# REPORT

# of the

# PROCEEDINGS OF THE

# JUDICIAL CONFERENCE OF THE

# UNITED STATES

**March 5-6, 1980**

**Washington, D.C.**
**1980**

**ADMINISTRATIVE OFFICE OF THE**
**UNITED STATES COURTS**

**William E. Foley**
**Director**

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## THE JUDICIAL CONFERENCE OF THE UNITED STATES, 28 U.S.C. 331

§331. JUDICIAL CONFERENCE OF THE UNITED STATES

The Chief Justice of the United States shall summon annually the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge from each judicial circuit to a conference at such time and place in the United States as he may designate. He shall preside at such conference which shall be known as the Judicial Conference of the United States. Special sessions of the conference may be called by the Chief Justice at such times and places as he may designate.

The district judge to be summoned from each judicial circuit shall be chosen by the circuit and district judges of the circuit at the annual judicial conference of the circuit held pursuant to section 333 of this title and shall serve as a member of the conference for three successive years, except that in the year following the enactment of this amended section the judges in the first, fourth, seventh, and tenth circuits shall choose a district judge to serve for one year, the judges in the second, fifth, and eighth circuits shall choose a district judge to serve for two years and the judges in the third, sixth, ninth, and District of Columbia circuits shall choose a district judge to serve for three years.

If the chief judge of any circuit or the district judge chosen by the judges of the circuit is unable to attend, the Chief Justice may summon any other circuit or district judge from such circuit. If the chief judge of the Court of Claims or the chief judge of the Court of Customs and Patent Appeals is unable to attend, the Chief Justice may summon an associate judge of such court. Every judge summoned shall attend, and, unless excused by the Chief Justice, shall remain throughout the sessions of the conference and advise as to the needs of his circuit or court and as to any matters in respect of which the administration of justice in the courts of the United States may be improved.

The conference shall make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary, and shall submit suggestions to the various courts, in the interest of uniformity and expedition of business.

The conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.

The Attorney General shall, upon request of the Chief Justice, report to such conference on matters relating to the business of the several courts of the United States, with particular reference to cases to which the United States is a party.

The Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.

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# Report of the Proceedings of the Judicial Conference of the United States

**March 5-6, 1980**

The Judicial Conference of the United States convened on March 5, 1980, pursuant to the call of the Chief Justice of the United States, issued under 28 U.S.C. 331, and continued in session on March 6. The Chief Justice presided and the following members of the Conference were present:

*First Circuit:*
Chief Judge Frank M. Coffin
Chief Judge Raymond J. Pettine, District of Rhode Island

*Second Circuit:*
Chief Judge Irving R. Kaufman
Chief Judge T. Emmet Clarie, District of Connecticut

*Third Circuit:*
Chief Judge Collins J. Seitz
Judge Alfred L. Luongo, Eastern District of Pennsylvania

*Fourth Circuit:*
Chief Judge Clement F. Haynsworth, Jr.
Judge Robert R. Merhige, Jr., Eastern District of Virginia

*Fifth Circuit:*
Chief Judge James P. Coleman
Chief Judge William C. Keady, Northern District of Mississippi

*Sixth Circuit:*
Chief Judge George C. Edwards, Jr.
Chief Judge Charles M. Allen, Western District of Kentucky

*Seventh Circuit:*
Chief Judge Thomas E. Fairchild
Judge S. Hugh Dillin, Southern District of Indiana

*Eighth Circuit:*
Chief Judge Donald P. Lay
Judge Albert G. Schatz, District of Nebraska

*Ninth Circuit:*
Chief Judge James R. Browning
Chief Judge Ray McNichols, District of Idaho*

*Tenth Circuit:*
Chief Judge Oliver Seth
Chief Judge Howard C. Bratton, District of New Mexico

*District of Columbia Circuit:*
Chief Judge J. Skelly Wright
Chief Judge William B. Bryant, District of Columbia

*Court of Claims:*
Chief Judge Daniel M. Friedman

*Court of Customs and Patent Appeals:*
Chief Judge Howard T. Markey

Circuit Judges Walter J. Cummings, Edward A. Tamm and Gerald B. Tjoflat; Senior District Judges Thomas J. MacBride, Charles M. Metzner, George L. Hart, Jr. and Roszel C. Thomsen; and District Judges C. Clyde Atkins, Robert E. DeMascio, Alexander Harvey II, Elmo B. Hunter, and Robert E. Maxwell attended all or some of the sessions of the Conference.

The Attorney General of the United States, Honorable Benjamin R. Civiletti, accompanied by the Deputy Attorney General, Honorable Charles B. Renfrew, and the Solicitor General, Honorable Wade H. McCree, addressed the Conference briefly on matters of mutual interest to the Department of Justice and the Conference.

William E. Foley, Director of the Administrative Office of the United States Courts; Joseph F. Spaniol, Jr., Deputy Director; James E. Macklin, Jr., Assistant Director; and Mark W. Cannon, Administrative Assistant to the Chief Justice, attended all sessions of the Conference.

The Director of the Federal Judicial Center, A. Leo Levin, reported on the activities of the Center since the last session of the Conference.

*Designated by the Chief Justice in place of Judge Morell E. Sharp who was unable to attend.

# REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

The Director of the Administrative Office of the United States Courts, William E. Foley, requested, and the Conference approved, the immediate release of the written report of the ad hoc Committee on the Oversight of the Administrative Office of the United States Courts, submitted by the Chairman, Judge John D. Butzner, Jr. The report had been prepared at the request of the Committee on Appropriations of the House of Representatives.

The Director was also authorized to transmit to the Congress a study on the use of staff attorneys in the courts of appeals, together with any comments thereon submitted from the various circuits.

## JUDICIAL BUSINESS OF THE COURTS

Mr. Foley reported that appeals docketed in the United States courts of appeals in the year ending December 31, 1979 increased more than 10 percent from the previous year to a record 21,680 new appeals. There were 19,049 appeals terminated during the year, 2,631 fewer than the number filed. As a result the pending caseload increased 15 percent to a record 20,034 appeals pending on December 31, 1979.

During the calendar year 1979 civil cases filed in the United States district courts were 162,469, an increase of 13 percent over 1978. There were 151,465 civil cases terminated during the year, an increase of 16,400 cases over the previous year, but 11,000 cases less than the number filed. Civil cases pending on the dockets of the district courts thus increased to 184,104 on December 31, 1979.

Criminal cases filed in the district courts declined to 30,106 during 1979. Although the 30,763 criminal cases disposed of were 10 percent fewer than those disposed of last year, they exceeded filings by 657 cases. Consequently, the pending caseload declined to 14,662 cases on December 31, 1979, a reduction of more than four percent.

On October 1, 1979 the United States bankruptcy courts began receiving bankruptcy case filings under the Bankruptcy

Reform Act of 1978. During the three-month period ending December 31, 1979 there were 56,023 bankruptcy cases filed. This compares with 55,275 cases filed under the old Bankruptcy Act during the same three-month period in 1978. While this comparison shows only a modest increase in the number of cases filed under the new Bankruptcy Code, it is somewhat misleading because joint petitions from husband and wife under the new Code are filed as one case. Under the old Act these petitions were filed as two cases. Data collected during the three-month period indicates that approximately 23 percent of the bankruptcy case filings were joint petitions; therefore, the 56,023 petitions filed under the new Code were equivalent to approximately 68,900 case filings under the old Bankruptcy Act.

## REPORT OF THE FEDERAL JUDICIAL CENTER

The Director of the Federal Judicial Center, Professor A. Leo Levin, reported that the district court workshops recently conducted by the Center had been extremely well received. Four of these workshops received the highest possible rating by the judges in attendance. Currently the staff of the Center is considering a proposal to develop a videotape presentation on work of the Center and the types of programs that can be made available to the federal courts for their instruction and information.

## JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

A report submitted on behalf of the Judicial Panel on Multidistrict Litigation indicated that during the six-month period ending December 31, 1979 the Panel, in carrying out its functions under 28 U.S.C. 1407, had conducted three regularly scheduled hearings and had issued 27 major orders. Fourteen new groups of multidistrict litigation were considered and the transfer of cases was ordered in 12 groups encompassing 89 civil actions. Of these, 41 cases were trans-

ferred for pretrial purposes and consolidated with 48 other actions originally filed in the transferee districts. The Panel denied transfer of two groups of cases consisting of ten separate actions. During the same period 494 civil actions were transferred by the Panel for inclusion in ongoing centralized pretrial hearings with previously transferred actions. Since the creation of the Panel in 1968 there have been 7,369 civil actions centralized in pretrial proceedings under 28 U.S.C. §1407.

## COMMITTEE ON COURT ADMINISTRATION

Judge Elmo B. Hunter, Chairman of the Committee on Court Administration, presented the report of the Committee.

### EQUAL EMPLOYMENT OPPORTUNITY

At its September 1979 session (Conf. Rept., p. 58) the Conference directed the Committee to prepare a model affirmative action plan for adoption by each federal court. A plan, submitted by Judge Hunter on behalf of the Committee, was approved by the Conference with certain amendments. The plan will be circulated to all federal courts in accordance with the resolution adopted by the Conference last September, the last sentence of which was amended to read as follows:

> Each federal court shall annually submit a report on the implementation of its affirmative action plan to the Administrative Office for evaluation. The report of that evaluation, as well as the court's report itself, shall be included in the Director's annual report to the Judicial Conference.

### PRINTING OF OPINIONS

The Appropriations Committee of the House of Representatives had requested the Administrative Office to explore less costly means of printing the opinions of the United States courts of appeals. Judge Hunter informed the Conference that the Committee had reviewed a study prepared

by the Administrative Office which presented a comprehensive collection of information on the various methods and costs of printing opinions. Upon recommendation of the Committee the Conference directed that the Administrative Office study be referred to the chief judges of the courts of appeals for consideration at their next meeting to be held in conjunction with the Judicial Conference and that the chief judges of the circuits subsequently report to the Conference with their recommendations.

## Miscellaneous Fee Schedules

The Conference, pursuant to 28 U.S.C. §§1913 and 1914, approved the following change in the miscellaneous fee schedules for the courts of appeals and district courts previously approved by the Conference, to clarify the application of the fee for copy work to reproductions made from microfiche or microfilm:

> For reproducing any record or paper 50 cents per page. This fee shall apply to paper copies made from either: (1) original documents; or (2) microfiche or microfilm reproductions of the original records.

This change was also made applicable to the schedule of fees to be charged by clerks of the bankruptcy courts adopted by the Conference in March 1979 (Conf. Rept., p. 11) pursuant to 28 U.S.C. 1930(b).

