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10/ /82

TO: Mr. William P. Barr

From: Edward A. (Chip) Dent

Dear Bill,

I appreciate your taking an interest in my piece. I look forward to talking with you further about it in the future.

Sincerely,
Edward Dent
Chip

The Washington Post OUTLOOK Editorials / Columnists B

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INSIGHT

Pro Bono Judges to Unclog Courts

Draft lawyers to render justice in the public interest

By Edward A. Dent

IT'S LITTLE WONDER that our clogged court system has been receiving considerable attention of late, most recently from Supreme Court justices.

The obvious consequences of overloaded courts are intolerable case delays or assembly-line justice (where justice prevails at all), unnecessary costs and anguish for plaintiffs, defendants and witnesses, more criminals on the streets, and growing fear and cynicism among the citizenry.

It's past time, therefore, to take a simple step to relieve jammed courts: Appoint experienced attorneys to serve, without fee, as temporary judges.

one to three cases. The American Bar Association Journal reports that 600 volunteers have served so far on 200 panels.

In the eight months, the temporary judges have disposed of 312 cases. Some 40 of these have been appealed further to the state supreme court, but only one appeal has been granted — an indication of the quality of the decisions by the temporary judges.

Such programs certainly have to be developed with care. *Pro bono* judges, for example, should come from the ranks of more experienced and respected attorneys, perhaps with at least 10 years' experience in the criminal or civil area.

Provisions might be made to have

"Although there are a number of reasons for today's clogged courts, the chief one is that we simply do not have enough judges."

This mismatch makes absolutely no sense, especially when one considers the magnitude of the problems produced by the judge shortage.

In criminal cases, it is the established practice of prosecutors, sanctioned by judges, to accept plea bargaining or reduced charges and sentences as a means of clearing jammed dockets. Courts have freed persons indicted for crimes because their constitutional right to a timely trial was being violated. Witnesses are often lost or their cooperation compromised when they refuse to tolerate further inconveniences.

In many jurisdictions, civil actions take between one and two years before they are heard. In Maryland, for example, civil law cases take an average of 435 days from filing to disposition; criminal cases take an average of 155 days. In the District of Columbia, the average civil case takes 365 days from calendar assignment to trial.

OUR CLOGGED COURTS: A PLAN FOR JUDICIAL REFORM

by Edward A. Dent

At the American Bar Association Convention on August 6th Supreme Court Justice John Paul Stevens shocked the judicial community with his frank remarks on the desparate state of the Supreme Court, due in large part, according to Stevens, to enormous case loads. Justice Stevens cited numerous instances of cases prematurely or inadequately considered by the Court and many not seen at all. His charge echoed that of fellow justices, most notably Chief Justice Warren Burger. Justice Steven's unusual candor showed great courage and sounded an alarm that most Americans can appreciate. For decades now, citizens have been vicimized by courts at all levels which expedite cases both criminal and civil at a tortuously slow pace. The cost in time alone to plaintiff, defendants, and witnesses alike has been unconscionable.

But perhaps there is a solution to this problem. Until now, in order to see that in America justice is done, the local Bar Associations have seen fit to appoint on a rotating basis some of their number in criminal cases for no fee to represent those of the poor who need representation but have no means to pay for it. As well, both in civil and criminal cases many law firms donate a certain percentage of their attorneys' hours in handling cases, which they believe have merit but where the plaintiff or defendant has no means to pay. As a logical extention of these policies, why should the legal profession not be willing to appoint some of their more experienced members on a rotating basis to serve for no fee as temporary judges until the criminal and civil case dockets are reduced to

reasonable levels? After all, judges in most cases are drawn from the ranks of the legal community, many of whom are political appointees with no distinguishing judicial credentials.

