PREPARED STATEMENT

OF

THE HONORABLE JOSEPH F. WEIS, JR.
UNITED STATES CIRCUIT JUDGE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
CHAIRMAN OF THE FEDERAL COURTS STUDY COMMITTEE

BEFORE

THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE ADMINISTRATION OF JUSTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ON
H.R. 5381
"FEDERAL COURTS STUDY COMMITTEE IMPLEMENTATION ACT OF 1990"

THURSDAY
SEPTEMBER 6, 1990

It is a pleasure to be here today in the follow-up of the work of the Federal Courts Study Committee. Particularly, I appreciate the opportunity to meet once again with Chairman Kastenmeier and Congressman Moorhead, two of the most active and productive members of the Study Committee. Our association during the Committee's activity was most pleasant and I welcome the opportunity to publicly thank them for their helpfulness and unstinting cooperation.

Most of the matters in H.B. 5381, particularly Title I, are based on recommendations prepared by the Study Committee. Because those items were studied in depth by the Committee, I do not propose to review them one by one, but simply state that in general I agree with them.

There are one or two matters, however, which cause me some concern and I would prefer to use my limited time to address them rather than to discuss the many points which I do support. I hope that this approach, however, will not be viewed as carping or disapproval of the Bill as a whole. Indeed, I welcome and applaud the expedition with which this legislation has been brought to the fore by Congressmen Kastenmeier and Moorhead. Their enthusiasm and interest bodes well for progress on the more substantial recommendations of the Study Committee which will be addressed in the future.

I do wish to call attention to one matter which is not presently included in the draft of H.B. 5381. As the Study Committee pointed out, the most acute problem of case overload is

at the appellate level and that is more difficult to resolve than that in the trial courts. Projections for future numbers of appeals and the difficulties of resolving those controversies by multi-member bodies are sobering indeed, if not alarming.

The Study Committee was faced with a multitude of issues and a limited time in which to prepare its Report. Recognizing those facts and the difficulty in arriving at a consensus in restructuring the appellate courts, the Committee did not make any specific recommendation, but urged further study. As the Report states, "Fundamental structural alternatives deserve the careful attention of Congress, the courts, bar associations, and scholars over the next five years . . . Delay in seeking a remedy will make the situation worse, and diminish the likelihood of making the right choice as the result of careful planning in advance."

Appellate restructuring is an issue that requires careful and detailed scrutiny. It is a matter that deserves priority but because it may ultimately require extensive changes, some of them perhaps disconcerting, it invites avoidance and delay by bench and bar. This highly important facet of the Committee's Report should not be allowed to languish because no one has assumed the initiative. I would therefore hope that your Committee would seriously consider requesting the Federal Judicial Center to conduct some, at least, preliminary surveys of the alternatives available so that in perhaps a year's time an interim Report might be submitted.

This survey could research published commentary -- a not insignificant body of thoughtful proposals -- and if time permitted seek comment from a limited group of judges, academics, and interested members of the bar. In addition, a compilation of pertinent statistics could be prepared which would provide some basis for assessing the extent of the problem.

A comprehensive study in this very complex area will require a rather detailed agenda. The survey that I suggest would lead to a blueprint for research and evaluation and, perhaps, the criteria for an appropriate body to conduct it. The success of the Federal Courts Study Committee composed of representatives from all three branches of the government, as well as the practicing bar and academia, may indicate that such a body could appropriately attack the appellate structure problem.

The Study Committee also recommended that the Judicial Center be given the additional resources it needs to carry out the ambitious programs Congress envisioned. The survey I have suggested is one example of a project emphasizing the need for more funding.

I do have a few comments on some of the provisions in H.B. 5381 which are good as far as they go, but I would hope would be enacted with the understanding that more might be done in the future. For example, § 109 extending the life of the Parole Commission, leaves open for a later resolution the issue of who will conduct hearings for revocation of supervised release. As the Study Committee learned, the number of hearings

projected for the future could become a serious burden on the district courts in a few years.

In a somewhat similar vein, § 105 follows the Committee's recommendation that public defenders be appointed by an independent body, rather than by the judges before whom those lawyers practice. In the future, I would hope that serious thought could be given to suggestions by Mr. Vincent Aprile, one of the Committee members, that public defender organizations be autonomous so that, for example, their compensation would not be set by the courts. I note that the Judicial Conference would prefer to hold § 105 in abeyance pending the results of a comprehensive study of the defender organizations. I would have no objection to such a proposal.

Section 112 is a good start on a knotty problem, the statute of limitations for federal claims. This section, as drafted, applies to law suits arising under statutes enacted in the future. I hope that passage of this section will not delay the highly desirable process of reviewing statutes presently on the books for the addition of specified limitations periods. Addition of statutes of limitations would end the practice of recourse to analogous state time periods, a generally wasteful exercise.

There are concerns, however, which I share, about § 120. As presently drafted, that section would enlarge the jurisdiction of the federal courts. In its Report, the Study Committee did recommend that "Congress expressly authorize

federal courts to hear any claim arising out of the same 'transaction' or 'occurrence' as a claim within federal jurisdiction, including claims that require the joinder of additional parties, namely defendants against whom the plaintiff has a closely related state claim."

