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TIME EXTENSION FOR COMMENCING ACTIONS ON BEHALF OF INDIANS

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HEARING

BEFORE THE

SUBCOMMITTEE ON INDIAN AFFAIRS

OF THE

COMMITTEE ON INTERIOR AND INSULAR AFFAIRS

UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

ON

S. 3377 and H.R. 13825

BILLS TO EXTEND TIME FOR COMMENCING ACTIONS ON BEHALF OF AN INDIAN TRIBE, BAND, OR GROUP

SEPTEMBER 12, 1972

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Printed for the use of the
Committee on Interior and Insular Affairs

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TIME EXTENSION FOR COMMENCING ACTIONS ON BEHALF OF INDIANS

TUESDAY, SEPTEMBER 12, 1972

U.S. SENATE,
SUBCOMMITTEE ON INDIAN AFFAIRS OF THE
COMMITTEE ON INTERIOR AND INSULAR AFFAIRS,
Washington, D.C.

The subcommittee met at 10 a.m. in room 3110, New Senate Office Building, pursuant to notice, Paul J. Fannin, presiding.

Present: Senators Fannin and Anderson.

Also present: Forrest Gerard, professional staff member, Thomas Nelson, assistant minority counsel, and Steven Quarles, special counsel.

Senator FANNIN. The hearing will come to order.

The purpose of this morning's hearing is to receive testimony on S. 3377, a bill which would amend existing law to provide an additional period of time within which action may be instituted by the United States for or on behalf of a recognized tribe, band, or group of Indians for money damages founded upon any contract express or implied in law or fact, and for trespass.

Six years ago, on July 18, 1966, an act was passed imposing a statute of limitations of 6 years on tort or contract suits brought by the United States on its own behalf and in carrying out its trust responsibilities to Indians.

One of the subsections provided that a right of action subject to the act which accrued prior to the act will be deemed to have accrued on the date of enactment. Thus, all Indian claims subject to the act which accrued prior to the date of its enactment would have been barred after July 18 of this year.

Although S. 3377 was introduced on March 20, 1972, and although the measure was referred to the Department of the Interior and the Office of Management and Budget on May 18, the executive reports did not arrive until Congress was in recess for the Democratic convention.

Since, upon return, not enough time was available to either the Senate Interior Committee or the House Judiciary Committee to hold hearings on S. 3377 or any House counterpart to it and order them reported, Congress passed H.R. 15869 as an interim measure.

H.R. 15869 simply extended the statute of limitations for 90 days on actions brought by the United States for or on behalf of a recognized Indian tribe, band or group.

This temporary extension through October 18, 1972, provides this committee with the opportunity to consider more carefully the 5-year extension proposed by S. 3377 and other issues related to the measure.

The House Judiciary Committee has already concluded its deliberations and, on July 31, reported H.R. 13825, a similar measure. The House subsequently passed H.R. 13825 on August 14, 1972.

In their report on S. 3377, the Department of the Interior stated:

> Indians are quite concerned that the present statutory limitation might bar them from recovering damages for many wrongs they have suffered. The Bureau of Indian Affairs and the Solicitor's Office of this Department have not been able to perform the necessary work to identify all of these wrongs and then develop the factual information necessary to get litigation filed. Even with the help of attorneys employed by the various tribes, there are, no doubt, many causes of action which have not been identified. This inability to prosecute the present claims of Indians will work a hardship on tribes all over the country and may result in a considerable loss to Indians through no fault of their own, losses which Indians can ill afford because of their low position on the economic scale.

I hope that in addition to addressing the specific language of S. 3377, the witnesses today will make an effort to describe the potential extent and magnitude of the losses which the Interior Department suggests Indians would suffer should the measure or a similar proposal be enacted into law.

The bills and department reports will be inserted in the record at this point.

(The documents referred to follows:)

92D CONGRESS
2D SESSION

S. 3377

IN THE SENATE OF THE UNITED STATES

MARCH 20, 1972

Mr. FANNIN (for himself and Mr. GOLDWATER) introduced the following bill; which was read twice and referred to the Committee on Interior and Insular Affairs

A BILL

To extend the time for commencing actions on behalf of an Indian tribe, band, or group.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28 of the United States Code, section 2415, is amended as follows:

(a) The period at the end of subsection (a) shall be changed to a colon, and the following provision shall be added thereto: "*Provided further,* That an action for money damages brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years

after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.".

(b) The words ", including trust or restricted Indian lands" appearing after "lands of the United States" shall be deleted from the proviso in subsection (b), the period at the end of the subsection shall be changed to a comma, and the following words shall be added thereto: "except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought within eleven years after the right of action accrues.".

92D CONGRESS
2D SESSION

H. R. 13825

IN THE SENATE OF THE UNITED STATES

AUGUST 15, 1972

Read twice and referred to the Committee on Interior and Insular Affairs

AN ACT

To extend the time for commencing actions on behalf of an Indian tribe, band, or group.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28 of the United States Code, section 2415, is amended as follows:

(a) The period at the end of subsection (a) shall be changed to a colon, and the following provision shall be added thereto: "*Provided further,* That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection (g) brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian

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whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.".

(b) In subsection (b), the period at the end of the subsection shall be changed to a comma, and the following words shall be added thereto: "except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection (g) may be brought within eleven years after the right of action accrues.".

Passed the House of Representatives August 14, 1972.

Attest: W. PAT JENNINGS,

Clerk.

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JUN 26 1972

Dear Mr. Chairman:

This is in response to your request for the views of this Department on S. 3377, a bill "To extend the time for commencing actions on behalf of an Indian tribe, band, or group."

We recommend enactment of the attached substitute bill in lieu of S. 3377, and we urge your immediate action thereon for the reasons described below.

The Act of July 18, 1966, 28 U.S.C. 2415, imposed a statute of limitations on tort or contract suits brought by the United States on its own behalf and in carrying out its trust responsibility to Indians. The statute generally allows six years from the date the action first accrues, with certain exceptions and provisions for tolling the time. Subsection g of section 2415 provides that any right of action subject to the provisions of section 2415 which accrued prior to the date of enactment of section 2415 will be deemed to accrue on the date of enactment. All Indian claims subject to section 2415 which accrued prior to the date of its enactment, and these include some very complicated and substantial claims for damages, will therefore be barred from litigation after July 18, 1972, unless the statute is extended by legislation.

S. 3377 would amend 28 U.S.C. 2415 to provide an additional period of time within which action may be instituted by the United States for or on behalf of a recognized tribe, band, or group of Indians for money damages founded upon any contract express or implied in law or fact, and for tort or trespass.

Indians are quite concerned that the present statutory limitation might bar them from recovering damages for many wrongs they have suffered. The Bureau of Indian Affairs and the Solicitor's Office of this Department have not been able to perform the necessary work to identify all of these wrongs and then develop the factual information necessary to get litigation filed. Even with the help of attorneys employed by the various tribes, there are, no doubt, many causes of action which have not been identified. This inability to prosecute the present claims of Indians will work a hardship on tribes all over the country and may result in a considerable loss to Indians through no fault of their own, losses which Indians can ill afford because of their low position on the economic scale.

We believe it is particularly important not to let these unidentified claims lapse because we are on the verge of making substantial progress in discharging our trust responsibilities with regard to Indian resources. Recently, the Bureau of Indian Affairs established a new unit, the Indian Water Rights Office, which will have as its principal duties the assertion and protection of water rights of Indians. Efforts have also been made to obtain additional funds and personnel for investigation and determination of boundary conflicts. In addition, the Administration has proposed the creation of an independent Trust Counsel Authority to represent the resource rights of Indians free of any governmental conflicts of interest. It would be most unfortunate for many Indian claims to be barred by the statute of limitations at a time when the means for discovering and prosecuting such claims are in the process of being markedly improved.

However, S. 3377, would do more than merely "save" those claims that would be barred on July 18, 1972. It would establish an eleven-year statute of limitations for all Indian claims arising under 28 U.S.C. 2415. We do not believe such special treatment of Indians is warranted across the board and would suggest narrowing the effect of the extension of the statute to those claims which would otherwise be barred on July 18, 1972. We submit herewith a substitute draft bill to accomplish this more limited purpose. In addition, we note that the statute which S. 3377 would amend does not differentiate between the claims of Indian tribes or groups and those of individual Indians. Yet both of the amendments contained in S. 3377 would be limited in applicability to "a recognized tribe, band, or group of American Indians." We see no reason not to extend the statute of limitations as well on behalf of individual Indians whose land is held in trust or restricted status. Therefore we have added the phrase "or on behalf of an individual Indian whose land is held in trust or restricted status" to both amending sections of the substitute draft bill.

The Office of Management and Budget has advised that there is no obejction to the presentation of this report from the standpoint of the Administration's program.

Sincerely yours,

Harrison Loesch

Assistant Secretary of the Interior

Hon. Henry M. Jackson
Chairman, Committee on Interior
and Insular Affairs
United States Senate
Washington, D.C.

Enclosure

A B I L L

To extend the time for commencing actions on behalf of an Indian tribe, band, or group.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28 of the United States Code, section 2415, is amended as follows:

(a) The period at the end of subsection (a) shall be changed to a colon, and the following provision shall be added thereto: "Provided further, That an action for money damages which accrued on the date of enactment of this Act in accordance with subsection g brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later.".

(b) The words ", including trust or restricted Indian lands" appearing after "lands of the United States" shall be deleted from the proviso in subsection (b), the period at the end of the subsection shall be changed to a comma, and the following words shall be added thereto: "except that such actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or

restricted Indian lands, or on behalf of an individual Indian whose land is held in trust or restricted status which accrued on the date of enactment of this Act in accordance with subsection g may be brought within eleven years after the right of action accrues.".

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

JUN 27 1972

Honorable Henry M. Jackson
Chairman, Committee on Interior
and Insular Affairs
United States Senate
3106 New Senate Office Building
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request of May 18, 1972 for the views of the Office of Management and Budget on S. 3377, a bill "To extend the time for commencing actions on behalf of an Indian tribe, band, or group."

In its report to your Committee on S. 3377, the Department of the Interior recommends enactment of a substitute bill in lieu of S. 3377. The Department indicates in detail the reasons for its preference of the substitute bill. We concur in the views expressed by the Department, and, accordingly, would have no objection to the enactment of the proposed substitute bill in lieu of S. 3377.

Sincerely,

Wilfred H. Rommel

Wilfred H. Rommel
Assistant Director for
Legislative Reference

OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C. 20530

SEP 6 1972

Honorable Henry M. Jackson
Chairman, Committee on Interior
and Insular Affairs
United States Senate
Washington, D. C. 20510

Dear Senator:

This is in response to your request for the views of the Department of Justice on S. 3377, a bill "To extend the time for commencing actions on behalf of an Indian tribe, band, or group."

Under section 2415(a) of title 28, United States Code, as originally enacted, the statute of limitations for contract actions brought by the United States or an officer or agency of the United States is six years after accrual of the action or one year after a final administrative decision. Under subsection (b) of section 2415, as originally enacted, actions for damages brought by the United States or an officer or agency of the United States founded upon a tort must be brought within three or six years after the right of action accrues, depending upon the nature of the tort. Under subsection (g) of section 2415, an action covered by the provisions of the section which accrued prior to the date of its enactment was deemed to have accrued on the date of enactment. Public Law 92-353, approved July 18, 1972, provided as a temporary measure an extension of the period of limitations by ninety days for actions brought by the United States for or on behalf of a recognized tribe, band or group of Indians.

S. 3377, which was introduced prior to enactment of Public Law 92-353, would make an exception to the limitations in the original versions of sections 2415(a) and (b) by substituting, in the case of actions brought by the United States on behalf of a recognized tribe, band, or

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group of American Indians or arising from trespass on trust or restricted Indian lands, an eleven-year statute of limitations for both the six-year limitation otherwise imposed upon the United States by subsection (a) of the section and the six-year limitation imposed by subsection (b). The bill would also substitute a two-year period, in the case of Indians, for the one-year period provided by 28 U.S.C. 2415(a) for the filing of a complaint following a final decision in an administrative proceeding.

Our only information with respect to the background of this bill is contained in the remarks of Senator Fannin appearing at page S4189 of the Congressional Record of March 20, 1972, in which Senator Fannin cited administrative problems of the Department of the Interior in preparing cases before the July 18, 1972, deadline on cases accruing before July 18, 1966, the date of enactment of section 2415.

We note that the bill would extend the statute of limitations for cases accruing after its enactment as well as for those which accrued prior to enactment of section 2415 of title 28, and that this is apparently contrary to the intention of the sponsors. H.R. 13825, the companion bill recently passed by the House of Representatives, was amended to avoid this problem by making the provisions specifically applicable only to those Indian actions which accrued on the date of enactment of section 2415 under the provisions of subsection (g) of that section.

The Department of the Interior is better informed than this Department whether there are special circumstances respecting the initiation of actions by the United States for the benefit of Indian Tribes, bands or groups necessitating the longer period of limitations which the subject bill would allow. We therefore defer to that Department regarding the desirability of enactment of the bill.

The Office of Management and Budget has advised that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Ralph E. Erickson
Deputy Attorney General

Senator ANDERSON. Our first witness is Mr. William A. Gershuny.

Mr. GERSHUNY. Thank you Senator Anderson.

Senator ANDERSON. Has the Indian Claims Commission been abolished?

Mr. GERSHUNY. This particular bill would extend the time in which suits can be filed by the Federal Government on behalf of tribes.

This suit does not relate to the Indian Claims Commission at all.

Senator ANDERSON. Why not?

Mr. GERSHUNY. Because the jurisdiction of the Indian Claims Commissions is to entertain suits by the Indian tribes against the Federal Government, and we are dealing here today with a bill which would extend the time for the U.S. Government to file suits on behalf of Indian tribes against others.

Senator FANNIN. If we can have the witnesses identify themselves, please.

Mr. GERSHUNY. Senator Fannin, my name is William A. Gershuny, and I am Associate Solicitor for Indian matters and I appear today in lieu of Harrison Loesch and I am accompanied by one of my senior lawyers, William Moses.

Senator FANNIN. Will your testimony clarify some of the questions or the question that was asked by Senator Anderson?

Mr. GERSHUNY. Yes; I hope it will, Senator.

Senator FANNIN. If you will continue then.

STATEMENT OF WILLIAM A. GERSHUNY, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY WILLIAM MOSES

Mr. GERSHUNY. Mr. Chairman and members of the committee, it is a pleasure to appear before you this morning and recommend the enactment of S. 3377, a bill to extend the time for commencing actions on behalf of an Indian tribe, band, or group, if it is amended as suggested in our report of June 26, 1972.

Mr. Chairman, at this time, since in your opening statement you had summarized our report of June 26, I am wondering if it might save time, if I could just submit my opening statement for the record and then immediately go into the real substance?

Senator FANNIN. That is fine. Your complete statement will be a part of the record. You can summarize it.

Mr. GERSHUNY. In substance, Senator, we support the bill and at the same time we propose two changes, one which would clarify the language of the bill so as to insure that the time for bringing suits not only on behalf of Indian tribes, but also on behalf of the individual Indian would be covered and second, to clarify the aim of the bill and that is to merely extend for an additional 5 years those claims which had occurred prior to the enactment of the 1966 act.

