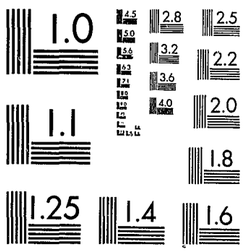

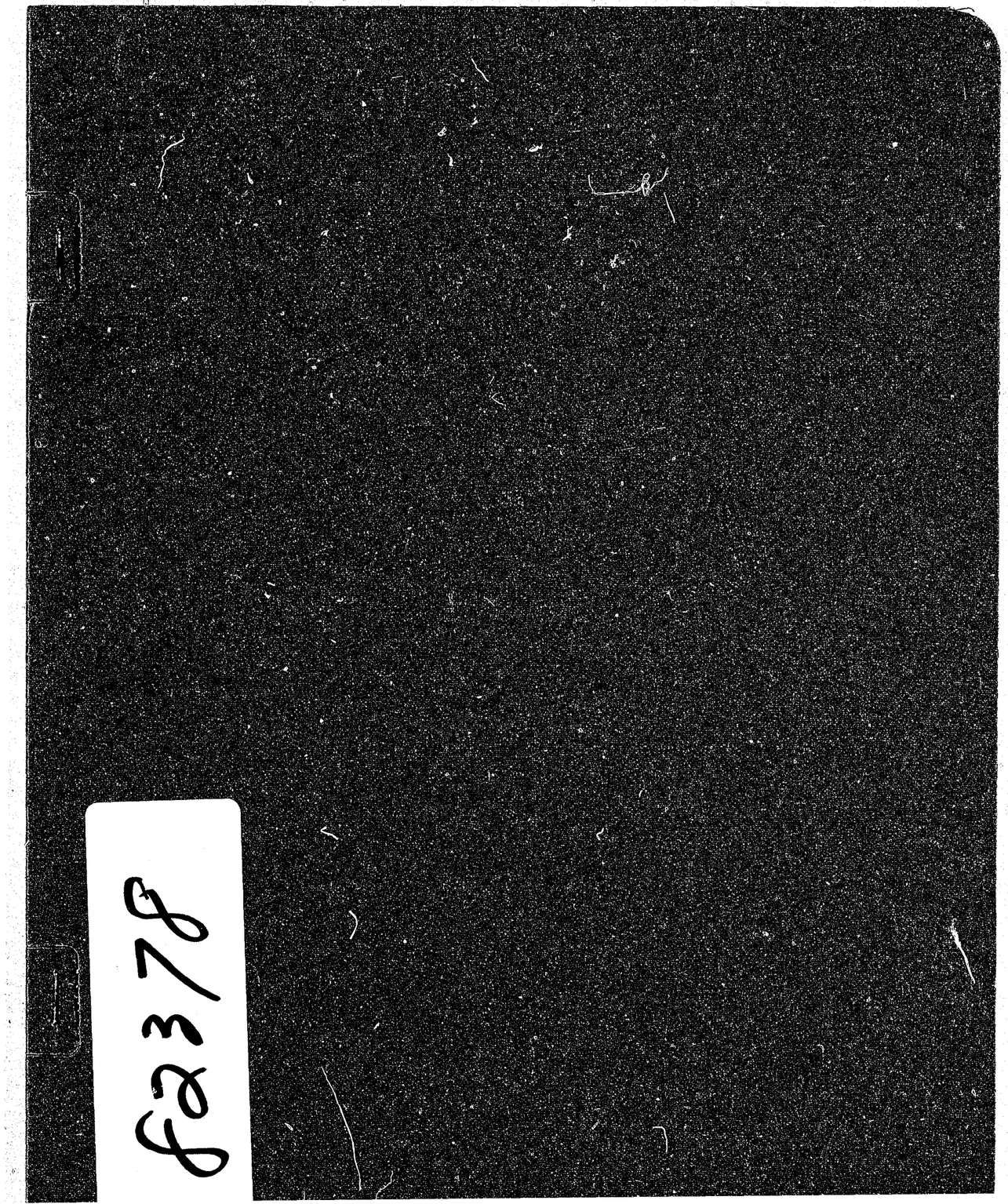

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YEAR-END REPORT ON THE JUDICIARY

BY

Chief Justice Warren E. Burger

December 28, 1981

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INTRODUCTION

This year marks the 75th anniversary of Roscoe Pound's now famous 1906 address on "The Causes of Popular Dissatisfaction with the Administration of Justice." We have made progress in solving a number of yesterday's problems, but as society turns more and more to the courts for solutions -- a task judges do not seek -- new problems continue to press themselves. Indeed, yesterday's solutions sometimes become today's problems, for many solutions generate yet more grist for judicial mills. Pretrial procedures, for example, were instituted to speed litigation. Uncontrolled, they are often used by some to frustrate the very goals they were instituted to achieve. In certain respects, as Pound said in 1906, the administration of justice continues to be "behind the times."