The attorneys assigned on a temporary basis could be pooled from the ranks of its more experienced and respected members, say with at least ten years experience in either the criminal or civil areas. Provisions might be made to have these temporary judges serve in separate counties or jurisdictions to avoid conflicts, and of course they would be barred from hearing any case in which they had dealings or were acquainted with the parties. Temporary judges would probably be barred from hearing cases regarding an industry in which they served as corporate attorneys. As is the case with permanent judges, any decision rendered could of course be appealed to a higher court. Perhaps attorneys, who wished permanent assignment to the bench, would first be encouraged to serve some time as temporary judges -- it might even become a prerequisite.

At the state appeals court level, an experimental plan in Oklahoma using this concept of temporary judges to reduce caseload has yielded good results and might well be emulated elsewhere. Oklahoma Supreme Court Justice Pat Irwin started the program some eight months ago to relieve the appellate system of its backlog of cases. The legislature recently extended the program for another year. Temporary judges are selected by the justices of the Supreme Court; the Chief Justice then appoints these attorneys to a temporary court. Each temporary court handles one to three cases. The American Bar Association Journal reports that so far 600 volunteers have served on 200 three-judge panels. Those attorneys volunteering to serve have done so on a pro bona basis.

Marvin Emerson, who helped implement the program as former state

court administrator, said a popular response has been, "By golly I learned more about appellate procedure and writing briefs than I ever did." Emerson, who is now Executive Director of the Oklahoma Bar Association, adds that lawyers are generally pleased with the program.

In the eight months the program has been in force, temporary judges have disposed of 312 cases. Some 40 writs of appeal to overturn have been forwarded to the state Supreme Court and only one has been granted, an indication of the quality of the decisions by the temporary judges.

The problem at the Supreme Court outlined by Justice Stevens mirrors the larger problem nationwide. Horror stories about court delays abound. In many jurisdictions, civil actions which are set take between one and two years before they are heard. In Maryland, for example, law cases take an average of 435 days from filing to disposition. Criminal cases take an average of 155 days to complete. In the District of Columbia, the average civil case takes 365 days from calendar assignment to trial.

Court ordered continuances, as a result of crowded dockets, often require all parties and witnesses to spend hours and days on two or three separate occasions sitting around the court, only to have their cases rescheduled to be heard some months later. All of this causes great inconvenience for the participants, and for many, a loss of wages.

In addition, attorneys fees continue to mount, as lawyers sit and wait with their clients. Although attorneys may not concede the point, many are not upset, as they still remain on the clock. Often important witnesses in cases are lost or their cooperation compromised when they refuse to abide further inconveniences -- contin-

uances and rescheduling. In criminal cases it is the established practice of prosecutors, sanctioned by judges, to accept plea bargaining or reduced charges and sentences as a means of clearing jammed criminal dockets. In many instances, courts have freed individuals indicted of crime because their constitutional rights to a timely trial were violated.

In many other cases, no criminal prosecution takes place at all where it certainly should have, and would have, were prosecutors not faced with enormous caseloads. The victim of this sad situation is society, in delayed, compromised and costly civil litigation and in ineffective, impeded or vacated criminal prosecution. Simply put, in America justice is not being done. And the scales of justice often seem weighted against society.

Certainly the principal cause of this problem is that there simply are not enough judges to handle the case load. There are upwards of 450,000 attorneys in the United States of America today -- one lawyer for every 500 Americans. In some areas, legal representation among the population is even higher. In New York City, one of every 200 residents is a lawyer. At the same time, a jurisdiction such as the state of Virginia is dispensing justice with one general district court judge for every 54,145 residents.

