FEDERAL JUDICIAL BRANCH

OVERSIGHT HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

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ON

FEDERAL JUDICIAL BRANCH

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WITNESSES

FEDERAL JUDICIAL BRANCH

WEDNESDAY, MAY 6, 1981

HOUSE OF REPRESENTATIVES, SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE OF THE COMMITTEE ON THE JUDICIARY,

Washington, D.C.

The subcommittee met at 10:15 a.m. in room 2226 of the Rayburn House Office Building; Hon. Robert W. Kastenmeier (chairman of the subcommittee) presiding.

Present: Representatives Kastenmeier, Danielson, Railsback, Sawyer, and Butler.

Staff present: Michael J. Remington, counsel; Thomas E. Mooney, associate counsel; Audrey Marcus, clerk.

Mr. KASTENMEIER. The hearing will come to order.

This morning we will continue our oversight hearings of governmental entities, agencies, and corporations over which the subcommittee has jurisdiction. One of the most important elements of the subcommittee's jurisdiction is the Federal court system.

It has often been stated previously that this oversight is significant because it involves an entire independent branch of government. We have had a good working relationship with the Federal judiciary, under the stalwart leadership of Chief Justice Warren E. Burger, through his efforts, the judicial branch has identified and communicated many of its structural problems to the Congress.

In response, the subcommittee, with bipartisan support, has attempted to resolve some of these problems. We have succeeded in passing legislation that affects magistrates, judicial discipline, circuit council reform, and the fifth circuit division. We have also passed legislation affecting jurors, marshals, witnesses, and minor dispute resolution.

Even without the passage of legislation by Congress and subsequent Presidential signature, we have tried to maintain open channels of communication with representatives of the Federal judicial branch. We had also tried to devote time and consideration, to identifying problems in a fair, open and expeditious manner.

It is in that spirit really that I am pleased to call forward our panel of witnesses.

First, we will have an old friend and ofttime witness, the Honorable Elmo B. Hunter, Chairman of the Court Administration Committee of the Judicial Conference of the United States.

Judge Hunter, we're always pleased to see you.

And we'll hear from Mr. William E. Foley, Director of the Administrative Office of the United States Courts.

And he, of course, will be accompanied by James E. Macklin, Jr., Executive Assistant Director of Administrative Offices, and William Weller, Legislative Affairs Officer.

We're very pleased to greet you all, and good morning.

I know you have a long statement, Judge Hunter, which I commend to every member, because of its treatment of the development of the Federal judiciary, because of the singular information, knowledge, and history which it gives us, which enables us, I think, to address court problems in a much more informed way. This is a document that we will be able to use in the future.

However, you may or may not wish to read all of the material you have prepared for us. But in any event, I encourage you, if you do not, to at least touch on some of the matters which you have given, more fully, time in your prepared statement.

Judge Hunter, we're very pleased to greet you.

TESTIMONY OF HON. ELMO B. HUNTER, CHAIRMAN, COURT ADMINISTRATION COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES; HON. WILLIAM E. FOLEY, DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS; JAMES E. MACKLIN, JR., EXECUTIVE ASSISTANT DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS; AND WILLIAM J. WELLER, LEGISLATIVE AFFAIRS OFFICER, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Judge HUNTER. Thank you, Mr. Chairman.

As you have stated, I appear here today in response to your request to explain the role which the Judicial Conference of the United States performs on behalf of the third branch, and the extent to which the Administrative Office performs its responsibilities under direct supervision of the Conference.

This is an awesome request, requiring a person who is a blend of twentieth-century American historian, political science professor, and all-knowing jurist.

And obviously, Mr. Chairman, I possess none of those qualifications. Even so, your request is clear, and I welcome this opportunity to respond as well as I can.

If, at the end of my presentation, your questions take me into areas not sufficiently familiar to me, I will simply say so and request that you permit me to answer by immediate written response.

My purpose, as is the purpose of this highly needed and most welcome oversight hearing, is to give this subcommittee some helpful background to better enable it to understand the operation and problems of the Federal judiciary, which in turn will aid this subcommittee as it addresses specific matters in the ensuing term of this Congress.

Fortunately, and as you have mentioned, I have with me today, at your invitation, the Honorable William B. Foley, the Director of the Administrative Office of the U.S. Courts, and two of his very able assistants, Mr. James E. Macklin, Jr., Executive Assistant Director, and Mr. William J. Weller, Legislative Affairs Officer.

As a group and individually, these highly qualified witnesses are prepared to explain the performance of their office and to answer your questions on that subject.

Mr. Chairman, your time and the time of the subcommittee is precious, and I know that you invite no accolades for your accomplishments. Yet I simply cannot let this opportunity pass without again expressing to you, to your colleagues, and to your staff the

extremely high regard that the judges, the Judicial Conference, and particularly I have for you and your extraordinary insight into and knowledge of the judiciary and its modern day problems.

We and the public of America are indeed fortunate to have this subcommittee, and especially to have you as its chairman, as all of us endeavor to cooperate to bring to our citizens an ever-higher quality of justice, as timely and as inexpensively as reasonably possible.

We have admired your efforts and your work so much that it has constantly challenged us in the judiciary to do an ever-better job of fully cooperating with you and working with you for the common good.

I am sure that you know that you and this subcommittee will continue to have our full cooperation and our respect.

I have filed, Mr. Chairman, a rather lengthy prepared statement, and I hope that it will serve as an adequate written response to your request.

I ask permission for it to be received into the record and, because of time restraints, I will do as you have suggested and simply mention, in very summary form, some of its highlights.

Mr. Chairman, it is helpful to know from when we come in order to know where we should go. The history of our Federal courts parallels the history of the United States. Both were given birth when society was comparatively simple and our peoples were few in number.

In 1789, the entire court system consisted of a handful of judges, with a little work to do.

This was the situation addressed in the Judiciary Act of 1789. It divided the Nation into 13 districts, with a Federal court in each district.

The act also established three so-called circuits, with a court in each.

Every one of these 16 courts was a separate trial court of original jurisdiction. No provision was made for intermediate appellate courts or for centralized administrative support.

There was then no perceived need. Each court pretty well administered its own affairs in its own fashion, sufficiently satisfactorily for those times.

However, by 1891, there was a need for an intermediate appellate court system, and the Congress responded by enacting the Circuit Court of Appeals Act. Still, no need was perceived for centralized administration.

Twenty years later, the Judicial Code of 1911 abolished the circuit trial courts created in 1789 and established district courts as the basic trial units in the Federal judicial system. Thus the three-tiered system which exists today, was created by the Congress.

No provision was made for nationwide coordination or for centralized administration. However, many leaders in the Congress and elsewhere began to perceive a need that was not yet addressed.

In 1906, Roscoe Pound identified numerous causes of popular dissatisfaction with the Federal judicial system. The growing size and complexity of society was mirrored in the court structure. Foremost among problems were growing dockets and unreasonable delays.

Those knowledgeable perceived that the creation of more judgeships alone was not a sufficient remedy; better administration of the system was also required.

As a result of many ongoing studies, Congress, in 1922, created the Conference of Senior Circuit Judges, the forerunner of our present Judicial Conference of the United States. It consisted of the chief judges of the nine circuit courts of appeals with the Chief Justice as its chairman. It was to serve as the principal policymaking body of the U.S. courts, other than the Supreme Court, and was to be concerned with the administration of the courts, including the making of comprehensive annual surveys of the conditions of the courts, preparation of plans for the transfer and reassignment of judges to areas of greatest need, and of—and I quote—"such suggestions to the various courts as may seem in the interest of uniformity and expedition of business."

Great good was predicted as a result of the senior circuit judges of the different circuits getting together, exchanging ideas and experiences, and assessing needs—all to the end of improving the administration of justice.

Conference sessions lasted from 2 to 5 days, and the meetings were held in the Supreme Court building in Washington, D.C. The Conference membership increased to 11 in 1929, with the creation of the 10th circuit by splitting the old, too large 8th circuit. The 12th member was included by adding the chief judge of the U.S. Court of Appeals for the District of Columbia.

Conference minutes were prepared at the direction of the Chief Justice. A shorter account of the session was, from the earliest days, prepared by the Chief Justice for public distribution.

Title 28, United States Code, section 331 codifies that practice by requiring the Chief Justice to submit an annual report of the proceedings of the Conference to Congress. From the very beginning the Attorney General attended the Conference and delivered a report. This practice continues.

The Conference of Senior Circuit Judges took an enlightened view of its responsibilities. It took on the problem of securing more informative and reliable judicial statistics. It endeavored to stimulate the various court systems to improve methods of handling their various court calendars. It worked for better facilities for the courts and for needed appropriations. It called attention to needs for additional judges and supporting personnel. It undertook to provide information and insight and to propose legislation that would directly impact the court system.

In the early years it was customary to appoint committees on various subjects to conduct research, work with the bar, and advise the Conference.

Under the statute which created the Conference of Senior Judges, the power of the Conference was only to make suggestions to the courts in reference to their administration.

Through strong Chief Justices, namely Taft and Hughes, the senior circuit judges were encouraged to act vigorously to prevent delays and to improve internal court procedures. However, direct contact with the Chief Justice was necessarily limited.

To partially address the mounting problems, a somewhat spontaneous movement toward circuit judiciary conferences occurred.

These conferences were neither required nor directly sanctioned by law, but they were a response to the need for information-sharing and problem-solving meetings. The resultant suggestions and recommendations were forwarded to the Conference.

Historically, the Attorney General, rather than the courts' presented the courts needs to the Congress. Many perceived this to be a direct conflict-of-interest situation, as the Attorney General was the most frequent litigant in the Federal courts. The judiciary believed its needs could be more effectively met if they were presented to the Congress by the third branch itself.

The Attorney General recognized the problem, and in 1937 recommended that budgetary responsibility be transferred to the courts.

He also recommended—and I quote—"The courts should be an independent coordinate branch of government in every proper sense of the term. And accordingly, I recommend legislation that would provide for the creation and maintenance of such an administrative system."

In August 1939, legislation creating the Administrative Office of the U.S. Courts was enacted. I'll leave to Mr. Foley, Mr. Macklin, and Mr. Weller the task of explaining the present functions and operations of that office. I simply note that it was created, not as a policy-formulating body, but to serve the Conference by implementing and executing Conference decisions, policies, and orders. It was designed to provide staff.

The 1939 enactment also required a convening of a circuit council in each circuit twice a year. The circuit council was to be composed of all the active appellate judges of the circuit meeting en banc. The act further required that a report of the Director be submitted to the circuit councils, that the circuit councils take necessary action on the report, and that the district judges carry out the recommendations of the circuit council.

Thus by 1939—just 17 years after the creation of the Council of Senior Circuit Judges, there was in place and operating our current administrative establishment—namely, a Judicial Conference, circuit councils, circuit conferences, and the Administrative Office.

In 1948, the council changed the name of the Conference to the Judicial Conference of the United States and explicitly recognized and authorized its role in recommending legislation relating to areas affecting judicial administration.

In 1956, membership was expanded to include the chief judge of the Court of Claims; and in 1957, to include a district judge from each circuit, selected for a 3-year term by the district judges of the circuit. In 1961, the chief judge of the Court of Customs and Patent Appeals was added.

So, today, Mr. Chairman, the Conference consists of 25 members, the Chief Judges of the 11 circuits, an equal number of District Court judges, the chief judges of the Court of Claims and the Court of Customs and Patent Appeals, and the Chief Justice as presiding officer.

When the fifth circuit splits on October 1, 1981, two new members will be added. On April 1, 1984, under the provisions of the Bankruptcy Reform Act of 1978, two bankruptcy judges will be added.

The increase in the size of the Conference over the years—and the increase in the complexity of the matters arising in the Conference—have resulted in more committees of the Conference being established—much as has the Congress and our Government generally become larger and more complex—in response to an ever-growing and advancing nation.

In an appendix which is attached to my filed statement, there appears a full profile of the standing committees and the ad hoc committees of the present-day Conference. Just to note their names is to describe the subject matter they research and upon which they formulate recommendations for the Judicial Conference. Likewise, these names give a good indication of the basic subjects on the agenda of a typical Judicial Conference meeting.

I ask you to note that there are eight standing or general committees, seven special committees, and a Committee on the Rules of Practice and Procedure. At least 225 district and appellate judges, active and senior, serve on these committees. Eminent law professors and lawyers serve on some of the more specialized panels. In their research and studies, they account to judges with expertise in their subjects, and consult with learned professors and other experts on an as-needed basis.

The Judicial Conference meets for approximately 2 days twice a year, usually in March and September. A majority of its committees also meet twice a year, usually for 2 days. They must meet sufficiently in advance of the Judicial Conference meeting to allow their reports to be written and delivered to the Judicial Conference about 3 weeks in advance of the Conference meeting. If a particular committee of the Judicial Conference has subcommittees—as does the Court Administration Committee, which I chair—those subcommittees meet approximately 3 weeks in advance of the parent committee, to allow time for their reports to be written and sent to the members of the parent committee.

Mr. Chairman, there is a need for informality and elasticity to be built into the process if it is to work as intended. From my personal experiences I am confident that the present Judicial Conference system, with its committees and subcommittees, works very satisfactorily. It is a time-tested system and has the confidence of the judges and also of the Congress, I trust.

In the past 20 years, the Conference's agendas have necessarily become more complex. But for the necessary and very substantial administrative support it receives from the Administrative Office, it could not carry on its present vital work.

In summary, Mr. Chairman, history reveals the change in our country from a relatively simple nation with a small government to one that necessarily has become more and more complex and sophisticated. The courts in their administration have the same history. Fortunately, with the help of an understanding Congress, the courts and their judges have generally been given the tools and the opportunity to keep on top of problems as they arose—and the authority to evolve adminstrative procedures designed to provide an ever-higher quality of justice, as timely and as inexpensively as reasonably possible.

We are grateful to you and to your colleagues for your work, and for your dedication to this mutual objective. We pledge you our

continuing cooperation and assistance. This is how we demonstrate to ourselves and to a watching world that democracy works well and for the benefit of its people in providing a justice system that has no true parallel and is not excelled anywhere else in the world.

[The complete statement of Judge Hunter follows:]

PREPARED STATEMENT OF HON. ELMO B. HUNTER

INTRODUCTION

Mr. Chairman, I appear today in response to your request for an explanation of "the role which the Judicial Conference of the United States performs on behalf of the third branch and the extent to which the Administrative Office performs its responsibilities under direct supervision of the Conference." In your letter inviting me to testify you asked that I "explain to the subcommittee the Conference's duties and responsibilities and the extent to which the Conference's work is actually performed by staff in the Administrative Office."

While I have appeared before this panel on a number of occasions, I have never before felt quite as inadequate to the task as I feel today. The task assigned me deserves not a trial judge from Missouri—but rather a blend of American historian, political science professor with a specialization in twentieth-century American government, and jurist pre-eminient in the field of jurisprudence.

Mr. Chairman, I am not *any* of those—much less the required blend. Having clearly advised you of my reservations concerning this testimony, I will now proceed to do the best I can.

I believe the role of the Judicial Conference within the third branch and that organization's relationship with the Administrative Office are best explained and most easily understood in an historical context. Justice Holmes commented in a tax case [1] that: "Upon this point a page of history is worth a volume of logic." The role and relationship which I seek to explain today are certainly as historically influenced as are many tax decisions. Perhaps in this case a few pages of history will be of value. A great deal of the information which follows has been drawn from published research of the late Henry P. Chandler,[2] who served as the first Director of the Administrative Office for a period of seventeen years, from an extensive report to the Senate Appropriations Committee prepared in 1959 by staff member Paul J. Cotter,[3] and from a 1977 "Statement" by former Director of the Administrative Office, Rowland F. Kirks, prepared for this subcommittee.[4]

A BRIEF HISTORY OF THE U.S. COURTS, 1789–1921

For the first 132 years of the nation's existence the overall administrative structure of the federal courts was a matter of little real concern to Congress—or to judges who were serving a specific court; each court realistically administered its own affairs in its own fashion. Since World War I, however, changes in administration of the federal courts have been relatively dynamic, and directly related to the rapid growth of the federal judicial system and its workload.

When the Founding Fathers established the judicial branch they used rather broad concepts in the Constitution. With the Judiciary Act of 1789,[5] however, elements of detail began to appear. The nation was divided into thirteen "districts" with a court in each, and into three "circuits" with a court in each. Every one of the sixteen courts was a separate trial court of original jurisdiction; no provisions were made for either intermediate courts or for centralized administrative support. Given the size of the third branch, and the existing volume of business before it in 1789, Congress logically would not have then perceived a need for either. That simple decentralized structure set a pattern which remained unchanged for a century, and the tradition of decentralization still remains a strong influence today. Numbers of "districts" and "circuits" increased as the nation grew, yet intermediate courts of

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[1] *New York Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921).

[2] Chandler, H. P., "Some Major Advances in the Federal Judicial System, 1922–47," 31 F.R.D. 307 (1963). See also Chandler, H. P., "The Administration of the Federal Courts," —— Law & Contemp. Prob. 182 (1948).

[3] Cotter, P. J., Staff of Senate Comm. on Appropriations, 86th Cong., 1st Sess., Field Study of the Operations of United States Courts (Comm. Print 1959).

[4] Hearings on General Oversight on Justice Related Agencies Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st Sess. (1979).

[5] Act of Sept. 24, 1789, 1 Stat. 73.

appeals as we now known them and centralized administrative support for the individual courts were never considered.

In 1891—for the first time—Congress recognized and responded to the developing need for an intermediate appellate court system by enacting the Circuit Court of Appeals Act.[6] Even then, however, no action was taken to fashion instruments for centralizated administration. Twenty years later, when the Judicial Code of 1911[7] abolished the "circuit trial courts" first created in 1789, and established district courts as the basic trial units in the federal judicial system, the "three-tiered" structure which exists today was created. Yet again no provisions were made for nationwide coordination or centralized administration. The need for some degree of coordination had only recently been acknowledged. From that growing awareness in the first decade of this century grew the institutions which are the subject of this oversight hearing.

PRELIMINARY DEVELOPMENT OF A FEDERAL JUDICIAL ADMINISTRATIVE SYSTEM, 1906–39

Creation of the Judicial Conference

In 1906 Roscoe Pound identified certain "causes of popular dissatisfaction" with the federal judicial system. As the nation had grown, increasing numbers of judgeships had been authorized, and the federal court structure had been modified in ways which were perceived to have contributed to a more complex structure. Additional factors—an earlier "regulatory reform movement" and the development of new fields of law in commercial and industrial relations—were creating new kinds of work for federal courts. The most obvious problem arising from the growth and increasing complexity in both work and structure was delay—and for the first time a theme was heard—one which we have heard repeatedly in the past decade: "The creation of more judgeships alone is not a remedy." Roscoe Pound recommended a spectrum of administrative changes in management of the federal courts, and his most controversial suggestion was a procedure to allow greater mobility in the use of judges—a procedure flexible enough to permit the assignment of judges to locations in which the nature and volume of court business required their presence at a given moment in time.

A year later the American Bar Association created a special commission to study possible means to prevent delays in litigation and then-perceived "unnecessary costs" of litigation. That commission recommended a series of "administrative reforms."[8] Next, in 1913, the American Judicature Society was formed to study and promote modernization of the judicial system. Ex-President Taft was instrumental in the Society's formulation and a forceful advocate of administrative reform. His efforts immediately following termination of World War I were intensive and aggressive. Mr. Chandler's history capsulizes the cause for concern in the following brief summary:

"Statistical tables in the annual reports of the Attorney General show that beginning about 1918 there had been a marked increase in the number of cases coming to the United States District Courts. The number filed of civil cases to which the United States was a party more than trebled between 1918 and 1921, rising from 2,877 to 9,722; the number of criminal prosecutions increased between 1917 and 1918 from 19,628 to 35,096, and went on to 54,487 in 1921; the number of suits filed to which the United States was not a party rose from 13,879 in 1918 to 22,453 in 1921."[9]

In 1921 Attorney General Daugherty appointed a committee of judges and U.S. Attorneys to identify problems and recommend remedies, and Congress convened hearings in 1921 and 1922. Ex-President Taft, by then Chief Justice Taft, personally testified in favor of administrative innovations, placing his prestige squarely behind proposals to provide the federal judiciary with a centralized policy-making, administrative and management entity. The result, in 1922, was Congressional creation of something labeled the "Conference of Senior Circuit Judges"—the foundation upon which the Judicial Conference of the United States as we now know it was to be built.[10]

A brief review of the Congressional action in 1922 may be of value to this hearing—because, just as we can see with hindsight now how little change actually occurred in federal court administration between 1789 and 1922, there were ideals and objections enunciated in Congress in 1922 which are today still enunciated. The

[6] Act of March 3, 1891, 26 Stat. 826.
[7] Act of March 3, 1911, 36 Stat. 1087.
[8] See 29 ABA Report, at 395–417.
[9] Chandler, supra, note 2, 31 F.R.D. 307, at 319.
[10] Act of Sept. 14, 1922, 42 Stat. 837, as amended 28 U.S.C. § 331 (1976).

principal sponsor of reform legislation in the Senate, Senator Albert B. Cummings of Iowa, opened debate on the proposed reform legislation in 1922 with the following words:

"When we contemplate a situation in which thousands and thousands of persons accused of crime must lie in jail for a year or two years, if they are unable to discharge themselves by giving bond, awaiting trial, and when we reflect upon the fact that in many parts of the United States it is utterly impossible to secure the trial of a civil suit within a year or two years, where both attorneys and parties are ready to proceed with the trial, it is to me a source of great humiliation."[11]

In addition to proposing twenty-five new judgeships to deal with the immediate crisis, the 1922 bill sought to remedy that "great humiliation" in a much more fundamental, if not radical, way. It called for the Chief Justice to annually preside over a "conference" of the most senior judges of the circuits. This panel would serve as the principal policy-making body concerned with the administration of the United States courts, make a comprehensive annual survey of the condition of business in the courts, prepare plans for the transfer and reassignment of judges to areas of greatest need, and "submit such suggestions to the various courts as may seem in the interest of uniformity and expedition of business." The bill required the Attorney General to report to the conference on matters related to the business of the courts when requested to do so by the Chief Justice. It also provided that the senior district judge of each district court submit to the circuit's delegate to the conference a report setting forth the conditions in the district and recommendations for additional judicial assistance. The courts, through the creation of the conference, would acquire a policy-making body, with fact-finding capacity, and the authority to recommend to the Congress legislative proposals for change. In short, the bill was deliberately designed to provide a "corporate board of directors" for the federal judiciary.

The 1922 proposal was not, however, without its vocal critics. Influential Senator Thomas J. Walsh of Montana objected to the very idea of the Conference saying, "It means absolutely nothing on earth except a junket and a dinner." Senator Shields of Tennessee suggested that broadening the power to assign judges might be used in some way by influential figures to manipulate results in particular cases and noted that the lobbyist for the Anti-Saloon League was actively supporting the measure. Other commentators expressed the view that each judge should remain as unfettered as possible, seeing any "regulation" as an encroachment on the jealously-guarded independence of the federal bench.

One of the act's proponents, however, Senator Spencer of Missouri, provided a clear and apparently reassuring answer regarding the purpose of the Conference:

"The judicial business of the United States is largely administrative. There is a business side to it as well as the law side. There are practices in the different circuits which are commendable. There are some that could be improved. Both are remedied by [the] conference. It seems to me there is very great advantage when the circuit judges of the different circuits of the States get together once a year to discuss the method of transacting business, the state of their dockets, the things that have proved advantageous, the things that have proved disadvantageous. The resultant of it all is a distinct benefit to the administration of justice and that is precisely what the conference provides for."[12]

The first 17 years

Conference sessions lasted from two to five days and were held in Washington, at the Supreme Court Building. The number of Conference members initially was ten, the senior circuit judges of the nine circuits and the Chief Justice. The 1922 statute did not explicitly make the Chief Justice a voting member of the Conference; it made him its "presiding officer." Chief Justice Taft, however, immediately established the precedent of voting membership and it has remained unquestioned since. The membership was expanded to eleven by the creation of the tenth circuit in 1929 and to twelve by the addition of the chief judge of the District of Columbia Circuit Court of Appeals in 1937. Conference minutes were prepared at the direction of the Chief Justice. A shorter account of the sessions was, from the earliest days, prepared by the Chief Justice for public distribution. This early practice is continued today in accordance with 28 U.S.C. § 331, as amended, which now requires that the Chief Justice submit an annual report of the proceedings of the Conference to Congress. From the very beginning the Attorney General attended the Conference and delivered a report.