The Conference further modified the schedule of special charges under Sec. 40c(3) of the Bankruptcy Act in cases filed prior to October 1, 1979 to make the charges contained therein consistent with the charges authorized in the schedule adopted pursuant to 28 U.S.C. 1930(b), which was also modified in the following respects:

1. Changed the introduction to read:

   The scheduled charges for special services to be made under Section 40c(3) of the Bankruptcy Act for deposit to the Referees' Salary and Expense Fund and the miscellaneous fees chargeable in bankruptcy cases filed after October 1, 1979, pursuant to 28 U.S.C. 1930(b) are as follows (except that no fees are to be charged for services rendered on behalf of the United States):

2. Changed Item 7 of the schedule to read:

   For filing a complaint $60.00. If the United States, other than a United States Trustee, acting as trustee, in a case under title 11, is the plaintiff, no fee is required. If a trustee in a case under title 11 is the plaintiff, the fee shall be payable only from the estate and to the extent there is any estate realized.

3. Added a new Item 9 to read:

   For each set of notices in cases filed under title 11 of the United States Code in excess of fifty notices per set, twenty-five cents for each additional notice. The fee shall be payable only from the estate and only to the extent there is an estate.

## Fees in the District of Columbia

At its session in April, 1976 (Conf. Rept., p. 5) the Conference authorized the Director of the Administrative Office to transmit to the Congress a bill which would authorize the Judicial Conference to fix the fees to be allowed and the costs to be charged in the United States District Court for the District of Columbia, as it does in other district courts. No action was ever taken on the bill. Upon recommendation of the Committee, the Conference again authorized the Director to transmit the proposed legislation to the Congress.

## Fees and Expenses of Attorneys Representing Indigent Persons in Civil Rights Actions

The Conference, upon recommendation of the Committee, authorized the appointment of an ad hoc subcommittee of the Court Administration Committee, with representatives from each of its existing subcommittees and with assistance from the Administrative Office and others as deemed necessary (such as paid consultants) to address the entire problem of fees and expenses of attorneys appointed to represent indigent persons in civil rights actions, and other expenses of such litigation.

## FEDERAL COURTS IMPROVEMENT ACT OF 1979

Judge Hunter informed the Conference that S. 1477, 96th Congress, the Federal Courts Improvement Act of 1979, had passed the Senate and is now pending before the Subcommittee of the House Judiciary Committee chaired by Congressman Kastenmeier. The provisions of the bill, as originally reported by the Senate Judiciary Committee, were considered by the Conference at its September 1979 session (Conf. Rept., p. 61).

Upon recommendation of the Committee the Conference took the following action relating to the provisions of the bill as passed by the Senate:

A. *Selection and Tenure of Chief Judges.* Reaffirmed its approval of Part A of Title I of the bill which would provide that the judge who is senior in commission, age 64 or under, and who has served one year or more on the court shall be the chief judge. A chief judge would serve for a term of seven years or until attaining 70 years of age.

B. *Membership on Judicial Councils.* Reaffirmed its approval of the provisions of Part C of Title I which would restructure the judicial councils of the circuits to provide for district judge membership. The judicial council would consist of the chief judge of the circuit and a number of circuit and district judges to be fixed by majority vote of all circuit judges in active service, provided that a minimum district judge representation would be required. Terms of service would be determined by the majority vote of the active circuit judges. The council would be given authority to conduct hearings, take sworn testimony and to issue subpoenas.

C. *Retirement and Resignation of Judges.* Approved Part D of Title I of the bill to permit a judge who resigns his office at age 64 with 15 years of service to continue to receive an annuity equal to the salary which he was receiving when he resigned.

D. *Assignment of Judges to Managerial Positions.* Reaffirmed its approval of Part E of Title I of the bill to authorize the temporary assignment of an Article III judge to a limited number of managerial positions in the Judicial Branch of Government.

E. *Interest on Judgments and Prejudgment Interest.* The Conference previously endorsed a provision of Part C of Title II of the bill which would amend 28 U.S.C. 1961 to authorize a court to award interest on civil money judgments measured "from the time that the party against whom damages have been awarded became aware of his potential liability or from the time he should have become aware of such liability, but, in any case, not to exceed a period of five years." The Conference, however, questioned a provision of the bill that would link the interest rate to Section 6621 of the Internal Revenue Code and directed the Committee to consider other possible methods of fixing interest rates. Judge Hunter pointed out that the interest rates under the Internal Revenue Code, as determined by the Secretary of the Treasury, are readily available to everyone and provide a desirable measure of stability in determining the amount of the interest rate. The Committee had considered other methods for determining and fixing interest rates to be charged under Section 1961 of title 28 and believes that the method set out in the bill is more practical. Upon recommendation of the Committee, the Conference approved the provisions of Part C of Title II of the bill.

## Places of Holding Court

H.R. 5924 and H.R. 6060, 96th Congress, would amend 28 U.S.C. 84(c) to designate Santa Ana as an additional place of holding court for the United States District Court for the Central District of California. Similar bills, H.R. 5697 and H.R. 5789, would create a new division within the district consisting of Orange, Riverside, and San Bernadino Counties. One of these bills would designate Santa Ana as a place of holding court and the other would designate Riverside as a place of holding court. Judge Hunter informed the Conference that the district court and the judicial council of the circuit prefer the designation of Santa Ana as a place of holding court rather than the creation of a new division within the district. Upon recommendation of the Committee the Conference approved the provisions of H.R. 5924 and H.R. 6060.

## LEGISLATION RELATING TO OPEN MEETINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES AND THE JUDICIAL COUNCILS OF THE CIRCUITS

The Chairman of the Senate Judiciary Subcommittee on Improvements in Judicial Machinery, Senator DeConcini, had previously requested the views of the Conference on a draft bill to require all meetings of the Judicial Conference of the United States, its committees and subcommittees, and all meetings of the judicial councils of the circuits to be conducted in open public session. Subsequently, a bill, S. 2045, 96th Congress, which embodies the provisions of the draft bill, was introduced in the Senate. The Conference, after full discussion, voted to express its strong opposition to the enactment of S. 2045 and authorized Judge Hunter in his testimony before Senator DeConcini to express grave reservations as to the constitutionality of the bill based on separation of powers principles.

## ATTORNEYS' FEES

H.R. 5342, 96th Congress, entitled the "Equal Access to Justice Act" provides for an award of costs and attorneys' fees to certain prevailing parties (individuals whose net worth does not exceed $1,000,000 and corporations whose net worth does not exceed $5,000,000) in proceedings before administrative agencies that are subject to Section 554 of title 5, United States Code, and in any civil action brought by or against the United States in any court having jurisdiction of such action.

In September 1979 the Committee reported its view on a similar bill, S. 265, 96th Congress, that the question of awarding attorneys' fees in agency and court proceedings is a matter of public policy for the determination of the Congress, but pointed out that a piecemeal approach to this issue is eroding the "prevailing American Rule" requiring parties in civil litigation to pay their own attorneys' fees, without thorough study of the potential consequences. The Conference then approved the Committee's suggestion that before any new authority to award attorneys' fees is enacted, the Congress be requested to conduct general hearings on

the desirability of further modifying the "prevailing American Rule" so that the views of the bar and the public generally can be elicited. The Conference, upon recommendation of the Committee, renewed this recommendation but also suggested that the Congress explore the advisability and constitutionality of classifying parties by net worth and the difficulties and impact on the courts of determining net worth.

In its last report the Committee also expressed concern about the provision in S. 265 (also contained in H.R. 5342) requiring the Director of the Administrative Office to report attorneys' fees assessed by courts which are to be paid by other agencies of the Federal Government. Upon further consideration the Committee now believes that if the collection of information on the awarding of attorneys' fees against the Government is to be required, it would be appropriate for the Administrative Office to undertake this responsibility.

## VENUE IN COURTS OF APPEALS AND DISTRICT COURTS

S. 739 and H.R. 5130, 96th Congress, are bills relating to venue in cases in the district courts and on appeal, or on review of administrative proceedings in the courts of appeals. Both bills appear to be motivated by concerns of proper venue in environmental cases. Although questions of venue in particular types of cases are matters of policy for Congressional determination, Judge Hunter reported the views of the Committee that the more narrowly drawn bill, H.R. 5130, is preferable to S. 739 since it is not possible to determine the effect of a broad amendment to the venue statutes.

The Committee suggested, however, the deletion of the words "in which the impact or alleged injury is less than nationwide" from the proposed new Section 1409. It appeared to the Committee that these words add nothing and might invite contentions that the district of impact is not a proper venue because the injury is nationwide and the district of impact does not satisfy the general venue statutes. The Committee also believed that Section 1295 should be amended to say "a judicial circuit" rather than "the judicial circuit" to avoid any implication that there can be only one such circuit.

Further, the Committee believed that amending Section 2343 of title 28, as proposed in S. 739, is preferable to adding a new Section 1295 to the Code. At the request of Judge Hunter the Conference authorized the transmission of the Committee's views to the appropriate Congressional committees.

## MEDICAL PRIVACY ACT

H.R. 5935, 96th Congress, is a bill to protect the privacy of medical information maintained by medical care facilities in order to protect the patient's right to privacy in and to medical information about him. The stated purposes of the bill are (1) to establish procedures allowing a patient to inspect and correct medical information; (2) to define the circumstances under which individually identifiable medical information may be disclosed either with or without the consent of the patient; and (3) to make it a crime to request or obtain medical information from medical care facilities under false pretenses. Involuntary disclosures may be made by the medical care facility pursuant to the Federal Rules of Civil and Criminal Procedure, or comparable rules of other courts or administrative agencies, in connection with litigation to which the patient is a party and pursuant to a grand jury subpoena, administrative summons, subpoena, or warrant. In addition there are certain other specific exemptions including the release of medical information to which law enforcement authorities are entitled.

The Committee notes that the bill contains no provision permitting the disclosure of medical information to a probation officer or pretrial services officer, nor does it authorize disclosure of medical information to a federal public defender or defense counsel in a criminal case in a situation in which the patient is not a party to litigation. It was the view of the Committee that section 127(a) of the bill should be amended to authorize disclosure of medical information to a probation officer or pretrial services officer, and that Section 131(a) should be amended by striking the words "to which the patient is a party" so as to permit a federal public defender or defense counsel to obtain medical information in connection with a criminal case.

The Committee recommended that the Conference express no view on the desirability of the legislation, but if enacted, the bill be amended as recommended above. This recommendation was approved by the Conference.

## Registration of Civil Judgments

Judge Hunter indicated that some district courts have had difficulty interpreting 28 U.S.C. 1963 which permits the registration and execution of a civil judgment in another district provided that the original judgment "has become final by appeal or expiration of time for appeal." The problem arises when an appellant fails to file a supersedeas bond pursuant to Rule 62(d) of the Federal Rules of Civil Procedure and the decision on appeal is long delayed to the detriment of the prevailing party. The Uniform Enforcement of Foreign Judgments Act, now adopted in 16 states, permits the filing of any foreign judgment, unless the judgment debtor furnishes security required for the satisfaction of the judgment. Upon recommendation of the Committee the Director of the Administrative Office was authorized to draft and submit to Congress a suitable bill to amend 28 U.S.C. 1963 to incorporate the procedures of the Uniform Act.

