ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Memorandum

DATE: September 19, 1990

FROM: Art White and Karen Kremer, Legislative and Public Affairs Office

SUBJECT: Amendments to H.R. 5381, the Federal Courts Study Committee Implementation Act

TO: L. Ralph Mecham, Director

The attached memorandum reflects the changes to H.R. 5381 adopted by the Subcommittee on Courts, Intellectual Property and the Administration of Justice on Friday, September 14, 1990. The Subcommittee bill was reported by the full Judiciary Committee without changes on September 18, 1990.

cc: Mr. James E. Macklin, Jr.
Ms. Karen K. Siegel

Analysis of H.R. 5381

BASED ON SEPTEMBER 14, 1990 MARK-UP

Federal Courts Study Committee Implementation Act of 1990

Section 102. STUDY OF INTERCIRCUIT CONFLICTS BY FEDERAL JUDICIAL CENTER

Would implement the recommendation of the Federal Court Study Committee Report (p. 125) that the number and frequency of unresolved intercircuit conflicts should be studied and analyzed to determine, objectively, those that are "intolerable" and yet, for whatever reason, are unlikely to be resolved by the Supreme Court.

Bill as passed by subcommittee adopts language recommended by the Director of the Federal Judicial Center to request the Board of the Federal Judicial Center to make the study in 12 months and to give it authority to consider the full range of structural alternatives for the Courts of Appeals.

Section 103. APPOINTMENT OF DIRECTOR AND DEPUTY DIRECTOR OF THE ADMINISTRATIVE OFFICE.

This section modifies 28 U.S.C. 601, which states that the Supreme Court shall appoint the Director and Deputy Director of the Administrative Office, to provide that the Chief Justice shall make the appointment in consultation with the Judicial Conference of the United States.

The Chief Justice is the only member of the Supreme Court with official administrative duties regarding the courts of appeals and district courts and, of course the Chief Justice is the titular head of the Judicial Branch and Chairman of the Judicial Conference of the United States. In these capacities, he works on a daily basis with the Director of the Administrative Office and has an obvious substantial interest in naming a qualified person to fill this major judicial branch position.

The Administrative Office, on the other hand, serves the Courts of Appeals, district courts and all other facets of the Judicial branch, and does so based on the policy guidance of the Judicial Conference. The Conference ,therefore, also has a substantial interest in assuring that a qualified individual is named to head up the administrative apparatus that applies directly to them.

By giving the appointment authority specifically to the Chief Justice, the law will be modified to reflect actual practice and responsibility. By including a requirement that the selection be made in consultation with the Judicial Conference, the law will also reflect in large part present practice and recognize the great interest that the Conference has in who becomes the Director and Deputy Director of the Administrative Office.

Language retains "in consultation" rather than the preferred "after consulting with."

Section 104. POWER OF SUPREME COURT TO DEFINE FINAL DECISION FOR PURPOSES OF SECTION 1291.

This section requires that the Judicial Conference advise the Judiciary Committees of the House and Senate on whether the Supreme Court should be authorized to promulgate rules which define when a ruling by the district court is final for purposes of appeal. This implements a recommendation of the Federal Courts Study Committee (at p.95). Such a change would be a major extension of the Supreme Court's power to prescribe procedural rules. At present, 28 U.S.C. § 2072 provides that rules of procedure and evidence "shall not abridge, enlarge or modify any substantive right."

No change in bill language.

We have recommended a technical amendment to committee staff to insert "shall" before "define" to clarify the intent of this section.

Section 105. STUDY OF CRIMINAL JUSTICE ACT PROGRAM. Section 105 of the bill, as amended, would require the Judicial Conference of the United States to establish a special committee to study the Federal defender program. This is consistent with the position of the Conference on this issue, but it does not include the more comprehensive review of the Criminal Justice Act which the Conference suggests. The amended version calls for a report to be submitted to the Judicial Conference and the Committees on the Judiciary of the Senate and the House by September 30, 1992.

Section 106. EFFECT OF APPOINTMENT OF JUDGE AS DIRECTOR OF CERTAIN JUDICIAL BRANCH AGENCIES.

This section would amend title 28 to provide, in effect, that the appointment of an active Federal judge to the position of Director of the Federal Judicial Center, Director of the Administrative Office of the United States Courts, or Administrative Assistant to the Chief Justice will create a vacancy in the court on which the judge was sitting and, if the judge subsequently returns to the court as an active judge, the next judicial vacancy on the court will not be filled. The purpose of this section is to encourage active judges to seek to serve in these important Judicial Branch administrative positions without penalizing the court from which they come or prejudicing their opportunity to return to active service as a judge.