Mr. Chandler succinctly summarized the scope of early Conference proceedings:

[11] Chandler, supra, note 2, 31 F.R.D. 307, at 319.
[12] Id., at 328.

"The Conference rightly took a broad view of its responsibilities. It gave earnest and persevering consideration to the problem of securing more informative judicial statistics. It tried to stimulate the courts to improve the methods of handling their calendars. It worked for better facilities for the courts and the requisite appropriations. It undertook to represent the courts in respect to legislation which would affect them".[13]

He also described early processes and procedures for the conduct of business: "The number of members of the Conference, only one more at first than the membership of the Supreme Court, was not so large but that sitting around a table in committee of the whole, they could discuss intensively many items of their business. Nevertheless, at the first meeting, in order to focus their thought, Chief Justice Taft appointed five committees which reported the following year. It was thereafter in the early years, the customary but not invariable practice to appoint committees on particular subjects rather than standing committees. These generally reported in writing at the next meeting, putting in precise and appropriate form for adoption by the Conference, the consensus of opinion on matters which had come before it."[14]

The effects on court efficiency of the early Conference actions are difficult to assess meaningfully. One of the primary motives for the establishment of the Conference was, of course, the creation of a mechanism for the reassignment of judges from courts with available "judge time" to courts with an oppressive backlog. Even this area is difficult to assess. Records show that certain significant benefits were immediately realized. For example, in 1926 the district court for the Southern District of New York received 378 days of service from 12 or more district judges from other circuits. Yet the assignment of judges proved to be no panacea. Few courts could spare judges for more than a few days, and attorneys were reluctant in many instances to try a case before a judge unknown to them. Mindful of the potential for criticism inherent in reassignment on anything other than a random basis, Chief Justices Taft and Hughes were very careful to avoid abuses of the power of transfer. Certainly judges did not move about freely in the system. In the final analysis, the reassignment of judges turned out to be, in the words of Mr. Chandler, "* * * only an alleviating factor in congested districts, and not a very large one at that. * * *"

While considerable improvement in the condition of court dockets was realized between 1922 and 1929—Assistant Attorney General William J. Donovan reported to the 1926 Conference that there had been a "general improvement in dockets due to increased efficiency of organization and of district judges"—how much credit for that development can be attributed directly to the work of the Conference is not assessible; twenty-five new judgships had been created by the same legislation which created the Conference.

Nevertheless, Conference efforts to improve efficiency during this period can be identified. One of these was a move to bring about periodic "docket calls" in district courts to eliminate what a Conference resolution termed "dead and moribund cases." Guidelines were established for granting continuances, for examining prospective jurors with respect to their fitness, and for convening court for the hearing of motions and settlement of issues. Perhaps more important than any one of these initiatives by the Conference, however, was the explicit recognition of the duty of the courts to seek the expeditious resolution of cases rather than simply leaving their disposition to chance or to the wishes of counsel.

Also important—as much for its symbolism as for any particular result—was the recognition by the Conference of its admonitory function. As Director Chandler pointed out:

"Although under the statute the power of the Judicial Conference was only to make 'suggestions' to the courts in reference to their administration, it exercised its influence strongly under both Chief Justices Taft and Hughes to correct as far as it could, not only inefficient practices in general but neglect of duty in particular instances. This it did through advice to its members and assurances from the chief justices of readiness to give them moral support if needed.[15]

The Conference and Chief Justices Taft and Hughes encourage senior circuit judges to act vigorously to prevent delays in their district courts. The Conference also recognized, however, that the principal factor determining the efficiency of any court is the innate capability of its judges and that the Conference's power to influence change was therefore realistically limited. Direct contact from the Chief

[13] Id., at 332.
[14] Id., at 333.
[15] Id., at 348.

Justice was used in only the most extreme cases of obdurate neglect, especially since lesser efforts usually proved effective.

Important as an influence on efficiency and policy formulation during the early years was the rather spontaneous movement toward judicial conferences within the circuits. These conferences—neither required nor directly sanctioned by law at the time—arose in response to the need for information-sharing and problem-solving meetings—particularly between the district courts and their circuits—but also between bench and bar. The federal bar was officially represented at many of these early conferences as the practice of holding annual sessions grew commonplace. These "circuit conferences" improved communications and produced suggestions for further improvements which were forwarded to the Conference.

As we have learned only too well in the last two decades, as much as the efficiency of a court depends on the dedication and abilities of its judges, it also depends on the range and complexity of the laws which the courts must review. From its inception the Conference made recommendations for legislative change. Much of the business taken up at meetings of the Conference concerned the status of judicial work. Statistical reports were received from the Attorney General and from the individual circuits through their member judges. The superficiality and unreliability of the available data was a chronic problem for early Conferences, regardless of the medium through which the information was furnished. Chief Justice Hughes, for example, was candidly critical of the workload data—whether transmitted by the Attorney General or by Conference members. Although substantial improvements were made over the decade of the Thirties in both in reporting of information and its preparation and assembly, the statistical data base available to the Conference remained a source of concern throughout that period.

Yet another area of Conference attention was what Mr. Chandler characterized as the "business needs" of the courts, such matters as quarters, supporting personnel, facilities and equipment. One of the first action of the first Conference session in 1922 was to point out the need for supporting personnel, quarters and equipment for the judges who would soon be added as a result of the same 1922 legislation which created the Conference. The 1924 Conference focused Congressional attention on the inadequacy of certain court law libraries. As a result, $165,000 was appropriated the following year. The Conference and the Attorney General cooperated in developing a plan for the expenditure of these funds. The 1926 Conference report noted with satisfaction that:

"The result is that for the first time in many years the district judges find that they are fairly well supplied with their necessary tools, and the circuit courts of appeals have reasonably satisfactory libraries, or will have with the aid of further special items of legislation now in force. We have no doubt that the efficiency of the courts has been substantially increased by the aid which this Congressional appropriation has given."[16]

In later years the Conference brought up such matters as the need for qualified legal secretaries, for funds for the incidental expenses of travel, the need for a greater number of law clerks, and for funds to more adequately staff the clerks' offices. All these matters received Congressional attention as a result of Conference efforts.

CREATION OF THE ADMINISTRATIVE OFFICE AND EARLY DEVELOPMENT, 1939–60

While advances were made in such matters, a feeling persisted that the business needs of the judiciary would be more effectively met if presented to Congress by the third branch itself—rather than filtered through the Department of Justice. The Thirties were lean and difficult years. Undoubtedly part of the dissatisfaction felt by judges was a result of the times rather than a consequence of the system of administration. Nonetheless, a disaffected feeling persisted, exacerbated by the fact that appropriated funds were provided jointly to the courts and the Department of Justice, raising a suspicion that the Department took care of its own needs and then gave the courts what was left. These concerns were discussed at Conference meetings. Despite repeated assurances from the Attorneys General and their aids, and evidence of a sincere effort to do equity with the limited funds available, dissatisfaction continued.

A distinct concern, but one which merged with the "business needs" problem in terms of the proposed solution, was the simple reality that the budget and expenditures of the courts remained under the jurisdiction and control of the executive branch. Though at that time fully seventy percent of the cases before the courts were government cases, the government's chief litigator and prosecutor directly

[16] Id., at 361.

controlled recommendations to the Bureau of the Budget concerning the salaries of judges, the number and salary levels of clerks and secretaries of judges, the accommodations and equipment in United States coaurthouses, and even the money available to judges to travel on official business. Judges who were not inclined to be critical of the past practices of the Attorneys General were, along with others, increasingly aware of potential for mischief in this procedure. Several Attorneys General had themselvels pointed to this practice as both potentially threatening to the independence of the courts and a burden to the Department of Justice. In his annual report for fiscal year 1937, the Attorney General unequivocally indicated that he felt budgetary responsiblity for the third branch be located elsewhere:

"I believe, too, that there is something inherently illogical in the present system of having budget and expenditures of the courts and the individual judges under the jurisdiction of the Department of Justice. The courts should be an independent, coordinate branch of the Government in every proper sense of the term. Accordingly, I recommend legislation that would provide for the creation and maintenance of such an administrative system under the control and direction of the Supreme Court."[17]

His recommendation was incorporated in the ill-fated comprehensive court reform proposal of the Roosevelt Administration which generated so much controversy in 1937 over the feature which would have expanded the size of the Supreme Court. Though the 1937 bill died, its proposal for an administrative agency was received with considerable favorable comment. Two years later, in August of 1939, legislation creating the Administrative Office of the United States Courts was enacted.[18]

ROLE OF THE ADMINISTRATIVE OFFICE

While I leave to Mr. Foley and Mr. Macklin the task of explaining the present *functions* performed by the Administrative Office—a significant number of which have been mandated by Congress in the past two decades—I will try to respond to your request that I explain "the extent to which the Administrative Office performs its responsibilities under direct superivision of the conference" and assists the conference in its work. Let me again reference a few historical factors. They have had a lasting impact and contribute to an understanding of the present-day relationships between the Conference and the Administrative Office.

The Administrative Office was clearly createed to serve the Conference as a performance unit, implementing and executing Conference orders and policies; it was not intended to play a policy-formulation role of its own. The 1939 legislation, in creating the position of Director of the Administrative Office, envisioned an *administrative* officer for the entire judicial system below the level of the Supreme Court, and the statute described the role of the Administrative Office largely be describing the duties of its Director. Appointment of the Director, and Deputy Director by the Supreme Court, will full recognition that they were to act under the supervision and direction of the Conference, was an unusual feature. Concern was apparently expressed when the 1939 statute was drafted that allowing the Conference—which was not itself a court—to appoint a Director might not comply with the Article II Constitutional requirement that judicially initiated appointments be made by "the courts of law." Providing that the Director be appointed by the Supreme Court overcame that potential problem. Each Chief Justice, as head of the Supreme Court and as Presiding Officer of the Judicial Conference, has consistently and effectively acted as the bridge between the appointing body and the supervisory body. All employees of the office below the Deputy Director were to be appointed by the Director.

The House committee which developed the bill summarized its findings in the committee report which accompanied the bill, and that statement still presents the clearest evidence of the intentions of those legislators who approved creation of the office. The committee report stated in part:

"The primary object of the bill is to promote the administration of justice in the U.S. courts. Its accomplishment is sought principally by the establishment of an administrative office, with a director in charge, having the duty of examining the dockets of various inferior Federal courts and preparing statistical data and reports of the business transacted by those courts, acting as a clearinghouse through which information gathered with reference to improving the efficiency of the courts and expediting the disposition of cases may be disseminated, preparing and submitting budget estimates of appropriations necesary for the maintenance and operation of the said courts and the Administrative Office, disbursing, as now provided by law, the moneys so appropriated for the maintenance and operation of the courts, purchasing and distributing equipment and supplies, examining and auditing vouchers and accounts of the officials and employees of the courts, and performing such other functions as may be assigned by the Supreme Court and the Conference of Senior Circuit Judges, under whose supervision the Director and his assistant are to work.

"The design of the legislation is to furnish to the Federal courts the administrative machinery for self-improvement, through which those courts will be able to scrutinize their own work and develop efficiency and promptness in their administration of justice. To that end, the Director is required to prepare and submit quarterly, to the senior circuit judge of each circuit, statistical data and reports of the business transacted by the district court therein, and a semiannual council of the circuit judges in each circuit is provided for the purpose of studying such reports and expediting the work of the district courts, as well asthe circuit courts of appeals. The district judges are required to carry out the directions of the council as to the administration of the business in their respective courts. In addition to the council, the bill provides for an annual conference of the circuit and district judges in each judicial circuit, with participation by members of the bar for the purpose of considering the state of the business of the court and advising way and means of improving the administration of justice within each circuit.

* * * * * * *

One further significant fact should be mentioned. Congress has created the inferior Federal courts and has the right to expect that that they will function efficiently and expeditiously, but Congress thus far has failed to provide adequate administrative machinery whereby the best results may be obtained from the Federal judicial system. This bill is intended to supply that need. Experience has shown that the absence of administrative control which causes a delay of justice has amounted in many instances to its denial, and has occassioned bitter resentment among litigants. There are those who fear to litigate just causes in the Federal courts because of delays and resulting expense. On the other hand, prompt trial of cases would result in the elimination of causes brought only for the purpose of delay and harassment, because those cases are void of accomplishment when prompt trials are had.

The bill places the responsibility for judicial administration where it belongs—with the judiciary—and it will be an urge to the elimination of the evil of judicial delays that the citizens of the country know that the courts have in their power the prompt and adequate dispostion of pending cases.[19]

The momentousness of the undertaking was well recognized. One of the enactment's supporters, noted as the bill was debated on the House floor:

The American people will pay gladly for the benefits made possible by this measure. There are many well-informed judges, lawyers, and laymen who believe that this bill, if enacted, will represent a landmark in the development of American jurisprudence. Personally, I share that belief. The American Judicature Society, in endorsing the bill, stated: 'We have no hesitation in declaring this measure to be the most important one ever drafted for the enforcement of either State of Federal judicature."[20]

The "Administrative Office Act" achieved far more than creation of the office, it really provided the first comprehensive administrative capability within the judiciary. Not only was the Administrative Office created, but—perhaps just as significant—the act also produced a more formal and comprehensive apparatus for policy-making within the third branch by the judges themselves. The 1939 enactment required—for the first time—that each "senior"—or what we now call "chief"—circuit judge convene a circuit council meeting twice a year, that a report of the Director of the Administrative Office be submitted to that circuit council, that the council take necessary action on the report, and that district judges promptly carry out the recommendations of the council. Thus, by 1939, just seventeen years after creation of the "conference of senior circuit judges," the administrative apparatus which we now have—a Judicial Conference, circuit councils, and the Administrative Office—had emerged, and the relationships between and among its components had been roughly outlined.

LATER DEVELOPMENTS AND CURRENT RELATIONSHIPS

When title 28 was recodified in 1948 Congress changed the name of the Conference of Senior Circuit Judges to the Judicial Conference of the United States and explicitly recognized and authorized its role in recommending legislation relating to areas affecting judicial administration. Membership in the Conference was expanded in 1956 to include the chief judge of the Court of Claims. In 1957, membership

[17] Id., at 375.
[18] Act of Aug. 7, 1939, 53 Stat. 1223, as amended 28 U.S.C. § 631 et. seq. (1976).
[19] H. Rep. No. 702, 76th Cong., 1st Sess. (1939).
[20] See 84 Cong. Rec. 9308–10 (1939).

was again expanded to include a district judge from each circuit, selected by the district judges of this circuit at the annual "judicial conference of the circuit." The chief judge of the Court of Customs and Patent Appeals was added in 1961.

Today the Conference consists of twenty-five members; The Chief Justice as presiding officer, the chief judges of the eleven courts of appeals of the judicial circuits, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and eleven district court judges, each of whom is chosen by his district court colleagues within each judicial circuit to serve a three-year term. When the Fifth Circuit "splits", on October 1 of this year, an additional circuit and an additional district seat will be added for the new Eleventh Circuit. Under the provisions of the Bankruptcy Reform Act of 1978 two new seats for bankruptcy judges will come into existence on April 1, 1984.

That incremental increase in membership, combined with a proliferation of business requiring Conference attention, long ago transformed the "single issue" committee arrangement instituted by Chief Justice Taft into a formal "standing committee" structure not unlike that used by both the House and the Senate, which is suplemented by "ad hoc" committees for particular projects. Both the present membership of the Conference and the present committee structure are presented in Appendix A to this statement.

In summary that structure consists of eight "standing" or "general" committees, seven special committees, and the Committee on the Rules of Practice and Procedure. The jurisdictional responsibilities of the standing and special committees are clear from their names:

General Committees.—Committee on Court Administration, Committee on the Administration of the Criminal Law, Committee on the Operation of the Jury System, Committee on the Administration of the Bankruptcy System, Committee on the Administration of the Probation System, Committee on the Budget, Committee on Intercircuit Assignments, and Committee on the Administration of the Federal Magistrates System.

Special Committees.—Committee to Implement the Criminal Justice Act, Judicial Ethics Committee (Statutory), Implementation Committee on Admission of Attorneys to Federal Practice, Committee on Pacific Territories, Bicentennial Committee, Advisory Committee on the Codes of Conduct, and Committee on the Judicial Branch.

In examining Appendix A, one feature worth noting is the fact that only the Court Administration Committee and the "Rules Committee" have individual sub units. In each case that arrangement is a necessary consequence of their respective ranges of responsibility. I should also specifically note the existence of the Executive Committee; it exists for one purpose which has become increasingly more important in recent years—it acts for the Conference when the Conference is not in session and expeditious action is required.

The proliferation of business long ago resulted in the Conference meeting at least biannually—usually in March and September of each calendar year—and occasionally scheduling "special sessions." Another consequence of growing work and the need for more expeditious Conference action on specific matters—usually matters of urgent concern to Congress—has been increasing reliance upon the Conference's Executive Committee's authority to act on behalf of the Conference when it is not in session.

In the past two decades Conference Proceedings agenda have become increasingly more complex. In order to cope with the increasing amount of work, semi-formalized procedures have become essential. Each Conference committee regularly schedules its meetings in order to prepare and distribute written reports to all Conference members prior to Conference meetings. Almost all of the work associated with the preparation and distribution of those reports is performed by Administrative Office personnel who routinely staff those Conference committees. Appendix B to this document graphically presents the organizational structure of the Administrative Office. The correlation between Conference committee jurisdiction and line divisions within the Office is obvious. Administrative Office personnel from the Magistrates Division staff the Conference's Committee on Administration of the Federal Magistrates System, Bankruptcy Division personnel staff the Committee on the Administration of the Bankruptcy System, and so forth.

In spite of the inevitably increasing complexity of the business before the Conference, and an undeniable growth in "bureaucratic procedures" associated with Conference committee activities, every effort has been made to preserve a maximum permissible degree of collegiality and agenda flexibility. In that sense, the creation of the Administrative Office and its increasing responsibility for supporting the Conference since 1939, have complemented rather than complicated the manner in which the Conference conducts its business. In my twelve years of work with the

Court Administration Committee I have repeatedly been amazed by the extent to which informality and an atmosphere of candid discussion have been preserved in spite of very heavy agendas and very sensitive policy issues.

One personal observation is very much in order here. Since my assumption of the chair on the Court Administration Committee in January of 1978, I have been required to testify on several rather sensitive legislative proposals before both houses. On March 7, 1980, I testified on a Senate bill (S. 2045, 96th Congress) which would have statutorily rigidified Judicial Conference processes and procedures for conducting business in furtherance of the objective of "greater public understanding and respect for" the judiciary. On behalf of the Conference, I advised the Senate that, while that objective—that "end"— was certainly desirable, the bill than pending was not going to achieve that end. That bill was merely mandating a means—a rather elaborate and perhaps unconstitutional set of requirements—which would drastically alter a time-proven, reliable, and highly desirable way of conducting Conference business. The issue is a very important one, especially given reintroduction of the bill as S. 111 in this Congress. For the record, I have included my Senate statement of March 7, 1980 as Appendix C to this document. My description (at pages 2-3 of that statement) of the procedure used by the Conference in developing views on the bill is an example of the care taken in such matters—as well as the standard procedure followed by the Conference in conducting its business.

I will burden this presentation further concerning that issue only by observing that, if events since 1922 have supported any conclusion strongly, they have definitely evidenced the value of the Conference conducting its business in a collegial and candid atmosphere. Just eight weeks ago, during its March Proceedings, the Conference again reviewed the question of "opening" its meetings "to public observation". My committee had reviewed the issue with care and had unanimously concluded that the long-established practice of the judiciary "answering to" the public through the elected representatives in Congress was working better now than at any time in our history. Congress in recent years has demonstrated an increasing interest in working with the Judicial Conference in addressing problems which can only be resolved by Congressional action. Your personal contribution to this development, Mr. Kastenmeier, has been critically important. The Conference has responded through programs such as the Brookings Institution's Seminars on the Administration of Justice in Williamsburg and by inviting Members of Congress and Congressional staff personnel to Conference committee meetings and to Conference Proceedings. Recently the Chief Justive formalized a tradition of inviting the Chairman of both Judiciary Committees, or their representatives, to each Conference Proceeding. My committee strongly endorsed that approach. It works well. Never have our relations with Congress been more comfortable and constructive. The committee also recommended continuation of press briefings at the conclusion of each Conference session and the wide distribution of the Reports of the Proceedings of the Judicial Conference. The Conference accepted the committee's recommendations. We believe those methods of publicizing the Conference's work have proven their value over time—helping rather than hindering the Conference's ability to perform its responsibilities efficiently—properly balancing your "need to know" on behalf of the public and the Conference's need to preserve that collegial atmosphere which will permit a truly candid and productive exchange of opinions.

Realistically, as important as is the relationship between the Conference and Congress, the relationship you expressly asked me to address today—that between the Conference and the Administrative Office—is almost as important. Today I believe I can safely say that the relationship between the Administrative Office and the Judicial Conference is in complete conformity with that envisioned by Congress in 1939. Acting under the oversight of and in cooperation with Congress, the Conference formulates policy and exercises supervisory authority as a board of directors for the third branch; the Administrative Office implements Conference policy and performs ministerial duties and responsibilities under Conference's supervision.

While a "look back at history" clearly reveals the continuity of a central spectrum of problems associated with the growth of the federal courts, their jurisdiction, and resulting litigation, I think it also reveals the value of both the Conference and the Administrative Office. When we look at the incredible increase in work facing our federal courts since 1960 (see Appendix D), I dread the thought of where we would be today without both a Conference and an Administrative Office. If Congress had to directly oversee the functions which the Conference oversees, many would not be monitored; you simply do not have time. If the Conference did not have an Administrative Office, many policy determinations could never be implemented and—if my experience is a measure—many issues would be moot before becoming ripe for decision by the Conference if Administrative Office staff support for Confer-

ence committees did not exist. Our judges are racing to keep up with their adjudicatory duties. In the administrative area, they need the support provided by the Conference and the Administrative Office. Resources are stretched thin these days, and Mr. Foley will address that problem, but I believe the Administrative Office performs a broad spectrum of essential services without which the courts would never be able to remain in the race. The information base with which the Conference—and Congress—now works is vastly superior to any Chief Justice Hughes could have envisioned. Today the judiciary can and does respond to Congressional inquiries expeditiously and competently. Intercircuit assignments of judges are processed in accordance with established guidelines by an entity authorized to supervise their coordination so that the entire judicial system is well-served. Supporting personnel decisions are centrally managed and centrally administered. The Conference's authority to admonish and "discipline"—just strengthened last year due to this subcommittee's commendable work on the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980—is firmly established. As one Conference participant in the efforts which culminated in enactment of that law, I want to commend and thank you, Mr. Chairman, for the magnificent contribution your subcommittee and its staff made to that endeavor.

CONCLUSION

Mr. Chairman, I hope this material has been responsive to your specific request for an explanation of the Conference's role and the relationship between the Conference and the Administrative Office. My treatment has been deliberately free of too many details—and it has also only lightly touched upon one aspect of the role performed by both the Conference and the Administrative Office. In the past four years I have appeared before this panel on a number of occasions. Other Conference committee chairmen increasingly appear before other Congressional subcommittees and full committees. In my twelve years with the Conference I have noted an amazing—and encouragingly successful—increase in communication and understanding. I would indeed be negligent were I to appear today without thanking this subcommittee and its staff for all that you have done to help us help ourselves for the past decade. I have been directly involved in the Conference's activities during that period. No other Member of Congress has more consistently and more responsively assisted the judiciary and encouraged it to perform its duties well than have you. On behalf of the Conference—and every judge serving the federal judicial system—I express our most genuine thanks.

