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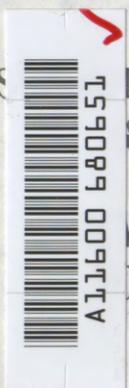
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HEARINGS

BEFORE THE

COMMITTEE ON JURISPRUDENCE AND
 GOVERNMENTAL RELATIONS
 OF THE
 COMMITTEE ON THE JUDICIARY
 UNITED STATES SENATE
 NINETY-SIXTH CONGRESS
 SECOND SESSION
 ON
 JUDICIAL IMPACT STATEMENTS



SEPTEMBER 24 AND DECEMBER 2, 1980

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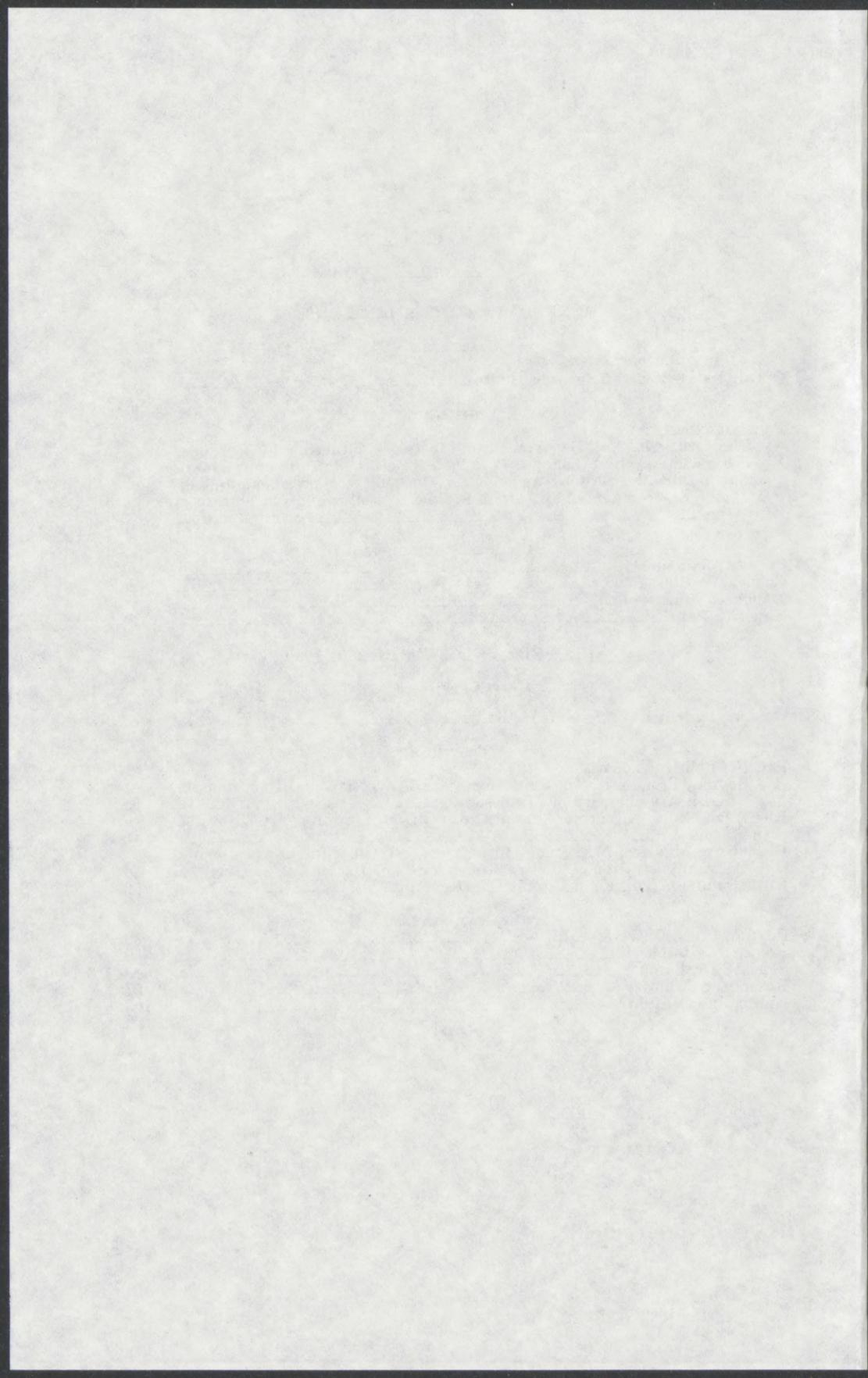
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JUDICIAL IMPACT STATEMENTS

WEDNESDAY, SEPTEMBER 24, 1980

U.S. SENATE,
SUBCOMMITTEE ON JURISPRUDENCE AND
GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:32 a.m., in room 6226, Dirksen Senate Office Building, Senator Howell T. Heflin (chairman of the subcommittee) presiding.

Present: Senator Heflin.

Staff present: Arthur Briskman, chief counsel; Michael Gilliland, staff counsel; Ray Stanford, staff counsel; and Linda Ashley, clerk.
Senator HEFLIN. We might as well start the hearing.

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. Today, we hold a second hearing to investigate the feasibility of judicial impact statements. In conjunction with the first hearing held November 14, 1979, today's hearing questions the usefulness of a bill which would implement a system to measure the impact of new legislation on the Federal court system. These judicial impact statements would be used by judicial administrators as well as Congress to facilitate the planning of judicial funding and staffing.

The concept of impact statements has been increasingly utilized in areas affected by legislation. The National Environmental Protection Act of 1969 requires that an impact statement on the environment be included in every recommendation for legislation which significantly affects the quality of the human environment.

Under the provisions of the Congressional Budget and Impoundment Act of 1974, the Director of the Congressional Budget Office is required to prepare a 5-year cost estimate of bills reported by congressional committees.

Similarly, interest in judicial impact statements has grown steadily over the last decade. Of great import is the interest taken by Chief Justice Warren Burger. In his 1972 state of the Federal judiciary message, Chief Justice Burger urged Congress to consider the needs of the courts when proposing legislation. He lamented the lack of mechanisms capable of analyzing Federal court dynamics.

In 1977, the National Research Council created a panel to study methods of judicial analysis. Under the chairmanship of Prof. Samuel Krislov and Keith Boyum, the panel recently completed their analysis of the feasibility of judicial impact statements. The Council plans to release the report shortly.

In the fall of 1978, the Department of Justice selected Mathtech, Inc., to survey the existing judicial impact methods and to develop a viable methodology. Completed last spring, their report offers cautious optimism over the feasibility of judicial impact statements. The methodology developed by Mathtech estimates the impact of new legislation on judicial resources, primarily attorneys and judges. Although other methodologies could be designed to monitor other facets of the judicial system, Mathtech's method represents a successful attempt to monitor the impact of existing or proposed legislation on an existing judicial system.

The growing diversity of demands placed upon our courts necessitates the adoption of a systematic approach to court planning. The remotest activity of Congress now influences the operation of our Federal court system. Thus, the focus of these hearings stem from a need to minimize unnecessary burdens on the judicial machinery.

Although urgency would seem to be a guiding force, a delving analysis requires a more deliberate pace. Major areas of concern must be reviewed. First, these hearings must address the purpose of judicial impact statements. Should judicial impact statements attempt to measure impacts upon the quality of justice or merely the quantifiable elements within the judicial system?

Second, the scope of impact statements should be delineated. Should impact statements be required of all legislation or merely legislation which bears significance to the judicial system?

Third, we must investigate the appropriate time for conducting impact analysis. Should impact statements be required after the final passage of legislation or during the period between introduction and final passage? If applied prior to final passage, should all drafts and amendments be the basis for study? Finally, the presence of an impact statement must never serve as justification for denying passage of legislation simply because the impact statement predicts an increase in litigation.

We are pleased to have with us today Dr. Charles Wellford from the Department of Justice; Paul Nejelski, staff director of the American Bar Association's Action Commission to Reduce Court Cost and Delay; Ed Cushen, project director of the report conducted by Mathtech, Inc.; and Jeanna Celeste and Katherine Douglass, coauthors of the report. Prof. Samuel Krislov of the University of Minnesota was scheduled to appear today, but due to illness will not be with us.

I want to welcome each of you to today's hearing, and we look forward to hearing your comments. We will first hear from Dr. Charles Wellford.

PANEL OF EXPERTS:

STATEMENTS OF CHARLES WELLFORD, DEPARTMENT OF JUSTICE; KATHERINE E. DOUGLASS, ASSOCIATE, ARTHUR YOUNG & CO.; PAUL NEJELSKI, STAFF DIRECTOR, AMERICAN BAR ASSOCIATION ACTION COMMISSION TO REDUCE COURT COST AND DELAY; AND WALTER CUSHEN, VICE PRESIDENT AND DIRECTOR, MATHTECH, INC., ACCOMPANIED BY JEANNA F. CELESTE, SENIOR ANALYST, MATHTECH, INC.

Dr. WELLFORD. Senator, thank you for inviting the Department of Justice to again appear before a hearing on the very important topic of developing justice impact statements.

As your statement indicated, we have been involved in this area for almost 2 years now, primarily through the project that you referred to that we funded to Mathtech, Inc., using funds from the Federal justice research program.

We have received the reports from this project, as have you and your staff, and currently have them under review and discussion within the Department of Justice. Maurice Rosenberg, the Assistant Attorney General in charge of our office, has forwarded to Mr. Civiletti a memorandum with our general impressions and recommendations concerning our future activities in this area, and we expect to have his reaction and the reactions of others within the Department prior to the next set of hearings that we understand you are planning to hold sometime later this year or early next year.

We have with us today the individuals you indicated from Mathtech, who really at this point are the ones, we think, most qualified to speak to the issues that you have addressed. After the general presentations by them and by Paul Nejelski, I would be glad to respond to any questions or any issues that emerge from that discussion that you or your staff might have.

What we thought might be most useful, if it is agreeable with you, would be for Katherine Douglass and Jan Celeste to discuss generally the reports and the activities of the project; then to hear from Paul Nejelski, who can respond to that project, and then have Ed Cushen offer some general summary comments that go directly to the questions that you raised at the end of your statement.

First, then, Katherine Douglass.

Ms. DOUGLASS. Good morning, Mr. Chairman, members of the subcommittee, and ladies and gentlemen. My name is Katherine Douglass and I am currently a management consultant with Arthur Young & Co. I am here this morning to discuss the subject of justice impact statements. I was involved in a project to study this subject while employed at Mathtech, and coauthored a number of reports on the project.

The subcommittee has heard testimony on this project and on justice impact statements previously, specifically on November 14, 1979.

Justice impact statements, or justice resource estimates, have been previously discussed in many contexts and from many points of view. During the course of the Department of Justice-sponsored project to study ways of performing justice impact statements, several approaches to the problem were investigated. For a given piece of legislation, these approaches could include reviewing testimony given by experts on the subject, and organizing the key points of that testimony in a way that they can be compared with those given by other experts. This method has been called conceptual analysis or the development of impact tables.

A second approach is the use of cognitive mapping, a technique in which experts on a particular issue or piece of legislation are interviewed in a systematic manner and the responses to those interviews are analyzed. This procedure yields a list of factors that the expert finds particularly important with respect to the issue at hand. This technique, cognitive mapping, is a promising method to be used during the developmental phases of legislation. In addition, cognitive mapping may well be a way to define the critical factors in what has been called the quality of justice, so that they may be taken into account in justice impact statements.

The third approach investigated was that of simulation and feedback. In this method, a sophisticated computer model is used in conjunction with a panel of experts to develop numerical estimates of the impact of a piece of legislation. It is this technique that formed the central part of the justice impact project.

These three methods—conceptual analysis, cognitive mapping, and simulation and feedback—can be used separately or can be combined to analyze complex pieces of legislation. We view them as forming a continuum of methods rather than three separate and distinct ones.

The third method, simulation and feedback, warrants further discussion at this point. During the project, a large and complex computer model was developed to model the activities of the Federal district court. The program was written to show court cases of different types entering the court system and going through the types of activities which cases normally undergo, such as trials, hearings, and delays. The program also includes district court judges and Federal attorneys, and allows them to handle cases in court and in their offices or chambers.

The computer model produces measurements on how the court system is working. These include numbers of cases of different types which are completed each year, and the length of time from their filing to their disposition. The numbers of cases in court backlogs and how long those cases have been waiting are also recorded. The amounts of time that judges and attorneys spend working on cases is also tracked.

Although still in its developmental stages, this technique is an advance over previous attempts to model the justice system in that it allows cases of different types to flow through the same system. In addition, it allows civil and criminal cases to be modeled in different manners to account for the different activities scheduled and procedures used in those types of cases. Most importantly, the simulation and feedback technique allows the opinions and knowledge of experts on the justice system to be brought to bear on the operation of the computer model. This process is the feedback component.

To illustrate the concept of feedback, I will briefly discuss a feedback experiment that was conducted during the project. This experiment was on the subject of the abolition of diversity jurisdiction. A panel of three professionals from the Department of Justice was interviewed, with one panelist representing a Federal district judge, one a Federal attorney, and one a member of the private bar. Each panelist reviewed the results produced by the computer model and suggested changes that would be made in the system if diversity jurisdiction were abolished. Those changes were made and the panelists again reviewed the results and made suggestions based on those results. After three rounds of this process, the experiment ended with a meeting of the panel.

The diversity jurisdiction feedback experiment could be considered successful in a number of ways. The experiment demonstrated that experts can understand the concepts of the model and that they could make meaningful, quantifiable changes to the system. It also demonstrated that the numerical results of the model were comprehensible and useful to the experts in their effort to participate in the experiment. Although the outcome of the experiment was not conclusive, several points for further development of the method were suggested. Perhaps the most significant of these was the need for data to be provided to the panelists. Ms. Celeste will address the topic of data.

I wish to thank you, Mr. Chairman, and the subcommittee for the opportunity to speak on this subject. I hope my remarks are of some help to you.

Ms. CELESTE. Good morning, Mr. Chairman, members of the subcommittee, ladies and gentlemen. My name is Jeanna Celeste and I would like to continue the discussion on justice impact studies. I am currently employed at Mathtech, Inc., and have coauthored various reports on the justice impact project.

I would like to address the subject of data. The simulation model which Ms. Douglass has described requires rather detailed data in order to make it operate. To be more specific, in the first stage of the model, it is necessary to indicate the number of cases of particular types, that is, criminal cases, Federal question cases, and so on, which enter the system within a given time frame, say, per year. It is in this initialization stage that cases may or may not have judges and attorneys assigned to them. This assignment is made based on the likelihood that a case of type x will proceed far enough into the system to require the services of an assistant U.S. attorney and a Federal judge.

An example of a case that would not have an attorney or a judge assigned to it would be a criminal case in which the accused is diverted into some sort of rehabilitation program prior to any hearing. Thus, assuming that he or she is not returned to the justice system, no justice resource time will have been expended.

In the same stage of the model, case activity and event profiles are selected. Data is required on the number of event or activity episodes and the duration of each. These events and activities consist of the court appearance, for example, hearings, trials, and so on, and out-of-court processing carried out in the offices and chambers of the resource actors. These may include such things as conferences, letter writing, legal research, and so on.

Another important event set includes the delays experienced by cases. Delays are handled in two ways, as internal or external to the modeled resources. Internal delays include any noncase-related time expended by the assistant U.S. attorneys and the Federal judges. Administrative work, participation in professional activities, pro bono work, vacation, sick leave, and so on, all constitute these sorts of delays.

External delays include time expended by the private counsel, probation office, auxiliary services of the court, and so on, which, although they are not explicitly modeled, do prevent cases from completing their processing by the modeled resources. The number of episodes and points at which cases undergo these delays are set according to case type in the initialization stage.

Other sorts of data which are needed include the average life of cases, and this is calculated by the elapsed time from entry into the system until exit from the system for cases of particular types. In addition, we need to input the probability of cases terminating at particular points in the process so that we can estimate the number of cases that are dropped from prosecution, diverted from the system, plea-bargained, dismissed, withdrawn, tried and acquitted, and so on.

The data requirements of the model are rather extensive and detailed, particularly considering the current state of recordkeeping in the Federal justice system. This is partly due to one of the objectives followed during the modeling effort to construct the most accurate simulation network possible, unconstrained by the availability of the data. This was considered to be the best policy since efforts were underway to collect and analyze very detailed data on the workload of U.S. attorneys offices as well as studies on the conflict resolution forums and costs of civil litigation.

Also, the Federal Judicial Center has been in the process of updating its case-weighting information of the Federal judiciary's workload. The recently established Bureau of Justice Statistics has been given the mission of providing for the collection, analysis, and dissemination of data on crime and on the operation of the criminal justice system at the Federal, State, and local levels. They have also been given the authority to devise standards for the collection of these data. All of these endeavors should greatly enhance the capability of supplying the simulation model with data.

Another point which should be made is that the task of collecting and inputting data to the simulation need not be a major effort but once. The model is cumulative in its ability to reuse input data to undertake any number of studies. There may be a need for doing some reprogramming, resetting case priorities, and so on, and the location and processing of data on some specific topic for input to the model when conducting new studies. For the most part, however, once the model has been supplied with data, the data needs only to be updated periodically to maintain the currentness of the model.

Once the data has been input, the model is "equilibrated," and by this we mean tested and adjusted until it produces "reasonable" results. We have defined reasonable as producing outputs which are consistent with published statistics or other established criteria that describe the system's current operational status.

The outputs from the simulation model include: The number of case completions by case type within a specified period of time, elapsed time from the entry of cases of the various types into the system until their exit, the percentage of time each judge and attorney spends on case-related activities, and measures of courtroom and noncourtroom case backlogs for each modeled resource.

When a Justice Resource Estimate is being prepared, the model is equilibrated and a group of system experts is brought together to serve as a feedback panel. The members of the feedback panel are "calibrated," and by this we mean that the research team has each member answer a series of questions relating to altered states of the system, which are then translated into quantitative magnitudes of perceived change.

The panel reviews the simulation outputs and, when satisfied that they represent the current operational status of the justice system, the experiment begins. Changes are introduced to components of the system which would be affected by the adoption of the legislation of rule changes. A simulation is run and the new outputs are given to the feedback panel to review. Based upon this review, the experts suggest behavioral adaptations which they would expect actors in the system to make. These adaptations are entered into the model and another simulation is run. This process is reiterated until all the panel members are satisfied that the system has made all the adjustments it is likely to make. These outputs are considered the prediction of the effect of introducing the legislative changes.

In addition to their role as providers of behavioral adaptations for justice system actors, the feedback panel could serve a particularly valuable role in assessing the quality of justice being served, based upon the predicted alterations in the system's operation. For example, they may suggest that the elapsed time for getting particular cases through the system is unfair to the citizens involved in the litigation, or that too many serious criminal cases are being dismissed due to the attorney's backlog of cases, and so on. This would be a very important evaluation of the expected impacts.

Some of the data that Mathtech used in the justice impact project was obtained from published sources such as the annual report of the Director of the Administrative Office of the U.S. Courts, Management Statistics for U.S. Courts, and the 1969-70 Time Study of the Federal Judicial Center. Additional sources included data obtained using special tapes prepared by the Administrative Office, and data were produced by Public Sector Research from the 1979 Inslaw study, "Allocation of Resources to U.S. Attorney's Offices: A Case-Weighting Approach."

In some instances, no data were available in published or computer retrievable form. In these instances, surveys were constructed and distributed to various judicial personnel who agreed to supply the needed data; other estimates were made based on available data.

Prospects for future studies look considerably brighter. The Department of Justice is currently sponsoring projects to further the development of case-weighting systems for the U.S. attorneys' workloads. In addition, the Department is also sponsoring a project to assess the cost of civil litigation. This includes an analysis of the

actual volume of particular types of conflicts which are resolved outside of court, as well as those which go into the system. The litigants' reasons for electing one forum over another are also examined.

The newly established Bureau of Justice Statistics promises to provide another rich source for detailed and current information about the functioning of the justice system. The more advanced available data become, the information the simulation method can provide.

I appreciate the opportunity to present this information to you and the subcommittee and I hope that my testimony will be of some help. Later in this program, Dr. Edward Cushen will provide information on the future uses of the model. Thank you.

Mr. NEJELSKI. Senator, my name is Paul Nejelski. It is a great pleasure to be here, and I am honored to testify on this subject. I would emphasize that I am here as a private citizen. I am not representing either the American Bar Association or the University of Maryland, where I teach.

I will not, unless you wish me to, read my testimony, but rather summarize it quickly and then move on to the discussion. It might be useful to distinguish between, on the one hand, the process of creating an impact statement—the triangular relationship between the three branches of government. In that sense, we have had impact statements. The Congressional Budget Office prepares some rudimentary discussions on many bills about how much this would cost. In the context of specific legislation, people have tried to make some kind of estimate from time to time.

I would distinguish that process from the methodology—something called an impact statement, such as the people from Mattech have prepared for us. That may be anywhere from guesstimates through very sophisticated computer simulations. Some people may be in favor of the process but not the methodology, and vice versa. I would be in favor of both, but with qualifications. I would like to address these qualifications.

One is that there is a need to talk about more than just the impact on the judges or even the judicial department. The whole justice system has to work together. Part of the problem is that it often does not work together. When I was a court administrator in the State of Connecticut, we put into operation a crash program and doubled the number of judges to clean up the criminal calendar. But it turned out to be a great failure because no one knew that the investigator for the public defenders office was on vacation at that time, and the cases just did not go anywhere.

Unless we have everybody working together—and that may include the private bar and it may include a fairly wide range of interested parties—a program is not going to be as useful as it should be.

The second qualification I would have is that we need to consider more than just legislation. Court rules, court decisions, constitutional amendments—all sorts of things impact on the justice system and increase workload and caseload for the judges. We need to look at a total system. That is very difficult to consider; but, as I tried to point out in my written testimony, some caseloads are coming down in the Federal system, while others are going up.

One needs to look at a total system, including the individual pieces which form that system.

The Mathtech report is a good first step. I was part of the panel at the Department of Justice which selected this group, and I served on the advisory committee which met twice to try to work with them and give them some ideas. But we are still at a very early stage in the development of methodology in this field. If this report were an airplane, I would not want to fly in it. That is not a criticism of the work that has been done; it is a statement of where we are at in this field.

The report is a useful device to give us some parameters. It has been a learning device for everyone concerned with the project—how complicated this is and how changes in the subsystems affect the result.

I would like to conclude my remarks by making a few specific suggestions about how we can make better impact statements.

First, I would emphasize a middle range and not try to simulate the whole court system. There may be different subsystems that can just be estimated without having to go into all the problems of computerization. Even if they were completely successful in doing the whole justice system, there are other subsystems such as the cost of attorneys' fees that would require a separate program and a separate examination.

A second suggestion is not to forget the qualitative side in impact statements. Too often, we get caught up in quantification but it is useful to walk into the courtrooms sometime and see what is going on. How are people being treated there? Let's not get all of our information by just reading the annual reports and the statistics.

I know you share my concern about the quality of justice. Many of the measures that are before the Congress and other policymakers raise questions about whether or not some system that may be more efficient in terms of resolving cases may have very serious problems about how the people perceive they are being treated in that system and how their rights are being protected.

Third, I would give some concern about the benefits of a system. One problem with impact statements is that we just look at the cost. In a cost/benefit ratio, it is often more difficult to consider the benefits rather than the cost—and we know it is hard enough to do the cost! But we have to consider what we are gaining from this legislation. What do we hope to gain versus how many judges are going to be needed to the drain it is going to put on our resources?