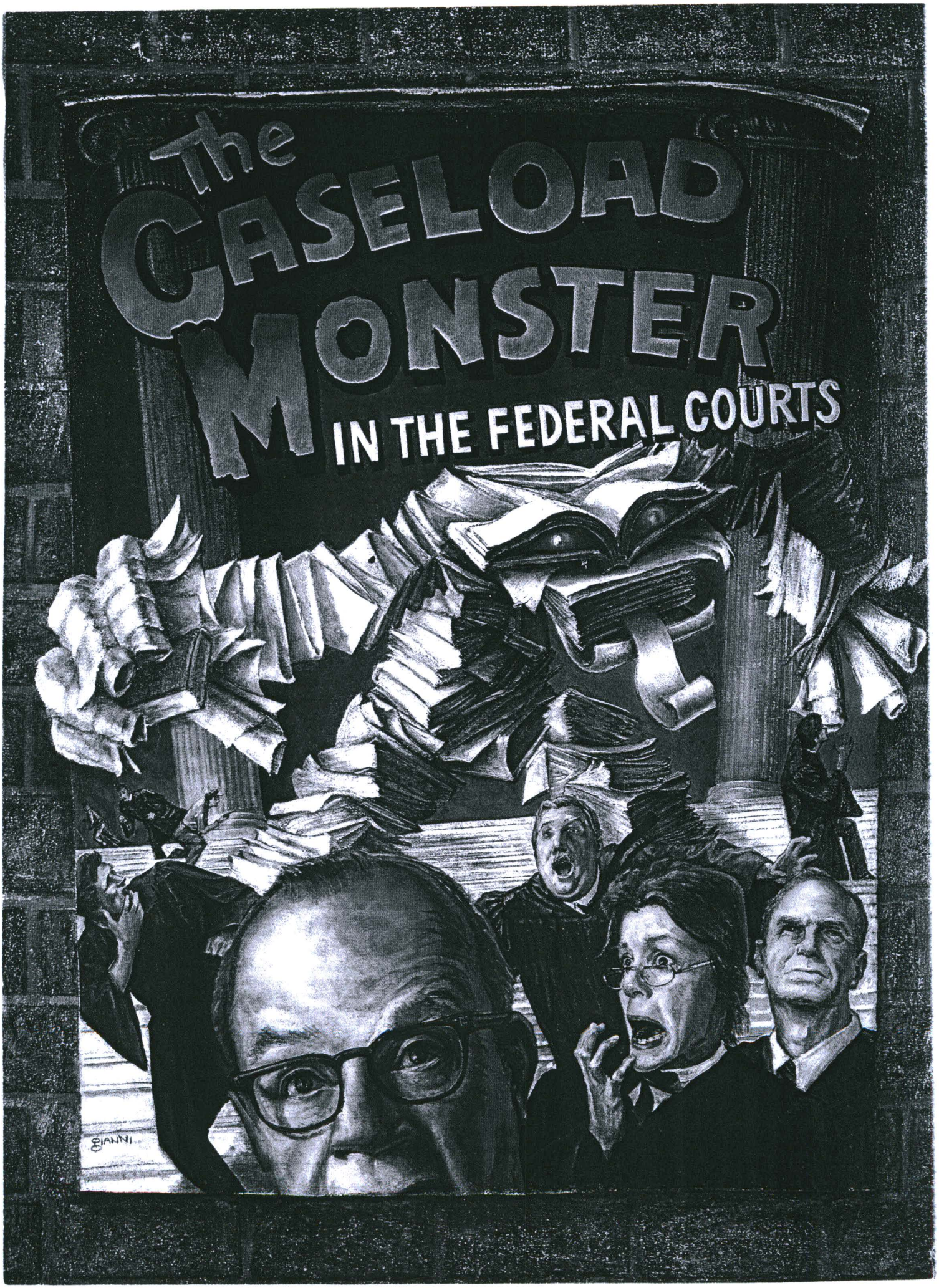
As well, citizens are saddled with a judicial system which by and large operates at its own convenience and not at the convenience of its citizens. Seldom will one see courts operating on other than old fashioned bankers hours, 9 or 10 a.m. to 5 p.m., Monday through Friday, though in fairness to judges, many work unseen extra hours in their chambers. But although there are many conscientious judges who work hard to do a good job, there are also some who do not. Accountability is weak as many of these judges are appointed

for life and it is frowned upon for fellow judges to criticize members of the club -- one another -- especially in public. Likewise, there is little incentive for lawyers to criticize -- to raise a hue and a cry about -- the situation, because through it all their bills continue to mount. If laws were passed barring attorneys from charging clients for time spent while waiting in courts, lawyers would raise the roof for reform in a clamor the likes of which America has never seen. This is not likely to happen.

