EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

September 4, 1990

TESTIMONY

TESTIMONY

LEGISLATIVE REFERRAL MEMORANDUM

TO: **Legislative Liaison Officer**

Administrative Office of the U.S. Courts - Robert Feidler (633-6040)

SUBJECT: Department of Justice proposed testimony on H.R. 3898 and H.R. 5381 -- two bills relating to reform of the Federal judicial system.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

Please provide us with your views no later than 10:00 m. -- 9/5/90. (FIRM -- Testimony is for delivery Thursday morning. Portions of this testimony have been delivered previously -- see memo -- attached).

Direct your questions to Jim Brown (395-3457), the legislative analyst in this office.

Connie J. Bowers for

James J. Jukes for
Assistant Director for
Legislative Reference

Enclosures
cc: Cora Beebe
Boyden Gray
Bob Damus

SUBJECT: Attached Testomony on H.R. 5381 and substitute for H.R. 3898

To make you life a little easier, we offer the following comments on our draft testimony.

1. The first part of the testimony, on the substitute for H.R. 3898, is based on our letter of July 12 to Senator Biden on S. 2648 -- the text of S. 2648 is being used in lieu of H.R. 3898. There is literally nothing new here.

2. The second part of the testimony, on H.R. 5381 the Federal Courts Study Committee Implementation Act, is based on the Attorney General's statement before the Federal Courts Study Committee on January 31 to the extent it is applicable. In certain areas, it is clearly new.

   * Removal, venue and statute of limitations provisions (pages 10-13) are based on our litigation experience. In several instances, we are concerned that litigation costs would be exacerbated.

   * The Magistrates discussion (13-14) is also new and we have a great concern that our ability to litigate effectively on behalf of the government.

   * Supplemental jurisdiction (14-15) is just plain dangerous to the public fisc.

   * ADR (15-16) carries forward our position in 1988 and is consistent with testimony last year on ADR before both House and Senate Gov't Ops/Affairs Committees.

   * Bankruptcy (16-19) is consistent with the Attorney General's statement before the FCSC.

   * Parole Commission (19-20): we want to substitute the Administration's proposal.

   * Court of International Trade (20-21) is consistent with the D'Amato letter that you have cleared, although the proposal is somewhat different.

3. The judgeship testimony is a short version of an established Administration position embodied in our July 12 letter to Biden and the letter to Brooks.

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

mass torts litigation alone, the Division has, since 1981, expended 433,000 hours to defend 3,200 asbestos cases. Given budgetary and manpower realities, we could not have managed this type of complex litigation without having developed and adopted efficient managerial mechanisms and automated litigation support.

These facts illustrate the Department's realization that litigation under the present system indeed is intricate and often burdensome. We thus commend the efforts of this Subcommittee to streamline litigation in the federal courts.

As I describe the Department's views on these important pieces of legislation, and renew our commitment to working with the Judiciary and the Congress on judicial reform legislation, I must reiterate an important Administration policy. We are guided by a healthy respect for the Constitution's separation of powers. This respect leads us to refrain from commenting on a number of provisions in these bills that we regard as internal and native to the Judicial Branch. Thus, for example, § 202 of H.R. 5381 would provide a statutory recognition of the power of the Judicial Conference of the United States to issue rules and regulations for the federal judiciary. If the Judicial Conference believes that a statutory authorization is necessary for it to issue rules and regulations for the internal governance of the Judicial Branch, the Executive Branch would support it. However, it is not our mandate or desire to manage the Judicial Branch.

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...)

These recommendations would be adopted as a plan as outlined in § 472. In addition, the bill provides for uniform reporting of case aging, standardized characterizations of judicial actions, and litigation management training.

The Department favors this centralized approach to planning and guidance in the development of district plans. We believe that the purely administrative district plans envisioned by the current proposals could improve the disposition of civil cases without unnecessarily formalizing the civil litigation process.

The proliferation of inconsistent local court rules is a problem the judiciary and litigants have faced for years; even under current practice, counsel for the Department and other multi-district litigators, such as multi-state businesses, labor unions, and public interest groups, must frequently comply with many different and inharmonious rules. Significantly different case management plans would exacerbate this problem.