Fourth, I would talk in terms of estimates and ranges; upper and lower limits, if possible, rather than specific numbers. I do not think that the technology and our data are good enough to give very precise answers. The best we can do is give estimates, and we should perhaps convey our results in those kinds of estimates and ranges rather than give a spurious accuracy that it is going to be eight judges as a result of this legislation. I would be happier if we talked more in terms of 6 to 12, perhaps.

Fifth, I think we need to remember that averages—and that is what we are often dealing with in these figures—are made up of individuals. Some judges handle certain types of cases a lot faster; they learn quicker. They like a certain type of case, or they handle it in a different way. They assign to a magistrate; they have the law clerk go over

it. It takes a very individualistic approach when one is out dealing in the real world.

I remember that when I was an assistant U.S. attorney in New Jersey, we had six judges in Newark where I was practicing who had very different work habits and very different sentencing patterns. An important part of the practice of criminal law was for the private attorneys to get their client away from the judge that—

Senator HEFLIN. Will we not eventually have to have a model? I mean, there is no possible way that you could ever take care of individual habits and traits. Precision would require that you would have to have some type of model. Each U.S. Senator is different, but each of them puts in so many hours a day of work; that sort of thing.

Mr. NEJELSKI. I think those differences could be built into the system. At this stage now, we are happy just to have gotten where we are. But you can take into account that certain types of litigation are centralized in certain parts of the country. In immigration litigation, when I was studying this 10 years ago, 50 percent of the cases were in the Southern District of New York. You can put in a special assistant U.S. attorney who does nothing but immigration cases. He will handle those cases, I think, a lot faster than an assistant U.S. attorney for whom this is the first immigration case and who has to look up a lot of law.

I think you can build in those differences. That that is one next step that we may be looking forward to.

We need to have some kind of continuity in developing impact statements. In his written statement, Mr. Cushen said that he thought that most Cabinet departments should have the capability to do impact statements. I would respectfully disagree. I think that would be too diffuse. I would prefer to see it centralized.

I am not sure that the Department of Defense, for example, which he mentions specifically, would have enough volume in the justice impact system, unless they were going to get into military law questions, to justify this approach. Some kind of continuity would be helpful.

On the other hand, as I suggest in my written testimony, we need cooperation between the three branches of Government. Whoever prepares the statements will be suspect for bias, whether it is real or imagined. I remember, when I was at the Department of Justice as a Deputy Assistant Attorney General in the Office for Improvements, trying to worry about the impact of the Speedy Trial Act. Each branch was preparing its own study. Perhaps that is necessary, but it might have been possible to do some kind of joint study and share some of the advantages, data, and the expertise. There is a lot of expertise out there, but people are not talking together as much as they might. Consequently, I suggest some cooperative arrangement, if the Congress decides to go ahead with justice impact statements, to draw on the strengths of all three branches.

Thank you very much, Senator.

Mr. CUSHEN. Senator Heflin, my name is Ed Cushen. I will also provide the testimony for the record here, and will simply speak to some points as Paul has done here.

First of all, I do want to acknowledge the many people who participated in our study and tried to give us counsel and advice, and also

refer back to your November hearings, because I think the testimony that was offered there is very helpful as well.

The comments that I want to make are based on two things. No. 1, the justice impact study from the Department of Justice was, in fact, done by the group in Washington for which I am the vice president and director—Mathtech. So I had opportunity to watch the study as it was going through and to interact with it.

The second basis on which I want to offer my comments is that I have had about 28 years of experience doing policy studies for Federal, State and local governments, and working with all three branches of government. So, predicated on that, I do have some developed biases over the years that I hope will do you some good.

I want to make comments in three areas. No. 1, is it now feasible to do justice impact statements? No. 2, when should they be done and who should do them? No. 3, where do we go from here; what kinds of things for the future?

As has been mentioned, we did some impact statements, and I guess Paul Nejelski here is really the grand daddy, because he did the very first one. Justice impact statements, in my opinion, are, in fact, feasible. They can take one of many different forms. People tend to concentrate on our very elaborate computer model as being the only example of how we think a justice impact statement should be done. It is not that at all; it just happens to be one of the extreme forms which we spent a fair fraction of our \$300,000 on, but not all of it.

What we did, really, in the project was to try to benefit from the advice of the advisory council and others who warned us that we were going to have three major problems if we really tried to do a good impact statement. No. 1, the data was not going to be usable. No. 2, somehow we had to consider the impacts of human and institutional behavior. No. 3, we had to worry about, as Paul says, the quality of justice or the benefits that come out of the system.

Therefore, what we really tried to do was to say, "I am going to do an impact statement knowing that those are, in fact, the major difficulties that confront me."

Now, in balance, I come down, having looked at what we did and at what other people did, by saying, yes, we have a justice impact statement method, a process, a thing; we have some results that came out of it. I personally would be willing to be the test pilot on this airplane that Paul does not want to put into production yet. I agree; I am not ready to put it into production either, but I do think that some of the information that is in this report can, in fact, be productively used in the process of rebuttal and debate that characterizes not only what a department does as it considers legislation, but also the processes that you all are involved with as you consider legislation. So, I think they can be done and I think they ought to be done.

The second question is, who should do them and when should you do them? To my mind, the real question is answered if you say, who needs to have an impact statement and why do they need it? Government, industry, and everybody is overloaded with massive computer systems and massive data bases because they try to answer every conceivable question that could be aroused by anything. So, to my mind, we ought to say, who needs an impact statement and why does

he need it? That tells you who ought to do it and what it ought to look like.

For me, there are two essential times at which an impact statement is useful. It is useful as you design the legislation so that you can attempt to foresee and to estimate not only the primary consequences of what you are looking at, but what some of the ripple effects are likely to be, and that is what we had in the complicated one.

It should be used in the various stages of the design process. If you do an impact statement and you say, here is an adverse consequence that I really do not like, then that should help the designers of the legislation to try to improvise ways to head off those adverse consequences before the legislation goes into effect.

The second time at which I think you really ought to do an impact statement is in the process of budget justification. To some extent, we do that now. The program packaging that takes place in the Department of Justice, I believe, would be enhanced if some of the justice impact stuff were put into it.

The third and fourth reasons for doing an impact statement and who should do it is, as Paul said, the research purpose. We really do not know an awful lot about the anatomy of the criminal justice system in a way that would support really convincing analysis and a really convincing impact statement. If you want the last ounce of excellence, we just do not have the research knowledge to do that.

The fourth thing that I would like to suggest is that impact statements probably ought to be adapted for training purposes. When new people come into a department or new people come into a system, if they are set down to an impact statement and allowed to twist knobs or to analyze it, I believe this would help them to visualize how they fit into a system or what the system really is like. The Department of Defense uses war games for training purposes, and in my mind this could be done in the same way.

The third major question is where we go from here. I have lumped that into five separate categories: Applications, a user requirements study, methods research, data, and new areas. As I have mentioned, I would like to see some instant applications using the methods that we developed. We ran out of money and we ran out of time before we were really able to carry the diversity jurisdiction analysis to the point that I would like to talk about it on Capitol Hill here.

Applications should be done in some of the administrative law agencies. When I was with the Federal Power Commission, we developed a computerized model of case flow through that. So, administrative law is a great one.

Somebody ought to try using the method as it now exists to forecast future caseloads and their consequences; for instance, the asbestos claims, and the radiation claims that are going to hit the Navy, and things like that. We ought to try using it as a training vehicle to see whether or not what I have just suggested makes sense.

We did not do a systematic study of who needs an impact statement. I think that ought to be done. All of our testimony is loaded with advice like, let us do lots more methods research, and I thoroughly agree that that ought to be undertaken. But I am equally convinced

that we ought to drag these numbers out of here and start talking about them and start doing some applications.

The data system is, as has been mentioned, really not so good, but there were lots of data that we could use in our thing.

New areas, we ought to get into everything there. Paul mentioned evaluating constitutional amendments. My feeling is that as our Republic nears the 200th anniversary of the Constitution, we really ought to do an analysis of the Constitution and its ability to sustain our Republic for another century, and look at ways in which it might be fine-tuned to accommodate some of the new environments.

Thank you very much for the opportunity of talking with you.

Senator HEFLIN. Let me give you a hypothetical and maybe let you go through a scenario of how the conceptual analysis would work, how the cognitive mapping would work, and how the simulation and feedback would work.

There is a very complex issue which is now before Congress, and there is legislation which is known as a superfund—and some of you may have seen something in the paper—which is designed to provide a remedy for the discharge of chemical wastes, particularly by chemical companies.

Under the various proposals, it is conceivable that you would have three approaches. One, this fund would be created, however it may come, whether it was 100 percent or 75–25 as, I believe, the House bill proposes, but a fund is created. Claimants who suffer injury would have the right under the bill to go to the fund; if they had a valid claim, they would be paid. The administrative fund would then be charged with pursuing legal remedies in the courts against the industry that discharged the hazardous chemical. That is one aspect.

One provision would say that you would eliminate the issue of diversity and you would give a right of action in the Federal court to all those that suffered injury to go into court and to seek their redress. A claimant could go into the Federal court, or he could pursue his remedy in the State court. As you can see, that could cause different approaches on trying to evaluate these types of things; it is very complex as to what the effect on the judicial system would be.

But let us get away from the complexity and get down to one issue, and that would be that you would give the right to into Federal court to any person who received an injury, and would do away with diversity requirements, which is the \$10,000 limit that you normally have to have to go into it. You would have to take a situation where, because of chemical discharge, you would have to calculate some way, first, how many cases are going to arise out of this new litigation. Then, as a result of that, what would be the impact on the courts?

I reckon it is looking at something different. You would abolish diversity and you would probably create a Federal law of strict liability; you would have personal injury on the one hand and property damage on the other.

Now, on that basis, give me a scenario of what you would do under the conceptual analysis, and then under the cognitive mapping, and then under the simulation and feedback.

Ms. DOUGLASS. I think I will address that, since I spoke about those three methods. In that sort of situation, especially when there is more

than one alternative—and that is kind of a natural for this type of analysis—if we are speaking about one specific example where litigants would be allowed to bring their cases into court for this type of damage by a chemical firm, a conceptual analysis of that problem would begin by taking the results of hearings that Congress has had on this superfund and this particular alternative under this bill, and taking scholarly papers that have been written by noted authorities in the field, whether they are lawyers for chemical companies, public citizen advocates, or that type of expert, and to try and get opinions either in testimony or in scholarly papers from experts representing both sides of the issues, or all sides if there are more than two.

Analysts would then sit down with this written material and go through it and construct a table that shows for each expert what their view is of the likely impacts and what the magnitude is. For example, someone from the chemical company might say that under this provision, hundreds of thousands of cases would arise; they would sue for millions of dollars each. You try to get an idea of the number of cases that they think would arise particular problems that might come up, and the magnitudes of those.

Then those different types of experts would be compared against each other and we would see whether or not they formed groups or camps, and present those different groupings of experts as the different projections of what the impacts will be.

Senator HEFLIN. How long would this take?

Ms. DOUGLASS. We performed something like this on diversity jurisdiction and it did not take long; 2 weeks, say.

Senator HEFLIN. In your panel of experts, you would include medical people and chemists?

Ms. DOUGLASS. Possibly; anyone who had information or had an opinion on the effect that this would have on the courts. It would not necessarily have to be a lawyer or someone connected with the judiciary.

Senator HEFLIN. With their expert knowledge, I would suppose that, like the immigration lawyer, they would not have to do all of the empirical studies to determine what had occurred in example α ; they ought to have that somewhat at their fingertips. In other words, Love Canal is now documented, and I suppose that the expert would be familiar with Love Canal and its problems.

Ms. DOUGLASS. That would help.

Senator HEFLIN. Some of the concepts are under a strict liability, as opposed to other forms. You would have to consider, I reckon, the effect of the statute of limitations too, and whether or not the act had retrospective application or whether it was prospective only. If it was retrospective in its application—there is one bill that is being introduced and considered that has no statute of repose or limitation; it would go back 30 or 40 years. I reckon all of those factors would be considered.

In your idea of the conceptual analysis, would you have some established criterion? I imagine that each individual evaluation by an expert would depend on the subject matter, but would there be a required consideration checklist?

Ms. DOUGLASS. We would attempt to develop, as I said, a table that we can make comparable. We would have specific subsections under

the legislation or specific issues that are dealt with, and then we would seek through the written testimony the experts' opinions on each of these. So we would have a specific checklist, and then we could also, if there were additional comments, note those.

Senator HEFLIN. All right. Well, now give us a scenario of the cognitive mapping.

Ms. DOUGLASS. Although it is similar to the conceptual analysis in that it uses expert opinion, cognitive mapping requires that experts be worked with in person. What the process is is that experts of the same type that you might use in the conceptual analysis would be interviewed on a one-on-one basis, in an attempt to define the specific issues which that expert feels are most important.

I do want to point out that cognitive mapping was a part of our project and it was actually used by Dr. David Koehler and his associates at American University on the subject of the small business judicial access bill, I believe.

Senator HEFLIN. Would you have a collegial discussion under cognitive mapping or would it be a collection of individuals and then an analysis of it?

Ms. DOUGLASS. Well, under cognitive mapping, it is an analysis of specific individuals, and then to, in a sense, map out the factors they think are important and the interrelationships between those factors. Again, we can attempt to compare expert views and see if there are groups that group together or similar approaches to the problem. We can present these as impacts or future projections of the effects of the legislation.

Senator HEFLIN. But you would not have them together for discussion?

Ms. DOUGLASS. No. The interviewing, I believe, takes place on a one-on-one basis, with an analyst with a list of questions and a computer—

Senator HEFLIN. That is really the distinction between the conceptual analysis and the cognitive mapping.

Ms. DOUGLASS. Yes.

Senator HEFLIN. One is a consensus by discussion; the other one is a collection and an estimate by an evaluator.

Dr. WELLFORD. Senator, one of the major differences is the types of questions that are being asked. Both are done, generally, in an individual, one-on-one situation, collecting information either from an established record, written papers, testimony, et cetera, or from interviews.

The difference is that in conceptual analysis or impact table, we are really only interested in the consideration of the direct effects of the legislation; while in cognitive mapping, we are also concerned with questions like why these effects might occur; how people see the change actually coming about; and, what specific changes might occur. These questions begin to direct the analyst the indirect effects of the proposed legislation; that is, what effect it might have on other cases that are delayed or effectively denied access to justice.

Mr. CUSHEN. There is another shading of difference here too, I think. In the conceptual approach, you could do a conceptual approach simply by taking, for instance, your hearings and trying to lay out sys-

tematically what everybody was saying and what they were really trying to say, and seeing where things fall and looking at that as a whole thing.

Cognitive mapping is an attempt to become a little bit more quantitative and put a few more numbers in it, and also to be a little bit more systematic about probing the pros and cons of the different things that have been done. So, the cognitive map is getting very close to a structured interview-type situation in which you are deliberately trying to pull things out and say, will the effect be very, very big; will it be negative or positive; how long will it take to happen, and things of that sort.

Senator HEFLIN. All right. Now, give us a scenario of simulation and feedback.

Ms. CELESTE. With the simulation and feedback method, one of the first steps that we would need to take is to model the system in question; in this case, the Federal courts. What that involves is pretty much what I testified to about laying out the different components of the system; you can have it as elaborate or as simple as you may need to have it. You can have the entrance mechanism, investigative arms, or the various ways that the cases get into the court system.

We also model the particular resources—the attorneys involved, the enforcement arms, the judges, or whomever would be required. We need to have a way of inputting the number of cases that would be entering the system. This is where we may run into some problems with the data, because you are talking about a new right to action and a new type of case coming in. So we would have to be able, in our conceptual analysis or perhaps in the cognitive mapping section, to arrive at some sort of estimate so that we know approximately how many cases would be coming in at this point.

We may select several different scenarios that came out of the different camps of opinion and run each of those different scenarios through the model to find out what kinds of results each one of them produced. For example, in the example Ms. Douglass gave she said that the chemical companies may say that there are going to be thousands and thousands of cases generated that have claims over \$1 million, or something like that. We can run that scenario through and get a picture of what the system is going to look like if, in fact, that happens. We can run different levels; we can cut their predictions in half and run that through the model to get a picture of what the system will look like. What would the backlogs be; what would be the elapsed times to get cases through the system; would cases start to be dismissed.

Another component of this is the feedback panel who would be reviewing the results that would be coming out of the model. They could probably give us some advice as to whether some of the predictions we were putting in were too extreme, or how would they expect the judges and the attorneys and the different actors in the system to react to these changes.

All of this would give us a picture, essentially, of what could happen after this legislation were passed.

Senator HEFLIN. Well, in the present Federal courts, when there are mass disasters like 200 people being injured or killed in a 747, they

have, in some instances, tried as one case the liability, and then reserved for individual trials the damage claims, separating liability from damages. That is just a system by which they have felt that handling it that way could reduce the number of cases. I suppose you would have to take into account those types of things as different methods, rather than on an individual basis, on something of this sort.

If it were to be adopted as a form of strict liability as opposed to concepts of contributory negligence in States or on the basis of comparative negligence, you would have different approaches on that. For example, if Congress were considering knowing the impact on courts, they would have to know what the approach would be if the recovery was based on a concept of strict liability, comparative negligence, or contributory negligence, which all have different issues involved and do not allow so much for the concept of mass disaster with an airplane.

You seem to be having some animation about that; maybe you would like to respond, Paul.

Dr. NEJELSKI. Quite positive animation. I think you are pointing out the advantage of trying to do some kind of impact statement not only for its impact on the court system, but its impact on the amount of recovery and how much money would be at stake. I think one could at least have some rough cuts under these different alternatives, and I think it would help the policymaking to have at least some idea of how much money we are talking about or how many cases might be generated.

One alternative which I mentioned in my testimony and which may not be appropriate to the particular example you have given, although with the Federal system a lot of things are possible, is to go out and try it in a limited way. We did that with the arbitration legislation, rather than requiring that all 96 districts have court-annexed arbitration. Try it for a year or two in three districts and see what it looks like.

It might be possible with the superfund and the chemical waste to try that approach in one or two States and see exactly what happens. As people have suggested, when you have a new course of action and a brandnew area, it is really hard to make some meaningful statements; it is much easier where you are amending some existing legislation and you are fine-tuning something. There, I think we can make impact statements with a lot more confidence.

Mr. CUSHEN. I would like to toss in something here too. When you threw this new challenge, what would happen if you all tried to do an impact analysis of this particular piece of legislation and its variants?

The first thing you really want to do, I think, is to get the subject matter specialists—the lawyers, the companies who will be affected by the law and who are the potential litigants—together with those who are more methodologically inclined, such as the analyst type and the mathematician type, and so on. So, you always have the team there. It is not something that the mathematician ought to do by himself, because he is going to get the wrong answer. He is not even going to know how to analyze the problem; he has to be there with the person who has the problem.

The second point I would like to make is that I can see doing both a cognitive mapping and a conceptual approach on that; that is fairly straightforward, I think. I am trying to figure out how you would stick this into the computer. Now, the model that we have is one that takes all cases in a typical Federal district court and it handles each one of them individually. To add this new cause of action into our computer would require the following kinds of numbers: How many cases will arise as a result of the new legislation? There, you are going to have to consider three or four variants anyhow, depending on what the primary issues are.

You have to have somebody estimate what the characteristics are of the cases as they trot through the district court here; how frequently will a case receive this kind of treatment, that kind of treatment; how often will it go to a jury; how long will it take to process this activity. How much attorney time is required at this stage of the case; how much judge time is required at this stage of the case, and so on.

Then you add those numbers into the computer, run it out, and you get the results, then, as a consequence of putting the new numbers in the system. Now, where do those numbers come from? When we did our quantitative statements here and tried to estimate probable caseload as a result of some kind of change, we had lawyers sit down and they said, "Oh, boy, if I have that, I am going to have a field day here, because for the first cases that go through the system, I am going to probe every last lacuna to see whether or not I can take advantage of that." So, the initial caseload will probably be of the nature of testing the legislation to find its limits and testing the court system to discover what they will react at.

But after all of that is finished, you ask the question, "Well, what will the courts do when confronted with this kind of aberrant behavior," and then "they would probably do the following thing." Then you are off to, "what is the normal caseload that would be introduced by that new kind of legislation." Those are the kinds of things that you need. A computer model would be very complicated on something like that; it would take weeks to corral the data and put it into the computer. As has been noticed many times, each time you turn a computer on and put something new in it, there is a horrible habit where computers are able to expose bugs very quickly, and you might spend a lot of time doing some new programing.

Dr. NEJELSKI. One additional area I would add is, what would be the geographical impact of this legislation. Antitrust changes perhaps would not impact North Dakota as much as they would New York or Los Angeles. Black lung cases, as we know, hit very hard in the sixth circuit and some other areas. But I think we can make some quick estimates on that; one does not need, necessarily, terribly sophisticated devices to run down a fairly quick checklist and see what it tells us about impact on the justice system and ripple effect, and so forth.

Mr. CUSHEN. I think the real proof of whether or not you can do a meaningful, credible, usable justice impact statement rests in putting the thing to the test. I would say, why not pick a piece of legislation that you are tremendously interested in and that has some chances

of finding numbers that are not stretching people's ability to be reasonable, and run one through? Do not do a \$300,000 job, but do something which is within the time frame of the legislative history that you are looking at; do something which is within the budget that you can live with, and invite people in. People will do things in developing state of the art in a forum such as yours and they will not charge you full price for it, really, because they are not only doing something for the good of the country, but they are also getting a little publicity out of it as well. You know, they have some seniority of having been there first.

I would say try it, if that is the piece of legislation that is troubling you most. I would say, do not pick a real easy one, because then you have done a kind of mechanical computation. Do not pick out a real complicated one; we beg Charles, "please do not give us the assignment of analyzing the new criminal code or anything like that," because that is much too complicated.

Senator HEFLIN. I think this superfund would be about as complicated as anything you have, if you went through the four different aspects. It has some provision that might be adopted where a person has three choices. He could go into the Federal court for injury; he could go to the superfund and the superfund would subrogate to recover and to add to the fund, and then they would have the State court remedies available. If you ever got into the impact on State courts, you would have so many varying situations, depending upon what the substantive law is—strict liability, contributory negligence, and all of these other issues that could come in. That would be an impossible situation.

But I think that because you have limited access to the Federal courts in this, it is certainly a worthwhile experiment; it is not as large scale as some of the others. Something like 96 percent, I think the figures are, are tried in the State courts, which leaves only 4 percent in the Federal courts, so you have restricted impact, initially at least, to investigate.

Dr. Wellford, do you want to comment on these?

Dr. WELLFORD. The only comment I would make is in response to the notion that experimentation and evaluation might be an alternative to doing impact statements; that is, a piece of legislation could involve a 2- or 3-year experimental period, such as has been the case with court-annexed arbitration and bankruptcy reorganization.

At this early stage of developing justice impact techniques, we could, of course, define them any way we want. But it seems to me, as was stated in our testimony last November, that there really needs to be a distinction between research and evaluation on the one hand and impact statements on the other. Impact statements should be ways of organizing in an orderly, open, and reliable way existing information, whether that information be expert opinion, quantitative information, or qualitative data. They are ways to organize what is available. I believe such organizing of existing information is an important thing to do in the legislative and the executive process of recommending and implementing change.

experimentation, which is very important in and of itself, but we

I do not believe that we should shift the focus of impact statements to

should maintain our movement toward developing approaches and institutionalizing these approaches to better organize what we have available when we have to make decisions about the likely impact of legislation.

Senator HEFLIN. Well, we appreciate your all coming and being here, and I think this has been very enlightening. We may have some written questions that we may want to send to you. As you obviously know, everybody is feeling their way here and getting ideas, and we will have further hearings on this as we go along. But at least I think we are making a record and having something for evaluation.