However, preceding that recommendation and qualifying it is the Committee's observation that eliminating or substantially curtailing diversity jurisdiction would provide additional capacity so that federal courts could resolve additional disputes when the unique characteristics of the federal courts are pertinent. We mentioned that our concern was not simply alleviating the federal courts' work load, but promoting the most rational possible allocation of jurisdiction between state and federal courts.

I personally believe that creating supplementary jurisdiction should be coupled with repeal of, or further limitations on diversity jurisdiction. If your Committee prefers to go ahead with the provision on supplementary jurisdiction at this time, however, it would seem appropriate to confine the legislation to claims brought in the district court under 28 U.S.C. § 1331, federal question cases.

I must confess that the Study Committee Report on pendent jurisdiction is not as precise as it might have been, but I do recall discussion during one of our meetings that supplemental jurisdiction should be limited to federal question cases.

As § 120 now reads, the plaintiff in a diversity case would be permitted to assert a state law claim against a third-party defendant or intervenor even though complete diversity does not exist and even though other requirements of 28 U.S.C. § 1332 have not been met. Thus, the statute would change the doctrine of complete diversity articulated in Strawbridge v. Curtiss, 3 Cranch 267 and Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365 (1978). The Study Committee did not intend to encourage additional diversity litigation in that fashion.

Pendent jurisdiction became a topic of revived interest after the United States Supreme Court decided Finley v. United States, 490 U.S. ____, 104 L.Ed. 593, 109 S.Ct. 2003 (1989), in an opinion which denied pendent party jurisdiction. The chief criticism of the result in that case is that there the plaintiff was required to bring her case against the United States in the district court because of the exclusive jurisdiction provisions of the Federal Tort Claims Act, and there was no way she could join her state law claim arising out of the same occurrence against the non-diverse defendant. As a result of the ruling in the Finley case, the plaintiff was forced to split her claims arising out of the same occurrence between federal and state forums.

Exclusive jurisdiction in the federal courts, of course, is not present in diversity cases where the state courts are available for resolution of state law claims and the joinder of additional parties as needed. The present draft of § 120,

however, does not distinguish sufficiently between diversity cases and federal question cases. In keeping with the Study Committee's philosophy that diversity jurisdiction should not be unnecessarily expanded, I believe that the scope of § 120 should be reduced.

Federal question cases are a natural component of the district court jurisdiction, and steps to make resolution of these claims and related ones reasonably comprehensive are logical. That same concern, however, need not be extended to diversity cases because of the availability of the state courts and their broad jurisdiction.

Professors Thomas Rowe and Larry Kramer, two of the Reporters for the Study Committee, as well as Professor Thomas Mangler and others scholars, have voiced opinions along the same lines. In general, we are in agreement that the requirement of complete diversity in § 1332 cases should be continued as it presently exists and should not be eroded through operation of the proposed supplemental jurisdiction.

It is important that the supplemental jurisdiction not be used to let the tail wag the dog. Thus, when a state claim predominates, the district court should be authorized and encouraged to decline the exercise of supplemental jurisdiction. To proceed in the face of state claim predominance would be an affront by a district court to considerations of comity and federalism. Subsection (c) of proposed § 1367 does give the district court power to remand or dismiss such claims.

The Judicial Conference has suggested three amendments to proposed § 120 and I support them.

I have taken the liberty of attaching to my statement some language which might be helpful to your Committee in drafting a new § 1367. This wording is taken, to great extent, from suggestions prepared by Professor Mangler as modified to be consistent with the Judicial Conference recommendation.

I move on to § 106 which proposeS to integrate the budgets of the Court of Appeals for the Federal Circuit and the Court of International Trade with the other federal courts. The Study Committee suggested that in addressing this matter, Congress might wish to defer implementation of the recommendation for consolidation until after the tenure of the then incumbent chief judges. The Judicial Conference has decided not to take a position of § 106.

The Judicial Conference does support § 105 containing provisions for the selection and tenure of the Chief Judge of the court of International Trade, suggesting however that Congress delay implementation for a two year period. Consistent with that proviso, a two year delay in the effective date of the budget consolidation provision would appear to be appropriate also.

The Study Committee recommended the consolidation of the budgets on an institutional basis, but was anxious to avoid any implication reflecting unfavorably upon the then Chief Judges of those two Courts. Both of those Chief Judges had demonstrated exceptional ability and responsibility in developing budgets as

well as very competently implementing other administrative measures during their tenure as Chief Judges. With the termination of their incumbency in the office, however, the institutional reasons for suggesting consolidation of the budget come to the fore.

Mr. Chairman and members of the Committee, I thank you for the invitation to be present at the hearing today. I stand ready to be of service to the Committee in any manner in which I can.