Five years ago, the American Bar Association, the Judicial Conference of the United States and the Conference of Chief Justices sponsored the "Pound Revisited Conference" in St. Paul, Minnesota. The conferees recognized in 1976, as Pound said in 1906, that "there is more than the normal amount of dissatisfaction with the administration of justice in America. Assuming this, the first step must be diagnosis." On the occasion of that Conference I urged those who administer justice to begin to propose an "Agenda for 2000 A.D." -- a systematic plan (consisting of research, experimentation and ultimately action) to anticipate the future.

As Lawrence Edward Walsh, then ABA President, stated at the 1976 Conference: "[W]e are obligated to make our system work, to

get something better for the public." Pound's contributions, and the results of his thinking, continue to stimulate the kind of thought and action which can help us to meet that obligation. Against that backdrop, the following noteworthy highlights of 1981 developments are presented.

JUDICIAL WORKLOAD AND PRODUCTIVITY

Caseload

To no one's surprise, federal case filings continued to mount, playing out a general fifteen-year trend:

-- Cases docketed in the Supreme Court grew to 4,174 in the 1980 Term, a 4.7% increase over the previous Term.

-- Court of Appeals filings increased even more dramatically to 26,362, almost a 14% increase over the last judicial year.

-- District Court filings expanded to 211,863, a 7% increase over the last judicial year.

The problem these case filings present is not simply workload on the courts or delay for the litigants, but a real threat to the quality of federal justice. As then Solicitor General Robert Bork put it at the Pound Conference, "we are thrusting a workload upon the courts that forces them towards an assembly line model."

The future gives no promise of relief. According to recent statistical projections prepared by the Administrative Office of the United States Courts, Court of Appeals case filings will rise between the judicial years 1975 and 1983 by 80%. This represents

an increase of 12,342 case filings. During the same period, the projected increase in civil filings in the District Courts will be 78%. Filings in federal Bankruptcy Courts are projected to increase 114% during that period. This means 290,516 more case filings in Bankruptcy Courts.

Productivity

To be sure, federal judges have responded -- and will continue to respond -- at every level. At the federal appellate level, the number of terminated cases per judgeship rose by fully twenty percent over the previous judicial year, representing an increase of 31.7 cases per judgeship. At the District Court level, the number rose from 349.3 cases per judgeship in judicial year 1980 to 384.1 cases in 1981. (In 1961 there were 280 cases terminated per District Court judgeship.) There is a limit, however, to how long this trend of increased "judicial productivity" should continue, for at some point, the risk of eroding the quality of justice could outweigh the risks of backlog and delay.

FACING UP TO THE LITIGATION EXPLOSION

Costs of Litigation

As Pound pointed out, litigants are entitled to have their disputes resolved as speedily and as inexpensively as possible.

At this point in time, pre-trial discovery presents a problem: too many of today's advocates too frequently take undue advantage of it. Five years ago, Simon H. Rifkind remarked at the Pound Conference: "The practice -- in many areas of the law -- has been to make discovery the 'sporting match' [Pound's 1906

phrase] and an endurance contest. Is this a luxury which an overtaxed judicial system can afford?"

Abuse of the discovery process often serves nothing other than to enlarge the fees of counsel (many of whom are paid on an hourly basis): the economically stronger litigant benefits at the expense of the weaker party. The Federal Judicial Center's training programs for judges' continuing legal education include techniques for effective case management and the curtailment and control of discovery abuses. Additionally, the Judicial Conference Advisory Committee on Civil Rules has been exploring ways of imposing enlarged penalties against lawyers who abuse the discovery process -- on the lawyers, not on their clients.

Disputes between attorneys and clients over the amount and payment of fees are growing. Fortunately, according to the most recent American Bar Association report on the subject, over half the state bar associations now have some kind of fee arbitration mechanism. These programs are operating mainly in the larger states, and combined with other arbitration mechanisms, they lessen the need for costly litigation and judicial involvement in the resolution of fee disputes.

Improving The Use of Juries

The United States still makes greater use of juries than any other nation, yet we are sadly inattentive to helping jurors perform their task, to treating them with the respect they deserve, and to using their time efficiently.

It is still not clear, for example, that jurors understand the instructions by which judges explain the lay person's task.

A study by members of the University of Nebraska Psychology Department found that the average juror may grasp approximately fifty percent of the legal instructions given by a judge prior to deliberations. The Federal Judicial Center has been working with a committee of judges to prepare model jury instructions that judges might use in criminal cases, specifically in areas that would be unaffected by any revision of the federal criminal code. Similarly, committees in several of the circuits are developing new pattern jury instructions.

Moreover, there are gross inefficiencies in our methods of summoning jurors and determining which will serve. We must see to it that undue numbers of citizens do more than simply waste their time waiting not to serve. As I have said in a short essay published earlier this year, far fewer than half the jurors called ever serve in a trial, and even those who do serve waste up to two-thirds of their time in dingy jury lounges, waiting.