## Fair Housing Amendments Act of 1979

S. 506 and H.R. 5200, 96th Congress, are bills to amend Title VIII of the Civil Rights Act of 1968 to revise the procedures for the enforcement of fair housing and for other purposes. The bills would provide several types of enforcement procedures. The Secretary of the Department of Housing and Urban Development would be authorized to consider a complaint filed by an aggrieved person and conduct a preliminary hearing into the matter. Based upon this preliminary inquiry, the Secretary could then file a formal administrative complaint, conduct a hearing, and issue an order providing appropriate relief. The final order of the Secretary would be reviewable in the appropriate United States court of appeals.

The aggrieved person may, however, commence a civil action in an appropriate United States district court, or state

court, at any time not later than two years after the alleged discriminatory practice occurred or terminated. In that event the Secretary may not commence or continue a proceeding unless the Secretary has already commenced a hearing on the record with respect to that complaint. The Attorney General of the United States may intervene in any civil action if he certifies that the case is of general public importance and may bring a separate civil action against any person or group of persons engaged in a pattern or practice of resistence to fair housing rights.

It was the view of the Committee that the enforcement procedures of the bill are appropriate, except that the aggrieved person who files a complaint with the Secretary should not then be permitted to file a civil action in a district court based on the same complaint until the administrative proceeding had been concluded and the aggrieved person had exhausted his administrative remedies. The Conference, upon recommendation of the Committee, took no position regarding the merits of the proposed legislation, but recommended an amendment to the bill requiring an aggrieved person who commences an administrative proceeding to exhaust administrative remedies before commencing a civil action in a state or Federal court.

## CUSTOMS COURT ACT OF 1979

S. 1654, 96th Congress, is a bill to improve federal judicial machinery by clarifying and revising certain provisions of the Judicial Code relating to the judiciary and to the judicial review of international trade matters. The bill would give the United States Customs Court, to be renamed the "United States Court of International Trade," jurisdiction in any civil action arising directly out of an import transaction and involving one of the specified statutes concerned with international trade, or a case involving a provision of the Constitution, a treaty of the United States, an executive agreement or an executive order which directly and substantially involves international trade. The court would have all the powers and functions of a United States district court, including the power to grant equitable relief, but would be authorized to transfer a case involving a party who desires a

jury trial to a local United States district court.

Upon recommendation of the Committee the Conference approved the bill.

## SMALL BUSINESS JUDICIAL ACCESS ACT OF 1979

H.R. 5103, 96th Congress, is a bill to provide for better access to the federal courts for small businesses and others with small to moderate size claims and to expand the duties of the Office of Advocacy of the Small Business Administration. The purposes of the bill are threefold: (1) to improve class damage procedures for the benefit of small businesses and other injured persons while preserving class action relief; (2) to provide rapid and inexpensive court review of administrative fines and penalties affecting small businesses; and (3) to compensate small businesses and other injured persons for delayed remedies.

Title I of the bill would create two new types of action—a public action and a class compensatory action. In this regard the bill is virtually identical to a draft bill prepared in the Office of Improvements in the Administration of Justice in the Department of Justice and considered by the Conference at its session in September 1979 (Conf. Rept., p. 68). At that time the Conference disapproved the compensation provisions of the bill through a public recovery fund as inappropriate for administration by any public agency, including the Director of the Administrative Office or the office of the clerk of a district court. The Conference suggested in lieu thereof a penalty provision depriving a person of the fruits of unlawful conduct, or the use of a "fluid recovery" as an alternative to the payment of damages. The Conference also recommended that claims of less than $15 not be paid because of the costs of administration. The Conference voted to reaffirm these views.

Title II of the bill would require that district court proceedings involving small civil penalties levied against small businesses be conducted by a United States magistrate. This matter was referred to the Committee on the Administration of the Federal Magistrates System and is discussed later in this report.

## COURT OF MILITARY APPEALS

Judge Hunter stated that the Department of Defense had submitted to the Congress a draft bill to reconstitute the Court of Military Appeals as an independent court under Article 1 of the Constitution of the United States. The bill would increase the number of judgeships from three to five, authorize full 15-year terms for each appointee, and permit review of decisions of the court by the United States Supreme Court on writ of *certiorari.* The Committee expressed no opinion with regard to review by the Supreme Court on writ of *certiorari,* suggesting that this is a matter to be considered by the Supreme Court, but did note that the bill continues a provision of existing law, 10 U.S.C. 867(a)(3), authorizing the President of the United States in the event of an emergency to designate a judge of the United States Court of Appeals for the District of Columbia Circuit to sit temporarily as a judge of the Court of Military Appeals. In its 25-year history this provision of the statute has never been invoked. The Committee recommended that the last sentence of Section 943(b) of the bill be deleted. This recommendation was approved by the Conference.

## IMPOSITION OF CIVIL MONEY PENALTIES BY ADMINISTRATIVE AGENCIES

The Chairman of the Administrative Conference of the United States had submitted to the Chief Justice a copy of Administrative Conference Recommendation 79-3 which calls upon administrative agencies to establish standards for the determination of a penalty amount, and recommends standards for conducting proceedings to determine the initial assessment of penalties and their mitigation. The recommendation also asks agencies to conduct evidentiary hearings so that a "*de novo* proceeding upon judicial review could be avoided." Finally, the Administrative Conference addressed the following recommendation to the courts:

> Where such a hearing procedure has in fact been observed by the agency, and the statute does not provide for *de novo* judicial proceedings, the court should ordinarily utilize a

limited scope of judicial review of such agency action imposing civil money penalties.

At the suggestion of the Committee the Conference took no action on this recommendation since it involves a question of statutory interpretation for each court to consider.

## BUMPERS AMENDMENT

S. 1477, 96th Congress, contains an amendment to the scope and review section of the Administrative Procedure Act, 5 U.S.C. 706, which would alter the standard of judicial review applied in resolving legal issues raised in challenges to agency action under the Act. Various interpretations have been placed on the meaning of the amendment and its practical effect. The Conference was advised that the provision is being strongly opposed by the Department of Justice, the Administrative Conference of the United States, and various federal administrative agencies.

The Committee believed that the amendment would certainly generate litigation involving basic interpretations of its purpose and recommended that Congress be urged to clarify the intended purpose to be served. The Committee also believed that if agencies are required to establish that every rule or regulation is founded upon a legal basis, caseloads will probably increase. In addition, if agencies are also required to prove reasonableness by a preponderance of the evidence, the resolution of many cases will probably become more time-consuming.

The Conference, on recommendation of the Committee, authorized the Director of the Administrative Office to convey the views of the Committee to the Congress.

## COURT REPORTERS' TRANSCRIPT RATES

The Conference, pursuant to 28 U.S.C. 753(f) authorized district courts to prescribe fees which court reporters may charge and collect for transcripts requested by the parties, including the United States, at the following maximum rates:

MAXIMUM TRANSCRIPT RATES

| | *Original* | *First Copy to Each Party* | *Each Additional Copy to the Same Party* |
|---|---|---|---|
| *Original Transcript* | | | |
| A transcript to be delivered within thirty (30) calendar days after receipt of an order. | $2.00 | $ .50 | $ .25 |
| *Expedited Transcript* | | | |
| A transcript to be delivered within seven (7) calendar days after receipt of an order .... | 2.50 | .50 | .25 |
| *Daily Transcript* | | | |
| A transcript to be delivered following adjournment and prior to the normal opening hour of the court on the following morning whether or not it actually be a court day ..... | 3.00 | .50 | .25 |
| *Hourly Transcript* | | | |
| A transcript of proceedings ordered under unusual circumstances to be delivered within two (2) hours ..... | 3.50 | .50 | .25 |

In setting the transcript rates to be charged by court reporters in each area the district court should look to comparable services rendered in state courts and consider setting the transcript rates in their courts to coincide with any lower comparable state rate. No other types of transcripts are authorized, other than those defined above.

Litigants and parties have the privilege and right to order transcripts at the rates fixed by each district court, not to exceed the above maximum rates. A notice of the rates established by the district courts and of the reporter's obligation to furnish transcripts at those rates and under those conditions shall be published in a conspicuous place or otherwise disseminated to the public.

During the course of its deliberations, the Committee considered and concurred in the following resolution received from the Committee to Implement the Criminal Justice Act which was submitted to and approved by the Conference:

> That the furnishing of accelerated transcript services in criminal proceedings should be discouraged, however, recognizing that there are some circumstances in which such transcript services are necessary and required by either the prosecution or the defense, or both, accelerated transcript services may be provided.
>
> That in those cases where accelerated transcript services are provided, the party from whom the request or order emanates shall pay for the original, and if the requesting or ordering party is other than defense counsel appointed under the Criminal Justice Act, the CJA counsel shall be entitled to a copy at the copy rate.
>
> That the present practice, in some districts, of routinely apportioning the total cost of transcript services equally among the parties obtaining such services should be abandoned.

## COURT REPORTERS—PRIVATE REPORTING

Judge Hunter stated that the Committee has been concerned over the number of official court reporters engaged in separate private reporting business ventures who are utilizing substitute reporters on a regular basis to perform their official duties. A survey indicated that the majority of the district judges are of the view that their court reporters who are engaged in private reporting do not neglect their official duties. The survey, however, identified ten court reporters who in 1978 spent less time in court than their substitutes. Two reporters did not spend any time in court during two calendar years. In that time all required services were performed solely and exclusively by substitutes. Nevertheless, these reporters derived all the fringe benefits given to government employees.

The Committee recommended that the matter of outside reporting continue to be left to the discretion of each individual court; however, where there is a conflict between official and private reporting, the reporter should be required to postpone any outside work. The Committee further recommended that the Conference, as a matter of policy, discour-

age the use of substitute reporters, and limit such use to daily copy work, absence due to illness, vacations, and other similar circumstances beyond the control of the reporter. Where the arrangement with the reporter clearly constitutes a contractual one, the relationship of employer and employee should be terminated and a reporting contract executed. These recommendations were approved by the Conference.

The Committee also noted a substantial variance in the amount of time court reporters spend reporting official proceedings indicating that some reporters are not fully occupied. It was the view of the Committee that under-utilized reporters should be made available for the recording of proceedings before magistrates, senior judges, visiting judges, and land commissioners to minimize or obviate the need for reportorial services on a contractual basis. The Committee suggested that courts consider pooling their court reporter resources and rotating the assignment of reporters in order to equalize their workload.

The Committee recommended that the Conference, as a matter of policy, encourage multi-judge district courts, whenever feasible, to consider a pool system for court reporters, and to designate a lead reporter to serve as a coordinator and to report on matters relating to reportorial services.

These recommendations were approved by the Conference.

