling Act Provisions Revised, Consolidated

In title IV of the recently passed Judicial Improvements and Access to Justice Act, H.R. 4807, Congress amended the Rules Enabling Act to consolidate all the current rules enabling provisions into chapter 131 of 28 U.S.C. and standardize the language applicable to the rules process. The amendments codify the current standing committee, advisory committee, and Judicial Conference roles in the rules process developed over 40 years, and require public notice and opportunity to comment, and public meetings under most circumstances. The Supreme Court must transmit proposed rules to Congress no later than May 1 of the year in which the rules are to become effective. The rules would take effect no earlier than Dec. 1 of that year (unless otherwise provided by law).

In addition, the changes provide that each federal court authorized to prescribe rules under 28 U.S.C. § 2071 (except the Supreme Court) shall appoint an advisory committee to study the rules and internal operating procedures of such court;

The amendments also provide that:

•The Director of the Administrative Office of the U.S. Courts shall periodically compile the following: (1) local rules promulgated by courts other than the Supreme Court, (2) rules promulgated by the judicial councils and the Judicial Conference of the United States for the conduct of judicial discipline proceedings under 28 U.S.C. § 372(c)(11), and (3) orders relating to judicial discipline required to be publicly available under 28 U.S.C. § 372(c)(15);

•The Judicial Conference shall periodically review local rules promulgated by the courts of appeals, the Claims Court, and the Court of International Trade, and is authorized to modify or abrogate any such local rule found inconsistent with federal law (amending 28 U.S.C. § 331);

•The relevant judicial council shall periodically review local district court rules for consistency with the national rules;

•Local rules duly issued shall remain in effect unless modified or abrogated by the judicial council of the relevant circuit or the Judicial Conference, as applicable;

•Local rules shall be promulgated only after advance public notice and opportunity for comment. General orders issued by judicial councils related to practice and procedure, as well as judicial discipline rules, must also be preceded by appropriate notice and opportunity for comment;

•Copies of local rules and general orders relating to practice and procedure shall be furnished to the Judicial Conference and the AO and be made available to the public. ■

Quadrennial Commission Holds Judicial Compensation Hearings in Washington, D.C.

The 1988 Quadrennial Commission on Executive, Legislative, and Judicial Salaries held public hearings on judicial compensation in Washington, D.C. Nov. 10 and 11.

Members of the Commission are appointed by the President, the Chief Justice,and members of the House of Representatives, and the Senate. The members of the Commission are Lloyd N. Cutler, *Chairman* (Attorney, Washington, D.C.); William M. Agee (Chairman and CEO, Morrison-Knudsen Co., Boise, Idaho); Preston R. Tisch (President and CEO, Loews Corp., New York, N.Y.); James T. Lynn (Chairman, Aetna Life & Casualty, Hartford, Conn.); Carlisle Humelsine (Chairman, Colonial Williamsburg Foundation, Williamsburg, Va.); John J. Creedon (President and CEO, Metropolitan Life Insurance Co., New York, N.Y.); William R. Ratchford (Attorney, Washington, D.C.); Thomas F. Eagleton (Attorney, St. Louis, Mo.); Charles McC. Mathias (Attorney, Washington, D.C.).

NOTEWORTHY

Anonymous jury permissible, Third Circuit holds. The empanelment of an anonymous jury was justified in a case involving a reputed organized crime figure, where prosecution witnesses claimed that a prospective witness had been killed in the past, a judge murdered, and attempts made to bribe other judges, the Third Circuit has held. *U.S. v. Scarfo*, 850 F.2d 1015 (3d Cir. 1988).

In the extortion trial of the alleged "boss" of an organized crime group, the district judge granted the government's motion to empanel an anonymous jury. During voir dire neither party was permitted to learn the prospective jurors' names, addresses, or places of employment. The prospective jurors completed an extensive written questionnaire on such topics as the nature of their employment, neighborhoods, education, reading and television tastes, organization memberships, hobbies, previous service as jurors in criminal cases, and connections to law enforcement agencies. The judge personally examined the prospective jurors and permitted further questioning by counsel. The judge told the jurors that they would be selected on an anonymous basis and sequestered, and emphasized that anonymity was intended to protect the interests of both prosecution and defense. The defendant was con-

See NOTEWORTHY, page 7

Positions Available

Technical Assistant, Fed. Cir. Duties include reviewing briefs and panel-approved opinions for publication, assisting with evaluation reports, advising judges and law clerks on legal or technical matters, researching technological and legal matters, and preparing research memos. Work includes patent issues. Minimum requirements are undergraduate degree in or related to electrical engineering or electronic technology and J.D. or LL.B. Admission to a bar and experience in intellectual property law, engineering, or high technology desirable. Open until filled. Send SF-171 and résumé to Senior Technical Assistant, U.S. Court of Appeals, 717 Madison Pl., N.W., Washington, DC 20439.

Clerk, Bankr. Ct., S.D. Cal. Provides all administrative support service required by the court. Supervises 56 personnel and provides support services to four judges. Requires at least 10 years of progressively responsible management experience, thorough understanding of automation concepts and applications. Undergraduate degree in public or business administration and graduate or law degree preferred (graduate or law degree may be substituted for two years of required experience). Entry level, salary $67,038 per year. Submit SF-171 and detailed résumé and references by Dec. 1, 1988, to Personnel, Clerk of the Court, U.S. Bankruptcy Court, 940 Front St., Room 5N26, San Diego, CA 92189.