[Appendix A]

JUDICIAL CONFERENCE OF THE UNITED STATES—MARCH 1981

Honorable Warren E. Burger, Chief Justice, Presiding.
Chief Judge Frank M. Coffin, Chief Judge Raymond J. Pettine—First Circuit, Rhode Island.
Chief Judge Wilfred Feinberg, Chief Judge Lloyd MacMahon—Second Circuit, New York (Southern).
Chief Judge Collins J. Seitz, Judge Alfred L. Luongo—Third Circuit, Pennsylvania (Eastern).
Chief Judge Clement F. Haynsworth, Jr., Judge Robert R. Merhige, Jr.—Fourth Circuit, Virginia (Eastern).
Chief Judge John C. Godbold, Chief Judge John V. Singleton—Fifth Circuit, Texas (Southern).
Chief Judge George C. Edwards, Jr., Chief Judge Charles M. Allen—Sixth Circuit, Kentucky (Western).
Chief Judge Thomas E. Fairchild, Judge S. Hugh Dillin—Seventh Circuit, Indiana (Southern).
Chief Judge Donald P. Lay, Judge Albert G. Schatz—Eighth Circuit, Nebraska.
Chief Judge James R. Browning, Chief Judge Ray McNichols [1]—Ninth Circuit, Idaho.
Chief Judge Oliver Seth, Chief Judge Howard C. Bratton—Tenth Circuit, New Mexico.
Chief Judge Carl McGowan, Chief Judge William B. Bryant—District of Columbia Circuit, District of Columbia.
Chief Judge Daniel M. Friedman—Court of Claims.
Chief Judge Howard T. Markey—Court of Customs and Patent Appeals.

[1] By designation of the Chief Justice.

COMMITTEES OF THE JUDICIAL CONFERENCE OF THE UNITED STATES—MARCH 1981

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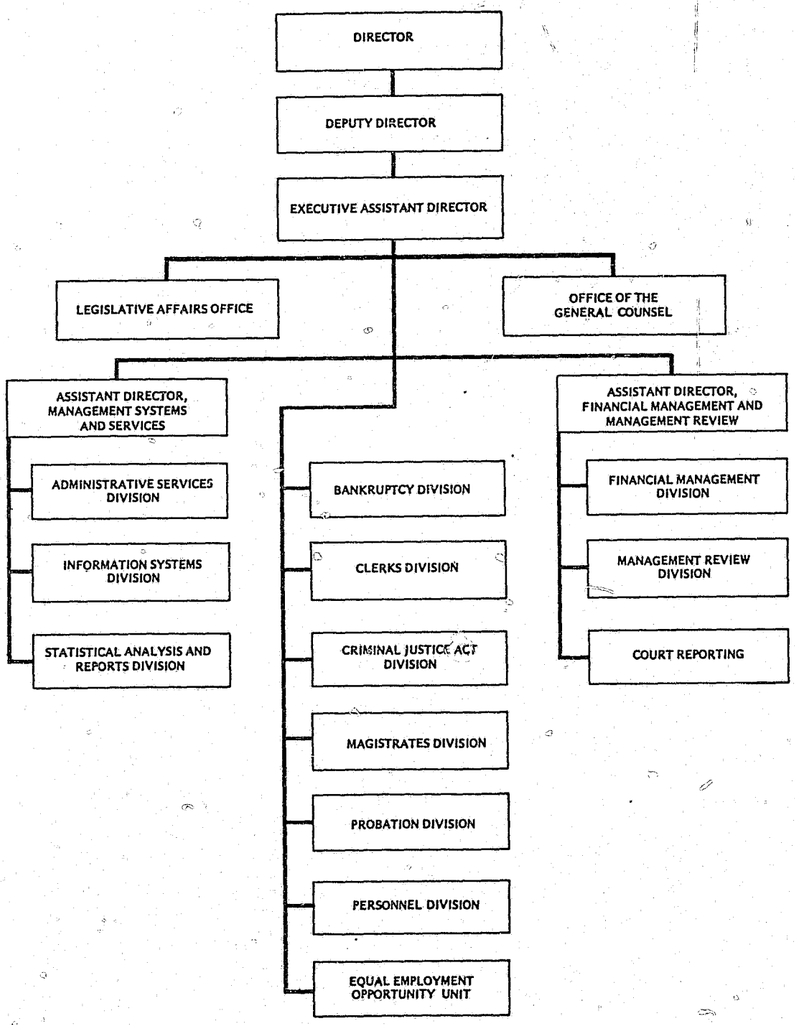
APPENDIX B

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS



[Appendix C]

Prepared Statement of Elmo B. Hunter

INTRODUCTION

Mr. Chairman, members of the subcommittee, once again I am appearing before this panel in response to your request for the views of the Judicial Conference of the United States on a legislative proposal pending before you. I am here today in the same capacity in which I have testified before this panel on several occasions in the past few years—as chairman of the Conference's Committee on Court Administration.

In past appearances I have provided for the record a brief summary of the service I have performed within the Conference's committee structure since 1969. For purposes of the record you are beginning to develop today, there may be some value in reiterating the extent to which I have been involved in the Conference's work—if only to place in perspective the degree of personal association I have had with an institution originally created by the Congress fifty-eight years ago. I first joined the Court Administration Committee as a member eleven years ago. Between 1976 and 1978 I chaired its Subcommittee on Judicial Improvements. In January of 1978, I succeeded Judge Robert A. Ainsworth, Jr., of the Court of Appeals for the Fifth Circuit, as chairman of the Court Administration Committee.

On at least one occasion in recent years a witness appearing before you on behalf of the Judicial Conference has provided a graphic presentation of the Conference's committee structure. While I realize that that structure is familiar to this panel, it may be especially relevant to this hearing record. I have attached a copy of the chart to this statement as an appendix (Appendix A) and I would ask that it be included in the printed record which is made of these proceedings.

Before directly addressing the two general matters referred to in this subcommittee's request for views—the purpose and provisions of S. 2045—I would like to describe the procedure followed by the Conference in responding to that request. It is the procedure which is usually followed when every Congress, through one of its committees, requests the views of the Conference on a pending bill. Upon receipt of Senator DeConcini's letter of September 11, 1979, transmitting a copy of a preliminary draft of the bill which was subsequently introduced as S. 2045, the Director of the Administrative Office asked me if the Court Administration Committee would be able to evaluate the proposal and formulate recommended comments for consideration by the full Judicial Conference at its next scheduled meeting. I advised him that the committee would attempt to do so. The Administrative Office notified the Senator of the development by letter. I, in turn, asked the chairman of the Court Administration Committee's Subcommittee on Judicial Improvements, Judge Bailey Brown, to schedule consideration of the matter for his subcommittee's next meeting and to report to the Court Administration Committee, which would be meeting only a few weeks later. Supporting personnel in the Administrative Office were asked to begin work on a preliminary analysis of the "draft bill."

Shortly after introduction of S. 2045, the text of the bill, the introductory statement which had appeared in the Congressional Record, and analytical materials were forwarded to the members of Judge Brown's subcommittee for review before their meeting. On January 7–8, 1980, Judge Brown's subcommittee met, and acted upon the request related to S. 2045 as one of many items on the agenda. Supporting staff in the Administrative Office circulated a report of the subcommittee's action—including the materials provided to subcommittee members in relation to S. 2045—to all members of the Court Administration Committee a week later. During the course of the Court Administration Committee's meeting on January 28 and 29, 1980, recommended views on S. 2045 were formulated for the consideration of the Judicial Conference. A report from the committee, including its recommendations, background materials related to S. 2045, the bill itself, and the related introductory remarks, were forwarded to all Conference members two weeks later. Two days ago the Judicial Conference commenced its Spring 1980 Proceedings in the Supreme Court Building.

Following discussion of the recommendations contained in the Court Administration Committee's Report concerning S. 2045, the Judicial Conference of the United States concluded that the bill raises serious separation of powers questions, that implementation of the processes and procedures manadated in the bill would seriously impair the efficient functioning of the Judicial Conference, its committees, and the judicial councils of the circuits, and that the bill should therefore not be enacted.

THE PURPOSE OF THIS BILL

The "introductory remarks" which were filed with S. 2045 on November 26, 1979, very clearly explain the purpose the chairman of this subcommittee intended to serve by having the bill's provisions reach the Proceedings of the Judicial Conference of the United States, meetings held by its committees and subcommittees, and meeting held by the judicial councils of the circuits:

"Open meetings will in no way hinder [the] proper function of these bodies. They will instead foster greater public understanding and respect for the institutions and the men and women who conduct the affairs of Government."

Obviously a "greater public understanding and respect for" the Conference, its committees, the councils—and the federal judicial structure which they serve—is a purpose, an objective, which every federal judge predictably supports.

S. 2045 will not guarantee realization of that objective; it will simply mandate an elaborate set of requirements which will have to be met by the Conference, each one of its committees, and every judicial council in order to conduct business. In other words, S. 2045 will merely mandate a means—not an end.

Having reviewed the bill—in the context of our tripartite federal governmental structure, and the concepts of separation of powers which have always preserved that structure—the Judicial Conference has concluded that the "means" mandated by S. 2045 will not facilitate the stated objective—they will impede progress in achieving it. The bill deserves widespread study and consideration. In the brief three to four months that this bill has been under review by the Conference, it has generated many more questions than have been answered.

THE PURPOSE OF THE GOVERNMENT IN THE SUNSHINE ACT IS NOT COMPATIBLE WITH THE CONSTITUTIONAL ROLE OF THE JUDICIAL BRANCH

S. 2045 is obviously modeled upon the Government in the Sunshine Act[1] which Congress passed in the 94th Congress after four years of study. The objectives Congress intended to achieve, in what has become known as "GISA," were clearly delineated: ". . . the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the government to carry out its responsibilities." [2] Implicit in that statement of purpose—and explicit in the Act's legislative history—is a belief that public observation of governmental processes fosters a fuller public knowledge, which assures an electorate more qualified to assess the performance of public officials—and more able to hold them accountable for their performance.

GISA applies to the Executive branch of the government only, and it is premised upon a need to maintain a balance between the public's "need to know" and the Executive branch's ability to function efficiently. In a very real sense GISA was carefully designed to complement and facilitate a concept of direct accountability to the people, which the Founding Fathers envisioned for the Executive branch, in light of the functions performed by that branch today.

The Legislative branch is, of course, also directly accountable to the public today—perhaps more directly accountable. During development of GISA in 1975, however, the Senate's Committee on Rules and Administration recommended that GISA be limited to the Executive branch.[3] On November 5, 1975, Title I of S. 5, 94th Congress, which would have included congressional committees within the scope of GISA, was deleted by the Senate.[4] While Rules in both the Senate and the House are today intended to serve a purpose similar to that which GISA serves, they are, of course, "means" to that "end" which are designed in consideration of the Legislative branch's "ability to function efficiently." Presumptively they are "compatible" with the Legislative branch's role in our form of government and, realistically, they are subject to necessary adjustment and revision with much less difficulty than they would be if embodied in a statute.

In both cases, GISA's applicability to the Executive branch and the Rules applicability to activities in the Congress, there is a recognition of the fundamental role performed by each branch of government in the tripartite arrangement dictated by our concepts of separation of powers, and a recognition of each branch's "ability to function efficiently." In attempting to convert provisions in GISA to directly apply to the Judicial Conference, its committees, and the judicial councils, S. 2045 is

[1] Pub. L. No. 94-409, 90 Stat. 1241 (1976) (codified at 5 U.S.C. § 552b (1976)).
[2] Id. § 2, reprinted in 5 U.S.C. § 552b note (1976).
[3] See S. Rept. 94-381, 94th Cong., 1st Sess., 1975.
[4] See 121 Cong. Rec. 35218 et. seq.

lacking in that recognition. In its present form S. 2045 may well be less applicable to the judiciary than it would be to the Congress.

The Judicial branch, unlike the Executive and Lagislative branches, was not only not intended to be directly accountable to the public at large, it was specifically insulated from that accountability. The Founding Fathers went to great lengths to guarantee a federal judiciary which could not be influenced or controlled by any public faction—representative of either majority or militant minority views. Federalist Paper No. 51 states:

It is of great importance in a republic not only to guard society against the oppression of its rulers, but to guard one part of the society against injustice of the other part.[5]

Hamilton envisioned a concept of judicial independence founded not just upon a balance of power with the other branches of the federal government, but also upon insulation from a potentially "unrepresentative" or "tyrannical" public. Life tenure during good behavior, removal from office only by impeachment under the Constitution, and a prohibition against diminution in salary are expressly embodied in the Constitution to insulate the Judiciary's members from political passions which may arise as a result of unpopular case decisions. The Founding Fathers were well aware of the extent to which integrity and moderation are often called upon to lean against strongly blowing political winds, and integrity and moderation lie at the heart of the judicial function in our form of government:

"Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirt of injustice, by which he may be a gainer today." [6]

Recognizing that the Judiciary is not directly accountable to the public is not equivalent to arguing that it is not accountable at all. In introducing S. 2045, the chairman of the subcommittee very clearly stipulated that this bill was only intended to reach the judiciary's administrative activities:

"In maintaining the delicate balance of power between the Congress and the judiciary, it is important that Congress recognize that its creations, the Judicial Conference and the councils, are not courts—that their judges do not sit as judges. They sit on a sense as administrators and legislators in their area of competence. (emphasis added.)" [7]

Will that distinction between adjudicatory functions and administrative functions support the argument that. in administrative activities, the judiciary should be directly accountable to the public? In the same text the chairman of this subcommittee observed that:

"The Founding Fathers wisely circumscribed [the judiciary's] broad power by limiting the jurisdiction of the courts, and by vesting the power to organize the lower courts *in the Congress*." (emphasis added.) [8]

"The Congress created the Judicial Conference and councils in furtherance of *its duties* to provide for the administration of the Federal courts." (emphasis added.) [9]

In fact the judiciary is fully accountable in all administrative matters to the public through the Congress. The Conference and the councils are "its creations," and their work is often an extension of Congress' duty "to provide for the administration of the federal courts." A few examples of the degree to which the Judiciary routinely "accounts to" Congress adequately demonstrate the scope of Congress' "administrative control," and the extent to which it exercises its oversight responsibilities.

In every session of Congress, judges appear before the Appropriations Committees in both houses to explain the judiciary's budget in detail. Places of holding court are designated by Congress, and judges are called before committees in both houses to explain why GSA should build a courthouse or lease space to provide the facilities which will enable judges to serve the public at those locations. Congress determines the number of judges a court shall have—and the public has waited years for the creation of additional judicial positions to meet the public's needs. Many committees other than the Judiciary Committees process legislation creating new causes of action. Every year, in response to requests from Congress, judges appear before the Judiciary Committees of both houses to comment upon legislation having an effect on the courts or the third branch—just as I am here today.

Through such appearances every aspect of court administration appropriately comes under congressional review. That is exactly the way the separation of powers concept was intended to work. The administration of the courts is essentially the

[5] Federalist Papers No. 51 (A. Hamilton), at 508 (Mentor Books ed. 1961).
[6] Federalist Papers No. 78 (A. Hamilton), at 464 (Mentor Books ed. 1961).
[7] See 126 Cong. Rec., daily ed., at S. 17218-9.
[8] See 126 Cong. Rec., daily ed., at S. 17218.
[9] Id.

responsibility of the Judicial branch, which must, of course, rely upon the Legislative branch to the extent that Congress has delineated the jurisdiction of the courts. The judiciary's exercise of administrative authority within the judicial branch, with appropriate oversight by the Congress, is in complete conformity with separation of powers concepts. Realistically, administrative functions are essential to the judiciary's fundamental role—the adjudication of cases and controversies.

S. 2045, however, is premised upon the assumption that administrative and adjudicatory activities can be distinguished from each other—that they constitute separate exercises of authority. That assumption is simply invalid. It would be impossible to craft a statute which would precisely distinguish one exercise of authority from the other. S. 2045 assumes that all activities of the Conference and the councils are "administrative." That approach raises serious questions about administrative activities which have an indirect impact upon adjudicatory activity. In the Fifth Circuit, the judicial council requires that the same panel of judges hear arguments arising from a desegregation case each time that case comes before the court. That administrative policy promotes case management efficiency and continuity in the determination of issues under litigation. Clearly an "administrative action," it nevertheless indirectly impacts upon case law development, and therefore influences the determination of the "law of the circuit." Under the Magistrates Act which this subcommittee processed earlier in this Congress, every circuit council is now reviewing the performance of presently serving magistrates in order to certify them as competent to exercise the new jurisdiction conferred upon them. When the members of the Fifth Circuit council discussed their policy before implementing it, were they merely exercising administrative ability? Did the experience gained sitting as judges in such cases influence their discussion? Did they discuss particular cases? Could they have properly done so in "open session"? When circuit council members evaluate a magistrate's competence, they do so candidly and openly, and they discuss his performance in particular cases. Are they acting only as administrators? Can a statute be fashioned which will realistically permit the ready identification of "administrative" and "judicial" activity when one role must inevitably influence the performance of another?

Fundamentally, the business of the courts is the adjudication of cases. Administration may be incidental to that fundamental activity, but is also inseparable from it. If "greater public understanding and respect" for the judiciary is the "end" to be served—by "means" of sunshine which falls only on administrative activities—that "end" cannot be achieved. One commentator has described adjudication in the following language:

"As a model of social adjustment, adjudication is a process for resolving particular conflicts between individuals through principled elaboration of authoritative norms, typically embodied in rules and precedents. * * * Courts as adjudicators act neither to promote any set of interest within society nor to find strategic solutions to social problems but rather to vindicate individual legal rights." [10]

Administrative activity frequently reflects a different mode of resolving issues, and the same commentator has described it as follows:

"Increasingly, students of government have come to view policymaking * * * as essentially a bargaining process. Rather than using authoritative norms as guides, the participants rely on the principle of exchange. Policy decisions * * * result not so much from formal structures * * * as from mutual accommodation of conflicting interests, none of which a priori enjoys a higher status than the others. Outcomes depend on the intensity of the participants' interest, the skill with which they play, and the power at their disposal." [11]

Judges meeting at the Judicial Conference, its committees, and judges serving on circuit councils often do "accommodate conflicting interests" on administrative matters. If sunshine could be focused on "policymaking" activity only, however, would that really promote a "greater public understanding and respect for" the judiciary and the fundamental duty its members perform—adjudication?

That question arises directly from our constitutional concept of separation of powers. In contrasting the judiciary to the Executive and the Legislative branches, Hamilton, noting the power of the sword and of the purse in the latter two, concluded that the Judicial branch had only the "power" of judgment. If the public perception of the responsibility judges exercise is equated with the manner in which a city council "bargains," that will not foster respect for the constitutional function which the courts perform—that of resolving cases and controversies.

[10] Diver, The Judge as Political Powerbroker: Superintending Structural Change in Public Institutions, 65 Va. L. Rev. 43, 46-47 (1979) (footnotes omitted).

[11] Id. at 47 (footnotes omitted).

If the administration of the courts—and accountability for that administration—is the matter at issue, the Constitution provides fully for accountability for that administration. Under the Constitution, the Congress is responsible for providing the judiciary with the tools needed to effectively administer the courts, and the federal judiciary is responsible for using them effectively and efficiently.

THE PROVISIONS IN S. 2045 TAKEN FROM THE GOVERNMENT IN THE SUNSHINE ACT SHOULD NOT BE APPLIED TO THE JUDICIAL BRANCH

In addition to questions concerning (1) how compatible S. 2045 may be with the tripartite separation of powers concept underling the Constitution, (2) what impact it may have upon the courts' general ability to properly perform its responsibilities for judicial administration, and (3) how well it will really serve the purpose it is intended to serve, there are many questions raised by its application of provisions from GISA—provisions designed for direct application to the Executive branchonly—to the judiciary's administrative and policymaking panels. Just as GISA was intentionally drafted with care to preserve the ability of the Executive branch of the government to carry out its responsibilities, just as the Rules of the House and Senate are designed to preserve the ability of those institutions to efficiently perform their responsibilities, the need to preserve the judiciary's ability to perform its responsibilities effectively and efficiently must be considered. S. 2045, as introduced, will certainly not enhance the performance abilities of the Judicial Conference, its committees, and the judicial councils of the circuits.

The statutory provisions which Congress has enacted to authorize the exercise of administrative and policymaking duties by the Judicial Conference, the judicial councils of the circuits, and the judicial conferences of the circuits are all embodied in Chapter 15 of title 28 (Sections 331, 332, and 333). A copy of the chapter is attached to this statement as an appendix (Appendix B). Conceptually the Conference is usually described as a "board of directors" for the third branch, and its committees are acknowledged to perform a staffing function. The same conceptual analogy is partially applicable to circuit councils and conferences; the circuit council is analogous to a board of directors and the circuit conference is analogous to supporting staff in many contexts. To the extent that issues require initial review and evaluation, that task is usually the responsibility of Judicial Conference committees and units established in the circuits through judicial conferences of the circuits. I described in my introductory comments the manner in which S. 2045 was evaluated by the Conference through utilization of the committee structure. In the circuits, special committees of the circuit conferences perform analgous functions on matters which come before the councils for final deliberation.

Obviously there is a marked lack of similarity between those roles and the roles played by elements in an Executive branch agency structure. The federal courts may be, in aggregate, a "national institution"; that institution, however, is truly a reflection of our constitutional concept of federalism, and all of the virtues long identified with the concept are certainly worth preserving. No one circuit is a mirror image of another. The realistic differences between the First and Fifth Circuits are obvious in terms of geography and numbers of judges and supporting personnel. The administrative responsibilities borne by the circuit councils reflect those differences. Today, two judges constitute a majority on the judicial council for the First Circuit, while fourteen are required to constitute a majority in the First Circuit. The manner in which those two councils function reflects that reality. Application of GISA provisions to the "panels" created by Congress to exercise administrative responsibility for the federal courts inevitably raises questions simply because the Conference and the councils are not "administrative agencies" in the Execitve branch of government. Let me cite a few of those questions which the Judicial Conference believe deserve very careful consideration. An outline of the provisions contains in S. 2045, prepared for the judges who evaluated the bill, is attached to this statement as an appendix (Appendix C). Where appropriate I will refer directly to the provisions as they appear in the bill itself.

S. 2045 will require open, public discussion of matters that should be conducted in camera—and that in some instances would be conducted in closed meetings under GISA. One recurring problem which I mentioned above, is the bill's failure to accommodate the possibility that judges, even in conferences, councils, and committees, can, do, and should draw upon their experiences on the bench in discussing matters with their colleagues. Reflections of judges on past or pending litigation always have been kept confidential, and no one seriously questions this rule.[12] Open

[12] Senator DeConcini, the sponsor of S. 2045, freely acknowledged this position when he introduced the bill: "When a judge or panel of judges sits as a court, secrecy in the deliberation process is required to protect the opinion of the judges from outside pressures and to guarantee

Conference, council, and committee meetings would lead either to the exposure of information that should remain undisclosed or to the elimination of a source of historical data vital to the judges' decisionmaking.

A. Exemptions in GISA not in S. 2045

Subsection (c) of GISA lists ten situations in which an agency lawfully may close its meetings.[13] S. 2045, by contrast, lists only two: proceedings that are likely to (1) "involve accusing any person of a crime, or formally censuring any person" or (2) "disclose information of a personal nature and such a disclosure would constitute a clearly unwarranted invasion of personal privacy."[14] Undeniably, some of the GISA exemptions do not apply to judicial meetings; for example, those reaching national defense matters or the regulation of financial institutions. Nevertheless, some exceptions provided in GISA—and needed in a judicial sunshine act—simply do not appear in S. 2045.