Your work is very much appreciated. Thank you very much.

Dr. WELLFORD. Thank you, sir.

[The prepared statements of Ms. Douglass, Ms. Celeste, and Messrs. Nejedlski and Cushen follow:]

PREPARED STATEMENT OF KATHERINE E. DOUGLASS

My name is Katherine Douglass, and am currently a management consultant with Arthur Young and Company. I am here this morning to discuss the subject of justice impact statements. I was involved in a project to study the subject while employed at Mathtech, Inc., and co-authored a number of reports on the project. The complete list of reports from the Mathtech project is as follows: Draft Report on Methodologies, January 1979; Draft Report on Data Requirements, February 1979; Reading Materials for June First Meeting of Project Advisory Board, May 1979; Qualitative Resource Estimate for the 1974 Juvenile Justice Amendment, June 1979; Qualitative Study of Possible Legislative Changes in Diversity Jurisdiction, June 1979; Qualitative Resource Estimation for Small Business Judicial Access, June 1979; Quantitative Justice Resources Estimate for the Juvenile Justice and Delinquency Prevention Amendment of 1974, October 1979; Quantitative Justice Resource Estimate Relating to the Abolition of Diversity Jurisdiction, November 1979; Draft Final Report on Methods and Data for Justice Impact Statements, December 1979; Draft Final Report: A Summary of Events and Achievements in The Justice Resource Estimation Project, December 1979; Final Report: A Study of Justice Impact Analysis, April 1980 Technical Appendices to Final Report, April 1980, and A Justice Impact Statement on the Abolition of Diversity Jurisdiction, April 1980.

The subcommittee has heard testimony on this project and on justice impact statements previously, specifically on November 14, 1979.

Justice Impact Statements, or Justice Resource Estimates, have been previously discussed in many contexts and from many points of view. During the course of the Department of Justice sponsored project to study ways of performing justice impact statements, several approaches to the problem were investigated. For a given piece of legislation, these approaches could include reviewing testimony given by experts on the subject, and organizing the key points of that testimony in a way that they can be compared with those given by other experts. This method has been called conceptual analysis, or the development of impact tables.

A second approach is the use of cognitive mapping, a technique in which experts on a particular issue or piece of legislation are interviewed in a systematic manner, and the responses to those interviews are analyzed. This procedure yields a list of factors that the expert finds particularly important with respect to the issue at hand. This technique, cognitive mapping, is a promising method to be used during the developmental phases of legislation. In addition, cognitive mapping may well be a way to define the critical factors in what has been called "the quality of justice," so that they may be taken into account in justice impact statements.

The third approach investigated was that of stimulation and feedback. In this method, a sophisticated computer model is used in conjunction with a panel of experts to develop numerical estimates of the impact of a piece of legislation. It is this technique that formed the central part of the justice impact project.

These three methods, conceptual analysis, cognitive mapping, and simulation and feedback, can be used separately or can be combined to analyze complex pieces

of legislation. We view them as forming a continuum of methods, rather than three separate and distinct ones.

The third method, simulation and feedback, warrants further discussion at this point. During the project, a large and complex computer program was developed to "model" the activities of a Federal district court. The program was written to show court cases of differing types entering the court system, and going through the types of activities which cases normally undergo, such as trials, hearings, and delays. The program also includes district court judges and Federal attorneys, and allows them to handle cases in court and in their offices or chambers.

The computer model produces measurements on how the court system is working. These include the numbers of cases of different types which are completed each year, and the length of time from their filing to their disposition. The numbers of cases in court backlogs and how long those cases have been waiting are also recorded. The amounts of time that judges and attorneys spend working on cases is also tracked.

Although still in its developmental stages, this technique is an advance over previous attempts to model the justice system in that it allows cases of different types to flow through the same system. In addition, it allows civil and criminal cases to be modeled in different manners, to account for the different activities scheduled and procedures used in those types of cases. Most importantly, the simulation and feedback technique allows the opinions and knowledge of experts on the justice system to be brought to bear on the operation of the computer model. This process is the "feedback" component.

To illustrate the concept of feedback, I will briefly discuss a feedback experiment that was conducted during the project. This experiment was on the subject of the abolition of diversity jurisdiction. A panel of three professionals from the Department of Justice was interviewed, with one panelist representing a Federal district judge, one a Federal attorney, and one a member of the private bar. Each panelist reviewed the results produced by the computer model and suggested changes that would be made in the system if diversity jurisdiction was abolished. Those changes were made, and the panelists again reviewed the results and made suggestions based on those results. After three "rounds" of this process, the experiment ended with a meeting of the panel. The diversity jurisdiction feedback experiment can be considered successful in a number of ways. The experiment demonstrated that experts could understand the concepts in the model and that they could make meaningful, quantifiable changes to the system. It also demonstrated that the numerical results of the model were comprehensible and useful to the experts in their effort to participate in the experiment. Although the outcome of the experiment was not conclusive, several points for further development of the method were suggested. Perhaps the most significant of these was the need for data to be provided to the panelists. Ms. Celeste will address the topic of data.

PREPARED STATEMENT OF JEANNA F. CELESTE

My name is Jeanna Celeste and I would like to continue the discussion on justice impact studies. I am currently employed at Mathtech, Inc. and have co-authored various reports on the Justice Impact project.

Data needed by the model

I would like to address the subject of data. The simulation model which Ms. Douglass has described requires rather detailed data in order to make it operate. To be more specific, in the first stage of the model, it is necessary to indicate the number of cases of particular types, i.e., criminal cases, federal question cases, etc. which enter the system within a given time frame, say per year. It is in this initialization stage that cases may or may not have judges and attorneys assigned to them. This assignment is made based upon the likelihood that a case of type X will proceed far enough into the system to require the services of an assistant U.S. attorney and/or a federal judge. An example of a case that would not have an attorney or judge assigned to it would be a criminal case in which the accused is diverted into some sort of community rehabilitation program prior to any hearing. Thus, assuming he/she is not returned to the justice system, no justice resource time will have been expended.

In the same stage of the model, case activity and event profiles are selected. Data is required on the number of event or activity episodes and the duration

of each. These events and activities consist of the court appearances (e.g., hearings, trial, etc.) and out-of-court processing carried out in the offices and chambers of the resource actors (e.g., conferences, letter-writing, legal research, etc.).

Another important event set includes the delays experienced by cases. Delays are handled in two ways, as internal or external to the modeled resources. Internal delays include any noncase-related time expended by the assistant U.S. attorneys and the federal judges. Administrative work, participation in professional societies, pro bono work, vacations, and sick leave represent such delays. External delays include time expended by private counsel, the probation office, auxiliary services of the court, etc., which although not explicitly modeled, prevent cases from completing their processing by the modeled resources. The number of episodes and points at which cases undergo these delays are set according to case type in the initialization stage.

Other sorts of data which are needed include the average life (i.e., elapsed time from entry into the system to exit from the system) of cases of particular types. In addition, we need to input the probability of cases terminating at particular points in the process so that we can estimate the number of cases: dropped from prosecution, diverted from the system, dismissed, plea bargained, withdrawn, tried and acquitted, tried and convicted, etc.

The data requirements of the model are rather extensive and detailed, particularly considering the current state of record keeping in the federal justice system. This is partly due to one of the objectives followed during the modeling effort to construct the most accurate simulation network possible, unconstrained by the availability of data. This was considered to be the best policy since efforts were underway to collect and analyze very detailed data on the workload of U.S. Attorneys Offices as well as studies on the conflict resolution forums and costs of civil litigation. Also, the Federal Judicial Center has been in the process of updating its case-weighting information of the federal judiciary's caseload. The recently established Bureau of Justice Statistics has been given the mission of providing for the collection, analysis, and dissemination of data on crime, and on the operation of the criminal justice system at the federal, state, and local levels. They also have been given the authority to devise standards for the collection of these data. All of these endeavors should greatly enhance the capability of supplying the simulation model with data.

Another point which should be made is that the task of collecting and inputting data to the simulation need not be a major effort but once. The model is cumulative in its ability to reuse input data to undertake any number of studies. There may be a need for doing some reprogramming, resetting case handling priorities, etc. and the location and processing of data on some specific topic for input to the model when conducting new studies. For the most part, however, once the model has been supplied with data, the data needs only to be updated periodically to maintain the currentness of the model.

Data output by the model

Once the data has been input, the model is "equilibrated," that is, tested and adjusted until it produces reasonable results. Reasonable is defined as producing outputs which are consistent with published statistics or other established criteria that describe the system's current operational status. The outputs from the simulation model include:

- (1) the number of case completions by case type within a specified period of time;
- (2) elapsed time from the entry of cases of the various types into the system until their exit;
- (3) the percentage of time each judge and attorney spends on case-related activities; and
- (4) measures of courtroom and noncourtroom case backlogs for each modeled resource.

When a Justice Resource Estimation is being prepared, the model is equilibrated and a group of system experts is brought together to serve as a feedback panel. The members of the feedback panel are "calibrated," that is, the research team has each member answer a series of questions relating to altered states of the system which are then translated into quantitative magnitudes of perceived change. The panel reviews the simulation outputs and, when satisfied that they represent the current operational status of the justice system, the experiment begins. Changes are introduced to components of the system which would be affected by the adoption of the legislation or rule changes; a simulation is run

and the new outputs are given to the feedback panel to review. Based upon this review, the experts suggest behavioral adaptations which they would expect actors in the system to make. These adaptations are entered into the model and another simulation is run. This process is reiterated until all the panel members are satisfied that the system has made all the adjustments it is likely to make. These outputs are considered the prediction of the effect of introducing the legislative changes.

In addition to their role as providers of behavioral adaptations for justice system actors, the feedback panel could serve a particular valuable role in assessing the quality of justice being served, based upon the predicted alterations in the system's operation. For example, they may suggest that the elapsed time for getting particular cases through the system is unfair to the citizens involved in the litigation, or that too many serious criminal cases are being dismissed due to the attorney's backlog of cases, and so on. This would be a very important evaluation of the expected impacts.

Data sources

Some of the data Mathtech, Inc. used in the Justice Impact project was obtained from published sources such as the "Annual Report of the Director of the Administrative Office of the U.S. Courts, Management Statistics for U.S. Courts," and the 1969-70 Time Study of the Federal Judicial Center. Additional sources include data obtained using special tapes prepared by the Administrative Office of U.S. Courts, and data were produced by Public Sector Research, Inc. from the 1979 Inslaw study:

Allocation of resources to U.S. attorneys offices: a case-weighting approach

In some instances, no data were available in published or computer retrievable form; in these instances surveys were constructed and distributed to various judicial personnel who agreed to supply the needed data; other estimates were made based on available data.

Prospects for future studies look considerably brighter. The Department of Justice is currently sponsoring projects to further the development of case-weighting systems for U.S. attorney workloads. In addition, the Department is also sponsoring a project to assess the cost of civil litigation. This includes an analysis of the actual volume of particular types of conflicts which are resolved outside of court as well as those which go into the system. The litigants' reasons for electing one forum over another are also examined.

The newly established Bureau of Justice Statistics promises to provide another rich source for detailed and current information about the functioning of the justice system. The more advanced available data become, the more information the simulation method can provide.

I appreciate this opportunity to present this information to the subcommittee and I hope that my testimony will be helpful to you. Later in this program, Dr. Walter Edward Cushen will provide information on the future uses of the model.

PREPARED STATEMENT OF PAUL NEJELSKI

I wish to thank the Subcommittee for this opportunity to speak as a private citizen on the subject of impact statements. These are personal views based on 20 years of experience working in and studying the courts, summarized in the enclosed biographical sketch. They do not necessarily represent the views of my current employers.

An article¹ which I coauthored a few years ago gives some history about attempts to make projections about case-loads and other indicia of change in the courts. The development of one "judicial impact statement" was described along with similar though less formal quantitative studies being performed at that time in the Department of Justice. Nothing in the intervening two years—including the recently completed \$300,000 Mathtech study—has changed my view that these studies are useful tools in studying the judicial process, but that their results have limitations in policy formulation.

At the federal level, relevant offices in the three branches of government (and other centers of study) have been developing increasingly useful studies of the

¹ Robert P. Davis and Paul Nejelski, "Justice Impact Statements: Determining How New Laws Will Affect The Courts," 62 *Judicature* No. 1, pp. 18-27 (June-July 1978).

justice system—including weighted workloads for District Court Judges and Assistant U.S. Attorneys. Hopefully, that trend will continue, and projections in certain circumstances can be useful. The universal requirement of such statement, however, cannot be justified by either their quality or cost.

The movement to produce judicial impact statements presently raises as many questions as answers. My reservations about relying heavily on these statements may be summarized under these familiar headings: (1) What is their proper scope? (2) Who should prepare them? (3) Where should impact statements be prepared? (4) When are statements appropriate? (5) Do they have an inherent bias? (6) How should they be prepared? (7) How much will they cost? (8) What is their purpose? (9) Are there alternatives? (10) What about quality of adjudication?

1. *What is the proper scope?*

Just studying the impact of changes on the number of judges is inadequate, for judges only compose less than 90 percent of the judicial branch. But even beyond the judicial branch, the ripples may be considerable—including Department of Justice, the whole executive branch, the private bar, clients-consumers-citizens.

Studying the impact of only legislation is clearly inadequate. Court decisions—such as the Supreme Court's *Brown v. Board of Education* in 1954—create more work for the courts, as do decisions by administrative agencies or new court rules of civil, criminal and appellate procedure. The passage of the Equal Rights Amendment to the federal constitution would undoubtedly result in an increase in litigation.

The number of lawyers and their cost (e.g. the creation of federally subsidized legal services for the poor) are pertinent. We do not know very much about why people sue. Or having commenced litigation, why they settle or go to trial.

We must remember that cases are added to *and subtracted from* the courts for a variety of reasons. The initial "bulge" of Black Lung cases has passed, class actions under Rule 23 have reduced substantially, Selective Service cases are no longer the problem they presented ten years ago, etc.

Alternatives to courts whether there are community justice centers or mediation of industry-wide problems (e.g. The Coal Project) may as a practical matter remove substantial areas from the courts.

Should the proposed abolition or curtailment of diversity jurisdiction—although some cases would remain under federal question jurisdiction—carry a provision "terminating", say, fifty federal judges? Probably not, but hopefully the point is made that courts, especially in the federal system, are relatively complex organizations.

There are ebbs and flows which we only imperfectly understand. Any individual change should be viewed in the context of the total workload. An increase in one type of case may be offset by a decrease elsewhere or a better way of handling these new cases.

Once one acknowledges that the justice system is adaptive, evolving, learning—then any study—given our present state of sophistication—must be suspect. We know that some judges will be more productive than others, some will assign these cases to a magistrate, some will issue a standing order which may govern scores of pending cases, etc. But we cannot now predict in a meaningful way how this adaptation will take place.

While computer simulations can be very clever, they (and their creators) may fail to understand the importance of basic policy questions. For example, important institutions and values are contesting for access to the federal courts. Bankers want their robbers investigated by the FBI and tried in federal courts. Civil libertarians also want access to the federal system, as do personal injury trial lawyers and scores of others. Without wishing to be characterized as either optimistic (or pessimistic), these interest groups will have more to say about the future mix of cases in the federal courts than the Q-GERT arcs and nodes.

2. *Who should prepare them?*

Preparing impact statements is an art, not a science. Consequently, who prepares these statements is very important. Do the authors understand the limitations of the methodology and data? Do they have sufficient familiarity with the system being modelled to understand its complexity and to spot errors?

The best simulations are done by persons knowledgeable in both legal pro-

cedures and substance, as well as social science quantification. There are very few people skilled in both of these areas.

The social scientist may err in developing very elaborate and superficially convincing models which do not take into account the reality of the law or its administration. Lawyers without any quantitative sense may overlook important system problems. Given the current development of law and social science research, we are very much at the beginning of this field.

3. Where should impact statements be prepared?

Should the capability to prepare impact statement be centralized or decentralized? Centralization in one place might improve the capability to learn. The cumulative development of statements should lead to improved methodology and a better understanding of the data and its limitations.

Decentralization, e.g. having statements prepared by a variety of sources, has the advantage of introducing a dialectic or adversarial process which may sharpen issues and bring out different points of view. With the three branches of government, there is a healthy tension if each has an interest and the capability to perform this type of work.

Another choice is between having this capability in government or contracting with consultants. Expertise and continuity would argue in favor of keeping this function within government. More independence and flexibility might be found in outside contractors, although they would probably be subject to some extent to the world view of their sponsors.

Regardless of whether the work is performed inhouse or on contract, one or more government agencies will need to be primarily responsible for the preparation of impact statements. There are many candidates.

In the legislature, there are at least five possibilities: (1) the Library of Congress, (2) the Congressional Budget Office, (3) the Office of Legislative Counsel, (4) the General Accounting Office or (5) Judiciary Committee or Subcommittee staff. Most—and perhaps all—of these units have on occasion studied and commented upon the impact of proposed or current legislation.

In the executive, there are also a variety of candidates. Within the Department of Justice, three come readily to mind: (1) the Office for Improvements in the Administration of Justice, (2) the Office of Management and Finance, and (3) the newly created Office of Evaluation. Depending on the subject matter, one or more of the other departments or agencies may have an important role to play, for example in producing or interpreting data. Then too, the White House staff or the Office of Management and Budget may wish to make a contribution.

In the Judiciary, there are two almost indispensable institutions. The Administrative Office of the Courts has the best data about the federal courts. The Federal Judicial Center has developed a rich body of studies, including important pioneering work on case-load forecasting.

This diversity of possible sources presents problems as well as promise. On the plus side, there is a great deal of talent and information potentially available. In some ways it may be best to leave it on an *ad hoc* basis—depending on the organization(s) with primary interest or expertise to develop a statement or give testimony. This has been the current situation.

But where a job is supposed to be performed by each of a dozen plus organizations, it runs the risk of not being done by any of them. No single group develops the expertise which can lead to steady refinements and improvements.

Another part of the problem is the fear of institutional bias—real or imagined. Some may feel that courts may err on the side of exaggerating the workload, or the Justice Department may overestimate the cost of granting attorneys fees, etc.

A final problem is the need for insulation of the staff which prepares an impact statement from political pressure. Most statements are reviewing someone's favorite idea. It may be hard, for example, to have a unit of the Justice Department draft a statement which may be seen as detrimental to an Attorney General's priority program.

A possible solution to this diversity of sources and the need for independence might be to create a consortium of the three branches with a lead office selected from each branch to provide continuity. For example, the Congressional Budget Office could represent the legislature; the Office for Improvements, the executive; and the Federal Judicial Center, the judiciary. Other offices could participate depending on the nature of the problem presented.

By being prepared jointly, the statements would benefit from a diversity of inputs, have fewer real or perceived biases, and insulate the preparers from the legislation's proponents (or opponents!).

Chief Justice Burger and Griffin B. Bell, when he was Attorney General, called for the creation of a Federal Justice Council. One of the suggested functions of this Council was the preparation of impact statements or, more generally, the predicting of federal caseloads and planning for the future.

As a step toward the cooperation and sharing of views and information contemplated by the call for a formal Council, there has been in recent years a meeting at Williamsburg early in each session of Congress for some of the leaders of each branch. The joint preparation by relevant staff from the three branches of impact statements and other long range forecasting could be a useful supplement to the Williamsburg discussions.

4. *When are statements appropriate?*

Other types of impact statements, for example in the environmental area, have been criticized for coming too late in the process to be very helpful. The timing of any judicial impact statement is certainly important.

Ordinarily, they would be most appropriate at the hearings stage. This would sort out those many bills which do not get to this threshold stage. Also, a hearing would provide for questions by Members of Congress which would help put the statement in proper perspective. (Updates may be necessary, if substantial changes are introduced at subcommittee or committee markups.)

5. *Do they have an inherent bias?*

Since they are generally concerned with measuring the cost of new legislation, most judicial impact statements will have an inherently negative impact. They will emphasize the cost with little recognition of the benefits. Although measuring the benefits is often at least as hard as studying the costs, at least some articulation of what is sought to be accomplished by the proposed legislation is appropriate.

One criticism of the Mathtech final report is that there is no description of what the legislation or proposal sought. Nor is there any attempt to discuss how those benefits might be measured.

6. *How should they be prepared?*

Lack of methodology and data are serious impediments to developing sound judicial impact statements. When I was at the Department of Justice in 1977, we were lucky in attempting to predict the impact of making the decisions of the Veteran's Administration reviewable in court—there was a wealth of comparable experience in disability cases from social security and elsewhere. Similarly, relatively minor amendments to existing programs or statutes can be predicted with more confidence.

One important lesson appears to be that actual experience with litigation resulting from legislation (or case decisions, court rules, etc.) is rarely a simple linear increase, e.g. 30 percent more each year. Some come in bulges at the beginning such as "Black Lung" cases. Others lie relatively dormant and then experience dramatic increases (e.g. 42 USC 1983).

The opening section of this statement on the scope of judicial impact statements indicates key questions for which computer simulations can *at this time* at best give a spurious accuracy. What are the causes of litigation? What is the impact of external factors such as an increase in the number of lawyers in the population—or more significantly in a particular specialization of the law? How does the judicial system adapt to new problems?

The Mathtech final report to me seems inadequate in dealing with basic relationships between caseload, workload, processing time and outcomes. What is the displacement in a system with an increase of cases—e.g. Will every case be delayed? Will some receive less detailed attention? Will other cases be decided differently? etc.

The authors of the Mathtech report candidly tell us that the results provided by their simulations did not conform to real world experience and that their final model has not been "debugged" (II-9). The report fails to give a justification for why their particular approach was followed and how it built on earlier work. No bibliography is presented. Since no data are given, it is impossible to comment on this crucial aspect. The "results" of the experiments lack any quantification and are couched in generalities. After \$300,000 and eighteen months of labor, we have at best an increased appreciation of the problems presented in producing meaningful results in this area.

7. *How much will they cost?*

If the Mathtech experience is typical, the cost of computer simulation—at least initially—is prohibitive; \$300,000 has resulted in three or four preliminary studies.

Admittedly, the problems presented were difficult and diverse—class actions, juvenile offenders, and diversity jurisdiction. But this raises an important question—to what extent is every type of litigation special and unique? If there are few similarities, then the cost of study and simulation for each new type will remain high.

Of course, not every impact statement needs to be the product of computerization. The 1977 Veterans Administration impact statement was done in a few days in collaboration with two of my colleagues at minimal cost. Necessity is often the mother of invention.

8. *What is their purpose?*

If impact statements are proposed as a vehicle for the automatic creation of new judgeships, their future is not bright. First, the problems already indicated make them an easy target. Second, the Florida legislature may have been willing to tie the creation of judgeships automatically to population increases, but the Congress has found the political party of the occupant of the White House to be a relevant variable in its decisions to create new judgeships.

If impact statements can be used to sensitize Congress in the long run about the need to provide adequate judges and other resources, they can be a useful tool in helping to manage the judiciary—and relevant parts of the executive branch.

This type of forecasting can be an increasingly useful servant in enriching policy debates. But it should not be allowed to be the master. The question of "how much is too much" must be weighed by Congress against the benefits. In the Veterans Administration example, we predicted that at least eight District Court judges would be needed in the first year.

If Congress found the current system of review at the Veterans Administration to be sound, eight new judges would be superfluous. On the other hand, if Congress found many abuses, eight would be a small price to pay for ensuring due process and fair treatment for our veterans.

Other benefits from this type of study include better understanding of these complex systems. Hopefully, impact statements can show the relative merits of alternative ways of handling various types of cases.