Addendum: Section 1367 Supplemental Jurisdiction

(a) Except as provided in subsection (b) and (c) or in another section of this title, in any civil action on a claim for which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims arising out of the same transaction or occurrence or series of transactions or occurrences, including claims that require the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction under section 1332 of this title, the district courts shall not have supplemental jurisdiction over claims by the plaintiff against persons joined under Rules 14 and 19 of the Federal Rules of Civil Procedure, or over claims by persons seeking to intervene under Rule 24 of the Federal Rules of Civil Procedure, when exercising supplemental jurisdiction over such claims would be inconsistent with the complete diversity requirement of section 1332.

(c) The districts courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if (1) the claim raises a novel or complex issue of State law, (2) the claim under subsection (a) predominates over the claim or claims for which the district court has original jurisdiction, (3) the district court has dismissed all claims for which it has original jurisdiction, or (4) there are other appropriate reasons, such as judicial economy, convenience, and fairness to the litigants, for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a) shall be tolled while the claim is pending in the district court and for a period of 30 days after it is dismissed unless state law provides for a longer tolling period.

(e) The word "States", as used in this section includes The Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(f) This section supersedes any other provision of law except to the extent that a federal statute expressly provides otherwise.

STATEMENT OF SENATOR JOSEPH R. BIDEN, JR.
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND
THE ADMINISTRATION OF JUSTICE
THURSDAY, SEPTEMBER 6, 1990

Mr. Chairman and Members of the Subcommittee:

I am pleased to submit this statement in support of the Civil Justice Reform Act of 1990.

At the outset, let me extend my sincere appreciation and thanks to you, Mr. Chairman, for your assistance on this legislation. I appreciate your joining Chairman Brooks, Congressman Fish and Congressman Moorhead as original co-sponsors of H.R. 3898, the initial civil justice legislation introduced in both the House and Senate on January 25. In addition, I want to thank you for scheduling this hearing, which I hope will hope facilitate enactment of the legislation this year. You are widely recognized as a true leader in the area of court reform and administration of justice, and your cooperation and assistance on this legislation has been invaluable.

As the members of the Subcommittee are no doubt aware, the Senate Judiciary Committee has favorably reported S.2648, The Judicial Improvements Act of 1990, to the full Senate. The vote in support of the legislation was 12-1.

Title I of S.2648 is the revised Civil Justice Reform Act of 1990; it incorporates numerous changes to the original legislation. Title II of S.2648, the Federal Judgeship Act of 1990, creates 77 new federal district and circuit court judgeships. Since Chairman Brooks's judgeships bill has been the subject of other hearings, I will address my comments to Title I.

Briefly stated, the Civil Justice Reform Act requires that every federal district court develop and implement a civil justice expense and delay reduction plan. Each plan, which will be based on the recommendations and assessment of a local advisory group convened in each district, will apply certain well-accepted principles and guidelines of litigation management. In this way, Title I promulgates a national strategy and national framework for attacking the cost and delay problem, while implementing that strategy through a policy of decentralization. Furthermore, by providing for periodic assessment of docket conditions and management practices and for regular opportunities to improve court procedures, Title I ensures continuous renewal of the commitment to reduce costs and delays. Finally, Title I's numerous information-intensive mechanisms substantially improve existing capacity to communicate techniques for litigation management and cost and delay reduction to all participants in the civil justice system in effective and prompt fashion.

Title I is built upon six essential components aimed at improving litigation management and reducing litigation costs and delays. Those principles are:

* building reform from the "bottom up;"

* promulgating a national, statutory policy in support of judicial case management;

* imposing greater controls on the discovery process;

* establishing differentiated case management systems;

* improving motions practice and reducing undue delays associated with decisions on motions; and

* expanding and enhancing the use of alternative dispute resolution.

Each of the principles is discussed at length in the Senate Judiciary Committee report, to which I would refer this subcommittee as it considers the legislation.

As you may know, the genesis for several of these principles is a Brookings Institution Task Force report entitled Justice For All. Reducing Costs and Delays in Civil Litigation. Convened at my request, the task force was comprised of authorities from throughout the United States and including leading litigators from the plaintiffs' and defense bar, civil and women's rights lawyers, attorneys representing consumer and environmental organizations, general counsels of major corporations, former judges and law professors. I have appended a copy of the task force's report to my testimony, and respectfully request that it be included in the record.

At the Judiciary Committee's March 6 hearing, Judge Richard Enslen, U.S. District Court for the Western District of Michigan, aptly described the task force as "Users United," noting that it represented the "heavy-weight thinking in every spectrum of our judicial system." He added that "to read the task force report and not be impressed as a federal district judge is to miss...the whole ball game." Judge Enslen concluded that the "report's analytical and thought-provoking thesis offers compelling argument to often elusive solutions to reducing delay and cost."

Mr. Chairman, there are some who believe that the comprehensive reforms promulgated in the Civil Justice Reform Act are unnecessary because, by creating new judgeships, costs and delays will, in effect, take care of themselves. I do not share that view. Increasing the number of federal judges is not the only answer, nor is it a sufficient answer. We are not in a "zero-sum game." This is not a question of do we "reform the system" or "do we add more judges." If the reforms make sense -- and I believe they make eminent sense -- they do so regardless of the number of judges.