We have recommended some language that we believe would serve that particular function.

I might say, Mr. Chairman, that the need for this bill is rather apparent to anyone who has followed Indian work. It has only been during the last few years that I believe a greater sensitivity has been shown toward the assertion of Indian claims, water claims, land

claims, and the nature of these claims is such that a great deal of work must be done before they are ready for the filing of a suit on behalf of the tribe against a third person.

As the date of July 18, 1972, neared, we found there were many claims which have not yet reached the stage where we were prepared to file suit, and we obtained a working arrangement with the Assistant Attorney General whereby suits would be filed before we have all of the necessary facts and we would follow up.

However, we have found that there is still a large number of claims or matters that we believe will be claims once we are able to do enough of the factual spadework.

In a recent survey of some of our field officers, we have ascertained that there may be upward of 100 of such claims that are now being worked on out in the field and hopefully will be forwarded into the Washington office for the filing of suit.

Again, I must say that out of the 100 cases, it has been estimated that perhaps as few as 25 could be ready for filing before the expiration of the 90-day period, some time ago, about October 16, and therefore, we believe that it is essential that section 2415 be amended, so as to allow more time for the Bureau, for the Solicitors' Office for the tribes and their own attorneys to work up these claims so they may be timely filed.

Senator FANNIN. Senator Anderson.

Senator ANDERSON. I think you ought to differentiate between this bill and the work of the Indian Claims Commission. The Indian Claims Commission was started around 1935. Now, you seem to be starting it all over again.

Mr. GERSHUNY. As I understand your question, Senator Anderson, the Indian Claims Commission had been established to allow the Indian tribes to submit their claims against the Government and then establish a forum for those claims to be heard. And the time for filing those claims has now expired.

No tribe can file a claim before the Indian Claims Commission any longer.

Senator ANDERSON. Did the Indians have such a warning?

Mr. GERSHUNY. Yes; I think they have. What we are now talking about Senator, is an alternative, a second means by which the Indian tribes can recoup for their losses of lands and so forth and this is a means whereby the Secretary, as the trustee of the properties brings the suit on behalf of the Indian tribes and the suit is then against a third person. Not a suit against the United States, but a suit against a third person to recover lands, to recover damages to those lands.

Senator ANDERSON. Can you give me an example of that?

Mr. GERSHUNY. Senator, an example would be one of the suits that we have just filed recently. For example, a suit filed on behalf of the Walker River Tribe.

This is a suit filed in district court by the United States against, I believe, the Southern Pacific Railroad, in which we claim and which the tribe has claimed, that it trespasses on the lands of the tribe. We filed a suit seeking some money damages to recover for the actual damages to those lands.

That would be one example. There are others.

Senator ANDERSON. Have the Indian tribes themselves requested this?

Mr. GERSHUNY. Yes, Senator. In every case in which a suit is filed, we try to be in rather close consultation with the tribes and their own leaders.

Senator ANDERSON. I think it is pretty hard to differentiate between the two. We have had the Indian Claims Commission year after year after year, and now what has happened? Are these third party claims?

Mr. GERSHUNY. The suits filed in the Indian Claims Commission, are based upon wrongful acts of the Federal Government. In the suits we are talking about here, we are talking about wrongful acts of other persons.

Senator ANDERSON. These matters were not settled at all by the Indian Claims Commission?

Mr. GERSHUNY. These matters were not, Senator; that's right.

Senator ANDERSON. Is the Navajo Tribe involved in this?

Mr. GERSHUNY. I am sure the Navajo Tribes will have some claims against third persons; yes.

Senator ANDERSON. For example?

Mr. GERSHUNY. Senator Anderson, at this time we have no requests from the Navajo Tribe to institute a suit.

Senator ANDERSON. Is the Navajo Tribe not well represented by lawyers?

Mr. GERSHUNY. And they have often brought their own suits, Senator, yes.

Senator ANDERSON. Are the Navajos satisfied with the legal work that was done?

Senator FANNIN. We will have some attorneys here this morning to testify on that question.

The Senator would like to have the Department answer the question.

Mr. GERSHUNY. If I understand the question——

Senator ANDERSON. I think they have had some very good legal work.

Senator FANNIN. Did they have full responsibility from the standpoint of protecting the Indian tribes, as far as the attorneys are concerned?

Mr. GERSHUNY. Yes.

Senator ANDERSON. Have these attorneys failed?

Mr. GERSHUNY. I don't know whether it is a failure on anybody's part.

Senator ANDERSON. There must have been some reason for the suits not being brought in here in time to meet the first deadline.

Mr. GERSHUNY. Many of these claims are lodged in history, they go back many years. Sometimes the facts are not known. Recently new theories of law have been worked up. Lawyers will view the factual circumstances in a slightly different way. I think generally there is now a greater sensitivity to the nature of this work and I think this is the reason why we are here today asking for more time in which to file such suits.

Senator ANDERSON. You got through saying the Navajos haven't asked for any more time.

Mr. GERSHUNY. As of now, Senator, we have no requests from the Navajos for suit, they have their own counsel, rather able counsel in Phoenix and here in Washington.

Our experience has been to some extent they use their own counsel and file their own suits.

Senator ANDERSON. I am trying to find out what this is all about.

Mr. GERSHUNY. One of the reasons, Senator, why it's so essential that the suits be filed, that some claims be filed by the United States, is the possibility that if the tribe itself in its own name files the suit it would be subject to a shorter statute of limitations than would otherwise be applicable to the Federal Government.

Senator FANNIN. Do you believe that the full 5-year extension is necessary? Is it not possible for the Departments of Interior and Justice to move more quickly for an extension less than 5 years?

In other words, is this going to mean they are going to linger on for that period of time?

Mr. GERSHUNY. I would hope not, Senator. Ever since the summer of 1971, we have been mounting an intensive campaign within Interior to prod the Bureau of Indian Affairs field officers, to prod our lawyers to bring out these facts. And in the last year, we have seen a certain amount of movement in this regard. I believe the nature of some of these claims is such that it will take several years to simply dig back into history, into the facts to ascertain whether or not we have a claim for filing. Whether or not we would need a full 5 years, it is hard to say.

But I think that 5 years—we are talking about claims that are as unique as these, is not a long period of time. In any event, Senator, we should remember that there is no statute of limitations with regard to the filing of suits by the Federal Government to quiet—we are only talking about one aspect of these claims and I should also say that the damage claims are generally only the second count of a suit to be filed.

Generally, when we are filing a suit involving a boundary problem or survey problem, maybe a trespass problem, the major part of the claim is one to simply quiet title. And incidentally, we threw in the second claim for damages. So, regardless of whether or not this section of the code is extended, suits will be filed by the Federal Government involving land transactions many, many years ago.

Senator FANNIN. I know Senator Anderson is concerned with the time element——

Senator ANDERSON. In 1941, which is quite awhile ago, we had an Indian study. The then chairman of the House Interior Committee began urging suits. In 1945, I had an interest in this because Secretary Brennen, of the Department of Agriculture, was offered a spot in the Indian Claims Commission. I advised him not to take it, because the Commission was only going to exist for 3 years. But it was not 3 years, it has been growing and growing.

Mr. GERSHUNY. We are not asking to bring a suit, Senator, on behalf of any tribe. We are asking generally the time for such suits be extended so that if any tribe or any of our offices ascertain there are circumstances such that would simply give rise to a claim against a third party, we have the adequate time to work up the necessary facts and research the law and file a suit.

Senator ANDERSON. Do you think, after all of these years, shouldn't that be enough?

Mr. GERSHUNY. I can't speak, Senator, for what happened in years past. I do know during the past year or two there have been signs of

major movement, and I think during the seventies we will see a much greater sensitivity to this work and I think in all fairness to the Indian community, Senator, that a few more years could have some very, very good results.

I must say, lawyers sometimes have a tendency to draw things out.

Senator ANDERSON. Lawyers only?

Mr. GERSHUNY. Being a lawyer, I will speak only for the lawyers.

The Secretary last fall started up an Indian Water Rights Office, which is now starting to function very well. We are putting a lot of cases into the pipeline, they are starting to flow out of the other side.

We are starting a lot more cases now dealing with water rights than we have ever before. We are filing more cases now involving land claims than have ever been filed before.

I see no reason why this movement over the next few years would not be really adequate to cover almost all of the major claims.

Senator FANNIN. The Department of Justice took part in the previous hearings held on 2415, Indian claims were considered at that time, and of course the 6 years was allowed.

Where are we going to be now after 6 years that is thought to be sufficient time?

Mr. GERSHUNY. I think the situation, Senator, quite frankly, in 1966, was entirely different than it is in 1972.

Again, using the same phrase I seem to be using quite often, in the 1970's there seems to be a greater sensitivity to this whole subject matter than there was in the 1960's.

Back in 1966 when the first package of bills was sent up to the Congress, I had a hand in this, being with the Civil Division of Justice at that time. I had written some of these bills, and I can tell you back in 1966, there was no awareness of this problem on our part.

Senator ANDERSON. Wasn't money paid out?

Mr. GERSHUNY. Not with regard to these bills, Senator, no. These bills will not cost the Federal Government anything at all, outside of the cost of filing and pursuing the cases.

Senator FANNIN. Does the Interior Department intend to inform the Indian people about their rights and what could be done?

Mr. GERSHUNY. We have tried to make a search of our files to find out what happened in the period between 1966 up through 1971, and we really can't find anything which would indicate that there were any notices sent out by the Bureau of Indian Affairs or really by the Solicitor's Office

I would have to think, however, that most of the lawyers were certainly aware, that is lawyers not only for the Secretary, but lawyers for the tribes. I would think that it is reasonable to understand why the Indian leaders themselves were not aware of it.

If you go back and read through the records of the House and Senate on the 1966 bills, there was almost no reference at all to Indians.

Senator FANNIN. How about lawyers for the Department?

Mr. GERSHUNY. When I came aboard in August of 1971, we had less than 1 year to work up these cases. In August 24 of 1971, I sent out a memo over my signature to all of our field officers reminding them we had less than 1 year.

Senator FANNIN. What happened in the previous 5 years?

Mr. GERSHUNY. We have not been able to find anything which would indicate we spread the word. We followed this up in January 1972 with a second memorandum out to all of our field officers.

Senator FANNIN. I see.

Mr. GERSHUNY. We followed these up with one of these last-minute memos on June 15 of 1972 and June 28 of 1972, plus numerous phone calls.

Senator FANNIN. Can we have a chronology of just what has been done? We are concerned here with waiting for 5 years to take the action which originally should have been taken; and if the 5-year extension is granted, what happens the first 4 years, do we wait 4 years and start in on the fifth year? It is disconcerting to see the time element go back and then be asked for another extension.

Mr. GERSHUNY. There seems to have been a 5-year period in which the officials within the Bureau and within the Solicitor's Office appeared to do nothing which would flag the issue. I am sure that everybody was fully aware of it, but we can't find any sort of a document.

But, starting with August 24 of 1971, over my signature we sent a memo to the Bureau and to all of our field officers reminding that we had a deadline outlined to them, the nature of the claims that were subject to it.

We followed this up again with a memo on January 20, 1972, to all of our field lawyers explaining to them once again what this act meant and what claims were subject to that statute of limitations.

Senator FANNIN. Are those memorandums part of your statement?

Mr. GERSHUNY. They are not.

Senator FANNIN. Could they be made a part of the record?

Mr. GERSHUNY. We can send up some fresh copies.

Senator FANNIN. Evidently we do have a copy that can be made a part of the record. A memo signed by you, dated August 24, 1971.

Mr. GERSHUNY. Yes, and we have one of January 20, 1972.

Senator FANNIN. Perhaps if you would furnish for the record the information you are referring to in your statement.

Mr. GERSHUNY. Yes. Also on June 15, 1972, a memo went to the Bureau of Indian Affairs, again reminding them, indicating what had to be done before the 18th.

On June 28, 1972, within about 3 weeks before the running of the statute of limitations, the memo went out asking how many cases you still have that we can expect. About that time, the Senate and House had a bill under consideration, a bill which would extend the statute 90 days, and the Bureau sent out a wire to all of its field offices, and we followed this up to all of our offices on July 18, and this was followed up with another telegram to all of the field offices, on July 28.

This was followed up by a memo from me to all of our field lawyers on July 27, 1972. We can reproduce, and submit copies of all of these for the record.

Senator FANNIN. Thank you.

(The memorandums referred to are in the appendix.)

Mr. GERSHUNY. What I am leading up to is I think we have now beat the drums a large number of times over the last 12 months. I think everybody now is fully aware of the statute of limitations.

We made them fully aware of the 90-day extension. If this section of the code should be extended further, I can assure you that the word will go out that we will lead them to the water and hope they drink.

Senator FANNIN. Can parties with tort or contract claims against the tribe, file lawsuits 6 years after the transaction?

Mr. GERSHUNY. Claims against the tribe, Senator, pose really two problems, two serious problems, the one concerning the applicable statute of limitations is really a secondary problem. The primary problem is whether or not the tribe or tribal entity may even be sued at all.

As you know, generally the rule is that a tribe or tribal entity is not suable. So you never reach the second issue on when the suit must be filed.

Senator FANNIN. If such parties are sued by the tribe because of that same transaction, can they assert their claims in a counterclaim?

Mr. GERSHUNY. I have some serious problems with that, Senator. I do not believe so, if for no other reason than I assume that the counterclaim that you are referring to would be in the nature of a claim by a third person, by that third person against the tribe, and I believe that the concept of sovereign immunity would also foreclose that.

Senator FANNIN. Now, the Department's report on June 26 stated the statute of limitations should not only be extended for a recognized tribe or band or group of American Indians, but also on behalf of individual Indians, whose lands are held in trust.

The 5-year extension passed the House, and does provide for extension of suits on behalf of individual Indians. Are we now able to provide for suits on behalf of individual Indians?

Mr. GERSHUNY. We recognize there is a legal issue we will have to face up to at some future time in court, and that is whether the inadvertent omission from the 90-day bill of any reference to claims on behalf of the individual Indians caused those claims to lapse and whether or not this bill, should it be enacted with the language we would like to see in it, can legally and can constitutionally revive the claim. We believe that the answer to that is yes, a very strong yes.

We see that there is a legal issue, but we are extremely confident that there will be no legal problem.

Senator FANNIN. You do not feel the statute of limitation has run in these cases?

Mr. GERSHUNY. I think it has run as of this moment. The reason I say that, Senator, is because my hurried research on this indicates that in 1945 in the case of *Chase Security Corp.* v. *Donaldson*, and that is cited at 325 U.S., 304, the Supreme Court had before it, Senator, a case involving a statute of limitations which had, under its terms caused a certain claim to expire and the State legislature then amended the statute of limitation in an effort to revive that claim.

In 1945, the Supreme Court held that because a statute of limitations in the constitutional sense does not effect the claim, but only goes to the remedy, and that the 14th amendment did not in any way bar the State from reviving a cause of action.