Clerk, Bankr. Ct., S.D. Ind. Requires a minimum of 10 years of progressively responsible administrative experience, at least three in position of substantial management responsibility. Active practice of law may be substituted on a year-for-year basis, and education may be substituted as follows: bachelor's degree equals three years; postgraduate degree in public, business, or judicial administration equals one additional year; law degree equals two additional years. Law degree, legal practice, and training or experience in judicial administration highly desirable. Salary range $46,679 to $72,000. Send four sets of résumé and cover letter by Dec. 31 to Chief Bankruptcy Judge Robert L. Bayt, Room 317-A, U.S. Courthouse, 46 E. Ohio St., Indianapolis, IN 46204.

Clerk, Bankr. Ct., E.D. Mo. Headquartered in St. Louis, the court has three bankruptcy judges, their staffs, and 28 deputy clerks. Applicant should have at least 10 years of progressive management experience, including three with significant responsibility; thorough understanding of modern management techniques, including utilization of automation; and interest in judicial management. Undergraduate degree preferred, and graduate/legal degree in business or public administration or legal practice experience may be substituted for some of experience requirement. Salary $57,158 to $74,303, effective January 1989. Submit SF-171, resume, and application letter by Dec. 30, 1988, in sealed envelope marked "Confidential 88-4" to William D. Rund, Clerk, U.S. Bankruptcy Court, 1114 Market St., Room 730, St. Louis, MO 63101.

Clerk, Bankr. Ct., W.D. Mich. Manages the office under direction of the chief judge. Must have minimum 10 years of progressively responsible administrative experience in public service or business, at least three with substantial management responsibility. Bachelor's degree may be substituted for three such years; postgraduate degree in public, business, or judicial administration for one additional year; a law degree for two additional years; and legal practice experience substituted year for year. Salary from $54,907 to $71,377. Submit SF-171 and detailed résumé by Dec. 31, 1988, to Sheila Kooistra, U.S. Bankruptcy Court, P.O. Box 3310, Grand Rapids, MI 49501.

Official Court Interpreter (Spanish/English), S.D.N.Y. Duties include interpreting for the court and related offices in various proceedings, translating written documents, and transcribing tape-recorded conversations. Requirements: Certification from the AO, at least two years of experience, extensive experience in simultaneous interpretation using electronic equipment and in consecutive mode, plus the interpersonal skills for dealing with defendants, witnesses, court personnel, the bar, and the general public. Experience must be documented in the submission. Salary from $25,226 to $33,218 annually; 120-day probationary period. Submit application to Personnel Office, U.S. Courthouse, Room 21, 40 Centre St., New York, NY 10007.

EQUAL OPPORTUNITY EMPLOYERS

COMMITTEE, from page 1

The Act specifies that the Administrative Office of the U.S. Courts, the Federal Judicial Center, "and each department, agency, and instrumentality of the executive branch of the Government, including the National Institute of Justice shall furnish the Committee information and assistance" that the committee may deem necessary to carry out its functions. The Director of the AO is designated to furnish staff and technical assistance. The committee is also authorized to appoint advisory panels, including members of the public, to support the committee with expertise in specific areas.

The Act specifies that the committee will cease to exist 60 days after it transmits its final report.

An amount of $300,000 is authorized for each of the fiscal years 1989 and 1990.

Salaries of the judges of the U.S. Claims Court, through an amendment to title X of H.R. 4807, were established at the same rate of pay as judges of the U.S. district courts.

In another title of H.R. 4807, there was congressional action on arbitration programs; these changes are detailed on p. 4 of this issue. ■

NOTEWORTHY, from page 5

victed of conspiracy and extortion.

The defendant claimed on appeal that the jury selection procedure impaired his right to exercise peremptory challenges and infringed on the presumption of innocence. The appellate court noted that because "voir dire is not of constitutional dimension, limitations affecting peremptory challenges need not be reviewed with the close scrutiny reserved for encroachments on the fundamental rights of an accused." Although the issue was one of first impression in the circuit, the court reviewed case law from other federal district and circuit courts and concluded that "defendant was not deprived of information reasonably necessary to the intelligent exercise of his peremptory challenges" and that the trial judge had not abused his discretion in empaneling an anonymous jury. The court distinguished this from the rule in capital cases, citing 18 U.S.C. § 3432. The appellate court also found that the trial judge's instructions adequately protected the defendant from possible adverse inferences by the jurors, and affirmed the conviction.

Department of Justice reported that 1987 personal and household crimes numbered 34.7 million, representing a 1.8 percent increase over 1986. In 1986 about 34.1 million personal and household crimes were reported, said the Bureau of Justice Statistics on Oct. 9, 1988. This is the first increase in crimes since 1981; the 1987 figure is still 16 percent less than in 1981. Single copies of the National Crime Survey bulletin "Criminal Victimization, 1987" (NCJ-113587), may be obtained from the Criminal Justice Clearinghouse, Box 6000, Rockville, MD 20850, (tel. (301) 251-5550; from outside Maryland and Washington, D.C. (800) 732-3277).

Juror utilization report issued. The AO has issued the quarterly report on juror utilization for the 12-month period ending June 30, 1988. Copies have been sent to all clerks of the courts. ■

PC SURVEY, from page 2

Nevertheless, some functions are not covered by those products and some courts will continue to have their own commercial software preferences.

The large number of court-developed systems designed to serve the same function (e.g., 28 case management systems) creates a need to devise some standard, objective criteria for describing and comparing those systems. The I&SD Division is in the process of collecting information for those standard descriptions and compiling it into a catalog for use by the courts. The catalog, which is expected to be available to courts by the end of the year in both electronic and print form, will contain information regarding both the commercial packages and the court-developed systems that have been used and recommended by the courts. The catalog will be supplemented by a software clearinghouse facility for those court-developed systems made available for general dissemination.

Functions not yet provided on PCs. Respondents listed numerous functions that they would like to perform on their PCs but could not, because of a lack of software or expertise. Some of those functions have already been developed by other courts, and the catalog should facilitate the sharing of that software.