For the last eighteen months, a committee of the American Bar Association's Judicial Administration Division, working with a National Center for State Courts task force of court administration officials, has been developing "Standards for Juror Use and Management," which will be submitted to the ABA in tentative draft form in 1982. Beginning in 1982, the National Center for State Courts will be augmented when the Center for Jury Studies in McLean, Virginia, becomes an operating division of the Center. At the federal level, the Judicial Conference has urged that each Circuit Council increase its oversight of jury management practices in the District and Bankruptcy Courts. The

Conference's Committee on the Operation of the Jury System, along with the Administrative Office of the U.S. Courts and the Federal Judicial Center, is working with the courts in these efforts. A Center study published this year, for example, evaluated procedures for jury summoning and developed two recommendations that, if implemented, could save $350,000 per year in court clerical staff time.

Protracted Litigation

There has long been a special concern that juries render the trial of complex, protracted cases more problematic. Last year I appointed a Judicial Conference Subcommittee, chaired by Judge Alvin Rubin of the U.S. Court of Appeals for the Fifth Circuit. That Subcommittee -- the Subcommittee to Examine Possible Alternatives to Jury Trials in Complex, Protracted Civil Cases -- has addressed some of the problems posed by protracted litigation. Information prepared by the Federal Judicial Center for the Subcommittee shows that protracted civil trials (defined as trials "lasting longer than 19 trial days or 100 trial hours") account for less than one percent of all civil trials, yet they consume almost twelve percent of civil trial hours. The Subcommittee's report will shed a good deal of light on the strengths and weaknesses of using juries in protracted cases.

Whether by jury or not, the trial of complex, protracted cases can wreak havoc with a court's calendar, especially a court without a large complement of judges. This year, the Judicial Conference authorized the creation of a "panel" of Senior District Judges who have demonstrated their ability to handle

large cases expeditiously. These judges have volunteered to go to District Courts to hear cases likely to exceed a month, thus diverting the disruption otherwise likely to interfere with the court's calendar. In all cases, of course, as the American College of Trial Lawyers has urged, court and counsel should promptly identify complex litigation in order to deal with the appropriate discovery conferences and motions.

Quality of Litigation and Lawyer Competence

When Roscoe Pound spoke of "the real and serious [public] dissatisfaction with courts," he was by no means limiting his diagnosis to the conduct of judges. He was also concerned with how lawyers (he preferred to call them "officers of the court") executed their duties. This concern leads naturally enough to the query posed in the 1979 Year-End Report: "What has been happening with the problem of inadequate representation of litigants at trial?" During the last decade there have been many encouraging developments. In the early 1970's, the report of the American Bar Association's Task Force on Trial Advocacy was followed by the creation of the National Institute For Trial Advocacy (NITA). Then in 1975 Chief Judge Irving Kaufman appointed a committee on Qualifications to Practice Before the United States Courts in the Second Circuit (Clare Committee). The Judicial Conference Committee to Consider Standards for Admission to Practice in the Federal Courts (the Devitt Committee) was formed in 1975 and issued a report in 1978. To implement its recommendations -- for an experience requirement in federal practice, for a federal practice examination, for

continuing legal education, for a student practice rule and for peer review systems -- the Judicial Conference created an Implementation Committee on Admission of Attorneys to Federal Practice, chaired by Judge J. Lawrence King of the Southern District of Florida. The Committee is working with fourteen District Courts to develop experimental pilot programs. In 1978, the A.B.A. Section on Legal Education and Admissions to the Bar announced the appointment of a task force, chaired by Dean Roger C. Cramton of the Cornell Law School, to consider and report on "Lawyer Competency: The Role of Law Schools." The Cramton Task Force delivered its report in August 1979, acknowledging the need for changes in legal education.

Following another recommendation of the Devitt Committee, federal courts all over the country have begun to sponsor or cosponsor continuing education activities for lawyers, programs designed to improve the quality of advocacy. These programs have a direct and immediate impact; their most important result is that they afford litigants the benefit of better representation.

1981 was the year that the American Law Institute-American Bar Association Committee on Continuing Professional Education sponsored and hosted a "National Conference on Enhancing the Competence of Lawyers." In one of the background conference papers, University of Wisconsin Law School Professor Stuart Gullickson observed that "[a]ll the states in this country, except Delaware, have abandoned the apprenticeship requirement," but by and large it has not been replaced with another form of practical training. A few states have replaced the

apprenticeship with another kind of "clinical" training. New Jersey requires a bar applicant successfully to complete a skills and methods course. Similarly, Montana has recently instituted a clinical training program which, though offered after the completion of law school, is a prerequisite for admission to that state's bar. New Hampshire and Rhode Island also have taken steps in this general direction.(In a similar vein, Colorado, Iowa and Minnesota, among other states, presently require licensed attorneys to enroll in approximately 10-15 hours of continuing legal education per year.)