Now, there is one sentence, I think, from that 1945 opinion, that I think answers your inquiry. The Court held that where lapse of

time has not vested a party with title to real or a personal property, a State legislature, consistently with the 14th amendment may repeal or extend the statute of limitation even after a right of action is barred, thereby restoring to the plaintiff his remedy and divesting the defendant of the statutory bar.

If it is allowable under the 14th amendment, it is certainly allowable under the fifth amendment. And certainly here, Senator, the lapse of time during this 90-day period in no way vests any title in anyone. As you recognize, section 2415 insures that there is no statute of limitations with regard to action to acquire title by the United States.

In summary, Senator, I don't believe there is a legal hurdle, although I do recognize that the issue could easily be raised.

Senator FANNIN. Thank you, very much, Mr. Gershuny.

The legal services suggest that the words "United States for or on behalf of be striken," on the theory that should a cause of action be extended that they could bring action on their own. Would you comment on this suggestion?

Mr. GERSHUNY. I have not seen that before, but it would seem to me, Senator, that their proposal is based on the erroneous assumption that section 2415 is a statute of limitations, which would apply to the tribe itself if it filed its own suit.

We don't read section 2415 that way. I have a lot of difficulty in understanding how section 2415 could be applicable if the tribe itself filed suit.

My first reaction, Senator, is that I think that that proposal is simply bottomed on a false assumption.

Senator FANNIN. Thank you, Mr. Gershuny.

At this time we would like to have inserted in the record the legislative history on the statute of limitations, there are several reports and documents involved and without objection they will be made a part of the record.

(The documents referred to are in the appendix.)

Mr. GERSHUNY. It must be remembered that there is no statute of limitations applicable to the suits by the United States on its own behalf or on behalf of the Indians with regard to acquiring title and certainly, in fairness to a third party we have to simply litigate questions of title, going back 100 years, 150 years, 200 years in some cases, is still involved.

Senator FANNIN. Thank you, very much. We appreciate you both appearing here this morning.

Mr. GERSHUNY. Thank you.

(The prepared statement of Mr. Gershuny follows:)

STATEMENT OF WILLIAM A. GERSHUNY, ASSOCIATE SOLICITOR FOR INDIAN AFFAIRS, DEPARTMENT OF THE INTERIOR

Mr. Chairman and members of the Committee, it is a pleasure to appear before you this morning and recommend the enactment of S. 3377, a bill "To extend the time for commencing actions on behalf of an Indian tribe, band, or group," if it is amended as suggested in our report of June 26, 1972.

The bill amends the Act of July 18, 1966 (80 Stat. 304), which imposed a statute of limitations on tort or contract suits brought by the United States on its behalf and in carrying out its trust responsibility to Indians by adding sections 2415 and 2416 to Title 28 of the United States Code. The limitation imposed is six years from the date of accrual of the cause of action with certain excep-

tions and provisions for tolling the time limitation. One of the exceptions is contained in subsection (g) of section 2415, which provides that any right of action subject to the provisions of section 2415 which accrued prior to the date of enactment of section 2415 will be deemed to accrue as of the date of enactment. Therefore, without the enactment of this bill, all Indian claims subject to section 2415 which accrued prior to the date of its enactment, and these claims include some very complicated and substantial claims for damages, will be barred from litigation after October 18, 1972, the period as extended by the Act of July 18, 1972 (86 Stat. 499).

The amendment proposed by S. 3377 amends 28 U.S.C. 2415 by providing an additional period of time within which action may be instituted by the United States for or on behalf of an organized tribe, band, or groups of Indians for money damages founded upon any contract, express or implied, in law or fact, and for tort or trespass.

Indians have been deeply concerned that the present statutory limitations might bar them from recovering damages for many wrongs that they have suffered. The Bureau of Indian Affairs and the Office of the Solicitor have not been able to perform the necessary work to identify all of the claims and then prepare the background information needed to support litigation. We believe that the time should be extended to allow sufficient time for the identification of claims and the preparation of necessary information to allow litigation. The failure to prosecute the claims would work a hardship on tribes and could result in a considerable loss to Indians through no fault of their own.

We believe it would be particularly disappointing to the Indian people if we let these claims lapse at a time when every effort is being made to more effectively meet our trust responsibility to Indian people.

However, S. 3377 does more than merely "save" those claims that would be barred by the Act of July 18, 1966, as extended by the Act of July 18, 1972. It establishes an eleven-year statute of limitations for all Indian claims arising under 25 U.S.C. 2415. We do not believe such special treatment of Indians is warranted across the board and our report suggests an amendment that narrows the effect of the extension of the statute to those claims which would otherwise be barred on July 18, 1972.

Further, we note that the Act of July 18, 1966, does not differentiate between the claims of Indian tribes, bands, or groups and individual Indians, yet this bill would limit the extension of the statute of limitation to Indian tribes, bands or groups. Our report recommends an amendment that makes it clear that the extension also applies to individual Indians whose land is held in trust or restricted status.

Thank you for the opportunity to appear and endorse this legislation. If there are any questions, I would be happy to answer them.

Senator FANNIN. The next witness is Franklin Ducheneaux, legislative consultant for the National Congress of American Indians.

Welcome here this morning.

STATEMENT OF FRANKLIN DUCHENEAUX, LEGISLATIVE CONSULTANT, NATIONAL CONGRESS OF AMERICAN INDIANS

Mr. DUCHENEAUX. Thank you, Mr. Chairman.

Mr. Chairman, my is Franklin Ducheneaux, legislative consultant for the National Congress of American Indians. I am appearing today on behalf of Mr. Leo Vocu, executive director of NCAI. We appreciate this opportunity to present our position on S. 3377.

S. 3377 would amend the act of July 18, 1966, 28 U.S.C. 2415, by providing for an additional 5 years or a total of 11 years within which an action may be instituted by the United States for or on behalf of a recognized Indian tribe, band, or group of Indians for money damages founded upon any express or implied contract or for tort or trespass.

Our testimony in support of this legislation will be centered around the trust relationship existing between the United States and the Indian tribes.

Indeed, the very fact that we are here today desperately trying to stave off what could be a disastrous blow to Indian rights is a reflection of the default of the trustee in protecting the beneficiary.

This law was enacted in 1966, presumably with full hearings and extensive debate on the floors of both Houses and presumably with the knowledge and support of the executive branch. To my knowledge, no Indian witnesses were called to testify. To my knowledge, no administration witness raised the question of the inclusion of Indian rights or explained their trustee obligation to the Indian.

And to my knowledge, there has been no concerted, extensive effort on the part of the trustee between July 18, 1966 and July 18, 1972, to determine if there were Indian claims which might be struck down because of the 1966 act.

In fact, to my knowledge, the first time the trustee made any attempt to advise Indian tribes of this time bomb in their midst was early this year through a memorandum from the Solicitor of the Interior Department.

Had it not been for a few concerned Congressmen, Senators, and private individuals whose desperation efforts resulted in enactment of a bill, H.R. 15869, to extend the time of the 1966 act for 90 days as it applied to such Indian claims, these claims may well have been a constitutionally moot, but nevertheless dead, question. In fact, the 90-day extension act may well have one serious defect which we will mention briefly herein.

The report of the Department of the Interior on S. 3377 and H.R. 13825 proposes, and the House Interior Committee has adopted, two amendments. Taking the last first, the Department differentiates between claims of Indian tribes, bands, or groups and those of individual Indians whose land or other asset is held in trust or restricted status by the United States and recommends inclusion of such individual claims in this legislation.

We would concur wholeheartedly in this recommendation. Unfortunately, we have been advised that the act giving us this 90-day grace period did not mention such individual claims and that the 6-year statute is still running against these claims. We are not sure of the legal implications of this defect and we look to the committee, to the Department, and to other more knowledgeable witnesses to either propose a means of rectifying this defect or a means to prevent further cutting off of such claims.

The Department's second amendment would limit the 5-year extension only to those claims which would have otherwise been barred by the 1966 act on July 18, 1972. The Department's reason is that they "do not believe such special treatment of Indians is warranted across the board."

This must have been pretty persuasive reasoning, since the House committee has adopted their recommendations. But to my inexperienced mind, it seems to be no reason at all, but a mere statement of opinion.

Why don't they believe such special treatment is warranted? Don't they believe in the trustee responsibility, the special treatment responsibility, which they have so inadequately performed? Then let them say so. Let them dispense with this farce of "self-determination without termination." Why don't they go back to the termination era

of the 1950's which was at least semihonest and semiopen and something we could fight.

The United States of America with the Department of Interior as agent, is the trustee of the tribal entities and their trust assets. They have complete control over the legal title to the trust property. They can bring an action to protect that property or refuse to do so as they see fit.

Once involved in a suit against a third party in which the interests of the United States and an Indian tribe is involved, they can prevent the Indian from intervening on his own behalf by asserting to the court that, as trustee, they are adequately protecting the interests of the Indian. If an Indian tribe brings an action in its own behalf to protect trust rights because of the culpable or negligent inaction of the United States, the United States can intervene at will.

Once in, it can compromise, settle, ignore, or otherwise seriously impair the Indian right without the consent or even the knowledge of the Indian.

On top of this, most Indian tribes and individuals are ill-equipped financially and otherwise to fight their own battle in the courts. It seems to me that there must be special treatment of the Indian rights in order to safeguard against this special protection of the trustee.

We oppose this departmental amendment and urge to the committee to retain the straight 11-year across-the-board extension.

As always, we will be grateful for the crumbs from the trustee's table. If the committee sees fit to follow the lead of the House and adopts the Department's recommendation, we must accept it as better than nothing.

We do raise one question. The Department's substitute bill proposes that the one-shot 5-year extension shall apply to appropriate claims which "accrue on the date of enactment of this act." Does this refer to the 1966 act or to this legislation, if enacted? If the latter, then our only objection is that cited above.

We have one last recommendation. Prior to the 1966 act, no statute of limitation ran against the claims in question here. The trustee had all the time in the world to adequately administer their trusteeship in this respect, to seek out third-party encroachment or damage to the trust estate and bring an action on behalf of the Indian. Yet, when asked if there are any claims which would be cutoff by the 1966 act, they shrug their shoulders and say, "Well, we don't know. Maybe there are. There must be."

We strongly urge the committee to write into the legislation or, at least, to make clear in the legislative history, that the Department be required to report within a reasonable time, say 6 months to a year, whether the beneficiaries of their trust have existing claims against third parties and what steps they are taking to act upon these claims. This legislation will do us little good if the trustee is permitted to continue to ignore its responsibility in this regard.

This completes my statement, Mr. Chairman. Thank you.

Senator FANNIN. Thank you, Mr. Ducheneaux.

Senator Anderson, do you have any questions?

Senator ANDERSON. Do you know if there has been any progress made in the last 10 years on titles of this nature?

Mr. DUCHENEAUX. It seems from the testimony of the Department there has been some progress made in the last year. As I said in my

testimony, prior to 1966, there was no statute of limitations running against these particular claims.

Senator ANDERSON. What happened to these claims?

Mr. DUCHENEAUX. It seems to me nothing has happened beyond the 10 years.

Senator FANNIN. You say that the fault lies with the Department not notifying Indians about section 2415. Aren't national Indian organizations remiss as well?

Mr. DUCHENEAUX. We were remiss. We were remiss in not being aware of the act over the last 6 years, but we were not the trustee.

Senator FANNIN. I realize that, but at the same time, you are a responsibility party along with the trustees.

Mr. DUCHENEAUX. The only excuse I have there, we are ill-funded We can't maintain a staff of attorneys to do this.

Senator FANNIN. I think with the organization you have and the number of tribes involved that it would be a matter of your responsibility or your organization's responsibility to notify your members and assist them in bringing forward their just rights.

Mr. DUCHENEAUX. It is our responsibility as far as our organization is concerned, and not only our responsibility, but something we want to do, and I say again, we are very ill-funded to do this kind of effort.

Many tribes have attorneys, that is true, and some of the larger tribes maintain Washington-based attorneys in addition to local counsel. Some tribes have no money whatsoever to retain counsel on a continuing basis, and in some cases on a one-case basis.

We are all remiss in this thing, but I think the primary party that is remiss is the trustee.

Senator FANNIN. Thank you, Mr. Ducheneaux.

Senator ANDERSON. Since you are all at fault, what should have been done?

Mr. DUCHENEAUX. I think what should have been done, is what should have been done not 10 years ago, but 100 years ago. The Department of Interior and BIA should have taken extensive action. There wouldn't have been these kinds of claims if the day-to-day trusteeship of the Department of Interior was carried on effectively, but it was not.

Maybe it was because of a lack of funds, I don't know. The fact of the matter is they have done a very poor job down through the years. That is why these claims are all stacked up. That is why you have 50-year claims, because they didn't do the job then.

Senator ANDERSON. Are there any Indian lawyers now practicing?

Mr. DUCHENEAUX. I am an Indian lawyer, but I am not practicing. There may be four or five Indian lawyers in private practice. I don't know of any of them who have tribal clients.

There are numerous Indian lawyers now, but most of them are involved in legal aid work or like myself. I know of very few in the private practice of law.

Senator FANNIN. Thank you, Mr. Ducheneaux.

Mr. DUCHENEAUX. Thank you, Mr. Chairman.

Senator FANNIN. The next witness is Webster Two Hawk, president of the National Tribal Chairmen's Association.

We are pleased to have you here today and look forward to your testimony.

STATEMENT OF WEBSTER TWO HAWK, PRESIDENT, NATIONAL TRIBAL CHAIRMEN'S ASSOCIATION

Mr. Two Hawk. Thank you, Mr. Chairman.

My name is Webster Two Hawk, the recently elected president of the National Tribal Chairmen's Association, and I appreciate the opportunity to appear here today to support the enactment of S. 3377, a bill to extend the time for commencing actions on behalf of an Indian tribe, band, or group.

The bill amends the act of July 18, 1966 (80 Stat. 304), by extending the statute of limitations imposed by that act on tort or contract suits brought by the United States on its behalf and in carrying out its trust responsibility to the Indians.

The act of July 18, 1966, added sections 2415 and 2416 to title 28 of the United States and through those sections imposed a 6-year statute of limitations that is effective from the date of accrual of the cause of action with certain exceptions and provisions for tolling the time limitation.

One of the exceptions is provided for in subsection (g) of section 2415, which provides that any right of action subject to the provisions of section 2415 which accrued prior to the date of enactment. Without the enactment of this bill, all Indian claims that fall under the provisions of section 2415 which accrued prior to the date of the enactment of the act of July 18, 1966, and included in those claims are some very complicated and substantial claims for damages, will be barred from litigation after October 18, 1972, the limitation period as extended by the act of July 18, 1972 (86 Stat. 499).

I am here today to express to this committee the deep concern that Indians feel about the possibility of their being barred from the recovery of damages for many wrongs they have suffered. The failure to extend the time would work an injustice on Indian people and might mean the loss of a considerable sum of money legally due under the trust statutes, and badly needed by Indian tribes. This loss would occur through no fault of the Indians themselves.

Some of the claims covered by the act of July 18, 1966, have been identified and suits have been brought but there are still a number of such claims that needed to be identified and evidence prepared to support the claims in court.

This activity will take time and unless legislation to extend the time is passed, there will be no time. Failure to extend the time would be looked upon by Indians as just another trick to deprive them of their just rights. We hope this will not happen.