Courts' need for PC training and support. Most respondents felt that their past training, level of knowledge, and adequacy of expert assistance fell in the middle of a scale ranging from "unacceptable" to "excellent." Many reported that they were self-taught, and many, while praising the experts who assist them, complained that they had no expert who was readily available. They indicated a need for both additional PC training and additional expert assistance.

The AO's upcoming PC procurement will include training programs for some aspects of PC usage. In addition, the I&SD Division, through its Automation Training Project, will be working to make the Center's Media Library more beneficial to PC users and to develop additional training curricula for PC support personnel.

Further information about the survey is available from Gary Bockweg of the Innovations and Systems Development Division, tel. (202) 633-6400. ■

APPROPRIATIONS, from page 1
resolved the differences between the Senate and the House bills by appropriating the $69 million increase. Under the appropriation, the AO received an appropriation of $33,600,000 for "salaries and expenses"; the FJC received $11,200,000 for "salaries and expenses."

In addition, however, the Committee supplemented the judiciary's new budget authority by registry funds held by the courts. (A 1 percent fee would raise about $15 million.) The Conference Committee also authorized funding the judiciary for up to $1.5 million from the Vaccine Injury Fund for one year to process vaccine injury cases, and authorized the establishment of death penalty habeas corpus resource centers in South Carolina, Alabama, Arizona, Mississippi, and Texas.

Although the judiciary's appropriation fell far short of its request, the Commerce Department appropriation (excluding funds for the Periodic Census and the National Oceanic and Atmospheric Administration) was increased only 1.9 percent, the Justice Department only 2.8 percent (excluding Prisons), and the State Department only 1.6 percent. Finally, the legislative branch increased its budget authority by only 3.4 percent. During the closing days of the 100th Congress, action on the FY89 drug supplemental was completed. The judiciary received an additional $51 million in new budget authority for drug-related programs, which was allocated among the following accounts: "salaries and expenses," $35 million; "defender services," $15 million; "fees of jurors and commissioners," $1 million. In addition, funding was included in Defender Services for establishing additional death penalty habeas corpus resource centers in California, Florida, Kentucky, North Carolina, and Oklahoma.

The Executive Committee of the Judicial Conference met Oct. 26 at the AO and approved a spending plan for the operation of the courts based on the appropriations approved for FY89. The plan, which distributes available funding among all the judiciary programs and activities, represents a consensus arrived at among the chairmen of the Judicial Conference committees whose programs are affected by the budget and the chairman of the Budget Committee. ■

JUDICIARY BUILDING, from page 1
thority over all decisions in the process. The Commission is to be composed of the following individuals or their designees:

- two members from among the Justices of the Supreme Court and other federal judges, to be appointed by the Chief Justice;
- the members of the House Office Building Commission;
- the Majority Leader and the Minority Leader of the Senate;
- the Chairman and the ranking minority member of the Senate Committee on Rules and Administration;
- the Chairman and the ranking minority member of the Senate Committee on Environment and Public Works;
- the Chairman and the ranking minority member of the House Committee on Public Works and Transportation.

The Commission will be responsible for the rules and regulations formulated under the Act governing the use and occupancy of the building. ■

BULLETIN OF THE FEDERAL COURTS
THE THIRD BRANCH

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BULLETIN OF THE FEDERAL COURTS

THE THIRD BRANCH

VOLUME 20
NUMBER 12
DECEMBER 1988

A Holiday Message from The Chief Justice

It is my pleasure to extend to all of the members of the federal court "family" my best wishes for a happy holiday season.

As we reflect on the past year, there is much for which we can be thankful and from which we can take satisfaction. First and foremost, the confirmation of Justice Anthony Kennedy brought the Supreme Court back to full strength. After laboring for many months with only eight members, we have all benefitted immeasurably from Justice Kennedy's ability and congeniality.

This past fall, the first nationwide conference of Judges of the United States Courts of Appeals was held in Washington, D.C. These judges had the opportunity to consider the future of the federal courts and the challenges likely to be presented in coming years. For some of the judges, it was their first opportunity to meet many of their colleagues. I have no doubt that the shop-talk and personal exchanges which took place will benefit the federal courts in the years to come.

At this holiday season, I would like to be able to report that 1988 also saw an appropriate rise in the salaries of federal judges. Unfortunately, such action has not yet occurred, and the federal judiciary remains undercompensated in comparison with the rest of the legal profession. As we look to the new year, we are hopeful that in light of the recommendations of the President's Salary Commission a suitable increase in judicial salaries will soon be forthcoming.

I thank each of you for your good efforts during the past year and look forward to working with you in 1989. Mrs. Rehnquist joins me in extending to you and to your families best wishes for a Merry Christmas and a Happy New Year.

Sincerely,

William H. Rehnquist

Veterans' Judicial Review Act Creates New Court of Veterans Appeals

Veterans gained the right to judicial review from final decisions of the Board of Veterans Appeals and limited payment of contingent attorneys' fees under S. 11 (Pub. L. No. 100-687), the Veterans' Judicial Review Act, which President Reagan signed Nov. 18. The Act establishes a U.S. Court of Veterans Appeals with exclusive jurisdiction to review decisions of the Board of Veterans' Appeals and to affirm, modify, reverse, or remand, as appropriate. The scope of appeal will include:

- the power to decide relevant questions of law; constitutional, statutory, and regulatory interpretation; and meaning and applicability of actions of the Administrator;
- the power to compel acts of the Administrator that have been withheld;
- the power to set aside findings of fact and hold them unlawful if clearly erroneous;
- the power to hold unlawful certain other findings, decisions,

See VETERANS APPEALS COURT, p. 6

Quadrennial Commission Witnesses Support Increased Judicial Compensation

In hearings held Nov. 10 and 11 in Washington, D.C., the Quadrennial Commission on Executive, Legislative and Judicial Salaries heard from numerous witnesses with distinguished records of public service, all advocating increased compensation for federal judges, executives and legislators.