(1) Personnel rules and practices.—GISA expressly permits an agency to close meetings that "relate solely to the internal personnel rules and practices" of that agency.[15] S. 2045 does not contain this exception. Thus, when a circuit judicial council discusses removal or continuance in office of magistrates,[16] the need to require a district judge to reside at a particular location,[17] approval of assignments of active or retired circuit and district judges to specific judicial duties,[18] or the certification of a sitting judge as disabled,[19] the proceedings would be open.[20] What is said may reflect poorly on the court official involved and thus undermine his credibility in the duties he subsequently must perform. Similarly, the absence of this exception would open up meetings of the Judicial Conference of the United States when it examines salaries and expenses of probation officers.[21]

(2) Premature disclosure.—Agencies, in general, may close meetings if opening them would lead to a premature disclosure of information which would "significantly frustrate implementation of a proposed agency action."[22] Again, no comparable provision can be found in S. 2045. Thus a circuit judicial council would be forced to disclose in advance changes in rules, which might aggravate the problem of forum or panel shopping.[23] The absence of such a provision also eliminates the possibility of closed meetings simply because pending litigation likely will be discussed—for example, a meeting to consider court rules[24] or the inability to comply with the Speedy Trial Act.[25]

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due process to the litigants." 126 Cong. Rec., S. 17218 (daily ed. Nov. 26, 1979). Indeed, in GISA itself Congress has provided that adjudicative deliberations should remain confidential when the adjudicator is an agency. See 5 U.S.C. § 552b(c)(10) (1976).

[13] See 5 U.S.C. § 552b(c) (1976).

[14] S. 2045, § 2(a) (to be codified at 28 U.S.C. § 335(d)(1)-(2)). These are taken verbatim from GISA. Compare id. with 5 U.S.C. § 552b(c)(5)-(6) (1976).

[15] 5 U.S.C. § 552b(c)(2) (1976).

[16] 28 U.S.C. § 631 (f), (i) (West Supp. 4 1980).

[17] 28 U.S.C. § 134(c) (1976).

[18] *Id.* §§ 294(c), 295. The chief judge of the circuit also may approve. Id.

[19] *Id.* § 372(b).

[20] One could argue that many of these proceedings could be closed under the general provision for matters of a personal nature, the disclosure of which would be an unwarranted invasion of privacy. See text at note 14 supra. To do so, however, one would have to meet the strong contention that Congress' exclusion of a provision for personnel discussions but inclusion of one for personal matters, when both appeared in GISA, was intended to open personnel discussions. The indication in the legislative history that discussion of an individual's competence might be closed if he is a low-ranking official or a private persons, see H. Rept. 94-880 (pt.1), 94th Cong., 2d Sess. 11 (1976), is irrelevant, for judicial officers would be higher-ranking public officials not covered by GISA's exemption 6.

[21] 18 U.S.C. § 3656 (1976).

[22] 5 *id.* § 552b(c)(9)(B). GISA also exempts from its open-meeting requirement discussions of an agency regulating securities, commodities, currencies, or financial institutions that would be likely to lead to financial speculation in securities, commodities, or currencies. *Id.* § 552b(c)(9)(A)(i). Congress recognized that markets react even to hints of agency action. *See* S. Rept. 94-354, 94th Cong., 1st Sess. 24 (1975). The premature release of information concerning court decisions, or even hints of what a decision in a pending case may be, can lead to severe speculation in the stock market and elsewhere. S. 2045 makes no provision for this possibility.

[23] For example, the Court of Appeals for the Fifth Circuit assigns the same panel to hear the same desegregation case each time it is appealed. A change in this rule or the adoption of a similar rule by another circuit might affect when a party files an appeal. Similarly, the Court of Appeals for the District of Columbia Circuit assigns judges to panels on a purely random basis. A change in this rule might influence not only the timing of a filing but also, in some cases, the circuit in which the appellant or petitioner files.

[24] 28 U.S.C. § 2071 (1976).

[25] 18 *id.* § 3174.

(3) Litigation strategy.—GISA permits agencies to discuss privately their own participation in litigation.[26] S. 2045 creates a cause of action againt judicial entities that close their meetings,[27] and then fails to afford to the members of that entity the ability to discuss their defense in private.

B. Other matters that require nondisclosure

Several other actions that by law must be taken by entities subject to S. 2045 will have to occur in public even though nondisclosure would be a more prudent course. Frequently discussion can turn to problems arising in past litigation at which particular judges presided. Because no one argues that intramural judicial deliberations over litigation should be open, later recountings of what happened "at conference" also should be protected. S. 2045 does not take this step.

(1) Court-appointed plans.—By law, the judicial councils of the various circuits must discuss district court plans for the implementation of the Speedy Trial Act,[28] for adequate representation of criminal defendants,[29] and for random jury selection.[30] Problems judges have encountered that are best not revealed publicly may surface in these discussions. Keeping these debates confidential does not eliminate public participation, for courts may enlist aid from outside the judiciary in drawing up these plans.[31]

(2) Disagreements over district court rules.—Circuit judicial councils also act as tiebreakers when the judges of district courts cannot agree on local rules.[32] The origins of the disagreements may stem from problems encountered in earlier cases. Moreover, this particular function of judicial councils may expose heated disagreements among sitting judges and increase the danger that the public, in seeing only the "bargaining phase" of judicial decisionmaking, will lose its confidence in judges as adjudicators.

(3) Making of local rules.—Judicial councils of the circuits also make rules for their respective circuits.[33] Again, the discussion properly may turn to matters from previous cases that judges should not release publicly.

(4) Judicial Conference activities.—Congress has charged the Judicial Conference of the United States with analyzing the efficiency of the federal judiciary and recommending changes that would improve it.[34] Naturally, discussion turns to judges' personal impressions of the efficacy of certain procedures, including specific instances in which they have had to employ them. A judge's dislike for a procedure does not necessarily mean that he cannot use it fairly and competently, but exposure to his disagreement with it might undermine confidence in his ability to do so—with both the public and counsel appearing before him. In addition, under the Freedom of Information Act, internal memoranda making suggestions to agency boards are not subject to disclosure,[35] a policy that encourages the free flow of discussion and a competition of ideas. Judges, however, do not have large staffs; thus there would be no room for preliminary "floating" ideas in rough form before the Judicial Conference of the United States unless some protection were added to S. 2045.

C. Litigation under S. 2045

S. 2045 creates a cause of action to enforce its open-meeting provisions. Under this subsection, any person can file an action to require that a meeting to be held in the future be opened or to compel the release of the transcript of a meeting that was closed.[36] This aspect, too, has problems that must be addressed lest it severly interfere with the functioning of the federal judiciary.

(1) Frivolous actions.—The Framers of the Constitution took great care to establish a highly independent judiciary, one that would not bend to popular pressures when justices leads it another way. The cause of action under S. 2045 as it now stands leaves too much room from individuals dissatified with judges' decisions in

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[26] 5 *id.* § 552b(c)(10).

[27] S. 2045, § 2(a) (to be codified at 28 U.S.C. § 335(j)).

[28] 18 U.S.C. § 3165(c) (1976). To facilitate the formulation of these plans, clerks of district courts are authorized to obtain information from judges, attorneys, and probation officers. *Id.* § 3170(b). This information may be confidential.

[29] *Id.* § 3006A.

[30] 28 *id.* § 1863.

[31] Indeed, the Speedy Trial Act requires the planning group for each district to include various prosecutorial and administrative officials, along with two private attorneys and a person skilled in criminal justice research. 18 U.S.C.A. § 3168(a) (West Supp. 4 1980).

[32] 28 U.S.C. § 137 (1976).

[33] *Id.* § 2071.

[34] *Id.* § 331.

[35] *Id.* § 552(b)(5).

[36] S. 2045, § 2(a) (to be codified at 28 U.S.C. § 335(j)).

cases to file harassing actions against judicial entities on which they also sit. Even a nonmeritorious suit can tie up the judges who were present at a meeting, annoying them and distracting them from their primary responsibility; namely, deciding cases. Although a plaintiff who brings a frivolous or dilatory action may have to pay the judicial entity's legal expenses,[37] the damage already is done when the judge forgoes a discretionary action in court for fear of later retaliation through a nuisance suit.

(2) Suing the circuit.—An action to enforce the opening-meeting requirement in the case of a judicial council of a circuit may be brought in any district court within that circuit.[38] No matter which way the district court rules, the party not prevailing has no appeal: all the circuit judges would have to recuse themselves because they comprise the defendant. S. 2045 thus leaves no room for correcting district judge's errors in many cases that will be filed under it.

(3) Chilling effect.—A judicial entity may close one of its meetings only if it properly determines that closure is authorized.[39] If a judge in a later action rules that this decision was improper, he may order the release of a transcript of the proceedings that were closed.[40] This prospect may chill discussions that occur at meetings even properly closed. A judge may chill refrain from discussing issues fully, using examples from his experience, simply because he fears later disclosure, even though a court later would find the closing to have been authorized. The possibility that a court later can second-guess the members' decision to close a meeting is almost as stifling as a decision to make all meetings open.

IS THERE ACTUALLY A PROBLEM REQUIRING A STATUTORY REMEDY?

In the introductory remarks which accompanied introduction of S. 2045, this subcommittee's chairman noted that:

"The shroud of secrecy necessary to protect the impartiality of a judicial decision does not appropriately cloak the Judicial Conference and the judicial councils."

The judiciary has never alleged that the activities of the Conference or the councils are in need of the same standard of confidentiality as are panels of judges sitting as judges. Nor should there by any misunderstanding among Members of Congress that that standard has even been assumed by the Conference, its committees, the judicial councils or the judicial conferences of the circuits.

When the Judicial Conference of the United States meets twice each year it does not meet as does a court "in conference"; nor do its meetings constitute "secret sessions." Attendees at the Judicial Conference are limited—to those who are invited to be there to assist the Conference in the performance of its functions. Including committee chairman, and supporting staff from the Administrative Office and the Federal Judicial Center, the number of attendees and members combined usually exceeds 40 and, on occasion may exceed 50. Every Member of Congress is familiar with the logistical and agenda problems created by large groups seeking to do much in a finite period of time. Agenda materials for the Conference in recent years have always filled at least two three-inch loose-leaf binders and on occasion four. The volume of work which must be done in only two days is immense. One year ago the agenda required the Conference to meet for an additional day. Those matters which are amenable to expeditious action are efficiently processed, and those requiring discussion and full deliberation are accorded it. Flexibility is essential, as is an atmosphere in which candor and honest contests of conflicting opinion can be indulged. Conference Proceedings conducted in public would inevitably require more time, and views expressed would inevitably be less candid in many instances. Issues before the Conference can be as sensitive to judges as issues before the President's Cabinet can be to the White House. Opinions expressed there may be as candid and blunt as opinions expressed in party caucuses in the House and Senate. Resolution of those issues is frequently, however, achieved because debate is candid and blunt. Would that still be possible if the Conference were to meet in the State Department Auditorium under television lights and before a national press corps?

Committees of the Judicial Conference also do not literally meet in secret session. Over the years Members of Congress and their staff personnel, academic experts, and representatives of the legal community have been invited to join committees in

[37] *Id.* (to be codified at 28 U.S.C. § 335(j)(3)).

[38] *Id.* (to be codified at 28 U.S.C. § 335(j)(1)). The action also may be brought in the United States District Court for the District of Columbia or in the United States District Court for the district in which the meeting has been or is to be held. *Id.* In practice, the judicial council usually meets within the geographic boundaries of its circuit.

[39] *Id.* (to be codified at 28 U.S.C. § 335(d)).

[40] *Id.* (to be codified at 28 U.S.C. § 335(j)(1)). The bill would rquire the entity to keep a transcript of its closed proceedings. *See id.* (to be codified at 28 U.S.C. § 335(g)(1)).

their meetings when matters before a committee have warranted such invitations. In recent years the Rules Committees of the Conference have regularly invited staff members from the House and Senate Judiciary Committees to attend their meetings, and at the meeting of the Judicial Conference which has just been held, the Standing Committee on Rules of Practice and Procedure presented the following recommendation, which the Conference approved:

"PUBLIC ACCESS TO COMMITTEE FILES AND RECORDS

"From time to time the committee has received requests for access to Committee files and records, including the text of proposed amendments to rules submitted by the advisory committees to the Standing Committee and by the Standing Committee to the Judicial Conference. It has heretofore been standard practice to make available to the public only the written comments on proposed changes submitted to the advisory committees in response to requests for comment. Modifications of the proposed rules so submitted for comment, made by the advisory committees or the Standing Committee, have not been made available to the public. As a practical matter, such changes have been technical or clarifying, because the Standing Committee requires recirculation to the bench and bar of any substantial change made after the original publication of proposed rules.

This procedure has not been understood by the public and has led to misunderstanding and criticism. The Committee therefore recommends that on request it be authorized to make available 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."

Circuit council meetings, although seldom "open" to individuals who are not actually members of the council or directly staffing it, have the benefit of views and reports referred to them by the judicial conferences of the circuits, which are broadly "open" to "outside participants" in every circuit. In part the nature of the business before a council discourages participation by nonmembers; either it is of no real interest to them or, as noted above, is business which should not be conducted in public. Chief Judge Coffin of the First Circuit has filed a statement with this subcommittee explaining what his council does and why he believes S. 2045 should not be approved. His statement is brief and to the point, and I recommend its message be carefully studied in light of the fact that the First Circuit is the smallest and certainly the easiest to administer.

Let me turn for one moment to one function which I discussed at the beginning of this prepared statement—the procedure which the Judicial Conference uses to evaluate proposed legislation in response to requests for comment from committees of the Congress. Presumably the Judicial Conference is asked to comment upon legislation because its opinion will be of value to Members of Congress. Presumably Members want and expect an expression of views which truly reflects the opinion of the Judicial Conference. I have described the process through which S. 2045 has been evaluated. Do Members of Congress really want to open that process not only to the observation, but also to the influence, of individuals or groups who will later be appearing before Congress to argue their points of view? Do Members of Congress want to authorize "two bites of the apple"? In fact, the authorization may be argued to constitute "three bites of the apple." Interest groups would not only be appearing before both the House and Senate committees, they would inevitably be seeking every opportunity to influence Judicial Conference committee deliberations. In this area especially, should nonjudiciary interests be afforded an opportunity to "join the issue" with the judiciary before the judiciary has an opportunity to report to the Congress? The Members of this subcommittee are fully aware of the controversy which has been associated with congressional consideration of legislation to abolish diversity jurisdiction. Every Member of this subcommittee is fully familiar with the strongly held views of the Association of Trial Lawyers of America, with their presentation of those views to Members of both houses, and with their efforts to generate public comment disputing evaluations filed by the Judicial Conference before the Congress. Clearly, the power of final determination does and should rest with Members of the House and Senate. If they are to exercise that power responsibly, they must have objective expressions of opinion from all parties. As you know, I have been intimately involved with the Judicial Conference's efforts to encourage abolition of diversity jurisdiction. I assure you that, at best, those who disagree with the Conference's position on that issue would have taken every opportunity to have influenced it—if not to have impeded it—through processes and procedures which would be authorized by S. 2045. There is no question in my mind that on matters related to the Judicial Conference's efforts to evaluate and comment upon pending legislation, it would be counterproductive to Congress' purposes to receive views

which may have been even subtly influenced by interested groups before they reach the Congress.

In my 11 years participation in the Conference activities I know of no instance in which a committee or members of the Conference have failed to review submissions from interested parties. I cannot envision such a failure at any time in the future. As I have already noted, committees of the Conference have frequently invited interested parties—often from Congressional offices—to attend and participate in their meetings on matters of direct concern to those parties. I cannot imagine those practices being discontinued. I can, however, easily see the value of those practices destroyed by rigid processes and procedures which could all too easily be abused, yielding not constructive comment and contribution, but influences which would obstruct the formulation of the genuinely objective expression of opinion which Congress must have if it is to exercise its power of final determination properly.

CONCLUSION

In summary, S. 2045 needs a great deal more study. The stated purpose of the bill may well not conform to our separation of powers concepts. The provisions now embodied in the bill will certainly impede, not promote, the efficient exercise of "administrative authority" which Congress has delegated to the judiciary in chapter 15 of title 28 of the United States Code. Indeed, there is a real question as to whether legislation providing "sunshine" for the Judicial branch is any more appropriate than would be legislation providing it for the Congress. The Senate, after four years of study, concluded that such legislation would not be appropriate for Congress. S. 2045 has been pending for approximately four months. The Judicial Conference firmly believes S. 2045 should not be enacted in its present form, questions the need for statutory provisions in any event, and certainly recommends that further congressional efforts to design a bill, if undertaken at all, not be undertaken without soliciting the views of every presiding officer of a circuit council—because each circuit is not a mirror image of every other—and a broad spectrum of academic and legal comment. This proposal is certainly one upon which the Congress should not rush to judgment.

JUDICIAL CONFERENCE COMMITTEES

AS OF JANUARY 8, 1979

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Clement F. Haynsworth Jr., C	3-18-70
Irving R. Kaufman, C	9-23-78
Andrew A. Caffrey, D	9-25-75
James H. Meredith, D	8-15-76

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William H. Orrick, D	1-1-79	1-1-85
Aubrey E. Robinson, D	1-1-77	1-1-83
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Abe Fortas	3-15-74	6-1-82
Joel W. Sherman	11-6-73	6-1-82
Walter J. Schaefer	5-1-78	6-1-82
Kenneth F. Ripple, Reporter	6-1-78	6-1-82

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Morell E. Sharp, D	12-1-78	12-1-82
Clive W. Bare, BJ	12-1-78	12-1-82
Asa S. Herzog, BJ	12-1-78	12-1-82
Beryl E. McGuire, BJ	12-1-78	12-1-82
Alexander L. Paskay, BJ	12-1-78	12-1-82
Robert Watson Foster	12-1-78	12-1-82
Charles A. Horsky	12-1-78	12-1-82
Norman H. Nachman	12-1-78	12-1-82
Joseph Patchan	12-1-78	12-1-82
Lawrence P. King, Reporter	1-1-79	1-1-83
Walter John Taggart, co-Reporter	1-1-79	1-1-83

COMMITTEE TO CONSIDER STANDARDS FOR ADMISSION TO PRACTICE IN THE FEDERAL COURTS

	Date of Appointment
Edward J. Devitt, D, Chairman	8-1-76
A. Leon Higginbotham, Jr., C	8-1-76
J. Clifford Wallace, C	8-1-76
Malcolm R. Wilkey, C	8-1-76
Sherman G. Finesilver, D	8-1-76
James Lawrence King, D	8-1-76
Morris E. Lasker, D	8-1-76
James R. Miller, Jr., D	8-1-76
Charles R. Renfrew, D	8-1-76
Adrian A. Spears, D	8-1-76
Robert E. Tasker, D	8-1-76
Hubert L. Will, D	8-1-76
E. Gordon Gee, Dean	8-1-76
Joseph R. Julin, Dean	8-1-76
E. Robert Kerton, Dean	8-1-76
Joseph M. McLaughlin, Dean	8-1-76
Dorothy W. Nelson, Dean	8-1-76
E. Donald Shapiro, Dean	8-1-76
Robert L. Clare, Jr.	8-1-76
Thomas J. Deacy	8-1-76
Henry T. Halladay	8-1-76
William R. Ide, III	8-1-76
William T. Kuhs	8-1-76
Robert W. Meserve	8-1-76
Steven C. Chan, Consultant	11-17-76
Andrew J. Goodman, Consultant	11-17-76
David C. Stoup, Consultant	11-17-76

BICENTENNIAL COMMITTEE

	Date of Appointment
Clement F. Haynsworth, Jr., C, Chairman	6-23-75
Howard T. Markey, CCPA, Coordinator	6-23-75
Harry A. Blackmun, Assoc. Justice	6-23-75
William J. Brennan, Jr., Assoc. Justice	6-23-75
Byron R. White, Assoc. Justice	6-23-75
Wade H. McCree, Jr., Sol. Gen'l	6-23-75
James P. Coleman, C	6-23-75
Roger Robb, C	6-23-75
Ruby Aldrich, CS	6-23-75
James M. Carter, CS	6-23-75
Henry J. Friendly, CS	6-23-75
Edward [illegible], DS	6-23-75
Alexander A. Lawrence, DS	6-23-75
Arthur [illegible], Jr., DS	6-23-75
William [illegible]	11-21-77
William [illegible], Consultant	6-23-75

COMMITTEE ON PACIFIC TERRITORIES

	Date of Appointment
Richard H. Chambers, CS, Chairman	3-1-76
[illegible]	3-1-76
[illegible]	3-1-76
Charles H. Habernigg	3-1-76
Paul D. Shriver	3-1-76

APPENDIX A

APPENDIX B

CHAPTER 15—CONFERENCES AND COUNCILS OF JUDGES

Sec.

§ 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. As amended July 9, 1956, c. 517, § 1(d), 70 Stat. 497; Aug. 28, 1957, Pub.L. 85-202, 71 Stat. 476; July 11, 1958, Pub.L. 85-513, 72 Stat. 356; Sept. 19, 1961, Pub.L. 87-253, §§ 1, 2, 75 Stat. 521.

§ 332. Judicial councils

(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council.

(e) The judicial council of each circuit may appoint a circuit executive from among persons who shall be certified by the Board of certification. The circuit executive shall exercise such administrative powers and perform such duties as may be delegated to him by the circuit council. The duties delegated to the circuit executive of each circuit may include but need not be limited to:

(1) Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

(2) Administering the personnel system of the court of appeals of the circuit.

(3) Administering the budget of the court of appeals of the circuit.

(4) Maintaining a modern accounting system.

(5) Establishing and maintaining property control records and undertaking a space management program.

(6) Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the chief judge, the circuit council, and the Judicial Conference.

(7) Collecting, compiling, and analyzing statistical data with a view to the preparation and presentation of reports based on such data as may be directed by the chief judge, the circuit council, and the Administrative Office of the United States Courts.

(8) Representing the circuit as its liaison to the courts of the various States in which the circuit is located, the marshal's office, State and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

(9) Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

(10) Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the circuit.

All duties delegated to the circuit executive shall be subject to the general supervision of the chief judge of the circuit.

(f) The standards for certification as qualified to be a circuit executive shall be set by a Board of Certification. These standards shall take into account experience in administrative and executive positions, familiarity with court procedures, and special training. The Board of Certification shall consist of five members, three of whom shall be elected by the Judicial Conference of the United States, and at least one of these three shall be selected from among persons experienced in executive recruitment and selection. The additional two members shall be the Director of the Administrative Office of the United States Courts and the Director of the Federal Judicial Center. The members of the Board elected by the Judicial Conference shall each serve for three years except that upon appointment of the first members, one member shall serve for one year, one for two years, and one for three years. The Board shall consider all applicants who apply for certification, shall certify qualified applicants, shall maintain a roster of all persons certified, and shall publish the standards for certification. A person's name shall be removed from the roster after three years unless he is recertified. Three members of the Board shall constitute a quorum for purposes of fixing standards and for certifying applicants, but

no action of the Board shall be taken unless three of the members are in agreement. The Director of the Administrative Office of the United States Courts shall provide staff assistance in support of the operation of the Board. Expenses of the Board of Certification shall be borne by the travel and miscellaneous expense funds appropriated to the Federal judiciary. Any member of the Board who is an officer or employee of the United States shall serve without compensation. Other members shall receive the daily equivalent of the rate provided for GS–18 of the General Schedule contained in section 5332 of title 5, United States Code, when actually engaged in service for the Board.

Each circuit executive shall be paid at a salary to be established by the Judicial Conference of the United States not to exceed the annual rate of level V of the Executive Schedule pay rates (5 U.S.C. 5316).

The circuit executive shall serve at the pleasure of the judicial council of the circuit.

The circuit executive may appoint, with the approval of the council, necessary employees in such number as may be approved by the Director of the Administrative Office of the United States Courts.

The circuit executive and his staff shall be deemed to be officers and employees of the judicial branch of the United States Government within the meaning of subchapter III of chapter 83 (relating to civil service retirement), chapter 87 (relating to Federal employees' life insurance program), and chapter 89 (relating to Federal employees' health benefits program) of title 5, United States Code.

As amended Nov. 13, 1963, Pub.L. 88–176, § 3, 77 Stat. 331; Jan. 5, 1971, Pub.L. 91–647, 84 Stat. 1907.