This proposal was recommended by the Federal Courts Study Committee.

No change in bill language.

Section 107. WITNESS AND JUROR FEES

The "Jury System Improvements Act of 1978," Public Law 95-572, among other things, increased the daily fee paid to grand and petit jurors from $20 per day to $30 per day. This change was approved to more adequately compensate jurors for their services. Although the "cost of living" has continued to increase each year, this daily fee of $30 has not changed over the past eleven years. Therefore, the proposed daily fee of $40

will adjust the compensation paid to jurors and witnesses to account for cost of living increases since the passage of the Jury System Improvements Act of 1978.

No change in bill language.

Section 108. Prisoner Review and Supervision

H.R. 5381 as originally introduced amended the original effective date provisions in the Sentencing Reform Act of 1984 for the purpose of deferring the abolition of the United States Parole Commission. Specifically, the amendment changed the date for the abolition of the Parole Commission from five years to ten years after the Sentencing Reform Act went into effect.

The subcommittee amended this section to provide for a Federal Offender Review Board established within the Department of Justice. The Judicial Conference of the United States approved the recommendation of the Federal Courts Study Committee that the life of the Parole Commission be extended or that a successor agency be created to conduct parole revocation hearings for "old law" prisoners. The proposed amendment to H.R. 5381 creating a Federal Offender Review Board to carry out the functions of the Parole Commission with respect to persons subject to parole is consistent with the purpose of that resolution.

Section 109. REMOVAL OF SEPARATE AND INDEPENDENT CLAIMS.

The amendment to Section 1441(c) would eliminate most of the problems that have been encountered in attempting to administer the "separate and independent claim or cause of action" test. Most of the cases have involved the requirement of absolute diversity to establish diversity removal jurisdiction. The plaintiff, for example, might sue a diverse defendant for breach of contract and join a claim against a nondiverse defendant for inducing the breach. Courts have found the test very difficult to administer and have reached confusing and conflicting results. At the same time, the need to provide removal to the defendants who are diverse is not great.

The amendment would, however, retain the opportunity for removal in the one situation in which it seems clearly desirable. The joinder rules of many states permit a plaintiff to join completely unrelated claims in a single action. The plaintiff could easily bring a single action on a federal claim and a completely unrelated state claim. The reasons for permitting removal of federal question cases applies with full force. In addition, the amended provision could actually simplify determinations of removability. In many cases the federal and state claims will be related in such a way as to establish pendent jurisdiction over the state claim. Removal of such cases is possible under Sec. 1441(a). The amended provision would establish a basis for removal that would avoid the need to decide whether there is pendent jurisdiction.

The further amendment to Sec. 1441(c) that would permit remand of all matters in which state law predominates also should simplify administration of the separate and independent claim removal.

The proposal is designed to enact in modified form the recommendation of the Federal Courts Study Committee to simply repeal section 1441(c)(Rept. p. 94).

No changes in bill language.

Section 110. VENUE

This amendment is intended to establish venue for both diversity and federal question cases in identical terms. Subsection (1) of the amendment to both 1391(a) and 1391(b) would allow venue in a district in which any defendant resides, if all defendants reside in the same state. This language is from the ALI study and adheres to the traditional belief that it is fair and convenient to allow suit where the defendants reside .

The Subsection 2 amendment to both (a) and (b) is taken verbatim from the ALI study and has already been adopted in Section 1391(f), added by the Foreign Service Immunity Act of 1976. The great advantage of referring to the place where things happened or where property is located is that it avoids the "litigation breeding phrase" "in which the claim arose". It also avoids the problem created by the frequent cases in which substantial parts of the underlying events have occurred in several districts.

Subsection 3 is meant to cover the cases in which no substantial part of the events happened in the United States and in which all the defendants do not reside in the same state. This provision would act as a safety net by allowing venue in a "judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced." If personal jurisdiction cannot be brought in a single federal court, this proposal does not create any new basis for personal jurisdiction. Instead two actions must be brought in separate courts.

This language is intended to reflect the position of the Judicial Conference as passed by its Executive Committee on May, 18 1990.

No change in bill language.

Section 111. STATUTE OF LIMITATIONS.

This section simply provides a fall-back statute of limitations for federal civil actions by providing that, except as otherwise provided by law, a civil action arising under an Act of Congress enacted after the date of enactment of this section may not be commenced later than 4 years after the cause of action accrues.

