PREPARED STATEMENT

OF

THE HONORABLE DEANELL R. TACHA
UNITED STATES CIRCUIT JUDGE
COURT OF APPEALS FOR THE TENTH CIRCUIT
CHAIRMAN OF THE COMMITTEE ON THE JUDICIAL BRANCH
JUDICIAL CONFERENCE OF THE UNITED STATES

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

Mr. Chairman and members of the Subcommittee, I am Deanell Tacha, Circuit Judge of the United States Court of Appeals for the Tenth Circuit, and Chairman of the Judicial Conference Committee on the Judicial Branch. I am here today as the representative of the Judicial Conference of the United States to address the issues raised in H.R. 5381, the "Federal Courts Study Committee Implementation Act of 1990". This is my first appearance before Congress representing the Judiciary, and it is indeed an honor to appear before this distinguished subcommittee which has played such an important role in so many issues affecting the Judiciary. I look forward to working with the subcommittee both on the issues embraced by this bill and so many others of vital interest to the Judiciary.

At the outset I would note that the vast majority of provisions contained in the bill are wholeheartedly endorsed by the Judicial Conference.

Chairman Kastenmeier, Mr. Moorhead, and Judge Joseph Weis, who served as chairman of the Federal Courts Study Committee, and the other members of the Federal Courts Study Committee are all to be congratulated for your herculean efforts in coming to grips with the vast array of issues currently facing the Federal

judicial system. The Report of the Federal Courts Study Committee and background materials generated for the Committee will serve as a basis for further study and also as a guide in helping to improve the delivery of justice in the Federal courts.

I would specifically like to commend Chairman Kastenmeier and Mr. Moorhead for introducing H.R. 5381. Both of you have been longstanding supporters of the Judiciary and your efforts in the area of court administration do not go unrecognized. Over the years, this subcommittee has displayed its understanding of both the substantive law needs of the courts, and of equal importance, the personnel needs of the courts. My colleagues and I are extremely appreciative of your interest and your efforts.

Of the twenty substantive measures contained in Title I of H.R. 5381 fourteen of those provisions are totally consistent with policy recommendations supported by the Judicial Conference. These areas of mutual accord include provisions relating to bankruptcy, federal jurisdiction, the Administrative Office, and the functioning of the courts. The areas of mutual accord in Title II include the functioning of the circuit judicial conferences and the eligibility rules under the Judicial Survivors Annuity Act. Although Title II addresses some issues not included in the Federal Courts Study Committee Report, these measures do, for the most part, promote policies with which the Conference is in accord. I look forward to working with members

of the Committee in resolving some of our differences on these issues as well as working to include a number of other provisions which I believe would increase judicial productivity and efficiency.

I will confine my remaining comments to those few issues where we have modest differences and attempt to make constructive suggestions for your consideration.

FEDERAL DEFENDER PROGRAM

Section 105 of the bill amends the Criminal Justice Act (18 USC 3006A) to provide that federal public defenders be appointed by independent boards or commissions formed within the districts served. The Judicial Conference has recommended that the method of appointment of federal public defenders be studied as part of a comprehensive review of the Criminal Justice Act.

Rather than create the boards or commissions as contemplated by the bill language, we would recommend that the Judicial Conference of the United States be tasked with appointing a special committee to conduct a comprehensive review of the 1964 Criminal Justice Act (CJA), as amended, including its implementation and administration. The review should assess the current effectiveness of the CJA program and recommend appropriate legislative, procedural, and operational changes.

This proposal provides for a comprehensive review of the implementation of the Criminal Justice Act, as recommended by the Federal Courts Study Committee.

BUDGET ESTIMATES OF COURTS

Presently, under 28 U.S.C. § 605, the Court of International Trade and the Court of Appeals for the Federal Circuit may submit their budgets directly to the Office of Management and Budget without first having them approved by the Judicial Conference. Section 106 of this bill would require Judicial Conference approval of the budgets of these two courts. This subcommittee has already received the views of the two courts affected by this proposal. The Judicial Conference has determined to take no position on whether the budgets of the two courts specified in the bill should be referred to the Conference for approval prior to their submission to the Office of Management and Budget.