Whether or not mandatory bar admission courses or programs represent the best approach to remedying one aspect of the lawyer competency problem is a matter that remains to be decided, taking into due account a number of factors including costs, availability of adequate facilities, and questions of practical feasibility. Nevertheless, we should not be blinded to the fact, as Professor Gullickson puts it, that "[l]aw students need practical training, and law schools should provide as much of it as they can. However, the need is far greater than can be met in a brief law school education." The American Bar Association has also begun to stress office skills training targeted at those lawyers with one to five years' experience who need to improve their interviewing, counseling, negotiating and drafting talents.

Since at least April 1980, efforts have been underway concerning various so-called "peer review" programs, whereby members of the legal profession assume responsibility for one another's performance. The Continuing Legal Education Committee

of the American Law Institute-American Bar Association last year proposed three kinds of peer review: "referral peer review" (essentially remedial and initiated by clients, attorneys or judges); "disciplinary peer review" (employed when remedial efforts prove unsatisfactory or when clients have been victimized by lawyer misconduct); and "law practice peer review" (voluntary efforts by attorney or law firm to improve attorney performance). In addition to federal pilot projects, states like California, Maryland, Missouri and Oregon have begun to experiment with their own forms of peer review. Interest in, and proposals advocating assorted types of peer review, are growing. These represent helpful steps in the movement to improve lawyer competency.

Since the American Bar Association published its updated Code of Professional Responsibility twelve years ago, changes both in the legal profession and in the role of lawyers have suggested to some the need for yet another revision of the Code. In 1977 the ABA appointed a fourteen-member Commission on Evaluation of Professional Standards to undertake comprehensively to rethink the ethical premises and problems of the legal profession. Under the chairmanship of Robert J. Kutak of Omaha, Nebraska, in May of 1981, the Kutak Commission released two drafts of recommended Model Rules of Professional Conduct.

Alternatives to Litigation

Perhaps the greatest impact of the Pound Conference has been the widespread examination and implementation of tribunals and forums other than courts to resolve disputes. The American Bar Association's Special Committee on Resolution of Minor Disputes -

- which grew out of the 1976 Pound Conference -- has published a 1981 Directory of 141 dispute resolution centers. The Director of the Committee reports that there are now over 170 mediation centers in the United States. For the past eleven years, the Law Enforcement Assistance Administration has provided seed money to support a number of dispute resolution projects. It is heartening that one center, in Houston, recently exceeded the "cash-match" requirement of its federal grant through contributions and pledges from private corporations and foundations.

Recently, various state legislators have introduced measures pertaining to mediation centers. For example, Minnesota this year appropriated $100,000 to minor dispute resolution, while New York appropriated $1.9 million for similar purposes.

Various private organizations are helping create a National Institute for Dispute Resolution to serve as a clearinghouse for information on available mechanisms for identifying and utilizing litigation alternatives.

A variation in non-judicial dispute resolution is court-annexed arbitration, long used successfully in various states. This year the Federal Judicial Center published an evaluation of experiments in court-annexed, nonbinding arbitration of certain classes of civil cases in three federal District Courts. Results of the evaluation show that arbitration rules can expedite case dispositions by several months.

A 1981 Rand Institute for Civil Justice study of mandatory, court-annexed arbitration in thirteen select California counties,

in which all civil damage suits involving claims for $15,000 or less were heard by an attorney or judge-arbitrator, revealed that arbitration offered an expeditious settlement alternative for parties who volunteered for the program. Arbitration was found to eliminate certain court costs along with expert and other witness fees. Some reductions in attorney time required to present a case were also noticed. Though it is still too early to assess the overall merit of the California experiment, valuable lessons can be learned. The California experience, for example, demonstrates that the success of arbitration hinges greatly on the manner of implementation. Thus, improvements like increasing the minimum controversy amount levels or promptly assigning cases to arbitrators may enhance any given program's desirability and proficiency. More experimentation with disincentives could prove beneficial in cases where parties seek to protract the conflict by filing in court even after arbitration is completed.

The problem of the growth of litigation is merely a reflection of larger societal problems. As a nation, we ought to find ways of channeling, for more productive activities, the energy that goes into expanding contentious litigation. More energy is needed for finding new ways to increase the quality and production of goods and services that people need.

On another front, we should find ways of reducing criminality, not only to reduce criminal dockets, but more important, to reduce the damage done to human lives by illegal acts. In this regard, a recent study, using control groups,

proved encouraging. The study found that delinquency is cut significantly when law-related education courses are properly taught in schools. The vital features of these programs include student involvement in activities like case studies and mock trials, along with the active involvement of actual policemen, lawyers and judges, among others.

JUDGES, SUPPORT STAFF AND AUTOMATION

Quality of Judges

The Pound Conference Follow-Up Task Force Report emphasized the "importance of a program of continuing education for judges" and also urged that these programs be included in "any program concerned with judicial quality." I can report that some real gains have been made over the years. The Federal Judicial Center continues to provide many innovative educational programs for federal judges, and recently instituted "mini-orientation seminars." New judges are afforded the opportunity to view, under the guidance of an experienced federal judge, videotapes of earlier Center seminars. The new judges are thus alerted to potential mistakes or inefficiencies before they attend the Center's more advanced week-long orientation seminar in Washington.