A computer simulation² which I wrote up over ten years ago concerning the judicial review of deportation orders is an example of what we can learn from studying a judicial system—learning not just how many more judges we need, but how best to handle particular types of cases. The question was whether the District Courts or Courts of Appeal should review deportation orders.

In 1961, Congress passed an amendment which made these orders directly reviewable in the Courts of Appeals. The primary concern was speed. Certain alleged racketeers and communists seemed to delay their deportation endlessly by appeals and repeated review in the courts. In response, Congress sought to shorten that period and limit the opportunities for review by making these cases directly reviewable in the Court of Appeals—thus eliminating District Court review.

My research suggested that, by focusing on these exceptional cases, Congress really made the process longer for all aliens seeking judicial review of deportation orders. Review starting directly in Courts of Appeals—plus Supreme Court review—took 346 days on an average. In contrast, review in the District Court including all of the possible review in the Court of Appeals and the Supreme Court took an average of only 204 days—142 days faster than the new system of direct review by the Courts of Appeals.

One problem with the Court of Appeals route was that the alien got an automatic stay of deportation, thus increasing the incentive to bring an action regardless of the merits. A record had to be prepared and filed. Briefs had to be written. No priority was given to these cases.

In contrast, District Court review placed the burden on the alien to get a temporary restraining order or preliminary injunction. The matter could be over within a day or two. Also, about half of the cases were in the Southern District

² Paul Nejelski, "Computer Simulation: An Aid to Court Study," 55 *Judicature* No. 1, pp. 17-20 (June-July 1971).

of New York, which developed a great deal of expertise both in terms of the government counsel and in the judges in handling these matters. On an average, cases commenced in this district took only 137 days for all stages of review.

The key variable was that only 7 percent of deportation cases were appealed to the Court of Appeals. But, even at a 50 percent appeal rate, the District Court route was faster. Only at a 90 percent appeal rate with initial Court of Appeals review faster. This simple example hopefully demonstrates the need to say more than: "let's add more judges." Rather, we need to consider in what court, by whom, and under what procedures, standards and presumptions these cases are best handled.

9. *Are there alternatives?*

Properly conducted, the annual budget process is supposed to review the total needs of the judiciary—including forecasts of work and caseload. In theory, it can take into account total increases and decreases. The budget process may in some applications be a substitute or possibly a complement to a front-end, piecemeal impact statement approach.

As a veteran of various efforts at Programming, Planning, Budgeting Systems and Management By Objective, I must note certain reservations about the precision of budgeting techniques, politics, and results. Also, the budget process can at times be less than rational, for instance when items are cut in retaliation for specific, unpopular court decisions.

Finally, as an alternative to existing methodologies (whether human guesses or computer simulations), trying a few real world experiments may be more rewarding. For example, rather than guess or use computers to simulate how court-annexed arbitration would work in the federal courts, experiments in three districts are hopefully providing important information about such questions as appeal rates and impact on cost and delay.

10. *What about the quality of adjudication?*

This example highlights the final question about any attempt to study the impact of a new idea—what is its impact on the quality of justice? In this instance, are lawyers picked at random from the bar a proper substitute for a federal District Court judge? These qualitative considerations are crucial, but they may be easily overlooked in a rush to quantification.

PREPARED STATEMENT OF WALTER EDWARD CUSHEN

On behalf of Mathtech, Inc. and the research personnel associated with the project, I want to thank Senator Heflin and the Subcommittee for the opportunity of sharing with you and the American people the findings of our project on Justice Impact Statements, sponsored by the Office for Improvements in the Administration of Justice, in the Department of Justice. I want also to acknowledge the helpful guidance of Dr. Charles Wellford, members of our Advisory Committee (two of whom have offered their counsel today), David Koehler and the staff of Policy Research Consultants, and many others. I also want to acknowledge the assistance of the materials presented by yourself, Harry Scarr, Samuel Krislov, Judge Alvin Rubin and John Dawson, in your hearings of November 14, 1979, for there are many thoughtful observations made there.

Now that the Mathtech project has been completed, I would like to offer some conclusions in three areas. These are based in part on the results of the study, and in part on lessons learned during my 28 years of helping agencies of federal, State and local governments to use the "systems approach" to problem solving. Jeanna Celeste and Katherine Douglass have described the Mathtech analyses, concentrating on the complicated computer model and the feedback run that we made.

The three areas in which I would like to offer my suggestions are as follows:

- (1) Given the Mathtech and other experiences, are justice impact statements now feasible?
- (2) When, in the process of developing legislation, should impact statements be prepared, and by whom?
- (3) Where should we go from here?

1. *Feasibility*

The Mathtech project was a research project, whose purposes were to list different methods that might be reasonable candidates for use in making justice

impact statements, and to use the most promising methods in developing some impact statements. The list of methods was prepared, critiqued and reported in the early days of the project. We selected three methods, described by Ms. Douglass, for further testing in three applications contexts. These methods were: (1) impact tables, (2) cognitive mapping, and (3) the computer simulation-feedback methods. These represent three portions of a spectrum of methods ranging from less to more quantitative.

Our sponsor, our Advisory Panel, and external commentators reminded us that, although a massive computer simulation of a federal court could be programmed, there would still be at least two major conceptual difficulties. These included the availability of usable data, and incorporation of human and institutional behavior into the model or its associated analysis. We did develop a massive computer simulation and we selected one particular form of simulation because it had the ability to set case priorities depending on different factors such as the Speedy Trial requirement and factors such as the filing of injunctions. This choice brought with it some difficulties, since the resulting model filled the Justice Department computer to overflowing, and since it required some new programming and debugging to be done.

We concluded that existing data, supplemented with judgmental estimates by judges, attorneys, and others, resulted in a working system. The results were calibrated to match the summary statistics reported by the Administrative Office. When different assumptions were built in, the new results seemed to be credible. Some anomalies did develop, and a large amount of time was spent in determining whether the anomalies were fatal to the use of the model, or simply signals that some adjustments needed to be made. We do conclude that more, and better data, is needed to improve justice impact statements. But, we think that the data that now exists, or that can be developed from interviews and questionnaires, can carry the burden of "first generation impact statements" that will produce results that should be included in preparation and discussion of proposed legislation.

While making this optimistic judgment, we still note that some of the data objections raised by Dr. Krislov in his November testimony are still unsolved, e.g., our model uses data related to the number of cases entering the federal court system, and not the fates of all the aggrieved persons whose grievance did not reach the federal court system. We approximated this data shortcoming by having experts "estimate" the number of cases that would finally reach the courts, given the universe of grievances.

The behavior of people working in the court system—the judges and attorneys—was approximated in one feedback experiment, in which several steps were taken, as described by Ms. Celeste.

Thus, the Mathtech study targeted on trying to make a justice impact statement, addressing the data and behavior issues.

Now, when I personally balance the imperative to make an estimate of the impact of legislative or rule change, with the still large area of theory and data unknowns, I came down squarely on the side of doing some justice impact statements, and of investing further in research and development to improve their usefulness.

Impact statements are feasible because they have been done. Paul Nejelski's analysis of Veterans Administration legislation may be the first in a long line of impact statements. Mathtech has done three. This includes one very complicated one that may be regarded as an evolutionary stepping stone. The state of the art has been advanced. Our model counted things like caseflows, backlogs, elapsed time to handle cases, and workload on judges and attorneys in a federal district court. A good impact statement would also include things like balance of equities, shifts of power, and the effects of milestone cases on the future. A good impact statement would include a consideration of both State and federal courts. We had some indirect measures of these effects, but they were only partial indicators. We analyzed some limited topics, like the elimination of diversity jurisdiction, changes in the juvenile justice law, and changes in class action rules. Had we had more time, we would have considered the consequences of the proposed Magistrates Act and some changes in Equal Employment Opportunity legislation. A different simulation would have permitted estimates of changes in administrative law and procedures.

But, to me, the important thing to observe is that impact statements were made, and they included an explicit computation of the results of many factors. There were data—although there should be more. We did include the behavioral factors—although there should be more testing of our method and others for including them.

Finally, with respect to feasibility, there is the question of cost. Our studies included some simple impact analyses that priced out at about \$5,000. The entire study was funded at \$300,000 plus a \$100,000 extension, in addition to sponsor's time and computer costs at the Department of Justice. The costs of a data system to permit greater comfort with the results would be still larger. A large system would, of course, be designed to allow many different pieces of legislation to be compared using the same basic simulation, and this was the intent behind our developing the large computer model. That is, make a model that will allow a wide variety of questions to be answered, much like the Defense computer war games can compare different weapons, different tactics, different organizations, different logistics, different intelligence, different training, and different geographies. We made no explicit cost-benefit studies of doing justice impact statements. However, my personal experience with defense and other studies leads me to believe that the costs of doing justice impact studies are no more (nor less) prohibitive than doing analytic studies of other major issues. Some impact studies will be cheap. There will also be the inevitable drive to create a major multi-purpose, authoritative, analysis activity somewhere that can serve many users for many purposes.

2. *Where and when in the legislative history should impact studies be done, and by whom?*

Who should do an impact study, and when, is properly determined by the answer to the question, "Who needs them, and for what purpose?" It is attractive to prepare long lists of users and uses, and the natural consequence of that exercise will be to guarantee the construction of a massive computer-based general purpose model, with an increasingly insatiable appetite for more detailed data.

As a start, I would urge that impact statements should be used when legislation is being designed, and when resource planning to implement the legislation is being done. Impact statement methodology should be used for research and training purposes.

In the design process, an impact statement should focus on the major entailments of the legislation (or rule change) as proposed, and the entailments if modified in a variety of reasonable ways. An impact study should be asked where major undesirable effects can be anticipated, so that the designers can invent ways to stop those adverse effects. As the variants of legislation are debated, the impact statement should be rerun for similar purposes.

Who should do these statements? I argue that those who do the legislative designing should prepare them. This will be heavily in the Legislative Branch, significant in the Executive Branch, and to some extent in the Judiciary. I do not feel competent to suggest who in the Legislative and Judicial Branches of government should have that responsibility, but I feel less restraint when it comes to the Executive Branch. In that case, I feel that most Cabinet level departments should have an impact statement making capability. While some of the work can be contracted out, I feel that the policy-importance of the questions require a significant in-house capability to do some statements and to interpret and properly use those created under contract. A departmental group need not be large, although Departments with large responsibilities, such as Defense and HHS may need to be of some significant size.

The second major use of the impact statements is in the preparation of the resource budgets to implement the new legislation. This again means that an Executive Branch agency needs to be able to estimate its manpower and other resource requirements sufficiently well to satisfy the searching questions of OMB examiners and the Appropriations Committees. This kind of impact statement need not be a whole new run of the model, but could pick up the initial results of the first runs with modifications to accommodate the local issues within the agency or the administration.

One application of the Resource Model that has always appealed to me is the potential for use in the Budget packaging processes in the Departments. An impact statement that says how many more attorneys, investigators, judges, and court-room space is needed provides some inputs for saying how large a Minimum, Current, or Enhanced budget package should be, with (sometimes) more credibility than the estimating procedures currently used.

In your previous hearings, both Harry Scarr and Samuel Krislov made the point that we do not really know the mechanics and human behavior of the justice system and its actors as well as we should, and that more research is needed. Indeed, one of the uses of an impact model is to help in exploring what these mechanics are, and to determine where more research is needed. I would suggest

that research activity in the Justice Department, in the Legislature, and in the Judiciary should include impact statement methods as part of their research portfolios—both developing the impact methods, and for using existing methods to help guide their research programs.

Finally, other agencies, such as the Department of Defense, have found analytic methods to be valuable training devices. They show people how the system works for initial orientation; they allow people to learn how to do things by observing success or failure as a result of their choices; and they have the merit that they are "hands-on" training aids, and not just classroom lectures. As to who should do this, I would argue that the group that has the Impact Study methods in each organization should plan to spend part of their time working with the Training Office to adapt the model to serve a training purpose.

3. *Where do we go from here?*

My judgment is that there are five kinds of things that should be done now in the area of Justice Impact Analysis.

a. *Application.*—(1) My personal feeling is that the methods developed in the Mathtech contract should be tested in several more applications contexts—perhaps an analysis of the Magistrates' Act, the proposed Class Action Reform bill, and a run involving the new, but untested Criminal Justice portion of the model. The Justice Department would be a natural home for that work.

(2) Some applications in Administrative Law Agencies should be tried—perhaps in FERC, EEOC, or another agency. There would have to be some model changes, since it is not a federal district court that is the scene of action.

(3) Some forecasts should be tried, e.g., the effects of caseload increases in handling asbestos or radiation claims under the Federal Tort Claims Act and the Federal Employees Compensation Act.

(4) Some trial runs in using the model as a training vehicle should be made.

b. *User requirements.*—Before embarking on a full-scale use of impact models, I would urge that two user requirements surveys be made:

(1) General purpose user requirements have been identified as a result of thinking about who would use the impact statements and for what purposes. A more systematic assessment of user, use, type of issue, and the ways in which they change over the history of developing and administering a law, should be made.

(2) A systematic layout of output measures needed in an impact statement should be developed. As mentioned earlier, we used elapsed time, caseloads, utilization, and backlogs. This is certainly not an exhaustive set of output measures that should be used.

c. *Methods research.*—(1) Our model needs reprogramming before any extensive new applications are made. It is too big for the Justice computer, and we suspect that whole portions of the computer program that take computer time and memory space can be removed with little effect on the final answers.

(2) The model should be modified to include the effects of changes in the federal caseload on the State courts. In the diversity jurisdiction example, we computed the changes in the federal courts, but not on the State courts.

(3) The mechanics of the feedback exercise need to be improved. The communication language between the computer specialist and the subject matter professionals needs to be improved. The feedback concept was tested using Justice Department professionals. It should also be tested with courtroom professionals, and methods modified to accommodate lessons learned there. More generally, methods for incorporating behavior into impact statement-making should be researched.

(4) A more systematic way of generating legislative alternatives should be explored. We found alternatives in two ways: (a) asking people what other options are possible and reasonable, and (b) finding results that were unacceptable and asking what changes should be introduced to offset the bad effects.

(5) Research should be undertaken on the question of how best to use an impact statement. At the moment, use consists of some professional looking at the results and deciding what, if anything, to do with them. We need to develop a track record of lessons learned in actual attempts to use impact statements, as well as to learn how to place the right questions to the impact models. If we don't do this, we could end up with another massive requirement to do the equivalent of mandated environmental impact statements.

(6) Research is needed on how to forecast future workloads. Our model forecasts the steady-state results as a consequence of legislative or rule changes.

(7) Research should be done on how to draw inferences from the impact models. We did sensitivity analyses, and statistical analyses on whether the estimated changes were statistically significant. But, when confronted with a question as to why the caseload on criminal attorneys dropped slightly when diversity jurisdiction was eliminated, we could not say why definitively—we had to speculate as to the possible hidden causes or to rely on professional judgments that the change was *de minimis* or was reasonable. In any computer model, there is always the haunting fear that a change may be the result of some internal computer logic rule.

d. *Data*.—Although I have offered the opinion that there is enough data of acceptable quality in existence or obtainable to make some runs of the existing model of some value, I would be foolish to press reliance on the data too far. Two kinds of data need to be collected and drastically improved—the mechanical operations of the justice system, and the behavioral data of persons affected by the justice system.

e. *New areas*.—As indicated earlier, we have both mechanical proxies and the use of expert opinion for the essential features of such issues as the quality of justice, equities and equal access, and of due process. The overriding importance of this research demands that it be pursued with vigor and dedication.

We can say the same of justice impact statements—the overriding importance of making systematic estimates of the consequences of legislative and rule changes demands that justice impact statements be made with vigor and dedication.

[Whereupon, at 11:49 a.m., the subcommittee was adjourned.]

JUDICIAL IMPACT STATEMENTS

TUESDAY, DECEMBER 2, 1980

U.S. SENATE,
SUBCOMMITTEE ON JURISPRUDENCE AND
GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:50 a.m., in room 5110, Dirksen Senate Office Building, Senator Howell Heflin, chairman of the subcommittee, presiding.

Present: Senator Heflin.

Also present: Arthur Briskman, chief counsel; Michael Gilliland, staff counsel; and Peter Velde, minority staff.

OPENING STATEMENT OF SENATOR HEFLIN

Senator HEFLIN. The hearing will come to order.

Today this subcommittee holds its third and concluding hearing on the need and feasibility of judicial impact statements. Legislation increasingly affects the administration, procedures, and financing of our Federal courts. Judicial impact statements would be used essentially to predict and measure the impact of new legislation on the Federal court system. In today's hearing, we will continue to explore the practical aspects of implementing a system of impact analysis which could then be used by judicial administrators, as well as Congress, to facilitate the planning of judicial funding and staffing.

In recent years, impact statements have been increasingly utilized in areas affected by legislation. For example, the National Environmental Protection Act of 1979 requires that an environmental impact statement be included in every recommendation for legislation which significantly affects the quality of the human environment.

Similarly, there has been a growing interest in judicial impact statements over the past decade. In his 1972 state of the Federal judiciary message, Chief Justice Warren Burger urged Congress to consider the needs of the courts when proposing legislation. He lamented the lack of mechanisms capable of analyzing Federal court dynamics.

In 1977, the National Research Council created a panel to study methods of judicial analysis. Under the chairmanship of Prof. Samuel Krislov, the panel recently completed their analysis of the feasibility of judicial impact statements and released their report a few months

ago. In their report the panel examined, among other things, the potential and limitation of analysis techniques and the advantages and disadvantages of the different times such analysis could be made.

In the fall of 1978, the Department of Justice selected Mathtech, Inc., to survey the existing judicial impact methods and to develop a viable methodology. The method designed by Mathtech utilizes both intuitive analysis and complex computer analysis to predict the impact of proposed legislation on a judicial system's "resource" requirements, especially attorneys and judges. Their report offers cautious optimism over the feasibility of judicial impact statements.

Over the past few years several States have begun to develop methods of assessing the impact of proposed legislation on State courts. Moreover, on several occasions, Congress has undertaken or asked for court impact statements when considering legislation that would realign Federal and State jurisdiction, change diversity jurisdiction, authorize judicial review of Veterans' Administration adjudications, offer equal access to courts and expand the jurisdiction of U.S. magistrates.

The growing diversity of demands placed upon our courts necessitates the adoption of a systematic approach to court planning. The remotest activity of Congress now influences the operation of our Federal court system. Thus, the focus of these hearings stem from a need to minimize unnecessary burdens on the judicial machinery.

A thorough analysis regarding the development and use of judicial impact statements require that at least four major areas of concern be studied. First, these hearings must address the purpose of judicial impact statements. Should judicial impact statements attempt to measure impacts upon the "quality" of justice, or merely the quantifiable elements within the judicial system? Second, the scope of impact statements must be delineated. Third, the appropriate time for conducting impact analysis must be determined. Finally, the presence of an impact statement must never serve as justification for denying passage of legislation simply because the impact statement predicts an increase of litigation.

We are pleased to have with us today Prof. Samuel Krislov of the University of Minnesota and Prof. Keith Boyum of California State University, coauthors of the National Research Council's report "Forecasting the Impact of Legislation on Courts"; Dr. Ralph Kleps, former director of the Administrative Office of the Courts in California; and U.S. Circuit Judge Alvin B. Rubin of the Fifth Circuit Court of Appeals; and the Honorable Maurice Rosenberg of the Department of Justice.

Gentlemen, we are delighted to have you. We'll be rather informal. If you have prepared statements, they can be admitted into the record and become a part of the hearing record. If you would like to summarize what you have, or a statement you would like to make, we would be delighted to hear from you.

Professor Krislov, if you would go ahead.

Professor KRISLOV. Professor Boyum will go ahead with our presentation.

PANEL OF POLITICAL SCIENTISTS:

STATEMENTS OF PROF. KEITH O. BOYUM, CALIFORNIA STATE UNIVERSITY, AND PROF. SAMUEL KRISLOV, UNIVERSITY OF MINNESOTA

Professor BOYUM. Thank you, Senator.

As you know, I am here today with Professor Krislov, and he and I thought that I ought to prepare a statement for the hearing. This, I understand, will be a part of the record, so I can summarize in some brief ways.

First of all, I think the issue is of particular importance for planning for judiciary, and I think that credit is due to the chairman of the subcommittee for his interest in pursuit of this issue.

Let me also say that we, at the National Academy of Sciences, were very well served by the National Science Foundation which supported our research over there, and particularly the Division of Applied Research, which is an arm of the National Science Foundation, which will allow projects like this based on scientific points of view to address issues that we believe are of pressing importance.

In my prepared statement I really take up two issues. One of these is the difficulty of the analysis, what it is that one can do and what it is that one is presently unable to do with precision in estimating the impact of new legislation on courts. The second issue has to do with the overlap of possibility and pertinence, what it is that lawmakers might like to have in particular as they decide on the adoption of new legislation and its impact on courts.

First of all, as to the difficulty of the analysis, it seems to me that there are two general problems that are going to be involved any time that you sit down with a statute and attempt to understand what its impacts on courts are going to be. The first kind of difficulty is a legal or statutory analysis. There one is going to have to have expert judgment from persons who are learned in the law, from persons who are learned in the way of lawmakers, as to what the imports of those statutes are going to be, what does the statute say in precise terms.

I think we all know that some statutes are more carefully and clearly drafted than other statutes are, and there are occasions when ambiguity can foil any analysis of the impact of new legislation on courts at the outset.

One might, for example, have to wait a year or two until some appellate court has clarified the detailed meaning of what kind of a statute.

But supposing that we can get by that in most of the cases, most of the instances, or at least make some best guess about that issue in most of the instances, the second aspect or area of difficulty has to do with obtaining expert judgment on the effects of the statute on individual behavior, or in the view of the social scientist, that is what one is inevitably talking about when you're talking about the impacts that legislation may have on courts; that is, what people out there are going to do physically, behaviorally, what actions they're going to take, what decisions they're going to reach or not take or not reach.

The panel, in its conclusion, I think was calling for a modest lowering of expectations about what expert knowledge could be brought to that second issue, to that issue of theoretical knowledge about what kinds of behaviors and what kinds of decisions are going to be made or not made, given some new statute or other system.

What we had to say was that we don't know enough at this point. What we have to say is that as people who are interested in the social sciences and who have done some work in those areas we have to admit our own lack of knowledge. One can point to some hopeful signs; one can say that we know more about relevant kinds of behaviors and decision situations now than we did some years ago, and on that basis, among other bases, one can say that work can reasonably go forward. And yet, the theoretical basis for predicting those behaviors and decisions is largely lacking.

I go into some detail on that in my statement, and let me pass over that now just by noting the general conclusion that routine, precise estimates are probably not now attainable. That leaves the issue then of nonroutine impact statements or impact analyses, and it leaves us with the opportunity to consider in a little bit more careful way the issue of what kinds of precision may be needed by lawmakers.

Here I am being, well, a little presumptuous perhaps. But what I tried to do in the second part of my remarks was to make some best guess about the kinds of situations in which lawmakers might particularly value the analysis of the impacts that new legislation might have for courts, and my suggestions run along these lines.

That in the 80 to 90 percent of the instances of deciding on new legislation, it may be an item of interest, but perhaps not an item of crucial interest. There may, on the other hand, be situations which one might say are at each of two extremes, where judgments about the impacts that new legislation may have for courts can be of special value in reaching decisions. These would be first in those situations where a statute might honestly be thought to have the potential of truly swamping courts, a statute the size of the Civil Rights Act of 1964, or at the State level, a statute of the size of the so-called Rockefeller Drug Act passed by the State of New York in 1973.