We recognize that some tailoring of district court operations to address local factors is necessary, and believe that the current proposals allow flexibility for that. We note, however, that district-level plans adopted without an adequate degree of coordination and deference to the uniformity of the Federal Rules

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[1](...continued)
Attorney for that district be named a parmanent member of the group.

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

Case Tracking Systems

Proposed 28 U.S.C. § 473(a) would require that each district court develop a system of differentiated case tracking 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.

in litigation a wide range of matters bearing on the conduct of the case. That court power is reinforced by the power to sanction attorneys or parties who do not comply.

To ensure success, a case tracking plan must be carefully crafted to avoid being unnecessarily burdensome to litigants. Any such proposal particularly should take the government's litigation interests and resource limitations into account.[3]

While we believe that the tracking concept has merit, we are concerned that any such tracking system imposed on the federal courts not be legislated too narrowly or restrictively. Accordingly, we agree with the bill's purpose of ensuring that district courts consider and implement case tracking while leaving the details to be worked out by the individual judges.

Pretrial and Settlement Conferences

I would like to draw your attention to the fact that several sections of the bill would direct the district courts to consider implementation of actions that may conflict with the Attorney General's authority to manage and administer the legal affairs of the United States. See 28 U.S.C. §§ 516-519. The Attorney General has delegated, through the offices of the United States

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[3] The Civil Division's Commercial Litigation Branch has had illustrative experience in this area. The Commercial Litigation Branch expends a great deal of time filing motions in individual cases in order to obtain exceptions from various aspects of the procedures set forth in the Claims Court case management plan because those procedures simply are not effective in specific cases. Various procedures appear to be inappropriate in different kinds of cases. This would occur even under the more specifically-tailored plans that would be required under the proposed legislation.

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).

order to retain necessary litigation control to protect the public fisc, the Department necessarily reserves settlement authority to senior officials and does not delegate such authority broadly to its more than 6,000 trial counsel. See 28 C.F.R. §§ 0.160-0.169.[5] The Department makes every effort to participate in settlement negotiations, but cannot realistically send officials with full settlement authority to each settlement conference.

The government may not settle a case unless the United States' liability and the amount of damages have been clearly identified. Furthermore, payment must be properly authorized. The Department of Justice has been most successful in representing the taxpayer in this regard.

As the Attorney General noted in testimony before the full Committee last Spring, during 1989 we defeated over $21 billion in claims against the United States. In contrast, the United States paid out only $123 million in claims -- less than six-tenths of one percent of the amount sought by plaintiffs against the United States. On the affirmative side, the government in

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[5] The Attorney General has authorized the Deputy Attorney General to exercise his authority to settle all claims against the United States. 28 C.F.R. § 0.161(b). Assistant Attorneys General have been authorized to settle or close those claims which do not exceed $750,000, with limitations. §§ 0.160, 0.164. In addition, we have redelegated certain settlement authority pursuant to § 0.168. For example, in cases under the jurisdiction of the Civil Division, the United States Attorneys and Branch Directors are authorized to settle claims up to $200,000, while the Environment and Natural Resources Division redelegates settlement authority ranging from $100,000 to $300,000, depending upon the type of claim.

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

again commend the accomplishments of the Study Committee and of this subcommittee for its responsiveness in developing this important legislation. I address today those proposals in H.R. 5381 that directly affect the Administration.

Civil Process Changes

Removal. We must oppose § 110, which would alter the removal statute, 28 U.S.C. § 1441(c). Currently, where multiple independent claims are brought in state court, the statute allows the entire case to be removed to federal court if there exists a separate claim "removable if sued upon alone." The proposed change replaces this phrase to allow removal only if there exists a claim "within the jurisdiction conferred by section 1331 of this title." This change would prevent removal in those cases where the federal claim is not based on the "federal question" statute, 28 U.S.C. § 1331, but on some other federal jurisdictional statute such as the Federal Tort Claims Act, 28 U.S.C. § 2679(d)(2), or the "Little Tucker Act", 28 U.S.C. § 1346(a)(2). We see no reason why removal is not appropriate in such cases.

We also oppose that part of § 110 that would alter current 28 U.S.C. § 1441(c), which allows the district court (if a removable claim exists) either to decide the non-removable claims or to remand all matters "not otherwise within its original jurisdiction." The proposed change would allow the district court to remand all claims "in which the State law predominates."