The Center's 1981 five-day antitrust seminar, held in Ann Arbor, Michigan, illustrated the cost-effectiveness of continuing education that highlights the interplay of substance and procedure. A prime judicial goal is to guide each case to disposition as effectively as possible, by limiting discovery to the issues in dispute and perhaps even by helping the parties

avoid the trial altogether. The judge can increase expedition by early identification of the key legal issues on which the case will turn -- in antitrust, for example, early identification of the "relevant market" -- and, with that identification, take the case management steps best designed to sharpen and resolve them.

The American Bar Assocation-affiliated National Judicial College at the University of Nevada has now issued over 13,000 Certificates of Completion (1,299 in 1981 alone) to judges who attend the College's intensive one, two, three and four-week resident sessions. One of the College's many noted graduates is Associate Justice Sandra Day O'Connor.

The University of Virginia Masters Program in the Judicial Process, headed by Professor Daniel Meador, former Assistant Attorney General, has provided judges an opportunity for "sustained, in-depth study of subjects relevant to their work on the bench." Significantly, all twenty-eight members of the first class (representing twenty-one states) have completed the two six-week resident terms over two consecutive summers; they are now working on their degree theses.

For some time, federal courts have taken steps to assure litigants that any legitimate complaints about federal judges and magistrates will get a fair hearing. The Judiciary Councils Reform and Judicial Conduct and Disability Act of 1980 (P.L. 96-458), which took effect in October of this year, basically gave statutory form to procedures that the federal courts had previously adopted. The Act also expanded the membership of the Judicial Councils to include District Judges.

Judicial Compensation

Other considerations loom large regarding the quality of federal judges. Many of our judges come to the bench from private practice; and while selection as a federal judge is truly an honor, for the lawyer it often represents a difficult and sizable pay reduction. The economic penalty for joining the federal bench should not be so great as to constitute a barrier to accepting judicial office. Inflation and salary freezes have so eroded judges' purchasing power that to restore it to its 1969 level would require an increase of more than sixty-five percent of current salaries. As of October 1981, this would mean, for example, adjusting District Judges' salaries to $118,035 and Circuit Judges' salaries to $125,710 per year.

Judicial benefit programs also need attention. In February, Judge William Hughes Mulligan resigned from the United States Court of Appeals for the Second Circuit, citing insufficient survivors' benefits (for his wife) as the main reason for his resignation. The present compensation system prompted Judge Mulligan's quip, "I can live on it, but I can't die on it." We have to ask ourselves whether, in the long run, we can afford many repeats of what Chief Judge Wilfred Feinberg of that Circuit Court termed "a great loss for the Federal Judiciary."

A promising development in this area is the recent introduction of a bill presented in the House by Congressman Robert Kastenmeier (Wisconsin) and in the Senate by Senator Strom Thurmond (South Carolina). The bill is the Judicial Survivors' Annuities Reform Act of 1981. This proposed legislation would

improve the present survivors' benefits program, upon which federal judges and their families rely.

Supporting Staff

The Judicial Conference last year adopted a resolution providing for the selection of District Court Executives in pilot court programs. These District Court Executives will serve in the federal courts of the Southern District of New York, the Eastern District of Michigan (the first to appoint an Executive), the Southern District of Florida, the Northern District of Illinois, and the Central District of California. Though the Appropriation Committees of the Congress have approved funding for the pilot project, statutory authorization of these positions is still needed if the pilot project is to continue beyond its present experimental status. In this regard, the Director of the Administrative Office of the U.S. Courts has, with the Judicial Conference's approval, arranged to submit proposals to Congress to authorize these District Court Executive positions.

Automation

As the federal judiciary searches for less costly ways to serve the needs of justice, it continues to use modern, automated and computerized techniques that assist in case management. The Federal Judicial Center has this year continued its development of the Courtran program. This program allows participating federal courts to employ a variety of computer-based applications for case management and administrative support purposes. During the last fiscal year, six of the eleven Circuit Courts and sixty

of the ninety-five District Courts were experimenting in differing degrees with various Courtran applications. The program's applications have assisted participating courts in federal criminal case processing -- this with a watchful eye towards the requirements of the Speedy Trial Act. In 1981, Courtran provided automated case management assistance mainly to the larger federal courts most in need of automation. This assistance accounted for almost forty percent of federal criminal felony case filings. Another Courtran application, INDEX, is now being used in courts whose combined caseload accounts for almost sixty percent of the total federal criminal and civil caseload. INDEX replaces the old file card index systems and provides judges and their staffs with ready information on caseloads, information concerning parties, age of cases, and other indicators. Less dramatic, but of no less impact, are systems to support the Central Violations Bureaus, which handle such minor infractions as traffic offenses committed on federal lands. Other Courtran applications now use microfiche to ensure ready public access to court records.

