REPORT OF THE JUDICIAL CONFERENCE.

SEPTEMBER SESSION, 1938.

The Judicial Conference provided for in the Act of Congress of September 14, 1922 (U. S. Code, Title 28, sec. 218), convened on September 29, 1938, and continued in session for three days. The following judges were present in response to the call of the Chief Justice:

First Circuit, Senior Circuit Judge George H. Bingham.
Second Circuit, Senior Circuit Judge Martin T. Manton.
Third Circuit, Senior Circuit Judge J. Warren Davis.
Fourth Circuit, Senior Circuit Judge John J. Parker.
Sixth Circuit, Senior Circuit Judge Xenophon Hicks.
Seventh Circuit, Senior Circuit Judge Evan A. Evans.
Eighth Circuit, Senior Circuit Judge Kimbrough Stone.
Ninth Circuit, Senior Circuit Judge Curtis D. Wilbur.
District of Columbia, Chief Justice D. Lawrence Groner.

The Senior Circuit Judges for the Fifth and Tenth Circuits, Judges Rufus E. Foster and Robert E. Lewis were unable to attend, and their places were taken respectively by Circuit Judges Samuel H. Sibley and Orie L. Phillips.

The Attorney General and the Solicitor General, with their aides, were present at the opening of the Conference.

State of the dockets.— Number of cases begun, disposed of, and pending, in the Federal District Courts. The Attorney General submitted to the Conference a report of the condition of the dockets of the district courts for the fiscal year ending June 30, 1938, as compared with the previous fiscal year. Each Circuit Judge also presented to the Conference a detailed report, by districts, of the work of the courts in his circuit.

The report of the Attorney General disclosed the following comparison of criminal and civil cases (exclusive of bankruptcy cases) commenced and terminated during the fiscal years 1937 and 1938:

	Commenced		Terminated	
	1937	*1938*	*1937*	*1938*
Criminal	35,369	34,099	35,351	34,214
Civil	32,672	33,409	37,393	38,155

We noted last year the decrease in the number of cases pending in the district courts at the close of the fiscal year, and the figures for the year ending June 30, 1938, show a further decrease, as follows:

Pending Cases	*1937*	*1938*
Criminal cases	11,011	10,896
United States civil cases	12,623	11,285
Private suits	27,995	24,587
Bankruptcy cases	54,274	54,277
Total	105,903	101,045

Arrearages.—Delays in the disposition of cases.—We called attention last year to the improvement that had been made with respect to the approximate time required to reach the trial of cases after joinder of issue. While in the fiscal year 1934 there were only 31 districts of which it could be said that all cases in which issue had been joined and which were ready for trial could be tried not later than the term following the joinder of issue, it appeared last year that this was true of 68 of the 84 districts, exclusive of the District of Columbia. Substantially the same may be said this year.

The Attorney General points out that the tabulations showing the minimum length of time between joinder of issue and opportunity for trial do not adequately disclose the real state of the dockets with respect to arrearages and delays. The Attorney General notes the misnomer, in previous tabulations, in describing dockets as "current" merely because cases can be tried at the term following joinder of issue. Thus, it is observed that there are many districts in which the trial dockets are up to date and yet litigants may have to wait from six months to a year after issue is joined in order to obtain trial. This is said to be due principally to long intervals in certain districts be-

tween terms of court. And the tabulations above mentioned do not take into account the cases continued at the request of the parties or the period that is absorbed by preliminary proceedings before joinder of issue.

In order to give a more adequate picture of the state of the dockets, the Attorney General has submitted a table—now presented to the Conference for the first time—showing the status of the civil cases pending on June 30, 1938. From this table it appears that of the 35,872 civil cases pending on that date there were only 11,660 that had been pending for six months or less, while 24,212, or 67%, had been pending for six months or over; 18,017 cases, or 50.2%, for a year or more; 11,374 cases, or 32%, for two years or more; 7,741 cases, or 22%, for three years or more; 5,910 cases, or 16%, for four years or more; and 4,720 cases, or 13%, for five years or more.

The Attorney General classifies the delays as being of three types, (1) those between the beginning of suit and joinder of issue, (2) those between joinder of issue and trial, and (3) those in the disposition of matters that have been submitted to the court. The Attorney General feels justified in expecting that the first sort of delay will be substantially reduced as a result of the adoption of the new Rules of Civil Procedure which went into effect on September 16, 1938. So far as the second and third types of delay have been due to congestion of dockets and the burden imposed upon judges they may be considerably remedied by the increase of judicial personnel. In the District of Columbia it is believed that through the provision for additional judges the large arrearages may be very considerably reduced during the ensuing year and soon after may be completely disposed of.

