Department of Justice

STATEMENT

OF

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BEFORE

THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

FEDERAL COURT IMPROVEMENTS ACT OF 1979

ON

MARCH 20, 1979

Mr. Chairman and Members of the Committee:

On February 27, 1979, the President announced his program to reform the federal civil justice system. As the President stated in his message to Congress, the goal of this program, taken as a whole, is to increase the efficiency, reduce the costs, and maintain the integrity of our federal courts. True justice for American citizens requires a federal judicial system that functions well as an institution, and the purpose of the President's recommendations is to attain this objective.

On that same day, the Attorney General transmitted to Congress the Federal Courts Improvement Act of 1979, which provides implementing legislation for several of the President's proposals. This Act primarily addresses two major court-improvement themes: one relates to the federal appellate courts and their processes; the other focuses on problems of judicial administration. In addition, the President's message urges enactment of five other key measures which were pending before the last Congress and have now been reintroduced. These are the bills to enlarge the jurisdiction of federal magistrates, to eliminate the general diversity of citizenship jurisdiction, to convert most of the Supreme Court's obligatory jurisdiction to a discretionary basis, to authorize the district courts to adopt arbitration

for certain civil cases, and to establish a minor dispute resolution program. Those bills, combined with the Federal Courts Improvement Act, provide a comprehensive program to put the American justice system in a better position to deal with the vast range of controversies among our citizens. We urge the early enactment of those other bills as well as the bill which is the immediate subject of this hearing.

I am delighted to be with you today to discuss the program contained in the Federal Courts Improvement Act. The first group of proposals concern appellate court reforms.

I. APPELLATE COURTS AND PROCESSES

This Committee is well acquainted with the statistics that illustrate the problems of judicial administration at the federal appellate level. Since the 1960's the eleven regional circuit courts of appeals have experienced docket growth that has soared at an exponential rate. For example, in 1962 only 4,823 cases were filed in the federal intermediate courts of appeals. By 1977, however, the number of filings in those courts had risen to 19,188. During that same 15-year period, the number of federal circuit judges rose from seventy-eight to ninety-seven. Thus, the growth of filings outpaced the number of additional judgeships by a twelve-to-one ratio. Docket pressures on the Supreme Court increased concomitantly.

In recognition of this problem, the 95th Congress enacted the Omnibus Judgeship Act (P.L. 95-486), which authorized 117 new district court judgeships and 35 new appellate judgeships. This was a much-needed measure that will bring the federal judiciary up to strength to handle current docket conditions, and thus it will meet some of the compelling problems of the appellate system. But it is a curious characteristic of judicial organization and procedure that a remedy for one malady in the system often creates or exacerbates another -- and that is the case here. The Omnibus Judgeship Act cannot permanently alleviate docket congestion and, even more significantly, it does nothing to increase the capacity of the federal judicial system for definitive adjudication of issues of national law.

During recent years, the number of cases filed in the district courts has risen by about 6% annually, and continued growth of district court caseloads is predictable. In handling these expanding caseloads, the 117 newly appointed district judges will generate increased decisions at the trial level. As a result, even with the addition of the 35 new appellate judges, it will not be long until the federal courts of appeals are again inundated by pending cases. Furthermore, the training of a large number of new federal judges and their integration into the judicial system presents a major administrative problem -- a problem

that becomes more difficult as the size of each court increases. Likewise, dispositions by the new appellate judges will add to the burden on the Supreme Court.

Consequently, the Omnibus Judgeship Act is only a partial remedy to the difficulties that confront the federal judiciary. As the President said in his message to Congress:

> [U]nless we improve the system of justice itself, we may find that the additional judges have been swallowed up by outmoded procedures and by an ever-rising volume of cases. We must take prompt and effective steps to eliminate the remaining obstacles to efficiency in the justice system, and to increase access to federal courts by those with federal claims.

Moreover, creating additional judgeships without enacting more fundamental changes in the appellate system will ignore certain basic weaknesses that have arisen in the federal judicial structure. The present framework of the federal courts of appeals was created by the Evarts Act, Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826. In that Act, Congress established a structure that served well until the courts began to be beset by their current difficulties in the 1960's.

The basic problem centers on the inability of the federal appellate system to render within a reasonable time decisions that have precedential value nationwide. Under the current system, there are eleven regional circuits. The decisions in any one of these circuits bind none of the others.

