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STATEMENT OF FEDERAL JUDGES ASSOCIATION
S. 2648, THE JUDICIAL IMPROVEMENTS ACT OF 1990

U.S. SENATE JUDICIARY COMMITTEE
JUNE 26, 1990

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

DRAFT

Mr. Chairman and members of the Committee, I appreciate the opportunity to appear before you today to offer the comments of the Federal Judges Association on S. 2648, The Judicial Improvements Act of 1990. Title I represents efforts to make civil litigation in the federal courts more efficient and to assure effective case management. We share those objectives and commend the sponsors for their interest in them. We support Title II creating 77 new and much-needed federal judgeships. Title I concerns us a great deal, however, and we hope that the changes we will recommend here today will be incorporated into the bill as it proceeds through the legislative process.

Mr. Chairman and Senator Thurmond, we sincerely appreciate your willingness to listen to our concerns and to consider our suggestions and comments. You and your staffs have been cordial and courteous. We intend to continue to work with you to insure that any legislation addressing the processing of cases through the Federal Courts is effective and workable.

The Federal Judges Association is an independent voluntary dues-paying organization which a majority of Federal District and Circuit Judges have joined. The purpose of the Federal Judges Association is to seek the highest quality of justice for the people of the United States and to preserve and protect the ability of the federal judiciary to attract and retain the best qualified men and women for judicial service.

At the outset, we would like to recognize that the legislation has been significantly improved since it was first introduced. Title II is long overdue and will help to relieve

some of the backlogs and delays that are occurring. Title I has been improved from the original S. 2027 by removing the prohibition against the use of magistrates, by eliminating many mandatory procedures and permitting districts to continue to use procedures that they have found to work well in different localities, by shifting the tracking system to only two demonstration districts, and by providing for review by committees made up of district court judges rather than by the 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.

To be frank, however, many judges continue to believe the subject matter of Title I 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 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 law. The lower federal courts also need adequate time to commit their reasons to writing in a complete and thoughtful manner to enable meaningful appellate review. In the long run, no management system for civil litigation in federal trial courts can be effective without adequate numbers of judges, relief from

crushing criminal caseloads, and reduction in time-consuming processes. The priorities of the Speedy Trial Act, the burgeoning criminal caseload, and lengthy sentencing hearings consume essentially all of many courts' time.

The Constitution created a government with three equal and separate branches. Each branch has important responsibilities which impact the administration of our civil justice system. But if you read the findings contained in section 102 of S. 2648, two of the branches of government appear to be absolved of any responsibility for the perceived problems in that system. Section 102(2) and 102(3) place the blame for cost and delay in civil litigation solely on the courts and the litigants and their attorneys. The roles of Congress and the President also need to be considered. Enactment of many statutes impacts on the caseload and procedural requirements of the federal courts and contributes to cost and delay. Adequate resources are needed for the administration of the courts, including personnel and up-to-date technology. For a variety of reasons, judicial vacancies sometimes remain unfilled for very long periods. A comprehensive approach should at least recognize other causes of the perceived problems.

In the long run, effective management systems in the federal courts cannot succeed unless Congress and the Executive branch are aware of the impact of their actions on the litigation process and of their responsibility to contribute to its solutions.

Mr. Chairman, I would like now to move to several of the specific concerns that the Federal Judges Association has with the bill. Section 472 provides for the appointment of advisory groups; for the study and compilation of reports on civil and criminal dockets and the causes of cost and delay; and for the advisory groups to make recommendations that "include significant contributions to be made by the court, the litigants and the litigants' attorneys toward reducing cost and delay." The requirements of section 472 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 the 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 firm 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 case, or across the docket, or what type of trials or emergency hearings may be ongoing when the motions are brought.

For these reasons section 473 should not require that the district plans "apply" such principles. Either the section should be eliminated so that districts would be free to fashion a plan appropriate to their circumstances or section 473 should be amended to provide that all advisory groups and districts consider such principles in fashioning their plans.

Section 475 requires complete docket assessment in each district at least once every two years in consultation with the advisory group. This provision requires that the court be involved in almost constant review and assessment with complicated and time-consuming procedures. Such reassessment, if required at all, should be no more often than 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."

Section 477 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 ongoing reporting and assessment required by the statute institute a whole new area of procedure. These complex, time-consuming and sometimes repetitive procedures will necessarily take away from other work without any evidence whatsoever that they will result in benefits to the system. The legislation is based on an assumption that it will result in greater efficiency and speed in civil cases, but there is no hard evidence available

on the cause and effect of the procedural requirements and no comprehensive look at the overall problems and their causes in the Federal courts.

Mr. Chairman, we appreciate this opportunity to present our views on S. 2648 and we will be happy to answer any questions that the Committee may have. We will continue to work with the Committee and its staff to address problems faced by the federal courts and are confident that working together, we can resolve many of the problems. Thank you for your attention and consideration.