## Salaries of Secretaries

Judge Hunter stated that due to changes in the law, particularly the new Bankruptcy Act, the amendments to the Federal Magistrates Act, and various resolutions of the Judicial Conference, the system of setting the grades of secretaries to court officers has been disrupted. The Conference, on recommendation of the Committee, and subject to the availability of appropriated funds, established the following maximum grades for secretarial positions in court offices:

| *Court Officer* | *Maximum Authorized Secretarial Salary* |
|---|---|
| Judge | JSP-10/11* |
| Circuit Executive | JSP-10 |
| Circuit Judge (Ass't. Secty) | JSP-9 |
| Magistrate | JSP-9 |
| Clerk of Court | JSP-9** |
| Chief Probation Officer | JSP-8 |
| Senior Staff Attorney | JSP-8 |

## SALARIES OF CHIEF PROBATION OFFICERS

Judge Hunter stated that the classification of chief probation officer positions has remained basically unchanged since approval of the Judiciary Salary Plan by the Judicial Conference in 1961 and its implementation in 1964. The only exception was the passage of the Speedy Trial Act which authorized salaries not to exceed grade GS-16 for the chiefs of the five probation offices having a Pretrial Services Agency established on a demonstration basis under the Act. It was pointed out that the duties of chief probation officers have not only increased over the past 18 years, but have grown more complex as a result of legal concerns for the protection of the rights of offenders and added responsibilities such as providing drug dependent after-care services and administering aftercare contracts. Furthermore, the salaries of chief probation officers, particularly in a large district, are no longer comparable to clerks of court.

Upon recommendation of the Committee, the Conference raised the grade level of positions of chief probation officers in small, medium and large courts from grades JSP 13, 14, and 15, to grades JSP 14, 15, and 16 with a proviso that neither the salary of any chief probation officer nor of any subordinate personnel in the probation office shall exceed the salary of level 5 of the Executive Schedule or the maxi-

*Eligibility for grade JSP-11 requires a minimum of eight years experience as a secretary to a federal judge, seven of which must have been at grade JSP-10.

**Regardless of size; provided the clerk of court has been delegated and performs all or substantially all of the duties in the clerk's mission and function statement approved by the Conference and the secretary has responsibility for expanded administrative functions, such as personnel, procurement, and budget.

mum salary for circuit executives, less $2,000, whichever is smaller. These changes are subject to Congressional authorization of appropriated funds.

### Appointment of a Special ad hoc Subcommittee

Judge Hunter indicated the need for the appointment of a special ad hoc Subcommittee of the Committee on Court Administration to consider two bills pending in the Congress, a bill relating to interlocutory appeals and a bill to curtail service of process by U.S. marshals in private civil litigation. No objection was made to the appointment of such a committee.

## COMMITTEE ON THE BUDGET

Chief Judge Robert E. Maxwell, Chairman of the Committee on the Budget, presented the report of the Committee.

### Supplemental Appropriations for the Fiscal Year 1980

Judge Maxwell informed the Conference that requests for supplemental appropriations for the fiscal year 1980 in the amount of $25,961,000 to cover the general salary increase granted last October had been submitted to the Congress. The amount included for the pay increases of judges was computed at the rate of 12.9 percent in view of the litigation currently pending in the courts.

### Appropriations for the Fiscal Year 1981

Judge Maxwell also informed the Conference that the budget estimates for the fiscal year 1981, approved by the Conference last September, had been submitted to the Congress and that hearings thereon were conducted by the House Appropriations Subcommittee on February 5, 1980 and by the Senate Appropriations Subcommittee on February 7, 1980. The Committee recommended that the Director of the Administrative Office be authorized to amend the budget for the fiscal year 1981 to request funding because of new

legislation or because of any action of the Conference at this session, or for any other reason the Director considers necessary and appropriate. There was no objection to this procedure.

### ASSISTANTS TO CIRCUIT EXECUTIVES

The Conference was also informed that the budget requests for the fiscal year 1981 included funds to provide Assistant Circuit Executive positions to serve the 15 major metropolitan district courts. In this regard, the Conference adopted the following resolution:

> Any assistant to a circuit executive appointed pursuant to an appropriation authorized by the budget for the fiscal year 1981 for any metropolitan district court shall be selected by and be subject to the direction of the judges of the district court for the relevant district in accordance with the selection procedures provided in 28 U.S.C. 332.

### COURT SECURITY

The Conference considered problems relating to courtroom and courthouse security and adopted the following resolution:

> The judiciary has continuously experienced inadequate courtroom and courthouse security. Various arrangements in which the Executive Branch provides security services have differed in terms of effectiveness and adequacy of resources. The inadequate control by the judiciary over the function, the inadequate resources provided to do the job, and, in some cases, the minimal utility of the protection provided indicate the need for the judiciary to address this problem. The Conference authorizes the Administrative Office to explore with appropriate Congressional offices, the possibility of the judiciary having control of its own security personnel.

## JUDICIAL ETHICS COMMITTEE

Judge Edward A. Tamm, Chairman of the statutory Judicial Ethics Committee, presented the report of the Committee.

## ACTIVITIES OF THE COMMITTEE

Judge Tamm informed the Conference that the Committee had reviewed 1,564 financial disclosure reports filed during the calendar year 1979 and that, in addition, the Committee had reviewed 179 report forms filed by nominees to judgeship positions. Thus, the Committee was required to review approximately 1,743 financial disclosure reports filed during the year. Judge Tamm also pointed out that as of February 29 the Committee had addressed 1,019 letters to reporting individuals including 587 letters relating to errors and omissions in filed report forms. Judge Tamm indicated that in the future the Committee may require additional staffing to support its activities.

In May 1979 a United States district judge in New Orleans had enjoined the public disclosure of financial disclosure forms. Because of this action, the Committee had not made any financial disclosure statements available to the public since receiving notice of the order of the court, nor has the Committee referred to the Attorney General any case involving the non-filing of a financial disclosure report. Further action by the Committee awaits the final disposition of the civil proceedings in this case.

## REPORTS OF PART-TIME UNITED STATES MAGISTRATES

A recent amendment to the Ethics in Government Act authorizes the Judicial Ethics Committee to exempt an individual who is "not reasonably expected to perform the duties of his office or position for more than 60 days in a calendar year" from the requirement of filing a financial disclosure report within 30 days of assuming the position of "judicial employee," or within 30 days after termination of employment. An individual who does not perform the duties of his position or office for a period in excess of 60 days is not required to file the annual report required to be submitted by May 15 of each year. In accordance with this provision, the Committee has determined that part-time United States magistrates receiving salaries in levels 1 through 7 of the salary schedule for part-time United States magistrates, approved by the Conference in September 1979 (Conf. Rept.,

p. 83), are not reasonably expected to perform the duties of their office for more than 60 days in a calendar year and therefore are not required to file financial disclosure reports within 30 days of assuming their positions (Sec. 301(a)) nor within 30 days of termination of employment (Sec. 301(d)).

### Reports by Senior Judges

The Conference endorsed the view of the Committee that every senior judge who has been certified as performing substantial judicial services during the year must file the financial disclosure report required by the statute. A senior judge who relinquishes his staff and assumes full retirement must file a financial disclosure statement within 30 days of assuming full retirement, as required by Sec. 301(d) of the Ethics in Government Act, but thereafter need not file the annual report required by Sec. 301(c) of the Act.

### Courts of the District of Columbia

The Ethics in Government Act of 1978, Sec. 308(9), defines a "judicial officer" as including judges of the "courts of the District of Columbia." Judges of these local courts, however, are not subject to the jurisdiction of the Judicial Conference of the United States. The Conference shared the view of the Committee that the financial disclosure reports of the judges of these courts should be filed with some entity within the District of Columbia government, such as the Judicial Disability Commission, and voted to request a change in the statute to place the courts of the District of Columbia under a separate reporting system.

### Filing of Copies of Reports with Chief Judges

Reports submitted under the Ethics in Government Act of 1978 are required to be filed only with the Judicial Ethics Committee and the clerk of the court on which the individual sits or serves. Judge Tamm reported the view of the Committee that no change should be made by statute or regulation requiring that a copy of the report be filed with the chief judge of each court.

## ADVISORY PANEL

At its March 1979 session (Conf. Rept., p. 23) the Conference "authorized the Chief Justice to appoint an Advisory Panel of the Conference to respond to requests from reporting individuals for advice and assistance on problems relating to reporting under the Ethics in Government Act of 1978 . . ." In September 1979 (Conf. Rept., p. 80) the Conference assigned to the Panel so appointed "the responsibility of rendering advisory opinions on the various codes of conduct, a function previously performed by the predecessor Committee on Judicial Activities." The provisions of the Ethics in Government Act, however, (28 U.S.C. App. 1, §§ 303(a), 303(c) and 306(a)) place exclusive responsibility on the Judicial Ethics Committee, subject to the jurisdiction of the Conference, to deal with all questions in the judiciary arising under the Act including the rendering or issuing of advisory opinions. The Conference, upon recommendation of the Committee, rescinded the resolution of March 1979 giving this responsibility to a separate advisory panel. The existing Panel, however, will continue to render advisory opinions on questions arising under the various codes of conduct.

## ASSETS OF SPOUSES AND DEPENDENT CHILDREN

Judge Tamm informed the Conference that the Committee believes that the listing of assets held by the spouses and dependent children of reporting individuals is sufficient without a public disclosure of the "category of value" of the assets so held. The Conference agreed and voted to recommend to the Congress that consideration be given to amending the statute to allow reporting individuals to list the assets of spouses and dependent children without indicating the value of such holdings.

## REPORTING FORM AND INSTRUCTIONS

In accordance with Sec. 303(c) of the Ethics in Government Act of 1978, the Conference approved a revised financial disclosure reporting form and instructions submitted by

the Committee. The Director of the Administrative Office was requested to print the new form and instructions forthwith and distribute them promptly to those individuals required to file annual reports by May 15, 1980.

## ADVISORY PANEL ON FINANCIAL DISCLOSURE REPORTS AND JUDICIAL ACTIVITIES

Judge Howard T. Markey, Chairman of the Advisory Panel on Financial Disclosure Reports and Judicial Activities presented the report of the Panel.

### Activities of the Panel

Since its inception in April 1979 the Panel has responded to 41 financial disclosure inquiries and 35 inquiries pertaining to the various codes of conduct. As of February 12, there were nine code inquiries pending. At the present time, the Panel is preparing five opinions for publication. Judge Markey also stated that the Panel is interchanging code advisory opinions with 17 states and is maintaining a file on court opinions relating to codes of conduct.

### Codes of Conduct for Staff Attorneys, Circuit Executives and Public Defenders

In September 1979 (Conf. Rept., p. 81) the Conference approved the promulgation of codes of conduct for circuit executives, staff attorneys and public defenders with instructions that all three provisions of these codes pertaining to the practice of law be uniform with that for staff attorneys which would permit the private practice of law on a limited basis. Public defenders, however, are precluded from "engaging in the private practice of law" by 18 U.S.C. §3006A (h)(2)A. Thus uniformity would be achievable only by a total prohibition of the practice of law by circuit executives and staff attorneys. Upon recommendation of the Panel, the Conference approved the codes of conduct for circuit executives and staff attorneys permitting limited law practice by them and a code of conduct for public defenders which

precludes such practice in accordance with the prohibition in the statute.