Judge Frank M. Coffin (1st Cir.), Chairman of the Committee on the Judicial Branch of the Judicial Conference of the United States, presented a report entitled *Promises Made, Promises Still Unkept*, which set out historical and comparative data that he described as "the most complete judicial branch submission in the two decades of Quadrennial Commission activity." The report focused on questionnaire responses from 638 of the 710 active judges. All respondents described financial strictures compared with private sector income levels, and many detailed hardships on families and referred to erosion of purchasing power over time. Many also noted that outside income and assets, part-time teaching, and debt underwrote their standard of living. One said that he felt he was "inflicting a life of genteel poverty upon his family in order to be a federal judge." Younger judges—with children to educate

See QUADRENNIAL COMMISSION, p. 8

Inside . . .

U.S. Marshals Service Designated a Bureau in Department of Justice on Eve of 200th Year

The U.S. Marshals Service has been statutorily designated a bureau within the Department of Justice, rather than a collection of relatively autonomous district offices, as had been the case for 200 years. Beginning at § 7608, the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, streamlines, modernizes, and consolidates related existing statutory provisions, providing explicit authority for functions the marshals and their deputies have in the past traditionally performed.

Although the office of U.S. marshal was created by act of the 1st Congress on Sept. 24, 1789, the Marshals Service has until now existed only by order of the Attorney General.

The legislation, originally introduced as a separate bill that was endorsed by the Judicial Conference of the United States last March, spells out the authority and duties of the Marshals Service, restating its traditional and primary responsibility for providing security for the federal courts and executing court orders. It also authorizes the Service to provide personal protection to judges, witnesses, and other threatened persons in connection with judicial processes and other official proceedings. Law enforcement officers of the Service are now provided with specific authority to conduct investigations of fugitives and to provide for the custody, care, and transportation of unsentenced federal prisoners in Service custody. All these responsibilities, together with the management and disposal of seized criminal assets, have become more burdensome with the increase in drug cases.

Marshals Service Director Stanley E. Morris pointed out, "The new provisions respond to several concerns of the Judicial Conference. It gives the Marshals Service authority to enter personal services contracts for security guards, permitting more efficient use of funds appropriated to the courts' security needs. In addition, it removes the unrealistic $6 per day limit on court bailiff salaries without fixing the salary level or otherwise affecting the courts' appropriations."

The current system of presidential appointment of U.S. marshals with the advice and consent of the Senate is retained, with the same method used to designate the Director of the Service. However, temporary vacancies in the office of marshal will now be filled by the Attorney General rather than by the district court.

A key feature designed to strengthen the administration of justice in the District of Columbia is creation of the new Office of Marshal for the Superior Court of the District of Columbia. The services provided to the D.C. Superior Court are vastly different from those for other federal district and circuit courts, and the Marshals Service district in that court has the greatest number of personnel of any district. The new office is intended to ensure meeting the unique needs of the District of Columbia.

In a related action, Congress adopted a resolution to declare Sept. 24, 1989, as "United States Marshals Bicentennial Day" and asked the President to issue a proclamation to that effect. Director Morris said that one of the first events celebrating the Service's bicentennial will be the opening on Dec. 9 of a special Smithsonian Institution exhibit in the U.S. Supreme Court Building entitled *America's Star: U.S. Marshals, 1789-1989*. The exhibit will be shown in 12 cities in the United States after its Washington, D.C., debut. ■

Spanish/English Interpreting Certification Test Set

The Administrative Office has announced a Mar. 4, 1989, written examination for Spanish/English interpreters, the first step of the certification process established pursuant to the Court Interpreters Act of 1978, at 28 U.S.C. § 1827(b). Successful candidates from the written examination will be given the oral test in July or August 1989. Testing will be offered once in 1989 and only in certain cities.

The Act requires courts to use certified interpreters for all proceedings covered by the Act and permits use of otherwise competent but uncertified interpreters only if no certified interpreters are reasonably available.

Successful candidates will be placed on an eligibility list from which certified court interpreters may be chosen. Full-time, salaried interpreters, as of Jan. 1, 1989, will be designated as JSP-10 and JSP-11 (salary ranges $26,260-$37,509 annually). The freelance certified interpreter fee is $210 per day.

The AO has issued an examination announcement, which has been posted in federal judicial workplaces. It is also available through the University of Arizona Federal Court Interpreter Certification Project, Modern Languages Building, Room 456, University of Arizona, Tucson, Arizona 85721, or by telephoning them from 8 a.m. to 5 p.m. RMT at (602) 621-3687. The application fee is $25 and the deadline is Jan. 15, 1989.

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Co-editors

Alice 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.

Changes in Jury Service Exemptions, Excuses, As Jury Act Amendments Become Effective

The Jury Act of 1968 has been amended by title VIII of H.R. 4807, the Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702, 102 Stat. 4642). (See *The Third Branch*, November 1988, for details of the rest of the Act.) The amendments became effective upon President Reagan's Nov. 19 signature of the Act, and they do the following:

- limit jury service exemptions to members of the armed services, federal and state public officers, and members of fire and police departments;
- authorize automatic excuses from jury duty for "public agency volunteer safety personnel" (firefighters, rescue squads, ambulance crews);
- permit temporary excuses on grounds of undue hardship, or extreme inconvenience;
- eliminate the requirement that jury lists be alphabetical;
- authorize delegation of jury selection functions to non-court personnel;
- authorize two-year experimental testing of one-step qualification and summoning in as many as 10 courts to be selected by the Judicial Conference of the United States.