The Conference has carefully considered the tabulations furnished by the Attorney General and fully appreciates the importance of adequate statistics upon this subject. The Conference is in entire agreement with the view that the new Rules of Civil Procedure, through a required simplification of practice, will diminish the delays that have

heretofore occurred. The provision of Rule 16 for pre-trial procedure should have a most salutary effect. Under this Rule the district court may direct the attorneys for the parties to appear before it for a conference to consider (1) the simplification of the issues, (2) the necessity or desirability of amendments to the pleadings, (3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, (4) the limitation of the number of expert witnesses, (5) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury, and (6) such other matters as may aid in the disposition of the action. The court is to make an order reciting the action taken by the conference and may establish a pre-trial calendar. Although this rule has been in effect for a very short time it has already been applied in at least one district with apparent success. If the District Judges avail themselves of this opportunity, and proceed in the manner contemplated, there is every reason to believe that the speedy and appropriate disposition of cases will be greatly facilitated. The real points at issue may be ascertained at an early stage of the litigation and arrangements be made to avoid all delays for unsubstantial reasons.

In considering the statistics with respect to the accumulation of pending cases, attention was directed in the Conference to some of the reasons why cases remain on dockets for a year or more. Thus, cases may be held to await a decision in some other jurisdiction, which would make a trial unnecessary or affect the rights involved, or to await the result of negotiations for settlement; foreclosure suits may be suspended by moratorium or redemption statutes; the litigation may be ancillary to that in another jurisdiction or may be held in abeyance because of bankruptcy or reorganization proceedings, or because of an injunction restraining parties from proceeding; cases may have been appealed and sent back for another trial; or, as frequently occurs, the continuances are by consent of counsel.

How important it is to analyze statistics in order to ascertain the exact circumstances of the cases to which they relate may be illustrated by the situation in one of the districts to which attention was directed in connection with the submitted table. It should be noted that as soon as this table was received (shortly before the meeting of the Conference) inquiries were made in certain instances in order to ascertain the reasons for the disclosed delays. The instance just referred to was that of the Western District of Missouri, where the table showed that out of 411 pending cases there were 240 which had been pending for more than a year and of these 168 cases had been pending for more than five years. On inquiry it appeared that of those last mentioned there were 140 cases involving certain insurance rates fixed by the state authority where it had seemed necessary for many separate suits to be brought. The cases were before a three-judge court and common principles of law governed all. After the merits had been finally disposed of by settlement, the mere administrative work of the distribution to a host of persons in interest under insurance policies of the huge fund accumulated under order of the court has required considerable time. It is understood that thousands of checks are being sent out monthly and the distribution is being made as rapidly as possible. With respect to the same district, other explanations were given to account for the delays in the remaining cases shown by the table.

While it is thus highly important, in order to appreciate the true significance of statistics as to the number of pending cases, to know their nature and the precise reasons for holding them on the docket, it is still believed to be true that there is a very large accumulation of cases which encumber the dockets and should have been disposed of long ago. The Senior Circuit Judges will take up this matter with the District Judges in their respective circuits. One remedy immediately at hand, which has proved effective in many jurisdictions, is to have the entire docket called

at reasonable intervals so that the "dead wood" on the docket may be removed and the cases that are expected to be tried shall be brought to a speedy determination. Further, cases should not be kept on the docket for an inordinate time merely on the consent of counsel and in the absence of substantial reasons. The Conference adopted the following resolution:

> "Resolved that it is the sense of the Conference:
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> 1. That there should be a complete call of the docket at least once every six months in each judicial district or in each division of a district where there are divisions.
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> 2. That the provisions of the pre-trial procedure provided by Rule 16 should be followed as far as practicable in connection with such call.
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> 3. That reports as to such call of the docket should be made annually to the Senior Circuit Judge.
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> 4. That where calls of the docket are not made by the judge of the district, the Senior Circuit Judge should assign some other judge to the district to perform that service."

Additional judges required.— The Attorney General justly emphasized the importance of having a sufficient number of judges to dispose of the judicial work and has pointed to the relatively small amount that is expended by the Government in the maintenance of the Judicial Department.

Provision for circuit judges.—The Conference in 1937 recommended that provision be made for additional circuit judges as follows:

> 1 additional circuit judge for the Second Circuit;
> 1 additional circuit judge for the Fifth Circuit;
> 1 additional circuit judge for the Sixth Circuit;
> 1 additional circuit judge for the Seventh Circuit.

Congress provided for those judgeships and also for an additional associate justice for the Court of Appeals for

the District of Columbia and removed a restriction against the filling of a vacancy when it occurs in the office of circuit judge for the Third Circuit.