The codes of conduct for clerks of court, probation officers, employees of the Administrative Office, and the Federal Judicial Center currently forbid the practice of law. Upon recommendation of the Panel, the Conference directed that these provisions be continued.

## CHANGE OF THE NAME OF THE PANEL

The Conference, upon recommendation of the Panel, changed its name to "The Advisory Committee on Codes of Conduct."

## MEMBERSHIP IN CLUBS

The Conference considered fully a proposal submitted by the Advisory Panel that would prohibit a judge from being a member of a club which limits membership on the basis of the applicant's race, sex, religion, or national origin. After full discussion the Conference adopted the following resolution:

> The Judicial Conference of the United States endorses the principle that it is inappropriate for a judge to hold membership in an organization that practices invidious discrimination.
>
> The Advisory Panel on Financial Disclosure Reports and Judicial Activities is requested to consider whether the Judicial Conference should adopt a canon of judicial ethics or take other action to further this principle. In view of the desirability of parallel provisions in the Code of Judicial Conduct for United States Judges and the American Bar Association Code of Judicial Conduct, the Advisory Panel in considering this question is requested to consult with the appropriate committees of the American Bar Association.
>
> If the Advisory Panel concludes that a statement reflecting this principle is appropriate, as a canon or in another form, the Advisory Panel is directed to draft a proposal for consideration of the Conference. For the reasons stated in the preceding paragraph, the Advisory Panel is requested to consult with the appropriate committees of the American Bar Association with regard to the wording of any proposed canon or other statement of this principle.

The Advisory Panel is directed to submit any proposal to all United States judges for their comments and suggestions.

The Advisory Panel shall submit its recommendations to the next meeting of the Judicial Conference.

## COMMITTEE ON THE ADMINISTRATION OF THE PROBATION SYSTEM

The report of the Committee on the Administration of the Probation System was presented by the Chairman, Judge Gerald B. Tjoflat.

### SENTENCING INSTITUTES

The Committee submitted to the Conference a plan for a joint institute on sentencing for the judges of the Seventh and Ninth Circuits to be held in November 1980 at a site near a Federal correctional institution in California. The tentative agenda is modeled after the agenda for the joint institute on sentencing for the judges of the Third and Sixth circuits which is scheduled to be held in Lexington, Kentucky in May 1980. The Conference approved the agenda and participants for this joint sentencing institute, subject to the selection of a date and location which are to be reported to the Conference at its next session.

### PRETRIAL SERVICES AGENCIES

Title II of the Speedy Trial Act of 1974 required the Director of the Administrative Office to file a comprehensive report with the Congress on or before July 1, 1979 regarding the administration and operation of the pretrial services agencies established in ten demonstration districts. In March 1979 (Conf. Rept., p. 35) the Conference authorized the Committee to exercise continued oversight of the completion of the Director's report and to authorize, on behalf of the Conference, the release of the Director's report to the Congress. The final report, which recommended continuation of the program under Judicial Conference supervision, was

issued on June 29, 1979 and copies were provided to the members of the Conference.

Congressional action is now required if the program, currently funded through June 1980, is to be continued. Anticipating that Congress will hold hearings before then, the Committee submitted the following resolution which was approved by the Conference:

> The Committee on the Administration of the Probation System of the Judicial Conference of the United States has reviewed the report of the Director of the Administrative Office of the United States Courts on the experiment with Pretrial Services Agencies created by Title II of the Speedy Trial Act of 1974.
>
> That report states that judges and magistrates in the demonstration districts have expressed substantial satisfaction with and strong support for the continuation of services rendered by those agencies. These views appear to be grounded in the utility of information provided by pretrial service officers to the judicial officers responsible for setting bail. Judicial officers in the ten demonstration districts stated that they were able to make better informed decisions as a result of the regular, prompt, and impartial information provided by the agencies. This is consistent with the findings of the 1978 Comptroller General's Report to the Congress regarding the Federal bail process, in which the General Accounting office cited the need for better defendant related information and supported the continuation and expansion of this particular Pretrial Services Agency function.
>
> The Conference places great reliance on the opinions of the judicial officers. The Conference also places significance in the Director's findings that the operations of the Federal agencies compared favorably with state programs and that they have provided additional services to the courts which have improved the administration of criminal justice.
>
> The Conference therefore recommends the continued funding and expansion of the Pretrial Services operation.

## COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

The report of the Committee on the Administration of the Bankruptcy System was presented by the Chairman, Judge Robert E. DeMascio.

## SALARIES AND ARRANGEMENTS FOR BANKRUPTCY JUDGES

The Conference considered the recommendation of the Committee that the part-time bankruptcy judge position at Alexandria in the Eastern District of Virginia be increased to full-time service as recommended in the January 1980 survey report of the Director of the Administrative Office. The Director's recommendation had previously been approved by the Judicial Council of the Fourth Circuit pursuant to Section 404(g) of the Bankruptcy Reform Act of 1978, Public Law 95-598. The Conference thereupon took the following action and directed that it be made effective when appropriated funds are available:

### FOURTH CIRCUIT

*Eastern District of Virginia*

(1) Changed the bankruptcy judge position at Alexandria from part-time to full-time status at the currently authorized statutory salary for a full-time bankruptcy judge with the regular place of office, territory and places of holding court to remain the same.

## GUIDELINES IN CHAPTER XIII (WAGE-EARNER) CASES

The Conference upon recommendation of the Committee approved ten guidelines for the administration of Chapter XIII (wage-earner) cases, submitted by the Committee as a replacement for the existing guidelines. These new guidelines conform the previous Conference-approved guidelines for wage-earner cases to the changed requirements of the Bankruptcy Reform Act.

## RETIREMENT OF BANKRUPTCY JUDGES

The Conference, upon recommendation of the Committee, endorsed a proposal that bankruptcy judges appointed by the President under 28 U.S.C. 152 have the same retirement provided to territorial district judges under 18 U.S.C. 373.

A proposal that a referee or bankruptcy judge who is continued in office pursuant to Section 404(b) of Public Law 95-

598 and who is subsequently appointed by the President under 28 U.S.C. 152 be granted service credit toward retirement dating back to his original appointment as referee or bankruptcy judge was disapproved by the Conference. The Conference also voted to disapprove the automatic granting of full retirement to bankruptcy judges who are not appointed by the President under Section 28 U.S.C. 152 beyond the credits already earned under the Civil Service Retirement Act.

## COMMITTEE ON THE ADMINISTRATION OF THE FEDERAL MAGISTRATES SYSTEM

The report of the Committee on the Administration of the Federal Magistrates System was presented by the Chairman, Senior Judge Charles M. Metzner.

### Qualification Standards and Selection Procedures

Judge Metzner reported that the Federal Magistrate Act of 1979 requires the Conference to adopt binding standards and procedures governing the appointment and reappointment of United States magistrates by the district courts. The regulations must provide for public notice of all vacancies in magistrate positions and the use of merit selection panels to assist the courts in selecting magistrates. The standards and procedures developed by the Committee in accordance with the mandate of the statute were approved by the Conference and ordered distributed to all district courts. Judge Metzner informed the Conference that the staff of the Administrative Office is developing a pamphlet to assist the courts and the merit selection panels in implementing the new selection procedures.

### Legal Assistant Positions

The Federal Magistrate Act of 1979 also authorizes the Conference to provide legal assistant positions for the offices of full-time magistrates upon the recommendation of the respective circuit judicial councils. Upon recommenda-

tion of the Committee the Conference established the following standards for the authorization of legal assistant positions for magistrates' offices.

(1) Funding requests for legal assistant positions will be authorized by the Conference only upon a showing of need based upon a case-by-case Committee analysis.
(2) A request for legal assistant positions must be approved by the district court.
(3) A request must also be approved by the judicial council of the pertinent circuit.
(4) The number of legal assistant positions authorized in any district may not exceed a ratio of one assistant per full-time magistrate position.
(5) A request for legal assistant positions must specify that the magistrates to whom the assistants are assigned perform an appreciable volume of "additional duties" for the court under authority of 28 U.S.C. §636(b) and (c).
(6) The salaries of legal assistant positions shall be the same as those established by the Conference for law clerks to bankruptcy judges.

## ADMINISTRATIVE REGULATIONS

The regulations for the administration of the Federal magistrates system, promulgated by the Director of the Administrative Office pursuant to 28 U.S.C. 604(e), set specific fees to be charged by magistrates and their staffs for the sale of duplicate tape recordings of proceedings before magistrates. At its session in March 1979 (Conf. Rept., p. 9) the Conference approved a comprehensive new schedule of fees to be charged by clerks of court which sets a fee for the sale of duplicate tape recordings by clerks of court which is different from that previously fixed in the regulations for magistrates and their staffs. Judge Metzner reported that the Committee believes that the fees charged by magistrates and their staffs should be the same as those charged by the clerks of the district courts. Upon recommendation of the Committee the Conference approved an amendment to section 2.7 (d)(i) of the regulations of the Director to read as follows:

> Reproductions of tape recordings of proceedings prepared by the staff of a magistrate shall be sold to parties at the

same rates established by the Judicial Conference for recordings prepared and sold to parties by the clerk of court.

## SMALL BUSINESS JUDICIAL ACCESS ACT OF 1979

The Committee, at the request of the Subcommittee on Federal Jurisdiction, had considered a provision in Title II of H.R. 5103, 96th Congress, the Small Business Judicial Access Act of 1979. The bill would permit a small business to file a petition in the district court for expedited review of a fine of up to $2,500 assessed against it by an administrative agency and would require the district court to "direct a magistrate to conduct all proceedings, including entry of judgment." The magistrate's determination would be "final, and may not be reviewed by any agency or court." The Committee noted that the bill would expressly designate a specific category of civil cases for hearing and disposition by magistrates, an approach rejected during Congressional consideration of the Federal Magistrate Act of 1979. Moreover, a provision which requires the reference of a certain category of civil actions to a magistrate, without the consent of the litigants or the court, raises questions of potential constitutional dimensions. The Committee was further of the view that the district courts should be free to determine which cases are to be assigned to magistrates for hearing and disposition. Upon recommendation of the Committee the Conference disapproved in principle legislation which mandates that a district court automatically refer particular types of cases to magistrates.

## SALARIES OF FULL-TIME MAGISTRATES

The salaries of full-time magistrates are set by the Conference at rates not to exceed the salaries provided by law for full-time bankruptcy judges. The salary of a bankruptcy judge is currently $50,000 per annum plus any increase resulting from the October 1, 1979 general cost-of-living increase which may be determined in pending litigation. The salaries of full-time magistrates, however, have not been adjusted to reflect the cost-of-living increase granted to other officers and employees; consequently, full-time magistrates have not

been accruing any increase in salary to which they may be entitled.