This year the Supreme Court has switched to word processing units (available to each Justice), with the printing of opinions flowing directly from the initial typed version -- eliminating the "hot lead" linotype process. The new system speeds up the issuance of opinions.

JUDICIAL SYSTEM AS A WHOLE

Organization

After over a decade of continued efforts and proposals, I am glad to note that on October 1, 1981 what was the largest federal circuit, the old Fifth Circuit Court of Appeals, was divided into two new circuits pursuant to The Fifth Circuit Reorganization Act (P.L. 96-452).

The split provides for two smaller -- albeit still large -- circuits. The recently reorganized Fifth Circuit Court of Appeals, centered in New Orleans, covers Texas, Louisiana, Mississippi and the Panama Canal Zone. The newly created Eleventh Circuit, centered in Atlanta, covers Alabama, Florida and Georgia. The Fifth Circuit includes fourteen judges and five senior judges, while the Eleventh Circuit consists of fourteen judges and six judges with senior status.

While one important objective has been attained, another has still to be realized: the long-needed statutory division of the Ninth Circuit, whose filings continue to mount. In the last two statistical years, for example, Ninth Circuit Court of Appeals filings have increased by an incredible forty-two percent. For the twelve month period ending June 30, 1981, the assistance of ninety-nine judges from other courts was employed to enable the Ninth Circuit Court of Appeals to deal with the matters pending before it.

Under the direction of Chief Judge James B. Browning, and with the assistance of his fellow judges, the Ninth Circuit has made gains in accomodating the problems associated with caseload

increases. (For some time, that Court has been using a computerized system of calendar assignment developed by the Federal Judicial Center. The Center is also evaluating an "appeals without briefs" project that the Ninth Circuit undertook in cooperation with the Center. More recently, the Ninth Circuit began to implement a wide range of other innovations it had asked the Center to prepare.) Even with these and other improvements -- among them an administrative partition of the Circuit into three divisions -- that Court will be very hard put to meet the demands of its rising caseload. Congress has acted to correct the problems which plagued the "old" Fifth Circuit. I hope Congress will provide some form of statutory relief for the problems that presently confront the Ninth Circuit. It should be divided into three full-fledged circuits. It is unfeasible for any appellate court to operate with twenty-three full time circuit judges and eight senior judges. The administrative division of that Circuit is a temporary expedient.

Need for New Judges

The federal court backlog has tripled since 1960. The number of overall federal filings is approximately a quarter-million. This illustrates the need for careful targeting of needed judgeships and prompt congressional action to provide those judgeships.

The need for additional federal judgeships remains acute. House Judiciary Committee Chairman Peter Rodino's bill, authorizing an increase in judicial positions, enjoys widespread support from the American Bar Association, the Federal Bar

Association, and the Judicial Conference. The Rodino-sponsored proposal would create eleven new Circuit judgeships and twenty-three additional District Court judgeships. The plan would also provide for the appointment of six additional District Court judges, and three more Circuit judges who would not be replaced should they vacate their positions within five years of the bill's enactment.

Regardless of the particular form in which it may manifest itself, action must be taken to assure that there is always a sufficient number of able judges to meet the demands on the courts.

Jurisdiction

For ten years I have urged Congress to take swift action to end the present mandatory appellate jurisdiction of the Supreme Court. This year Representative Robert Kastenmeier and Senator Howell Heflin (Alabama) introduced companion bills designed to allow the Supreme Court greater discretion in selecting the cases to be reviewed. This proposal would, among other things, help eliminate attorney confusion over whether to file both an appeal and a certiorari petition to review the same order of a lower court. More important, this proposed legislation would enable the Supreme Court to devote more care and attention to truly significant cases. The American Bar Association, the Judicial Conference, the Justice Department and many noted legal scholars have endorsed this proposed legislation. Indeed, it has no opposition.

There is a growing concern about federal District Court jurisdiction by way of collateral review of state court convictions. In his 1981 Morrison Lecture to the California State Bar Association, Judge Carl McGowan of the U.S. Court of Appeals for the District of Columbia Circuit said:

> "A state prisoner who has unsuccessfully exhausted his avenues of state trial and appellate relief can, even many years later when retrial is not practically feasible, attack that conviction in the Federal District Court as violative of federal law, and procure his release if such a violation is established."

He went on to say that

> "Congress might well consider the abolition of collateral attack by state prisoners in the federal courts, at least in certain kinds of cases . . . . [Federal Courts] should not have to exercise a supervisory authority over the administration of state criminal laws unless that is plainly necessary in the interest of justice."

Judge McGowan has made an important point and I hope Congress will promptly consider limiting federal collateral review of state court convictions to claims of manifest miscarriages of justice. The administration of justice in this country is plagued and bogged down with lack of reasonable finality of judgements in criminal cases.