A program of temporary judges, however, could go a long way toward reducing court backlogs. Although judicial delay arises as well from inefficiencies within the prosecutors' and court clerks' offices, judicial administrators seem to agree that the provision of an adequate number of judges would provide the momentum necessary to considerably improve performance in their troubled areas.

With the cooperation and continued public spirit of our nation's local, state, and national Bar Associations the appropriate legislative measures could be passed to provide for this procedure and a monumental problem put to rest. Designed and implemented carefully, a voluntary judgship program could not only relieve our clogged courts of their backlogs, but it could provide aspiring permanent judges with valuable hands-on experience on the bench. Perhaps more important, these reforms could make a major contribution to restoring the confidence and respect in American justice on the part of a cynical citizenry. Then once again in America justice could be done with reason.

Mr. Dent is apolitical consultant and an advisor to the judicial reform project of the Free Congress Foundation.


The CASELOAD MONSTER
IN THE FEDERAL COURTS
GIANNI

By Robert S. Want

CIVIL filings in the United States district courts soared to record-breaking levels in 1982, exceeding 200,000 new cases in one year for the first time. This dramatic increase in the 94 districts continues a trend that has seen filings nearly double during the past decade.

In the 12-month period ending June 30, 1982, civil filings in the district courts shot up by 14.2 per cent, as 206,193 new cases were filed. The largest upsurge in filings was in debt collection actions brought by the federal government. Significant increases also were seen in lawsuits involving breach of contract, labor law, intellectual property, securities, social security benefits, and employment discrimination.

By comparison, the number of criminal cases creeped up only 4.3 per cent.

Judicial overwork

As the number of cases filed reached a new apogee, the productivity of district judges, measured by the case termination rate, increased 6.5 per cent over the previous 12-month period. This was not enough, however, to counter the new filings.

Civil cases pending rose to 399 per authorized judgeship, a 9 per cent gain in pending caseload over 1981. In 1970 pending cases per judgeship were about half this level.

In 1982 all but 12 federal district courts saw their filings increased. The hardest hit were the Middle District of North Carolina, up 104.7 per cent; the District of Minnesota, up 101.4 per cent; the Northern District of Oklahoma, up 80.6 per cent; and the Southern District of Indiana, up 57.2 per cent.

The big-city districts are creaking under the weight of their caseloads. The most burdened are the Southern District of New York, which took 8,666 filings; the Northern District of Illinois, with 7,752 filings; the Central District of California, with 6,754 filings; and the Eastern District of Michigan, with 6,222 filings.

Chief Justice Burger has argued that new judgeships are needed to cope with what he recognizes as an "explosion" in federal litigation. The Judicial Conference has recommended 75 new federal judges (51 district and 24 courts of appeals), and legislation to this effect has been introduced in the 98th Congress as part of the bankruptcy court reform package.

Another proposal for dealing with the expanding federal caseload is to do away with diversity jurisdiction. Data compiled by the Administrative Office of the U.S. Courts indicates that this action would result in a 25 per cent reduction in the federal district court caseload and a 17 per cent reduction in appellate filings.

Those in favor of the abolition of diversity jurisdiction argue that its traditional justification—the fear of local bias against out-of-state litigants — is not as relevant in our 20th century economic system, and that the caseload argument should be given primary consideration. Legislation to abolish diversity has twice passed the House of Representatives but failed both times in the Senate. Chief Justice Burger favors this legislation, but the organized bar generally has opposed it.

Contracts and torts

Contract actions filed in the federal district courts in 1982, as the table shows, streaked up by 31.5 per cent. Almost half of these actions were brought by the federal government for recovery of overpayments of veterans' benefits and enforcement of judgments on defaulted student loans.

These filings, which rose 65.5 per cent over 1981, were the single class of case contributing most to the increase in the civil caseload. The high level of these filings should continue in the current year, as the Justice Department says that debt collection will remain a priority item.

There are more cases in federal court than ever before. With more than 20,000 new filings each year, the rampant caseload growth is unlikely to slow down soon.