It is of some interest that in each of those two examples, which we did review in a little bit of detail during our work at the National Academy of Sciences, that lawmakers took an active interest in what was going to happen to the courts given the adoption of this legislation. The decision as to whether or not to pass those laws probably did not hinge in particular ways on whether the courts were going to be greeted with a large number of cases or not, and yet lawmakers showed concern and, in fact, in the instance of the Rockefeller Drug Act, added new judges to the top court of general jurisdiction in New York State, the supreme court. So that's at one end of a continuum.

A small number of very large enactments might be particularly good candidates for some careful thinking about the number of new cases which might be generated.

The other category that occurred to me was at the absolute other end of the continuum, were small changes, probably technical changes, perhaps well exemplified by jurisdictional changes, in new legislation. The issue there would be that a major justification for adopting the statute at all would be reduction in overall caseload, some alleviation of congested dockets or whatever.

Here we also have some interesting examples, reviewed in a little bit of detail in our report, where proposals for example to alter diversity of citizenship jurisdiction in the U.S. district courts were evaluated with some great care as to the number of cases which might be expected to fall out of those dockets in the U.S. district courts.

There are some other examples of these relatively minor changes which are of interest then, I think, because lawmakers may wish to know in detail about the number of cases which will not come to court inasmuch as those pieces of legislation are justified in those terms.

That's a brief rendering, I think, of most of what I said in my prepared statement. Let me conclude with a little bit of the language that I used at the very end.

First, my own thinking, which I should say is my own—I believe it's consonant with what the National Academy report says, but I ought to say it's my own thinking—my own thinking is that non-routine estimates in situations which fall into one of those two categories may be useful to obtain. It is possible that there is significant overlap between lawmakers' interest in having such estimates and the possibility of generating something reasonable.

Second, to win some extra certainty in the estimates that are, in fact, obtained, we obviously need further theoretical development from the point of view of the social scientist.

Third, the winning of extra precision will necessarily await the theory which tells us what data to gather, and then the gathering of the data, which itself may be a problem just in terms of expense.

Present knowledge, in my judgment, does not permit cheap estimates of high quality in the substantial majority of instances which are not in either of the two categories outlined above. Even high quality expensive estimates may not be attainable. Still, where lawmakers and Congress and State legislatures may think it necessary either to know that courts will not be truly inundated in the short run, or to have previous experience laid out as a practical guide in deciding on small changes, some help may, in my judgment, be generated. To the extent that this is done, it will be necessary to bear in mind the often sharp limitations of any estimates received.

There, what I would like to say in concluding, is that the lawmakers who, in effect, purchase these estimates ought to be wise consumers, that they will always necessarily be limited, but yet there may be some use in having them.

Thank you very much.

Senator HEFLIN. Thank you.

Proceed, Professor Krislov.

Professor KRISLOV. My name is Samuel Krislov. I am joining Professor Boyum.

I just want to make one or two very brief comments in view of the time.

We came in early and peeked at some of the prepared statements, and at the risk of further eliminating what little disagreement there is among us, I want to emphasize that the Academy report in its guarded optimism which, of course, necessarily means guarded pessimism as well, had no wish to discourage the development. On the contrary, I think most of us wanted to encourage the development of impact statements, but were very aware of the fact that many of

the uses of social science in the United States had been oversold by practitioners, and then there had been a great deal of disappointment. So that we have tried to emphasize what was feasible and what was not feasible.

In addition, I think the report tries to emphasize the undesirability of any one agency having the monopoly of these projections for exactly the same reason, that if one agency which inevitably will have its point of view takes on the projections and the projections have all of the faults that were discussed in Professor Boyum's statement, that the whole art of projection can become discredited in an artificial way.

So our caveats are designed to protect the development of this sort of thing, rather than to discourage it.

My next point is also that no one agency should have a monopoly in its projection, that we should not think of the use of impact statements as being solely for the purpose of Congress or the legislature. These projections, this type of analysis, is essential for all components of the justice system and ought to be developed in the most general way possible so as to be used most generally.

Finally—and this is my last remark, really, or set of remarks—I think that we're very aware of the fact, and perhaps it is not well expressed in the report, that precision that demanded may not be the kind of precision that we theoretically are talking about. I look at the example of Congress and the Congressional Budget Office and I did some informal inquiries as to how they went about their estimates in putting price tags on things. It turns out that they call up the affected agency and they get their guess, and then they put a dollar figure on that guess so that in cases like this they would call the Department of Justice, the Administrative Office of the Courts, and get their guess, and then call a couple of other people and get some other guesses and put a price tag on it.

Now, my next level of inquiry was to ask "Has CBO ever studied its estimates to find out if they're accurate," and at least to the memory of anybody there during the period of this inquiry, nobody could remember their ever doing that.

Well, I think this comes under *res ipsa loquitur* as to why CBO would not be interested in finding out whether its predictions were completely accurate or not.

But the other interesting thing is that the Congress has not chosen to do that, either. So I think that also speaks for itself in the sense that the Congress, when it gets these estimates, is well aware of the fact that they are not scientific and precise instruments but are guesstimates.

One of the things we wanted to emphasize in the report was that these were, in fact, rough guides, the best thing that was available.

Recently a Nobel prize was awarded for the development of econometric models. As a result, there was a great deal of discussion in the press as to how accurate econometric models were. They concluded, as is an open secret in the social sciences, that given the hopes that there were, these are relative failures and that in many ways autoprojection and simpler devices would have produced as accurate and sometimes more accurate results.

Then the question was asked of business leaders who were fully aware of their limitation, and economists who were fully aware of

their limitation, would they have been better off without the econometric models. The answer of the businessmen was that, as imprecise as they were, it would have been impossible to have developed the economy without them; that one had to be aware of the limitations but they were absolutely indispensable.

I think if we get that kind of verdict 10 years from now, that they were imperfect instruments but they were very helpful, that we will have to call that a success. We think it's better to say that our judgment is that in 10 years that's the best outcome we can hope for. But it would be a very valuable outcome and on the whole I think it's achievable.

[The prepared statements of Professors Boyum and Krislov follow:]

PREPARED STATEMENT OF KEITH O. BOYUM

My name is Keith O. Boyum, Professor of Political Science, California State University, Fullerton. I served between 1977 and 1979 as Study Director to the Committee on Research on Law Enforcement and Criminal Justice of the National Academy of Sciences' National Research Council, and as Study Director to the Committee's Panel on Legislative Impact on Courts. As you know, the Panel's report was published as *Forecasting the Impact of New Legislation on Courts* by the National Academy of Sciences in October 1980. The chairman of both the parent Committee and of the Panel on Legislative Impact on Courts was Professor Samuel Krislov, from whom you have heard before, on two occasions. He and I have worked together closely on this project, and we are pleased to be able to share some ideas with you here today. We thought that the prepared statement might usefully be written by me on this occasion, inasmuch as Professor Krislov has set out his thoughts for you in the past. Professor Krislov is here today, and will be available with me to answer any questions you may have. I should note, however, that this statement is my own; and in particular, neither the Academy, its research arm, the National Research Council, nor California State University, Fullerton, are responsible for its contents.

On this point, however, let me presume to speak for Professor Krislov as well as for myself. I know he joins me in the belief that interest in planning devices such as impact analyses is well taken for any governmental institution. As the chairman of the Subcommittee knows better than we, planning for crucial yet fragile institutions such as courts may be especially important, and this is highlighted in times when frequently well-justified demands for tax relief mean that savings and efficiencies must be sought even more diligently than usual. I am pleased to note both the sound motives and the excellent timing which have led the Chairman to schedule these hearings.

In our work we have been concerned with whether it is possible to forecast the impacts that new legislation may have for courts. Chief among the impacts of interest is the number of new cases which will seek dispositional attention from courts. Of course a number of new cases is not the only possible impact, nor is it the only important one. New legislation may, for example, change aspects of difficulty or burden among types of cases which pre-existed. Or new legislation may result in a different docket mix of cases which, as a mix, might be criticized by observers as in some way the wrong mix. (Rightly or wrongly, courts might be accused of wasting time on too many trivial cases, for example.) We shall, however, concentrate on the issue of estimating the number of new cases to be generated by new legislation.

The issue is not simply whether one can estimate, for in a sense one can always find a more or less educated guess. Instead the issue is whether one can estimate routinely, reliably and accurately. We may first briefly lay out the dimensions of the estimating task. Figure 1 entitled "Impact Assessment Matrix," drawn from the Panel's report, offers a convenient way to do this. Four rows are defined in the matrix, representing different very general types of statutes. The six columns headed A through F are meant to represent sets of persons. The logic is that any estimate of the number of new court cases which new legislation will engender must take some account of the movement of persons from one set to another, metaphorically on their way to courts.

FIGURE 1
IMPACT ASSESSMENT MATRIX

	A	B	C	D	E	F
1. Statutes that explicitly seek to regulate behavior.	Number of persons apparently engaged in a regulated activity.	Proportion of (A) who are apparently not in compliance with regulations.	Proportion of (B) who are accused of being in noncompliance.	Proportion of (C) who dispute the accusation.	Proportion of (D) who fail to resolve dispute without recourse to court processes.	Proportion of (E) who resort to court processes.
2. Civil wrongs-----	Number at risk of a particular type of civil wrong.	Proportion of (A) who are apparently wronged who claim compensation.	Proportion of (B) whose claim is denied.	Proportion of (C) who dispute the denial.	-----do-----	Do.
3. Status changes and title to property.	Number who apparently are eligible to seek a particular status change or title transfer.	Proportion of (A) who apply for a status change or title transfer.	Proportion of (B) whose application is denied.	-----do-----	-----do-----	Do.
4. Statutes conferring direct material benefits on some group of the population.	Potential beneficiaries: number of persons apparently in the defined category.	Proportion of (A) who apply for benefits.	-----do-----	-----do-----	-----do-----	Do.

Note: The panel wishes to thank Keith O. Boyum for developing the matrix.

Apparent at a glance is a need for considerable knowledge before accurate and reliable estimates may be made. Generally this information is of two types. First, and prior, one needs sophisticated understanding—theory, or less preferably, some surrogate for theory such as well-charted analogous past experience. Second, armed with understanding, one needs data. The Matrix in Figure 1 illustrates rather graphically that the issues to which theory must speak, the decisions and behaviors which need to be well and thoroughly understood, are both numerous and difficult. Beyond this, we can see that even if we knew very explicitly the kinds of data which we would need for an estimating task they would yet be numerous, probably difficult to gather, and almost surely expensive to obtain.

Based in substantial measure on observations such as these, the Panel on Legislative Impact on Courts reached conclusions which may be characterized as largely negative on the issue of routinely achieving good estimates in most circumstances. The Panel's report used this language (at page 3).

We conclude that the basic theoretical and empirical knowledge necessary to develop good estimates of the impact of legislation on courts for broad classes of legislation is not yet available. The task of estimating impact is fundamentally one of predicting behavior: the number and nature of transactions in the society that may eventually lead to litigation, the choices made by potential litigants to go to court or note the behaviors of lawyers and others who broker entry to the legal system. Estimating the impacts of new legislation on courts involves predicting the effects of the legislation on all those behaviors and probably more, and they are all extremely difficult to predict.

There may be some limited exceptions to the general conclusion—for example, legislation that specifies jurisdictional responsibility for courts and especially laws that would exclude some cases from courts that are currently being heard in those courts—but, in general, the present prospects for achieving good estimates are dim.

The reason why predicting the effects of new legislation on all of the behaviors which are broadly represented in the Impact Assessment Matrix is so difficult may be succinctly put. We lack the understanding, the theory.

Understandably, the Panel called for further development of theory. But in this one may find some optimism, for one must believe that there is a reasonable chance of payoff before recommending that a quest for theoretical advancement be undertaken. Moreover, as a part of any general developmental enterprise, the Panel felt that systematic reporting of forecasting and related research could amount to "a stimulus to further work" and "a resource for improvement in capabilities" (page 9).

The Panel recommended against the position of a requirement that a formal impact statement accompany all legislation that could have an impact on courts. Yet the Panel went on with these observations (page 3).

If a more modest view is taken, however, a different picture emerges. Estimates in selected instances of legislative proposals, which might establish approximate costs, seem feasible. More importantly, downstream studies of programs already in place appear to be more manageable tasks, and such studies would contribute to knowledge about court functions on the part of the legislative branch. For most programs, it is sufficient for the legislature to be confident that even a conservative estimate of the cost is not prohibitive.

This last observation may be worth pursuing a bit, especially in this forum where we assume a key interest is in the overlap between what is possible and what is useful or pertinent to lawmakers. I want to note that what follows is consonant with the Panel's report, in my judgment, but represents something of an extension of what the report says, and so I want to make it plain that what follows should not be attributed to the Panel or to the Academy. My present thinking about the pertinence of estimating may be somewhat more optimistic in tone than one might expect upon a reading of the Panel's report. To the extent that there is any difference between my thinking and the Panel's report, it is not based on any different evaluation of available theory and method, but instead on what lawmakers may want or need for decision.

Sampling theory, which provides the basis for generalizing to a population on the basis of measurements made on a subset of samples of that population, has some concerns which are broadly similar to ours. On the basis of a sample, estimates are made about the characteristics of interest in the population. The reliability of population estimates can be described by two related concepts.

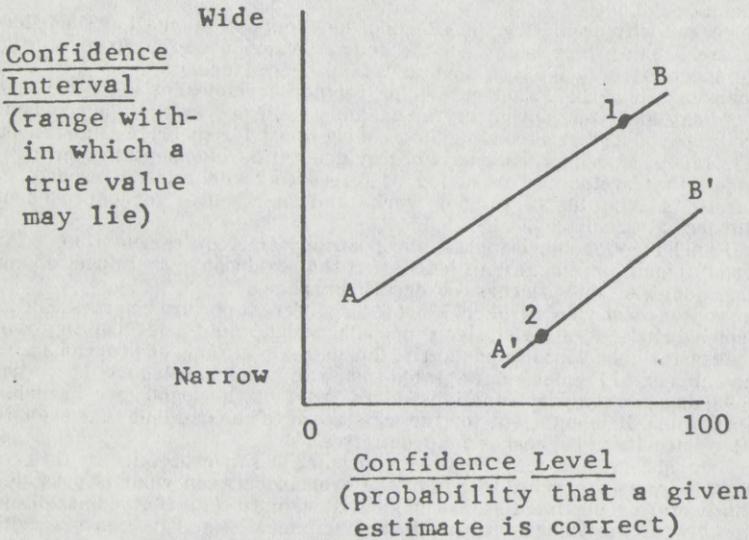
These are the confidence interval, and the confidence level. Because we are concerned with the reliability of estimates even as sampling theory is so concerned, we will borrow the language here.

A confidence interval is the range around a true value within which estimates can be expected to lie at a given confidence level. A confidence interval may be very wide, where one might say, that the number of expected new cases was 1000 plus or minus 900, or a confidence interval might be narrow (e.g., 1000 plus or minus 50). A confidence level refers to the probability that a given statement (or estimate) is correct. As Warwick and Lininger (on whom we draw for this discussion) say, "more simply, [the confidence level] has to do with the chances one is willing to take on his estimates." (See *The Sample Survey*, McGraw-Hill Pub. Co., 1975, page 92.)

The two are related, as Figure 2 below illustrates in general fashion. With wide confidence intervals one may purchase extra confidence that a given statement is correct. With narrower confidence intervals we normally are left with a lower probability that a given estimate is correct. Lines AB and A'B' generally illustrate this trade-off relationship.

Senators, Congressmen, and members of other lawmaking bodies will surely know better than I know what proportions of these things they need for decision—whether they need more precision (narrower confidence intervals) or more certainty (higher confidence levels) in estimates of the impact of new legislation on courts. It may nevertheless be worthwhile to suggest an elementary breakdown.

FIGURE 2



There may be a class of actions which Congress contemplates that are expected to have considerable workload consequences for courts but which are going to be considered and/or adopted entirely on other grounds (e.g., pressing need, or the redress of grave injustice). A Civil Rights Act of 1964 may fall into this category. At the state level, the so-called "Rockefeller Drug Law" (Chapters 276, 277, 278, 676, and 1051 of the 1973 Laws of New York State) may have been an example. In each of these instances there is evidence that lawmakers were interested in being reassured that the courts would not literally be swamped in the short term. (In the longer run lawmakers retain the options of modification of statutes, enlargement of judiciaries, or even repeal.) Indeed there is a record of provisions

being placed in such statutes in order to prevent any possible "swamping" of courts. On the other hand there may be another class of actions which Congress contemplates which are narrow, perhaps technical changes, including changes which are proposed in substantial part because they would lighten courts' workloads. Proposals to change diversity of citizenship jurisdiction in U.S. District Courts would fall in this category. One must note the obvious, of course—that most statutes fall in neither of these categories, but instead somewhere in between. In Figure 2 proposals of the first class (such as Civil Rights acts) would fall at 1 on line AB, and proposals in the second class (such as proposals to change diversity jurisdiction) would fall at 2 on line A'B'.

In Figure 2, line AB illustrates less knowledge about expected behaviors than does line A'B'. Point 1 on line AB defines a circumstance where estimation is not well or thoroughly informed by theory (or by surrogate knowledge), but where lawmakers' needs are much on the side of certainty even at the cost of precision. Line A'B' illustrates a situation where more knowledge about expected behaviors is in hand. We locate point 2 on line A'B' to define a circumstance where legislators would desire precision, and where precision might be had at little cost in certainty. We have in mind the "legislation that specifies jurisdictional responsibility for courts and especially laws that would exclude some cases from courts that are currently being heard in those courts" for which our report had modest optimism (at page 3) about estimating impacts. I must stress the relative nature of the differences between the situations defined as points 1 and 2 in Figure 2. In even the best situation we may be contemplating errors of as much as 100 percent: we might estimate a need (or a savings) of 4 judge time equivalents when the true value was 2.

Our report says that routine, certain and precise estimates for the number of new cases that proposed legislation would engender are not attainable. I persist in thinking that correct. But let me conclude with some further consideration of each of those terms: routine, certain, precise.

First, non-routine estimates in situations which fall into one of the two categories briefly outlined above may be useful to obtain. It is possible that there is significant overlap (though a good ways from total overlap) between Congress' interest in having such estimates and the possibility of generating something reasonable. Second, to win extra certainty (narrower confidence intervals) we need theoretical development. Third, the winning of extra precision will necessarily await theory which tells us what data to gather, and then the gathering of that data.

Let me end by saying again that present knowledge does not permit cheap estimates of high quality in the substantial majority of instances which are not in either of the two categories outlined above. Even high quality expensive estimates may not be attainable. Yet where Congress may think it necessary either to know that courts will not be truly inundated in the short run, or to have previous experience laid out as a practical guide (in the absence of theory) in deciding on small changes, some help may be generated. To the extent that this is done, it will be necessary to bear in mind the often sharp limitations of any estimates received.

PREPARED STATEMENT OF SAMUEL KRISLOV

My name is Samuel Krislov, professor of political science, University of Minnesota. I served as chairman of the National Academy of Sciences panel on prediction of legislative impact on courts as well as chairman during most of its operations as chair of the parent committee. As you know our report is scheduled to be available next week. My previous statement summarized our report and I will allude to the Report or summary only if essential to today's testimony. This, therefore, is a personal statement and neither the Academy, its research arm, the National Research Council, nor the University of Minnesota are responsible for its contents.

I am delighted to be invited to supplement my testimony of last November. (Judicial Impact Statements, this sub-committee, Nov. 14, 1979, Serial No. 96-48, pp. 10-20.) This is important work that you and indeed all of us are doing. Careful and considered effort is necessary to move at the opportune time to put into place

the best planning effort possible for governmental institutions. Courts, bulwarks of citizen liberty, are also fragile institutions, much more at the mercy of other people's agendas. They need all the help they can get and we owe them all the support we can give. The chairman of this subcommittee is, of course, unusually sensitive and aware of the courts' current needs, and it is due to his concern that we get this much needed awareness of impact and other planning devices.

There was some fear in my mind that I would be caught in a web of conflicting motives. On the one hand I served on the panel that selected Mathtech for the study. I also chaired the NAS-NRC panel which concluded the state of the art did not permit such progress. The final report in my opinion, vindicates both judgments. Mathtech has struggled valiantly and has made some real progress, particularly where the going was easy. On the tougher questions it has perhaps demonstrated the problems are even tougher than we thought.

1. PROGRESS ON AN ITERATIVE MODEL OF INTERNAL PROCESSES

In my previous discussion I emphasized that the conceptual problem was least difficult in the area of known litigants with relatively known motivations where minor changes in the law are implemented. This is what was attempted with the diversity jurisdiction data, and with the criminal justice resource allocation models. Both efforts are theoretically feasible and usable. They are similar to a study done at the request of your committee by the Federal Judicial Center on what mandatory sentencing would do in generating cases and filling prisons. What is distinctive in these models over simple pencil-and-paper projects is they try to simulate real events and take into account queuing (lapse of time, lawyer availability at a specific time) and conflicts between resources and demands of several cases. Mathtech has made available general programs to deal with such matters.

It would appear that not enough real-world data has been run to tell much about how well this first effort will be able to guide practitioners. As noted by them, anomalies appear which may be a product of queuing, which can be avoided by realizing the problem, or may indicate the computer program has logical problems. It is almost inevitable that such pioneering efforts will have kinks and flaws. Even simple information flow systems need shakedown periods and adjustments. This effort which is halfway between system development and feasibility study is of course more susceptible to such problems.

The Department of Justice is developing similar data processing information systems for internal purposes, e.g. planning their lawyer's time. I understand Dr. Wellford is in touch with this development and the efforts should be co-ordinated.

In short, these efforts by Mathtech are helpful and promising. But they deal with that area of court jurisdiction already relatively known and reasonably predictable from past litigation. Linked up with management information systems they will help the Department perhaps more than the Courts, but will have utility particularly if these efforts prove generalizable. That is to say if only minor changes have to be made for differing types of cases, and in different eras or areas. So far as I can tell from their report these questions remain open.

2. WHAT WE LEARN ABOUT PROJECTING NEW COURT DOMAINS AND COMPLEX BEHAVIOR

The strategy of the Department and Mathtech was to crawl before walking. We do not, however, know that there is such a sequence in computer programming. My instincts are to stay simple and plunge into more complex simulation later, but that is intuitive and could be counterproductive.

Let me illustrate by taking diversity jurisdiction adjustments. Predictions are easy if we assume constant human behavior. Simple projections of either outright elimination or curtailment can be studied with queuing effects. (More civil rights cases e.g. may be filed if time waiting is reduced.) But we also need to know whether cases are susceptible to increasing claimed amounts or being filed as federal questions if diversity requirements are altered and eliminated.

Human behavior then has complexities even with recorded and known past behavior available. New Legislation is, of course, even less tractable.

The Mathtech solution was to get informed experts to project behaviors they thought would be generated by new proposals, and feeding these guestimates into a model. This might well be justified on the hand as realistic given the utter paucity of information noted in my earlier testimony. It is also criticizable as lending a false air of precision to a crude process, reminding one of the joke about economists' calculators which are programmed to get to eight decimal places.

In point of fact the Congressional Budget Office does something like that right now. In costing new legislation it calls appropriate departments and other experts and derives from such conversations and loose data an estimate of costs per case (if it is litigation being essayed) and number of cases expected. It is a crude process and so far as I can find no one has ever followed up to judge its accuracy, or the office's strengths and weaknesses in this regard.

It is not clear to me that Mathtech's approach would have given better or clear results or that potential users would understand its limitations as well, or better, than they do CBO's predictions.