In the 1980 Year-End Report I noted: "There are signs that state and federal dockets are becoming more and more alike and that the federal system seems to be on its way to a de facto merger with the state court system. There are risks that this trend will undermine accepted principles of federalism."

This year legislative steps were taken to address this problem. On March 10, 1981 a bill to establish a Federal Jurisdiction Review and Revision Commission was introduced by Senator Strom Thurmond along with Senators Howell Heflin, Dennis DeConcini (Arizona), Alan Simpson (Wyoming), and John East (North Carolina). The bill was referred to the Senate Judiciary Subcommittee on the Separation of Powers on March 17, 1981.

The proposed Commission would study state and federal courts' jurisdictions and report any recommendations to the President and to Congress. The sixteen-member Commission, appointed by the heads of the three branches of government, would be required to submit a final report to the President and to Congress within two years of its first meeting. Operations would then cease ninety days after the Commission submitted its final report.

Rulemaking

The Judicial Conference's Standing Committee on Rules of Practice and Procedure, chaired by Chief District Judge Edward T. Gignoux (Maine), has begun its work on a formal statement describing rulemaking procedures. That statement will be considered at the March 1982 meeting of the Judicial Conference. These efforts will further enhance public understanding of the formation of the rules which govern the operations of our federal courts.

In light of the Supreme Court Justices' ever-mounting burdens, it remains uncertain whether the Justices should set aside the time and effort required to examine proposed rules

affecting the federal court system. I have suggested on earlier occasions that the rule-approving role of the Supreme Court -- whose members are much busier now than they were when the procedures were established over forty years ago -- merits examination.

The Federal Judicial Center this year published Federal Rulemaking: Problems and Possibilities. That study, though not intended to be a complete examination of the process, provides policy makers with, among other things, a cogent analysis of the salient arguments for and against reducing the level of Supreme Court involvement in the rulemaking process. The study takes a fresh look at many of the past problems encountered in this area and deals mainly with various objections to the procedures.

State Court Developments

State courts are estimated to handle over ninety-five percent of all the litigation that goes to trial in the United States. They are responsible for first resolving issues arising under their constitutions and statutes and then for passing on matters concerning federal law. It is not surprising that the public's perceptions of the quality of justice in the United States is largely determined by the quality of justice in the state courts.

Senator Howell Heflin's and Representative Robert Kastenmeier's 1981 legislative proposals for establishing a State Justice Institute would help to strengthen and improve state judicial systems. The State Justice Institute would be a private nonprofit corporation responsible for distributing federal funds

to state courts (and to appropriately related nonprofit organizations) that are fostering innovations in judicial administration. Creation of the Institute would enhance the states' ability to cooperate with the federal judiciary in fields of mutual concern; the Institute would provide for a better allocation of responsibility between the state and federal court systems.

Created in 1971, the National Center for State Courts -- which would receive funds from the Institute -- is one of the most important developments in the administration of justice in this century; it must not be allowed to "wither on the vine" for lack of funding.

In the 96th Congress, a similar bill unanimously passed the Senate as well as the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice. Unfortunately, there was not enough time for the House to act on the proposal. I look forward to the current proposals faring better in the 97th Congress.

Criminal Justice and Corrections

The Senate Committee on the Judiciary has recently passed along to the full Senate a massive revision of the Federal Criminal Code. That revision is receiving diligent consideration by a subcommittee of the House Committee on the Judiciary.

The most notable development in the field of corrections during the past year has been the surge in the size of our prison populations. In September, the Department of Justice's Bureau of Justice Statistics disclosed that during the first six months of

1981, the population of state and federal prisons increased by over 20,000 persons, adding more inmates in a half year than had been added during the entire preceding year. In ten years the total prison population has grown from just under 200,000 to approximately 350,000.

Prison overcrowding is a problem not merely because it denies prisoners their reasonable space needs, but because it often frustrates the aims of corrective confinement by denying prisoners basic safety. Indeed, a study published in December of 1980 by the National Institute of Justice concluded that among the adverse effects wrought by high levels of "sustained crowding" are "higher death and suicide rates" and "higher disciplinary infraction rates."

We must be glad that 1981 was a year free of uprisings like the February 1980 outbreak at the New Mexico State Prison in Santa Fe, where thirty-three men lost their lives. Nevertheless, 1981 was plagued by prison upheavals, the more notable being the May riots in Michigan and the late October seizure of hostages in Graterford, Pennsylvania. A June 1981 Los Angeles Times editorial was all too accurate in its assessment that "the country is warehousing human beings under conditions that guarantee explosions."

This year the National Institute of Corrections centralized its efforts at training state and local corrections personnel, with the establishment of the National Corrections Academy in Boulder, Colorado. As noted in the 1980 Year-End Report, "we must focus more attention on the conditions of incarcerated

persons." The creation of the National Corrections Academy is one step toward providing better trained guards and other personnel working with prisoners daily -- even hourly."