In my view, the Civil Justice Reform Act is one of several reforms necessary to improve our federal courts. Together, they can go a long way toward bringing about a civil justice system that is less expensive, more efficient and more accessible for all Americans.

PREPARED STATEMENT OF

STEPHEN B. MIDDLEBROOK

SENIOR VICE PRESIDENT

AND EXECUTIVE COUNSEL

AETNA LIFE & CASUALTY

THE CIVIL JUSTICE REFORM ACT OF 1990

BEFORE THE SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND ADMINISTRATION OF JUSTICE

COMMITTEE OF THE JUDICIARY

U.S. HOUSE OF REPRESENTATIVES

SEPTEMBER 6, 1990

I am Stephen B. Middlebrook, Senior Vice President and Executive Counsel of Aetna Life & Casualty. I am testifying today on behalf of the American Insurance Association. The AIA is a national trade association representing 220 insurers, which write a large portion of the nation's property/casualty insurance business. AIA's member companies are substantially involved in civil litigation, as party litigants, when they defend the interests of their policyholders, when they pursue their policyholders' rights through subrogation, when they engage in coverage disputes, and when they appear as plaintiff or defendant in a wide range of commercial litigation.

I served on the Brookings Task Force on Civil Justice Reform. The AIA heartily endorses the reforms we have proposed in our report Justice for All, and the AIA equally supports The Civil Justice Reform Act of 1990, which would require the implementation of the Brookings reform measures.

My remarks today will focus on how I think the reforms in The Civil Justice Reform Act will produce meaningful and appropriate cost savings. Much of what I have to say draws upon my experience, and the experience of those at Aetna who oversee our litigation. Many of us who consistently participate in and are affected by the civil justice system have felt the tremors of a system in need of repair for some time. Until recently, through personal observation and incomplete data we were speculating that of the billions of dollars being spent on civil litigation, too few were reaching the injured in the form of compensation and too much time was being spent in the process.

Now, we have more than speculation to warrant those conclusions. The past few years have seen a quantum leap toward a better understanding of the dimensions of the civil justice problem. The Institute for Civil Justice, the National Center for State Courts, and the Federal Judicial Center have each provided us with concrete measurements of the system's inefficiency.

Some federal judges have developed innovative ways to move cases efficiently through the system without compromising the equitable treatment of the parties. However, the use of these devices has not been institutionalized in the courts and there is a need to do so in a way that tailors the procedures to the unique needs and resources of each federal district. The Civil Justice Reform Act would accomplish that objective.

There are numerous ways in which the reforms in The Civil Justice Reform Act will aid federal judges in their efforts to eliminate waste and promote the early settlement of cases. I will discuss, today, the mechanics of just a few.

Although roughly 95 percent of all lawsuits settle, as opposed to going through to verdict, a substantial number settle late in the process...on the courthouse steps or even during trial. This means they settle after the costs of discovery and possibly trial preparation have been incurred. Early settlements serve the interests of plaintiffs, particularly when delayed compensation imposes a financial hardship on injured parties and their families. Early settlements also serve the interests of defendants, who often find it difficult to live with the uncertainty of open ended liability. And early settlements serve the interests of insurers, who, although they may realize investment

income from compensation dollars if settlement is delayed, find those benefits easily surpassed by the added legal fees that result from extending the process. AIA would applaud a system that fostered early fair settlement.

Several features of The Civil Justice Reform Act increase the likelihood of early settlement:

- First, a staged discovery process, combined with an early settlement conference, puts the nuts and bolts of each case before the parties and the judge early in the process and in a cost effective manner.

- Second, setting firm trial dates as early as practical also forces the parties to come to grips with the case much sooner than if the time for trial is uncertain.

- Third, using the court or someone appointed by the court to discuss with the parties the possibility of alternative dispute resolution overcomes two existing barriers to the use of those mechanisms, which have the potential to produce early settlements. Under the current system, one of the parties or the insurer must suggest the use of ADR. It is not uncommon for this suggestion to be perceived as a sign of weakness, therefore stimulating yet more vigorous preparation for trial by the opponent. The suggestion may also be resisted simply because it has been

proposed by the adversary. There would be great advantage to having that suggestion come from the courts.

The Civil Justice Reform Act targets two circumstances in which the resources of counsel are being wasted and proposes ways to mitigate this waste. First, having judges set firm trial dates should decrease trial postponements and avert situations where counsel must "re-prepare" so that the issues and facts are fresh. Second, requiring judges to establish the dates when motions will be resolved should help with structuring discovery so that issues which may become irrelevant after the motion is resolved are not discovered until later in the process.

The Civil Justice Reform Act sends an important message to trial and appellate judges from those who use and depend upon the courts. The message is that citizens cannot allow these courts to evolve unfettered by any efforts to control cases individually or in the aggregate. Rather as innovative judges have demonstrated, case-management techniques must and can be introduced into the judiciary without upsetting the balance between efficiency and equitable treatment of litigants.