At present, the federal courts "borrow" the most analogous state law limitations period for federal claims lacking limitations periods. Congress should be the institution that

determines federal statute of limitations policy. Moreover, reference to analogous state law creates a number of practical problems. As pointed out by the FCSC (Rept. p. 93):

> It obligates judges and lawyers to determine the most analogous state law claim; it imposes uncertainty on litigants; reliance on varying state laws results in undesirable variance among the federal courts and disrupts the development of federal doctrine on the suspension of limitation periods.

This is a recommendation in concept of the Federal Courts Study Committee (Rept. p. 93). The FCSC also recommended a study of current federal statutes of limitations with the objective of enacting specific limitation periods for major congressionally created federal claims that currently lack such periods and perhaps rationalizing the existing limitations.

An amended, the bill's application of the statute of limitations continues to be <u>prospective</u> rather than retroactive as preferred by the Judicial Conference of the United States.

Section 112. RETIREMENT PROGRAM FOR CLAIMS COURT JUDGES

This section enacts a new retirement program for judges of the United States Claims Court. The Claims Court, established in 1982 under Article I of the Constitution, consists of 16 judges appointed by the President to serve a term of 15 years.

When the Claims Court was created by the Federal Courts Improvement Act of 1982, Congress deferred action on a separate retirement system for its judges. In recent years the absence of such retirement provisions has become a serious problem to the judges of that court and will predictably have an adverse effect on recruitment for future judicial vacancies if not promptly remedied. At present these judges have available to them only the same Civil Service Retirement or Federal Employees' Retirement Systems which apply to Federal employees generally. These generic retirement systems are not well adapted to an Article I court to which judges are commonly appointed in mid-career and without significant prior Federal governmental service.

Recently, the Federal Courts Study Committee in its landmark report noted the lack of a retirement program suited to the circumstances of the Claims Court and recommended that this void be filled with a system modeled on the existing retirement system for judges of the United States Tax Court. Report of the Federal Courts Study Committee, Chp. 8(B)(1)(e) at 155-156 (1990).

For this purpose section 113 would add to chapter 7 of title 28, United States Code, a new section 178 providing a distinct retirement plan for the Claims Court judges. As recommended by the Federal Courts Study Committee, this program is patterned upon the Tax Court retirement system (section 7447 of the Internal Revenue Code, 26 U.S.C. § 7447), and it also bears a close resemblance to that applicable to United States bankruptcy

judges and magistrates (28 U.S.C. § 377). The essential features of the new Claims Court retirement system are as follows:

1. Its judges could retire from office upon attaining age and judicial service requisites determined under the "rule of 80" (commencing at age 65 with 15 years of service) and thereafter receive for life an annuity equal to the salary currently payable to active Claims Court judges.

2. A Claims Court judge whose term has expired and who is not reappointed would receive for life the same annuity as above, if he or she has served at least one full term in office and advised the President in writing of willingness to accept reappointment.

3. A judge who retires under either provisions (1) or (2) may be called upon by the chief judge of the Claims Court to perform judicial duties in retirement for specified periods not to exceed 90 days (unless the recalled judge consents to longer service). Failure to perform assigned judicial duties would result in the forfeiture of annuity rights under this section for a one-year period unless illness or disability precludes the performance of such duties.

4. A judge who retires, or is removed from office, on account of mental or physical disability after serving at least five years would receive for life the salary of the office if he or she has served at least ten years, or one-

half of such salary if the service was between five and ten years.

5. A judge would have to make an irrevocable election of the rights offered by this section and, in so doing, would waive any annuity entitlement under the Civil Service Retirement or Federal Employees' Retirement Systems. Deposits previously contributed to those systems would become refundable to the judge in a lump-sum payment upon electing coverage under 28 U.S.C. § 178.

6. A retired judge who represents a client in making any civil claim against the United States shall forfeit all rights thereafter to an annuity under this section, unless the judge first elects to freeze the amount of his or her annuity and forego all subsequent increases that take place in the salary rate for active Claims Court judges.

7. Since this new system provides no survivor annuity protection, Claims Court judges would become entitled to elect coverage under the Judicial Survivors' Annuities System (28 U.S.C. §376) applicable to Article III judges, which requires a contribution in the amount of five percent of salary.

Annuities payable under section 178 of title 28 would be paid out of a new fund to be established in the Treasury, called the "Claims Court Judges Retirement Fund" and invested by the Secretary of the Treasury.

[The Executive Committee of the Judicial Conference of the United States voted to support a separate and enhanced retirement plan for the United States Claims Court.]