The AO has disseminated copies of relevant portions of the Act with an analysis. David Williams in the Court Administration Division at FTS 633-6221 is available to answer questions on the volunteer safety personnel excuse. For general questions on title VIII, call Deputy General Counsel Robert Loesche at FTS 633-6127. ■

Rules Committee to Suggest Model Local Rules and Forms for U.S. District Courts

The Judicial Conference of the United States Standing Committee on Rules of Practice and Procedure will review recommendations of its Local Rules Project at a meeting to be held in San Francisco Jan. 19-20, 1989, announced Judge Joseph F. Weis, Jr. (3d Cir.), Chairman. The Project will suggest, in addition to a uniform numbering system, some model local rules, illustrative forms, and other possible methods of reducing and simplifying local rules. Soon thereafter, the Committee plans to send the results of the Local Rules Project's study to each district court for information and comments. Judge Weis suggested that district courts that have begun a review of their local rules and those that contemplate doing so in the next few weeks might wish to await the Committee's report before proceeding on a review of their local rules.

Anti-Drug Abuse Act Creates New Office to Oversee Unified National Drug Strategy

Before adjournment the 100th Congress passed the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, and President Reagan signed the Act on Nov. 19. As passed, it combines several separately introduced bills, some unconnected to substance abuse. The following are summaries of drug-related sections.

Coordinating national drug policy. The Act establishes an Office of National Drug Control Policy within the Executive Office of the President, to be headed by a Director appointed by the President subject to Senate confirmation. The Director is to organize U.S. resources into a single drug control strategy at the national level. Within 180 days of his or her confirmation, the Director must submit to Congress a "comprehensive, research-based, long-range plan" for reducing drug abuse in the United States. The plan must balance resources between reductions in supply and demand, must review state and local drug control activities to facilitate coordination at all levels, and must organize compatible automated information and communication systems among federal and other agencies. The Act requires the Director to submit yearly plans to implement the national strategy, and each plan submitted in the second and subsequent years shall evaluate the preceding plan's effectiveness.

Within a year of appointment, the Director shall submit a Justice Department reorganization plan, targeting these elements of the Criminal Division: the Organized Crime and Racketeering Section and all the strike forces; the Narcotics and Dangerous Drugs Section; the Asset Forfeiture Office; and the Organized Crime Drug Enforcement Task Force Program.

By Jan. 15, 1990, the Director must recommend to the President and Congress a plan for reorganizing other existing federal agencies for greater efficacy in reducing illegal drug supply and demand.

The Director is to designate high-intensity drug trafficking areas and provide federal assistance to the areas. By Mar. 1, 1991, he or she is to report to Congress the utility of such designations and the allocation of federal assistance to those areas, along with comments and any recommendations for legislation. The Director's broad authority includes power to review other agencies' staffing and budgets for adherence to the national strategy (agencies may appeal disapprovals to the President). The Director will report quarterly to Congress on needed programs or funds transfers. In presidential budgetary submissions to Congress, each requested appropriation for the Office of National Drug Control Policy and other programs is to be designated separately.

See ANTI-DRUG ABUSE ACT, p. 6

PERSONNEL

CIRCUIT JUDGES
Death
J. Skelly Wright, D.C., Aug. 6

DISTRICT JUDGES
Appointment
Alex Munson, D. N. Mar. I., Nov. 18

Senior Status
Almeric L. Christian, D.V.I., May 15
Scott Reed, E.D. Ky, Aug 1
Alfred Laureta, D. N. Mar. I., Nov. 19

Deaths
George Templar, D. Kan., Aug. 5
M. Joseph Blumenfeld, D. Conn., Nov. 5

BANKRUPTCY JUDGES
Appointments
Kathleen P. March, S.D. Cal., Nov. 10
J. Vincent Aug, Jr., S.D. Ohio, Dec. 1

Photo courtesy Pete Souza, The White House

Pictured above with President Reagan at the White House Sept. 21 are, left to right, Bankr. Judge William E. Anderson, W.D.Va.; Chief Bankr. Judge George C. Paine, II, M.D. Tenn.; President Reagan; Chief Bankr. Judge Charles N. Clevert, D. Wis.; and Chief Bankr. Judge Conrad B. Duberstein, E.D.N.Y. The bankruptcy judges discussed with President Reagan recent legislation and the current status and problems of the bankruptcy 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, 1520 H St., N.W., Washington, DC 20005.

Barber, Sotirios A. "Judicial Review and *The Federalist*." 55 *University of Chicago L. Rev.* 836 (1988).

Burnett, Arthur L., Sr. "U.S. Claims Court Practice," in *Intellectual Property Counseling & Litigation*, ch. 107 (Matthew Bender & Co., 1988).

Copple, Robert F. "From the Cloister to the Street: Judicial Ethics and Public Expression." 64 *Denver University L. Rev.* 549 (1988)

Eisenhower, James J., III. "Four Theories of Precedent and Its Role in Judicial Decisions." 61 *Temple L. Rev.* 871 (1988).

Everett, Robinson O. "FBA Fourth Circuit Conference Keynote Address." 35 *Federal Bar News & J.* 356 (1988).

Fratcher, William F. "The Independence of the Judiciary under the Constitution of 1787." 53 *Missouri L. Rev.* 1 (1988).

Hutton, Mary Christine. "The Unique Perspective of Justice White: Separation of Powers, Standing and Section 1983 Cases." 40 *Administrative L. Rev.* 377 (1988).

Kastenmeier, Robert W. "Let Ideas Flourish: How We Can Improve Our Justice System." 72 *Judicature* 122 (1988).

Lay, Donald P. Remarks at the Eighth Circuit Judicial Conference (July 14, 1988).

Luneberg, William V. "Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement." 1988 *Wisconsin L. Rev.* 1.

MacManus, Sheila. "Center Surveys JCO Complaint Disposition, Budget and Staff for 1986." 10 *Judicial Conduct Rep.* 1 (1988).