STATUTE OF LIMITATIONS

Section 112 of the bill contains language creating a federal statute of limitations for federal civil law if none has been specified in the law. We endorse the concept; however, as written the langugage only applies prospectively to future legislation that the Congress will enact. It would appear more appropriate to make the law apply to those causes of action arising under laws in existence at the time of enactment of this

legislation rather than only to make it applicable prospectively. A two-tiered system, as envisioned by the bill, would leave laws presently on the books open to lengthy determinations of applicable state law statutes of limitations and the laudable purpose of the amendment would largely fail. I should be pleased to work with the subcommittee in working out language that might more satisfactorily meet the desired goal.

CLAIMS COURT RETIREMENT PLAN

With respect to the proposed retirement plan for judges of the United States Claims Court as embodied in section 113, the Judicial Conference supports a separate and enhanced retirement plan such as the one contained in this bill.

SUPPLEMENTAL JURISDICTION

Positive recommendations of the Federal Courts Study Committee regarding federal jurisdiction are contained in the bill and in principle the Conference supports the Supplemental Jurisdiction language in section 120 of the bill. However, the Conference would recommend three minor changes. In section (c) the requirement that the district court must determine whether to dismiss or remand a non-Federal claim within 90 days after its first assertion should be deleted as it is an unrealistic time constraint which would impose an unnecessary burden on the court's control of its docket. The Conference also recommends that the section (c) requirement that the district court "file

with the order a written statement of the reasons for the dismissal or remand" be deleted. There is no need to require a separate written statement; the court may be directed by the law to give its reasons but it is not necessary to specify that a separate written document must be filed. The section (f) requirement that the district court "use any certification procedures available for the determination of state law" should be deleted as it would unduly delay the federal proceeding since it would be particularly difficult to be sure that the state law questions were cogently framed at the point -- and perhaps several points -- at which the court is determining whether to exercise supplemental jurisdiction.

ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

As currently drafted, this section would permit the continuation of mandatory arbitration programs in ten district courts, but apparently would prohibit the continuation or adoption of any other ADR programs in which participation is mandatory, even if such programs included provisions for appropriate exceptions and for exemptions on motion. If this interpretation of this section is accurate, we are puzzled and troubled by it. As Chairman Kastenmeier appreciates, the Federal Courts Study Committee specifically recommended that Congress "permit (but not require) district courts to include in their local rules mandatory mechanisms such as mediation, early neutral evaluation, and court-annexed arbitration, with limitations on

types of cases subject to mandatory reference, and authorization for motions to exempt cases from an otherwise mandatory procedure." (Report of the Federal Courts Study Committee, April 2, 1990, at 83). The Executive Committee of the Judicial Conference has endorsed this recommendation. Our strong feeling that legislation in this area should be consistent with the recommendation of the Federal Courts Study Committee is inspired in part by the successes that mandatory programs have enjoyed and in part by the fact that independent studies have demonstrated that between 80 and 90 percent of lawyers whose cases have been subject to mandatory programs, such as the early neutral evaluation program in the Northern District of California, endorse them and want to see them expanded. See, e.g., Levine, Early Neutral Evaluation: The Second Phase, 1989 Journal of Dispute Resolution 1, 46; and Brazil, A Close Look at Three Court-Sponsored ADR Programs, 1990 University of Chicago Legal Forum (forthcoming in October, 1990). We also note that there appears to be some tension between the current version of section 121 and at least the spirit of those portions of Title I of S. 2648 that actively encourage district courts to consider adopting programs like early neutral evaluation. Thus we respectfully urge the sponsors of H.R. 5381 to conform section 121 to the recommendation of the Federal Courts Study Committee.