Illustrations by Gary Gianni

Table
U.S. District Courts
Civil Cases Commenced by Nature of Suit
1978 through 1982

Nature of Suit	1978	1979	1980	1981	1982	Percent Change 1982/ 1981
Total	138,770	154,666	168,789	180,576	206,193	14.2
Contracts	25,728	36,898	49,052	51,159	67,276	31.5
Insurance	3,265	3,343	3,733	4,234	5,324	25.7
Marine	4,013	4,681	4,762	5,143	5,552	8.0
Miller Act	971	886	799	754	866	14.9
Negotiable Instruments	2,139	2,266	4,072	3,332	3,987	19.7
Recovery of Overpayments and Enforcement of Judgments	1,856	9,254	15,588	18,161	30,048	65.5
Other	13,484	16,468	20,098	19,535	21,499	10.1
Real Property Actions	12,781	11,876	11,067	8,887	8,812	-0.8
Mortgage Foreclosure	4,159	4,711	4,674	4,725	5,754	21.8
Land Condemnation	7,021	5,599	4,763	2,179	1,055	-51.6
Other	1,601	1,566	1,630	1,983	2,003	1.0
Tort Actions	26,375	28,901	32,539	33,767	34,218	1.3
Employers' Liability Act	1,494	1,540	1,990	1,876	2,017	7.5
Airplane	975	1,231	943	801	963	20.2
Marine	4,843	4,905	5,006	5,235	5,394	3.0
Motor Vehicle	5,839	5,991	6,321	6,199	6,651	7.3
Other Personal Injury	5,921	6,255	7,288	7,997	8,253	3.2
Personal Injury Product Liability	2,874	4,034	5,969	7,212	6,856	-4.9
Property Damage	4,429	4,945	5,022	4,447	4,084	-8.2
Actions Under Statutes	73,034	76,067	75,574	86,172	95,294	10.6
Antitrust	1,477	1,284	1,496	1,352	1,066	-21.2
Bankruptcy Suits	1,712	1,731	1,688	1,985	2,340	17.9
Civil Rights:						
Accommodations	497	434	342	336	237	-29.5
Employment	5,504	5,477	5,017	6,245	7,689	23.1
Voting	139	145	160	152	170	11.8
Welfare	214	195	212	253	215	-15.0
Other Civil Rights	6,475	6,917	7,213	8,433	8,727	3.5
Commerce (ICC rates, etc.)	2,365	1,395	1,105	1,080	1,057	-2.1
Deportations	163	141	139	113	134	18.6
Economic Stabilization Act	40	50	35	47	27	-42.6
Energy Allocation Act	79	121	153	104	47	-54.8
Environmental Matters	519	559	557	582	394	-32.3
Forfeiture and Penalty Suits	2,988	2,779	3,019	2,963	3,340	12.7
Freedom of Information Act	532	627	627	507	381	-24.9
Labor Laws	7,461	8,404	8,640	9,300	10,227	10.0
Patent, Copyright, Trademark	3,265	3,374	3,783	4,027	4,592	14.0
Prisoner Petitions:						
Federal	4,955	4,499	3,713	4,104	4,328	5.5
State	16,969	18,502	19,574	23,607	24,975	5.8
Securities, Commodities and Exchange	1,703	1,589	1,694	1,768	2,376	34.4
Social Security Laws	9,950	9,942	9,043	9,780	12,812	31.0
Tax Suits	2,669	3,527	3,271	3,930	4,234	7.7
Other	3,358	4,375	4,093	5,504	5,926	7.7
Other Actions	852	924	557	591	593	0.3
Domestic Relations (Local Jurisdiction)	304	269	94	12	5	-58.3
Insanity (Local Jurisdiction)	101	116	123	135	113	-16.3
Other	447	539	340	444	475	7.0

Source: Administrative Office of U.S. Courts

The "Other" subsection under the "Contracts" category of the table consists principally of breach of contract and warranty suits between private parties, filed or removed on the basis of diversity jurisdiction. These suits reached a record 21,499 cases filed in 1982, up 10.1 per cent from 1981.