§ 333. Judicial conferences of circuits

The chief judge of each circuit shall summon annually the circuit and district judges of the circuit, in active service to a conference at a time and place that he designates, for the purpose of considering the business of the courts and advising means of improving the administration of justice within such circuit. He shall preside at such conference, which shall be known as the Judicial Conference of the circuit. The judges of the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall also be summoned annually to the conferences of their respective circuits.

Every judge summoned shall attend, and unless excused by the chief judge, shall remain throughout the conference.

The court of appeals for each circuit shall provide by its rules for representation and active participation at such conference by members of the bar of such circuit. As amended Dec. 29, 1950, c. 1185, 64 Stat. 1128; Oct. 31, 1951, c. 655, § 38, 65 Stat. 723; July 7, 1958, Pub.L. 85–508, § 12(e), 72 Stat. 348.

§ 334. Institutes and joint councils on sentencing

(a) In the interest of uniformity in sentencing procedures, there is hereby authorized to be established under the auspices of the Judicial Conference of the United States, institutes and joint councils on sentencing. The Attorney General and/or the chief judge of each circuit may at any time request, through the Director of the Administrative Office of the United States Courts, the Judicial Conference to convene such institutes and joint councils for the purpose of studying, discussing, and formulating the objectives, policies, standards, and criteria for sentencing those convicted of crimes and offenses in the courts of the United States. The agenda of the institutes and joint councils may include but shall not be limited to: (1) The development of standards for the content and utilization of presentence reports; (2) the establishment of factors to be used in selecting cases for special study and observation in prescribed diagnostic clinics; (3) the determination of the importance of psychiatric, emotional, sociological and physiological factors involved in crime and their bearing upon sentences; (4) the discussion of special sentencing problems in unusual cases such as treason, violation of public trust, subversion, or involving abnormal sex behavior, addiction to drugs or alcohol, and mental or physical handicaps; (5) the formulation of sentencing principles and criteria which will assist in promoting the equitable administration of the criminal laws of the United States.

(b) After the Judicial Conference has approved the time, place, participants, agenda, and other arrangements for such institutes and joint councils, the chief judge of each circuit is authorized to invite the attendance of district judges under conditions which he thinks proper and which will not unduly delay the work of the courts.

(c) The Attorney General is authorized to select and direct the attendance at such institutes and meetings of United States attorneys and other officials of the Department of Justice and may invite the participation of other interested Federal officers. He may also invite specialists in sentencing methods, criminologists, psychiatrists, penologists, and others to participate in the proceedings.

(d) The expenses of attendance of judges shall be paid from applicable appropriations for the judiciary of the United States. The expenses connected with the preparation of the plans and agenda for the conference and for the travel and other expenses incident to the attendance of officials and other participants invited by the Attorney General shall be paid from applicable appropriations of the Department of Justice. Added Aug. 25, 1958, Pub.L. 85–752, § 1, 72 Stat. 845.

APPENDIX C

Outline of S. 2045
"Judicial Conference and Councils in the Sunshine Act"

The following outline indicates the definitions, the requirements, the exceptions to those requirements, the remedies and the sanctions of S. 2045. The impact of this bill would be significant both in concept and in the administrative implementation of its provisions.

Definitions

A judicial entity, to which S. 2045 would apply, includes the Judicial Conference, its committees and subcommittees, and the judicial councils of the circuits. The bill does not specifically include advisory panels of the Judicial Conference or circuit conferences.

A meeting is defined as any deliberation between or among the minimum number of members required to dispose of official business or act on behalf of that judicial entity.

The bill defines open as access to judicial meetings by means of "public observation." The scope includes each portion of any "meeting." By implication, it also includes access to a transcription or sound recording of any meeting. The Sunshine Act (Pub. L. 92-409) permits the executive agencies the option of satisfying this latter requirement by making accessible a "set of minutes" which summarize the meeting; S. 2045 does not include this option.

Notice is defined in the bill as the announcement to the public of meetings, changes in such meetings, explanations of closed meetings, and regulations.

Requirements

The bill proposes six major items upon which the judiciary must act or must refrain from acting:

1. "...Every portion of every meeting of each judicial entity shall be open to public observation." 335(c)

2. "Members shall not jointly conduct or dispose of business of the judicial entity other than in accordance with this section." [section 335 which would require open meetings] 335(c)

3. "Each judicial entity shall publicly announce" each meeting
   a. at least one week prior to the scheduled meeting
   b. and the announcement must include
      1) time
      2) place
      3) subject matter
      4) status (i.e., open or closed)
      5) name and telephone number of official designated to respond to public information requests 335(f)(1)

4. For each meeting that is closed, the Chief Justice, chief judge of the circuit, or the applicable chairperson "shall publicly certify that in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision." 335(g)(1)

5. Within one year after enactment, the bill would require the judicial entities to "promulgate regulations" to implement public access to meetings. 335(h)(1)

6. The bill requires the Judicial Conference and each judicial council to submit a compliance report to Congress annually. 335(k)

The bill does provide two exceptions to the requirements above:

1. Exception to open meetings

Any meeting may be closed and the disclosure of information restricted if the "meeting or the disclosure of such information is likely to --

"(1) involve accusing a person of a crime, or formally censuring any person; or
"(2) disclose information of a personal nature and such disclosure would constitute a clearly unwarranted invasion of personal privacy."

The exception applies to the public observation of meeting itself (335(c)) and to the public's access to the transcript or recording of such meeting (335(e)(f)).

S. 2045 takes these two exceptions verbatim from the executive agency Sunshine Act (Pub. L. 92-409). S. 2045 does not, however, include two exceptions in Pub. L. 92-409 which logically should be applicable to the judiciary as well as to the executive branch. These exceptions concern exempting matters relating to personnel management and matters exempted from disclosure by other statutes. Neither this bill nor the Sunshine Act specifically exempts meetings concerning general internal administration.

2. Exception to minimum one week public notice prior to meeting

This exception permits a public announcement to be made at the "earliest practicable time" rather than at least one week prior to the meeting if and only if:

(1) the majority of members of the judicial entity by recorded vote decide
(2) that "business requires" such a meeting be called without giving the required one week notice.

Remedies and Sanctions

The bill would create a civil cause of action to enforce the opening of meetings and would make available declaratory judgment, injunctive relief, and other relief as appropriate.

As proposed in S. 2045, costs could be assessed against any party by the party who substantially prevails, except that no costs would be assessed against a plaintiff unless the suit was "initiated primarily for frivolous or dilitary purposes." (335(j)(3)). Costs including attorneys' fees against a judicial entity would be assessed against the United States.

The bill would not authorize any federal court having jurisdiction over the opening of meetings to:

(1) set aside, or
(2) enjoin, or
(3) invalidate

"any action by any judicial entity (other than closing meeting or withholding information) taken or discussed at any judicial entity meeting out of which the violation of this section [335] occurred." (335(j)(2)).

Procedures

The bill sets out many administrative procedures and also details the legal procedures and standards to be followed in enforcing compliance with the administrative requirements. The following lists those procedures and cites their location in the bill.

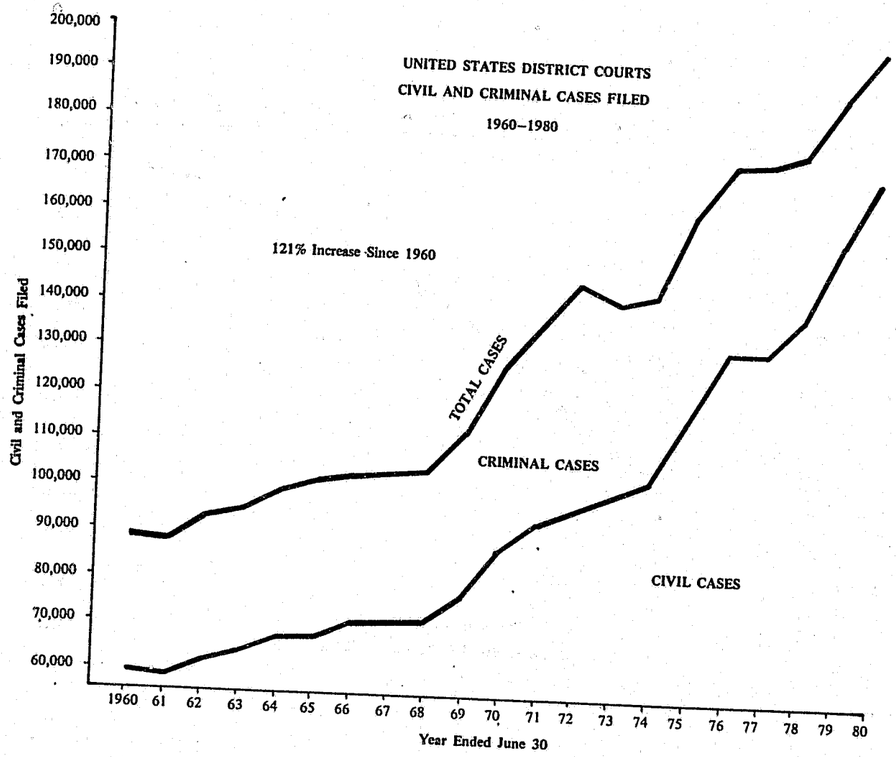
Administrative Procedures

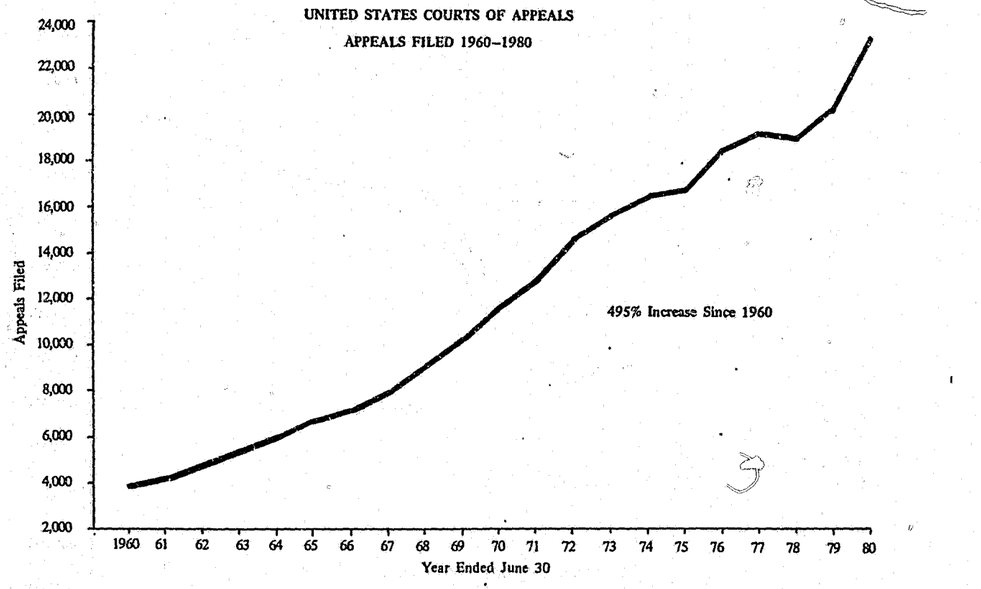
	S. 2045
- by judicial invitation, to close any portion of any meeting and to restrict the disclosure of information therefrom.	(e)(1)
- by individual request, to close any portion of any meeting and to restrict the disclosure of information therefrom.	(e)(2)
- to publicly announce any meeting	(f)(1)
- to publicly explain any closing	(e)(3)
- to change the time or place of any meeting after public announcement of any meeting	(f)(2)
- to publicly change the subject matter or status (open/closed) of any meeting or any portion thereof after public announcement of such meeting	(f)(2)
- to announce any changes to any meeting already publicly announced	(f)(2)

- to make information concerning meetings available to the public (g)(2)
- to maintain records of meetings (open and closed) (g)(2)
- to promulgate regulations to apply to judicial entities by which openness of meetings will be assured (h)(1)(2)
- to seek Senate/House approval for such regulations (h)(2)
- to report to Congress on compliance by judicial entities with requirements for open meetings (k)

Legal Procedures

- to enforce the opening of meetings, the bill permits any person to initiate a civil action against any judicial entity in any district court: (1) where the meeting was held, or (2) where the judicial entity has its headquarters, or (3) in the U.S. District Court for the District of Columbia. (335(j)(1)).
- to enforce the promulgation of regulations to insure open meetings when appropriate, any person may initiate suit in the U.S. District Court for the District of Columbia against any judicial entity which fails to promulgate such regulations or promulgates regulations which are not in conformance with the proposed requirements for opening meeting. (335(i)).
- any person would have standing to sue, regardless of injury or interest. The bill also proposes to impose the burden to sustain the action on the defendant judicial entities, rather than on the plaintiff as in other civil actions. (335(j)(1)).


UNITED STATES DISTRICT COURTS
CIVIL AND CRIMINAL CASES FILED
1960–1980
121% Increase Since 1960
TOTAL CASES
CRIMINAL CASES
CIVIL CASES
Civil and Criminal Cases Filed
200,000
190,000
180,000
170,000
160,000
150,000
140,000
130,000
120,000
110,000
100,000
90,000
80,000
70,000
60,000
1960 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80
Year Ended June 30


UNITED STATES COURTS OF APPEALS
APPEALS FILED 1960–1980
Appeals Filed
24,000
22,000
20,000
18,000
16,000
14,000
12,000
10,000
8,000
6,000
4,000
2,000
495% Increase Since 1960
1960 61 62 63 64 65 66 67 68 69 70 71 72 73 74 75 76 77 78 79 80
Year Ended June 30

Mr. KASTENMEIER. Thank you very much, Judge Hunter, for your historical analysis of the Judicial Conference and the Administrative Office, and of the Federal judiciary generally. I also thank you for your complimentary remarks about this committee.

I think we will hold questions until we've heard from Mr. Foley. Mr. Foley.

Mr. FOLEY. Thank you, Mr. Chairman. I should like, if I may, to associate myself with Judge Hunter's comments concerning the work of this committee, and express my appreciation for the assistance we have received from you and from your fine staff.

I have a prepared statement which I would like, if it is agreeable, to submit for the record.

Mr. KASTENMEIER. Without objection, that statement will be accepted with various appendices.

[The complete statement of William Foley follows:]

PREPARED STATEMENT OF WILLIAM E. FOLEY, DIRECTOR, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Mr. Chairman, I want to express my genuine appreciation to you for scheduling this hearing, the third such opportunity in three Congresses, for us to advise you of our programs—and of our problems—and to provide answers to questions which you, the subcommittee members, or staff may pose. This subcommittee's work in the past decade has repeatedly helped both the Judicial Conference and the Administrative Office better serve the judiciary. I join Judge Hunter in thanking you personally, Mr. Chairman, for all you have done on behalf of the third branch. I would also like to make a special point of recognizing the skill and ability demonstrated by your subcommittee staff. The unfailing courtesy and consideration with which they have handled all communications with us have impressed personnel in the Administrative Office—and won the lasting respect and admiration of judges serving the Conference.

In direct response to your request, I will not present again material already submitted in previous Hearings held on February 17, 1977 and May 16, 1979, but focus instead upon new developments since last appearance. Logically, the first such development I should report is that noted in your letter of invitation—a reorganization of individual units within the Administrative Office, which I believe has contributed to our ability to better serve the judiciary nationwide without incurring appreciable budgetary or personnel growth. Appendix B to Judge Hunter's statement displays the agency's current organizational structure. Those units with responsibility for supporting a specific segment of the federal judicial system, such as bankruptcy courts or probation offices, are all under the supervision of Executive Assistant Director James Mackin, who is accompanying me today. Those units with responsibility for accounting, budgetary, and appropriations functions, management evaluation and assessment functions—including audits of court accounts—and supervision of court reporting services, are under the supervision of Assistant Director Edward V. Garabedian; he has on many occasions worked with your staff to develop cost estimates for pending legislation. Those units with a continuing daily service role related to every court facility nationwide—from the collection and tabulation of data for your extensive statistical reports program to the provision of space, furniture and furnishings, and supplies and equipment, including library services—are under the supervision of Assistant Director John E. Allen. Mr. Allen joined the staff relatively recently and has not yet had an opportunity to work directly with your staff. One of his supporting employees, David Cook, has worked frequently with this subcommittee in responding to your needs for data on caseloads and case dispositions.

As Judge Hunter has noted, personnel serving in those units, the General Counsel's Office and the Legislative Affairs Office perform a critically important supporting staff function for the committees of the Judical Conference—in direct relation to their areas of expertise and the committees' individual jursidictions. Staff efforts on behalf of the Conference range from the preparation of committee agendas and research and advisory memoranda to the preparation of committee and Conference reports and draft legislation. All such work is performed under supervision of committee chairmen and members. In recent years, Administrative Office personnel have also increasingly prepared reports for submission to Congress in accordance

with statutory requirements and conducted special surveys at the request of Congressional Committees.

I welcome and encourage that increasing mutual effort. The Administrative Office's basic responsibility for serving the courts and their personnel nationwide is often dramatically impacted by Congressional action. Legislation such as the Omnibus Judgeship Bill of 1978 and the Bankruptcy Reform Act of 1978 has a devastating "rippling effect". A thirty percent increase in the number of district and courts of appeals judges, and a complete restructuring of the bankruptcy courts, are events which require massive adjustments in space utilization, supporting personnel, and equipment—not to mention appropriations. Congress, of course—often due to the efforts of this subcommittee—also provides relief that helps lighten the administrative burden. Jury reform legislation and revisions in chapters 3 and 5 of title 28 are examples. They may appear to be relatively small achievements compared to a judgeship bill; they are nevertheless essential to a system desperately in need of new judgeships, yet "scrambling" to absorb them all at once.

Like many other governmental entities—including Congress—the federal judicial system has grown dramatically in the past two decades. The graphs which Judge Hunter submitted with his statement—evidencing a 121-percent increase in district court filings and a 495-percent increase in courts of appeals filings since 1960—go far toward explaining not only the 54-percent increase in the number of district court judgeships and the 48-percent increase in the number of courts of appeals judgeships, but also the 70-percent growth in the number of Administrative Office employees since 1960.

We have made every effort to limit our growth, and one development since my last appearance before this subcommittee has been especially gratifying. In its 1979 Committee Report on our budget, the House Committee on Appropriations questioned the Administrative Office's growth in staff and budget between 1970 and 1980. The Chief Justice immediately asked the Judicial Conference to create an Ad Hoc Committee on Oversight of the Administrative Office, and subsequently appointed Judge John D. Butzner, Jr., then Chairman of the Court Administration Committee's Subcommittee on Statistics to serve as chairman of that Ad Hoc Committee. The Committee concluded, in a report published in March of 1980, that:

"The growth of the Administrative Office during the last decade is commensurate with the increase in the responsibilities of the Office. Its growth has not been excessive. It can be attributed to a large increase in the workload of the judicial branch, the requirements of the new legislation, the transfer of functions from other agencies, and some commendable improvements in the services that the Administrative Office provides for the judiciary."

I cite this report here to support my firm belief that today's Administrative Office is a lean and efficient organization—and also to portray succinctly the current relationship, not only between the Judicial Conference and the Administrative Office, but also between the Conference and the Congress. A Congressional committee's suggestion generated a Conference inquiry. The Conference, in its proper policy-making role, reviewed the operation of its administrative agent. The result of the review was duly transmitted to Congress. I believe that is exactly the arrangement of relationships which Congress envisioned when it passed the "Administrative Office Act" in 1939.

Because the duties and responsibilities vested in the Administrative Office under section 604 of Title 28, United States Code, and an evergrowing number of Public Laws have been rather extensively summarized for you in our two previous oversight hearings in the past four years, I will rely on that existing record today. If I may, I would like to advise you of a range of specific matters now burdening us and invite whatever observations you might have.

BANKRUPTCY ADMINISTRATION

Fluctuating workload

The principal difficulty in administering the bankruptcy system in the last two decades has been the extreme fluctuation in the bankruptcy rate. These variations can exceed 4,500 cases in one month. In the year ending December 31, 1980, there was an increase of 210,582 estates. These drastic changes in workload affect all segments of bankruptcy court operations—judicial workloads, supporting staff, and availability of forms, envelopes, typewriters, working space, and postage payment resources.

At the time the judiciary budget is prepared and submitted to OMB—which is usually 18 months in advance of final Congressional action—and is often no indication of the direction of filings. Sharply increased workloads will inevitably cause offices to fall behind until appropriations can be obtained, which is often nearly a year after the fact—and after large backlogs have developed which take several

years to remove. To deal with this problem, bankruptcy courts regularly use a large number of temporary employees which can be dropped form the roles when no longer needed.

As a means of predicting filings, several years ago the Bankruptcy Division explored use of a new method for forecasting bankruptcy case filings based upon published economic indicators. This program is now being reviewed by the Statistical Analysis and Reports Division. While in need of further study, it shows promise of being developed into a reasonably accurate method for forecasting bankruptcy filings for purposes of appropriation requests.

Staffing requirements

In addition to the problem of forecasting workloads, weighing the new responsibility of clerks' offices under the Bankruptcy Reform Act and determining proper staffing ratios has been a major problem. The new Code requires the clerk of a bankruptcy court to perform many new tasks—such as financial accounting—in addition to the acceptance of bankruptcy cases and adversary proceedings for filing. In calendar year 1980, a work measurement study was conducted of the bankruptcy courts which is being used as the basis for staffing in the 1982 appropriation request. Some adjustments will have to be made to the formula because operations under the new Bankruptcy Code cannot yet be considered normal.

Salaries of clerks

The salaries of clerks of bankruptcy court which, by statute, must be the same as clerks of district court, have presented a problem. During the first year of operation, clerks' salaries were established under the same interim formula used to determine the salaries of clerks of district court and Chief Probation Officers. The Administrative Office is now trying to develop permanent criteria for setting salaries based on a study of functions actually performed in each office.

Space

The new responsibilities of the bankruptcy court have required additional space and facilities—rooms for the conduct of meetings of creditors apart from courtrooms, space for law clerks, and so forth. The Judicial Conference of the United States, at its March 1981 meeting, approved space standards for the bankruptcy courts. While plans have been approved for most bankruptcy courts, the implementation of the changes under the General Services Administration has proceeded slowly.

Court reporting

Under the Bankruptcy Code, the Judicial Conference of the United States has determined that judicial proceedings be reported by live reporters and that meetings of creditors be recorded by electronic devices. For judicial proceedings, contract reporters are to be used until we can be sure that it would be more economical to use salaried reporters. One problem with the Bankruptcy Code is that there is not authority for bankruptcy reporters to retain earnings from private transcripts. This would not make the position attractive on a salary basis. A bill introduced in the Senate (S. 863), containing technical amendments to the Bankruptcy Reform Act, would correct this. Most bankruptcy courts now have contracts for court reporters. The system is operating with minor problems only. Nevertheless, one bankruptcy court has filed an action against the Director of the Administrative Office to enforce an alleged right to hire a salaried reporter. The action is under advisement by a district court judge.

Training

Instructional seminars for bankruptcy judges and clerical employees to help them meet their new responsibilities under the new Code have been undertaken by the Federal Judicial Center in conjunction with the Administrative Office. Excellent seminars have been provided for bankruptcy judges, clerks of court, chief deputies, and some specialized personnel in clerks' offices.

Supervision of trustees

A major problem stemming from the Bankruptcy Reform Act arises because no provision was made for the supervision of trustees in the 74 judicial districts which were not part of the experimental United States Trustee program. The Code contemplated the removal of the bankruptcy judge from the task of supervising the administration of estates by trustees. The United States Trustee was specifically given the function in 18 districts during the transition period. No mention was made of this necessary function in the remaining courts. The Administrative Office requested funds from Congress to employ a limited number of deputy clerks with requisite ability to perform this service. The total number needed has not yet been

authorized. These employees will, however, provide a very needed element of control over the 1,100 private panel trustees in the 74 districts not under the United States Trustee program.