To alleviate this disparity in treatment between magistrates and other officers in the judiciary the Conference, upon recommendation of the Committee, authorized the general October 1, 1979 cost-of-living increase, retroactive to the first pay period commencing on or after that date (in accordance with 5 U.S.C. 5307), for full-time magistrates at the same percentage rate provided by law for bankruptcy judges, as determined in the pending litigation. Part-time magistrates now receiving a salary of $24,250 would receive the same percentage salary increase as full-time magistrates.

## CHANGES IN MAGISTRATES' POSITIONS

After consideration of the report of the Committee and the recommendations of the Director of the Administrative Office, the district courts, and the judicial councils of the circuits the Conference approved the following changes in salaries and arrangements for full-time and part-time magistrates. Unless otherwise indicated these changes are to become effective when appropriated funds are available. The salaries of full-time magistrates are to be determined in accordance with the salary plan previously adopted by the Conference.

### FIRST CIRCUIT

*District of Maine*

(1) Redesignated the deputy clerk-magistrate position at Portland as a clerk-magistrate position at the currently authorized salary of $900 per annum for the performance of magistrate duties.

*District of Massachusetts*

(1) Continued the part-time magistrate position at Cape Cod National Seashore for an additional four-year term at the currently authorized salary of $4,500 per annum.

(2) Continued the part-time magistrate position at Pittsfield for an additional four-year term at the currently authorized salary of $900 per annum.

*District of New Hampshire*

(1) Authorized the clerk of court at Concord to perform the duties of a part-time magistrate for an additional four-year term at the currently authorized aggregate salary of a clerk of court of a large district.
(2) Authorized the clerk-magistrate at Concord to serve in the adjoining District of Maine.

## SECOND CIRCUIT

*Northern District of New York*

(1) Authorized the clerk of court at Albany to perform the duties of a part-time magistrate for an additional four-year term without additional compensation.

*Eastern District of New York*

(1) Changed the official location of the full-time magistrate position at Brooklyn which is due to expire on April 30, 1986 from "Brooklyn" to "Hempstead (including the village of Uniondale)."

## THIRD CIRCUIT

*District of Delaware*

(1) Converted the combination bankruptcy judge-magistrate position at Wilmington to a full-time magistrate position.

*District of New Jersey*

(1) Continued the part-time magistrate position at Atlantic City for an additional four-year term at the currently authorized salary of $1,800 per annum.
(2) Increased the salary of the part-time magistrate position at Asbury Park from $15,500 to $17,900 per annum.

*Middle District of Pennsylvania*

(1) Continued the part-time magistrate position at Scranton for an additional four-year term at the currently authorized salary of $20,300 per annum.
(2) Designated the full-time magistrate at Wilkes-Barre and the part-time magistrate at Scranton to serve in the adjoining Northern and Southern Districts of New York.

## FOURTH CIRCUIT

*District of Maryland*

(1) Authorized a new part-time magistrate position at Prince George's County (Hyattsville) at a salary of $17,900 per annum.

*Eastern District of Virginia*

(1) Continued the part-time magistrate position at Williamsburg for an additional four-year term at the currently authorized salary of $24,250 per annum.
(2) Continued the part-time magistrate position at Richmond for an additional four-year term at the currently authorized salary of $24,250 per annum.

## FIFTH CIRCUIT

*Northern District of Georgia*

(1) Continued the full-time magistrate position at Atlanta which is due to expire on August 10, 1980 for an additional eight-year term.

*Middle District of Georgia*

(1) Increased the salary of the part-time magistrate position at Macon from $6,400 to $15,500 per annum.

*Middle District of Louisiana*

(1) Authorized the bankruptcy judge at Baton Rouge to perform the duties of a part-time magistrate at no additional compensation, in lieu of the part-time magistrate position currently authorized at Baton Rouge.

*Western District of Louisiana*

(1) Increased the salary of the part-time magistrate position at Alexandria from $20,300 to $24,250 per annum.

*Northern District of Mississippi*

(1) Authorized the clerk of court at Oxford to perform the duties of a part-time magistrate for a four-year term without additional compensation.

*Northern District of Texas*

(1) Authorized a new part-time magistrate position at Abilene at a salary of $900 per annum.

*Western District of Texas*

(1) Increased the salary of the part-time magistrate position at Midland/Odessa from $6,400 to $15,500 per annum.

## SIXTH CIRCUIT

*Eastern District of Michigan*

(1) Continued the full-time magistrate position at Detroit which is due to expire on February 28, 1981 for an additional eight-year term.
(2) Authorized a new part-time magistrate position at Flint at a salary of $8,200 per annum.

*Middle District of Tennessee*

(1) Continued the full-time magistrate position at Nashville for an additional eight-year term.

*Western District of Wisconsin*

(1) Authorized the clerk of court at Madison to perform the duties of a part-time magistrate for an additional four-year term without additional compensation.
(2) Continued the part-time magistrate position at Ashland for an additional four-year term at the currently authorized salary of $900 per annum.

## EIGHTH CIRCUIT

*Northern District of Iowa*

(1) Continued the part-time magistrate position at Sioux City for an additional four-year term at the currently authorized salary of $1,800 per annum.

*District of Minnesota*

(1) Discontinued the part-time magistrate position at Rochester upon the expiration of the current term.

*Eastern District of Missouri*

(1) Continued the part-time magistrate position at Cape Girardeau for an additional four-year term.
(2) Increased the salary of the part-time magistrate position at Cape Girardeau from $900 to $1,800 per annum.

*District of Nebraska*

(1) Converted the part-time magistrate position at Lincoln to a full-time magistrate position.
(2) Discontinued the part-time magistrate position at Grand Island, effective upon the appointment of a full-time magistrate at Lincoln.

*District of North Dakota*

(1) Continued the part-time magistrate position at Rolla for an additional four-year term at the currently authorized salary of $1,800 per annum.

NINTH CIRCUIT

*District of Arizona*

(1) Continued the part-time magistrate position at Flagstaff for an additional four-year term at the currently authorized salary of $3,600 per annum.

*Central District of California*

(1) Continued the part-time magistrate position at San Luis Obispo for an additional four-year term at the currently authorized salary of $15,500 per annum.

*Southern District of California*

(1) Continued the full-time magistrate position at San Diego which is due to expire in September 1980 for an additional eight-year term.

*District of Nevada*

(1) Continued the full-time magistrate position at Las Vegas for an additional eight-year term.

*District of Oregon*

(1) Converted the bankruptcy judge-magistrate position at Eugene to a full-time magistrate position.

TENTH CIRCUIT

*District of Colorado*

(1) Changed the official location of the part-time magistrate position at "Cortez or Durango" to Cortez.
(2) Authorized a new part-time magistrate position at Durango at

a salary of $2,700 per annum.

(3) Authorized the part-time magistrate at Durango to serve in the adjoining District of New Mexico.

*District of Kansas*

(1) Increased the salary of the part-time magistrate position at Junction City from $1,800 to $10,000 per annum.

*District of New Mexico*

(1) Continued the part-time magistrate position at Albuquerque for an additional four-year term at the currently authorized salary of $24,250 per annum.

(2) Continued the part-time magistrate position at Alamogordo for an additional four-year term at the currently authorized salary of $1,800 per annum.

*District of Wyoming*

(1) Continued the part-time magistrate position at Jackson for an additional four-year term at the currently authorized salary of $4,500 per annum.

(2) Continued the part-time magistrate position at Sheridan for an additional four-year term.

(3) Increased the salary of the part-time magistrate position at Sheridan from $900 to $1,800 per annum.

## AUTHORIZATION TO SERVE IN ADJOINING DISTRICTS

The Federal Magistrate Act of 1979 amended 28 U.S.C. 631(a) to permit a magistrate to serve in a neighboring district without regard to the existence of a multidistrict federal enclave when authorized to do so by the Conference. Prior to the 1979 Act the Conference had authorized 12 magistrates to exercise jurisdiction over an entire federal enclave which extended into adjoining districts. To conform these prior authorizations with the revised language of the new Act the Conference, upon recommendation of the Committee, authorized magistrates appointed in the following districts to serve in other specified adjoining districts:

## THIRD CIRCUIT

*Middle District of Pennsylvania*

(1) Authorized the magistrate at Stroudsburg to serve in the adjoining Eastern District of Pennsylvania and the District of New Jersey.
(2) Authorized the magistrate at Harrisburg to serve in the adjoining Western District of Pennsylvania.

## FOURTH CIRCUIT

*District of Maryland*

(1) Authorized the magistrate at Salisbury to serve in the adjoining Eastern District of Virginia.
(2) Authorized the magistrate at Hagerstown to serve in the adjoining Middle District of Pennsylvania.

*Eastern District of Virginia*

(1) Authorized the magistrate at Richmond to serve in the adjoining Eastern District of North Carolina and the Western District of Virginia.

## SIXTH CIRCUIT

*Eastern District of Kentucky*

(1) Authorized the magistrate at London to serve in the adjoining Western District of Virginia and the Eastern District of Tennessee.

*Western District of Kentucky*

(1) Authorized the magistrate at Hopkinsville to serve in the adjoining Middle District of Tennessee.

## EIGHTH CIRCUIT

*Southern District of Iowa*

(1) Authorized the magistrate at Council Bluffs to serve in the adjoining District of Nebraska.

*Eastern District of Missouri*

(1) Authorized the magistrate for the Ozark National Scenic Riverways to serve in the Western District of Missouri.

NINTH CIRCUIT

*Central District of California*

(1) Authorized the magistrate at Lancaster to serve in the adjoining Eastern District of California.

*District of Nevada*

(1) Authorized the magistrate at Las Vegas to serve in the adjoining District of Arizona.

*Western District of Washington*

(1) Authorized the magistrate at Vancouver to serve in the adjoining Eastern District of Washington.

## COMMITTEE ON THE ADMINISTRATION OF THE CRIMINAL LAW

Judge Alexander Harvey II, Chairman of the Committee on the Administration of the Criminal Law, presented the report of the Committee.

### CRIMINAL CODE REVISION

Judge Harvey reported that only a few of the amendments to the criminal code revision bill, recommended by the Conference, have been adopted in the current versions of the criminal code. Neither the House nor the Senate bills have included Judicial Conference recommendations with respect to definitions of states of mind or the retention of the Federal Youth Corrections Act. The Committee was particularly concerned about the failure of the House and Senate Judiciary Committees thus far to adopt a Conference formulation of definitions for states of mind. The Committee therefore recommended that the Conference once again call the attention of the appropriate Congressional committees to the importance of adopting previously approved definitions of "knowingly," "intentionally," "recklessly," and "negligently" in the pending legislation. This recommendation was approved by the Conference.

## CAPITAL PUNISHMENT

The Conference voted to take no position on various bills pending in the Congress relating to capital punishment.

## PRETRIAL RELEASE LEGISLATION

S. 2100, 96th Congress, is a bill to authorize a court in cases involving narcotic trafficking to impose such conditions of release pending trial as are reasonably necessary to insure that the person will not engage in the conduct proscribed by the offense pending trial. Judge Harvey pointed out that the bill singles out a particular class of offenders, namely, offenders charged with narcotics offenses, in establishing criteria for the setting of conditions for pretrial release. On recommendation of the Committee the Conference disapproved the bill.