The only court that has the authority to deliver decisions that serve as precedents nationwide is the Supreme Court. Yet the Supreme Court currently is reviewing less than 1% of the decisions of the courts of appeals. This is an inadequate degree of review to assure supervision of the system. As a result, there are areas of the law in which the appellate courts reach inconsistent decisions on the same issue, or in which -- although the rule of law may be fairly clear -- courts apply the law unevenly when they are faced with the facts of individual cases. This condition demonstrates that the mere addition of more judges to the system will not enable the federal appellate courts to produce authoritative resolutions to certain important questions of national law. The difficulty here is structural, and the remedy lies in some reorganization at the appellate level.

The Federal Courts Improvement Act of 1979 undertakes to address some of these problems. Concerning appellate courts and their processes, this bill provides:

(1) Appellate Court Consolidation by merging two unique federal courts with the capacity for expanded jurisdiction into a new, intermediate appellate court on the same tier as the existing regional courts of appeals;

(2) Composition of Appellate Panels that would foster stability in the law of the circuit and at the same time would allow for the productive use within reasonable limits of the valuable services of federal judges outside the court of appeals' own active cadre;

(3) More Effective Means of Rulemaking by requiring each court of appeals to create an advisory committee, composed of persons outside the court, to make recommendations on the rules of practice and operating procedure within the court.

These provisions will improve the functioning of the appellate courts. Let me explain each of them in some detail.

A. United States Court of Appeals for the Federal Circuit

In order to resolve the systemic problems described above, various proposals for restructuring the federal appellate courts have been considered in recent years by lawyers, jurists, and academicians. Detailed recommendations have been developed by the Study Group on the Caseload of the Supreme Court (the Freund Committee), the Commission on Revision of the Federal Court Appellate System (the Hruska Commission), and the Advisory Council for Appellate Justice chaired by Professor Maurice Rosenberg. * Thus, when we began efforts in the Department

* See Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972); Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, reprinted in 67 F.R.D. 195 (1975); Advisory Council for Appellate Justice, Recommendation for Improving the Federal Intermediate Appellate System (1975).

of Justice to draft legislation to resolve continuing problems of the federal appellate courts, we did not write on a clean slate. We have tried to draw on the experiences of those groups and to present a program that would alleviate some of the most compelling problems of the appellate system and would also be politically feasible.

The essence of the proposal is to create a new intermediate appellate court through the merger of the Court of Claims and the Court of Customs and Patent Appeals into a single appellate court with expanded jurisdiction. The new court, to be called the United States Court of Appeals for the Federal Circuit, would be an Article III court on line with the existing U.S. courts of appeals. Thus, it would not be an additional tier interposed between the regional courts of appeals and the Supreme Court; instead, it would be established as an additional circuit court and fitted administratively into the federal judicial structure along with the other circuit courts of appeals. Review of decisions of the court would be in the Supreme Court by writ of certiorari.

The proposed court would inherit all of the appellate jurisdiction of the two existing courts. This includes appeals in suits against the government, appeals from the Customs Court, and appeals from the Patent and Trademark Office. In addition, the court would have jurisdiction over all federal contract appeals in which the United States is a defendant and over patent and trademark appeals from all

federal district courts throughout the country. The court would handle approximately 900 cases annually. Although the projected caseload is somewhat lighter than the number of cases that are docketed in the regional courts of appeals, it must be remembered that the cases considered by the new court will be unusually complex and time-consuming.

The new appellate court would consist of the twelve judgeships of the two existing courts; those courts themselves would be abolished. Future vacancies on the court would be filled by the President with the advice and consent of the Senate, as with all other Article III judgeships. Initially the chief judge of the Court of Appeals for the Federal Circuit would be appointed by the President, with the approval of the Senate. After the first chief judge of the Federal Circuit vacated that position, the chief judge would be chosen by seniority of commission, in the manner prescribed for other United States courts of appeals under 28 U.S.C. § 45.

The new court would be headquartered in Washington, D.C., in the building currently housing the Court of Claims and the Court of Customs and Patent Appeals. However, it would be authorized to sit at other designated places throughout the country.

The court would be authorized to sit in panels of three or more judges or en banc. There are good reasons why the Court of Appeals for the Federal Circuit might find it desirable to sit in panels of larger than three judges. The jurisdiction

of the court would consist of a large number of complex cases in which current law is disuniform or inconsistently applied, and its decisions are intended to have nationwide precedential effect. Panels of five judges, for example, might provide greater assurance of sound collective judgment and afford greater dignity to the decisions, thereby contributing to nationwide stability in the law.