Nevertheless, the most interesting result is the unwillingness of highly informed and specialized experts to make predictions without greater specification of conditions that had been worked out by the staff. This is particularly interesting in view of The Beteille Institute's case projection study. There, using Delphi techniques, a group was asked to predict what effect odd and cataclysmic events would have on caseloads. While these people were extremely knowledgeable they were asked rather global questions. Whether it was because they essentially were not really functioning within their zone of expertise or Beteille used greater pressures to obtain estimates, the fact is they got them. And the results were very nearly useless, random dartboard shots at predicting those events which did happen to occur.

The experts here were aware of complexity. They did not welcome the use of blind intuition and could develop contingencies where different behaviors would ensue. I presume they were answering mail questionnaires as there is no indication of follow-up on the experts revolt, which is most interesting, and might have produced great insight.

All of this supports our report's conclusion that insufficient data exists to model really new departures. Seat-of-the-pants predictions and estimates are less costly and less misleading there. Where we are fine-tuning existing programs more precise methods are, as demonstrated in the Mathtech report, promising and worth experimenting with. Long-range commitment to data such as the University of Wisconsin cost-of-litigation project are needed. (That study also sponsored by the Office for the Improvement of Justice, provides information on what alternatives to litigation litigants and attorneys considered and why they persisted in litigation.) Ultimately most—but not all—of our panel believes an econometric model of justice use is feasible and usable with some understanding of its vulnerabilities.

To summarize, the recommended package is (1) simple projections, analogies to existing legislation and other non-esoteric efforts for planning generally (not just to decide on whether to legislate or not) for new developments which involve opportunities for emergent new behavior by unpredictable individuals. (This constitutes the bulk of new legislation.) The crude estimates will then not be mistaken for something more precise. (2) Development of more precise methods for known, patterned behavior both within the Department and the Court system and externally as well. While in some sense the intellectual problems will be trivial, efficiencies are feasible here, clearly. Furthermore these developments have high promise of yield in more complex areas. That has often occurred in sequence, sometimes in very short order. (3) Accumulation of more information on litigation-types of cases, propensities to litigate, effect of incentives, differential tendencies by region or other variables. (4) Long-range intent to develop better and more effective measures.

It is a great pleasure to participate in an effort shared by the Congress, NSF which funded our study, the Department of Justice (and particularly the Office for the Improvement of Justice) academia and the contract research industry. We get highly publicized accounts when things go awry. Here we have modulated and cumulative efforts moving in the right direction and I venture to say close to optimum speed. I would continue to emphasize moderate effort and expenditure, but continue to move in an inevitable direction.

Senator HEFLIN. Dr. Kleps?

STATEMENT OF DR. RALPH N. KLEPS, FORMER ADMINISTRATIVE DIRECTOR OF THE COURTS, STATE OF CALIFORNIA

DR. KLEPS. Mr. Chairman, I served as a member of the panel for the National Academy and I agree with the conclusions expressed in that report. I have a very high regard for all the people I worked with. But, of course, I speak from a different background. It might be thought of as I'm speaking from experience "in the right."

I served as legislative counsel in California for 11 years where issues such as this were up all the time, and I served for 16 years as administrative director of the California courts, so that my special interest is that of court management and of a court administrator. What I would like to do is to describe what I believe to be a pragmatic and helpful approach of the use of judicial impact statements.

I have submitted a written statement which, unfortunately, I couldn't get to you in advance. I was out of the country for a month—

Senator HEFLIN. Don't worry. We don't worry about those things.

DR. KLEPS. My point of view also reflects the experience of State systems. In fact, I think my major contribution to the National Academy panel was an insistence that adequate attention be paid, as it was, in fact, paid, to the accumulated experience of the States. I want particularly to call your attention to that, pages 125 to 175, in which Susan Brooks' memorandum on the experience of the States was published. Of course, I'm not an expert on the Federal system, so I don't plan to attempt any analysis of the kinds of problems that a Federal program might present.

But I would like to describe a California experience, and then I would like to describe some of the conclusions that I reached based upon that.

In 1972 we noted Chief Justice Burger's call for judicial impact statements with a great deal of interest. For many years our legislature has required of its legislative budget office a "State cost analysis" for every piece of legislation that is considered by one of our fiscal committees. That office, incidentally, is the model upon which the Congressional Budget Office was based.

Now, these reports are integral parts in a legislative rule that requires every bill that has a State cost to go before a fiscal committee in each House.

Early in my tenure as administrative director of the courts—and I think was an obvious spinoff from my service to the legislature as legislative counsel—the legislature asked the administrative office of the courts to prepare a report for its fiscal committees on every bill that requested the creation of additional judgeships. It was out of that experience that California's pioneering system of "weighted case-load" reports and nonjudicial staffing reports was developed.

Of course, from that point it was a rather simple step to consider the preparation of judicial impact statements, and a program to explore that possibility was adopted during the last years of Governor Reagan's term of office in California.

During the period from 1969 to 1973 the allocation of LEAA funds to the State court system was programed in California for the most

part by a "court task force" that was chaired by the Governor's legal adviser. In 1972 that task force put judicial impact statements on its priority agenda for 1973. It was item 11 in a list of 43. Thereafter, grants of about \$100,000 in State-level LEAA funds were provided in both 1973 and 1974.

We assembled a special contract staff, and its function was to lay out an acceptable methodology during 1973 to undertake a number of specific reports on a test basis in 1974, and to begin to function in earnest in 1975. The thought was that, if successful, the program would be incorporated into the State's regular budget for the court system at the end of the 3-year experimental period.

The Courts Task Force said its purpose was to encourage the development of a methodology for assessing the workload impact of legislative changes and to provide information about these changes to the agencies that might be affected.

It was designed to be an operating experiment, and the staff consisted of an attorney, a court management analyst, an accountant, and a clerical support position.

In the first year there was an analysis for the need for such reports, in light of other information being made available to the legislature, and there was a comparison of the work done elsewhere in other States. General guidelines were drafted for the production of such reports and a few sample reports were prepared. Incidentally, these reports were made available to your committee.

In the second year—

Senator HEFLIN. If it's possible, we would like to have them as an appendix to our hearing record.

Dr. KLEPS. I'll do that.

In the second year, over 50 impact reports were prepared on legislative measures offered at the 1975 session. Legislative staff personnel, States and local court employees and other affected groups were brought into the process as contributing sources of information. Standard measures were devised for those factors that would be in continuous use in the making of impact analyses, including a wide variety of both time and cost measurements.

During the contemplated third year, the same staff was intended to put into actual operation such a system as part of the 1976 session. It was hoped then that if the staff proved its value and dependability, it would become a permanent part of the California judicial structure.

But with the inauguration of Governor Jerry Brown in January of 1975, the entire LEAA program came to a halt for about 6 months. Ultimately, his administration decided to terminate the project in its entirety. His budget director, however, was convinced of the value of such an effort. One day I got a call from him asking that we include an impact analysis position in our budget because his office thought such reports would be of great value. Incidentally, that's the first time in a long career in State government that I ever had a budget director ask me to put a position into a budget.

The additional position was approved. The Governor signed it and we retained one member of that project staff for that purpose. He is still employed in the Sacramento branch of the Administrative Office of the California Courts and to the extent that one person could do so, he still continues to turn out such analyses.

Now, to bring that story up-to-date, I should report that in two recent legislative sessions there have been unsuccessful bills introduced to require judicial impact analyses for every bill referred to the Legislature's judiciary committees. Unfortunately, the legislation doesn't have any support from the present judicial council, and at its request the most recent bill was amended to put the responsibility in the legislative budget office.

Now, I have some conclusions from the experience and from the thought that went into the National Academy study. Our effort was obviously designed to function at the lower end of this spectrum of sophistication. The people assigned to the project were not theoreticians. They visualized themselves as people who would have to perform the task on an ongoing basis. They were, in other words, working on their own project, not simply contemplating recommendations that could be made to others. Using the terminology adopted in the Mathtech report, we undertook a moderately sophisticated "conceptual analysis" approach.

Now, in my work with the National Academy of Sciences panel, on which I was the only person with a background in court administration, I soon discovered that very high levels of sophistication can easily be brought to bear on this kind of a problem. But as the panel's report so clearly indicates, the information and the necessary data to support such elaborate and technologically complex approaches simply do not exist in court systems. And the human factors that are involved in the court process, as Professor Boyum has pointed out, are similarly beyond our grasp. So I have no difficulty in concluding that computer-generated simulations and statistical models have very little promise in our field at this time.

That more modest view that is espoused in the National Academy of Sciences report, pages 3 to 5, does offer a more attractive alternative. Our experience in California convinces me that a carefully designed analysis, prepared on a regular basis and in a consistent form, can have a substantial and beneficial effect. I think the benefits will extend to legislators and to the executive branch as well as to those responsible for the management of court systems.

I obviously don't mean every bill, and I am prepared to admit that some bills are too speculative to make such a report, in which case that's what the report should say.

The essence of this more modest view, as indicated by the experience in several States, is that the present levels of knowledge and information about judicial systems are not being used in the consideration of bills.

Over time, if the existing body of knowledge can be put to use through judicial impact reports, that knowledge will be expanded, can be more usefully applied in a number of ways, and should produce both better court systems and a more certain accomplishment of legislative purposes.

Incidentally, I come down on the side of prospective reports, not postenactment reports, or postenactment evaluations.

So we approach the question of who should prepare such analyses. The California study concluded that the judiciary's management agency, the Judicial Council, should undertake this responsibility.

That conclusion might differ in another environment, but if credibility can be achieved by reports prepared by the judicial branch, several important values will be promoted. Those having the responsibility and the knowledge about court systems will be required to put their judgments on the line. The predictive effort will be coordinated with the annual budget presentations so that an overall view of workload increases and decreases can be considered. And a continuing staff effort will result so that more accurate and more sophisticated analyses can be developed in the process, this being, in my opinion, no field for a drop-in/drop-out expert.

The promise, incidentally, that the National Academy report mentions of development in this field will result only if somebody is at work in the field on a continuous basis.

Finally, of course, judicial systems are far less apt to be legislative sponsors, a role which can easily create questions about conflicting interests and bias.

So what legislation should be analyzed? The California study concluded that the process should be a selective one and, of course, that's the conclusion of the National Academy of Sciences' study as well.

One obvious selection technique is that bills can be ignored until they start to move. In California the policy committee's action is preliminary in the sense that a fiscal committee must thereafter pass upon any bill involving State costs. Of course, in that situation no harm comes from waiting until the bill reaches the fiscal committee and the same pattern is followed in the second house as well. But that system won't work in our legislature, with bills having local costs, and unfortunately, that's most of the court bills. In that case a discretionary judgment has got to be made.

Of course, a legislative request or an executive request for an impact report would be a good basis for selection, but a selection process by a judicial body can be designed. The key question will always be the capacity of the staff assigned to the task. It's essential that the impact analysis team's workload burden be kept within reasonable bounds so that the reports do not become routine documents without substantial value.

Now, what about the impact of impact reports? For any report that does not originate with a legislative request, there is always the possibility of resentment on the part of the author of the bill. Inevitably, many of the judicial impact reports will create previously nonexistent problems that must be considered in the enactment of the measure. Often, of course, this will have the effect of making it a better and more workable piece of legislation.

Reference is made in the National Academy of Sciences report to the adaptive capacity of the system. Another way to state that is that you leave the legislation open and its implementation will sometimes modify what the legislature had in mind.

I don't want to take too much of your time, but we had a determinant sentencing law passed in California where the author put into the bill that the Judicial Council was to enact guidelines in sentencing, which nobody had ever done in California, to keep track of every felony sentence in the State, and it was to be prepared to file a report with the legislature upon the consideration of each bill that might affect

future sentencing. It didn't state the bill that way, but that's what they had in mind.

We made it perfectly clear that there wasn't a chance in the world that that could be done within, say, 5 or 6 years, and if reports were filed they would be filed on a quarterly basis. Well, that kind of an "open hole" is going to cause trouble unless somebody explains to the sponsor of the bill what it is possible to do within the framework of his idea, which is what I mean by making it a more workable piece of legislation.

But even in cases where the item of cost creates a threat to the bill's passage, it is almost certain that that cost factor is going to surface sooner or later. What is vitally important is that the estimates be based on the best information available, be as accurate as they can possibly be.

So, I think a judicially volunteered impact report, if prepared with care and worded with discretion, ought to be acceptable, particularly if based upon principles and techniques that have prior legislative approval. Prior legislative approval, as I contemplated it in California, could have been as simple as a budget authorization to put people to work on that task. Congress, for example, could authorize and encourage preparation of the reports.

Most realistic legislators understand that the basic facts surrounding their proposals will have to be faced in some form sooner or later. A regularized process for the presentation of the judiciary's view on impact ought to be welcomed, and it ought to be available early in the legislative process, rather than at the end of it.

Finally, on operations versus research, both the National Academy study and the Mathtech report urge further research and that recommendation has great appeal. I think it ought to be done.

On the operational level, however, I believe it would be worth assigning the responsibility for a selective series of impact reports to some appropriate judicial agency as an experiment, if nothing else.

There should be no universal or mandatory process, and the legislation could be subject to an automatic termination unless Congress takes further action. In that way an assessment can be made as to the value of the information furnished during the experimental period, and the assessment can be made by legislative, executive, and judicial leaders. If it's favorable, a permanent program can be adopted.

Needless to say, I am sorry California's experiment didn't work out that way. If it had, we would all know more about this subject than we now do.

Thank you.

Senator HEFLIN. Thank you.

[The prepared statement of Mr. Kleps follows:]

PREPARED STATEMENT OF RALPH N. KLEPS

1. QUALIFICATION

My long public career in California includes 11 years as Legislative Counsel (1950-1961) and 16 years as the state's first Administrative Director of the Courts (1961-1977). In the latter role I was responsible for an LEAA funded experiment with judicial impact statements in California (1974 and 1975) and

I supervised a follow-on state program designed to produce such statements (1975-1977). From 1977 to 1979 I served as a member of the National Academy of Sciences' Panel on Legislative Impact on Courts.

2. BACKGROUND OF TESTIMONY

I am not here to comment on the Mathtech study which has already been presented to you or to discuss the National Academy of Sciences' recent report entitled *Forecasting the Impact of Legislation on Courts*, hereafter referred to as the "NAS study." My special interest is that of a court administrator, and my purpose today is to describe what I believe to be a helpful, pragmatic approach to the use of judicial impact statements.

My point of view inevitably reflects the experience and the needs of state court systems. In fact, I believe that my major contribution to the National Academy of Sciences' panel was my insistence that some attention be paid to the accumulated experience of the various states in this field. (See, NAS study, pages 125-175.) And, since I am not an expert on the federal judicial system, I do not plan to attempt any analysis of the problems that a federal program for judicial impact statements would present.

I hope however that my description of the California experience, and the conclusions deduced from it, will offer the members of the committee some insights into the practical problems that such a program involves.

3. JUDICIAL IMPACT STATEMENTS IN CALIFORNIA

In 1972 California noted Chief Justice Burger's call for judicial impact statements with great interest. For many years our Legislature has required of its Legislative Budget Office a "state cost analysis" for every piece of legislation that is considered by either house's fiscal committee. These reports are integral elements in a legislative rule that requires each bill that has a state cost to go before the finance committee in each house of the Legislature.

Early in my tenure as Administrative Director of the Courts, probably as a spin-off from my service as Legislative Counsel, the Legislature asked my office to prepare workload reports for its fiscal committees on every bill that requested the creation of additional judgeships in the California system. It was out of this experience that California's pioneering system of "weighted caseload" reports was developed.

From that point, of course, it was a short and logical step to consider the preparation of judicial impact statements, and a program to explore that possibility was adopted during the closing years of Governor Reagan's term of office. During the period from 1969 to 1973 the allocation of LEAA funds to the state court system was programmed for the most part by a "Courts Task Force" that was chaired by the Governor's legal adviser. In 1972 that task force put "judicial impact statements" on its priority agenda for 1973 (it was made Item 11 on a list of 43 projects). Thereafter, grants of about \$100,000 in state-level LEAA funds were provided in both 1973 and 1974 for this purpose. A special contract staff was assembled by the California Judicial Council. Its function was to lay out an acceptable methodology during 1973, to undertake a number of specific reports on a test basis in 1974, and to begin to function in earnest in 1975. The thought was that, if successful, the program would be incorporated into the state's regular budget for the court system at the end of the three years experimental period.

The Courts Task Force stated its purpose as follows: "The objective . . . is to encourage the development of a methodology for assessing the workload impact of legislative changes and to provide information about these changes to the agencies which may be affected." The project was designed to be an operating experiment and the staff consisted of an attorney, a court management analyst, an accountant and a clerical support position.

The first year's effort included an analysis of the need for such reports, in light of other information being made available to the Legislature, and a comparison of the work being done along these lines in other states. General guidelines for producing impact reports were drafted and sample reports were prepared for a few selected legislature bills. (Ralph Anderson and Associates, *Guidelines for Determining the Impact of Legislation on the Courts* (1974), 188 pp., Judicial Council of California.)

The project team was kept intact for a second year during which over 50 impact reports were prepared on legislative measures offered at the 1975 legislative session. Legislative staff personnel, state and local court employees and other affected groups were brought into the process as contributing sources of information. Standard measures were devised for those factors that would be in continuous use in making impact analyses, including a wide variety of both time and cost measurements. During the contemplated third year of the project the same staff was to put the system into actual operation as part of the 1976 legislative session. It was hoped that the staff would then continue, if it had proved its value and dependability, as a permanent part of the California judicial structure. (Ralph Anderson and Associates, *Judicial Impact Analysis Project: Second Year Findings and Recommendations* (1975), 100 pages, Judicial Council of California.)

With the inauguration of Governor Jerry Brown in January 1975, however, the entire LEAA program came to a virtual halt for about six months. Ultimately his administration decided to terminate the project and eliminated the third year of the judicial impact study in its entirety. His budget director, however, was convinced of the value of such an effort. One day during the legislative session I was astonished to receive a call from him asking that we include one "impact analysis position" in our 1975-76 budget because his office thought such reports would be of great value to them. That was the first time, incidentally, in a long career in state government that I ever had an executive budget director ask me to put a new position into a budget.

The additional position was approved by the Legislature and accepted by the Governor in 1975 so that we were able to retain one of the project team members as a permanent staff member. That person is still employed in the Sacramento branch of the Administrative Office of the Courts and, to the extent that one person is able to do so, he continues to turn out judicial impact analyses.

To bring the story up to date, I should report that in two of the recent legislative sessions of our Legislature unsuccessful bills have been introduced to require judicial impact analyses to be prepared by the California Judicial Council for every bill referred to the Legislature's judiciary committees (Assembly Bill No. 2246 of 1978 and Senate Bill No. 720 of 1979). The legislation does not have the support of the present Judicial Council, however, and at its request the most recent bill was amended to place the responsibility in the Legislative Budget Office.

4. CONCLUSIONS FROM THE CALIFORNIA EXPERIENCE

a. Methodology

Our effort was obviously designed to operate at the lower end of the spectrum, insofar as technological sophistication is concerned. The people assigned to the project were not theoreticians: they visualized themselves as the ones who would have to perform the task on an ongoing basis. They were, in other words, working on their own project, not simply contemplating recommendations that could be made to others. Using the terminology adopted in the *Mathtech* report, we undertook a moderately sophisticated "conceptual analysis" approach.

In my work with the National Academy of Sciences panel, on which I was the only person with a background in court administration, I soon discovered that very high levels of sophistication can easily be brought to bear on problems of this kind. But, as the panel's report so clearly indicates, the information and the necessary data to support such elaborate and technologically complex approaches simply do not exist in court systems. And the human factors that are involved in the court process are similarly beyond our grasp. Thus I have no difficulty in concluding that computer-generated simulations and statistical models have very little promise in our field at this time.

The "more modest" view espoused in the NAS report (pages 3 to 5), however, does offer a more attractive alternative. Our experience in California convinces me that a carefully designed analysis, prepared on a regular basis and in a consistent form, can have a substantial and beneficial effect. The benefit will extend, I believe, to legislators and to the executive branch as well as to those responsible for the management of court systems. The essence of this "more modest" view, as is indicated by the experience in several states, is that the present levels of knowledge and information about judicial systems are not being used during the legislative consideration of bills. Over time, however, if the existing body of knowledge can be put to use through judicial impact reports, it will be expanded, can be more usefully applied in a number of ways and should produce both better court systems and a more certain accomplishment of legislative purposes.

b. Who prepares impact analyses?

The California study concluded that the judiciary's management agency, the California Judicial Council, should undertake this responsibility. That conclusion could differ in another environment, but if credibility can be achieved by reports prepared by the judicial branch, several important values will be promoted thereby. Those having the responsibility and the knowledge about court systems will be required to put their judgments on the line. The predictive effort will be coordinated with the annual budget presentations so that an overall view of workload increases and decreases can be considered. A continuing staff effort will result so that more accurate and more sophisticated analyses can be developed in the process, this being no field for "drop-in, drop-out" expertise. Finally, judicial systems are far less apt to be legislative sponsors, a role which can easily create questions about conflicting interests and bias.

c. What legislation should be analyzed?

The California study concluded that the process should be a selective one and that is the opinion of the NAS study as well. One obvious selection technique is that bills can be ignored until they start to move. In California the policy committee's action is preliminary, in the sense that a fiscal committee must there-after pass upon any bill involving state costs. In that situation no harm comes from waiting until the bill reaches the fiscal committee and the same pattern is followed in the other house as well. That system does not work, however, with bills having local costs (as is the case with most court bills) and in that case discretionary choices have to be made.

A legislative or executive request for such an impact report would furnish a good basis for selection, of course, but a selection process by a judicial body can also be designed. The key question, however, will always be the capacity of the staff assigned to the task. It is essential that the impact analysis team's workload burden be kept within reasonable bounds so that the reports do not become routine documents without substantial value.

d. The impact of impact reports

For any report that does not originate with a legislative request there is always the possibility of resentment on the part of the author of the bill. Inevitably, many of the judicial impact reports will create previously nonexistent problems that must be considered in the enactment of the measure. Often, of course, this will have the effect of making it a better and more workable piece of legislation. But even in cases where the item of cost creates a threat to the bill's passage, it is almost certain that the cost factor will surface sooner or later. What is vitally important, however, is that the estimates used be based upon the best information available and be as accurate as they can possibly be.

A judicially volunteered impact report, if prepared with care and worded with discretion, ought to be acceptable particularly if based upon principles and techniques that have prior legislative approval, as for example a budget appropriation designed to authorize the creation of an impact analysis staff. Most realistic legislators understand that the basic facts surrounding their proposals will have to be faced in some form sooner or later. A regularized process for the presentation of the judiciary's view on impact ought to be welcomed, and it ought to be available early in the legislative process rather than at the end of it.

e. Operations versus research

Both the NAS study and the Mathtech report urge further research and that recommendation has great appeal. On the operational level, however, I believe that it would be worth assigning the responsibility for a selective series of impact reports to some appropriate judicial agency as an experiment. There should be no universal or mandatory process, and the legislation could be subject to an automatic termination date unless Congress takes further action. In that way an assessment can be made as the value of the information furnished during an experimental period. That assessment can be made by legislative, executive and judicial leaders and, if it is favorable, a permanent program can be adopted. Needless to say, I'm sorry that California's experiment did not work out that way; if it had, we would all know more about the subject than we now do.

**STATEMENT OF MAURICE ROSENBERG, ASSISTANT ATTORNEY
GENERAL, OFFICE FOR IMPROVEMENTS IN THE ADMINISTRATION
OF JUSTICE, DEPARTMENT OF JUSTICE**

Mr. ROSENBERG. Thank you, Mr. Chairman.