Posner, Richard A. *Law and Literature*. (Harvard Univ. Press 1988).

Wald, Patricia M., Mary McGowan Davis, Daniel J. Meltzer, John H. Pickering, and Newton N. Minow. "In Memoriam: Carl McGowan." 82 *Northwestern University L. Rev.* 213 (1988).

White, Byron R., Bernard G. Segal, George Clemon Freeman, Jr., David L. Westin. "Tributes to Associate Justice Lewis F. Powell, Jr. on the Occasion of His Retirement." *Supreme Court Historical Society Yearbook 1987* 1 (Summer 1987).

1989 Circuit Conferences

First	Nov. 13-15	Newport, RI
Second	Sept. 7-9	Lake George, NY
Third	Sept. 10-12	Pittsburgh, PA
Fourth	June 29-July 1	Hot Springs, VA
Fifth	May 7-10	New Orleans, LA
Sixth	May 10-12	Lexington, KY
Seventh	Apr. 30-May 2	Chicago, IL
Eighth	July 18-21	Minneapolis, MN
Ninth	July 9-14	Laguna Niguel, CA
Tenth	Sept. 6-8	Santa Fe, NM
Eleventh	May 7-10	New Orleans, LA
D.C.	June 4-6	Washington, DC
Federal	May 23	Washington, DC

NOTEWORTHY

Record numbers on parole or probation. The Justice Department has revealed that in 1987 the total of persons on probation or parole reached a record high of 2.6 million. Adults in the custody of a governmental entity, including those in federal, state, or local prisons and jails, numbered 3.4 million, or almost 2 percent of the nation's population. Three-fourths of these are being supervised in the community and about one-fourth are incarcerated.

Geographic differences were noted in probation growth patterns, with the Midwest leading in probationers with 8.7 percent, followed by the West with 8.6 percent, the Northeast with 5.7 percent, and the South with 3.8 percent. The federal probation population increase was 4.6 percent.

Parolee increases also varied geographically, with the West leading with 21.7 percent, followed by the South with 13.8 percent, the Midwest with 7.9 percent, and the Northeast with 3.1 percent. Texas and California had almost one-half the national increase in parolees. The federal parole population rose 6.2 percent.

The percentage of offenders released from state prisons on discretionary parole board decisions declined from 72 percent in 1977 to 41 percent in 1987, with an additional 31 percent of 1987 dischargees serving a period of supervision in the community

Second Circuit Committee reports on ADR. The Second Circuit Standing Committee on the Improvement of Civil Litigation, appointed by Chief Judge Wilfred Feinberg in 1986 and chaired by Standish Forde Medina, Jr., issued its report on "Settlement Practices in the Second Circuit" on Oct. 13. The Committee reported three conclusions: First, ADR techniques, raised at the right time, could assist parties in satisfactorily settling their disputes with less expense and delay than could proceeding to trial; second, judges have to educate litigants to get them to use ADR procedures; third, few judges have used or recommended the use of ADR mechanisms despite the effectiveness of such techniques.

The Committee report recommends that federal trial judges in the circuit make greater use of ADR techniques and that the judges become actively involved in educating parties about the availability of ADR processes. The Committee had four suggestions aimed at resolving these concerns: (1) that every judge raise the issue of settlement with the parties, offering the court's assistance and encouraging serious discussions, early and often thereafter, and shaping discovery to facilitate such discussions; (2) that every judge routinely advise litigants early in every civil case about the ADR procedures available to them, such as minitrials and summary jury trials, and distribute suggested guidelines and forms to use with the ADR procedures; (3) that there be formed a working group system of four to six judges, meeting regularly to coordinate their caseloads and discuss solutions to court operation problems; (4) that the Second Circuit Judicial Council consider a one-day retreat to encourage discussions of settlement techniques and related issues. ■

CALENDAR

Dec. 5–6 Judicial Conference Committee on Administration of the Magistrates System
Dec. 12–13 Orientation for New Assistant Federal Defenders
Dec. 12–13 Judicial Conference Committee on Court Security
Dec. 12–13 Judicial Conference Committee on the Administrative Office
Dec. 12–13 Judicial Conference Committee on Judicial Resources
Dec. 12–13 Judicial Conference Committee on Judicial Improvements
Dec. 12–13 Judicial Conference Committee on the Bicentennial of the Constitution

Positions Available

Director, Office of Staff Attorneys, 9th Cir. Supervises 50 employees, including 37 staff attorneys. Responsible for prebriefing conferences, coordinating motions practice, preparing case memoranda, drafting dispositions, and evaluating incoming cases. Requires 5 years legal experience; academic or court experience is preferred. Salary range begins at $57,158. Women and minority candidates encouraged to apply. For information call (415) 556-7361. Begins fall 1989. Résumé to Dinah Shelton, Director, Office of Staff Attorneys, U.S. Court of Appeals, P.O. Box 547, San Francisco, CA 94101.

Clerk, Bankr. Ct., S.D. Ind. Requires 10 years progressively responsible administrative experience, at least three in position of substantial management responsibility. Active law practice may substitute on year for year basis, and education may substitute for experience as follows: bachelor's degree equals three years; postgraduate degree in public, business, or judicial administration equals one additional year; law degree equals two additional years. Law degree, legal practice, and training or experience in judicial administration highly desirable. Salary from $46,679. Send four sets of résumé and cover letter by Dec. 31 to Chief Bankruptcy Judge Robert L. Bayt, Room 317-A, U.S. Courthouse, 46 E. Ohio St., Indianapolis, IN 46204.