Survey for the number of judges in 1984

The Bankruptcy Division is carrying out the principal responsibility of the Director under the Bankruptcy Reform Act in conducting a study to determine the number of bankruptcy judges which will be needed in 1984 based on current responsibilities under the Code. The principal difficulty with this task has been the relatively short period of time during which the substantive law has been in effect. The bar has not yet used many of the new provisions to their full advantage—such as removal provisions or demands for jury trials. The rate of filing of adversary proceedings is still increasing. Cases of any substance under the Code have not yet run the normal period of administration, so any studies made will reflect a system that has not in fact fully matured. It is also possible that changes will be enacted in the law which might affect the overall judges' time required. A time study will be conducted of the judicial and administrative activities of bankruptcy judges from which a set of weights will be developed for each type of bankruptcy case filed. The report of the Director recommending the number of needed judgeships will be completed approximately one year from today.

COURT REPORTING SERVICES

The problem we are facing in relation to provision of court reporting services for the bankruptcy courts is part of a larger problem involving the district courts as well. Court reporters in the district courts are being appointed pursuant to the provisions of 28 U.S.C. § 753, while, in the bankruptcy courts, reportorial services are being provided on a contractual basis. We know that reports are not being fully utilized in the district courts. We know that the workload is not being equally distributed—despite the fact that all reporters receive the same basic salary. We have some reporters in the system who are not performing at an acceptable level of competence and who continuously are delinquent in producing transcripts. That in turn delays the appellate process. Regrettably, there are today no special rewards for efficiency—and no real penalties for inefficiency. In this regard, there clearly is a need for more effective management and supervision of reporters. We also are aware that reporters occasionally overcharge litigants for transcripts in violation of the fee schedule prescribed by the Judicial Conference; When we become aware of such overcharges, we bring them to the attention of the chief judge of the court and to the Judicial Council of the circuit for appropriate action.

The Subcommittee on Supporting Personnel of the Judicial Conference Committee on Court Administration has asked that my office conduct an extensive survey to determine whether any adjustments are needed with respect to court reporter salaries, benefits, and the schedule of fees for transcripts. We have been asked to address the problems I have referred to and to make recommendations for changes in policy and procedure which will correct certain deficiencies in the system and provide more effective and efficient service to the courts. We also are exploring the feasibility of electronic sound recording of proceedings in court as well as computer-aided transcription. There are, however, limits to the range of remedial actions the Conference can authorize the Administrative Office to implement under existing statutory provisions.

There are also very real pragmatic limits. Court reporters in the district courts, for all intents and purposes, are part-time employees—who are being paid salaries ranging from $28,741 to $31.615, depending on longevity and proficiency, for their attendance in court or in chambers for the purpose of taking notes of proceedings. They do not have a regular tour of duty nor do they get annual or sick leave as do other Government employees. They do receive such benefits as Civil Service retirement, health and life insurance.

In a very realistic sense, court reporters are unique; they are private entrepreneurs with respect to the preparation and sale of transcripts ordered by parties. In that role they pay all of their own expenses, including fees for notereaders and transcribers, equipment, supplies, telephone services, and postage. Many reporters are also proficient enough to engage in private reporting work which is quite extensive.

Although our studies are preliminary only, they indicate that, on the average, court reporters spend approximately 15 hours a week in court. They produce, on the average, 10,000 pages of official transcripts per year. How valuable those figures are is questionable—because there is a substantial variance in the amount of time the reporters spend in court and in the volume of transcripts being produced among the respective district courts. Naturally, there is also a considerable difference in the

income of reporters from the sale of transcripts. *On the average,* the court reporters' net income from the sale of official transcripts is approximately $12,000—but there are several reporters who have had annual earnings of over $100,000. One reporter, during calendar year 1980, reported a net profit from the sale of transcripts of over $200,000.

I have included this material in this statement today because the General Accounting Office has been engaged in a study of court reporting services in the district courts for several months, and we expect a rather critical report—one which concludes that court reporters are not being fully utilized. I have no doubt there will be recommendations for changes in the law to provide alternatives to the present system—including greater use of electronic recording equipment. While we anticipate a critical report, we also welcome GAO's comments and any suggestions they may offer which will result in a more cost-effective and efficient service to the courts and the litigants. The current reporting system was established by the Congress in 1944—37 years ago. At that time there were only 195 district judgeships, and we did not have magistrates or bankruptcy courts as they are constituted today. You are fully familiar with the tremendous increase in the volume and complexity of litigation before the courts. The legislation enacted in 1944 was probably adequate in 1944. Conditions have obviously changed, and we now must recognize that and move to meet the needs of the judicial system in the 1980's and 1990's. We plan to conduct experimental programs utilizing electronic sound recording equipment and computers to determine whether they are, in fact, viable alternatives to shorthand or stenotype reporting. In essence, we intend, within the limits of the present law, to make such changes as are possible to utilize our resources more effectively. This subcommittee, however, may wish to consider the need for reforms in the 1944 law. The Judicial Conference and the Administrative Office will provide whatever assistance we are able to provide if you do choose to evaluate the problem.

COURT INTERPRETERS PROGRAM

When Congress passed the Court Interpreters Act in October of 1978, requiring the Administrative Office to certify interpreters, the courts then employed sixteen Spanish/English interpreters working full-time in salaried positions and contracted with hundreds throughout the United States on a free-lance basis. Until the Administrative Office began administering examinations required by the Act, an interpreter merely attested to his ability to interpret courtroom proceedings—there was no formal examination to "prove" his proficiency in languages or competency in the skill of oral interpreting.

Using nationally recognized interpreters, language specialists and linguists, we developed a test which we administered nationwide from March through July of 1980. One thousand three hundred seventy-one candidates took the written language proficiency test, and 350 took the oral skills test, resulting in 121 persons being certified. The test was administered again in November 1980 through April 1981, with 1,463 persons taking the written test, 484 taking the oral, and 73 persons being certified. Of the original sixteen federal court interpreters, six did not qualify for certification and have been replaced in the courts. Additionally, most of the free-lancers did not qualifying during the first or second examination rounds.

We began with Spanish/English testing because there were nearly 30,000 docketable events requiring Spanish/English interpreters reported by the clerks of court for 1979. Although the federal courts have actually used interpreters for twenty-six different languages, the need for Spanish-language services has by far been the greatest. French, Haitian and Thai, in certain geographic areas, seem to be the languages requiring interpreters most frequently in addition to Spanish, but at less than 200 docketable events each year. Other languages are used even less frequently.

I bring this matter to your attention today because I believe the costs related to certification of Spanish/English interpreters is a warning we must heed. It cost $138,000 to develop the testing materials and administer them in the first testing cycle, an average cost of $1,100 per interpreter certified. In the second cycle, although we administered the test to a larger pool of candidates, a smaller percentage passed, for an average cost of $2,000 per interpreter certified; we believe that the more experienced candidates passed the test when it was first administered. We believe we must administer the test annually to insure that specific geographic areas like New York City, Miami, San Diego and other cities will have enough interpreters certified to meet their needs.

The need for Spanish/English interpreters is clear. So too, however, is a cost implication that cannot be ignored. A strict reading of the Act would suggest that the Administrative Office is required to develop certification procedures for every language. From a practical economic standpoint, we believe we should only develop

certification programs for those languages for which we can discern a reasonable quantitative justification. We would invite whatever guidance the Judiciary Committee may wish to provide on this problem because the development of legal translation certification standards for every language may prove to be an incredibly expensive undertaking.

SERVICE OF CIVIL PROCESS

As this subcommittee knows only too well, the Department of Justice has for several years been attempting to divest itself of statutory responsibility for the service of civil process under 28 U.S.C. § 569(b). While that attempt has not yet succeeded, we do face a serious problem. The Department did not request funds for serving process in its fiscal year 1981 appropriation—and, since October, U.S. Marshals, while continuing to serve private civil process on a limited basis, have done so without appropriated funds. A Department request for a supplemental appropriation is now pending before Congress, and funds for service of process are included in it.

The JudicialConference has consistently expressed its opposition to attempts to eliminate the statutory obligation until viable alternatives to the Marshal's serving private civil process are not only authorized but also available in every federal district. The Conference officially supports granting the Attorney General the authority to set, at his discretion, compensatory fees. This method, the Department argued last year, would encourage private process servers and state and local officials to serve federal process. Without such an incentive, it may be impossible to find replacement process servers in all districts or to develop that resource where it does not currently exist.

In this Congress, the Department is again seeking to eliminate the statutory obligation to serve private civil process. The Department's program authorization bill as originally drafted included the following amendment to 28 U.S.C. 569(b) to limit the U.S. Marshals' responsibility to serve private civil process:

"(b)(1) Except as provided in paragraph (2), the United States Marshals shall execute all lawful writs, process, and orders issued under authority of the United States, and command all necessary assistance to execute their duties.

"(2) Service of civil process, including complaints, summonses, subpoenas, and similar process, shall not be performed by the United States Marshals on behalf of any party other than the United States, unless performed pursuant to—

"(A) section 1915 of this title or any other express statutory provision, or

"(B) order issued by the court in extraordinary and exigent circumstances".

While H.R. 3111 which Chairman Rodino introduced on April 7, 1981 does not contain that amendment, Mr. McClory's bill, H.R. 3201, introduced on April 9, 1981, does. So, too, does S. 951, the equivalent Senate bill, introduced on May 5.

We realize that the Department's objectives are not unreasonable; facing a need to limit personnel and expenditures in our own branch, we understand the Department's need to do so. We are working through the circuit councils to encourage appropriate local rules which will limit the use of Marshals in serving civil process—so that we will be able to accommodate whenever possible a "phased withdrawal" by U.S. Marshals from the task. As previously noted, we also fully support a grant of authority to the Attorney General permitting the setting of fees which will encourage development of alternative process service entities.

COURT SECURITY

As in the civil process matter, we are facing serious problems in providinig adequate court securtiy due to budgetary realities. The Department of Justice has not avoided the traditional responsibility of the Marshals Service in this area—and we are genuinely appreciative of the Department's commitment and continuing help. Appropriations which have been sought, however, have been insufficient to meet what the U.S. Marshals Service and the courts agree is the minimum level of security, For fiscal year 1982, the Administration request for appropriations is less than what the Marshals Service has projected is necessary, and no provision has been made either for personal security details or for extraordinarily dangerous trials.

Inadequate protection in life-threatening situations is simply unacceptable. Given budget cutbacks, however, the problem is getting worse. In fiscal year 1980, resources for personal security and dangerous trails were "borrowed" from other budget line items such as civil process. In fiscal year 1981, resources to serve private civil process as well as resources to protect threatened judges and secure extraordinarily dangerous judicial proceedings must all be borrowed from other budget items such as regular court security.

At present, the Marshals Service, through their own personnel or by contract through GSA personnel or contract guards, has assumed responsibility for the following: (1) courtroom/corridor security; (2) personal security; (3) extraordinary trial/hearing security; (4) after-hours facility security; and (5) security equipment purchase, installation, and maintenance.

Although personnel costs, equipment maintenance costs, and court have increased, the total amount of resources available has decreased. Consequently, the protection available for the public as well as for judges and judicial personnel has markedly decreased.

The following chart indicates the reductions in deputy marshal resources. Positions designated for civil process are shown because, in reality, resources are routinely "borrowed" to meet security or process-serving demands. Since there is no line item for personal security, all positions assigned to that function must be borrowed from positions designated for other functions such as court security or civil process service.

	Fiscal year—		
	1980	1981	1982
Total number of deputy U.S. marchal positions authorized	1,956	1,711	1,548
		(−254)	(−163)
Number of positions—court security program (including nondeputy U.S. marshals)	747	391	256
		(−356)	(−135)
Number of positions—service of private process program (including nondeputy U.S. marshals)	257	0	0
		(−257)	

The GSA is also experiencing a dramatic reduction in positions. In fiscal year 1980, GSA had 2,776 Federal Protective Officer positions for building security and court security. The following reductions in the number of positions are planned:

	Reduction in positions
Fiscal year 1981 (cut to be made Oct. 1, 1981)	342
Fiscal year 1982 (cut to be made Oct. 1, 1981)	410
Fiscal year 1983 (cut to be made Oct. 1, 1982)	384
Fiscal year 1984 (cut to be made Oct. 1, 1983)	384
Fiscal year 1985 (cut to be made Oct. 1, 1984)	384
Fiscal year 1986 (cut to be made Oct. 1, 1985)	74

By fiscal year 1986, FPO positions will have been reduced to 799 positions, a level almong 70 percent lower than today. Because GSA does not have a line item in its budget for court security, GSA will control where the cuts will be made—whether in court security positions or in building security positions, and building security is a statutorily mandated duty of GSA. GSA program personnel have indicated that GSA will attempt to eliminate FPO's from court security and replace them if possible with contract guards. Contract guards have consistently been viewed as unacceptable by many courts, but the judiciary cannot control GSA's allocation of FPO's between building security and court security.

Mr. Chairman, the Department is as genuinely concerned about this problem as are we. In recent months, we have worked together to identify possible remedies and I am hopeful we will be able to resolve the problem soon. Given the concern you have consistently shown in relation to preserving adequate means for the service of civil process—and the unavoidable linkage between resolution of that problem and resolution of the court security dilemma—I felt the situation described above should be brought to your attention.

COURTHOUSE SPACE AND FACILITIES

This subcommittee's processing of court reorganization legislation in the past two Congresses has provided you with a rather full familiarity with the range of interests which become involved in determining where *new* courthouses shall be established. In your previous hearings we have discussed our policies and procedures for evaluating proposals for new court locations, and I will not burden this record by restating that information. In those same hearings we have described our efforts to insure that *existing* facilities are adequately utilized and our efforts to close those which are not. Since your last hearing on court locations and facilities, we have

completed the second "space utilization survey" in a decade and report to the Judicial Conference. As a result, the Conference in March approved the release to the General Services Administration of underutilized court space in 18 communities in 15 judicial districts. I assure you that my summary description of the exercise does not reflect the work involved. As you know only too well, community feelings about such matters can be very intense. The Administrative Office report to the Conference Committee was five inches thick—primarily due to the flood of community and Congressional comment we received. Our Legislative Affairs Office received so many Congressional inquiries concerning the project that we literally developed a "form letter" in order to respond to them expeditiously. A copy of that letter is attached to this statement as Appendix A; I submit it for the record because it fully explains the manner in which we conducted the survey—and serves as an example of how the Conference performs a specific function with the support of our Office.

I know that you are personally familiar, Mr. Chairman, with the problems we encounter in our efforts to provide courts with needed facilities. Regrettably the case you know best—that of Madison, Wisconsin—is a dramatic example of how confused and difficult matters can become. In the last Congress, the House Public Works and Transportation Committee's Subcommittee on Public Buildings and Grounds painstakingly reviewed almost 30 GSA prospectuses for courthouse projects. Subcommittee Chairman Levitas' dedication to careful scrutiny was an invaluable service to the taxpayers and a thoroughly beneficial experience for us. When the series of hearings he scheduled began, the Administrative Office was called upon to answer for confusion similar to that which your home court has experienced. I assure you that Chairman Levitas probed deeply and thoroughly—and I was very pleased that, as one prospectus after another was processed, identifiable problems were *not* found to be a consequence of Administrative Office errors. Although this subcommittee should be advised of those developments, I fully recognize that remedies must be fashioned by other panels in Congress. I assure you that the courts have as many problems with GSA as do other governmental entities, and that our Office has worked—and will continue to work—with those committees in Congress which are devoting their efforts to finding solutions.

ASSUMPTION OF COURTRAN COMPUTER SYSTEMS

Since its creation, the Federal Judicial Center has been developing computer-based systems to automate various activities of Federal courts. "Courtran" is an umbrella term which collectively includes all of these systems.

In accordance with the desires expressed by the Appropriations Committees of Congress, the Administrative Office will begin assuming operational responsibilities for some of the Courtran systems in Fiscal Year 1982. The systems have proven to be beneficial, and should now enter operational status. Responsibility for management and operation of the 2 Courtran computer facilities, 3 of the 4 large computers, the telecommunications network, approximately 300 computer terminals, 19 operations and support personnel, and $2 million in funding will be transferred to the Administrative Office on October 1, 1981. This will represent a significant expansion in the operational and maintenance responsibilities of the Administrative Office and the beginning of a new technological era for the U.S. Courts. Further, during Fiscal Year 1982/83 six computer applications and an additional six personnel will be transferred from the Federal Judicial Center to the Administrative Office.

Upon assumption of the two computer facilities from the FJC, along with the facility currently operated to support the Administrative Office, we will be operating and manning three separate computer sites. We have requested GSA to locate, on a priority basis, space for the consolidation of these facilities for obvious reasons of economy. This will result in the third branch of government having a single computer facility to support the courts, the Administrative Office, and the Federal Judicial Center. This is a priority need for the present, and offers significant saving in operation and maintenance costs.

ADMINISTRATIVE OFFICE SPACE NEEDS

Of equal importance is our requirement to obtain sufficient space to consolidate all of our personnel, presently located in four widely dispersed buildings. For many years the Administrative Office was located in the Supreme Court Building and thus able to provide better assistance to the Chief Justice. We would welcome the opportunity to again be near the Court, but it is most urgent from a management point of view to co-locate all of our divisions in one physical location.

CONCLUSION

Mr. Chairman, in concluding let me again express my appreciation for this subcommittee's assistance and help on a broad spectrum of issues in the past decade. The last ten years have yielded extensive changes in rapid succession. Proliferating caseloads, increasing jurisdiction, and responsive changes and growth in the federal judicial system have forced the Administrative Office to reorganize and reallocate resources repeatedly. We have literally had to race to keep pace with the changes. While we have managed to do so, we could not have done so without this subcommittee's continuing help. When I look at the problems I have mentioned in this statement—as well as other I have not—I am both amazed by what we have been able to accomplish and concerned about the future.

In the last decade, we have innovatively responded to ever-growing demands for services by the courts that were literally unavoidable. New requirements and new problems will continue to arise—and we will do our best to be innovative and responsive in fashioning remedies. Yet, I sense a very real danger that we may be rapidly reaching a point at which innovation alone will not be enough—and simultaneously confronting a financial crisis. One fact has remained constant in the past decade which I find astounds those who are advised of it for the first time: The entire third branch of government—the entire federal court system—consumes less than one percent of the federal budget in each fiscal year. I have been told that we literally spend less on the third branch in each fiscal year than we spend to build on Trident class submarine. I assure you that the Judicial Conference and the Administrative Office are dedicated to holding expenditures to absolute minimum levels. I do think, however, that appropriations may become a major problem very soon.

Inevitably, many of the problems we confront in the future will find remedies only with this subcommittee's continuing help and guidance. Given the developments in the past decade, while I perceive difficult times in the next, I am confident that our continuing mutual efforts will be constructive and productive.

APPENDIX A

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS,
Washington, D.C.

In response to your recent inquiry concerning a federal courts space utilization survey which is presently being conducted by the Administrative Office of the U.S. Courts and, specifically, a September 29 memorandum from the Director to selected judicial officials concerning that project, let me try to explain what we are doing and why we are doing it.

On October 20, 1978, the President signed Public Law 95-486, "the Omnibus Judgeship Bill of 1978." That Act created more new federal judicial positions (117 district court judgeships and 35 circuit court judgeships) than any previous similar bill had ever created; in one legislative action Congress increased the number of federal judicial positions by a factor of 35 percent. On November 6, 1978, the President signed Public Law 95-598, "the Bankruptcy Reform Act of 1978," which authorized a completely new bankruptcy court structure and provided for its full realization by April 1, 1984.

When the Administrative Office first testified before the House and Senate Appropriations Committees in early 1979, and advised those committees of the consequences those bills would have in terms of federal court space and facilities, the committees immediately recognized the impact which those consequences would have upon expenditures of appropriated funds. Both committees urged the Administrative Office to take action as soon as possible to not only limit any increases in expenditures for space and facilities, but to also identify any facilities which might be released to G.S.A. for reassignment to other governmental functions.

Under 28 U.S.C. § 604 the Director of the Administrative Office acts "under the supervision and direction of the Judicial Conference of the United States." Paragraph (12) of section 604 expressly authorizes the Director to provide accommodations for the courts. In the performance of that responsibility, however, the Director is not only generally subject to the supervision of the Judicial Conference, he is expressly required to provide facilities for the courts, through G.S.A., only upon the approval of the judicial council of the federal judicial circuit in which a facility is located. See 28 U.S.C. § 142 and § 332.

The Judicial Conference conducts its business through a committee system somewhat similar to that relied upon by Congress. Policy issues related to court accommodations are within the juridistion of the Conference's Committee on Court Ad-

ministration, which in turn acts upon recommendations prepared by its Subcommittee on Judicial Improvements. When the Congressional Appropriations Committees asked the Director to limit space and facilities expenditures, he advised the Conference Subcommittee on Judicial Improvements of the request. In June of 1979 that subcommittee ordered him "to conduct a detailed utilization survey of all judicial space towards the end of recommending to the subcommittee eventual Judicial Conference discontinuation or increased utilization of specific space."

On September 24, 1979, Conferees for the House and Senate Committees on Appropriations specifically directed that "all space persently owned or controlled by the Federal Government be utilized to the fullest extent possible prior to the rental of additional space." The Conference Report which they then filed on the State, Commerce, Justice, and Judiciary Appropriations Act for fiscal year 1980 also stated:"

The Conferees further direct that specific justifications be developed by the Judiciary and General Services Administration for the additional space requested for the Omnibus Judgeship Act and the Bankruptcy Reform Act, including location, amount and kind of space and related information and report to the House and Senate Committees on Appropriations prior to the rental of additional space."

Furthermore, the conferees expressed their concern "about the very low utilization of certain existing courtrooms" and directed that "every effort be made to utilize all courtrooms to the fullest extent possible before funds are used to rent or construct additional space."

On October 15, 1979, the Director of the Administrative Office notified all courts of the conclusions reached by Congress, and of the action taken by the Conference's Subcommittee on Judicial Improvements in June of 1979. He requested their assistance in conducting the utilization survey ordered by the Conference subcommittee. He specifically asked that detailed information be tabulated and forwarded to him for use by the subcommittee at its meeting in January of 1980. That request was designed to gather information on utilization of facilities during the month of November 1979 only. Following the subcommittee's review of the November tabulations. A second survey covering the months of February, March, and April 1980 was conducted.

In late June the Subcommittee on Judicial Improvements reviewed the results and directed that recommindations based upon the three-month survey "be submitted to the chief judges of the affected courts for their comments, and then to the appropriate circuit councils for their consideration." On September 29, 1980, the Director took that action. The document which he distributed on September 29 generated the communications you have received expressing concern about the "closing" of court facilities. A copy of the document itself is enclosed. No court facility will be closed upon the basis of the recommendations contained in that document alone. It is deliberately designed to encourage responsive comment from courts and circuit councils. On October 15, 1980, the Director responded to an apparent widespread misunderstanding of the purpose to be served by the September 29 document with a supplemental memorandum. A copy of that October 15 memorandum is also enclosed.

When comments have been filed by courts and councils, the preliminary recommendations contained in the September 29 document will be fully reviewed—and revised where appropriate—by the Conference's Subcommittee on Judicial Improvement. As Mr. Foley's October 15 memorandum emphasizes, the Administrative Office will make every effort to obtain comments from each court and council, and all material submitted will be reported to the subcommittee by December 15, 1980. The subcommittee will meet and take action on January 5, 1981. If reasons exist to revise recommendations contained in the September 29 document, every concerned court will have an opportunity to submit those reasons for evaluation.

Nor will the subcommittee's findings in early January be conclusive; the "revised or "interim" recommendations approved by that panel will be reviewed by the full Court Administration Committee on January 26, 1981. Action taken by the full committee will be presented to the Judicial Conference in March. Only when the Judicial Conference has acted upon recommendations presented to it will they become final recommendations as for action by the Director. Furthermore, while the Conference may authorize the Director to act to implement those final recommendations immediately, it might also merely direct their transmission to the Congress as a part of the report the Director is required to make to both Appropriations Committees, or direct other action. Until March of 1981, we will not know what acton the Judicial Conference will take.