Under the bill it is contemplated that the court would manage the assignment of cases and judges to panels so as to assure a balance between continuity and rotation, and a balance between the development of subject matter competence and the avoidance of undue specialization. This would be achieved through a blend of gradual rotation of panel assignments of judges and subject matter assignments of cases. This is important in order to promote doctrinal coherence and stability. Taken together, the provisions on panel composition and the provisions on the assignment of cases to panels authorize the court to conduct its adjudicative business in a flexible way that will take advantage of the backgrounds and special competencies of its judges. It provides an optimal procedure for developing sound, uniform legal doctrine.

Under this proposal, the trial business of the Court of Claims would be assigned to a new independent Article I court, to be known as the United States Claims Court. This court would resemble the Tax Court of the United States. Its jurisdiction would be almost identical to the trial jurisdiction of the

current Court of Claims. This court would be composed of sixteen judges who would be appointed by the President with the consent of the Senate. They would serve for a term of fifteen years. As a transitional measure, persons who were in active service as commissioners of the Court of Claims on the effective date of the Act would become Article I judges of the United States Claims Court. Like those commissioners and the judges of the Tax Court, the Claims Court would be authorized to sit nationwide. The court would be required to establish times and places of its sessions with a view toward minimizing inconvenience and expense to citizens.

The proposal to merge the Court of Claims and the Court of Customs and Patent Appeals would improve the appellate structure in two ways. First, it would simplify judicial administration by reducing the number of decision-making entities at the appellate level. Second, it would provide a new forum for the definitive adjudication of complex legal issues of national interest.

The creation of a single new appellate entity has considerable advantages. The Court of Claims and the Court of Customs and Patent Appeals were historically justified at the time they were created, and those courts have done a good job with the cases that have been assigned to them through the years. But the merger now of these two courts would reduce some

overlapping functions and would provide for more efficient court administration. For example, there should be considerable savings through the maintenance of one clerk's office instead of two. At the same time, the consolidation would bring the two courts administratively into the mainstream of the federal judiciary and would upgrade the status of their judges and functions.

In addition to achieving the administrative efficiencies that will be produced by the consolidation of these two courts into one, a central purpose of this bill is to create an appellate forum capable of exercising jurisdiction over appeals from throughout the country in areas of the law where Congress determines that there is special need for national uniformity. Thus, once such a forum is created, Congress will have available a central appellate court to which it can route categories of cases as needs and conditions change. For example, in 1971 Congess found it necessary to create a special appellate court known as the Temporary Emergency Court of Appeals to decide appeals nationwide in wage and price control cases. There was a felt need for a single, nationwide appellate decision-making body for these cases; yet there was no existing forum of that sort. Had the proposed U.S. Court of Appeals for the Federal Circuit been in existence, Congress would not have been compelled to create a new court merely for those cases.

In considering which types of cases would be most appropriate for inclusion in the new court's initial jurisdiction, we canvassed judges and practitioners and studied the findings of the Hruska Commission. Based on the extensive evidence that the Commission had compiled, it focused on tax and patent law as areas in which uncertainty and disuniformity of legal doctrine were especially pronounced. In these two fields, there appear to be special needs for a single appellate forum which could decide the legal issues with nationally uniform binding effect. The Administration's proposal, as described in the President's message and as sent forward by the Attorney General, focuses on patent appeals and a few other categories of cases.

The Hruska Commission pointed out that the courts take such a variety of approaches and attitudes toward the patent system that, even if there is no actual conflict in the rule of law, the application of the law to the facts of an individual case often produces different results in different courtrooms. Perceived disparities of results between the circuits have led to what Judge Henry Friendly has described as "mad and undignified races" between the alleged infringers and patent holders to be the first to institute proceedings in the forum they consider most favorable. Friendly, Federal Jurisdiction: A General View 155 (1973).

Similarly, the Hruska Commission's patent law consultants, Professor James B. Gambrell and Donald R. Dunner, Esq., noted that, at least when the issue turned on validity, "[p]atentees now scramble to get into the 5th, 6th, and 7th circuits since the courts there are not inhospitable to patents whereas infringers scramble to get anywhere but in these circuits." Commission on Revision of the Federal Court Appellate System, supra at 152. The validity of a patent should not turn upon the happenstance of who wins the race to the courthouse door. As Professor Gambrell and Mr. Dunner said, forum shopping on this scale "not only increases litigation costs inordinately and decreases one's ability to advise clients, it demeans the entire judicial process and the patent system as well." Id.