I have a prepared statement which has been filed, and I shall extend it only by a few brief remarks.

In the first place, I am delighted to hear Professor Krislov sum up the NRC report as one of guarded optimism. I think that that means that all of us here at the table can claim to be believers in the usefulness of judicial impact statements. As a matter of fact, I guess it's like the fellow from your part of the country, Senator, who was asked whether he believed in infant baptism, and he said: "Believe in it? Hell, I've seen it done." [Laughter.]

With Mr. Kleps here, we've got one of those also.

We inevitably, I guess, all of us, do impact statements when we put in next year's judicial budget, and assume that there's going to be a certain amount of consistency and regularity in the number of cases coming into the courts and in the number of judges we're going to have to have, the number of sides to the judiciary, the courtrooms and so on.

Obviously, we are not going to be able to produce judicial impact statements that will have pinpoint accuracy, but as Judge Rubin says in his statement, it seems to me quite clear that we can say with regard to a particular piece of legislation, or a particular regulation, it's going to have a blockbuster effect, very likely, or it's going to have very little effect, or its effect will be ambiguous. That tells us something right to start out.

It is true there are difficulties in going beyond that start. The difficulties that have been brought to our attention forcibly by the NRC report are difficulties in predicting human behavior. They are possibly unpredictable as some of the candidates in the recent election can tell you. So human behavior is a tough problem in projecting the way in which human beings will react to new legislative enactments. All of us can grant that.

Also, the system adapts in different ways to legislation, and those adaptations are themselves unpredictable. I think that ought to be stipulated.

Despite these difficulties and unpredictabilities, however, there are very distinct regularities. I think not enough is known or said about the regularities in the justice system that allow us to make useful predictions if we only know what those regularities are and try to use them as the outer and inner boundaries of what the impact may be. Let me give you a few examples from the 1980 annual report of the Director of the Administrative Offices.

First of all, with all the laws on the books, and all the new rights that are generated all the time by court decisions, as well as by the Congress, one would suppose that it would be sort of a lottery as to how many cases will be filed in the Federal courts from year to year. The fact of the matter is that if you go back 20 years and look at the filings, you can see a pattern of regularity, certainly a pattern of regular

growth, that has brought us from the 1960 figures of 59,000-odd filings to the 1980 figures of 168,000 or so.

But within that growth of 185 percent, you can see an averaged out regularity of growth. And what about trials? One would suppose, considering how many incentives come to bear on human beings in deciding on whether to go to trial or to settle the case—human beings including lawyers for these purposes—that you would think it would be pretty tough to guess how many trials we would have next year, or what percentage of the filings of last year would result in trials.

I am here to tell you that you can make that guess on the basis of past performance, and you can make the guess within about 2 percent of accuracy with almost no risk. From 1960 to 1980 the percentage of trials to filings on the civil side in Federal courts has been between 7.8 and 11-plus percent each year. Now, there's a regularity that seems to transcend all sorts of vagaries and unpredictabilities in human behavior and in institutional adaptability.

Now, take appeals. The percentage of appeals that rise out of the mass of terminations in the district court is a figure which I believe last year was 13 percent-plus. That's a figure, which although I haven't for today's session worked back through the past 20 years, is one that is very close to the figure that has been coming in year after year. I have in mind figures like 14 to 17 percent as the common figures for the past 20 years.

Senator HEFLIN. Let me interrupt you.

In regards to an inferior court, if it could be called that, and a higher trial court, where there is an appeal de novo, I am under the impression that only about 10 percent of those cases are appealed.

Is that an approximate figure that is fairly right?

Mr. ROSENBERG. I think it's true that at lower levels, and particularly not in the Federal system, the percentage of appeals taken in the State systems tend to be lower. I know that's overall a fact because I have in mind the National Center for State Court Studies for fiscal 1975 and 1976, which show filings in courts of general jurisdiction on the order of 7 or 8 million, and appeals on the order of only 125,000—I believe that's the figure for 1975. So the disparity is much greater between what the appellate courts take in and—in the way of volume in the State systems—as compared with the Federal court system.

As I said, in the Federal system we had about 168,000 filings in the district courts on the civil side in fiscal year 1980, and there were about 20,000 appeals taken from those 168,000 filings—not from those, but from those the year before.

So as far as reversals, which would also seem to me to be a real lottery, the figures for last year, as the AO worked them out, were 17.4 percent. You would be pretty correct to guess the figures for 1979 were within 2 percentage points of that. They were less than 1 percentage point away. It was 16.6 percent. And so it goes.

I say we can sit here today and make pretty informed projections about how this whole judicial system is going to pay off in terms of quantitative estimates.

Now, if that's so, then there's a very important message it appears to me in the data, and that is that if you know what the quantity parame-

ters, the quantitative data in the Federal system is, if you know that, then you have a very good basis for starting to frame in what the potential impact of legislation or regulations will be. That is, you can draw a pie chart of the total range of civil business coming into the Federal courts and you can see, looking at one slice after another, whether the slice that you would expect using the most conservative estimates or the most liberal estimates, you can start to calculate whether the slice from the pending legislation might look more like the slide or category "x" of litigation or category "y."

I'm not saying you should make predictions and estimates on that basis. All I'm saying is you can get a sense of perspective about the problem from it, and that's where we want to start, a sense of perspective.

Senator HEFLIN. Your premise is that if you could figure how many cases go into the system, you can figure the impact after it's in the system fairly accurately and with a 2-percent margin of error?

Mr. ROSENBERG. Right. That's my submission, Mr. Chairman.

So I would, rather than focus on the behavioristic aspects, I would focus on the payoff aspects in terms of the systems' experience to start out with, and I think we do that a great deal in life.

If you just think about the doctors—I believe I heard on the radio this morning that the Surgeon General has come out with a new report on smoking, and suggests that we ought to give tax benefits and other bounties to people who will attend courses in smoke ending. Well, we know an awful lot—

Senator HEFLIN. How much? [Laughter.]

Mr. ROSENBERG. The Surgeon General is pretty well satisfied that there are payoffs in giving up smoking, even though the physicians don't know the ideology of the diseases that arise from smoking; that is, they don't know the causal relationships, and they don't know the particular chemical and biological reactions that occur.

So my point is that we know in all of our experience how to respond to problems very often when we don't know exactly what the internal dynamics that cause the problems are. That applies even in the life sciences; much more does it apply in the social sciences.

So my message is essentially hopeful, that if we start looking at system data we may know a lot more than we suspect we know about the possibilities of reactions by the system when we lay on new legislative or regulatory rights and duties.

So I have a couple of suggestions to make as to how we might implement them. First, I believe that the justice system impact should be considered by each congressional committee that processes any legislation that might have an impact on the justice system. That's in addition to having the Justice Department, for example, responsible for trying to come up with justice system impact statements on initiatives that it forwards to the Hill, or on regulatory proposals that it forwards to the agencies.

Second, I believe we ought to prepare a handbook about the justice system for congressional staffers that would give them some of the bare and brute facts about the justice system as it now functions, going back over a number of years, the kinds of data, in other words, that I was reciting here this morning, and that, in addition, we ought

to perhaps hold some seminars for congressional staffers so that they could get to ask questions that they're interested in asking, both of one another and of people who have had more experience than they in dealing with the system. Those would be my suggestions for further actions.

Thank you, Mr. Chairman.

Senator HEFLIN. Thank you.

[The prepared statement of Mr. Rosenberg follows:]

PREPARED STATEMENT OF MAURICE ROSENBERG

Mr. Chairman: I am pleased to have this opportunity to appear before the subcommittee to discuss justice impact statements. The question of whether it is feasible to forecast with useful accuracy the impact of new legislation on our court systems is a matter of growing importance. This subcommittee is to be congratulated for its tenacious and effective attention to this difficult problem.

During the past 3 years, the Office for Improvements in the Administration of Justice has attempted to develop judicial impact assessments relating to several proposals before the Congress, sometimes at the behest of Members of Congress, sometimes on our own initiative. In addition, the Office has funded research to devise and test new techniques for conducting court impact assessments. Testifying last year before this subcommittee, Harvey A. Scarr reported that we were cautiously optimistic about the potentiality of justice impact statements. We remain hopeful still and this brief statement will explain why.

In registering guarded optimism, I do not mean to claim a breakthrough for efforts to date, whether our own, those resulting from work of Mathtech under an OIAJ contract, or efforts made by any other groups. Nevertheless, we detect signs of progress, partly confirmed by the recent significant report of the National Research Council of the National Academy of Sciences entitled "Forecasting the Impact of Legislation on Courts."

The Mathtech Project.—You have heard representatives of Mathtech testify about the research that firm has done in an effort to improve the techniques of estimating judicial impact and you have received copies of their reports to OIAJ. The Mathtech project has identified various methods that are used or could be used in assessing justice impact and has demonstrated how they can be employed. The computer-based simulation approach Mathtech designed is helpful in organizing data and expert opinions in an efficient way to produce estimates of impact. Of great importance, the project has identified a number of questions that must be answered in considering whether an impact study is feasible in particular circumstances and has advanced our understanding of which of available techniques may best be employed in given situations. It makes no claim to having identified or discovered the method of doing impact assessments. It has shown that there are better techniques available and it offered a simulation-based example, relying on a projection and feedback approach.

The National Research Council's Report.—The recently published report prepared by the NRC's Panel on Legislative Impact on Courts requires our careful consideration. This report will clearly have a major impact on the problem we address today. Three of the major points made in the report are the following:

(1) The need for judicial impact statements in planning justice system responses is not matched by our capacity to produce them. The NRC report said:

"The task of estimating the impact [of legislation] is fundamentally one of predicting behaviors" of affected persons, potential litigants, their lawyers and probably others, and "they are all extremely difficult to predict." Another way of saying this is that with regard to many enactments "the basic theoretical and empirical knowledge necessary to develop good estimates of the impact * * * on courts * * * is not yet available." (p. 3)

(2) The Panel concluded that no across-the-board requirement of impact statements should be imposed. In a very emphatic passage the report declares: "We recommend against imposition of a requirement that a formal impact statement accompany all legislation that could have an impact on courts." But that negative view is softened by the conclusions that "[E]stimates in selected instances of legislative proposals * * * [to] establish approximate costs seem feasible;" and that "downstream studies of programs already in place appear to be more manageable. * * *" (p. 3)

(3) On a positive note, the report finds that prospects are good for developing a theory to account for the way cases are generated. That opens a promising vista: once we identify and understand the factors that stimulate or inhibit the filing of court cases we will be in a position to obtain more reliable forecasts of legislative impact. Thus, the NRC's conclusion that we can develop a theoretical basis to understand the dynamics of the suit-generating process is a beacon of hope.

The Future.—In my opinion the Panel has accurately summed up its findings by saying they call for a "modest lowering of expectations as to the precision that may be reasonably expected" from current methods. (pp. 3-4) We differ with them in our somewhat more optimistic estimate of the usefulness of presently available methods and we are definitely more cheerful about the near-term prospects for improvement of the impact assessment art. We favor changing the conditions that act as barriers to producing impact statements and to do so starting now. If we wait until methods, theory, data and legislative sensitivities are perfected, we will continue into the next century proposing, considering and passing laws without appreciating their effects on courts.

We need not delay the start of stronger efforts. One measure that should be taken is to assign to an existing office in the Department of Justice the responsibility of preparing impact statements on Department-initiated legislation and major regulatory changes. These estimates can then be monitored for accuracy and to improve the methodology.

Another project to improve impact assessment has already been launched by efforts OIAJ is initiating to assemble and analyze data on the business of the federal courts that will serve as baselines for estimating the potential impact of new legislation. For example, when a member of Congress asks the Department to estimate the effects on the work of the courts of a change in the standard of review of administrative agency rules, it is essential to have an accurate reading of the effects on judicial workload of the present standard of review.

It is true that justice impact estimation is a complex task and that the art is not far advanced; but it is equally true that we have made progress. At this stage advances will not come in the form of dramatic breakthroughs or ultimate solutions to overall problems. Rather, we must look for a steady accretion of underlying information and a sharper sense of the right intermediate questions. We believe that this Subcommittee's work, the Mathtech project and the work of others—not least, the NRC's Panel—has advanced us well along the road. By proceeding incrementally and, as the NRC report urges, selectively we can be reasonably confident that steady progress in judicial impact assessment will continue.

I shall be pleased to respond to your questions.

Senator HEFLIN. Let's take about a 2- or 3-minute recess.

[Whereupon, the subcommittee was in recess.]

Senator HEFLIN. I think we can go ahead.

Judge Rubin, we have saved the best until last as we say, so we're delighted to have you with us again. If you will, we would be delighted to hear from you.

STATEMENT OF JUDGE ALVIN RUBIN, FIFTH CIRCUIT COURT OF APPEALS

Judge RUBIN. Thank you, Senator.

The distinguished chairman of the subcommittee and I, I think, first met about 15 years ago. The chairman was on the Alabama Supreme Court and I was on a mission to Alabama, trying to encourage some judicial reforms, or rather lawyer reforms, at that time, a lawyer referral service. We have on many occasions always engaged in trying to devote some time to new ideas that might improve the administration of justice. I think the idea we are here engaged in discussing is one that has a great potential for that.

It is quite interesting that all of us who have appeared today really come out from a diversity of backgrounds in training, education and experience, and yet we all seem to reach pretty much the same conclusion. Our differences are largely matters of emphasis rather than final objective. I think it's a fair consensus that we all agree that judicial impact statements would be highly desirable, that our ability to make absolutely accurate and scientifically accurate statements now is quite limited, but that nonetheless there is both a need and a purpose to be served by requiring such statements. So I would like to spend a little time talking about that need and purpose and devoting just a few comments to a slightly different perspective on the same basic premises that we share.

Professor Rosenberg said that it's possible to make predictions about all human beings, including lawyers, whom he classifies as human beings—I suppose a subspecies of that is judges, and it's possible to make predictions about what judges will do as well.

But, the purpose of judicial impact statements as I perceive them is not to help judges, not to help the executive branch, but it's to help Congress. Unless the judicial impact statement has that purpose, it should not be required. I think it has that purpose and it will have that effect, first of all because, as I said in my prepared statement—which I have handed to the committee and will not repeat—all legislation has and ought to have a goal, and one cannot really intelligently vote on proposed legislation unless one can evaluate the prospect of achieving that goal.

The judicial impact statement is a way to tell Congress, at the time when legislation is under consideration, how that goal may be achieved, what is likely to be achieved. Because if that goal does include some effect in the judicial system, unless some allowance is made for implementing the performance to achieve that goal, it's likely to fail.

Incidentally, one of the speakers—and I'm sure not in any sense of accuracy—said that we might have to wait 1 or 2 years for the courts to define the effective legislation. We all know that's a most sanguine estimate.

In our circuit, which as the distinguished chairman knows, we have the largest number of judges in the United States, and will have until October of 1981. We will subdivide into two still mammoth circuits, and where we have a very high disposition rate, and we have a large number of able and effective trial judges, even with our present staff, something like 4 years is required from the time a case is filed until the time it is disposed of by our court. In the typical situation this is true, and the hard cases require a longer time. Many of those cases are particularly significant and they're reviewed by the Supreme Court. They may be looking at 6 or 7 years in the easy case and 10 to 12 years in the hard case.

I just sat on a court panel in which we heard 20 cases, and of those 20, only the criminal cases, by virtue of the Speedy Trial Act, were less than 2 years old. There ought to be a better way to find out what's going to happen, in a culture that expects instant news, who expects to learn who the Cabinet members are before they know it, in something less than the term of the third succeeding President hereafter, and in less than two terms for the U.S. Senate.

The second aspect of assisting Congress in attaining its goals is to encourage Congress to ask about and to find the consequences of its actions. That's a little different inquiry because it includes an awareness, a focused awareness that legislation does not simply make things happen of its own accord.

It seems to me that if all judicial impact statements required were that each committee considering legislation put to itself this question—will this have judicial impact, yes or no—and then perhaps a part of “yes”, much or little. If that were all, that would be a very useful purpose to be accomplished.

In the first place, if the answer came back “we can't tell; the statute is too ambiguous,” that might be another reason to take a look at the ambiguity, to give it a purposeful ambiguity about which there is no remedy, or is it an inadvertent ambiguity which on a rewrite can be eliminated? Does the statute intend to create a private cause of action, or does it intend not to? One line in any statute that will have a judicial impact without it will tell us, will negative that impact.

A third aspect of informing a congressional committee of the consequences of its actions relates to its consequences on the State system. Almost none of our Federal legislation that creates a private cause of action confines it exclusively to Federal courts. We have very few such statutes. But almost always, even when the cause of action is a Federal cause of action—is arising under the constitutional laws of the United States—the suit that ensues may be filed in either State or Federal court.

Now, a lot of our thought on this subject has been devoted to impacts of legislation on Federal courts. We have not looked very much if at all, at the impact of this legislation on State courts. How many section 1983 actions, for example, are being filed nationwide in State courts?

So the purpose of asking the question is to broaden our horizons about the impact of legislation.

There is one other aspect of asking about consequences, and that is to ask if this is intended to result in some type of litigative or adjudicative procedures; is the court system the best way, or are there other systems, administrative, quasiadministrative, arbitrable, that might result in a more expeditious, more economical, and from a social aspect a better way to do it. So I say that merely asking the question and getting a purely subjective answer would be something that would have great value to the Congress.

There is one other aspect of this perhaps that I should mention, and that does relate to the particular impact on courts alone. It is what I have called the pebble to the pile assumption, for want of a better term. The assumption is, I think, usually that the courts have big pile of rocks to work on, and if we add one pebble to that pile it won't make much difference; that there won't be any predictable impact on the amount of resources required.

We know that in many instances that's an incorrect assumption, that the impact is profound. We also know that many pebbles can make a much bigger pile, and so we cannot confine ourselves with the notion that one pebble alone assays the consequences.

I think the two reports that have been made, the Mathtech and the NRC analysis of that report, are very valuable. I do not disagree with any of the conclusions in the NRC report. I simply suggest that precision is not required now as a prerequisite to adopting the requirement of judicial impact statements.

I do not minimize the technical difficulties that are required and ultimately producing rather precise data. I take a line from Professor Boyum's paper in his conclusion: The winning of extra precision will necessarily await theory which tells us what data to gather, and then the gathering of that data. It seems to me that perhaps I would re-focus that by saying we will not develop a theory until we have some data, that perhaps the theory will not be developed first as we develop data, but we will perhaps eventually, as we have in many scientific areas, be able to develop adequate theories only when we have enough data to work with that a pattern emerges; that until we begin systematically to gather data, we are not likely to develop a theory. Or to put it another way, in this field I don't believe that any of us—judges, lawyers, scientists, social scientists—are apt to develop an adequate theory as a purely theoretical matter that we can do by thinking the matter through. We have to have a lot of data and we have to work with that data, to which we can see what is significant, which despite its apparent significance is insignificant.

One way to do that, I think, is not only to start forecasting the judicial impact statements, but to start with the same staff and people who will be doing that in doing some retrospective impact analysis. There are any number of statutes on which that could be done with great benefit. Let me take one that will seem at first to be rather recondite.

The Longshoremen and Harbor Workers Compensation Act. The Congress passed some rather significant amendments to that statute in 1972. Those amendments include two significant things. One is the development part of it, the enhanced benefits and other modified administrative procedures or compensation benefits. That administrative procedure culminates, as so many of our administrative procedures do, with a judicial review. So with respect to that aspect of the act, we can see some of its impact in terms of administrative personnel, legal staff in the administrative agency, and final judicial impact.

There is another section of the act 905(v), which authorizes a different form of direct legislative action—I'm sorry, of direct judicial action—in which there is no preceding administrative review. Claimants who are injured as a result of the unseaworthiness of a vessel can file a suit directly in the U.S. admiralty courts.

We have 8 years of experience with that and a lot of experience about how many lawsuits result, and we can get a pretty good idea of the number of claims that exist from the reports of injury that go through the administrative process and end up in the courts, that go through the other procedure and end up in the courts.

Now, I know that in advance we could not actually have predicted that. But with 8 years of experience and working on that line of information, where we have no ideological or political motivations to file suit—we simply have the behavioral characteristic of injured human

beings—it seems to me we can learn a great deal. We're not going to do that kind of retrospective analysis without a medium to do it.

There are any number of other statutes that might profitably be used, various legislative proposals, various legislative enactments, to aid the handicapped, which in some instances have private causes of action, in some instances have administrative remedies, title 9, the aid to education, various almost innumerable areas where we could profitably, retrospectively analyze data to determine judicial impact.

There is one other matter I would like to comment on that we see surfacing in these various reports, and that is an emphasis on judicial impact statements as telling us the number of cases that's likely to result from a particular piece of legislation.

I suggest that this is not the only thing we ought to be interested in learning. Not merely the number of cases that will end up in court, but the impact of legislation on the entire structural system of our government.

Will, for example, this legislation require additional counsel for the executive agency? Will it require additional U.S. attorneys in the Department of Justice? How is litigation going to be handled? Will it create greater burdens on investigative staff? And, of course, will it create, after it enters the judicial system, what is the relative appellate burden?

Budgets have a way, quite apart from any specific authorization for legislation, for creating judicial impacts. This is the type of legislation that we don't pay much attention to because we don't envision that the Department of Justice budget has much judicial impact per se on the courts. And yet I don't know of any accurate studies, but based on some empirical observations, we believe that the number of assistant U.S. attorneys is the best index to the number of criminal cases to be filed in the court system—not the number of Federal criminal statutes. If you think about it, no case can be filed without an assistant U.S. attorney presenting information to a grand jury, obtaining an indictment without the staff to prosecute it. Criminal cases get in the courts through U.S. attorneys, not through the open door of the courthouse. So the number of U.S. attorneys and assistant U.S. attorneys is a far more significant factor in the volume of Federal criminal litigation than the number of Federal criminal statutes.

Another factor that strongly influences the number of Federal criminal cases is the number of investigative employees in the various Federal investigatory agencies such as the Secret Service for counterfeit cases, the FBI in the general criminal area. There is judicial impact in all of these matters which can be studied not only prospectively but fairly accurately retrospectively.

While I have said that I think judicial impact statements should be required only if they serve a very useful and fundamental purpose of the Congress, their usefulness to the other branches of Government I think also ought to at least be mentioned.

Obviously it would help the executive and judicial branches to assay their own needs for the future if they have this informed estimate as accurate as may be available, of the impact of legislation.

I guess, in summary, it seems to me that we can make a necessary forward step in our knowledge of the basic data that is required and

in the development of a theory only if we provide both a mandate to develop it and some kind of at least modest continuing basis, to continue the study, both of data and the formulation of a theoretical basis. And even should we never achieve an accurate scientific method—and I think all of us believe we will—we will achieve something significant by simply requiring that the questions be asked and answered to the best of our ability.

Thank you. I'll be glad to answer any questions you may have.
[The prepared statement of Judge Rubin follows:]

PREPARED STATEMENT OF JUDGE ALVIN RUBIN

Thank you very much for inviting me to appear before the Subcommittee on Jurisprudence and Governmental Relations. While I am a member of the Committee on Judicial Administration of the Judicial Conference of the United States and Chairman of the Subcommittee on Alternatives to Jury Trials in Protracted Court Cases, the views I express are personal, the result of reflections based on twenty years of active practice of law, twelve years as a United States District Judge and two years as a United States Circuit Judge as well as continuous service during these 34 years as an adjunct law professor. My views have neither been submitted to nor endorsed by either of the Committees on which I serve or by the Judicial Conference of the United States.