I hope this information is responsive to your request. Should you have further questions concerning the process we are using or its objectives, please have a member of your staff telephone me at 633-6040.

WILLIAM JAMES WELLER,
Legislative Affairs Officer.

Mr. FOLEY. In summarizing the prepared statement, I wish only to point out one or two factors. One is that, when we appeared here 2 years ago, that was just before the Chief Justice, on the authority of the Judicial Conference and at the request of the House Committee on Appropriations, appointed an ad hoc committee of three judges, chaired by Judge Butzner of the fourth circuit, to look into the operation of the Administrative Office and to report back to the Conference on what seemed like very rapid growth in a 10-year period of our operations.

Judge Butzner's committee studied all of the written data we could submit to him, and interviewed all of our senior staff. In their report to the Judicial Conference, the committee members said—and I quote their comment on page 4 of my statement "that the operations of the office were, in effect, no larger than the requirements of the past 10 years, when some 35 statutes added to our responsibilities." We have now in the office, as of the beginning of last month, 497 employees. I hope we grow no larger than that in the foreseeable future.

In other words, we are, among Government agencies, a relatively small office. It is true that there will be additional burdens given to us. As my report states, we will commence within the next fiscal year, to take over certain developmental operations of the Federal Judicial Center in the computer field, known as Courtran—because it is the view of the Center and of our office and of the Appropriations Committee, that the development phase of the operation is now completed, and there remain only operational factors. Therefore, they properly should be in the Administrative Office rather than in the Federal Judicial Center.

We have several outstanding problems which I have tried to outline for you in my prepared statement. Probably the most vexing one is, I would say, the adaptation to the rapidly mounting caseload in the bankruptcy field. As of the year ending March 30, the 12-month period ending March 30, bankruptcy estate filings have increased 65 percent. The figures we presented to the Appropriations Committee during the first week in February were out of date by April. This is a problem that we are facing with a limited staff in the clerks' offices, in spite of the many, many requirements for the clerks' offices which the Act imposes.

Mr. KASTENMEIER. Mr. Foley, let me interrupt to ask at this point, is that an economic comment on our times, or is that the result of a more liberalized bankruptcy act?

Mr. FOLEY. I suspect it is a combination of both, Mr. Chairman. Of course, we are also living in an age of lawyer advertising. You can pick up almost any newspaper, and you'll see advertising, "Clear yourself of debts. File bankruptcy. See attorney so-and-so."

I suppose that might have some impact too.

Mr. DANIELSON. Mr. Chairman, may I inquire along the same line, aren't there a great many more chapter 13 filings than there used to be?

Mr. FOLEY. Yes, sir. Very much so.

Mr. DANIELSON. I think that is attributable to the law, rather than the circumstances in which we live. I'm only reflecting feedback that I get from my home area.

Mr. FOLEY. Well, I have heard bankruptcy judges express the same view, sir.

Another vexing problem we have has been with us for many years—but it's getting more serious—and that is, the court reporter problem. I have gone into some detail in my statement as to the nature of the problem. Court reporters are statutorily sort of a hybrid in the system. They are Government employees in one sense of the word, and they are not in another sense of the word. Under the Bankruptcy Act there are more restrictions on court reporters than there are on court reporters in the district courts. For example, a court reporter in a bankruptcy proceeding is not reimbursed for copy as, of course, the district court reporter is. We have this problem very much under examination right now.

The Subcommittee on Supporting Personnel of the Judicial Conference which will meet in about a month, is going to devote most of its meeting, as a matter of fact, to an examination of this problem, in hopes of being able to recommend some remedial action to the Judicial Conference. Meanwhile, we are awaiting a report of the General Accounting Office, which has been examining the court reporter system around the country. I am sure it will be critical, and I am also sure that it will be beneficial to us.

Beyond that, Mr. Chairman, I'll leave my report to the committee to my prepared statement.

Mr. KASTENMEIER. Thank you, Mr. Foley. Actually, as I stated at the outset, and I'll state again, I want to commend the statements in their entirety to the subcommittee members to insure that they do read them, because your brief presentations, I think, are far more amplified and discursive of these problems than your written submissions, and I do hope that our members take advantage of that fact.

Judge Hunter, you indicated that historically, for all practical purposes, the Judicial Conference was commenced in 1922, with the creation of the Conference of Senior Circuit Judges. That is the beginning date, in modern times, of the Conference as we know it today.

Judge HUNTER. Yes. sir, that is correct. Then of course, the enormous changes I reviewed came really in 1938 and 1939. They evoke memories for me, because at that stage I was just out of law school, and a law clerk for the chief judge of the eighth circuit court of appeals, Judge Stone. So I was an eyewitness to many of the great changes that took place during that timespan.

Mr. KASTENMEIER. And the Administrative Office was created, you indicated, in 1939.

Judge HUNTER. Yes, sir.

Mr. KASTENMEIER. So that we understand fully the symbiotic relationship between the Administrative Office and the Judicial Conference of the United States, is it correct that the Administrative Office serves under the supervision and direction of the Judicial Conference?

Judge HUNTER. That is correct.

Mr. KASTENMEIER. The Administrative Office does not establish policy, but it serves as the administrative arm of the Judicial Conference.

Judge HUNTER. Yes, sir, it helps to carry out the policies, which the Judicial Conference decides upon and, of course, it provides needed staff.

Mr. KASTENMEIER. In brief, you made some reference to the fact that our sister subcommittee, not this subcommittee, authorized two new seats for bankruptcy judges in the Judicial Conference, this was done by statute, even though these are not article III judges; is that correct?

Judge HUNTER. That is correct, and they will be the only ones on it who are not article III judges.

Mr. KASTENMEIER. I regret that. I am speaking only for myself, because I think it sets a terrible precedent. Unless we as legislators conscientiously know what we are doing in the long term, we often create unfortunate precedents. This change would suggest that the magistrates and other supporting judicial personnel would also have a right to claim membership in the Judicial Conference. Now, if that is what we wanted to do, that is one thing—but it seems to me this sort of proceeded through the back door. I can understand someone being interested in the limited issue of a new bankruptcy law, but the result, it seems to me, was that we affected the judicial system in ways that were not—if intended—were not understood by all.

I personally don't know what particular justification there is for bankruptcy judges or others to serve on the Judicial Conference. I don't know if you want to make any further comments on this unfortunate issue.

Judge HUNTER. Simply to note that the Judicial Conference certainly did not put that language into the bill.

Mr. KASTENMEIER. Did the Judicial Conference have any comment about it at the time?

Judge HUNTER. May I take a moment just to advise——

[Pause.]

Mr. Weller will respond.

Mr. KASTENMEIER. Yes.

Mr. WELLER. Mr. Kastenmeier, as originally passed by the House of Representatives subcommittee, the bill, of course, provided article III status for the bankruptcy judges.

Mr. KASTENMEIER. Then it might have been possibly——

Mr. WELLER. I think that was the genesis of the misunderstanding and, of course, there were three seats provided by that version of the bill, which the Conference opposed.

Mr. KASTENMEIER. And when it reverted to article I, this particular deletion was not made in the act.

Mr. WELLER. Well, there were some adjustments made. Originally, three seats had been mandated for the Judicial Conference; as a consequence of the compromise that was reached between the Senate and the House that number was reduced to two.

Mr. KASTENMEIER. Mr. Butler, who served on the subcommittee, may want to make some comment.

Mr. BUTLER. Yes, Mr. Chairman. I was a member of that subcommittee that you were so critical of, and——

Mr. KASTENMEIER. I happen to be a member of that subcommittee at this point in time.

Mr. BUTLER. Oh, yes, you were conspicuous by your absence in the deliberations on that question.

Mr. KASTENMEIER. No, I was not a member at that time; I am presently a member.

Mr. BUTLER. What we wanted to do was elevate the consideration of the bankruptcy problems which I think statistically we found make up quite a substantial portion of the litigation of the Federal court system, and impact on individuals in this country probably more than any other aspect of the Federal court system. It was our feeling that they ought to be part of the deliberations of the Judicial Conference.

Then the article III change in status during the legislative trip, of course, created some problems with breaking the purity of the Judicial Conference group, but it was our assumption that the designation of article III status was a legal status. It was not the transition to high and intellectual capacity probably no more than it was an emotional experience. We felt the bankruptcy judges could make a contribution even though they were not designated as article III judges. That was the thinking behind it.

Mr. DANIELSON. Mr. Kastenmeier, could I get into this fight?

Mr. KASTENMEIER. Yes.

Mr. DANIELSON. I don't stay out of many of them. I remember that experience very well, and Congressman Railsback, as I recall, did keep them from being article III judges. Although most of my wounds have healed there's a lot of scar tissue remaining. Anyway, our architecture is pretty good. It's only the details we would get screwed up, but we do that frequently.

Mr. KASTENMEIER. If, as Mr. Butler reports, most citizens have come in contact with bankruptcy problems in terms of the Federal judicial system more than any other problems if that was not true 2 or 3 years ago, apparently it is true today as a result of that act.

I thank you very much. I will concede.

Mr. BUTLER. You do not concede what I stated. It is not the result of the act, although that is one of the conditions in which our economy finds itself. Fortunately we have a device for dealing with it. Now, as a result of the division that led to the Bankruptcy Act, we have a situation which can deal with the economic consequences of unfortunate situations.

Mr. SAWYER. Mr. Chairman, if I may just comment.

Mr. KASTENMEIER. Yes.

Mr. SAWYER. I think this act has created a kind of a monster. I was called by a professor of law from the University of Wisconsin regarding the act. The reason he called me was because I had been in a law firm where his son was a young partner. The professor was distressed, because law students were graduating from the University of Wisconsin, and then proceeding down to the bankruptcy court under chapter 13 and discharging their student loan obligations. In addition credit unions are all over my back. They're all going broke because of people who have not been laid off or fired, and still have their former jobs, but are enjoying the monster we apparently created.

I used to be quite conversant with the old bankruptcy law, but I have to say that I have not yet become conversant with the new act, but I have started to because of the constituent interest.

Mr. KASTENMEIER. I must say before the membership on the subcommittee that we had Bob Drinan on the committee in the last Congress, and he took the same position as Mr. Butler. He was very supportive of the other subcommittee's work on bankruptcy. But from our perspective, I would say that this is only one perspective, on this particular subcommittee there was a great deal of reservation about the total impact of that particular bill. I might observe that Mr. Foley's prepared testimony, devotes itself to the problems of bankruptcy administration in large measure—as far as space, court reporting, staffing requirements, the training of trustees, workload, and so forth. So I think we are still in the process of growing pains as a result of the 1978 act. Not that anyone will argue that very substantial changes were called for in our bankruptcy law. We have not yet had, perhaps, time to fully judge it.

I am interested in the question of the number of judges in the future and some other questions. I can present them to you in a moment, but I do want to yield to my colleagues. I yield to the gentleman from Michigan.

Mr. SAWYER. You know, I have to confess that I've practiced law for about 30 years, and quite a bit of it in the Federal courts, and I don't quite understand this Judicial Conference setup. Now, I am a so-called life member in the Sixth Circuit Judicial Conference. Is there a national Judicial Conference, too, in addition to the one they have in the sixth circuit; and presumably other circuits and how do the various conferences interact?

Judge HUNTER. Each of the 11 circuits has its own circuit judicial conference, principally to look over the problems that arise mainly in the conference area itself. Out of that review of those problems come recommendations which are forwarded to the Judicial Conference of the United States. Each circuit has its own conference and has a great deal of flexibility in developing the agenda of its own conference. All of the circuits, to some degree—and some to a large degree—have lawyer participation because, of course, the bar is interested in both input and learning what the conference does.

But to answer your question, most of the action of the national level does go before the Judicial Conference of the United States through recommendations.

Mr. SAWYER. Does the national conference also have what they call lawyer delegates, which is what they have in the sixth circuit?

Judge HUNTER. No, sir. The Judicial Conference of the United States restricts itself to its own membership with appearances by the Attorney General of the United States, selected members of his staff who, by custom, have always appeared, and others who appear by invitations issued by the Chief Justice. In recent times invitations have gone to the chairman of the two Judiciary Committees and other Members of Congress with an expertise or a high personal interest in what is going on.

Mr. SAWYER. Well, again this is just ignorance on my part, but what is the circuit judicial council? How does that interplay with the Conference, or does it?

Judge HUNTER. The circuit judicial council is today composed of the judges of the particular court of appeals of a circuit, and all of their functions which are not adjudicatory functions fall into the council's jurisdiction. In other words, it is the administrative boss

of the circuit, so to speak, and it takes up such problems as the status of the dockets of the various judges within the circuit, the need for more expeditious handling of the dockets, checking to be sure that all judges are reasonably up to date and don't have a lot of cases that are 3 years old or older. That type of thing.

Mr. SAWYER. I come from Michigan, and in our State systems the State supreme court has what we call superintending control, and that goes down the echelons of various courts within the State system. But I understand that the Federal court system does not have what we call superintending control. For example, the circuit cannot, in effect, order or direct in an authoritative way, a district judge to do or not to do something. Am I correct in that?

Judge HUNTER. Mr. Sawyer, that is a large question, and I'm going to take a good bite of it. The situation—please understand that I'm giving my personal opinion now—the situation is such that I think the original intent of the Congress was to provide that the circuit councils have supervising authority over the district courts and the judges of the circuit councils themselves. However, it hasn't worked out that way as a practical matter.

As I say, there were a substantial number of district court judges in particular, and some circuit court judges, who felt that that authority was lacking and that section 331 and 332 of title 28 needed amending to spell those powers out more explicitly. To some extent that has been done in the judicial discipline bill which Congress passed.

Other judges think that the authority is sufficiently complete, reasonably well spelled out. My personal view is that it wouldn't hurt to have it more explicit so as to remove any possible doubt. Mr. Weller.

Mr. WELLER. Congressman, in direct response to your original question, which led up to this one, let me try to describe the structure as having a Board of Directors in the Judicial Conference. Members of that board, of course, are chief judges of each of the circuit court of appeals, and they're also the presiding officers of the circuit councils. Circuit conferences are the units involving elements of the community—primarily the bar at the circuit level. So you can think of it as a three-tiered structure. The bar gets its input at level three, which goes up through the circuit council, through the chief judges, to the Judicial Conference of the United States. Judge Hunter was mentioning the ability of a circuit council to impose its will on a district court, and the statute does clearly state, in section 332, that all employees and officers shall obey orders of the council. This subcommittee, last year, in putting together the discipline legislation, vastly strengthened that authority and also strengthened the Judicial Conference's authority to issue orders which shall be obeyed in the disciplinary complaint area.

What the conference does not have statutorily is the authority to compel obedience by an order outside the disciplinary area.

Mr. KASTENMEIER. I was going to ask that myself because really you have sort of three organizations. You have the Judicial Conference with the Administrative Office as an adjunct; you have the judicial councils of the circuits which, as Mr. Weller says, we last year gave the immediate and regional power over judicial discipline; and then you have these circuit judicial conferences. The judicial councils have real authority to compel witnesses and to issue orders, and so forth, that not even the Judicial Conference of the United States has. The question is: Is this the best arrangement or organization?

Mr. SAWYER. I recall that I was on the subcommittee when we were working on this, and it was never completely clear to me what the tiers of authority in this area were. I keep confusing in my own mind the judicial conference in the sixth circuit, where I live, with the national judicial conference and then the judicial councils and so on. I think you have helped me very much. Thank you.

Mr. KASTENMEIER. It is very confusing because, actually, the Judicial Conference of the United States is exclusively judges and the circuit judicial conferences are not. The circuit judicial councils and the Judicial Conference of the United States are closely related bodies. It seems to me that the circuit judicial conference nomenclature is confusing.

Mr. SAWYER. In our area, in the sixth circuit, each district judge can appoint one lawyer delegate, and each circuit judge can appoint two. If you are a lawyer, and are appointed five times, then you become a life member, and you don't need to be appointed any more. So I don't know what you do other than go to a meeting for 2 or 3 days where you talk with all the judges and lawyers and perhaps convene some panels that probably vote on various issues. I don't remember specifically, but that was my total experience with judicial conferences, and that arrangement has always confused me, especially when you start getting into this national conference and so on. You have helped clarify it for me.

Mr. KASTENMEIER. Gentlemen. Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

You mentioned that bankruptcy filings are up 65 percent. You mean over last year or over what period?

Mr. FOLEY. That is for the year ending March 31, 1981.

Mr. DANIELSON. That would be compared to the previous year.

Mr. FOLEY. Compared to the previous year, yes, sir.

Mr. DANIELSON. On the court reporter problem, do you reach in your study the question of the use of shorthand reporters in taking of depositions? Is that being reached at all in the study?

Mr. FOLEY. That has not been as much of a problem, sir, as the actual trial work—court reporters in the trial of a case. Our study is more concerned with the actual courtroom performance.

Mr. DANIELSON. I can understand why it would be. It's an internal problem of the court system. Although your deposition takers work outside the structure of the court, they are certainly a part of the cost of administering justice. My concern is based on the fact that I am very much worried that having access to the court today is almost beyond the reach of anyone other than an individual—almost anyone concerned—who does not have a legal tax writeoff on litigation. I think one of the many factors which contributes to the problem is the cost of discovery in pretrial work—and depositions are unbelievably expensive. I don't want to dwell on the point, except it is always on my mind.

Mr. FOLEY. I might say, sir, that we are watching very carefully an experiment now going on in the Superior Court here in the District of Columbia using electronic recording for all proceedings.

Mr. DANIELSON. Court as well as discovery?

Mr. FOLEY. Yes, sir. It's very much in the experimental stage now, but——

Mr. DANIELSON. Is it strictly audio or audio visual TV tape?

Mr. FOLEY. It is audio entirely, I believe. It is a system that is used with great success, I am told, in courts of Australia and New Zealand.

Mr. DANIELSON. I know no reason why it can't work out well, except for the resistance of those who would be displaced. I think we might have to do a little displacing. I hope—if you have any ideas—I hope you will feel free to let us know, because we believe it might help.

I have a different question on bankruptcy. I know that there have been some problems as to whether the structure and the creation of the U.S. trustees and maintenance of trusteeship is working out. Can you tell us anything on that?

Mr. FOLEY. We have no firsthand knowledge of how the experimental program which is under the supervision of the Department of Justice is working. That covers, I believe, 12 districts, does it not, Jim?

Mr. MACKLIN. Eighteen.

Mr. FOLEY. Eighteen. Seventy-four districts are operated as they have been in the past, and we are operating those districts through deputy clerks—under the supervision of deputy clerks.

Mr. DANIELSON. Well, I assume you are watching it carefully, and I presume the Justice Department is, as well. Maybe we can learn something about it. I'm talking about the U.S. trusteeships. I have heard criticism, and I don't know whether it is well founded or not.

The other point, I notice that in your structure in the table of organization you have the probation division. Would you—what functions do you still perform on probation? It seems to me that we transferred a part of that function to the Department of Justice a couple of years ago.

Mr. MACKLIN. Mr. Danielson, I think it was the other way around. You transferred some of the functions of the Justice Department to our probation service. For example, the Drug Aftercare program that the Department of Justice had been running was transferred to our probation system, and for the last 2 years we have been operating the Drug Aftercare program.

In addition, of course, the primary function of the probation service is to oversee both probationers and parolees—military parolees, as well as parolees from Federal prisons. That is the basic function.

Mr. DANIELSON. Do you feel free to, or do you have any ideas as to whether probation belongs in the court system? I see a smile.

Mr. MACKLIN. That is one that was faced a number of years back when the system was first moved from the Justice Department into the judiciary, and I am not sure you want to get into that one again at the moment.

Mr. DANIELSON. I don't want to cause any embarrassment to anyone here, but I have always had a problem identifying probation and parole as being a case or controversy. It troubles me a little. Maybe I am wrong. I interpreted something out of those smiles.

I am going to add this. I have nothing but respect for the way you do your job. I think you do extremely well. I think you are sometimes a little shy about complaining. I wish you would feel free to get in touch with us. I think most of us would like to help you resolve your problems, but we don't always know what they are.

Mr. MACKLIN. We've tried to point out some of them in Mr. Foley's prepared statement.

Mr. DANIELSON. I confess I have not read it. I just received it now. But I am going to read it. I think maybe this is one of the worthwhile sets of papers I have received this year. Thank you very much.

I yield back the time.

Mr. KASTENMEIER. Thank you.

Mr. Butler?

Mr. BUTLER. Thank you, Mr. Chairman, I have a number of questions, comments, and things of that nature and you will just have to stop me when I have used up my time. But I want to say, just for the record, and I don't want to appear too defensive about our work in bankruptcy—I think it is a monumental success. It is a tribute to the independence of the legislative branch of the judiciary that we were able to pass it, and I think that it has some problems. This committee is addressing them slowly, and anything you can do to encourage their active and prompt consideration of the problems that have arisen would be appreciated by those of us who are trying to get action out of our subcommittee on that issue.

I think there are some corrections that have to be made, that ought to be made, and they are indicated and I am anxious to move to them, which brings me to a bankruptcy-related question. Before I get to that, the question you raised, Mr. Chairman, and I think also the gentleman from California, about whether we or the subcommittee on monopolies has jurisdiction over the determination of how well the U.S. trustees are doing and how well the administrative court supervised trustees are doing is an important one.

I would like that question resolved, and I would like either that subcommittee or this subcommittee to take a look in more detail than we have here, at just how well those two comparative systems are working.

So I hope you will give some consideration to that, and decide which subcommittee ought to be pursuing those parallel tracks and then go forward because I think it is pretty important that we take a look at it.

Our Monopolies Subcommittee had a hearing on April 1 on the progress of the advisory committee on the bankruptcy rules. Mr. Spaniol testified. It was my impression, Mr. Foley, following that that the Administrative Office was as committed as we were to lifting the statutory limitation on the availability of funds for the study of the rules of practice and procedure, so that the work of

the advisory committee could move forward on an accelerated schedule. This was agreed to in the course of that hearing.

My question to you is—and maybe I am wrong, but I have the distinct impression that the Administrative Office did not follow through with a written request to the chairman of the Appropriations Subcommittee considering the supplemental bill, which it seems to me would have been appropriate.

As you know, the supplemental appropriations bill has now moved out of that committee without the lid taken off. What I want to get out of you is some kind of a commitment that even though that lid has not now been removed, that you will make available, or the Administrative Office will make available to the Advisory Committee on Bankruptcy such funds as may remain for fiscal year 1981 for the study of the rules to demonstrate this commitment to expedite the promulgation of these very important rules.

Mr. FOLEY. Mr. Weller, I think, can bring us up to date on that, Mr. Butler.

Mr. WELLER. Congressman Butler, Mr. Foley signed yesterday, as a matter of fact, a letter to Mr. Rodino advising you that we would go forward with the schedule which you agreed upon in open testimony with Judge Aldisert on April 1—even though the ceiling has not been lifted. I would like to respond just for a moment—dirctly to your question concerning what action we took to get that ceiling lifted. In cooperation with the Chief Counsel for the main Judiciary Committee, we took no formal written action. We relied upon a letter from Mr. Rodino to Mr. Smith, which we were assured would do the job.

Mr. BUTLER. You thought it would.

Mr. WELLER. When the Appropriations Subcommittee checked with us by telephone, we assured them that we fully supported the views expressed by Mr. Rodino.

Mr. BUTLER. Well, thank you very much, and I appreciate your letter, and I am sorry. If I had known that, I would not have raised this question.

Mr. FOLEY. I may add that at our main hearings on the appropriations we also urged that the ceiling be eliminated.

Mr. MACKLIN. For fiscal year 1982.

Mr. BUTLER. I think that is indicated, and I hope you continue that. I see no reason why that sort of discretion should be limited by the appropriations bill. As you know, we are not on the Appropriations Committee.

I would like to turn to a problem in your report dealing with the court reporting services. It seems to me that that is a long overdue reform, and I notice that you are sort of holding your breath until the General Accounting Office comes up with some formal suggestions in this area. This is but one of the problems the Administrative Office has. Why do we have to wait for the General Accounting Office to come up with a suggestion in this and other areas? Don't you think that we ought to have a continuing flood of suggestions from your office as to what the Congress ought to be doing to improve the administration of the courts?