We have studied the Interior Department's report on S. 3377 and the amendments suggested in that report. The first amendment narrows the effect of the extension of the statute to those claims that would be barred as of July 18, 1972, by the act of July 18, 1966, instead of establishing an 11-year statute of limitations for all Indian claims arising under 28 U.S.C. 2415.

The second amendment proposed by the report of Department of the Interior makes the extension of time applicable to Indian tribes, bands, and groups, and to individual Indians whose land is held in trust or on restricted status. S. 3377 would extend the statute of limitations only for Indian tribes, bands, or groups.

We support both of the amendments recommended by the Department of Interior. Further, if the committee adopts the recommended amendments, S. 3377 would then conform to the bill passed by the other body.

Thank you for the opportunity to appear here today and endorse this legislation.

Senator FANNIN. Thank you, Mr. Webster Two Hawk.

Senator ANDERSON. Are any of the Indian tribes supporting this bill?

Mr. Two HAWK. Yes, the consensus of the Indian tribes today are in support of this bill.

Senator ANDERSON. Are you worried about the previous Indian settlements?

Mr. Two HAWK. I am sure I will follow it in the same line of thinking as Mr. Ducheneaux. Indian tribes have been made aware recently of the opportunities of going after their claims and this is only recently, and again I would agree that we have not been made aware of what are some of the resources that we have.

And secondly, I certainly will agree, that we didn't have the legal counsel in the past and we still don't have legal counsel, and this is why we are looking to the Department of Interior, our trustee, to inform as well as to help us in this matter.

In the past, some of us may have been aware, but in a very limited way and so I would say that certainly the responsibility should have been with the trustee in informing us so we can follow any recourse we may have.

Senator ANDERSON. Who are the trustees?

Mr. Two HAWK. For the Indian tribes, the Department of the Interior.

Senator ANDERSON. Are they all of the tribes' trustees?

Mr. Two HAWK. All of the tribes that I represent certainly look to the Department of Interior as their trustee, and of course they are in fact that.

Senator FANNIN. I think to expand on what Senator Anderson said, there seems to have been a breakdown in communication from the standpoint of leadership of the Indian organizations to the individual tribes. We obviously have this effort being made at the last moment and we are concerned about why, over a period of time, more hasn't been done. There doesn't seem to have been communication involved to inform the Indian tribes of their rights.

Is that something you feel is being corrected?

Mr. Two HAWK. I would like to say this, Mr. Chairman. the National Tribal Chairmen's Association has been formed just a little over a year ago specifically to help in this area. Especially since we represent the tribes that are recognized by the Bureau of Indian Affairs, and as such, we feel there is a great gap of communications like you said, and we feel like we are trying to set ourselves up so that we can expedite and if need be to work with, consult with and pressure, if need be, the Department of Interior to do their job and we offer this as our position.

Senator FANNIN. Thank you.

Senator ANDERSON. Does your membership include Indian tribes only?

Mr. Two HAWK. Yes, only federally recognized Indian tribes.

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Senator ANDERSON. What about the Laguna Indians?

Mr. TWO HAWK. They are entitled to be members, and I am pretty sure they have joined.

Senator ANDERSON. Are you certain?

Mr. TWO HAWK. I can check it out, sir. But the membership is open to all Indian tribes. I am aware there are 144 tribes that are official members of this group.

Senator ANDERSON. I am aware that the Lagunas are a well-represented group.

Mr. TWO HAWK. We don't mean as an association to preclude any individual tribes to represent themselves if they have the means, an open organization, an association of Indian tribal chairmen, and we feel this is an official body that has a special relationship with the Department of Interior.

Senator ANDERSON. A short time back, there were laws trying to make sure that——

Senator FANNIN. Do the tribes have freedom of opportunity to join your organization?

Mr. TWO HAWK. That's right, it is a matter of choice.

Senator FANNIN. And they are tribes recognized by the Bureau of Indian Affairs?

Mr. TWO HAWK. Yes, we have a special trustee relationship to 230-some tribes. It is open to all who wish to join.

Senator FANNIN. Thank you, very much.

Mr. TWO HAWK. Thank you, Mr. Chairman.

Senator FANNIN. The next witnesses will be the attorney's panel, and there are three attorneys here: Arthur Lazarus, Marvin Sonosky, and Charles A. Hobbs. We welcome you gentlemen here this morning.

Mr. LAZARUS. Mr. Chairman——

Senator FANNIN. One of our fine attorneys from Arizona, Simpson Cox, is here.

Was it your desire to be in on this panel?

Mr. Cox. No, Mr. Chairman, I did not come to testify. I came merely to listen. The tribes in Arizona do favor this bill.

Senator FANNIN. Thank you.

Mr. Lazarus, will you proceed.

Mr. LAZARUS. Yes, Mr. Chairman.

STATEMENTS OF ARTHUR LAZARUS, JR., MARVIN J. SONOSKY, AND CHARLES A. HOBBS, ATTORNEYS' PANEL

My name is Arthur Lazarus, and I am a member of the law firm Fried, Frank, Harris, Shriver, & Kampelman in Washington, D.C. On my left is Marvin J. Sonosky, and on my right is Charles A. Hobbs, a member of the firm of Wilkinson, Cragun & Barker.

What the three of us have in common is that we all represent Indian tribes throughout the United States, ranging from New York to Alaska, the Southwest and Middle West, a highly representative group of Indian tribes in this country.

We are here to express our basic support of S. 3377, a bill to extend the time for commencing actions on behalf of Indian tribes, bands, or groups.

I think it is desirable at the beginning of our presentation to make clear once again the point made in response to Senator Anderson's

question, that these claims that are the subject of the legislation before the committee are claims by the United States on behalf of Indian tribes against third parties.

These are not claims that the Indian Claims Commission could hear. It does not have jurisdiction to hear these claims. These are claims that would be filed in the Federal district court.

Senator FANNIN. I think that was made plain.

Mr. LAZARUS. It is important to note that if the United States does not carry out its trust responsibilities to the Indians and does not file these claims against third parties, then the United States might be subject to liability for failure to fulfill its duties as trustee; then it might be involved in a monetary sense.

Senator FANNIN. There is a dual responsibility in this regard. The attorneys also have a responsibility, and the tribal groups and organizations have a responsibility. I think we all must recognize that is a true picture of what is happening in this regard.

When you talk about a trust responsibility, at the same time you wouldn't feel you were carrying through with your responsibility if you didn't do everything possible to bring this to the attention of the Department.

Mr. LAZARUS. I realize there are responsibilities on the part of all of the advisers to the tribe, responsibilities on the part of the Department, and, of course, responsibilities on the part of Congress, too.

Senator FANNIN. Yes.

Senator ANDERSON. I was anxious to hear some testimony about the cases you are handling. I have watched for years your firm and others, and they have competently advised the Indians.

Mr. LAZARUS. If I understand the Senator's question, it was that the attorneys in the past have been advising the tribes, and I think his question probably is how is it that these claims have not yet been handled; is that the thrust of the question, Senator?

Senator ANDERSON. That is really it. I also want to say I am sincere about how the attorneys performed, they have done a very good job.

Mr. LAZARUS. I thank the Senator for the compliment. I think on the question of how did 5 years go by after the passage of the 1966 act, without anything having been done, I think that question is answered if we look at the legislative history of the 1966 act.

Now, we have—the three of us have submitted a joint statement, and I would very much appreciate the committee entering that statement in the record as if it had been given.

Senator FANNIN. The complete statement will be made a part of the record.

Mr. LAZARUS. I would like to summarize it because in that statement we go into some detail on the legislative history of the 1966 act, and it is evident from the legislative history of the 1966 act that although the language of the statute referred to Indians, it was not contemplated that the consequences that the act brought about in fact would occur.

In other words, at the hearings there was no discussion of the fact that this is legislation that will set a statute of limitations on

claims by the United States on behalf of Indian tribes in terms of the tribes' own interest.

The hearings on the 1966 act were held before a subcommittee of the Judiciary Committee. The legislation never came before the Interior Committee in Congress, where legislation affecting Indians normally is heard.

There were hearings by a subcommittee of the Judiciary Committee on the House side. There was no debate on the floor of the House and the bill was passed. There were no hearings on the Senate side and there was no debate on the floor of the Senate, and therefore nothing in the public record which would give an indication that Indian tribes were vitally affected by the legislation as it turns out they were.

The legislation is not codified in any place involving Indian land. It is codified only in the Judicial Code and the title deals with claims by the United States. It does not speak of claims by the United States on behalf of Indian tribes.

I think that record at least gives us an explanation of why some years could have gone by without the committees of Congress, the Department of the Interior, the Indian organizations, and we who represent Indians being aware that the statute of limitations, in fact, was running.

Senator FANNIN. Who discovered this?

Mr. LAZARUS. The first I knew about it was the memorandum of Mr. Gershuny circulated last August, and which I saw in December, and it was not very long after that that I was in touch with your office, Senator.

Mr. HOBBS. I would like to say in our law firm, the first I recall this matter coming to our attention was just about the same time Mr. Lazarus said. I don't recall being aware of this for the last 5 years until last year.

Mr. LAZARUS. I think we should also focus on the departmental recommended amendments which have been incorporated in the legislation as passed by the House of Representatives.

With respect to the second amendment, the amendment which would include claims on behalf of individual Indians as well as claims on behalf of tribes, bands, or groups, we completely endorse that proposed amendment.

There is one technical change, I think, that has to be made in the legislation because of the extension bill that has been passed.

The 90-day extension bill did part of the what the Department's second recommended amendment would do. So that instead of adding the second recommended amendment at the end of the existing section of the statute, we must substitute the second recommended amendment for language that was added in the bill passed on July 18. That is just a technical form of change.

But insofar as the substance is concerned, we can completely endorse that amendment. And I would like at this time also to subscribe and join in the testimony of the departmental witness who said that he did not see on the basis of the Supreme Court cases any constitutional problem by reopening the forum, notwithstanding the fact that the statute of limitations temporarily ran insofar as individual claims were concerned.

That matter came to my attention yesterday as I was reading over the departmental report and the bills that were passed in July and there was that gap dealing with individual claims, but upon reflection my thought is that the statute of limitations does not destroy a claim. It does not say, "That from this day forth the claim does not exist." All the statute of limitations says is that, "from this day forward you don't have a court in which you can take your otherwise legitimate claims," and if the Congress reopens the court, there is no constitutional objection.

Senator FANNIN. Mr. Lazarus. There is question of whether counter claims of third parties are possible? Do you want to comment on that?

Mr. LAZARUS. Yes. We had a little side discussion when that question was raised in the early testimony and the consensus we lawyers reached without having the lawbooks available to us was that a cross-claim could be filed. In other words, if the United States on behalf of a tribe sued a railroad on a particular transaction, and the railroad had a claim back against the tribe arising out of that same transaction, the railroad could file that claim and that would be called a cross-claim and that the sovereign immunity would be waived for the purposes of hearing that cross-claim.

Senator FANNIN. Are you qualifying your opinion in this regard by saying without reference to lawbooks?

Mr. LAZARUS. This is my belief without having a chance to go back and check it in the books. But I think this would be a general principle, that if I go into court on a certain transaction I cannot claim I am immune from suit on that same transaction. I think there was a Supreme Court case on that involving the Republic of China in a suit with the National City Bank, and this is really searching my memory because this is not my field of law, and it was about 20 years ago.

The Republic of China sued the National City Bank and the bank filed a cross-claim, and the Republic of China said: "You can't sue us. We are immune from suit." And the Supreme Court said, "No; you came into court on that same transaction, you are responsible."

That is substantially different from the case where the United States on behalf of a tribe sues a railroad because the railroad does not have a legitimate right-of-way and is, therefore, trespassing. The railroad may not counterclaim on a contract unrelated to its right-of-way. That is a different action and a different case.

Mr. SONOSKY. I agree with that thoroughly. A counterclaim is simply a lawsuit in reverse and therefore the protection of sovereign immunity extends to a counterclaim but not a cross-claim.

Mr. HOBBS. I, too, concur in the conclusion stated by Mr. Lazarus. The general principle I know is correct. I am sure the cases would support it.

Mr. Lazarus didn't mention the defense of the statute of limitations. My understanding of the law is that not only sovereign immunity is lifted if the railroad had a cross-claim, but any defense of the statute of limitations would be lifted.

Senator FANNIN. This is also the time involved with statute of limitations, what would be your opinion on that?

Mr. LAZARUS. What is sauce for the goose is sauce for the gander. If the statute is extended for suits against the third party, by the same token it is waived for the cross-claim.

Senator FANNIN. All right.

Mr. LAZARUS. The second recommended amendment by the Department on the first reading was or seemed acceptable, but upon rethinking I must confess that it creates a problem in that there is a potential for having a gap in a lawsuit.

The potential arises as a result of this situation.

The Department is suggesting that we have a 5-year extension of the statute of limitations only with respect to claims that accrued prior to July 18, 1966. And that with respect to claims that accrued after July 18, 1966, we stick with a 6-year statute of limitations.

That, as I say, on the first reading, seems to be reasonable, because the claims that accrued after July 18, 1966, are current, the statute in most of them has not yet run.

As a matter of fact, it has not yet run on any of them because of the 90-day extension bill, and these are claims that may have accrued in 1967, 1968, or 1969 which have but 1, 2, or 3 more years under the statute to run, and, therefore, in the Department's view, and in a certain sense it made sense, there was still time to file those claims and no additional extension was necessary.

A complication comes up, however, because of the nature of the cases that are subject to the statute of limitations, and trespass is the best example. Trespass is a continuing wrong; if the railroad has been on the reservation without a legitimate right-of-way for 20 years, you have a cause of action for trespass which existed prior to 1966, and you also have a cause of action that is continuing up to this day.

The problem that comes about with the departmental recommendation which extends the statute for 5 more years on the part of that cause of action that accrued before 1966, but does not have any extension after 1966, is this:

Suppose suit is filed. Suppose this legislation passes in the form recommended by the Department and now passed by the House of Representatives and suit is filed against a railroad for trespassing 3 years from today. That suit will legitimately include all of the damages accrued up to 1966, then we will have a 3-year gap, where a 6-year statute of limitations applies, not an 11-year one, and a 3-year gap of damages which are barred and then we will pick up, say, from 1969, and in 1975, we have a case again.

I think there is an unintentional gap caused by the departmental recommendations with respect to any one of these cases where there is a continuing wrong and, as I say, trespass in the most obvious example.

So my feeling is there should probably be a blanket 11-year statute of limitations on Indian claims so we will cover that situation.

I might say our experiences so far in defining these cases is that most of them will be trespass cases.

Senator FANNIN. To try to determine just what we have involved here, you have three law firms here to handle these cases. How many cases or causes of action will be barred if this bill is not enacted, from your law firms, and try to evaluate then how many will be involved nationally.

Mr. LAZARUS. The difficulty is that we have identified some cases which we will recommend be brought. The difficulty is with respect to the cases pre-1966. One of the reasons that the cases have not been brought to date is that the facts have not been uncovered.