Directing patent appeals to the new court not only would have the effect of eliminating forum shopping but also would have the salutary effect of removing unusually complex, technically difficult, and time-consuming patent cases from the dockets of the regional courts of appeals. This would leave those courts better able to handle other types of cases that flow to them. Although the creation of the new court would therefore reduce the workload in the appellate courts, case management is not the primary goal of the proposal; rather, the central purpose of the legislation is to reduce the widespread lack of uniformity and uncertainty of legal doctrine that exists in the administration of patent law.

We should emphasize, of course, that we are not now designing the jurisdiction of the new court for all time. This legislation merely provides the foundation. Once the Court of Appeals for the Federal Circuit is created, Congress will have available a forum to which it can add or take away categories of cases as circumstances change in the future. The new court can be used for other areas in which disparity in the law and forum shopping become a problem or in which, for any reason, there is a perceived need for a single appellate forum. In his message to Congress, the President noted that "a similar need exists for uniformity and predictability of the law in the tax area, where conflicting appellate decisions encourage litigation and uncertainty." However, the Administration is submitting no proposal on that aspect of the problem at this time.

We believe that the proposed new court not only has positive advantages but that it also avoids some of the major pitfalls of previous recommendations for appellate court reorganization. For example, in this country there is a stigma attached to specialized courts. Whatever the merits of that view, this proposed court is carefully structured to avoid over-specialization. The new court would handle all patent appeals and all federal contract appeals in which the United States is a defendant, as well as all matters that are

now considered by the two existing courts. The combined jurisdiction of the Court of Customs and Patent Appeals and the Court of Claims is quite broad. Court of Claims jurisdiction is limited only by the requirement that the United States be the defendant in the suit. Government claims cases which are raised before the court involve contracts, trademarks, Indian claims, customs, commerce, international trade, inverse condemnation, military and civilian pay claims, and all related and pendent aspects of these cases.

This rich docket assures that the work of the proposed new court would be broad and diverse and not narrowly specialized. The judges would have no lack of exposure to a wide variety of legal problems. Moreover, the subject matter of the cases would be sufficiently mixed to prevent any special interest from dominating the new court.

The proposal also observes other imperatives of appellate court reform which have emerged from the debates and experiences of recent years. For example, access to the Supreme Court is not shut off; certiorari review in that Court is preserved. Furthermore, the proposal does not add a fourth tier to the federal judicial system. The new court would be on line with the United States courts of appeals. In addition, the proposal would not unduly enlarge the federal judiciary. In fact, the consolidation of the Court of Claims and the CCPA into a single court would simplify judicial administration. Moreover, the proposal is free of jurisdictional uncertainties. The new

court's jurisdiction is clearly defined in the bill in such a way that jurisdictional disputes are unlikely.

The creation of the new court would be a simple step. From a practical standpoint, a merger of the Court of Claims and the Court of Customs and Patent Appeals could be accomplished with virtually no disruption to the personnel involved. The existing courts already jointly occupy the same building in Washington, D.C. They share the same library, and court personnel share the same dining facilities. Furthermore, there is already a standing order of the Judicial Conference allowing the interchange of judges between the two courts. The commissioners of the Court of Claims already function as a semi-autonomous trial court; the reorganization of those officials into a new United States Claims Court would be administratively simple.

An analysis of the workload of the proposed new appellate court discloses that this merger also could be accomplished easily in terms of caseload. The dockets of both existing courts are current. Based on statistics for FY 1978, the combined court would be considering 153 cases that would otherwise have been reviewed by the CCPA, 351 appellate cases that would have been reviewed by the Article III judges of the Court of Claims, and 145 patent cases and 214 federal contract appeals that would formerly have been heard by the regional courts of appeals. This provides for a total annual docket of about

863 cases. This number of appeals would make an adequate but not unduly burdensome workload for a court of twelve judges.

B. Composition of Appellate Panels

The Federal Courts Improvement Act would revise provisions of existing law that deal with the composition of appellate panels. Current law permits appellate courts to sit in panels of less than three. As a result, some federal appellate courts have used panels of two judges for motions and for disposition of cases in which no oral argument is permitted because the case is classified as insubstantial. There is a widespread belief that every disposition of an appeal should be the collective product of at least three minds. There are apprehensions that decisions at the appellate level by fewer than three judges carry a risk of being less sound or less balanced. The bill would require that all decisions be reached by at least three judges.