Mr. FOLEY. We are not holding up anything waiting for the General Accounting Office. We are having our major meeting on this in June with the Subcommittee on Supporting Personnel of the Judicial Conference. Actually, we have been gearing up all of our material to present to that subcommittee. Hopefully there will be a resolution and recommendations to the Judicial Conference emanating from that subcommittee meeting.

Mr. BUTLER. Well, on that point then—how is it developed? The copyright for the transcript is owned by the court reporter. Why do they have the rights to resell those? And why is it that if one reporter can make $200,000 a year from the sale of transcripts—nothing personal, young lady—if they can make $200,000 from the sale of transcripts, why is not this valuable asset reserved by the court system itself for resale?

Mr. FOLEY. This is what the statute provides, sir.

Mr. BUTLER. This is what I want to know. Is this the statute?

Mr. FOLEY. Yes, sir.

Mr. MACKLIN. Section 753, sir, of title 28.

Mr. BUTLER. Have you a recommendation with reference to repealing this section?

Mr. FOLEY. Not yet.

Mr. BUTLER. Well, thank you. I would pursue that then, at a later time, if I can.

Mr. Chairman, have I still got some time left?

Mr. KASTENMEIER. Yes.

Mr. RAILSBACK. Your second 10 minutes.

Mr. BUTLER. I have not had a chance to read this as carefully as I might, but it seems to me that one of the problems of implementing the Bankruptcy Act is turf problem of space. With all due respect to the judiciary, protection of one's judicial turf is nothing compared to the battle that they will fight for the protection of a few square feet of courtroom space.

I've seen the problem developing throughout, that we are having parallel court facilities of the requisite height, depth, and whatever other dimension an area has——

Mr. DANIELSON. Length.

Mr. BUTLER. Well, I was concerned with the amenities that go with the courtroom. We have a separate men's room for the bankruptcy court and a separate men's room for the courtroom for the district courts, and all of the facilities are going along parallel tracks.

What is there in existing law, that would permit the Administrative Office to resolve these differences in the taxpayers' interest? Or are we dependent on satisfying the judges before we can go forward with the resolve of these differences?

Mr. FOLEY. I'm afraid we are dependent on satisfying the General Services Administration, sir. That is the root of our problem.

Mr. BUTLER. You mean the regulations? Or are they statutory?

Mr. FOLEY. Operational, if I may say so.

Mr. BUTLER. Yes; you may say so, if you've got something to support it.

Mr. FOLEY. We've got this problem from one end of the country to the other. I think Mr. Kastenmeier can tell you firsthand what we've faced in his area of the country. Many times we're not able to put the bankruptcy court in the same building with the district court. There just isn't enough space.

And of course, if there is enough space, it means another agency must leave the courthouse, and the other agency isn't willing.

Mr. BUTLER. No; I want to go back a step further. I want to know why it is that there are not devices available so that one courtroom can serve both the needs of the bankruptcy judge and the district court judge. Who is the traffic cop there?

Mr. FOLEY. Well, it used to be that the chief judge of the district was, shall we say, the traffic cop. But now, the bankruptcy judges, in some instances, feel that they are completely independent of the district court, and that they do not have to take their leadership from the district court. In other districts, it is quite the other way.

Mr. BUTLER. All right. Now, you are restating the problem that I again stated.

Now, what I am saying to you is: What solution do you have to recommend, that we can implement in this area?

Mr. FOLEY. It is just persuasion that we can use, both with the judges and with the GSA people. I have a strong view that more of our problems are with the GSA people than they are with the judges.

Mr. BUTLER. Is there, within the court structure of the U.S. court system, a person or an institution which can say to the U.S. district judge and the bankruptcy judge, "You solve your problems, or we will provide a schedule of use for that courtroom"?

Mr. FOLEY. Well, the judicial council of the circuit is probably the only body that has that authority. We would work through the chief judge and try to assist him in doing the job.

Mr. BUTLER. Well, Mr. Chairman, the reason I bring up this problem, is because we are on the threshold of building a new Federal building in my area. The present plans indicate that we're going to have a U.S. bankruptcy courtroom and a district courtroom, and neither the bankruptcy judge or the district court judge lives in that city. They will be visiting there, maybe 3 of the 5 days each, per month, at the most.

Now, that, to me, is a system that ought not to exist.

Mr. RAILSBACK. Would you yield?

Mr. BUTLER. Certainly.

Mr. RAILSBACK. I wonder if we couldn't name that bankruptcy courtroom after Caldwell Butler.

Mr. BUTLER. I'm not dead yet, but I appreciate your interest.

Mr. RAILSBACK. They do it on a lot of other committees. Why couldn't we do that. I wouldn't mind having that.

Mr. BUTLER. That would be all right as long as we shared it.

Mr. RAILSBACK. Along with the post offices we could call it the Caldwell Butler courtroom.

Mr. DANIELSON. Is there going to be a magistrate's room in that courtoom?

Mr. BUTLER. That is not a problem. They don't have quite the same problem with magistrates, because the clear line of authority is there.

Mr. Chairman, I mention this because I think it is a real problem and the response of Mr. Foley indicates to me that it is not a problem that they want to address. It is creating a problem, and I think our subcommittee has a responsibility to pursue this issue in some detail. I just pass that forward for what it is worth.

My time isn't gone, but I yield back.

Mr. KASTENMEIER. Well, it is a problem. Perhaps we should statutorily state that the chief judge of the district is the person with authority to represent all administrative needs of everyone in the district including the bankruptcy judge. Maybe that would tend to unify presentations somewhat.

Mr. BUTLER. Mr. Chairman, if I may claim——

Mr. KASTENMEIER. Yes.

Mr. BUTLER. I think that is sound. I have a real question about that. We're talking about adding new judges all the time, and one of the reasons we need new judges is because they spend all of their time doing things like deciding the various details for a courtroom. It seems to me that the Administrative Office, if it is going to admininister the court system, ought to have the responsibility for resolving these questions about when the courtrooms will be used, instead of giving our judges more and more judicial responsibility, until we have to create new judges. So I wonder whether that is the correct——

Mr. DANIELSON. Would the gentleman yield a minute of his unused time?

Mr. KASTENMEIER. Another comment: Historically the judges always have had that responsibility, and I think the last thing you would want, and many other members would want, is to centralize that authority and that discretion in a national Administrative Office. They are helpful, but they should not have the ultimate decisionmaking authority. That would not be very popular, I don't think, with this Congress.

Mr. DANIELSON. Mr. Chairman, could I use a minute of Mr. Butler's unused time?

Mr. RAILSBACK. And some of my time.

Mr. DANIELSON. And some of your time. Thank you, Mr. Railsback.

I have a feeling, deeply seated, that it wouldn't be very easy to implement the change that Mr. Butler has suggested, although it might be very wise. Traditionally a judge has his own courtroom.

I think architecturally when they build courthouses the judge's chambers are somehow or another next to the courtroom. There is a physical connection. And you were talking about turf a while ago. I would say that the judge's chambers, his clerk's chambers, his secretary's chamber, and the courtroom are an integrated unit. And the tradition as well as the territorial imperative that you would have to combat, you would have to have courtrooms be a, you know, come one, come all, we'll assign you courtroom No. 3 today and you get No. 7. I think that we're almost behind the law of gravity there.

Mr. KASTENMEIER. As a result of the several comments made here, it does seem to me that this question perhaps can be pursued in the very near future at a different time. If we devote ourselves entirely to it, it may well be that the GSA and others may also be called on for some comment, because this question of facilities and the problem we confront in Virginia, as well as in California and Wisconsin, I can assure you it is substantial and it is very pressing.

We have, it seems to me, as a result not only of the Bankruptcy Act, but of the Judgeship Act and many others, compounded our

facilities problems. At the same time, we are facing a time of presumably cutback in what we invest federally. So we should look at it from our own perspective as a committee interested in the best possible operation of the Federal judiciary.

Mr. FOLEY. I would add, if I may, sir, that we have had considerable success recently just through persuasion in cutting down the number of courtrooms. There are many more senior judges today than there used to be. Senior judges quite frequently use another judge's courtroom. When they hear cases some courthouses don't have enough space, and a courtroom cannot be assigned just to a senior judge. Normally around the country a senior judge uses another judge's courtroom.

Mr. KASTENMEIER. I know the Chief Justice himself is conversant with this problem and has had discussions with various judges about what the real minimum needs are in terms of space. The Chief Justice recognizes the problems.

I would like to yield to the gentleman from Illinois.

Mr. RAILSBACK. I want to begin by thanking Mr. Foley and Mr. Weller for dealing with an internal complaint that I had relating to one of the internal functions of their operation, I think they did a good job of investigating and promptly resolving the complaint.

I would like to ask what has happened to the experiment with arbitration out on the west coast. Maybe, Judge, you are not familiar with that particular project. What is entailed was using the Federal courts with a different set of guidelines relating to jurisdictional amounts and using arbitrators rather than judges to solve some of the relatively, I guess, minor disputes.

Judge HUNTER. Congressman Railsback, I do have some familiarity with it. But Mr. Macklin has a better grasp of the overall current situation, if I may pass that question to him.

Mr. MACKLIN. We have three separate district courts that are experimenting with arbitration systems. It has been going, however, for such a short period of time that there haven't been enough cases that have been through the systems to know whether or not we want to recommend a continuation or expansion of arbitration. Of course, it's operating right now under rule of court, as opposed to under statute, and it will go to Judge Hunter's committee eventually, the Court Administration Committee, through one of his subcommittees.

Mr. RAILSBACK. Is it being utilized?

Mr. MACKLIN. It is being utilized, and are having some success with it.

Mr. RAILSBACK. I think it has actually been a couple of years, hasn't it?

Mr. MACKLIN. It has been approximately 2 years, I think, right now.

Mr. RAILSBACK. We ought to be getting a pretty good reading one way or the other whether it is being utilized.

Mr. MACKLIN. We have an initial report from our Federal Judicial Center, which is in its—I'm not sure whether it is final yet or just in draft stage—but that report should be available very shortly. I don't have it as yet.

Mr. RAILSBACK. Well, I've read the part of the statement that relates to the computer systems. I guess what I am wondering is if

the judiciary and if the courts are able to utilize information retrieval like many of the major law offices are now beginning to do with the different various systems that permit kind of instantaneous retrieval of court cases and citation and key numbers, such as a LEXIS system, for example. It would seem to me that the courts ought to be going in that direction.

I am told now by some lawyers that these systems of information retrieval could abolish the need for a library.

Are we getting into that for the judiciary? I can tell by your scowl, not yet.

Mr. FOLEY. We have 39 installations around the country for case law. It is the LEXIS system. Many of the courts are very anxious to have it. It is simply a money problem.

Mr. RAILSBACK. But you do have it in about 39?

Mr. FOLEY. Thirty-nine, yes. We have it wherever there is a courthouse in which there are both court of appeals and district court judges and a common library.

Mr. RAILSBACK. I see.

Mr. FOLEY. And we have authorized an operator for each of those installations who will answer judges' phone calls from other parts of the same judicial districts.

Mr. RAILSBACK. In your judgment, is it working well?

Mr. FOLEY. It is working very well, sir, yes.

Mr. RAILSBACK. Judge?

Judge HUNTER. We have one in our courthouse, and I use it constantly.

Mr. RAILSBACK. Good.

Judge HUNTER. And the other judges at the district court level use it constantly. We think it is really a wonderful device. I can get data off of that that hasn't yet come out in print. Sometimes it is critical data.

Mr. RAILSBACK. I would think, that if it has been that helpful that is one area where in your budget request where you would want to maybe expand. There's some justification for it.

Mr. FOLEY. The budget has a request in it.

Mr. RAILSBACK. Does it?

What about judges who are leaving the bench? How many judges have left the bench in the last year and actually given a reason that they can't afford to stay on the bench? Have there been several?

Mr. FOLEY. Bill may have it.

Mr. WELLER. We'll have to supply that exact figure by correspondence, Mr. Railsback, but I think the Commission testimony, the Salary Commission proceedings, listed 30 judges in the last decade—which has been a high increase over any previous decade's experience. The number was up to 30.

Mr. RAILSBACK. Why don't you supply us, if you would, with that information. But you all agree that salary is a problem now for judges?

Mr. FOLEY. Well, I'm sure they would agree unanimously that it is.

Judge HUNTER. Well, I would like to add something there. Being a Federal judge, of course, has different appeal to different people. But in my own judgment, if you really want to attract the foremost

attorneys, that is by training, experience, capacity, interest, to be Federal judges, you simply have to have the salaries more competitive with the general marketplace.

Some of our finest people, who really should be applicants for the Federal bench can't afford to do so. They don't require that the Federal bench pay the same as what they made in private practice. They know better than that. But they can only step down from the scale of living that they have so many steps before it pinches their families and their futures so much that they just have to say, "we sign off, we don't have that interest."

Now if you truly want to get the very best into the Federal judiciary, yes, the salary situation must be improved.

Mr. RAILSBACK. I thought I would just give you a little shot at that.

Judge HUNTER. I speak from the heart.

Mr. RAILSBACK. OK. That's all I have. Thank you very much.

Mr. KASTENMEIER. Along the same line, if I may ask, what is the present salary for a district judge and a circuit judge?

Mr. FOLEY. The circuit judge's salary is approximately $70,000, and the district court judge's is $67,000.

Mr. KASTENMEIER. Sixty-seven thousand?

Mr. FOLEY. Sixty-seven thousand, yes.

Mr. KASTENMEIER. I would like to go back to an important question. What should be done in terms of looking into the future about the constant growth of the number of Federal judges with the consequent effects of bureaucratization? Increased administrative problems, we've talked about in part. One of the things this committee suggested in the past, which has not become a reality, is the curtailment of diversity of citizenship jurisdiction.

But quite apart from diversity, do you have any other sort of general recommendations, assuming that Congress continues to create more and more new judgeships, and I suppose magistrates and bankruptcy judges. Is there anything we could do generally? Do you have any wisdom to give us?

Judge HUNTER. There are some suggestions that could be considered. Much of our increase in caseload comes from adding jurisdiction to the Federal court system in various new statutes as they are passed. This, of course, is a close question for Congress, but if there were some system for keeping track of the real burden that each new statute of that nature places on the judicial system, it would be most helpful. I think it also would enable the Congress to keep score better in that respect. That is one thing, and probably the principal thing.

Mr. KASTENMEIER. The judicial impact statement?

Judge HUNTER. Yes, sir, the problem is that different committees in Congress concern themselves with different subject matter. So the overall effect is what the courts feel. But a particular committee may not be aware of what other committees are doing to Federal court jurisdiction. That is one thing that really concerns us.

Some of the proposed bills in the Congress would have a very substantial impact on the Federal court system, and I don't know that adequate studies are made in advance or that Congress is aware of what really is going to occur in the system if a particular

bill is enacted. Yes, I think more awareness within the Congress with what a particular bill does and more awareness of what particular bills coming from other directions would do would help—so that you have the entire picture before you and not just a part of it.

Mr. KASTENMEIER. I might add that some of these questions can be administratively addressed, at least in part. For example, the conscientious decision for the last few years, by the Department of Justice Criminal Division not to pursue auto thefts and bankruptcies, but to insist that the States prosecute these cases. Even though current Federal jurisidiction existed, rather than to make these Federal criminal matters, the Justice Department insisted that in most instances State prosecutions be pursued.

Judge HUNTER. I overlooked saying to you that, as you know, there is a move toward a Federal-State jurisdictional entity. We have not really reviewed that question. That would be most helpful. We'd not only pick up the diversity question, among other things, but I think we would pick up a number of other overlaps—and perhaps some jurisdiction could be left exclusively to the States, rather than to the Federal system.

Mr. KASTENMEIER. Anyone else? Mr. Foley or anyone else?

[No response.]

Mr. KASTENMEIER. Any other comments?

Mr. DANIELSON. I have a comment, Mr. Chairman. I don't think that the caseload is going to be resolved administratively. The solution would help, but I think that a lot of it is procedural, and we are going to have to do something someday to speed up the administration of justice. And I would like to be able to help, except I really don't know what we can do. The Chief Justice's comments of a couple of months ago that appeals should be resolved within—I hesitate to say, but I believe he said 8 weeks, for final judgment in criminal cases. So there's an awful lot of truth that underlies that—I don't know how you do it in 8 weeks.

But we could certainly do it a lot faster than we're doing. Some of this has got to be done—I don't think it is administrative, I think it is procedural, to speed up the process, which would have the effect of lowering the caseload.

I think we fund all these cases too long, play with them, without resolving them. I hope I don't offend anybody, but it seems that way to me.

Mr. KASTENMEIER. We also passed a minor dispute resolution law. It was designed literally to divert litigation out of the courts and have matters reconciled in nonjudicial forums.

Mr. SAWYER. Mr. Chairman, if I might just make a comment. I totally agree with George, and I do agree with the Chief Justice, too. I have watched over a long period of years of trial practice the gradual but continual complication of trying lawsuits to where, you know, you've gotten into discovery, which didn't exist, really, when I started to practice; and to where it has become a burgeoning thing.

And I think everybody tries to make what they are doing more complex, you know. It satisfies the mind better. If you're a fly fisherman, you can't fish with just one pattern. You've got to have 40, and, you know, you persuade yourself that's important.

But I think what we've done, we have tended to create, is a chronometer instead of a wristwatch, whereas a wristwatch serves almost everybody's purpose, just to tell the time of day. We've built it up to a $2,000 chronometer. And if you don't have that, you can't tell the time of day. And it's gotten so that $5,000 or $10,000 lawsuits—I'm speaking principally of State courts—are so uneconomical, that nobody can afford to really handle them anymore. But I think we have so over-finetuned the system, in the pursuit of excellence, that we have gone from the wristwatch that does the job in 99 percent of the cases, to a chronometer that no one can afford.

Mr. DANIELSON. Would the gentleman yield?

Mr. SAWYER. Yes.

Mr. DANIELSON. Just this last weekend, I was talking to an old friend of mine—a far more successful lawyer than I ever was—and I was amazed. He told me that his firm could no longer take on a matter that involved $100,000. They just couldn't afford to handle it. It's kind of frightening.

Mr. KASTENMEIER. That, and incidentally, earlier this week, this subcommittee passed an extension of the authorization for the Legal Services Corporation, but we did provide in it that the Corporation shall encourage negotiation, settlement, of cases where feasible. Some language to that extent was incorporated. This would tend to go in the direction of encouraging a little less litigation and a little more settlement without resort to the courts.

Mr. BUTLER. I have some additional questions—are we in a hurry?

Mr. KASTENMEIER. The gentleman from Virginia.

Mr. BUTLER. I would like to inquire, since we're discussing the caseload, what is the experience with the magistrates' taking the load off the district court judges? Do you feel like the judges are using the magistrates in the way in which it was intended, and how substantially? Would you comment on that?

Judge HUNTER. Congressman Butler, I really do. This is where the judges have gone to school pretty thoroughly. They are making every use of the magistrates that is legally permissible. After all, any judge is quite willing to have someone else share the responsibility of his workload if he can find a body around who is capable to do it.

So the magistrates have been leaned on very heavily. They have been used heavily. You'd be hearing from us about more judges—for sure—if we didn't have those magistrates there. They really do perform a great service.

Mr. BUTLER. It would be my impression that everybody wants somebody else to do their work, but my question is have we made an analysis of the direct impact on how the caseload has shifted?

Have we gotten that far along?

Judge HUNTER. I don't think we have any statistics on it. I was just asking Mr. Foley. It wouldn't be easy to get them.

Mr. MACKLIN. We do have, though, a survey in process right now through the Magistrates Division as required by the latest amendments to the Magistrates Act.

Mr. KASTENMEIER. Which is due this fall, is it not?

Mr. MACKLIN. Which is due, as I recall, in the fall. We don't have the final report yet, but we are working on it.

Mr. BUTLER. Mr. Chairman, while we are discussing the question of creating new judgeships, it seems to me that we ought to take a look at what the judges are doing with their time.

There is an awful lot of time of judges spent in preparing the rules, for example, and reviewing the rules. I wonder if that should necessarily be a function of the Judicial Conference. It seems to me that that is an administrative sort of thing; that people who do not have robes on could do just as well; and that as a result maybe we could make better use of the judges' time.

Likewise, is it necessary to have a Judicial Conference meeting of every conference, for 3 or 4 days? That ties up a tremendous amount of judicial hours. Now, is that necessary?

I'm not asking you to respond to that; what I am asking you to do is, review from the point of view of the Administrative Office a recommendation of whether we cannot make a better use of the abilities of a judge, whose primary responsibility is to adjudicate. The rest of these things are secondary. So I would hope that you would look at that again before you come and ask us for more judges. I've made up my mind. I'm not going to vote for more judges until we get the diversity question resolved, because I think that is a use of resources.

Mr. Chairman, I also appreciate the need for a judicial impact statement. We've mentioned that. It is almost a recurring theme. But I would like to say that the next time we have a judicial conference with the Supreme Court and the other judges, I wish you would give some consideration to asking the judiciary to make a legislative impact study before they move forward into new areas, because they have created problems for us far out of proportion to problems that we have created for them, from time to time.

Maybe you might make that suggestion in the solitude of the Judicial Conference, where there is no public, nobody watching. I would appreciate it.

Thank you, Mr. Chairman.

Mr. DANIELSON. Mr. Chairman, I would like to follow up.

Mr. KASTENMEIER. Mr. Danielson.

Mr. DANIELSON. On the judicial impact statement, I don't know who would prepare it, because I don't know who would be wise enough to know in advance how many lawsuits are going to be generated.

But just as a for-instance, suppose a bill comes through here and we recognize that this is going to cause additional litigation in the Federal courts. Could we submit an inquiry to your office, Mr. Foley, somebody's office, and ask them to give us an estimate as to what the load would be?

Mr. FOLEY. Certainly.

Mr. DANIELSON. Would you have reason enough to respond to that?

Mr. FOLEY. It might not always be easy. We find impact statements are not the easiest things in the world to do. But we recognize their importance.

Mr. DANIELSON. I think the next time I see one coming along, I'll just do that. And I hope you won't hesitate to give it a fairly reasonable prompt reply, even though perfection won't be achieved.

I know that won't be achieved. But it might be a good idea to try it once.

Mr. FOLEY. Yes, indeed.

Mr. KASTENMEIER. Well, that is true. For example, you addressed yourself this morning to the impact of increased numbers of bankruptcy cases. I'm not sure to what extent that could be anticipated. Generally, it could have been predicted that modification of chapter 13 would result in additional filings. But could we be any more specific than that?

We requested an impact statement recently in terms of the effect of the new draft registration law. I think the Justice Department failed to respond. Can you imagine what would be involved if the prosecutions were pursued in connection with the draft registration violation? Heavens, there are hundreds of thousands, presumably, prima facie violations out there. If the U.S. Attorneys wanted to prosecute—and incarcerate every violator, the effect would be enormous.

Mr. DANIELSON. Mr. Chairman, should that—I have one in mind: Should that inquiry be addressed to you, Mr. Foley?

Mr. FOLEY. Yes. That would be fine, sir.

Mr. DANIELSON. I just wanted to know how to do it. We'll try it once. Thank you.

Mr. FOLEY. Thank you.

Mr. KASTENMEIER. In any event, the committee is grateful to the panel for its appearance this morning, I'd like to express thanks especially to our old friend Elmo Hunter, again back and, as usual, very helpful to us, in our deliberations and our oversight function. Thanks as well to Mr. Foley—it's good to see him—and to his colleagues, Mr. Mackin and Mr. Weller, this morning. We are thankful to all of you, and we undoubtedly will have, many times in the course of this year, occasion to call upon you for your help and assistance with various measures before us.

Thank you very much. We stand adjourned until 10 o'clock tomorrow morning, at which time we will have markup on the proposed creation of a court of appeals for the Federal circuit.

[Whereupon, at 11:55 a.m., the hearing was adjourned.]

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