Section 113. CONSENT TO TRIAL BY MAGISTRATES IN CIVIL ACTIONS AND EXTENSION OF TERMS OF OFFICE OF MAGISTRATES.

(a) Section 113 of the bill amends 28 U.S.C. section 636(c)(2) to permit judges and magistrates to advise civil litigants of the option to consent to trial by a magistrate.

Under present provisions, judicial officers may not attempt to persuade or induce any party to consent to reference of a civil matter to a magistrate. Many judges refrain entirely from even mentioning to parties the option to consent to civil trial by a magistrate. Litigants in many jurisdictions often receive little more than a standardized written notification of this option with the pleadings in a civil case. As a result, most parties in civil cases do not consent to magistrate jurisdiction. The present procedures have effectively frustrated the intent of the 1979 amendments to the Federal Magistrates Act which authorized magistrates to try civil consent cases.

The right of a litigant to have his civil case heard by an Article III judge remains paramount. Under the present Act, judicial officers are restricted from informing parties of their opportunity to have a civil matter referred to a magistrate because of concerns that judges would coerce parties to accept a reference to a magistrate. Those concerns have not been borne

out in the decade since the 1979 revisions. The amendment safeguards the right of a civil litigant to trial by an Article III judge by requiring judges and magistrates to advise parties of their freedom to withhold consent to magistrate jurisdiction without fear of adverse consequences. The amendment thus provides a proper balance between increased judicial flexibility and continued protection of litigants from possible undue coercion.

The need for the court system to have greater flexibility in utilizing judicial resources was recognized by the Federal Courts Study Committee. This need is particularly acute in handling the expanding civil caseload of federal courts. Liberalizing the civil case consent procedures furthers the goal of efficient and maximum utilization of judicial resources. Both the Judicial Conference and the Federal Courts Study Committee have endorsed this amendment.

No change in bill language.

(b) Extension of Terms of Office of Magistrates

This provision lengthens the "holdover" period during which a court may retain a magistrate in office after the expiration of his term from 60 days to 180 days. The process of filling a vacant magistrate position normally takes about six months. Although the appointment process usually operates smoothly and there is sufficient time to complete the appointment by the end of an expiring term, or within 60 days thereafter, there are some

occasions where further time is required. For example, an FBI report might be delayed or a court's nominee may withdraw, making it difficult to fill the position within the current holdover period. This amendment would insure a continuity of magistrate services in those cases where the appointment process might otherwise extend past the current holdover period.

No change in bill language.

Section 114. SUPPLEMENTAL JURISDICTION

The subcommittee made several changes to the section concerning supplemental jurisdiction and addressed the concerns raised by Judge Tacha in her testimony before the subcommittee. Specifically the subcommittee deleted the requirement that the district court determine whether to dismiss or remand a non-federal claim within the 90 days after its first assertion and the requirement that the judge file a written statement of the reasons for dismissal or remand. The subcommittee also deleted the provision requiring the district court to "use any certification procedures available" for the determination of state law.

TITLE II: MISCELLANEOUS PROVISIONS AND TECHNICAL AMENDMENTS

Section 201. PLACE OF HOLDING COURT

This section amends Section 112(a) of title 28, United States Code, to add Watertown, New York as a place of holding court within the Northern District of New York. The Northern District of New York is a large district consisting of approximately 28,000 square miles. Litigants in the Watertown area presently have to travel approximately 70 miles to Syracuse, the nearest place of holding court. There are federal facilities and Indian reservations in the Watertown area and litigation in the area has been increasing rapidly. The addition of Watertown as a place of holding court will reduce travel time and thus litigation expenses. The district court and the Judicial Council of the Second Circuit support the addition of Watertown and the Judicial Conference at its March 1988 session voted to support the designation of Watertown as a place of holding court.

No change in bill language.

Section 202. BIENNIAL CIRCUIT JUDICIAL CONFERENCE.

This section derives from section 1003 of H.R. 4807 (100th Cong.) as reported by the House Committee on the Judiciary.

The Judicial Conference adopted this proposal to require circuit judicial conferences once every two years (instead of every year), and optional in the off year, as one of a number of ways to reduce costs during the initial phases of the "Gramm-Rudman-Hollings" budget cuts in 1986 (JCUS.MAR86, pp. 15-17). It was included in S. 1482 as introduced and H.R. 4807 as passed by

the House in the 100th Congress. Senator Heflin personally objected to cutting down on required meetings and it was removed from the final version of the Judicial Improvements and Access to Justice Act of 1988. The idea of interjecting this flexibility into expensive circuit judicial conference meetings is still considered sound.