JUDICIAL CONFERENCE AND ADMINISTRATIVE ORDERS

Sec. 202 provides the Judicial Conference of the United States with authority to issue orders for the "effective and expeditious administration of justice." This is an issue affecting the entire Judicial Conference, and it will be on the Conference's discussion calendar at its September 12, 1990 meeting with a recommendation by the Executive Committee for approval. I shall promptly notify the subcommittee of any position the Conference takes on this issue.

RULE OF 87

Mr. Chairman, Sec. 204, dealing with retirement rights of federal judges is of major interest to me as chairman of the Judicial Branch Committee. I can also assure you that it is of enormous interest to most active judges in service today. As the subcommittee is fully aware, federal judges may serve for life and are entitled to their compensation for life. This system works well and has achieved its goals for those who indeed serve for life. But a problem develops for those judges, who, for whatever reason, have served on the federal bench for a substantial number of years, but, prior to retirement age, 65, the judge wants to leave the bench. That judge receives nothing by way of retirement benefits. For example, a judge appointed at age 40, could serve for 20 years, and if that individual then left the bench, he or she would receive absolutely nothing; there

would be no vesting of benefits; no future entitlements. This situation needs to be addressed.

The proposal of sec. 204, to create a so-called "Rule of 87" in which a judge could retire at ages 62 - 64 with 25 years' service is a beginning. However, this formulation is so strict in its requirements that it would have very little impact on the problem I have cited. I would strongly urge the subcommittee to consider some alternatives to the "Rule of 87." For example, the Judicial Conference endorses the proposal expanding the present "Rule of 80," which permits judges whose chronological age and years of service total 80, to take senior status. We would recommend that the present "Rule of 80" be modified to provide that a judge with 20 years of service who has reached age 60, could take senior status. If this formulation proves unacceptable, we are prepared to work closely with the subcommittee to fashion a retirement system that is more equitable than the present law. One example that suggests itself, is merely providing that Article III judges could opt into the retirement system already in place for bankruptcy judges and magistrates. In the bill before you, at section 113, you are providing a greatly enhanced retirement system for judges of the United States Claims Court. We hope you could include Article III judges as well in a similar system.

Again, I would be most pleased to work toward a resolution of this issue that can be included in this bill.

QUALIFICATIONS FOR CHIEF JUDGE OF COURT OF INTERNATIONAL TRADE

Sec. 205 brings the Court of International Trade into conformity with the United States district courts and the courts of appeals with respect to the manner in which the chief judge of the court is determined and the Conference endorses this principle. At its August 15 meeting the Executive Committee of the Judicial Conference agreed with the recommendation of Representatives Guarini, Rangel and Hughes that the present chief judge of the Court of International Trade be extended for two years. However, the provision conforming the succession method should become effective on the effective date of the bill.

NAME CHANGE AND CONTEMPT POWER FOR MAGISTRATES

The Executive Committee of the Judicial Conference cannot endorse the measures embraced by sections 206 and 207. Opposition to these provisions is based on the belief that a name change of United States magistrate to "assistant United States district judge" is unnecessary and potentially confusing. This issue has been the subject of considerable debate within the Judiciary and may come before the full Judicial Conference when it meets next week. Regarding the open ended contempt power it was simply felt that this is a substantial power and is more properly vested in district judges. Under present law, if a

magistrate feels an offense subject to the court's contempt power has been commmitted, the magistrate certifies the facts to the district court which may conduct a hearing and issue a contempt citation.

CONCLUSION

Mr. Chairman, members of the subcommittee, I again thank you for the opportunity to appear before you today to present the views of the Judicial Conference. We are extremely pleased that we could endorse and support the substantial majority of issues you have addressed in H.R. 5381. Additionally, there are several technical and stylistic suggestions that we hope the subcommittee will consider and which we will bring to the attention of subcommittee staff. We look forward to working with you and the staff in resolving those limited areas in which we seek modification.

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
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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 on § 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 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.