Assuming no change in diversity — a good bet considering the preoccupation of the 98th Congress with other matters — look for private party contract litigation to continue its upward trend in the years ahead. A relatively new area of litigation likely to contribute significantly to this trend involves breach of warranty actions against manufacturers of computers and related equipment.

Tort actions totaled 34,218 in 1982, reflecting a modest gain of 1.3 per cent over the previous year. Personal injury and products liability actions showed a decline of 4.9 per cent in 1982, but observers feel this downturn will reverse itself in the years ahead. This reversal will likely result from the advent of the "toxic tort," in which victims of latent occupational diseases seek damages.

Asbestos litigation, for example, already has become the largest product liability area at both the federal and state court levels, surpassing such heavily litigated product areas as the Dalkon Shield intrauterine device, Agent Orange, and diethylstilbestrol, known as DES. The Manville Corporation, one of the major defendants in the asbestos litigation, has filed for protection under Chapter 11 of the Bankruptcy Code while it attempts to reorganize to deal with the onslaught of suits against it.

It is expected that diseases allegedly related to exposure to toxic materials in industrial waste dumps, such as that at Love Canal, will be the next major round of toxic tort suits. Anticipating that this may be more than the courts can handle, the American Bar Association recently called on Congress to consider legislation that would remove most toxic torts from judicial to administrative forums.

Civil rights

One of the burgeoning areas of federal litigation during the past decade has been in civil rights, particularly filings under 42 U.S.C. § 1983. The historic purpose of Section 1983 was to provide a federal remedy for racial discrimination. But, as Supreme Court Justice Powell recently pointed out in this *Journal*, the vaguely drawn statute has become a "font" of constitutional tort claims. ("Are Federal Courts Becoming Bureaucracies?" November, 1982, page 1370.) Many Section 1983 claims, and particularly prisoner suits, Justice Powell argues, could be resolved if prior exhaustion of administrative remedies were required where these were adequate.

Employment suits, filed under the Equal Employment Opportunity Act and the Age Discrimination in Employment Act, reached a record 7,689 in 1982, an increase of 23.1 per cent over 1981. Of these, 292 were filed by the Equal Employment Opportunity Commission

against private employers and state and local governments. The remainder were instituted by private parties. Most of these actions alleged sex or race discrimination, although an increasing number claimed discrimination on the basis of age.

Prisoner petitions, federal and state, totaled 29,303 in 1982, up 5.7 per cent from the year before and 34 per cent from 1978. The 1982 total consists of 17,575 civil rights (Section 1983) actions, 17,016 state and 559 federal; 9,986 habeas corpus actions; 1,186 motions to vacate sentence; and 556 mandamus and other actions.

The category of prisoner petitions that has seen explosive growth over the past decade is that of Section 1983 claims from state prisoners. In 1972, 4,139 claims were filed. Ten years later 17,016 were filed, an increase of 311 per cent. State prisoner Section 1983 suits run the gamut from allegations of unsanitary prison conditions to inadequate medical treatment to failure to maintain a prison law library.

Increase in prisoners

The rise in prisoner petitions reflects in large measure increases in the number of prisoners confined in federal and state institutions. Prison population in 1982, according to Justice Department statistics, reached a level of just under 385,000, compared with 196,400 in 1970.

Many federal judges, including Justice Powell, have argued that state prisoner petitions should be cut back sharply, although not so as to prevent the exceptional case from receiving a federal hearing. It is argued, for example, that the statute that confers federal habeas corpus jurisdiction, 28 U.S.C. § 2254, results in endless appeals of state convictions and denigrates the state judicial process.

Labor actions in 1982 rose to 10,227 cases filed, an increase of 10 per cent from a year ago. The principal areas of federal labor litigation included breach of collective bargaining actions filed under the National Labor Relations Act, minimum wage and overtime violations under the Fair Labor Standards Act, failure to make pension contributions required by the Employee Retirement Income Security Act, and workplace hazard litigation under the Occupational Safety and Health Act.