This could allow a plaintiff, in a suit against the United States, to argue that a claim otherwise within the federal

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

contain such a provision. We support this proposal as it applies to private cause of actions.

Section 112, as drafted, is limited to legislation that is enacted after the date of enactment of this proposal. Accordingly, § 112 would not apply to the many extant laws that contain no statute of limitatic This discontinuity should be removed and the proposed resid atute of limitations should be applied to all congressiona tments that do not contain such a provision -- subject to an exclusion for the United States which we shall discuss. This simple change would save the federal courts a substantial amount of time and provide certainty in a wide range of cases where the appropriate statute of limitations is now litigated.

As with the issue of settlement authority, the United States would suffer if this provision were applied to the causes of action that it pursues. This provision could supplant the already existing statutes of limitation applicable to cases involving the United States with respect to any statute not containing its own statute of limitations.[6]

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[6] Sec. 112 sets out a statute of limitation that would apply "[e]xcept as otherwise provided by law." Many of the statutes of limitation that now apply to the United States also apply "except as otherwise provided by Congress." See, e.g. 28 U.S.C. §§ 2415, 2416, 2462. At a minimum, this would engender needless litigation over which statute of limitation would control. An additional problem of interpretation would result from comparing this provision to 28 U.S.C. 2415(c), which provides that "Nothing herein shall be deemed to limit the time for [the United States to bring] an action to establish the title to, or right of possession of, real or personal property." Because subsection 2415(c) does not affirmatively state that no 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.

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).

The Department agrees with the legislative history of 28 U.S.C. § 636 describing that judges and magistrates themselves should not be involved in advising parties of the availability of

a magistrate. 28 U.S.C. § 636(c)(2). Such suggestions from judicial officers have the inherent tendency to coerce.

The 1978 Act made substantial changes in the scope of a magistrate's delegable duties. The Act's referral process has worked and many cases have been resolved quickly and fairly by the magistrates with the consent of the parties. In the reporting year ending June 30, 1989, United States magistrates tried 5,354 cases by consent, and handled thousands of pretrial conferences and motions, and numerous criminal proceedings.[7] We participate in many such cases and consent often to disposition before a magistrate.

We do not believe that a magistrate's authority should be further expanded. The magistrate is an adjunct of the court and should not supplant the court through an award of independent authority. The changes envisioned by § 207 of the bill, providing contingent authority for new magistrates, including the power to hold parties in civil and criminal contempt, should be more fully considered before enactment. Also, we do not support the proposal in § 206 to change the title of "Magistrate" to "Assistant United States District Judge." Therefore, we recommend that both provisions be deleted from the present bill.

Supplemental Jurisdiction. Section 120 would invest the district courts with supplemental jurisdiction to hear all matters related to a case, whether independent federal jurisdic-

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[7] Annual Report of the Director of the Administrative Office of the United States Courts, 1989, Tables M-1 through M-5.

tion exists over those related matters or not. We oppose this proposal which 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 proceed cautiously and permit experimentation without altering the entire system of civil justice on a nation-wide scale.

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[8] 28 C.F.R. § 50.20.

Witness and Juror Fees. Section 108 would increase witness and juror fees from $30 per day to $40 per day. The fee amount has not been changed in many years. We believe that this change is appropriate.

Bankruptcy Proceedings

The United States participates in a large number of complex bankruptcy proceedings. The Civil Division, which routinely retains cases involving in excess of $200,000, received over 8,000 cases -- over 50 cases per week -- in FYs 87-89 alone, with a total dollar value in excess of $5 billion. Claims for less than $200,000 are routinely handled by the United States Attorneys.

The Tax Division's bankruptcy caseload exceeded 12,000 cases in FY 89 -- over 230 per week -- and that Division is budgeting for over 16,000 cases -- over 300 per week -- for the coming fiscal year. The Environment and Natural Resources Division now handles in excess of 100 cases which cumulatively involve hundreds of millions of dollars in clean-up liabilities. As previously noted, in most of these cases, settlement authority is retained by senior Departmental officials.