The reports of the Senior Circuit Judges show that in general the Circuit Courts of Appeals are up with their work. No additional judges are required in seven of the circuits or in the Court of Appeals for the District of Columbia. The Circuit Court of Appeals for the Sixth Circuit has a large accumulation of cases and it is apparent that in order to secure the prompt disposition of its work an additional judge will be needed even after the existing vacancy is filled. The Circuit Court of Appeals for the Seventh Circuit has kept up with its work through the assistance of district judges. The latter, however, are needed in the district courts. There is an existing vacancy but still another judge is required. Again, the Circuit Court of Appeals for the Eighth Circuit has been able to keep abreast of its work only through the aid of retired judges. It now appears that dependence can not be placed upon their continued ability to render this service and provision should be made for two additional circuit judges there.

Accordingly, the Conference recommends that there should be provision for one additional circuit judge in each of the Sixth and Seventh Circuits and for two additional circuit judges in the Eighth Circuit.

Provision for district judges.—In 1937 the Conference recommended that additional district judges be provided as follows:

1 additional district judge for the Northern District of Georgia;

1 additional district judge for the Eastern District of Louisiana;

1 additional district judge for the Western District of Louisiana;

1 additional district judge for the Southern District of Texas;

1 additional district judge for the Eastern District of Michigan;

1 additional district judge for the Northern District of Ohio;

1 additional district judge for the Western District of Washington;

1 additional district judge for the Southern District of California;

1 additional district judge for the District of Kansas;

3 additional district judges for the District of Columbia.

Accordingly Congress made this provision except in three instances: the Northern District of Georgia, the Northern District of Ohio, and the District of Kansas. Other additional judgeships were created by Congress as follows:

1 additional district judge for the Northern District of Alabama, with the proviso that no successor shall be appointed to the present senior judge.

1 additional district judge for the Northern District of Illinois.

1 additional district judge for the Western District of Virginia.

1 additional district judge for the Northern District of California.

1 additional district judge for the Southern District of New York, with the proviso that the first vacancy occurring in that District shall not be filled.

1 additional district judge for the District of Massachusetts, with the proviso that the first vacancy occurring in that District shall not be filled.

1 additional district judge for the Eastern and Western Districts of Arkansas.

1 additional district judge for the Eastern and Middle Districts of Tennessee, with the proviso that no successor shall be appointed.

Congress also made permanent a temporary judgeship for the District of Montana, and removed the prohibition

against the filling of a vacancy when it occurs in the office of district judge for the Eastern District of Pennsylvania.

The Conference gave close consideration to the extent of the need for still more district judges, having regard to the volume and character of the work in the districts and the need for the prompt disposition of cases. The Conference renews its recommendations for additional judges for the Northern District of Georgia and for the District of Kansas. Despite the relief already afforded in the Southern District of California and the Southern District of New York, further judicial assistance is necessary in view of the heavy dockets in those districts. In the Southern District of New York there has been reliance upon the assistance furnished through the assignment of judges from other circuits, but inquiry shows that it is impracticable to obtain this relief to the extent needed. Other increases are found to be advisable in the District of New Jersey, the Eastern District of Pennsylvania, the Eastern District of Missouri, and the Western District of Oklahoma.

Including the recommendations made last year and now renewed, the Conference therefore recommends that additional district judges be provided as follows:

2 additional district judges for the Southern District of New York;

1 additional district judge for the District of New Jersey;

1 additional district judge for the Eastern District of Pennsylvania;

1 additional district judge for the Northern District of Georgia;

1 additional district judge for the Eastern District of Missouri;

1 additional district judge for the Southern District of California;

1 additional district judge for the Western District of Oklahoma;

1 additional district judge for the District of Kansas.

Court rules.—The adoption of the Rules of Civil Procedure necessitates changes in the rules of the respective Circuit Courts of Appeals and the District Courts. With respect to the Circuit Courts of Appeals, while each circuit may adopt such rules as are found to be immediately necessary to conform to the new procedure, it is the sense of the Conference that the rules should be made as uniform as practicable and to this end the rules adopted in each circuit should be at once communicated to all the other Senior Circuit Judges. The Conference appointed a committee which, on reviewing the rules of the several circuits, will undertake to make recommendations in order to secure the desired uniformity. This committee is composed of Circuit Judges Parker, Hicks, Wilbur, and Phillips.

The Attorney General has called attention to the importance of simplifying the procedure in the conduct of cases in the Circuit Courts of Appeals other than those coming from District Courts. The Attorney General has offered his assistance in securing uniform and appropriate procedure in such cases and the committee appointed by the Conference to deal with the subject of rules, as above noted, will collaborate with the Attorney General for this purpose.

In the amendment of the rules of the respective District Courts it is important that regard should be had to simplicity. It is the sense of the Conference that these rules should be made in the spirit which has governed the adoption of the new procedure; the rules should be few, simple and free from unnecessary technicalities. The Senior Circuit Judges will communicate with the District Judges in their respective circuits to secure uniformity of rules within the circuit and the Conference appointed a committee of District Judges which will examine the various district rules and make recommendations so that the greatest practicable degree of uniformity throughout the country may be secured. This committee is composed of District Judge John C. Knox of the Southern District of New York, District Judge William P. James of the Southern District

of California, and District Judge Robert C. Baltzell of the Southern District of Indiana.