Litigation under E.R.I.S.A. and O.S.H.A. has been declining in recent years, while cases under the other two statutes, which account for about 60 per cent of all labor litigation, have been on the rise. Look for this upward trend to continue.

Patent, copyright, and trademark filings reached an all-time high of 4,592, a rise of 14 per cent over 1981. This total includes 843 patent suits, 1,746 copyright suits, and 2,003 trademark suits. Litigation in these categories consists primarily of infringement actions. A small percentage were requests for declaratory judgments of noninfringement and registration invalidity.

Filings in the patent, copyright, and trademark area have been on the increase in recent years, and this trend should continue. A growing area of copyright litigation, for example, involves suits alleging infringement of computer software, which was made subject to property right protection under a 1980 amendment to the Copyright Act. Litigation in patents is likely to be encouraged by recent Supreme Court decisions allowing patents to issue covering the products of genetic engineering and computer programs.

The category of prisoner petitions has seen explosive growth. In 1972 there were 4,139 claims filed. Ten years later 17,016 were filed—an increase of more than 300 per cent.

Securities cases

Case filings under the "Securities, Commodities, and Exchange" category in the table showed a mammoth 34.4 per cent increase in 1982. This reflects an upswing in litigation involving merger activity and suits against brokerage houses alleging negligence in the handling of securities and commodities accounts. Look for a continued growth, particularly in the light of recent Supreme Court decisions that have eased the ability of private parties to bring suits under the antifraud provisions of federal security laws.

Social security cases reached a record level of 12,812 actions filed in 1982, an increase of 31 per cent. The largest gains occurred in claims for disability insurance benefits. The prospect of benefit cutbacks in this and other social security areas may signal an upsurge in litigation over the next few years.

Monster on the loose

The statistics reveal that a monster is loose in the federal courts. Fed by 20,000 to 25,000 new cases each year, its rampant growth will not soon slow down.

The chief justice has called for a small army of new judges to fight the behemoth, but the immediate fate of this proposal is tied to the unpredictable debate over the bankruptcy court reform package.