Consent. Given the complexities of bankruptcy litigation and the varied federal interests involved, several provisions of H.R. 5381 would cause significant difficulties for the Department. For example, § 114 of the bill would provide that a party 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 magistrates, bankruptcy judges historically have been viewed as "specialists." Section 115 of H.R. 5381 would further that

perception by permitting two or more circuits to establish joint bankruptcy appellate panels with the approval of the Judicial Conference. Our experience suggests that bankruptcy appeals should not be ceded to a group of specialist judges when bankruptcy law is merely one part of the broad fabric of the law and the outcome of bankruptcy cases depends on the full range of statutory and common law principles. Rather than further isolate bankruptcy from the general fabric of the law, we believe that Article III judges should pay closer attention to bankruptcy proceedings. In short, the restructuring of the bankruptcy courts after Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), should not be disturbed.

Bankruptcy Appeals. We support § 116 of the bill because it properly limits review of certain bankruptcy determinations to appeal at the district court level, thus striking a balance between concerns of judicial economy and the requirement of Article III judiciary supervision of the bankruptcy court.

Bankruptcy Administrator Program. Finally, § 118 would extend for an additional 10 years, and broaden the authority of, the few remaining bankruptcy administrator programs in the judicial districts of North Carolina and Alabama. The Department strongly urges the Subcommittee to delete these provisions and to allow the United States Trustee program to become nationwide as originally planned in 1986.

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.

Extension of the Parole Commission

Section 109 of the bill would extend the life of the United States Parole Commission by merely changing the statutory termination date. It thus defers the question of the ultimate

termination of the Parole Commission. We do not support this approach.

The Parole Commission now is scheduled to terminate on November 1, 1993. At that time, approximately 18,000 to 20,000 parole-eligible prisoners will be in the federal prison system and parole hearings will need to be held for them; some parole hearings will need to be held long after the end of the five-year extension envisioned by § 109.

The Administration has proposed that the Parole Commission be replaced by a separate board for the interim five years between 1992 and 1997, and that authority for review of the small number of remaining cases be lodged within the Department after that date. This would guarantee that parole decisions can be made as long as necessary in the future, while also ensuring that the declining number of cases does not drain public fisc resources through the continuation of a separate entity. We shall provide the Subcommittee with a copy of the Administration's proposal and propose that it be substituted for current § 109.

The Court of International Trade

Section 205 of the bill would alter the process of designation of the Chief Judge of the Court of International Trade. In the Customs Court Act of 1980, Congress carefully crafted the 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 pursuing criminal and civil fraud, tax and bankruptcy cases relating to the failures of a multitude of savings-and-loans and other financial institutions.

As you know, a bill introduced by Chairman Brooks, H.R. 5316, which is pending before the Committee, would authorize 45 additional district judgeships. We believe that these numbers should be evaluated for adjustment in light of the most recent Judicial Conference request.

The Judicial Conference has also requested 20 additional judgeships for the courts of appeals, while H.R. 5316 would authorize nine. We recommend that H.R. 5316 be amended at least to bring it into conformity with the most-recent recommendation of the Judicial Conference.

We note, though, that the Department's initiatives, many of which are employing new statutory provisions, will raise complex and manifold appeals because of the novelty of the issues involved, the lack of precedent in interpreting new statutes and factual situations and the substantial amounts of money and prison sentences involved. Moreover, a distinct need has been identified for a more comprehensive method for determining the needs of the courts of appeal for additional judgeships, including the development of a weighted caseload formula.[9]

Accordingly, we also believe that, to respond to the needs we have just identified, that one additional judgeship should be 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

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[9] Report of the Federal Courts Study Committee (April 2, 1990) at 111.

Eleventh Circuit. In reaching this end, as we are always, the Department is fundamentally committed to working with this Subcommittee in assuring that the vital interests of the citizens of the United States in having 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 encourages 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 current and parties who are satisfied with the results produced. Congress can most help this process by giving the judges the

tools to effectively manage their dockets and by providing them with adequate resources.

Finally, I note that the nature of this sort of testimony has resulted in the fact that many of my comments have been negative or cautionary. I thus want to conclude by reiterating the Department's general support of the thrust of these proposed pieces of legislation and our strong commitment to continuing to work this Subcommittee.