COOPERATION AMONG GOVERNMENTAL BRANCHES

Communication With Congress And The Executive

In matters concerning the administration of justice, healthy and open communication between the three branches of government is part of the best of American traditions. In March 1981, the Brookings Institution conducted the Fourth Annual Williamsburg Conference on the Administration of Justice. The Conference was attended by leaders from each of the three branches of government. The conferees discussed plans for the future of the judiciary, means of creating new judgeships and selecting and retaining judges, new processes for rulemaking, alternatives to litigation, and the impact of regulatory reform on the federal courts. An examination of the history and development of the Williamsburg Conference appeared recently in an article entitled "Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation," published in the Winter 1981 issue of the Washington and Lee Law Review. The wisdom of cooperation among the branches of government was recognized by James Madison in Federalist #48: "[The separation of powers doctrine] . . . does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other."

Since 1972 when I urged Congress to require judicial impact statements on all bills affecting the courts, the Legislative and

Executive branches have functioned in a more cooperative spirit with respect to legislation concerning the federal courts' workload. Though the idea has generated increased interest among members of the political branches of government, judicial impact statements are still an ad hoc matter left to the discretion of each committee. Although there are apparently significant technical and methodological problems in developing judicial impact statements, the subject should continue to command attention, in part because legislative sensitivity to the need is itself important. As Simon Rifkind pointed out to his Pound Conference colleagues: "Impact statements are indeed necessary -- both so that Legislatures can think twice about enacting laws which will have an impact on the courts disproportionate to their social utility, and so that judges can be appointed in anticipation of the increased caseload -- not years after the burden has become backbreaking."

New Legislation

This year, in the 97th Congress, Representative Robert Kastenmeier introduced a bill entitled the Intercircuit Tribunal of the United States Courts of Appeals Act. The bill is designed, among other things, to lighten the caseload of the Supreme Court and to provide an appellate tribunal for important cases which the Supreme Court simply cannot review given its present caseload. A Senate measure, the National Court of Appeals Act of 1981 introduced by Senator Heflin, seeks in a different way to achieve similar goals.

Beyond these measures, both houses have passed almost identical versions of the Court of Appeals for the Federal Circuit Act of 1981. One of the major provisions of that act would merge the U.S. Court of Customs and Patent Appeals into a new court, called the United States Court of Appeals for the Federal Circuit.

BICENTENNIAL OF THE CONSTITUTION

Appropriate recognition of the 1987 Bicentennial of the United States Constitution should be a matter of continuing concern to the Judiciary and the nation. Three bills to establish a national commission to plan and develop a program to commemorate the Bicentennial of the United States Constitution were introduced this Fall to the Senate by Senators Charles McC. Mathias, Jr. (Maryland), Jesse Helms (North Carolina), and Arlen Specter (Pennsylvania).

A committee of historians and political scientists known as "Project '87," under the sponsorship of the American Historical Association and the American Political Science Association, has planned for a ten-year celebration in three phases. Project '87 has completed its first phase of two years of scholarly reappraisal of the Constitution. This phase included fellowship awards and sponsorship of five scholarly conferences. Currently, the program's organizers are awaiting additional funding for phases two and three of the Project. The goal is to revitalize educator's interest in the U.S. Constitution and to stimulate public discussion of the federal constitutional system.

Also in progress is the Encyclopedia of the American Constitution. The Encyclopedia is scheduled to be published in four volumes, with an approximate total length of 1,500,000 words. There will be over 170 contributors, primarily from law, history, and political science. The Encyclopedia is funded by the National Endowment for the Humanities and by the Weingart Foundation.

CONCLUSION

It is difficult to gauge precisely the impact of Pound's 1906 address or the impact of the 1976 Conference convened to review the "unfinished business" of Pound's agenda. Nevertheless, a number of signs indicate that, taken together, these two events have rekindled professional concern for assuring that our system of justice can meet the new demands made upon it.

We cannot escape the reality, like it or not, that law, lawyers, and judges are playing an ever more substantial role in our society. Judges do not seek this enlarged role; the role is thrust on them. Newly compiled American Bar Association estimates indicate that as of the latest fiscal year, there are 567,934 active attorneys across the nation. This means that there is over one lawyer for every 399 people living in this country. This figure represents an eighty-three percent increase over the 1971 number of practicing attorneys, a phenomenal development -- possibly even a disturbing development.[1] (In

[1]These figures are based on the totals of state bar counts given to the ABA. The 1981 figure presented has been reduced by

Footnote continued on next page.

Japan, by comparison, the latest available figures indicate that there is one lawyer for every 9,122 people.)

Those of us whose duty it is to administer justice have to ask ourselves if we have sufficiently anticipated and made provision for the consequences which flow from these and other transformations in our legal justice system -- transformations which have occurred in so short a time span.

We must get on with preparing a future agenda, the agenda for the year 2000. Only then may we, in Pound's words, look forward to a future "when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."

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eight percent in order to account for duplicate bar membership. The 1971 figure was reduced by five percent. The attorney-population comparison was based on the 1980 census figures.

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