No changes in bill language.

Section 203. RETIREMENT AGE OF CERTAIN FEDERAL JUDGES

This section would amend the retirement statute for Supreme Court justices and Article III judges, 28 U.S.C. § 371(c), to expand the age and service criteria for establishing retirement eligibility. Presently these criteria are determined by the so-called "rule of 80," commencing at age 65 with 15 years of judicial service or any combination of age and service thereafter (in whole numbers of years) which equals 80 or more.

Section 203 would further permit judges either to retire from the office or from active service to senior status as early as age 62 if they have completed at least 25 years of judicial service on a court or courts established under Article III of the Constitution. This 25-year service requirement would pertain to judges between the ages of 62 and 64; from that point onward the provisions of present law would be continued, allowing judges to retire at age 65 with 15 years of service and thereafter under the "rule of 80."

This extension of judicial retirement eligibility will affect only a relatively few judges, who have attained the unusual distinction of being appointed by the President to Federal judicial office prior to becoming 40 years old. It seems fair to recognize such lengthy judicial service by endowing this select group of judges with the opportunity to retire at a somewhat earlier age than permitted under current law.

No change in bill language.

Section 204. CHANGE OF NAME OF UNITED STATES MAGISTRATES.

Section 204 changes the title of United States Magistrates to **magistrate judge. The original proposal was assistant United States district judge.** The provision is one of nomenclature only and it is not intended to affect the substantive authority or jurisdiction of full-time or part-time magistrates. This provision is opposed by the Judicial Conference.

Section 205. LENGTH OF SERVICE REQUIRED FOR ELIGIBILITY UNDER JUDICIAL SURVIVORS' ANNUITIES ACT. Section 205 amends the Judicial Survivors' Annuities System (JSAS), 28 U.S.C. § 376, which provides for annuities for the survivors of Federal judges and judicial officials who elect to participate in JSAS. Section 208 eliminates the existing 18-month service requirement for survivor annuity eligibility in cases where a judge or judicial officer (as defined in 28 U.S.C. §§ 376(a)(1)(A), (B), and (F)) is assassinated. Amounts necessary to equal a full 18 months of

contributions are to be deducted from the annuity where an assassinated judge or judicial officer served for less than 18 months.

Section 205 further amends 28 U.S.C. § 376 to permit a survivor of a judge or judicial officer who is assassinated to receive an annuity notwithstanding the survivor's concurrent eligibility for Federal workers' compensation benefits under 5 U.S.C. chapter 81. Under existing law, survivors must elect between workers' compensation benefits and a JSAS annuity.

The determination as to whether the killing of a judge or judicial officer is an assassination is to be made by the Director of the Administrative Office, subject to review by the Judicial Conference of the United States.

The amendments made by section 205 apply retroactively to May 28, 1979, and thus would permit the receipt of JSAS annuities by survivors of the three judges who have been assassinated since that date -- Judge John Wood (W.D. Tex.) in 1979, Judge Richard Daronco (S.D. N.Y.) in 1988, and Judge Robert Vance (11th Cir.) in 1989.

No change in bill language.

Section 206. MISCELLANEOUS TECHNICAL AMENDMENTS

The provisions in this section were taken directly from the draft bill submitted by the Administrative Office to the relevant House and Senate subcommittees. The only provision not of a purely technical nature is (b)(3) which would amend 28 U.S.C. 377

to allow magistrates and bankruptcy judges to collect a military reserve retirement annuity in addition to their annuity for service as bankruptcy judge or magistrate. All other changes correct numerical, grammatical or typographical errors contained in existing legislation.

No changes in bill language.

The subcommittee deleted the following provisions from H.R. 5381, as introduced:

Sec. 106: Budget Estimates of Courts

Sec. 114: Parties' Consent to Determination by Bankrutpcy Court

Sec. 115: Appeals of Judgments, Orders, and Decrees of Bankruptcy Courts

Sec. 116: Appeal of Certain Determinations Relating to Bankruptcy Cases

Sec. 117: Extension of Terms of Office of Bankrutpcy Judges

Sec. 118: Bankruptcy Administrator Program

Sec. 121: Alternative Dispute Resolution Procedures

Sec. 202: Authority of Judicial Conference to Issue Administrative Rules

Sec. 205: Qualification of Chief Judge of Court of International Trade

Sec. 207: Contingent Authority of Assistant United States District Judges