The AIA believes that The Civil Justice Reform Act is a significant step toward overcoming the inefficiencies that attend civil litigation. Although it is not possible to

estimate the dollar savings these reforms represent, if they are implemented in a way that is faithful to the intent of the drafters, the savings should be substantial. The Members of the Congress who have decided to sponsor this legislation, and who choose to support it, are to be commended.

Department of Justice

STATEMENT

OF

STUART GERSON
ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION

BEFORE

THE

HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY,
AND THE ADMINISTRATION OF JUSTICE

CONCERNING

FEDERAL COURTS STUDY COMMITTEE
IMPLANTATION ACT

AND

CIVIL JUSTICE REFORM ACT

H.R.5381 & H.R.3898

ON

SEPTEMBER 6, 1990

Mr. Chairman and Members of the Subcommittee:

Given the great challenges that a litigious society continues to present to the administration of justice in the federal courts, it is a matter of importance to present the views of the Department of Justice and the Administration on H.R. 3898, the Civil Justice Reform Act (as revised) and H.R. 5381, the Federal Courts Study Committee Implementation Act of 1990. These two measures, along with the omnibus judgeship bill introduced by Chairman Brooks, H.R. 5316, could result in substantially improving the rendering of effective and efficient justice for all Americans.

Because the Department of Justice and the Administration believe it imperative generally to enhance the judicial system, the bills called before the Subcommittee today are of special interest to us. The revised version of H.R. 3898 centers upon the need to provide efficiency in the management of the federal court caseload; H.R. 5381, in turn, focuses on the work and recommendations of the Federal Courts Study Committee.

In reviewing these legislative proposals, the Department enjoys the unique perspective of being, by far, the largest litigant in the federal courts. For example, the United States participated in 26.4% of the 223,113 cases filed in the United States district courts in calendar year 1989.

The Civil Division, which I head, handles more than 18,000 cases at any given time, and expends more than 700,000 attorney hours annually in defense of the United States. In the area of

We similarly believe that it is unwise to impose detailed statutory controls on the internal operations of the Judicial Branch in the exercise of its constitutional authority. Congress, however, may wish to adopt measures that facilitate the exercise of that authority by extending to the courts additional tools or resources with which to improve the administration of justice.

I. CIVIL LITIGATION MANAGEMENT

Apparently, this Subcommittee is contemplating an amendment to H.R. 3898 that would conform it to the language recently adopted by the Senate Judiciary Committee in Title I of S. 2648. My comments therefore are directed to the revision.

Only six years ago, Congress repealed, as inherently unworkable, the maze of nearly 100 ad hoc statutory provisions directing the district courts to expedite various classes of cases on their civil dockets. See 28 U.S.C. § 1657. The instant bill seeks a more systematic method of expedition by requiring new planning mechanisms, providing greater emphasis on case administration and establishing new reporting requirements.

District Plans

The proposed amendments to the Judicial Code would direct each of the 94 district courts to appoint an advisory group to recommend improvements for the timely disposition of cases.[1]

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[1] If Congress enacts this amendment and each district court appoints an advisory group, we suggest that the United States

(continued...)

of Civil Procedure themselves have been of limited success in dealing with litigation process problems.[2]

Differentiated Case Management

Proposed 28 U.S.C. § 473(a) would require that each district court develop a system of differentiated case management based upon the complexity of each case, its requisite preparation time, anticipated trial length and resource requirements. The Attorney General supports this concept now, as he did in his statement before the Federal Courts Study Committee last January.

We suggest that the courts already have the authority to develop and implement this tracking without legislation, though legislation might help to ensure uniformity. Rule 16 of the Federal Rules of Civil Procedure already requires judges to schedule early initial conferences to establish firm timetables. Rule 16 also gives the district courts the general power, through conferences and scheduling orders, to promote efficient use of the court's and the litigant's resources, and to address early on

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[2] In 1972, for example, the judiciary adopted Fed. R. Crim. Proc. 50(b), which required that each district court adopt a plan for the speedy disposition of criminal cases. See 18 U.S.C. § 3771. However, Rule 50(b) plans were inconsistent among districts and frequently inflexible within a district; only two years later did Congress intervene and enact the Speedy Trial Act of 1974, 18 U.S.C. § 3161. The extent of the Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, 93 Stat. 327, Aug. 2, 1979, clearly elucidates the difficulty of managing the judicial process by statute. On the other hand, 18 U.S.C. § 3006A mandates district plans for providing counsel to indigent defendants, and 28 U.S.C. § 1862 requires district plans for the management of the jury wheel. These successful administrative plans differ in both kind and degree from the current proposal because the current proposal reaches far beyond the administration of the district courts to the litigation process itself.

Attorneys and the Assistant Attorneys General, specific and limited authorization to proceed with the prosecution and defense of the interests of the United States.[4]

In particular, proposed § 473(b)(2) and (b)(3) direct the district courts to consider requiring that an attorney representing a party have authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters. Such a mandate, as applied to the United States, could conflict with the Department's chain of command and policy-implementation functions -- essential tools in managing some 60,000 cases filed each year.