Clerk, Bankr. Ct., W.D. Mich. Manages office under direction of the Chief Judge. Requires 10 years progressively responsible administrative experience in public service or business, three with substantial management responsibility. Bachelor's degree may substitute for three years; postgraduate degree in public, business, or judicial administration for one additional year; law degree for two additional years; and legal practice experience substituted year for year. Salary from $54,907. Résumé by Jan. 10, 1989, to Sheila Kooistra, U.S. Bankruptcy Court, P.O. Box 3310, Grand Rapids, MI 49501.

Asst. Reporter of Decisions, U.S. Supreme Court. Assists Reporter in preparing the *U.S. Reports* for publication and in supervising 8-person staff. Writes syllabuses; edits opinions for accuracy, format, and style; prepares indexes; and reads page proofs for editorial changes. Law degree; three years lawbook publishing experience, particularly at managerial level; thorough knowledge of federal and state law, legal research methods, and English grammar, punctuation, and spelling; and a demonstrated aptitude for legal writing are all required. Admission to a state bar, 5 years practical legal experience, and familiarity with computerized printing desirable. Salary SCP 13 to 15, depending on qualifications. Closing date Jan. 13, 1989. Send SF-171 to Personnel Office, Supreme Court of the United States, Washington, DC 20543. Tel. (202) 479-3404.

EQUAL OPPORTUNITY EMPLOYERS

VETERANS APPEALS COURT, from p. 1
conclusions, and rules and regulations of the Administrator, the Board, and the Board Chairman and to set them aside if found to be arbitrary, unconstitutional, extrajurisdictional, in excess of authority, or not in conformity with procedure.

The record will be the only basis for review. Trial de novo is not available. When a final decision of the Board is based solely upon the failure of the claimant to comply with regulations, the Court of Veterans Appeals can review only the validity of the regulation and the compliance issue. The schedule of ratings for disabilities adopted under § 355 of the Act is not reviewable on appeal.

Appellants may have counsel represent them before the court pursuant to rules of practice to be established, but fee agreements must be filed with the court when the appeal is filed. The court may review the fee agreement and affirm or issue an unappealable order for reduction.

The court will have contempt authority, with power to sanction via fines and imprisonment, and the same enforcement power over its orders and processes as other federal courts. All proceedings and records, except those found by the court to be confidential, shall be public records.

Appeals by parties adversely affected by final orders require filing a notice of appeal with the court within 120 days of mailing of the notice of the decision contested. The General Counsel's Office will represent the Administrator and defend appeals of decisions of the Board.

The Court of Veterans Appeals is to include in its decisions conclusions of law and findings of fact. Appeals may be heard by single judges or by panels, and in the event of a single-judge decision, the aggrieved party or the court may gain panel review of the decision upon motion. Decisions of the court become final upon running of the time for filing notice of appeal or, if notice is filed, upon running of the time to pursue the matter to conclusion.

The Federal Circuit has exclusive jurisdiction to review decisions of the court on questions of law and interpretation underlying the court's decisions, and intermediate controlling questions of law and interpretation in disagreement may be heard on interlocutory appeals. However, except for constitutional challenges, review of factual determinations or of law or regulations applied to the facts of a particular case are foreclosed. Otherwise, rules for review of decisions of the court shall be those prescribed by the Supreme Court under 28 U.S.C. § 2072.

The President is to nominate the chief judge of the Court of Veterans Appeals, subject to confirmation by the Senate, between Jan. 21 and Apr. 1, 1989. After Feb. 1, 1989, the President may nominate two to six associate judges.

The Court of Veterans Appeals is an Article I court, with judges' terms of office set at 15 years and their compensation the same as U.S. district court judges. The chief judge is designated to head the court and to receive the same pay as judges of the U.S. courts of appeals.

Locating facilities for the new court is delegated to the Administrative Office, which is to consider the library, equipment, and personnel requirements plus resources available for shared use with other federal courts and agencies.

The Act amends provisions pertaining to the appointment of the Board of Veterans' Appeals; they now provide for appointment of the Board Chairman by the President with the consent of the Senate and the appointment of members of the Board by the Administrator with the approval of the President, to 9-year terms of office (staggered initially). The Board will avail claimants of hearing opportunities and shall base decisions upon the entire record.

Other provisions are effective Sept. 1, 1989, unless otherwise noted, and concern matters other than judicial review of benefit claims. ■

ANTI-DRUG ABUSE ACT, from p. 3
The Act also directs the Attorney General to ensure that civil statutes creating ancillary sanctions and remedies for drug law violations are given high priority and that increased field office legal and investigative staff are deployed. The Associate Attorney General is given responsibility for implementation, with an additional $6 million for salaries and expenses appropriated for the purpose, half earmarked for the U.S. attorneys.

The National Drug Enforcement Policy Board and White House Office of Drug Abuse Policy are terminated; the National Narcotics Act of 1984 is repealed.

Treatment and prevention programs. $1.5 million of the revised and extended alcohol, drug abuse, and mental health services block grants ($1.5 billion for FY89) allotted to the states on a demographic basis is authorized for law enforcement and judicial training. The Act promotes prevention and treatment of addiction, with set asides for treatment of women, children, and intravenous drug users. One goal is reduced waiting periods for treatment of alcohol and drug dependencies; another is testing model programs for pregnant women and women with infants. Special arrangements are provided for programs sponsored by the military and the Veterans Administration, for private sector employer, and for Native Americans. Funds under these provisions are not to be used to distribute or to clean needles or for basic AIDS research.

User accountability. Convicted possessors of and traffickers in controlled substances can be denied federal benefits at a court's discretion, including licenses, contracts, loans or grants (but not including

See ANTI-DRUG ABUSE ACT, p. 7

ANTI-DRUG ABUSE ACT, from p. 6

veterans', retirement, or Social Security benefits, welfare or disability, or obligations to Indians or Indian tribes). Federal contractors and grant recipients will have to comply with a new definition of "responsible source" under the Drug-Free Workplace Act of 1988, which mandates security, education, and sanctions for personnel who commit drug-abuse violations. Contractors and grantees who do not comply risk suspension, termination, or debarment. HUD grants for public housing are directed toward providing a drug-free environment, with enhanced security and education programs for management and tenants.