In addition, the bill would require the presiding judge and a majority of the judges on an appellate panel to be circuit judges of that court in regular active service. With a substantial number of judges from outside the circuit sitting by designation, and with district judges sitting regularly on the courts of appeals, it is not infrequent that there will be only one active circuit judge on a panel, or that the presiding judge of a panel will be a senior judge or a judge from another circuit. Such a situation leads to

instability in circuit law because district court and court of appeals judges from outside the circuit may not know or may not feel bound by the law of that circuit. This provision would provide greater stability and predictability in the law being applied in any given area of the country.

C. More Effective Rulemaking

The bill would require that advisory committees be appointed to make recommendations to the court of appeals on its rules and internal operating procedures. It would also require the publication of these rules. The composition of these advisory committees is left by the bill for each court of appeals to determine.

For years, the Judicial Conference of the United States has used advisory committees to assist it in drafting rules of procedure for the federal courts. These committees, consisting of lawyers, judges, and law professors, have rendered valuable assistance. Their work has resulted in rules which take into account appropriate concerns of the practitioners and the judges as well as the public. Several of the courts of appeals have similarly appointed advisory committees in recent years to assist them in formulating rules of practice. The bill would require that each court of appeals take this step.

The formulation of written rules for internal operating procedures in the appellate courts is more recent and novel. The Third Circuit was a pioneer in promulgating such rules to govern the processes through which the judges themselves consider and decide cases. The use of advisory committees to assist the courts in developing these sorts of rules would provide a means for the court to take into account the concerns of the bar and the public. Such committees would also provide a useful means for increasing the understanding of the bar about the functioning of the courts.

II. PROBLEMS OF JUDICIAL ADMINISTRATION

Several measures in the President's program relate to the sound administration of the federal judiciary. These provisions concern the terms of chief judges, the composition of judicial councils, and the transfer of cases.

A. Terms of Chief Judges

Under current law, the person who serves as chief judge of a federal court of appeals or a district court is the judge who is most senior in commission. The chief judge may hold office until age 70. As a result, a judge who becomes chief judge of a federal court at age fifty may serve as chief judge for twenty years, while a judge who becomes chief judge at age sixty-nine will serve for only one year.

A statute that bases the chief judgeship position solely on seniority, without any minimum or maximum term, produces two potential difficulties: it may require the retention for many years of a chief judge who may or may not have the interest or ability to be an enthusiastic administrator; at the same time, it requires rapid rotation among chief judges when the consecutive incumbents take office at an advanced age, thereby creating instability in the chief administrative office of the court. In recent times, this provision has resulted in the anomalous situation that one federal court had a chief judge who served for seventeen years, while another federal court had three chief judges within two years.

The bill would resolve this problem by setting a maximum term of office for chief judges of five years and permitting no one to become a chief judge of a district or circuit court after reaching age sixty-five. However, once becoming a chief judge prior to age sixty-five, a chief judge could serve for five years, even though this extended beyond his sixty-fifth birthday. These provisions insure a constant five year term for the chief judge unless death or resignation or retirement shortens the term. In other words, the bill would establish both a minimum and a maximum term, thereby striking a sound balance between continuity and rotation.

In order to avoid the undue displacement of reasonable expectations, the bill contains a provision that continues the present system for three years after the effective date of the Act. Moreover, the bill will not apply to anyone who was a chief judge on the date it becomes effective.

B. Judicial Councils

Judicial councils exist by statute in the eleven federal judicial circuits and are composed of the active appellate judges of the circuit. These councils are the only component of the federal judicial administrative machinery that has the power to issue "all necessary orders for the effective and expeditious administration of the business of the courts within its circuit." 28 U.S.C. § 332(d). The statute requires district judges of the circuit to "promptly carry into effect all orders" of the circuit council. 28 U.S.C. § 332(d). In short, the judicial council is the governing administrative body for the appellate and trial courts in each circuit.

Because the membership of the councils currently consists of all active courts of appeals judges in the circuit, the size of these councils varies greatly; indeed, after the appointment of judges authorized by the Omnibus Judgeship Act of 1978, the current system would mandate sizes ranging from four judges in the First Circuit to twenty-six judges in the Fifth Circuit. In larger circuits, these councils are too unwieldy

to function efficiently. Moreover, under current law, no district court judges are members of the councils, even though these bodies establish administrative policy that affects the district courts.