I would like to answer your question. I think the departmental witness said that they now had a possible 100 cases. I know the investigation that they made, and I know the responses they have been getting from the field have been in terms of here are four or five possible cases. I think when they are investigated those four or five cases may turn into one or two, and yet there may be other cases we do not know about.

I find it very difficult to quantify how many cases are involved here, but what little I know is that it is basically going to be trespass cases.

Mr. SONOSKY. Mr. Chairman, I have one or two cases, but the real reason we don't know is because the control of the tribal property is in the hands of the United States through the Department of Interior.

They have been managing that property for some 150 years. I agree fully with Mr. Duchenaux, it is hard to believe this, but they do not have an inventory of the property they are managing. If you do not have an inventory and do not know what you are managing, it is almost impossible where you don't know what is going on.

We have a situation on the reservation where Indian land is being used by non-Indians. But to make that determination through investigation, it has never been determined.

These are the kinds of things that the Department must do and has not yet done. What the Department is doing is simply soliciting information through its superintendents, who are not lawyers, and through requests to the tribal councils who are not equipped to give the information, because they do not have the facts.

They might suggest that someone is using a piece of land that they think belongs to the tribe. Then the Bureau might follow that up to see if there is validity to the suggestion.

Senator FANNIN. It is a complex question. Would this bill really accomplish what we are talking about? Certainly it would not provide for an inventory. It would not provide for it.

Mr. SONOSKY. All this bill is doing is keeping the doors open, and with a background of a history of 150 years where nobody has been paying attention to our property, I don't think it is fair to close those doors without taking an aggressive position and going out and cleaning this situation up.

My own feeling about this is that this bill should be treated as if it were a brandnew piece of legislation never before considered by Congress, because so far as the Indians are concerned, until it got to this committee, it has never before been considered by Congress.

When the Department of Justice got to the Judiciary Committee, you heard this morning that the attorney came from the Civil Division of the Department which handles cases in the Court of Claims, non-Indians.

The Department of Justice also has a division which is called National Resources, and the Indians are included in that.

Presumably that division should have been represented before the Judiciary Committee, had it been brought even before that division in the Department of Justice.

I have been before the Judiciary Committee on Indian bills and when they know what it is, they give fine attention to Indian bills.

I am not trying to criticize that committee. I feel there is a total unawareness of it.

Senator FANNIN. Anything further, Mr. Lazarus?

Mr. LAZARUS. Yes. Senator Anderson in his questioning of the departmental witness asked if he knew of any claims for the Navajo Tribe, and I would like to read into the record a paragraph of a letter written by Phoenix counsel for the tribe, to the regional solicitor in which he suggests several claims that the Navajo Tribe might have which should be filed by the United States. I think this illustrates the nature and age and inactivity on the part of the Department.

I quote:

> In the early 20th Century a number of checkerboard additions were made to the Navajo reservation. It appears for some years thereafter, the railroads continued to hold half of the checkerboard in many areas, often leasing the land out to cattle ranchers. Navajo stockmen were frequently excluded from their half of the checkerboard, and it should be possible to develop claims in quantum meruit against the railroad on behalf of the grazing fees received these years.

A general outline of the relevant data is contained in "Mosk, Land Tenure Problems in the Santa Fe Railroad Grant Area," University of California Press, 1944.

This is a publication available now for 28 years and the Department has not yet followed through on those claims.

Senator FANNIN. Thank you very much.

Is there anything further?

Mr. LAZARUS. That concludes our statement.

Senator FANNIN. Fine.

Thank you very much, gentlemen.

(The prepared statement, a letter to Senator Jackson, and a supplemental statement by Mr. Lazarus follow:)

JOINT STATEMENT OF ARTHUR LAZARUS, JR., MARVIN J. SONOSKY AND CHARLES A. HOBBS

Although members of different law firms, we each serve as counsel for a number of Indian tribes located throughout the United States, and have a common interest in the legislation before the Subcommittee for consideration today. Specifically, we appear on behalf of our respective clients to support S. 3377, a bill to extend the time for commencing actions on behalf of an Indian tribe, band or group. In this regard, we have examined the amendments to S. 3377 recommended in the report of the Department of the Interior, and wish to go on record as also endorsing these proposed changes. If the bill, with such amendments, were approved by the Committee, S. 3377 then would be identical to H.R. 13825, which was favorably reported by the House Judiciary Committee on July 31, 1972, and was passed by the House of Representatives on August 14.

The genesis of S. 3377 lies in the Act of July 18, 1966.[1] That act waived, for certain purposes, the ancient common law principle that general statutes of limitation are not applicable against the sovereign or, in other words, do not operate to limit the time in which the sovereign itself may bring suit upon government claims. The 1966 statute provided essentially that any action founded upon contract, brought by the United States and seeking recovery of money damages from private parties, would have to be filed within six years from the date on which the right of action accrued.[2] Any action founded upon tort, brought by the United States and seeking recovery of money damages, would have to be filed within three years from the date on which the right of action accrued,[3]

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[1] Public Law 89–505, 80 Stat. 304, 28 U.S.C. § 2415.

[2] 28 U.S.C. § 2415(a). Any right of action subject to the 1966 law which accrued prior to July 18, 1966, the date upon which the Act was passed, would be deemed to have accrued on that date. 28 U.S.C. § 2415(g).

[3] 28 U.S.C. § 2415(b).

while other actions founded on tort also were placed under a six-year limitation period. Among the latter claims were actions "to recover damages resulting from trespass on lands of the United States, including trust or restricted Indian lands" and "actions for conversion of property of the United States." [4]

The intent of the 1966 Act, as evidenced fully by its legislative history,[5] was to make the United States, in suing to protect its own interests, subject to the same six-year contract and three-year tort limitation periods as are applicable to suits brought by private litigants against the United States. The Department of Justice's representative at the House hearings on the 1966 Act testified that the equality of treatment contemplated by Public Law 89–505 was required by modern standards of fairness and equity in that many government claims arise out of activities closely resembling commercial activities, and that these claims are often indistinguishable from private claims made by private individuals against the Federal Government.[6]

The legislative history of the 1966 Act contains no discussion of the fiduciary duty of the United States to bring suit to protect Indian interests when necessary, or on the effect which the periods of limitation prescribed by the Act would have upon such suits. The only mention of Indians is in the Act itself which, as noted above, prescribes a six-year limitation period on tort suits seeking damages for trespass on lands of the United States, "including trust or restricted Indian lands." The brief references to this provision in the legislative history treat it as language dealing with government lands and public lands, and not as language involving the United States as a trustee for Indians.

In light of the purposes of the 1966 Act (combined with the absence of references to Indians in the agency and Committee reports), it is easy to speculate that, if the matter then had been called to the attention of Congress, the legislation might have been revised to cover only suits by the United States to protect its own interests, in Indian lands or otherwise,[7] and not to suits by the United States on behalf of Indian tribes, bands or groups to protect Indian interests. The latter suits seldom arise out of governmental activities "closely resembling commercial actiivties," and clearly are not claims which are "indistinguishable from private claims made by private litigants against the Government." For the most part, such suits arise from the inactivity of he Federal Government in expeditiously protecting Indian rights, and private parties who carry on activity which might give rise to a suit by the United States on behalf of an Indian tribe know, or should be held to know, that their activity not only affects interests of the United States, but also interests of those to whom the Government solemnly has pledged its protective powers. Nothing in the Act or its legislative history suggests that the failure of the Government to fulfill its pledge to Indians in particular cases, for whatever reason, be it laxity or mere inability to identify the wrong in timely fashion, should inure to the benefit of third parties.

Notwithstanding what Congress might have done six years ago if the full situation were known, the fact remains that Public Law 89–505 does expressly refer to trust or restricted Indian lands. Accordingly, either the language of the Act must be clarified to exempt suits by the United States on behalf of Indian tribes from application of the limitation periods, or new limitation periods should be established which would provide the United States with sufficient time to investigate existing claims and file suit thereon as appropriate. S. 3377 adopts the latter approach, and would establish an additional five-year period for this purpose beyond the time prescribed under the 1966 Act.[8]

The first question which arises, of course, is why additional time should be needed for the Federal Government to file claims on behalf of Indian tribes

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[4] *Id.*

[5] Hearings on H.R. 13650–52, 14182 before Sumcommittee No. 2 of the House Committee on the Judiciary, 89th Cong., 2d Sess. (1966); H.R. Rep. No. 1534, 89th Cong., 2d Sess. (1966); S. Rep. No. 1328, 89th Cong., 2d Sess. (1966); 112 Cong. Rec. 12262–63, 14378–81 (1966).

[6] Hearings, supra, at note 5.

[7] The rule that the United States acts in Indian affairs on behalf of itself and as trustee for Indian interests is well established. See, *e.g.*, *Brewer Elliott Oil & Gas Co.* v. *United States*, 260 U.S. 77 (1922). The Supreme Court often has held that these interests are separable. See, *e.g.*, *United States* v. *Minnesota*, 270 U.S. 181, 194 (1926); *Cramer* v. *United States*, 261 U.S. 219, 232–33 (1923).

[8] In its report on S. 3377, the Department of the Interior has suggested that the five-year extension apply also to actions by the United States on behalf of Indian individuals in connection with trust or restricted lands.

when the 1966 statute ostensibly gave the United States three to six years to do that job. We submit that the circumstances surrounding passage of the 1966 Act, and subsequent events, indicate not only that the Department of the Interior was unaware of the potential applicability of the Act to suits on behalf of Indians, but also that the tribes themselves and other persons involved in Indian affairs generally had little reason to learn of its impact.

Hearings on the 1966 Act, for example, were held before a House Judiciary Subcommittee, and not before the House Subcommittee on Indian Affairs. The Department of the Interior was not called to testify before the Judiciary Subcommittee, even though that Department is the governmental agency which is charged by Congress with the primary responsibility to protect Indian lands and resources and to fulfill other fiduciary obligations of the United States to Indian tribes. Indeed, the sole witness before the Judiciary Subcommittee was a representative of the Department of Justice who apparently did not contemplate, and certainly did not mention, that Public Law 89–505 might be made applicable to suits by the United States on behalf of Indian tribes. No hearings were held in the Senate in connection with the passage of Public Law 89–505, and the law was enacted without any debate on the House and Senate floors. The 1966 Act also was not publicized, codified or referenced as having any effect on Indian rights.[9]

The three-year limitation period contained in Public Law 89–505 had expired, and over five years of the six-year limitation period had elapsed, before the Solicitor of the Department of the Interior advised the Commissioner of Indian Affairs of the potential applicability of the 1966 Act to suits by the United States on behalf of Indian tribes. The Solicitor, in a memorandum dated August 24, 1971, informed the Commissioner that on July 18, 1972, it would no longer be possible for the United States to sue upon certain tort claims on behalf of Indian tribes which had accrued prior to July 18, 1966. The memorandum also noted that it was already too late to sue on other tort claims which were barred by the 3-year limitation period. The Commissioner, on September 3, 1971, forwarded the Solicitor's memorandum to Interior personnel in the field requesting that all claims which still could be brought by the July 18, 1972, deadline be investigated expeditiously. Needless to say, many complicated and substantial claims for damages were not susceptible of full investigation within the remaining time period.

In view of the failure of the Federal Government during the past six years to file any appreciable number of suits on behalf of Indian tribes, a brief characterization of the outstanding claims would seem appropriate. Our experience has been that the bulk of such claims are cases where the United States has failed properly to survey reservation boundary lines, and non-Indians have trespassed on the reservation, frequently removing valuable resources. Other cases which have come to light in recent months involve violations of lease agreements and State appropriations of Indian lands without the consent of Congress. The most significant point to make in this connection, however, is that, because of past inaction, we do not know today exactly how many claims may exist and what their nature may be. That is why legislation such as S. 3377 is so necessary.

A five-year extension of the periods of limitation contained in Public Law 89–505 should be adequate, with the Department of the Interior now aware of the time limitations, to investigate and file suit as appropriate on existing Indian claims. Handling of these claims would be expedited, of course, if the Interior Department were to assign to specific personnel the sole task and duty to perform the investigation and make recommendations based thereon. (The Department has done this recently with respect to Indian water rights by establishing the Indian Water Rights Office). Investigation of claims also would be facilitated by Congress' appropriating funds, which the Department of the Interior has requested, for land surveys and related expenses. The present potential for speedy and effective protection of Indian rights by the Government has never been greater and, as the Department of the Interior stated

[9] The Act was entitled "Time for Commencing Actions Brought by the United States" and was codified in the "Code of Judiciary and Judicial Procedure," Title 28, United States Code, without any cross-reference in Title 25 of the United States Code which deals with "Indians."

in its report on the pending legislation, "[i]t would be most unfortunate for any Indian claims to be barred by the statute of limitations at a time when the means for discovering and prosecuting such claims are in the process of being markedly improved." [10]

FRIED, FRANK, HARRIS, SHRIVER & KAMPELMAN,
Washington, D.C., September 18, 1972.

Hon. HENRY M. JACKSON,
Chairman, Committee on Interior and Insular Affairs,
U.S. Senate, Washington, D.C.

DEAR SENATOR JACKSON: In the light of questions asked during the hearing last Tuesday morning, I am submitting with this letter a supplemental statement on S. 3377, a bill to extend the time for commencing actions on behalf of an Indian tribe, band or group.

Briefly summarized, the cases cited in the enclosed statement make clear that, when the United States files suit against a private party, sovereign immunity and the statute of limitations are waived on any counterclaims by such party arising out of the same act or transaction up to the point of recoupment or, in other words, up to the point the defendant's recovery equals any recovery by the government. Although the cases indicate a split in authority on the issue of whether a defendant may obtain judgment over and above the government's recovery on a counterclaim which otherwise would be barred by the statute of limitations, the fact remains that, even assuming such awards are not allowed, extending the time for the United States to file suit does not place the prospective defendant whose claim currently is barred in any worse position than he already occupies. In short, passage of S. 3377 would not give the United States any new or special advantage over defendants in future law suits and, indeed, would generally continue the relationships among parties to such litigation which are established under existing law.

Secondly, the testimony presented at the Subcommittee hearing last week brought out that the substitute language for S. 3377 recommended by the Secretary of the Interior and incorporated in H.R. 13825, as passed by the House of Representatives, contains two defects, one substantive and the other a drafting oversight. With respect to the latter flaw, the Departmental witnesses simply failed to take into account the provisions added to 28 U.S.C. § 2415 by Public Law 92–353, approved on July 18, 1972. With respect to the former point, the Secretary's suggestion that the statute of limitations be extended for five years only on claims which accrued prior to July 18, 1966, overlooks the point that no meaningful distiction can be made between claims which accured before and after such date, particularly since most of the cases which the United States is expected to file under the Act involve continuing trespasses.

For your consideration, I am enclosing a further proposed substitute for the text of S. 3377, which should take care of both of the foregoing problems. In the case of the drafting oversight, a slight revision in the form of the proposed amendment seems sufficient. With respect to the period during which an eleven-year statute of limitations should be applicable, I recommend that it be the time up to the approximate date when S. 3377 is enacted.