Money laundering. Money laundering controls were strengthened in the following ways: Businesses described by the Bank Secrecy Act, 31 U.S.C. § 5312(a)(2), as similar to financial institutions and under that Act's control now include those involved in vehicle, airplane, and boat sales and in real estate closings and settlements; the U.S. Postal Service; and any other business or agency that the Treasury adds by regulation whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters. Another change facilitates prosecution for money laundering operations in which the target funds are in fact provided by law enforcement as part of an investigation. The Postal Service is authorized to investigate money laundering in cooperation with Justice and the Treasury.

Death penalty, other criminal and law enforcement matters. Two categories of defendants will face possible death penalties: those who kill as part of drug-related transactions and those who kill law enforcement officers during drug-trafficking activities. The death penalty is foreclosed to defendants who were under 18 when the crime was committed and to the mentally retarded or those who are unable to understand critical facts in the context of the circumstances or who are unable to convey that information to counsel or the court.

The jury, or the court in a non-jury trial, considering applying the death penalty must, in each case, issue findings on aggravating and mitigating factors. Aggravation must be found unanimously and beyond a reasonable doubt and may include such factors as defendant's prior criminal record, the brutality of the instant crime, whether the defendant was paid or paid another to commit the killing, whether the defendant intentionally killed the victim, and whether the defendant inflicted serious bodily harm on the victim. The existence of a mitigating factor may be established upon the finding of a single juror. Mitigating factors need only be proved by a preponderance of the evidence; aggravation must be weighed against mitigation. Even if there are no mitigating factors, any aggravation must be considered to determine if death is appropriate. Jurors must certify that the penalty was determined without regard to race, color, religion, national origin, or gender of the defendant or victim.

Guidelines require that well-qualified counsel are provided to indigent defendants for all stages of trial and appeal.

All death penalty cases are subject to review by the courts of appeals.

For defendants subject to the death penalty on whom the penalty is not imposed, the sentence range is 20 years to life imprisonment without the possibility of parole (amending 21 U.S.C. § 841).

The Act provides a mandatory life sentence for anyone convicted of a third felony drug offense, and related sections enhance penalties for offenses involving children or circumstances in which children were placed at risk of exposure to illegal drugs.

Supplemental appropriations. For the judiciary, judicial services salaries and expenses, $35 million; for defender services, $15 million; for fees of jurors and commissioners, $1 million. For associated programs: $7 million in salaries and expenses to the Bureau of Alcohol, Tobacco and Firearms; $8.5 million for the U.S. Customs Service salaries and expenses, and $7 million for operation and maintenance of the Air Interdiction Program; and $3.5 million for salaries and expenses for the new Office of National Drug Control Policy.

The AO is preparing a short summary of pertinent parts of the Anti-Drug Abuse Act of 1988 for distribution. ■

QUADRENNIAL COMMISSION, from p. 1

and homes still mortgaged, not having had time to accumulate assets—particularly felt the need to reconsider a long-term commitment to the federal bench.

Philip W. Tone, President of the American College of Trial Lawyers and former judge of the Seventh Circuit, responded to Commission Chairman Lloyd N. Cutler's invitation to address three specific topics: (1) how judicial salaries and benefits compare with those at comparable private sector levels, (2) how judicial salaries and benefits have an impact on judicial morale and willingness to serve for life, and (3) permissible outside income-producing activities. As to salary comparability, Mr. Tone stated that there is a "dramatic difference" between judicial salaries and benefits and those for commensurate positions and a similar disparity in important collateral benefits (e.g., life insurance and survivors' benefits). He pointed out that private sector lawyers can utilize higher incomes and tax-deferred savings to amass substantial estates, while "the typical judge has little but his salary when he reaches retirement age," and the retirement costs must be paid by the judge. Mr. Tone discussed morale implications, which he described as severe; judges cannot fail to know how much more their contemporaries and own former law clerks earn in the private sector, and while they cannot expect to earn that much, they have a right to compensation reflecting the relative responsibility and importance to society of their contributions and their positions. Mr. Tone described low morale as a deterrent to obtaining and retaining the best lawyers for the federal bench. As to outside income, permissible sources are essentially teaching and writing, with "slim" remuneration. The caseload generally leaves no time or energy for such activities, and federal judges should not be dependent upon supplemental income.

James C. Miller III, past Director of the Office of Management and Budget, testified that most agencies could absorb the additional salaries costs he advocated in present budgetary configurations. He said that the additional costs would be quite modest compared with the total federal budget or even the amount spent for compensation, being on the order of a third of a billion dollars annually. His view was that by raising compensation government could attract and retain the best people and that the value received would far exceed the cost.

Many of the witnesses referred to the steadily rising rate of resignations from the federal bench, something once quite rare, and noted that more judges had resigned during the past 20 years than in the preceding 180 years. Judge Robert H. Hall (N.D. Ga.), President of the Federal Judges Association, said that he was concerned that continuation of the trend could lead to the federal judiciary becoming "a mere stepping stone" to a prestigious law firm partnership at several multiples of the judicial salary.

All testified in support of substantial increases in base compensation, from $135,000 to $150,000 for district court and special court judges to more than $200,000 for the Chief Justice. They also called for significant improvements in ancillary and survivors benefits, including payment of those costs by the government rather than the judge.

The Commission will report its findings and recommendations to the President this month. He can accept or modify them, and he is to forward recommendations to the Congress on Jan. 9, 1989. His proposals will take effect automatically in 30 days unless both houses of Congress reject them. ■

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