The objectives of the Federal Courts Improvement Act of 1979 are to limit the size of the circuit councils and to provide for district court membership. The bill would alter the composition of the judicial councils by amending the statute to include as members of the councils no more than seven circuit judges, selected by seniority, and not more than four district court judges, selected by seniority from among the chief judges of the district courts. The actual size would depend on the number of circuit judges on the council. No council would have more than eleven members (seven circuit judges and four district judges). Each judge would serve a single five-year term. An additional provision would permit staggering of original terms to avoid wholesale turnover at any one time in later years.

C. Transfer of Cases

Because of the complexity of the federal court system and of special jurisdictional provisions, a case may on occasion be mistakenly filed in a court which does not have jurisdiction whereas there is another federal court which does have jurisdiction. In the time it takes to discover the mistake, a statute of limitations or a filing period may have expired. Moreover, additional expense is occasioned by having

to refile the case in the proper court. The bill would authorize the court in which the case is improperly filed to transfer it to a court in which jurisdiction is proper. The case would be treated by the transferee court as though it had been initially filed there on the date it was filed in the transferor court.

III. ADDITIONAL PROVISIONS

In addition to the proposals in the President's program relating to the appellate courts and their processes and to judicial administration, there are two other provisions. One concerns pensions for federal judges who resign to accept appointed positions in the executive branch. The other provides for more equitable interest on claims and judgments in the federal courts.

A. Pensions

The federal judiciary contains within its ranks persons with certain skills and backgrounds which may from time to time be especially useful in the executive branch. During recent years, several federal judges have left the bench to serve in significant positions in the executive branch. Article III judges who resign before the time limitations described in 28 U.S.C. § 371(a) (judges who have reached age 70 and have served for 10 years, or judges who have reached age 65 and have served for 15 years) must give up a lifetime salary mandated

by the Constitution, even though they have not been able to accrue pension benefits for these years of federal service under the civil service program. As a result, for these former federal judges, the acceptance of an executive branch position has left them with potentially serious financial consequences.

The bill would allow the Administrative Office of the United States courts to pay a deposit into civil service retirement for federal judges who resign to accept executive positions; this would serve as a credit toward a full civil service pension for the years that the person had served as a federal judge. The resulting pensions would still be considerably less than the salary the judges would have received by remaining on the bench; nonetheless this provision should help alleviate financial distress and would recognize the value of the years of judicial service.

B. Interest

Under current law, the interest rate on judgments in the federal courts is based on varying state law and frequently falls below the contemporary cost of money. This provision would set a realistic and nationally uniform rate of interest on judgments in the federal courts that would be keyed to the prime interest rate as determined from time to time by the Internal Revenue Service under 26 U.S.C. § 6621. This would eliminate an economic incentive which exists for a losing party to appeal a judgment in order to retain his money and

accumulate interest on it at the commercial rate during the pendency of the appeal.

There are presently no generally applicable guidelines concerning the award of prejudgment interest in federal courts. Yet such interest may be essential in order truly to compensate the plaintiff or to avoid the unjust enrichment of the defendant. For instance, a plaintiff who was unlawfully deprived of the use of $20,000 in 1976,and who did not receive a judgment until 1979, could have obtained $4,500 in those three years by investing the money at 7% compounded interest. The bill proposes that where a defendant knew of his liability, interest be awarded for the prejudgment period, at a rate that is keyed to the prime interest rate, where this is necessary to compensate the plaintiff for his losses or to avoid the unjust enrichment of the defendant. The award of such interest would be left in the discretion of the district judge in each case. Provisions for prejudgment interest would not only serve to compensate plaintiffs more fairly but would also provide positive incentives to defendants to settle meritorious claims without delay.

CONCLUSION

Problems have been accumulating in the federal judiciary since the mid-1960's. They derive principally from the rapid rise in the volume and in the complexity of litigation. The

addition of the new judgeships under the 1978 Act will aid the courts in reducing delay for individual litigants. However, these new judgeships will do nothing to resolve the problems which are systemic and administrative. To resolve those difficulties, Congress needs to enact promptly the measures set forth in the President's message of February 27th.

Specifically, the Department of Justice urges prompt action on the proposed Federal Courts Improvement Act in order to place the appellate courts in better position to deal more uniformly with cases of unusual national concern and to enable those courts to be more effectively administered. The enactment of these measures will benefit not only the litigants in the federal courts but ultimately all American taxpayers and citizens.

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