I would appreciate your making this letter and the enclosed materials a part of the formal record on S. 3377. In view of the October 16, 1972 deadline which now exists for filing claims, and the short remaining life of the 92nd Congress, I also urge that the Committee give prompt and favorable consideration to S. 3377, as revised on the basis herein set forth.

Respectfully submitted.

ARTHUR LAZARUS, Jr.

Enclosure.

SUPPLEMENTARY STATEMENT OF ARTHUR LAZARUS, JR.

At the Senate hearings on S. 3377, the question was raised whether a defendant in a suit by the United States on behalf of Indians or Indian tribes, brought within the time periods prescribed by S. 3377, as amended, might be barred by the doctrine of sovereign immunity, or by the shorter limitation

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[10] Report on S. 3377, dated June 26, 1972, p. 2.

periods applicable to suits against the government,[1] from asserting a counterclaim against the United States or a cross-claim against the particular Indian or Indian tribe. This memorandum is addressed to that question.

In suits by the United States, or an instrumentality thereof, a defendant is permitted to counterclaim or cross-claim or matters of recoupment,[2] but he may not secure an affirmative judgment against the United States on the counterclaim or cross-claim, unless the United States has waived its sovereign immunity with respect to the claims asserted by the defendant.[3] This principle was applied by the Supreme Court in *United States* v. *United States Fidelity and Guaranty Co.*,[4] a suit by the United States on behalf of two Indian tribes seeking royalties due to the tribes from a bankrupt estate. The estate cross-claimed against the tribes for a debt which involved more money than the claim sued upon by the United States, and the Court, while denying affirmative relief to the defendant, did permit recoupment to the extent of the amount of the United States' claim.

A defendant, therefore, in a suit by the United States always is permitted to seek recoupment based on the same transaction or occurrence on which the United States has sued. The mere fact that the United States is the party suing is deemed to be a waiver of sovereign immunity to the limited extent of recoupment. The Congress, however, has waived specifically its sovereign immunity from suits founded upon tort and contract,[5] and divergence of judicial opinion exists as to whether this waiver extends to counterclaims against the United States founded on tort or contract which seek affirmative relief. Some federal courts have granted affirmative relief on such counterclaims and others have denied such relief. The recent trend is towards granting affirmative relief in this regard, although the Supreme Court has not yet ruled on the question.[6] Neither the Act of July 18, 1966, nor the amendments to that Act contemplated by S. 3377, have any effect upon the question.[7]

S. 3377 would provide the United States with an additional five years, beyond the time period prescribed by the 1966 Act, in which to bring certain kinds of suits on behalf of Indian tribes. The question has been raised whether the shorter periods of limitation applicable to the same kinds of suits when brought against the United States would bar defendants from asserting counterclaims or cross-claims against the United States and the Indian or Indian tribe, in whose behalf the United States sues. As with the sovereign immunity question, a divergence of judicial opinion exists in the lower federal courts on this question also, and the Supreme Court has not yet rendered an opinion on the question. Again, the issue turns, in the majority view, on whether the counterclaim seeks affirmative relief or asserts matters of recoupment only.

In a comparatively recent case decided by the United States District Court for the District of Columbia, the court held that, if the United States does not sue on a tort claim within the time period in which the defendant could have sued the United States on the same claim, the United States waives the right to assert the statute of limitations against a defendant who interposes a counterclaim for affirmative relief based on the same occurrence on which the suit by the United States is founded.[8] This view finds some support in other jurisdictions,[9] but the majority view is that the period of limitation attaches to the

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[1] 28 U.S.C. § 2401.

[2] Recoupment is a demand, asserted by a defendant to diminish or extinguish the plaintiff's claim, which arises out of the same transaction or occurrence as the plaintiff's claim. *Bull* v. *United States*, 295 U.S. 247 (1935); *Frederick* v. *United States*, 386 F. 2d 481 (5th Cir. 1967). Recoupment is usually distinguished from assertion by way of counterclaim of independent claims, or matters of set-off, which arise out of a transaction different from that sued upon. *Frederick, supra; In Re Monongaheal Rye Liquors, Inc.*, 141 F. 2d 917 (2d Cir. 1945); *United States* v. *Dry Dock Savings Inst.*, 149 F. 2d 917 (2d Cir. 1945).

[3] *United States* v. *Shaw*, 309 U.S. 495 (1940); *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940); *Fed. Sav. & Loan Ins. Corp.* v. *Quinn*, 419 F. 2d 1014 (10th Cir. 1969); see also *Nat. City Bk.* v. *Republic of China*, 348 U.S. 356 (1955). By statute, in suits by the United States, a defendant also may prove a claim for a credit owing to him by the United States, and such a claim does not have to arise out of the same transaction or occurrence on which the original suit is founded. 28 U.S.C. § 2406; *United States* v. *Wilkins*, 19 U.S. (6 Wheat.) 225 (1821).

[4] 309 U.S. 506 (1940).

[5] 28 U.S.C. §§ 1346, 1491. *See, e.g., Aktiabolaget Bofors* v. *United States*, 194 F. 2d 145 (D.C. Cir. 1951).

[6] See discussion of cases in Moore's Federal Practice, ¶13.38 *et seq.*; 20 Am. Jur. 2d § 106.

[7] The 1966 Act specifically states that the time limitations contained therein do not bar counterclaims by the United States for damages arising out of the same transaction or occurrence upon which it is sued. 28 U.S.C. § 2415(f). The Act makes no reference to counterclaims against the United States.

[8] *United States* v. *Capital Transit Co.*, 108 F. Supp. 348 (D. D.C. 1952).

[9] *See, e.g., United States* v. *Southern California Edison Co.*, 229 F. Supp. 268 (S.D. Calif. 1964); *United States* v. *Southern Pacific Co.*, 210 F. Supp. 760 (N.D. Calif. 1962).

waiver of sovereign immunity and, therefore, once the limitation period has expired for an original suit by the defendant, on the transaction or occurrence which gives rise to the suit by the United States, the defendant may not counterclaim for affirmative relief, even in connection with that transaction or occurrence.[10] Apparently the defendant may, however, assert matters of recoupment by way of counterclaim to diminish the amount of, or defeat, recovery by the United States.[11]

In summary, therefore, in a suit brought by the United States on behalf of an Indian or Indian tribe, the defendant in all cases may assert, at the very least, matters of recoupment arising out of the same transaction or occurrence on which the suit is founded. This rule provides an equitable basis on which valid claims by defendants can reduce, or defeat, recovery by the United States on behalf of the Indian or Indian tribe, notwithstanding the doctrine of sovereign immunity and notwithstanding the fact that the period of limitation may have run on the counter claim if asserted in an original action. S. 3377 would have no effect upon this recoupment right of the defendant, and the bill, therefore, requires no revision to provide such protection.

Secondly, as the decided cases indicate, the law has not yet been finally settled on the question of whether a defendant may obtain an affirmative recovery against the United States, or an Indian tribe on whose behalf it is suing, through a counterclaim which otherwise would have been barred by the statute of limitations. Assuming, for the sake of argument, that the courts ultimately rule against the allowance of affirmative recoveries, a prospective defendant still would be placed in no worse position than he previously occupied, since, in the absence of a suit by the government, the statute of limitation already would have run on his claim. Thus, S. 3377 would not create a special disadvantage for defendants in litigation with the United States, and the bill needs no amendment to preserve the relative right of the parties.

AMENDMENTS TO S. 3377

Strike all after the enacting clause and insert:

That Title 28 of the United States Code, section 2415, as amended by the Act of July 18, 1972, Public Law 92–353, 86 Stat. 499, be amended further as follows:

(a) The second proviso at the end of subsection (a) shall be stricken, and the following provision shall be added thereto: "*Provided further*, That actions for money damages brought by the United States for or on behalf of a recognized tribe, band, or group of American Indians, or on behalf of an individual Indian whose land is held in trust or restricted status, which either accrued on the date of enactment of this Act in accordance with subsection (g), or which accrued at any subsequent time up to October 1, 1972, shall not be barred unless the complaint is filed more than eleven years after the right of action accrued or more than two years after a final decision has been rendered in applicable administrative proceedings required by contract or by law, whichever is later."

(b) The words "may be brought within six years and ninety days after the right of action accrues" appearing after "relating to allotted trust or restricted Indian lands" shall be deleted from the proviso in subsection (b), and the following words shall be substituted therefor: "or on behalf of an individual Indian whose land is held in trust or restricted status, which accrued on the date of enactment of this Act in accordance with subsection (g), or which accrued at any subsequent time up to October 1, 1972, may be brought within eleven years after the right to action accrues."

Senator FANNIN. Mr. Cox.

Mr. Cox. Thank you.

STATEMENT OF Z. SIMPSON COX, CHIEF GENERAL COUNSEL, GILA RIVER INDIAN COMMUNITY, ARIZONA PIMA AND MARICOPA

Mr. Cox. I am chief general counsel for the Gila River Indian Community, and I would like to put something in the record that

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[10] *See, e.g., United States* v. *Wilkes-Barre Transit Corp.*, 143 F. Supp. 413 (M.D. Pa. 1956); *United States* v. *Bristow*, 142 F. Supp. 601 (E.D. Va. 1956).

[11] *See, e.g., United States* v. *Webb Trucking Co.*, 141 F. Supp. 573, 575 (D. Del. 1956); *see also Wilkes-Barre Transit Corp., supra* note 10, at 415.

Governor Allison mentioned in the Department of Interior and Justice, both, yesterday.

They first knew of this limitation in the August communication from the solicitor which we received in my office of Cox & Cox.

Governor Allison mentioned to both that it is only in the year 1972, and a month or two before, there has ever been filed, so far as I can remember, an active lawsuit for and on behalf of the Indian interest by the trustee.

And that they presently, both the Department of Justice and the Department of Interior, have expressed willingness and eagerness to fulfill their trustee responsibility and the Indians on Gila River Reservation are thankful to both of these departments for that attitude, and I want to show that on the record.

Senator FANNIN. Thank you, Mr. Cox.

If there isn't anything further, the hearings will be adjourned and the record will be kept open for 2 weeks for further testimony.

Thank you, gentlemen.

(Whereupon, at 12 noon, the hearing was adjourned.)

APPENDIX

(Under authority previously granted, the following statements and communications were ordered printed:)

MATERIAL SUBMITTED BY MR. GERSHUNY

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., August 24, 1971.

MEMORANDUM

To: Regional Solicitor, Anchorage, Denver, Los Angeles, Portland, Sacramento, Salt Lake City, and Tulsa. Field Solicitor, Aberdeen, Albuquerque, Anadarko, Billings, Juneau, Muskogee, Pawhuska, Phoenix, and Twin Cities.
From: Acting Associate Solicitor, Indian Affairs.
Subject: Deadlines for filing certain actions on behalf of Indians.

Attached is a copy of my self-explanatory memorandum of this date on the above subject to the Commissioner of Indian Affairs.

Your cooperation in this matter will be much appreciated. If you have any questions we shall expect to hear from you.

WILLIAW A. GERSHUNY.

Attachment.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., August 24, 1971.

MEMORANDUM

To: Commissioner Indian Affairs.
From: Acting Associate Solicitor, Indian Affairs.
Subject: Deadlines for filing certain actions on behalf of Indians.

On July 18, 1972, the statute of limitations codified as 28 U.S.C. § 2415 will prevent, except in the few circumstances stated in 28 U.S.C. § 2416, the United States from litigating the following kinds of claims on behalf of Indians which arose before July 18, 1966: (1) Claims for money damages founded upon any contract (including leases, permits, etc.) express or implied in law or fact; (2) Claims for damages resulting from a trespass on lands; (3) Claims for damages resulting from fire on lands; and (4) Claims for conversion of property.

After July 18, 1972, it will not be possible to litigate claims of these kinds which are six years old or older. Except for the kinds of claims listed under 2, 3, and 4, claims founded upon torts are now barred by 28 U.S.C. § 2415 if they are three years old or older.

There is no time limit on bringing an action to establish the title to or right of possession of real or personal property, but after July 18, 1972, the six-year limitation will be applicable to the recovery of damages due from parties who have been in wrongful possession of land.

We urge that you bring the foregoing to the attention of all your field offices and have them make a final check to see that no old claims of the kinds mentioned above are overlooked. We suggest in this regard that they consult with the tribes so as to assure as far as possible complete discovery of existing claims subject to being barred by 28 U.S.C. § 2415. Of course, each field office should also keep constantly in mind the need to prevent Indian claims from being barred by the

future running of these limitations and should see that appropriate review procedures are adopted which will provide timely handling of such claims.

We are sending copies of this memorandum to the Regional and Field Solicitors who serve your Area Offices so that they may assist with the taking of timely action. It is recommended in this respect that all claims of the kinds listed in 1 through 4 which are more than six years old be reported by the Area Offices to the Regional and Field Solicitors as soon as possible, but in no event not later than December 1, 1971, so as to permit enough time for processing and filing them before July 18, 1972.

WILLIAM A. GERSHUNY.

JANUARY 20, 1972.

MEMORANDUM

To: All Regional Solicitors and All Field Solicitors.
From: Associate Solicitor, Indian Affairs.
Subject: 28 U.S.C. §§ 2415 and 2416.

Questions concerning the effects of sections 2415 and 2416 of title 28 on actions brought by the United States for the benefit of Indians and on actions brought by Indian individuals or tribes have from time to time been presented to this office.

For the guidance of the BIA offices which you serve, we have prepared the following which we hope simplifies the provisions of the act.

The provisions of the Act of July 18, 1966, 28 U.S.C. §§ 2415 and 2416, limit the time in which the United States may institute litigation seeking those remedies specified in the act. In our view, the limitations apply to suits brought by the United States on behalf of individual Indians or an Indian tribe (or where the United States Attorney acts as plaintiff's counsel for the individual or tribe) if the suits seek any of the specified remedies.

The act does not cover suits brought by tribes or individuals without the assistance of the United States. Since, however, Indians can no longer rely on the immunity of the United States from statute of limitation defenses, the act indirectly affects the filing of such actions because they would be subject to those limitations applicable generally, except in cases to quiet title to trust or restricted lands.

The following are specific categories covered by the act which we believe relevant to Indians. The statutory period begins to run as of the date of the act or on which the action accrues, whichever is later.

(1) ACTIONS FOR DAMAGES FOUNDED ON A CONTRACT, EXPRESS OR IMPLIED—SIX YEARS

This provision wou'd cover situations where the government would seek monetary compensation rather than cancellation, rescission, or specific performance of a contract. We believe the term "contract" could be fairly construed to include a lease.

(2) ACTIONS FOR DAMAGES RESULTING FROM TRESPASS OR FIRE ON INDIAN LANDS—SIX YEARS

This provision does not cover actions to quiet title to Indian lands and there is stil no limitation on such actions. Thus, for example, disputes involving boundaries and accreted lands would still be viable.

(3) ACTIONS FOR CONVERSION OF PROPERTY OF THE UNITED STATES—SIX YEARS

Since actions for conversion lie only with regard to personal property, this provision has no effect on the Indian cases normally handled by the government.

(4) ACTIONS TO RECOVER DAMAGES FOR TORTS OTHER THAN THOSE LISTED IN (2) AND (3) ABOVE—THREE YEARS

Since category (2) covers realty cases, few of the tort cases handled by this office would fall within the three-year limitation. We also note that a plaintiff often has a choice between an action in tort or an action based on a contract and that the latter has a six-year statute of limitations.