Almost a decade ago, Chief Justice Warren E. Burger first pointed out the need for and the purposes that would be served by requiring that every bill presented to either House of the Congress for final passage state its potential Judicial impact. This hearing represents another step in the study of that farsighted proposal, a study continued and advanced by the able Chairman of this Subcommittee, the Honorable Howell Heflin. Senator Heflin has worked for the improvement of the administration of the Judicial System for many years before he was first elected to the Senate of the United States, and it has been my privilege to join with him in some of those efforts.

At a hearing of the Subcommittee on November 14, 1979, I delivered a prepared statement in writing and made an oral statement. I will spare you any repetition of those remarks. Instead I will try briefly to outline my views after reviewing the Mathtech study; the study by the panel on Legislative Impact on Courts, National Research Council, Assembly of Behavioral and Social Sciences, Forecasting the Impact of Legislation on Courts; and the study by The California Judicial Council, Guidelines for Determining the Impact of Legislation on The Courts.

Let me first state my basic premises. Judicial Impact Statements should be required only if they can serve a useful purpose and assist Congress in fulfilling its legislative function. They should not be supplied as a formality or an afterthought.

After careful study of all of the reports I have examined, I have concluded that Judicial Impact Statements can be genuinely useful to lawmakers. They can assist in the accomplishment of the legislative purpose first merely by requiring someone to ask and to answer the question: Will achieving the objectives of this bill require any judicial resources? If the answer to this is, "Yes," then the Impact Statement should inform Congress the amount of resources required. Or the answer might be: The impact is so small that it will not add a significant burden to resources. Finally, the answer may be that the impact will be major. If so, that leads to the inquiry: What additional resources in personnel and appropriations are likely to be necessary?

One purpose of merely asking the question and eliciting an answer is to focus attention on how the statute will achieve its purpose. If the statute creates a new right or expands an existing one, does it authorize a private judicial remedy? You are of course aware that in many statutes Congress provides expressly that a person given rights by it may file suit in federal court or in state court or in both to enforce these rights. In other cases, Congress may create a right but decide not to authorize a judicial remedy, leaving enforcement to administrative processes, either those presently existing or newly created ones. Moreover, the right to file suit may be in addition to or it may be in place of an administrative remedy.

In many cases, however, statutes do not mention the subject of judicial enforcement. Courts must then attempt to determine Congressional intent. If Congress is alerted to the desirability of providing a direct answer to the question, then it can not only do so but it can also be certain that its purpose is achieved.

While both unnecessary and inconclusive work should be avoided, it is desirable that every bill provide some information about judicial impact. The statement might be very brief. It might say simply: "This bill creates no rights that will be enforced in court." Such a measure will have no judicial impact. That would probably be the case with most legislation.

In other cases the statement might read: This statute creates a private cause of action enforceable in federal courts after the exhaustion of administrative remedies. However, because the total number of claims likely to be presented to the administrative agency is estimated to be less than 50 a year, the total number of judicial actions that will result is estimated to be fewer than five per year. This number of cases can be handled without any increase in either judicial personnel or budget.

This type of conclusion could accurately be reached with regard to most legislation on the basis of a subjective judgment made by well-informed persons after careful reading of the bill. Indeed step one of the procedure proposed by the California Judicial Council is merely careful reading of the bill and recourse to any other sources necessary in order to understand the provisions fully. Step two in their proposal follows the same approach: The analysts would by simple reflection, based on experience, determine generally how the bill would affect the Courts.

After this kind of analysis, the conclusion may be reached that the measure will have a major impact on the Judicial Branch. It then becomes necessary to try to determine the impact more precisely. The National Research Council Panel has concluded that the basic knowledge necessary to develop good estimates of the impact of legislation on courts for broad classes of legislation is not available. I agree. However, I do not think that this means that we should not begin working with the skills and techniques now available. We should certainly do that even as we attempt to develop a greater fund of knowledge and better techniques.

The judicial impact of most of the legislation that is considered by the Congress can be assessed with reasonable accuracy in an informal and intuitive way. Persons experienced in judicial administration can determine whether or not a bill will or may authorize new judicial actions or alter existing actions in a manner likely to stimulate a substantial increase in litigation. An informal impact statement, based on intuitive judgment, should be required for all legislation. You will note that I use the term "informal" merely to distinguish the type of report based on subject evaluation from the kind of report the NRC Panel calls a "formal" report, one prepared after exhaustive study and research based perhaps on computer models and a large fund of information.

If an informal estimate indicates that the legislation is likely to have substantial impact then a more complete study should be required. Even if an accurate formal statement is not attainable with present knowledge, the best estimate available would be helpful. As the Panel suggests, "Impact analyses of the numbers of cases to be expected, and of the burdens of those cases, would be particularly useful at two stages of the process of planning for judicial needs: (1) prior to the adoption of a new law, to estimate approximate costs or a kind of rough pricing of proposed legislation; and (2) immediately following the adoption of new legislation, for preplanning for judicial system needs.

Work should continue, as the National Research Council suggests, to increase our knowledge of court functions. I agree with the Panel that "[t]he prospects for estimation of the impact of new legislation on courts rest on the further development of theory and better data."

When a statute will have substantial judicial impact, it is essential that Congress be aware of this so it can provide the necessary resources to accomplish the legislative purpose. It is futile for Congress to authorize the filing of suits to vindicate federal rights if the federal courts do not have the capacity to try and to decide such suits for four years. The ultimate purpose of the Judicial Impact Statements is to enable Congress to accomplish its goal, both by providing the necessary resources and by alerting the Judiciary to the functions it is expected to perform so that it, too, can prepare adequately. In many instances, the Executive Branch may also benefit by this advance warning for the legislation may

require new investigative and or additional personnel in the Department of Justice.

The NRC Panel suggests that no one governmental department or agency should be designated for making analyses and that the task should be undertaken by the involved agency. If an agency with knowledge of the judicial system cooperates with the involved agency and contributes its knowledge, this appears practicable. The Administrative Office of United States Courts can ably cooperate with any agency in preparing such an estimate, and can enlist the assistance of federal judges and of consultants in other agencies, such as the Justice Department, if needed.

What is important is that a start be made. The need for information is too great and the purpose to be achieved too important to await the development of technology that could produce accurate formal statements for each bill. We can learn while we are proceeding. Indeed, we can learn best what we need to develop by analyzing every proposed bill and exploring more fully what we need to know in order to do a better job of analyzing it. As the Chief Justice of the United States pointed out in his address to the American Bar Association in 1972 and has since repeated many times, the formulation of Judicial Impact Statements developed as well as we know how to prepare them would assist the Congress of the United States in forming legislation and in accomplishing its purposes and would help the Judicial Branch in responding to Congressional mandates. If the Legislative, the Executive and the Judicial Branches are able to predict what is likely to be required, they can muster the necessary responses in advance and be prepared to respond fully and promptly.

It will be a pleasure to answer any questions from the Committee.

Senator HEFLIN. Thank you, Judge Rubin, and thank you, members of the panel, for your statements.

An interesting observation of mine has been that recently, in connection with proposed legislation dealing with fair housing, a great deal of criticism is being given to administrative law judge tribunals; that there is no independence, that the administrative agency acts as an investigator and an instigator, a grand jury, a prosecutor, a trial jury, a judge and then a reviewing body. This all involved administrative law judges being in the same building and offices. There has been some evidence—not in connection with fair housing, but otherwise—that one agency has 11 administrative law judges and all 11 of them are former prosecutors.

So, in looking at fair housing, we attempted to create an independent administrative tribunal, a three-member panel, that would have the task of selecting the administrative law judges and their assignments, and then one of the members would serve as a review panel, with two other administrative law judges.

The point I'm making is, though, this bill then went to OMB, the Office of Budget and Management, and they came back with a precise number of anticipated administrative law judges that would have to be created as a result of this proposal, regardless of whether it be independent or within an agency. They were able to make some sort of prediction as to the number of administrative law judges that this legislation would have an effect upon. This is an example of a type of impact statement going on today.

I gather what you gentlemen are saying, particularly Judge Rubin and Mr. Rosenberg, is that basically, even after you get into the system, that you can have a good deal of precision. You've got various elements you can turn to, various procedures. Basically it seems that the imprecision here is predicting how many cases the proposed liti-

gation will generate. I gather from your viewpoints and your analysis of the *Longshoremen and Harbor Workers* matter, that matters are fairly predictable within the system.

Now, imprecision as to how many cases new legislation will generate is, of course, a problem. If you had a judicial impact statement—and I'd like for you to comment on this—could you put that in brackets with various numbers, if the proposed legislation created 1,000 "A" type cases, 500 "B" type cases, 5,000 "C" type cases, that you'd have A, B, and C in some categories, then you'd have in another one, if it produced so many, say, 25 A's or some other figure in brackets, in which you might evaluate the number of cases that it would generate. Then, there's the possibility that you could take an average, based on people's evaluation, of the number and type of cases that you would be generated.

Now, did you all get into considering something like that in your studies?

Professor KRISLOV. I think you have put your finger on the problem, and possibly the only place where I disagree with Professor Rosenberg. When you start talking like that, you have much greater difficulty than when you start talking about what's going to happen with 159,000 overall load. Because what you really will need to know to estimate the load is not only those cases but where they occur. It turns out it takes different amounts of time in different parts of the country.

If you start asking A, B, and C type cases instead of how many cases are generated generally by this type of legislation, you'll find that the error range, instead of being 2 percent, will turn out to be 30 percent, although because the errors will go in different directions, if you looked at the legislation and asked, the overall prediction would be 5 percent.

I want to go back to my previous testimony and to our report, and in Keith's prepared statement, too, where we also distinguish between different levels of novelty and therefore predictability. It's very easy now to come to a fairly good prediction about what will happen with the Longshoremen's Act after 8 years. All you have to do is project those 8 years of experience.

At the time of the new legislation, it was much more difficult, because there was nothing to project. Under those circumstances, there are some rules of thumb that you can go through. We commend, for instance, a project that was done in Professor Rosenberg's office in the Department of Justice, in I think a 48-hour period, where they were asked to say what new legislation would do and what they did was to look at it and decide it was most like this other program. It had nothing to do with that program in one sense, but the kinds of behaviors that could be expected on the part of lawyers, litigants, and judges was very much like this other one. Therefore, they projected a reasonable approximation.

Scientifically there's no basis for doing it. It's a very good way of doing it. So to the degree to which the program is really novel, you have enormous problems. If you have a totally unprecedented program, what do you compare it with? And to the degree to which you want very, very precise information about the load, you need to know much more than you would project.

Let's take Judge Rubin's "pebbles" business. If there are 5,000 cases, but they are spread throughout the country, you have one kind of problem with the court system. If they're going to occur in two districts, if you have a black lung type of situation where there's going to be a tremendous load in one district, there's no possibility of it becoming a pebble. You know it's going to become a rock. All of those things have to be built into the analysis.

All of these are not objections to doing the task. It's knowing what your problem is.

I thought of an example, by the way, of why it's important to understand the limitation. There's the famous story of Mr. Helms' being hauled in by the President who asked him why the CIA had not predicted Mr. Khrushchev's overthrow, and he said, "If Khrushchev didn't know it, how in the hell did you expect us to know it?"

On the other hand, I think we all would agree that the CIA's failure to predict the Shah's overthrow was a failure, because that was a visible manifestation that could be measured politically. So what we have to realize is that we're not going to get the ABC's, and more importantly, the ABC's in this area and in that area.

Let me come back again to that point about the problem of those overall parameters giving you a false picture of regularity.

Sure, on the average it's 14 percent appeals. But if we start asking what's the average in criminal appeals as opposed to civil, what's the average in the second circuit as opposed to some other circuit, you will find incredible diversities. The planning function of these statements requires more specificity than saying overall it's going to grow 2 percent. The more specific you want it, the more you want it broken down, the more difficult the problem becomes.

By the way, CBO gets much better looking figures—I've looked at some of the judicial things—because again, they take the number of cases and multiply by the dollars. In many instances they look better because they underestimated the number of cases and overestimated the dollars, or vice versa, so that by giving you dollars instead of how they got at it, which you can read carefully, they look much better than if they were asked or if you really cared about one of the other.

Senator HEFLIN. But they at least give you an approximation——

Professor KRISLOV. It's better than nothing.

Senator HEFLIN. It's better than nothing, that's right.

Professor KRISLOV. And very often it's—I would say most of the time the simple methods, from our standpoint, the very simple methods, result in all the information that Congress reasonably cares about.

Senator HEFLIN. Well, for an agency to conduct this, you're basically recommending that each committee or each group should come forward with an idea individually.

But should a centralized body like the Congressional Budget Office perform this task, as opposed to a committee?

Professor KRISLOV. Well, our recommendation is not that each committee do it, but that it not be either the Congress, the courts, or the Department, but really I personally—now, at this point our report isn't specific. I would like to see Congress develop its capacity, the Department develop its capacity, and the judiciary develop its capacity.

The point is, as Judge Rubin suggested—and I think Dr. Kleps' statements implied it—that this isn't really a new task. This is part

of an intelligence function, a planning function, so if you had one person doing it in the administrative office of the courts and another one in the Department of Justice, you're not really wasting anybody's time; you're gaining a lot.

If you gave a monopoly to somebody, it will be seen as serving their interests. If you gave it to the Judicial Conference, or you gave it to the administrative courts, the Congress would begin to think "Oh, this is—" as they do in many of the States—and this is my opinion now, not a conclusion. "It's another ploy for the judges to get more judges."

If they both have the capacity to develop their methods, they then can communicate with each other and see whether the claims are intelligent. That's my opinion.

I would encourage at a minimum at this point the Department and the legislature, or the courts and the legislature, to move ahead.

Mr. ROSENBERG. Mr. Chairman, my predecessor, Daniel J. Meador, had a meeting in which he invited me to be present, about a year-and-a-half ago, with Alice Rivlin, the Director of the Congressional Budget Office, and one of her chief lieutenants. We discussed this problem with them at that time. Professor Meador pointed out that since the CBO was doing the financial budgetary impact statements, and also I believe labor force impact statements, or at least I believe there was such a requirement that attaches to a lot of legislation—and, of course, we were aware of the environmental impact statements being required—that it was not such a far reach for that office to take into account the justice impact legislation.

She demurred on the ground that they did not at that time have anybody in the CBO who was skilled or versed in this kind of art, so that was, as far as I recall, was where the matter was left.

It may be that the CBO would like a greater level of sophistication and precision than is feasible today before getting into the business of taking on justice impact statements on an overall basis. It may be that if they were educated in the CBO that rougher measures are suitable that they would be more content to try to take it on, at least for a while, to see how it worked.

I agree with Mr. Krislov that you ought to allow the work to go on in various places and not try to centralize it or give one unit of government a monopoly.

As far as the question of systemwide as opposed to a more pinpointed projection, it does seem to me that if we know that there is likely to be a percentage step up of, say, 5 percent in the overall system needs for next year, that the question of where in the system, which districts, which circuits, are going to be hardest hit by particular kinds of litigation, be they type A or B or C under your new statutes, that that's a matter that ought to be left for internal management rather than for congressional projection.

So I'm saying it may suffice that Congress projects and estimates for the systematic needs and provides the flexibility at the management level for distributing the resources where the system in particular localities needs it the most.

Judge RUBIN. Let me add one or two things, not by way of a debate with Professor Krislov but by way of making sure that what I hope to be a constructive analogy is not misunderstood.

A retrospective analysis of past legislation and its impact gives a great deal of information about the kinds of data we can gather and what we can expect.

I chose the Longshoremen and Harbor Workers Compensation Act not as an example of what we can do in future analyses, not as a matter of how we can predict the future of longshoremen's cases, but how we can gather information that will help us to predict other kinds—the impact of other kinds of legislation. Because it does offer this precise kind of diversity. It offers different geographic impacts.

We know there are very few cases originating in Nebraska, but a lot that originate in New Orleans and Mobile, New York and San Francisco. We have different kinds of experience. We have a class of prospective litigants who are not apt to overlook the existence of a claim, because they're injured people. They need not only expenses, but they need compensation. We have a diversity of remedies.

Now, finding that kind of information that is available to us will tell us a good deal about analogous legislation. It is suggested—and I think quite accurately—by Professor Krislov that it won't tell us very much about absolutely unprecedented legislation. We don't have much of that. It is very difficult for me as I prepared these remarks to think of some type of congressionally created cause of action that is utterly without close analogy. Congress has been in the business of passing legislation for a little over 200 years and we have a rather wide mine of causes of action, a wide mine of information. So I think we can do a good deal with going back and looking at what we already have while we work on simultaneously predicting the future.

With regard to who should do it, I suggest that in the cases of those bills which originate in an existing executive agency—where a good deal of our legislation does so originate—some requirement ought to be made of the originating agency to furnish its own forecast. That's useful for a lot of reasons. Not only is it useful to the Congress, but it's useful to have that agency ask itself and answer for itself, as well as for the Congress, that question.

I think in addition, however, while we are working toward development of a model, it would be useful to have an informed avenue of those objective and subjective evaluations available to the judicial branch, and that could very well be accomplished by an ancillary, not primary systemwide facility, in either the Federal Judicial Center or the Administrative Office of U.S. Courts, which would be available both to the CBO and to originating agencies to provide such data as they have available and are able to develop as part of an interactive process with the executive branch agencies.

Professor BOYUM. If I can just give you 2 cents worth here, Senator, I just want to note that in the report we also explicitly endorsed the idea of doing retrospective analyses of what the impact of legislation has been. In that sense, I think Judge Rubin's comments are very well shared with Professor Krislov and Mr. Kleps and myself as well as the rest of the panel members.

On this issue of who should do impact analyses, if you look at the retrospective analyses that's probably going to be scholars in law schools, departments of political science and operations research and wherever. Who should do the prospective analyses may also include

people like this if one does it on an ad hoc basis and on a nonroutine basis, which our report also contemplates.

If one gets into the business of doing these things on a somewhat more routine basis, then I think the issue of whether it should be CBO, Congress own arm, or somebody in the judiciary, can be better solved by someone other than me. But as long as they're nonroutine and as long as the methods are as soft as we believe they currently are, Congress might be well served by letting a hundred flowers bloom.

Senator HEFLIN. Mr. Velde is here representing the minority, temporarily, until he becomes the majority.

Mr. Velde, we're delighted to see you. You, of course, have had an interest in this area in your work as Administrator of LEAA and courts and things. If you have questions you want to ask, we'd be delighted to have you do so.

Mr. VELDE. Thank you, Mr. Chairman.

I apologize for the fact there are no Republican Senators here today, but I think they're caucusing this morning—

Senator HEFLIN. As somebody said, "dividing the spoils." [Laughter].

Mr. VELDE. Mr. Chairman, there have been a number of statements here that have really been very stimulating. I am reminded of a briefing that I once received on a new communications system which the New York City Police Department had just established, called SPRINT. It had several million dollars worth of LEAA funds in it. New York City has a jurisdiction which annually reports about 10 percent of all the Nation's reported crime, State and local.

This new system had a capability of handling 11,000 calls per day. I was struck by the enormity of this system at the time, but the question was "How often does the system approach capacity?" The response was, "Well, it's over capacity now." Then the obvious question is, "How much crime is actually occurring in New York City?" They said, "We have no way of knowing. All we know is that after 11,000 calls a day, that's all we can handle."

There is sort of a rough analogy here to the administration of the Federal Gun Control Act of 1968, which has two titles, one dealing with sporting firearms and the other dealing with so-called destructive devices and machine guns. As I understand it, there are about 1,500 BATF, Bureau of Alcohol, Tobacco and Firearms agents, who do the investigating on these cases, and the investigative efficiency of these agents range from a factor of 10 cases per year up to 300 for the most efficient agent.

Well, if you multiply by the least efficient agents and the number of cases they can investigate and prepare evidence for, you come up with a universe of somewhere around 15,000 prosecutorial cases. But if you use the most efficient number, you come up with a rather immense figure of 450,000 Federal cases that could be prosecuted under this one act per year.

I understand there is an effort to train these BATF agents so that instead of 10 cases per year they can approach the 300 number. Obviously we jump to the next level of impact on the justice system, and that is what happens to the assistant U.S. attorneys who somehow, instead of getting 15,000 of these cases they get 450,000 cases.

I think when we look at the question of judicial impact it's a question of more than just looking at the impact on triable cases in the Federal courts. I am reminded of Mr. Kleps' comments earlier on that unless you have a good data base you don't really have much in the way of measuring what the impact is going to be.

There has been a concern on the development of a Federal data base of the developing indicators of criminal activity that violates the various Federal statutes. There is an interest in developing a Federal offender-based transaction statistic system to be able to measure the dynamics of this process. So far this data base is really not there. There certainly seems to be a need to do some kind of cost benefit analysis, but until we have some appreciation of the dynamics of the process and who's doing what, I suspect there are all kinds of Federal gun control acts out there where you could quickly overload the entire Federal justice system just by improving the efficiency of one or more of the major components to the point where you have a total overload and total saturation.

I guess the questions are rather obvious, directed first to Mr. Rosenberg: Do we have the kind of data either at the Justice Department or in the Administrative Office of the U.S. Courts that make judicial impact exercises really meaningful? Aren't what we're really doing here is de facto setting sets of priorities as to enforcement of the various existing laws and when Congress passes new laws you kind of superimpose on a rather finite set of resources new enforcement and new judicial priorities and more or less let a lot of other things go by?

I'm not sure that's a question more than a statement, but I would appreciate your observations.

Mr. ROSENBERG. I'll grab hold of the interrogation at the end.

On page 6 of the statement I submitted, in the first paragraph, I tried to address that problem by saying that one of the two projects I recommend to improve impact assessment is to develop a better baseline of information.

I don't see how we are going to be able to serve Congress' needs ever for the reasons that you outline unless we first have better available data. The reason I picked on the 1980 report is that it does give us a consistent body of rather gross data. We find, for most of the purposes we have in the Department, at least in OIAJ, is the existing data does not help you when it comes to important problems, that you have to go further.

I do believe that working with the Bureau of Justice Statistics and the National Institute of Justice, agencies like the Federal Judicial Center and others in the Federal establishment, not the least the Office for Improvements in the Administration of Justice, ought to be working seriously about getting better baseline data.

We have had a number of meetings with the Federal Judicial Center people and the Administrative Office to that end. We are working on aspects of the problem now. The one that's the most exciting to me in the Federal system is working on the appeals story, who is it that appeals and what kind of cases and for what reasons, and how does it change over time. That turns out to be a very intricate problem. We're getting excellent cooperation from the Administrative

Office. All of it is directed toward producing the baseline data, the kind that you speak of, so we'll then be able to gage the impact on the appeal process and the volume of appeals and their nature more precisely than we now can.

I couldn't agree more, though, with your plea for better base data.

Dr. KLEPS. Your comment about priorities is, of course, mentioned in the report. If Congress is not aware of the condition of things through such reports, they may well find that the more recent legislation finds itself under the kind of priority that makes the legislation ineffective. If you leave it open, the courts will adapt and they will do what they have to do. As has happened in a number of our States, civil cases, for example, won't get decided because they're deciding criminal cases only. I think I heard Judge Rubin say something like that, too.

The Congress ought to know that as it passes the next piece of legislation.

Mr. VELDE. Thank you, Mr. Chairman.

Senator HEFLIN. Thank you, Mr. Velde.

We appreciate each of you being here. Things have come up at some time or another where we need a study on the impact of activity like conference reports on Senators' time, so we all have impacts that we can't predict. I do have to take care of a matter right now.

I appreciate each of you being here. I think this has been—we've had three hearings, and we have developed a lot of problems, a lot of issues, and I think a good record. I think from it we can move forward.

Thank you for coming.

[Whereupon, at 11:35 a.m., the committee was adjourned.]