The Committee further recommended that the Conference call to the attention of the Senate its previous approval of amendments to 18 U.S.C. 3146 which would permit a trial judge to consider "the safety of any other person or the community" in setting the conditions for release before trial of a defendant charged in a noncapital case and the Conference approved.

## PRETRIAL DIVERSION

S. 702, 96th Congress, is a bill to establish alternatives to criminal prosecution for certain persons charged with offenses against the United States, and for other purposes. The bill would establish procedures for judicial involvement in pretrial diversion proceedings. It is also designed to standardize practices and to require equal treatment of similarly situated persons selected for pretrial diversion. Although the bill would require more judicial involvement in pretrial diversion proceedings, the Committee concluded that such involvement would be counterbalanced by benefits accruing to defendents and to the administration of the criminal law in general. Although the Committee is in favor of the legislation, it recommended that Sec. 3207 of the bill constituting each speedy trial planning group established under 18 U.S.C.

3168(a) as a diversion advisory committee be deleted from the bill. The Committee believes that speedy trial planning groups should not be involved in pretrial diversion programs. The Conference, upon recommendation of the Committee, recommended approval of S. 702 with the deletion of Sec. 3207.

## COMPUTER SYSTEMS PROTECTION

S. 204, 96th Congress, would amend the criminal code to make it a crime to use, for fraudulent or other illegal purposes, any computer owned or operated by the United States, certain financial institutions and entities affecting interstate commerce. The Committee concluded that the bill deals with computer crime with greater clarity than existing provisions of law. The Committee recommended and the Conference endorsed enactment of this legislation.

## IN CAMERA SCREENING OF CLASSIFIED INFORMATION

H.R. 4736, 96th Congress, is a bill to establish certain pretrial and trial procedures for the use of classified information in connection with federal criminal cases and for other purposes. The bill is similar to S. 1482, 96th Congress, which was considered by the Conference in September 1979 (Conf. Rept., p. 93) and approved with certain suggested modifications.

Judge Harvey informed the Conference that the Committee continues to be of the view that the promulgation of security procedures should more appropriately be made the responsibility of the Judicial Conference, or a duly designated Committee, rather than that of the Supreme Court or the Chief Justice. Furthermore, the Committee suggested that a period of 180 days, rather than only 120 days, should be provided for the enactment of rules establishing security procedures.

Upon recommendation of the Committee, the Conference endorsed the legislation with the two modifications suggested.

### COMPUTERIZED DOCKETS

Clerks of court in eleven United States district courts have been using the Courtran computer system, under development by the Federal Judicial Center, for the docketing of criminal cases and for monitoring them under the Speedy Trial Act. Several clerks have inquired as to whether it would be possible to dispense with a central criminal docket prepared manually, and to rely entirely on the computer record as the official criminal docket. Last October the Director of the Administrative Office advised the Federal Judicial Center that a computerized docket would constitute an adequate replacement for a manual docket provided that the computer system would guarantee public access to complete and current docket entries during office hours and that upon the conclusion of each criminal case a printout of the entire docket record be made and bound in the docket books of the court.

The Conference, upon recommendation of the Committee, approved, pursuant to Rule 55 of the Federal Rules of Criminal Procedure, the authorization granted by the Administrative Office to the clerks of the eleven Courtran districts to discontinue, if they wish, the maintenance of a manual criminal docket.

## COMMITTEE ON THE OPERATION OF THE JURY SYSTEM

Chief Judge C. Clyde Atkins, Chairman of the Committee on the Operation of the Jury System, presented the report of the Committee.

### BILINGUAL COURT LEGISLATION

H.R. 5563, 96th Congress, is a bill to provide that certain judicial pleadings and proceedings in the United States District Court for the District of Puerto Rico may be conducted in the Spanish language. On several prior occasions the Conference has considered legislation which would authorize the district court in Puerto Rico to conduct proceedings in the Spanish language instead of English (Conf. Repts., Sept. 1977, p. 50 and March 1979, p. 37). The Conference again

considered this legislation and approved the following statement, submitted by the Committee, for transmission to the Congress:

> The Committee believes that the present legislation, H.R. 5563, raises considerations of major significance which will provoke greater judicial and administrative difficulties than the flaws which it seeks to resolve. Specifically,
>
> 1. This legislation would appear to require the United States District Court for the District of Puerto Rico to maintain two separate master and qualified jury wheels—one for English-speaking and one for Spanish-speaking jurors. In this regard an amendment to section 1863(b)(4) of title 28, U.S.C., would be necessary and is not provided in the present bill. More fundamentally, the selection of jurors from two separate constituencies, depending upon linguistic ability, raises serious constitutional issues as to whether juries so chosen could be considered to represent a fair cross-section of the community. (Any construction of this legislation to require only a single set of jury wheels would appear defective because (1) prospective jurors under the proposed law could not then be excluded upon challenge for cause for inability to comprehend the language in which the trial is to be conducted, and (2) even if such jurors could be so excluded, the administration of such a system with a single qualified wheel would be impossible on account of the lack of predictability as to linguistic abilities of the jurors being summoned and the consequent need to summon extremely large jury panels to allow for anticipated exclusions.)
>
> 2. Puerto Rico is not the only area of the United States having a substantial proportion of non-English speaking persons in its population, and no showing has been made to justify the treatment of its Spanish-speaking population in a manner different from other American citizens not fluent in English by offering them the unique opportunity of a federal jury trial conducted in their preferred tongue.
>
> 3. This legislation would in effect require that all United States district judges appointed in Puerto Rico must be bilingual, thus imposing upon such court a unique requirement not applicable to any other court established under Article III of the Constitution.
>
> 4. The enactment of this bill would clearly cause a major expansion in the caseload of the Puerto Rico district court by encouraging the increased filing therein of civil cases, as

to which a jury trial is not now available under the civil law applied in the Spanish-speaking courts of the Commonwealth.

5. The ability of this district court to utilize visiting judges designated and assigned from other federal courts, who have in the recent past been indispensable in the management of its caseload, would be greatly reduced if a major proportion of its trials were to be conducted in Spanish.

6. The expense and delay inherent in federal litigation in Puerto Rico will be greatly increased by

(a) The need to translate exhibits and other documentary evidence during trial;

(b) The need to translate Spanish trial transcripts and pleadings into English for purposes of the record on appeal to the United States Court of Appeals for the First Circuit and possibly for further proceedings in the United States Supreme Court; and

(c) The apparent need to translate any opinions or memoranda handed down in Spanish by the district court into English for purposes of appeal and then to retranslate any subsequent appellate opinion into Spanish, where the trial was conducted in that language.

7. Whereas at present the district judge can readily and immediately verify the accuracy of any interpretation of testimonial proceedings taking place in court, and the Court Interpreters Act of 1978 envisions a system of certified interpreters guaranteeing the accuracy of simultaneous interpretation of the entire trial proceeding, no effective means would exist to monitor the authenticity of the written translations of appellate records which are envisioned by this legislation.

8. The enactment of this legislation would require the acquisition and permanent maintenance of a large new staff of translators in the Puerto Rico district court and of additional personnel to monitor and coordinate the efforts of this staff with the appellate processes of the Court of Appeals for the First Circuit in order to prevent unconscionable delays. To retain such highly trained personnel required for this purpose would necessitate an expenditure of appropriated funds which cannot be justified by any of the objectives which the bill seeks to accomplish.

9. An arguable alternative to this cumbersome translation process for purposes of appeal would be to establish the Court of Appeals for the First Circuit as a bilingual court, which is clearly impractical in view of the traditionally small size of this court (four authorized judgeships at present) and the

statutory procedures for the courts of appeals to sit in panels of three judges, randomly selected in each case from all available active, senior, and visiting judges assigned to the Court.

The Conference, having observed the legislative proceedings to date in the House of Representatives and being concerned over the absence of any exploration in depth of the practical implications of administering a busy metropolitan bilingual court within a national system otherwise wholly operated in the English language, and being further concerned that the right of appeal from judgments of the Puerto Rico district court not be diminished through expense or delay, urges strongly that the Senate hold hearings probing, with assistance from experts, such issues as (1) the fiscal, personnel, and organizational requirements incident to an adequate translation capability, (2) the alternative of reliance on Spanish-speaking appellate judges, (3) the necessity for legislation authorizing two sets of jury wheels, (4) the feasibility of initially confining the bilingual option to a pilot program of limited scope, and (5) the necessity to link the responsibilities of the district court under this legislation to the availability of adequate space, funds, and personnel.

## Use of Voter Registration Lists

The Conference has on several occasions endorsed legislation which would have designated voter registration lists as a presumptively sufficient sole source for the names of prospective federal jurors (See Conf. Rept., Sept. 1979, p. 94). Judge Atkins reported that the Committee is no longer persuaded of the need for corrective legislation of this type, since the aims of the legislation have largely been accomplished through the development of decisional law on the issues of community representation on federal juries and the adequacy of voter lists as the selection source. The Conference thereupon directed that this legislation not be resubmitted to the Congress and that no further effort towards its enactment be made.

## Juries in Bankruptcy Cases

The Transition Advisory Committee of Bankruptcy Judges, appointed by the Director of the Administrative Of-

fice to advise and assist on problems arising during the period of transition to the new system of bankruptcy courts, has recommended two amendments to the Judicial Code with respect to jury administration. The first proposed amendment would provide that the fees and expense allowances to be paid to jurors in bankruptcy courts would be disbursed by the clerk of the United States district court rather than the clerks of the bankruptcy court. Upon recommendation of the Committee, the Conference approved a draft bill and authorized its transmission to the Congress.

The second suggestion of the Transition Advisory Committee would provide for the participation of a bankruptcy judge in the design and review of the jury selection plan to be followed in each judicial district. The Conference had previously determined that a bankruptcy court should follow the jury selection plan of the district court and should use the same jury wheels and mechanics used in selecting juries for that district court. It was the view of the Committee that, because of the relatively small number of jury trials taking place in bankruptcy courts, the existing arrangement is fully adequate. Further, there is no need for formalized participation by a bankruptcy judge on the reviewing panel, since the present arrangement does not preclude the district courts from consulting with the bankruptcy judges of their district in the initial framing of the jury selection plan or amendments thereto. The Committee recommended that the Conference take no action on this proposal, and the Conference agreed.

## COMMITTEE ON INTERCIRCUIT ASSIGNMENTS

The written report of the Committee on Intercircuit Assignments, submitted by the Chairman, Senior Judge George L. Hart, Jr., was received by the Conference.

During the period August 16, 1979 to February 15, 1980 the Committee recommended 62 assignments to be undertaken by 48 judges. Of this number nine were senior circuit judges, one was an active circuit judge, three were district judges in active status and 27 were senior district judges. Thirteen assignments involved three active judges and one senior judge of the Court of Claims, two active judges of

the Court of Customs and Patent Appeals and two active judges of the Customs Court.