The scope of the act is limited to actions for damages. It therefore has no effect whatever on actions by the United States seeking to enjoin interference with the

violation of Indian treaty rights or other rights granted to Indians by federal statutes. Thus actions to protect Indian hunting and fishing rights or to prevent the imposition of state jurisdiction over "Indian country" are unaffected. Water rights are considered to be real property and, therefore, an action to determine the amount of water reserved for a tribe under *Winters* doctrine is similar to a quiet title proceeding and not subject to the provisions of 28 U.S.C. §§ 2415 and 2416. An action for damages for a taking of Indian water would appear to be subject to the act but we do not believe that the cause of action would accrue until there is a judicial determination of the amount of water vested in the tribe, particularly in light of 28 U.S.C. § 2416(b) excluding from the statute all periods in which facts material to the right of action are not, and reasonably could not be, known to the United States.

The statute has no effect on the right of individual Indians or tribes to sue the United States but in such a suit the United States could assert defenses and counterclaims which would be barred if the United States were asserting the claims as a plaintiff.

If individual Indians or a tribe were to institute litigation, they would be subject to the statute of limitations applicable to the general public except with respect to actions to quiet title to trust or restricted lands (if the statute were permitted to run in such cases it would conflict with federal statutes prohibiting alienation of Indian lands).

If the United States defends a suit brought against an individual Indian or tribe, the statute permits claims otherwise barred to be asserted as a defense, counterclaim, or offset.

WILLIAM A. GERSHUNY.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., June 15, 1972.

MEMORANDUM

To: Commissioner of Indian Affairs.
From: Associate Solicitor, Indian Affairs.
Subject: Request for litigation involving 28 U.S.C. § 2415.

We have noted within the last several weeks a substantial increase in the number of requests from the Bureau that matters be referred to the Department of Justice for litigation so as to meet the July 18, 1972, filing date under 28 U.S.C. § 2415. Since we already have a number of matters in this category that we are reviewing at the present time and are aware of other matters that will undoubtedly be forwarded to us for review, we request that the following procedure be adopted by the Bureau in order to permit us to review and process the requests for litigation that are anticipated between now and July 18.

First, we would request that to the maximum extent possible requests for opinions, requests for litigation, and other routine matters not involving the statute of limitations deadline that can temporarily be held in abeyance for a few weeks be so held in abeyance in the Bureau so as to permit us to direct our workload toward those matters that do have to meet the deadline. We also request that you advise us regarding matters that have already been forwarded to us as to which matters can safey be held in abeyance while we process the requests for litigation.

Second, we request that you provide us as soon as possible an estimate of the number of matters the Bureau is presently processing in its Washington office and in the various area offices that involve a request to the Department of Justice to institute litigation in order to meet the July 18 date so that we have a reasonable basis for anticipating the number of requests for litigation that will have to be reviewed and processed in this short time period. In this regard, we are sending a copy of this memorandum to each of our Regional Offices and to appropriate Field Offices so that the appropriate Regional and Field Solicitors can assist your Area Offices in providing the requested estimate as soon as possible.

Needless to say although the actual statute of limitations filing date is July 18, 1972, the last date on which we will be able to forward a request to the Department of Justice for the institution of litigation with any reasonable hope of meeting that deadline will be substantially earlier than July 18.

WILLIAM A. GERSHUNY.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., June 28, 1972.

MEMORANDUM

To: Commissioner of Indian Affairs.
Attention: Real Estate Services.
From: Acting Associate Solicitor, Indian Affairs.
Subject: Matters referred to Solicitor's Office that can be held in abeyance pending referrals to Department of Justice involving statute of limitation matters.

In response to my memorandum dated June 15, 1972, in which it was requested that this office be advised of matters referred to it that could safely be held in abeyance so as to permit us to process the numerous requests for litigation involving the upcoming statute of limitations deadline, we have been advised that the following matters can safely be held in abeyance:

1. Request that Justice Department initiate action to quiet title to certain lands within the San Carlos Mineral Strip, Arizona.

2. Request for opinion as to whether the surface of the land claimed by the Forest Service in the San Carlos Mineral Strip was in fact restored by Secretarial Order on January 16, 1969.

3. Appeal from decision of Area Director cancelling Palm Springs Lease No. PSL–106.

(Signed) DUARD R. BARNES.

BUREAU OF INDIAN AFFAIRS,
July 17, 1972.

CLARENCE SAUB.

The U.S. Senate and House have adopted a resolution providing a 90-day general extension of the statute of limitations found in 28 U.S.C. 2415, which otherwise would have run out on July 18, 1972.

This will enable the United States to continue, during said 90-day extension, initiating litigation on behalf of Indians for those kinds of claims enumerated in Associate Solicitor Gershuny's Memorandum of August 24, 1971, forwarded to you with our memorandum of September 3.

Please take prompt action towards assuring timely handling of any cases you have yet to submit and send them direct to Mr. William A. Gershuny, associate solicitor, Indian Affairs, Washington, D.C. 20240.

Please notify the commissioner by August 16 as to whether or not you expect to submit any cases and, if so, about how many.

(signed) JOHN O. CROW,
Deputy Commissioner.

JULY 18, 1972

CLARENCE SAUB
Wyman D. Babby, Area Director, Bureau of Indian Affairs, Aberdeen, S. Dak.
Walter O. Olson, Area Director, Bureau of Indian Affairs, Albuquerque, N. Mex.
Sidney M. Carney, Area Director, Bureau of Indian Affairs, Anadarko, Okla.
Morris Thompson, Area Director, Bureau of Indian Affairs, Juneau, Alaska.
Raymond P. Lightfoot, Area Director, Bureau of Indian Affairs, Minneapolis, Minn.
Virgil N. Harrington, Area Director, Bureau of Indian Affairs, Muskogee, Okla.
Anthony Lincoln, Area Director, Bureau of Indian Affairs, Gallup, N. Mex.
John T. Artichoker, Jr., Area Director, Bureau of Indian Affairs, Phoenix, Ariz.
Dale M. Baldwin, Area Director, Bureau of Indian Affairs, Portland, Oreg.
William E. Finale, Area Director, Bureau of Indian Affairs, Sacramento, Calif.
Theodore C. Krenze, Superintendent, Cherokee Agency, Cherokee, N.C.
John F. Gordon, Superintendent, Choctaw Agency, Philadelphia, Miss.
Duane C. Moxon, Superintendent, Seminole Agency, Hollywood, Fla.

JULY 28, 1972

W. J. MOSES
Wyman D. Babby, Area Director of Indian Affairs, Aberdeen, S. Dak.
Walter O. Olson, Area Director, Bureau of Indian Affairs, Albuquerque, N. Mex.
Sidney M. Carney, Area Director, Bureau of Indian Affairs, Anadarko, Okla.
Morris Thompson, Area Director, Bureau of Indian Affairs, Juneau, Alaska.

Raymond P. Lightfoot, Area Director, Bureau of Indian Affairs, Minneapolis, Minn.
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Dale M. Baldwin, Area Director, Bureau of Indian Affairs, Portland, Oreg.
William E. Finale, Area Director, Bureau of Indian Affairs, Sacramento, Calif.
James F. Canan, Area Director, Bureau of Indian Affairs, Billings, Mont.
James Claymore, Superintendent, Bureau of Indian Affairs, Eagle Butte, S. Dak.
Donald Morgan, Superintendent, Bureau of Indian Affairs, Ft. Thompson, S. Dak.
James R. Keaton, Superintendent, Bureau of Indian Affairs, New Town, N. Dak.
Louis M. Holman, Acting Superintendent, Bureau of Indian Affairs, Ft. Totten, N. Dak.
Stanley D. Lyman, Superintendent, Bureau of Indian Affairs, Pyne Ridge, S. Dak.
Charles W. James, Superintendent, Bureau of Indian Affairs, Wagner, S. Dak.
Wayne E. Stephens, Superintendent, Bureau of Indian Affairs, Cannon Ball, N. Dak.
Alfred Dubray, Superintendent, Bureau of Indian Affairs, Winnebago, Nebr.
Joseph F. Otero, Superintendent, Bureau of Indian Affairs, Ruidoso, N. Mex.
Donald Smouse, Acting Superintendent, Bureau of Indian Affairs, Ramah, N. Mex.
Orville N. Hicks, Superintendent, Bureau of Indian Affairs, Lower Brule, S. Dak.
Jess T. Town, Superintendent, Bureau of Indian Affairs, Rosebud, S. Dak.
Dennis Petersen, Superintendent, Bureau of Indian Affairs, Sisseton, S. Dak.
Frank X. Morin, Superintendent, Bureau of Indian Affairs, Rolla, N. Dak.
Lawrence J. Kozlowski, Superintendent, Bureau of Indian Affairs, Dulce, N. Mex.
Robert Friedman, Superintendent, Bureau of Indian Affairs, Santa Fe, N. Mex.
Kenneth L. Payton, Superintendent, Bureau of Indian Affairs, Albuquerque, N. Mex.
Raymond J. Dexay, Superintendent, Bureau of Indian Affairs, Ignacio, Colo.
Robert E. Lewis, Governor, Zuni Pueblo Tribe, Zuni, N. Mex.
Allen C. Quetone, Superintendent, Bureau of Indian Affairs, El Reno, Okla.
James D. Hale, Superintendent, Bureau of Indian Affairs, Pannee, Okla.
George Shellaner, Superintendent, Bureau of Indian Affairs, Browning, Mont.
Harold D. Roberson, Superintendent, Bureau of Indian Affairs, Roman, Mont.
William L. Benjamin, Superintendent, Bureau of Indian Affairs, Poplar, Mont.
Espeedie G. Ruiz, Superintendent, Bureau of Indian Affairs, Towac, Colo.
William W. Crissom, Superintendent, Bureau of Indian Affairs, Anadarko, Okla.
Jack Carson, Superintendent, Bureau of Indian Affairs, Horton, Kans.
John E. Taylor, Superintendent, Bureau of Indian Affairs, Shawnee, Okla.
Anson A. Baker, Superintendent, Bureau of Indian Affairs, Crow Agency, Mont.
Roderick H. Scurlock, Superintendent, Bureau of Indian Affairs, Harlem, Mont.
Alonzo T. Spang, Sr., Superintendent, Bureau of Indian Affairs, Lame Deer, Mont.
Thomas Harding, Superintendent, Bureau of Indian Affairs, Box Elder, Mont.
Joseph G. Wilson, Native Agency Director, Bureau of Indian Affairs, Juneau, Alaska.
Richard P. Birchell, Superintendent, Bureau of Indian Affairs, Bethel, Alaska.
Robert M. Davis, Superintendent, Bureau of Indian Affairs, Nome, Alaska.
Edwin L. Demery, Superintendent, Bureau of Indian Affairs, Bemidji, Minn.
Newman L. Groves, Field Representative, Bureau of Indian Affairs, Tama, Iowa.
Linus L. Gwin, Superintendent, Bureau of Indian Affairs, Okmulgee, Okla.
Clyde W. Hobbs, Superintendent, Bureau of Indian Affairs, Riverton, Wyo.
Roy Peratrovich, Superintendent, Bureau of Indian Affairs, Anchorage, Alaska.
Wallace O. Craig, Superintendent, Bureau of Indian Affairs, Fairbanks, Alaska.
Reginald Miller, Superintendent, Bureau of Indian Affairs, Ashland, Wis.
Celestine Maus, Superintendent, Bureau of Indian Affairs, Redlake Minn.
Daniel L. McDole, Superintendent, Bureau of Indian Affairs, Ardmore, Okla.
David L. Baldwin, Superintendent, Bureau of Indian Affairs, Pawhuska, Okla.
T. J. Perry, Superintendent, Bureau of Indian Affairs, Miami, Okla.
Donald Moon, Superintendent, Bureau of Indian Affairs, Talihina, Okla.
Paul W. Hand, Superintendent, Bureau of Indian Affairs, Chinle, Ariz.
Doald Dodge, Acting Superintendent, Bureau of Indian Affairs, Ft. Defiance, Ariz.

James P. Howell, Superintendent, Bureau of Indian Affairs, Tuba City, Ariz.
Tim C. Dye, Superintendent, Bureau of Indian Affairs, Mcnary, Ariz.
Jose A. Zuni, Superintendent, Bureau of Indian Affairs, Carson City, Nev.
Joe Ragsdale, Superintendent, Bureau of Indian Affairs, Tahlequah, Okla.
Buford Morrison, Superintendent, Bureau of Indian Affairs, Wewoka, Okla.
Edward O. Plummer, Superintendent, Bureau of Indian Affairs, Gallup, N. Mex.
Elvin G. Jonas, Superintendent, Bureau of Indian Affairs, Shiprock, N. Mex.
Stephen A. Lozar, Superintendent, Bureau of Indian Affairs, Parker, Ariz.
Francis Boyer, Acting Superintendent, Bureau of Indian Affairs, Holbrook, Ariz.
Joseph M. Lucero, Superintendent, Bureau of Indian Affairs, Sells, Ariz.
Kendall Cumming, Superintendent, Bureau of Indian Affairs, Sacaton, Ariz.
Theodore B. White, Superintendent, Bureau of Indian Affairs, San Carlos, Ariz.
William F. Streitz, Superintendent, Bureau of Indian Affairs, Vernal, Utah.
Ira Dutton. Acting Superintendent, Bureau of Indian Affairs, Pocatello, Idaho.
Cleveland Nelson, Superintendent, Bureau of Indian Affairs, Spokane, Wash.
James D. Cornett, Superintendent, Bureau of Indian Affairs, Warm Springs, Oreg.
William T. Schlick, Superintendent, Bureau of Indian Affairs, Toppenish, Wash.
Lawrence Hanline, Coordinator, Bureau of Indian Affairs, Phoenix, Ariz.
Charles Pitrat, Superintendent, Bureau of Indian Affairs, Valentine, Ariz.
Sherwin Broadhead, Superintendent, Bureau of Indian Affairs, Coulee Dam, Wash.
Thomas H. St. Clair, Superintendent, Bureau of Indian Affairs, Lewiston, Idaho.
Harold A. Duck, Superintendent, Bureau of Indian Affairs, Pendleton, Oreg.
George M. Felshaw, Superintendent, Bureau of Indian Affairs, Everett, Wash.
Norman Sahmaunt, Acting Superintendent, Bureau of Indian Affairs, Sacramento, Calif.
Norman W. Tippeconic, Superintendent, Bureau of Indian Affairs, Beaverville, Calif.
Robert Robinson, Acting Superintendent, Bureau of Indian Affairs, Riverside, Calif.
James Stevens, Acting Superintendent, Bureau of Indian Affairs, Philadelphia, Miss.
Buffalo Tiger, Chairman, Miccosukee General Council, Tamiami Station, Fla.
Richard S. McDermott, Area Field Representative, Bureau of Indian Affairs, Palm Springs, Calif.
Theodore C. Krenzke, Superintendent, Bureau of Indian Affairs, Cherokee, N.C.
Duane C. Moxoh, Superintendent, Bureau of Indian Affairs, Dania, Fla.
Howard F. Johnson, Liaison Representative, Bureau of Indian Affairs, Salamanca, N.Y.