The revised Bankruptcy Act.—Rules will also be required to meet the provisions of this Act. It is understood that the Supreme Court will in the near future promulgate its amended General Orders and forms, in the light of which local rules may be formulated.

The Attorney General, in accordance with the request of the Chairman of the Securities and Exchange Commission, informed the Conference that the Commission was ready to perform the duties which the new Act imposed upon it and desired to assist the courts in every possible way in the protection of the rights of security holders. The Attorney General also stated that he had issued a circular of instructions to the United States Attorneys calling their attention to the duties which the Act imposed upon them.

Boundaries of judicial circuits and districts.—At the last Conference a committee was appointed to cooperate with the committees of the Senate and the House of Representatives, respectively, which have been appointed to study the organization and operation of federal courts. It has been thought probable that the boundaries of existing circuits and districts would become the subject of consideration. The committee appointed by the Conference to deal with this subject has been continued.

Number of judges on the Circuit Courts of Appeals.—The Conference recommended that § 212 of Title 28 of the United States Code should be amended so that, in a circuit where there are more than three circuit judges, the majority of the circuit judges may be able to provide for a court of more than three judges when in their opinion unusual circumstances make such action advisable.

Improvements in budgetary practice and in the supervision of the administration of justice in the Federal

Courts.—The Attorney General directed attention to the bill introduced at the last session of Congress (S. 3212) for the establishment of an administrative office of the United States courts and, while not objecting to modifications and improvements, the Attorney General strongly endorsed the objectives of the measure in the hope that these might have the approval of the Conference.

One of these objectives is to give the courts the power of managing their own business affairs and to that extent to relieve the Department of Justice of that responsibility. The Attorney General thought it bad in principle and practice that the chief litigant before the courts should have the control of the financing, the budget, the accounting and all the other details which are so intimately a part of the judicial administration.

Another objective is to secure an improved supervision of the work of the courts through an organization under judicial control. These objectives, as well as the provisions of the bill in question, were fully discussed in the Conference. In order to attain the desired ends, and to meet such objections as had been urged to the pending measure, the Conference provided for the appointment of a committee to prepare a recommendation, subject to the approval of the Conference, "having in view the incorporation of the provisions of the present bill looking to the transfer of the budget from the Department of Justice to the administration of the courts by some proper means, and, likewise, embracing a provision looking toward the establishment of Judicial Councils or some other like method within the several circuits and the District of Columbia for the control and improvement of the administration of justice therein." This work on behalf of the Conference is to be prosecuted in collaboration with the Attorney General. The committee is also authorized to submit any recommendations that are cognate to the matters above mentioned.

This committee is composed of Chief Justice Groner of the United States Court of Appeals for the District of Co-

lumbia, and Senior Circuit Judges Manton, Parker, Evans and Stone.

Appropriation for law clerks.—The Conference recommended that the Congress fix the sum of not more than $3,000 per annum as the amount that may be paid to law clerks of circuit judges. The Conference also recommended that an appropriation be made for the salaries of law clerks of district judges in accordance with the statute where the appointment of such clerks is approved by the Senior Circuit Judge.

Disparity of sentences in criminal cases.—The Attorney General presented the subject of the disparity between sentences imposed in different districts by different judges for practically the same offense committed under similar circumstances. Apart from the apparent failure to administer equal and exact justice in such cases the Attorney General called attention to the disciplinary problem that was thus created for the Federal Bureau of Prisons. No particular recommendation was submitted but the study which had been undertaken in the Department of Justice was made available to the Conference. The Conference considered the subject and the obvious difficulties that are involved in suggesting a remedy. The Conference recommended that the Senior Circuit Judge in each circuit should make the subject a matter of careful consideration in consultation with district judges so that the disparity in sentences should be removed so far as practicable and welcomed the aid of the Department of Justice in this endeavor.

Counsel for indigent defendants.—The Conference renewed its recommendation of last year upon this subject, as follows:

> "We approve in principle the appointment of a Public Defender where the amount of criminal business of a district court justifies the appointment. In other

districts the district judge before whom a criminal case is pending should appoint counsel for indigent defendants unless such assistance is declined by the defendant. In exceptional cases involving a great amount of time and effort on the part of counsel so assigned, suitable provision should be made for compensation for such service, to be fixed by the court and to be a charge against the United States."

The Conference adjourned subject to the call of the Chief Justice.

For the Judicial Conference:

CHARLES E. HUGHES,
Chief Justice.

October 1, 1938.