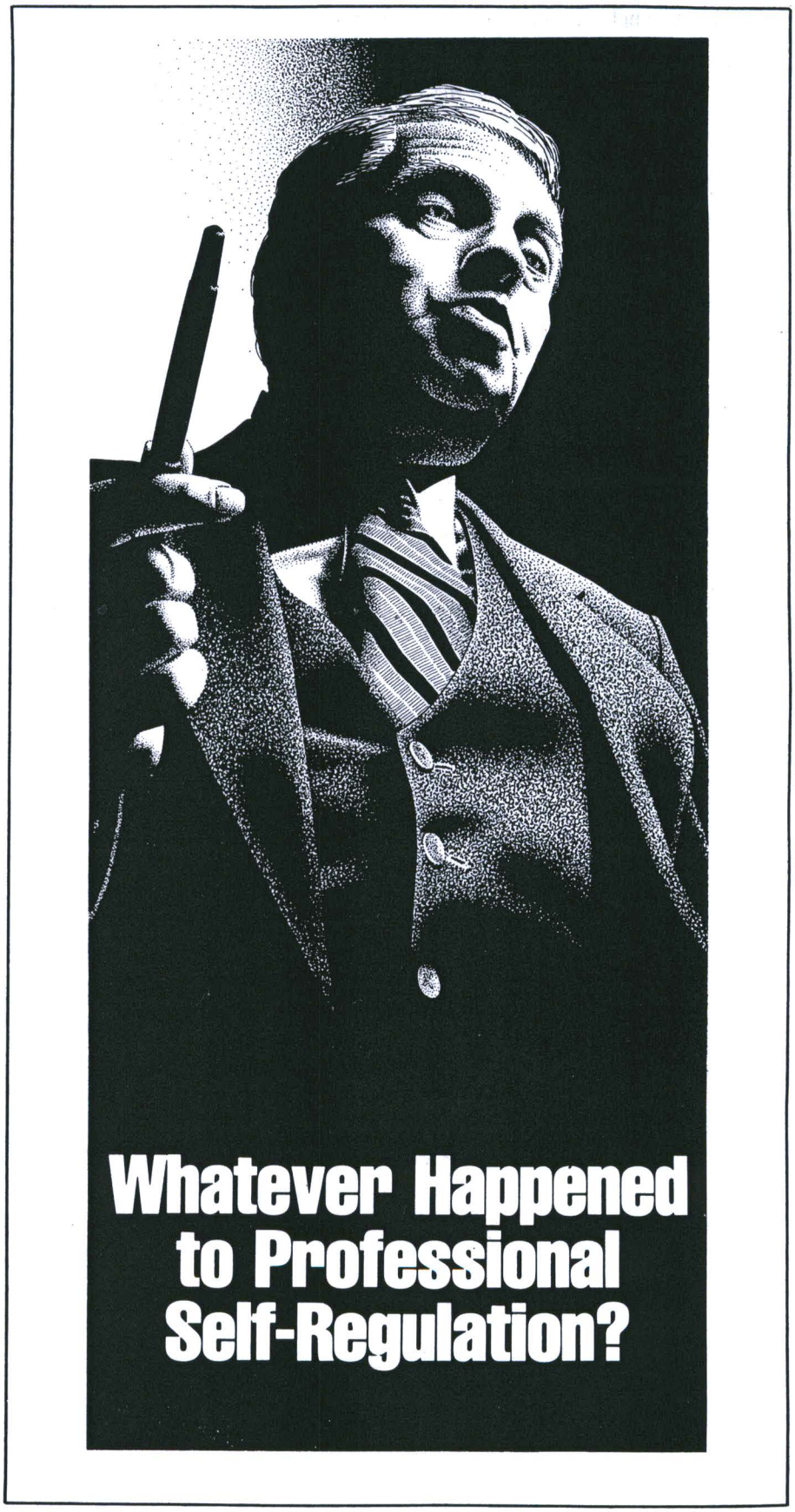
The abolition of diversity jurisdiction is unlikely to be enacted in the near future. Well-entrenched opponents have kept diversity alive and are positioned to protect it in the future.

The best hope for case filings to level off is the greater use of alternative forums other than courts to resolve disputes. There is some movement in this regard at both the federal and state levels. The federal judiciary has begun experimenting in three district courts with nonbinding arbitration in certain civil actions, and the A.B.A.'s Special Committee on Resolution of Minor Disputes reports that there are more than 170 mediation centers now operating in the United States.

Federal courts have been able to increase their efficiency somewhat, disposing of more cases than before. But some federal judges have expressed concern that cutting backlogs and delays will lead to an erosion of the quality of justice.

Meanwhile, the monster gets bigger and bigger. Journal

(Robert S. Want is a lawyer and editor of Federal Filings Alert, *a weekly report on new U.S. district court filings. He is president of Want Publishing Company in Washington, D.C.)*



Whatever Happened to Professional Self-Regulation?

By Jack R. Bierig

THROUGHOUT most of this century, self-regulation was accepted and encouraged as a fundamental aspect of professionalism. Indeed, professional self-regulation long was regarded as necessary to set high standards and to protect the public from the unscrupulous or incompetent. The traditional view was succinctly summed up in the observation of the Supreme Court that what "is generally called the 'ethics' of the profession is but the consensus of expert opinion of the necessity of such standards." *Semler* v. *Board of Dental Examiners*, 298 U.S. 608, 612 (1935).

With the exception of *American Medical Association* v. *United States*, 317 U.S. 519 (1943), and cases involving procedural issues, there were almost no decisions questioning self-regulation in the professions during the first three quarters of the 20th century. In the last decade, however, self-regulatory efforts have come under sharp and increasing attack. In 1975 these efforts were exposed to judicial scrutiny under the

There were almost no decisions questioning self-regulation during the first three quarters of this century. In the last decade self-regulatory efforts have come under sharp attack.