A pretrial conference on discovery could raise issues of attorney-client or executive privilege, matters frequently requiring decisions by the highest officials of the Department, after consultation with the affected agencies. It would make little operative sense to require the United States to have senior officials present whenever a court deals with such matters. The United States should be exempted from the possibility of imposition of a requirement inconsistent with the Department's need to maintain centralized control over litigation.

Similarly, subsection (b)(5) directs the district courts to consider requiring that an attorney representing a party attend a settlement conference with full authority to settle the case. In

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[4]See, e.g., 28 C.F.R. § 0.13 (delegation of authority to designate attorneys to appear; authorization of redelegation).

1989 secured judgments and settlements of $521 million. Maintaining proper control over such wide-ranging litigation involving vast sums requires a degree of centralized control quite inconsistent with the delegation of full settlement authority to trial counsel.

Accordingly, while the district courts may wish to consider generally requiring that attorneys appear for settlement conferences with the full authority to settle the case in some kinds of litigation, that requirement cannot be applied generally to cases involving claims by or against the United States. The Senate Judiciary Committee recognized this problem in its report on S. 2648 and stated its intention not to upset this delicate balance. We believe that specific exceptions should be made in the text of the bill to ensure that the litigation prerogatives of the United States and the public fisc itself are adequately protected.

II. FEDERAL COURTS STUDY COMMITTEE IMPLEMENTATION ACT

H.R. 5381 carries forward a number of proposals recommended by the Federal Courts Study Committee. My colleague, Edward S. G. Dennis, Jr., formerly the Assistant Attorney General for the Criminal Division, served on the Study Committee with you, Mr. Chairman, and Congressman Moorhead, and many offices of the Department assisted in the preparation of materials for the Committee's consideration. In addition, the Attorney General testified before the Study Committee on January 31, 1990. Let me

district court's jurisdiction should be remanded because, under the analysis in United States v. Kimbell Foods, Inc., 440 U.S. 716 (1979), or a similar doctrine, state law "predominates" in that particular case. While we would oppose such a reading of the statute in any given litigation, the proposed language virtually invites a district court to adopt such an argument and would, at the least, cause confusion and unnecessary litigation.

Venue. We oppose § 111, which would change the venue requirements in 28 U.S.C. § 1391(e) from allowing an action against the United States to be brought where a "cause of action arose" or "the property is situated" to where "a substantial part of the events or omissions giving rise to the claim occurred" or a "substantial part of the property is located." The present statutory language seems as clear and precise as is possible in determining venue questions. The proposed language does not appear to clarify material venue interests, but well might generate litigation over the "substantiality" of the "events or omissions" or the property involved.

Moreover, the language seems likely to lead to forum shopping as inventive counsel try to frame novel definitions of "substantial." We see no benefit to the proposed change but envision a likelihood of further confusion and litigation in this area.

Statute of Limitations. Section 112 would provide a statute of limitations for all federal statutes that do not already

Furthermore, there are certain types of actions for which there is currently no limitations period applicable to the government and for which no statute of limitation is appropriate. For example, there is no limitations period applicable to abatement actions under § 106 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9606.

The government's ability to clean up sites presenting an imminent and substantial endangerment to the public health or welfare should not be curtailed by litigation over whether the cause of action arose when the release of a hazardous substance occurred, when it was discovered, or when the endangerment was determined. Nor should such actions be barred because a dangerous condition may have been in existence more than four years before the action was filed.

Magistrates. Section 119 would permit United States district judges and magistrates to advise the parties before them of the availability of magistrates to resolve disputes. We believe that present procedures, which direct the clerk of the district court to inform the parties of the availability of a magistrate to hear their case, are adequate. See 28 U.S.C. § 636(c)(1).

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[6](...continued)
statute of limitation is applicable, although that may have been the intention of Congress, this provision would probably be interpreted to create a statute of limitation for such actions where none previously existed.

Supplemental Jurisdiction. Section 120 would invest the district courts with supplemental jurisdiction to hear all matters related to a case, whether independent federal jurisdiction exists over those related matters or not. We oppose this proposal because it would seem further to increase the burden of issues presented to the federal courts, which would seem the opposite of the Subcommittee's intent. Furthermore, such an expansion of pendant jurisdiction unjustifiably would permit plaintiffs to use limited jurisdictional grounds such as the Federal Tort Claims Act to bring private suits into federal court that otherwise could be maintained only in state courts.

Alternative Dispute Resolution. Section 121 would provide for a nationwide expansion of the use of voluntary alternative dispute resolution (ADR) by the federal courts. While the Department of Justice firmly supports the use of ADR in appropriate circumstances,[8] we recognize that Congress has proceeded cautiously in this area and for these reasons object to the proposal as currently drafted.

It was only two years ago that Congress expanded the authorization for court-annexed arbitration pilot programs from 10 to 20 districts -- an appropriate step in expanding experimental programs. That new authority, which has not yet been implemented, also provides guidelines and standards to ensure a measure of uniformity across different districts, a factor which is lacking in § 121. We believe that Congress should continue to

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[8] 28 C.F.R. § 50.20.

shall be deemed to consent to proceeding before a bankruptcy judge unless an objection is filed within 30 days of the date on which the party files its first pleading or 30 days after service of the pleading that initiates such proceeding, whichever occurs first.