Eight senior circuit judges and 16 senior district judges carried out 27 of the 36 assignments to the courts of appeals which were recommended during the period. One active circuit judge, one active district judge, two active judges of the Court of Customs and Patent Appeals, and three active judges of the Court of Claims participated in the other nine assignments to the courts of appeals.

Of the 26 assignments to the district courts, 15 senior district judges participated in 17 assignments, the remaining nine being carried out by one senior circuit judge, two active district judges, two active judges of the Customs Court and one senior judge of the Court of Claims.

## COMMITTEE TO IMPLEMENT THE CRIMINAL JUSTICE ACT

Senior Judge Thomas J. MacBride, Chairman of the Committee to Implement the Criminal Justice Act, presented the Committee's report.

### APPOINTMENTS AND PAYMENTS

The Conference authorized the Director of the Administrative Office to distribute copies of a report on appointments and payments under the Criminal Justice Act for the fiscal year 1979 to all chief judges, all federal defender organizations and to others who may request copies. The report indicated that $24,800,000 was appropriated by the Congress for the administration of the Act during the fiscal year 1979. During the year approximately 43,000 persons were represented under the Act, compared to approximately 44,000 persons represented during the fiscal year 1978, a decrease of 2.3 percent. Federal public defender organizations represented 13,338 persons during the year. Community defender organizations represented 7,333 persons. Collectively these defender organizations accounted for 48.1 percent of all persons represented during the fiscal year 1979,

compared to 45.7 percent during the fiscal year 1978 and 42.4 percent during the fiscal year 1977.

The report indicated that the average cost of representation under the Criminal Justice Act by all federal defender organizations during the fiscal year 1979 was $534 per case, an increase of 7.9 percent compared to a cost of $495 per case during the fiscal year 1978. The cost of representation by private panel attorneys was $478 per case during the fiscal year 1979, a 5.5 percent increase over the cost of $453 per case during the fiscal year 1978.

## BUDGET REQUEST—FEDERAL PUBLIC DEFENDER

At the September 1979 session of the Conference (Conf. Rept., p. 98) the Committee reported that, for the time being, it was recommending that no funds be authorized for the Federal Public Defender Office in the Central and Southern Districts of Illinois for the fiscal year 1981. Judge MacBride stated that the Committee continues to be concerned over the under-utilization of the Federal Public Defender Organization for these two districts and its high operational cost per case. The Committee now believes, however, that funding should be provided for the fiscal year 1981, and that a thorough review should be made at the time the Committee reviews budget requests for the fiscal year 1982. Upon recommendation of the Committee the Conference approved a fiscal year 1981 budget for the Federal Public Defender organization in the Central and Southern Districts of Illinois in the amount of $128,827.

## AMENDMENTS TO CRIMINAL JUSTICE ACT GUIDELINES

The Conference, upon recommendation of the Committee, approved the following amendments to the guidelines for the administration of the Criminal Justice Act:

1. An amendment to paragraph 2.12 to provide continuity of representation in appeals from decisions of United States magistrates.

2. An amendment to paragraph 2.01C to add a new subparagraph (4) pertaining to the appointment and compensation of counsel under the Jury System Improvements Act.

3. An amendment to paragraph 2.24 relating to multiple vouchers for compensation from one counsel and the proration of claims.

4. An amendment to paragraph 2.28D relating to the printing and reproduction of briefs.

5. An amendment to paragraph 2.11 relating to the compensation of multiple counsel representing one defendant.

6. An amendment to paragraph 2.01C to add a new subparagraph (5) pertaining to the appointment of counsel for deportation proceedings.

7. An amendment to paragraph 2.22A relating to documentation in support of Criminal Justice Act vouchers.

8. A renumbering of paragraphs 3.04 and 3.05, as 3.05 and 3.06 respectively, and the addition of a new paragraph 3.04 relating to documentation in support of claims of experts.

9. An amendment to paragraph 4.03 to clarify policies and procedures regarding the general authorization for federal defenders to obtain investigative, expert, and other services.

## Obligation of Appointed Counsel to Disclose Client's Assets

In its report to the Conference at the special session in January 1965, the Committee recommended the following guideline to be used in the formulation of district court plans for the implementation of the Criminal Justice Act:

> A district court plan may properly place upon appointed counsel the duty of reporting to the court any situation coming to his attention where a defendant appears to be able to finance a portion of his defense.

The Committee continues to adhere to this view but recognizes that Canon 4 of the American Bar Association's *Code of Professional Responsibility* also imposes an ethical duty on an attorney to preserve the confidences and secrets of a client. To require an attorney to report information to the court which was gained as a result of a privileged communication could result in a charge against the attorney of unethical conduct and subject the attorney to disciplinary action. The Committee therefore recommended, and the Conference resolved, that district and circuit court plans for the implementation of the Criminal Justice Act should contain a provision to this effect:

> If, at any time after appointment, counsel obtains information that a client is financially able to obtain counsel or to make partial payment for counsel, and the source of the attorney's information is not protected as a privileged communication, counsel shall advise the court.

The Committee, however, was requested to continue its oversight of this problem.

## Appointment of Counsel—Civil Rights Cases

The guidelines for the administration of the Criminal Justice Act, paragraph 2.01C(3), as approved by the Conference, clearly indicate that prisoners bringing civil rights actions under 42 U.S.C. 1983 are not entitled to the appointment of counsel under the Criminal Justice Act. Judge MacBride informed the Conference that many district courts are appointing counsel, particularly federal defender organizations, to undertake the representation of prisoner petitions for relief that are clearly under section 1983 of title 42, United States Code, and not within the scope of the Criminal Justice Act.

In order to prevent the expenditure of resources that are appropriated to provide defense services under the Criminal Justice Act from being used for activities beyond the scope of the Act, the Committee recommended, that the Conference reaffirm its position, that counsel may not be appointed under the Criminal Justice Act, nor may Criminal Justice Act resources be expended, in "civil rights" actions or proceedings brought under 42 U.S.C. 1983. The Conference approved the recommendation and reaffirmed its position on the matter as requested by the Committee.

## Personal Liability of Federal Public Defenders

Judge MacBridge stated that the federal public defenders had expressed to the Committee their great concern over their potential exposure to personal liability for malpractice in light of the Supreme Court's recent decision in *Ferri* v. *Ackerman.* The concern arises primarily because of footnote 16 which states "We have found nothing in the legislative history of the 1970 amendment [to the Criminal Justice Act] that indicates that Congress intended public defenders to be immune

from malpractice actions." Judge MacBride stated that the Committee shares the concern of the federal public defenders and had requested the Administrative Office to take necessary and appropriate action to provide protection against personal liability for Federal Public Defenders.

## COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The report of the Committee on Rules of Practice and Procedure was submitted by the Chairman, Senior Judge Roszel C. Thomsen.

### MAGISTRATES RULES

Upon recommendation of the Committee, the Conference approved for transmittal to the Supreme Court of the United States a set of *Rules of Procedure for the Trial of Misdemeanors Before United States Magistrates* with a recommendation that they be adopted by the Court. Judge Thomsen stated that the new rules are required as a result of the Federal Magistrate Act of 1979, Public Law 96-802, approved October 10, 1979, which amended 18 U.S.C. 3401 to abolish the concept of "a minor offense" and to authorize a United States magistrate to try any misdemeanor case with the written consent of the defendant. These new rules would supersede the *Rules for the Trial of Minor Offenses Before United States Magistrates* which were approved by the Supreme Court on January 27, 1971. Under 18 U.S.C. §3402 the Supreme Court has authority to adopt these rules without submitting them to the Congress.

### COMMITTEE DOCUMENTS

The Conference, on recommendation of the Committee, authorized the Standing Committee to make available on request any document submitted to the Standing Committee by an advisory committee and to make available any recommendations submitted by the Committee to the Judicial Conference. The Conference also authorized the immediate

release, on request, of any action taken by the Conference on recommendations pertaining to changes in rules of practice and procedure submitted by the Standing Committee.

## AD HOC COMMITTEE ON THE DISPOSITION OF COURT RECORDS

Judge Walter J. Cummings, Chairman of the ad hoc Committee on the Disposition of Court Records, presented the report of the Committee.

### Records of District Courts, Court of Claims, Customs Court, Bankruptcy Courts, and Territorial District Courts

The Conference in September 1979 (Conf. Rept., p. 105) approved a records disposition program and schedule for the disposition of the records of the United States district courts and bankruptcy courts and authorized the Committee to make further changes in the schedule that might be called for as a result of an appraisal by the National Archives and Records Service. Subsequently, the National Archives and Records Service suggested certain changes and technical amendments to the schedule to conform with its overall program. Upon recommendation of the Committee the Conference approved a revised records disposition program and schedule and directed that it be made applicable to the records of the Court of Claims and to the records of the Customs Court, provided the schedule is acceptable to the Customs Court.

### Records of the Courts of Appeals, Court of Customs and Patent Appeals, Circuit Judicial Councils, and Circuit Judicial Conferences

The Committee submitted to the Conference a proposed records disposition program and schedule covering the records of the United States courts of appeals, the Court of Customs and Patent Appeals, circuit judicial councils and circuit conferences. Judge Cummings informed the Con-

ference that the proposed schedule had previously been circulated to all circuit judges, the Chief Judge of the Court of Customs and Patent Appeals, circuit executives, and the clerks of the courts of appeals and that comment thereon had been received and considered by the Committee. The Conference, upon recommendation of the Committee, approved the disposition schedule and program statement, as submitted, and authorized its transmission to the National Archives and Records Service and to the courts concerned.

### Termination of the Work of the Committee

Judge Cummings informed the Conference that the basic work of the Committee in preparing schedules for the disposition of the records of the various United States courts has now been completed. The Conference thereupon discharged the Committee from any further responsibilities and commended the Chairman and members thereof for their exceptionally fine work. The Conference directed that future modifications in the disposition schedules be considered by the appropriate standing committee of the Conference.

## ELECTIONS

The Conference, pursuant to 28 U.S.C. 621(a)(2), elected Chief Judge William S. Sessions of the United States District Court for the Western District of Texas to membership on the Board of the Federal Judicial Center for a term of four years, succeeding District Judge Frank J. McGarr whose term expires on March 28, 1980.

## PRETERMISSION OF TERMS OF COURTS OF APPEALS

The Conference, pursuant to 28 U.S.C. 48, approved the pretermission of a June 1980 term of the United States Court of Appeals for the Fourth Circuit at Asheville, North Carolina. The Conference also approved the pretermission of terms of the Court of Appeals for the Tenth Circuit at

Wichita, Kansas and Oklahoma City, Oklahoma during the calendar year 1980.

## RELEASE OF CONFERENCE ACTION

The Conference authorized the immediate release of matters considered at this session where necessary for legislative or administrative action.

Warren E. Burger
Chief Justice of the United States

April 30, 1980

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