In many cases, the Department is most willing to consent to proceeding before a bankruptcy judge, but we simply cannot evaluate all of the many facets of each proceeding and coordinate the many different agencies that might be involved within such a limited time frame. The Department would be hard pressed in most cases to do more than file a boilerplate objection to such referrals until the necessary evaluation has been completed. This would also mean a separate filing in most cases because the Bankruptcy Rules allow the Government 35 days to answer a complaint.

Moreover, aside from the Government's practical problems, an implied waiver of the right to an Article III tribunal raises possible constitutional concerns. By analogy, trials before the non-Article III magistrates require express consent, and the rules of court must include procedures to insure the voluntariness of that consent. Currently, Bankruptcy Rule 7012(b) requires a statement that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge, and we believe that this requirement should be retained.

Bankruptcy Appellate Panels. Like the magistrates, bankruptcy judges are adjuncts of the district courts, but unlike

Under the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, Congress expanded the United States Trustee Program as a permanent part of the Department of Justice. Under the transition provisions of the law, judicial districts were placed under the United States Trustee Program at varying stages. The final judicial districts, those in North Carolina and Alabama, are scheduled to come into the Program in 1992.

The administration of cases involves the appointment and oversight of trustees and debtors under the Bankruptcy Code, duties which are presently performed by the United States Trustee in 88 judicial districts throughout the country. In contrast, until 1992, the judiciary will continue to carry out these administrative functions in the judicial districts in North Carolina and Alabama.

The 1986 Act represents Congress' emphatic determination that, in bankruptcy matters, the proper role of the judiciary be limited to resolving disputes, not to administering cases. Specifically, the bankruptcy system should not allow trustees and examiners to be appointed by the same branch of government that adjudicates disputes involving those individuals, and that approve their compensation. In sum, there should be one system of administering bankruptcy cases and that should be under the United States Trustee Program.

structure of the Court of International Trade. Two years later, a similar process in the Federal Courts Improvements Act created the Federal Circuit and the Claims Court. In both instances, Congress recognized the special nature of these courts. The designation of the chief judges was but one aspect of a balancing of complex relationships. We believe that these courts are working effectively as Congress intended and that no change should be made in the statute.

III. ADDITIONAL JUDGESHIPS

Before closing, Mr. Chairman, I would also like to reiterate the Administration's view on a subject that is of great concern to all of us: the need for additional judgeships. As the Subcommittee is aware, on June 22, the Judicial Conference recommended creating a total of 96 additional judgeships in light of 1989 caseload figures.

We support the Judicial Conference's recommendation that Congress create 76 new district court judgeships. We recognize also an interest in targeting additional judgeships in areas of most pressing need and greatest projected growth. The Judicial Conference recommendations, however, are predicated on past filings, and do not respond to planned caseload adjustments predicated on governmental policy.

The Department is making substantial commitments of recently-authorized resources for the prosecution of drug trafficking, money laundering and related cases. Similarly, we are vigorously

authorized in the Ninth Circuit, at least one additional judgeship should be authorized for the Fifth Circuit, and at least one additional judgeship should be authorized for the Eleventh Circuit. In reaching this end, as we are always, the Department is fundamentally committed to working with this Subcommittee to assure that the vital interests of the citizens of the United States in having a capable and responsive federal court system are met.

CONCLUSION

As a litigator with a continuing experience of 23 years in the federal courts, I believe that effective case management must originate with the district judges themselves. It is, of course, not the role of judges to make the law; their job is to apply the law that this Congress passes. But to apply it, they must manage their dockets effectively.

I suggest that there are judges who simply let things happen and those who make things happen. We must encourage the latter. As overloaded as our dockets are presently, a large majority of cases still settle. The effective judge, through use of active case management and timely decisions on motions, including those for summary judgment, can encourage the parties to evaluate their positions with an eye towards realistic, voluntary resolution of the matter before the court. The judge who follows this prescription has the resultant freedom to try the case that must be tried, and generally is the judge who has his or her docket

STATEMENT OF FEDERAL JUDGES ASSOCIATION
H.R. 5381, The Federal Courts Study Committee
Implementation Act
Civil Justice Reform Act of 1990
Judicial Improvements Act of 1990

Subcommittee on Courts, Intellectual Property
and the Administration of Justice
September 6, 1990

THE HONORABLE DIANA E. MURPHY, PRESIDENT
UNITED STATES DISTRICT JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

been a Federal District Court Judge in the District of Minnesota since 1980.

FEDERAL COURTS STUDY COMMITTEE IMPLEMENTATION ACT

H.R. 5381, introduced by Chairman Kastenmeier and the ranking member of the Subcommittee, Mr. Moorhead, is based on the recommendations of the Federal Court Study Committee, on which they both served.

The Federal Judges Association has commended the Federal Courts Study Committee for its careful and thorough survey of the work and needs of the federal courts and welcomes this initial attempt to incorporate some of the committee recommendations into law. The Association is in the process of studying the committee's final report and has not yet taken a position on most of its recommendations, but we do want to comment today on two areas related to H.R. 5381.

Section 206 of the bill provides that the name of United States magistrate would be changed to assistant United States district judge. We were surprised to see this provision, particularly in legislation described as implementing proposals of the Federal Courts Study Committee. The committee did not make such a proposal and in fact rejected a proposal to change the name of United States magistrate to magistrate-judge.

The Federal Judges Association opposes section 206 as confusing, misleading, and unnecessary. We appreciate and value highly the work of the United States magistrates, but we cannot support the name change. The responsibilities and power of

its passage. Unless the judiciary receives appropriate cost-of-living increases in the future, however, the crisis caused by diminution of compensation will reoccur. Section 140 will perpetuate this crisis, and we urge its repeal, either in this legislation or at another early opportunity.

JUDICIAL IMPROVEMENTS ACT

In discussing the Judicial Improvements Act, we would like at the outset to recognize that the legislation has been significantly improved since it was first introduced by Chairman Biden and Senator Thurmond. As approved by the Senate Judiciary Committee, S. 2648, is superior to S. 2027 because of its elimination of the prohibition against the use of magistrates and of many mandatory procedures, its permitting districts to continue to use procedures found to work well in different localities, its shifting the tracking system to only two demonstration districts, and its provision for review by committees made up of district court judges rather than judicial councils. These changes mitigate some of the adverse affects on the civil justice system that we feel would have resulted from S. 2027 as originally introduced.

It is well known that S. 2027 generated widespread concerns among the federal judiciary, and we continue to be concerned by S. 2648. This is not because we differ with the underlying goals. The judiciary is dedicated to the service of justice and continually seeking ways to improve its service. We share the desire to make civil litigation in the federal courts more

compiled by the Rand Institute for Civil Justice and the Administrative Office of the United States Courts show that the median time from filing to disposition of private cases fluctuated between eight and ten months in the period from 1971 to 1989.

If this legislation is enacted, it should at least exempt those districts with current civil dockets from the required procedures. Senator Biden has considered such a provision and in fact directed a written question to me after the June 26, 1990 hearing in the Senate Judiciary Committee inquiring about our position on such an exemption. If a court were to meet certain criteria, it would not have to take the steps set out in the bill. The triggering criteria could be defined by the Director of the Administrative Office of the United States Courts as in § 481(b)(2) of the bill. Such an exemption provision would greatly improve the legislation.

To be frank, many judges continue to believe the subject matter of S. 2648 would be best addressed by the rules process. More importantly, we are concerned because this legislation only deals with one aspect of the work of the federal courts. The numbers of civil and criminal cases have increased steadily, as have their complexity. Congress has created new areas of federal jurisdiction and mandated time-consuming new procedures. Even with the proposed new judgeships fully staffed, the federal judiciary will be strained to the limit. We need more time to do our work and to render wise decisions according to developing

Section 472 requires procedures that will take considerable time and resources away from the important work of the courts. It may well result in greater delays and costs in civil litigation. In addition, section 472 presumes that in every federal district there is unnecessary delay and cost and that in each district all specified parties, including the court, are at fault. I would suggest that most federal courts are operating as efficiently as is possible, given their resources and the statutory constraints under which they operate.

Section 473 requires each federal district to establish a Civil Justice Expense and Delay Reduction Plan. The required content of these plans would set impossible targets in many cases and thereby mislead litigants, the bar and the public. The requirement that trial is to occur within 18 months absent special certification establishes an expectation that cannot be fulfilled at the present time in many districts, primarily due to the volume and length of criminal trials. Eighteen months would more properly be viewed as a goal for disposition of each civil case. For similar reasons, no <u>firm</u> trial dates are possible for civil cases in many districts. While it is well recognized that firm trial dates lead to settlement of cases, the bar learns when courts are taken over by criminal cases that the target trial dates are not firm regardless of any plan's language. In addition, no meaningful target dates for deciding motions are possible at the outset of the case -- at that time there is no knowledge of the number or complexity of motions to be made in a

with an advisory group is deemed by the Congress to be necessary, that it should be required every three years.

Although the review process is greatly improved in the current draft, section 474 still includes the chief circuit judge on the review committee. Many judges, both circuit and district, believe the section should be amended to include only chief district judges. The reasons for this are that most chief circuit judges have no experience or expertise in trial court management, issues created by the district plans may be raised on appeal, and as one respected circuit judge says "not because it would do any particular harm, but because it is simply unnecessary." Moreover, chief circuit judges already are overburdened with the many demands on their valuable time.

Section 478 provides that the chief district judge shall appoint each district's advisory group after consultation with the other judges of the court and that the chief judge shall determine the balance of the advisory group and representatives of "major categories of litigants" in the court. This procedure differs from the standard statutory authority for operating the district court in 28 U.S.C. § 137, and any final plan would have to be adopted by all the judges of the district court under sections 471 and 472. It follows that the whole court needs to be involved in selecting the advisory group.

The development of the plan, implementation of the plan, review of the plan by the circuit committee and the Judicial Conference, use of an advisory group and its appointment, and