As you are aware, on July 17, 1972, the House and the Senate passed, and the President subsequently signed, H.R. 15869, which amends portions of 28 U.S.C. section 2415. The essential provision of H.R. 15869 is a 90-day extension of time within which actions for or on behalf of a recognized tribe, band, or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought. Each area office and agency office, including agency offices reporting directly to the central office, shall immediately meet with each governing body of each tribe, band, or group of Indians within its respective jurisdiction for the purpose of explaining to such governing body the provisions of H.R. 15869, and the effect thereof on 28 U.S.C. section 2415. Extreme care should be taken in explaining to such governing body the type of claims that the statute of limitations' provisions of 28 U.S.C. sections 2415 and 2416 do apply to and those to which the provisions do not apply. In this regard, the associate solicitor for Indian affairs has requested all regional and field solicitors to provide assistance in explaining the applicability of the statute of limitations to your respective offices as well as to the various Indian governing bodies if you deem such assistance necessary.

The Associate Solicitor for Indian Affairs has been requested to send a copy of his memorandum to the regional and field solicitors to each bureau area office and agency office, and you will therefore be receiving a copy of that memorandum shortly. The memorandum summarizes the procedure that has been worked out between this office and the associate solicitor for handling statute of limitations claims and also sets forth the areas of responsibility of the Bureau and the areas of responsibility of the Solicitor's Office with regard to the processing of such claims.

(signed) JOHN O. CROW,
Deputy Commissioner.

U.S. DEPARTMENT OF THE INTERIOR,
OFFICE OF THE SOLICITOR,
Washington, D.C., July 27, 1972.

MEMORANDUM

To: All Regional and Field Solicitors.
From: Associate Solicitor, Indian Affairs.
Subject: Statute of Limitations; 90-day Extension of 28 U.S.C. § 2415.

On July 17, 1972, the House and Senate passed, and the President signed, H.R. 15869, which amends portions of 28 U.S.C. § 2415. The essential provision of H.R. 15869 is a 90-day extension of time within which actions for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands, may be brought.

Each Area Office and Field Agency of the Bureau of Indian Affairs has been directed forthwith to formally bring to the attention of each governing body of each tribe, band or group of Indians within its respective jurisdiction, the provisions of H.R. 15869, and the effect thereof on U.S.C § 2415.

In this regard, care should be taken to make clear to such governing body the types of claims to which the limitation provisions of 28 U.S.C. §§ 2415, 2416 apply, and those to which the provisions are inapplicable. Your assistance in explaining the applicability of the statutes to both area offices and field agencies, and if necessary to the various Indian governing bodies, is requested.

When this office has received inquiries regarding applicability of 28 U.S.C. § 2415 we have advised that generally speaking, the statute of limitations can be summarized as applying to actions by the United States on behalf of a tribe, band, group or individual Indian against third parties which actions seek money damages. We have found it necessary to point out that the statute is inapplicable to actions merely seeking recovery of real or personal property, or to claims against the United States. The most common type of action reviewed in this office to date has been an action based on a trespass theory, although clearly other types of actions are also covered by the statute.

In an attempt to avoid a last minute rush in the referring of actions to the Department of Justice as the limitation period deadline approaches, I will summarize once again the working arrangement for handling potential claims that has been arrived at by the Commissioner and myself.

First, the Bureau has the basic responsibility of ascertaining the factual background of potential claims brought to its attention whether by Indian tribes, tribal attorneys, individual Indians, or from any other source. Furthermore, the Bureau has the basic responsibility of notifying the various governing bodies of the existence of the statute and its potential effect.

Second, the Bureau also has the basic responsibility to provide the Solicitor's Office with some type of factual report establishing the factual basis for the claim as well as some type of appraisal of the potential damages to be claimed. Since the preparation of such a report as well as an appraisal may take a little time, Bureau personnel have been instructed to notify the appropriate Regional or Field Solicitor immediately upon receiving information regarding a potential claim so that the Solicitor's Office is at least aware of the fact that the Bureau is working on a potential claim.

Third, the Solicitor's Office has the basic responsibility for providing a legal review of the potential claim and submitting a recommendation as to whether or not litigation should be requested. Such legal review obviously requires that the Bureau provide some type of factual report and appraisal to the Solicitor's Office as fast as possible but it is realized that depending on the surrounding circumstances and the time factor involved, such factual report may not necessarily meet the standards that are generally expected in a request for litigation.

Fourth, in order to speed up the process of transmitting the factual report and appraisal prepared by the Bureau and the legal review and recommendation thereon prepared by the Field or Regional Solicitor from the field to Washington, the Commissioner and I have agreed that it is acceptable for the Regional or Field Solicitor to submit the report, appraisal and his review and recommendations directly to this office with simply a copy of the documents going to the Commissioner's office so as to avoid having to route these matters through the Commissioner's office before reaching this office. The Bureau will, of course,

review the copies of the documents provided to it and send its recommendation directly ot this office.

Fifth, while it is realized that in some situations it is virtually impossible to prepare anything more than a most rudimentary factual report in the Bureau for your review and recommendations, it has been pointed out to the Bureau that as an absolute minimum before any recommendation can possibly be made to the Department of Justice the Solicitor's Office must know who the potential defendants are, where the land or other subject matter of the controversy is located, a legal description of the same, and a time sequence of the events involved. While it is not absolutely necessary to have an actual appraisal from the Bureau setting forth the claimed damages, there should be at least a realistic estimate of damages provided by the Bureau so that in reviewing the matter we have some idea of whether the case is a potential $10,000 case or a $10,000,000 case and can pass this information on to the Department of Justice.

A final note regarding cases which have already been forwarded to the Department of Justice and filed as so-called "protective suits." As you may have already noted from copies of the complaints that have been filed in such cases, the Department of Justice has alleged that because of the time factor it has not had an opportunity to review the merits of the suit and is therefore merely filing a protective suit. This office has advised the Department of Justice that as to any case referred over to it and filed as a protective suit the Department of the Interior will, wihtin the 30 days of the date of the original transmittal to the Department of Justice, provide a formal recommendation regarding the case and it is therefore imperative that this office receive from you the full report and recommendations regarding each of such protective suits forwarded by your office to this office in order to permit the Department to make its recommendations to the Department of Justice within the time specified.

WILLIAM A. GERSHUNY.

MATERIAL SUBMITTED BY SENATOR FANNIN

[From the Congressional Record—House, June 6, 1966]

ESTABLISHING A STATUTE OF LIMITATIONS FOR CERTAIN ACTIONS BROUGHT BY THE GOVERNMENT

Mr. ASHMORE. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 13652) to establish a statute of limitations for certain actions brought by the Government, as amended.

The Clerk read as follows:

H.R. 13652

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That title 28 of the United States Code is amended by adding thereto the following two new sections:

"§ *2415. Time for commencing actions brought by the United States.*

"(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

"(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States, including trust or restricted Indian lands; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues.

"(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

"(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

"(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommended within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommended the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

"(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

"(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accurred on the date of enactment of this Act.

"(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

"§ *2416. Time for commencing actions brought by the United States—Exclusions*

"For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

"(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

"(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

"(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

"(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States."

SEC. 2. The table of sections at the head of chapter 161 of title 28 of the United States Code is amended by adding at the end thereof the following items:

"2415. Time for commencing actions brought by the United States.

"2416. Time for commencing actions brought by the United States—Exclusions".

The SPEAKER. Is a second demanded?

Mr. MCCLORY. Mr. Speaker, I demand a second.

The SPEAKER. Without objection, a second will be considered as ordered.

There was no objection.

The SPEAKER. The question is on the motion of the gentleman from South Carolina [Mr. ASHMORE] that the House suspend the rules and pass the bill H.R. 13652, as amended.

The question was taken: and (two-thirds having voted in favor thereof) the rules were suspended and the bill was passed.

A motion to reconsider was laid on the table.

JUDGMENTS FOR COSTS AGAINST THE UNITED STATES

Mr. ASHMORE. Mr. Speaker, I move to suspend the rules and pass the bill (H.R. 14182) to provide for judgments for costs against the United States, as amended.

The Clerk read as follows:

H.R. 14182

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2412 of title 28 of the United States Code is amended to read as follows:

"Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. A judgment for costs when taxed against the Government shall, in an amount established by statute or court rule or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by him in the litigation. Payment of a judgment for costs shall be as provided in section 2414 and section 2517 of this title for the payment of judgments against the United States."

SEC. 2. Section 2520(d) of title 28 of the United States Code is hereby repealed.

SEC. 3. These amendments shall apply only to judgments entered in actions filed subsequent to the date of enactment of this Act. These amendments shall not authorize the reopening or modification of judgments entered prior to the enactment of this Act.

The SPEAKER. Is a second demanded?

Mr. MCCLORY. Mr. Speaker, I demand a second.

The SPEAKER. Without objection, a second will be considered as ordered.

There was no objection.

Mr. ASHMORE. Mr. Speaker, I yield myself 1 minute.

Mr. Speaker, and gentlemen and ladies of the House, I think any prolonged statement or explanation will be unnecessary in this case.

This is a bill to provide that when the Government loses a lawsuit a judgment for cost may be awarded the prevailing party; in other words, the court can direct that it pay the costs of that lawsuit. Heretofore it has not been that way in many instances. In substance, that is what this bill does.

This inequity should have been removed many years ago. I think the Attorney General and other officials of the administration should be commended for recommending such legislation.

I move the question.

The SPEAKER. The question is on the motion of the gentleman from South Carolina [Mr. ASHMORE] that the House suspend the rules and pass the bill H.R. 14182 as amended.

The question was taken; and (two-thirds having voted in favor thereof) the rules were suspended and the bill was passed.

A motion to reconsider was laid on the table.

[From the Congressional Record—Senate, June 27, 1966]

STATUTE OF LIMITATIONS FOR CERTAIN ACTIONS BROUGHT BY THE GOVERNMENT

The bill (H.R. 13652) to establish a statute of limitations for certain actions brought by the Government was announced as next in order.

The ACTING PRESIDENT pro tempore. Is there objection to the present consideration of the bill?

Mr. ERVIN. Mr. President, under existing law the Federal Government is not subject to any statute of limitations, unless there is a special statute so providing in specific instances.

H.R. 13652 would establish statutes of limitations for certain types of actions brought by the Government. The rule is that there is no limitation of time against the Government for bringing an action unless it is specifically authorized by statute. There are a few exceptions to this rule. For example, a civil suit brought by the Government on a false claim must be filed within 6 years; suits for penalties or forfeitures under the customs laws must be brought within 5 years; 2 years is the limit within which the Federal Housing Administration must sue to recover an overpayment on a guarantee of a home improvement loan. There are, however, no time bars against the great majority of Government claims.

Additional time limitations are desirable for a number of reasons. Application of statutes of limitation in tort and contract actions would make the position of the Government more nearly equal to that of private litigants. A corollary to

this objective is the desirability of encouraging trials at a sufficiently early time so that necessary witnesses and documents are available and memories are still fresh.

Presently the cost of keeping records and detecting and collecting on Government claims after a period of years may exceed any return by way of actual collections. Also, this measure should encourage the agencies to refer their claims promptly to the Department of Justice for collection minimizing collection problems arising with respect to debtors who have died, disappeared, or gone bankrupt.

Accordingly, it is proposed that statutes of limitations be applied to important general areas where none are now in effect. The proposal would impose a 6-year limitation on the assertion of Government claims for money arising out of an express or implied contract or a quasi-contract. This time-bar corresponds to the 6-year limitation on those who sue the Government on similar claims under the Tucker Act.

Suits in tort are to be brought within 3 years, except those based on trespass to Government lands and those brought for the recovery of damages resulting from fire on such lands, and actions for conversion of Government property for which the limitation period will be 6 years.

A 6-year limitation would be imposed upon suits by the Government to recover erroneous overpayments of wages and other benefits made to military and civilian employees of the Government.

Mr. KUCHEL. Mr. President, will the Senator yield?

Mr. ERVIN. I yield.

Mr. KUCHEL. What effect, if any, does this tort claim have on liability of a citizen under the provisions in the Internal Revenue Code?

Mr. ERVIN. The bill expressly provides that it does not apply to tax claims. Consequently such claims are governed by other statutes of limitations under the Federal Internal Revenue law.

Mr. KUCHEL. Would the Senator say that where there are in the law today specific provisions, that this general law would not apply?

Mr. ERVIN. The Senator is correct. This bill does not cover tax claims. It merely establishes statutes of limitations for claims of the Government based on contracts or quasi-contracts or torts. Tax claims are neither contracts nor torts.

Mr. KUCHEL. I thank the Senator.

Mr. ERVIN. Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 1328), explaining the purposes of the bill.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE

The purpose of the bill is to establish statutes of limitations which will apply to contract and tort actions brought by the United States.

STATEMENT

A similar Senate bill, S. 3142, was introduced by Senator SAM J. ERVIN, Jr.

In its favorable report on the bill, the Committee on the Judiciary of the House of Representatives said:

"The bill, H.R. 13652, is one of three bills introduced in accordance with the recommendations of an executive communication from the Department of Justice. These bills, H.R. 13650, H.R. 13651, and H.R. 13652, have the common purpose of improving existing procedures for the disposition of monetary claims by and against the Government. These subjects now comprise the bulk of civil litigation of the Government. The three bills just mentioned, along with H.R. 14182, providing for payment of costs by the United States when judgment is entered against it, are intended to improve claims procedures and to provide a more balanced and fair treatment of litigants in civil actions involving the Government. The committee has considered these bills as a group. Their enactment will reduce unnecessary litigation and court congestion, speed up meritorious settlements and cut down on unproductive paperwork. At the same time, the private litigants can be assured of a more fair and balanced treatment when dealing with the Government.

"The bill H.R. 13652 was the subject of a hearing on April 6, 1966. At that hearing it was noted that the Government litigation covered by the bill arises out of activity which is very similar to commercial activity. Many of the contract and tort claims asserted by the Government are almost indistinguishable

from claims made by private individuals against the Government. Therefore it is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity.

"Statutes of limitation have the salutary effect of requiring litigants to institute suits within a reasonable time of the incident or situation upon which the action is based. In this way the issues presented at the trial can be decided at a time when the necessary witnesses, documents, and other evidence are still available. At the same time, the witnesses are better able to testify concerning the facts involved for their memories have not been dimmed by the passage of time. The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice. Stale claims can neither be effectively presented or adjudicated in a manner which is fair to the parties involved. Even if the passage of time does not prejudice the effective presentation of a claim, the mere preservation of records on the assumption that they will be required to substantiate a possible claim or an existing claim increases the cost of keeping records. As time passes the collection problems invariably increase. The Government has difficulty in even finding the individuals against whom it may have a claim for they may have died or simply disappeared. These problems have been brought to the attention of the committee previously in connection with other legislation. This bill provides the means to resolve these difficulties.

"CONTRACT ACTIONS—6 YEARS

"Subsection (a) of new section 2415 added by the bill provides for a 6-year limitation which would apply to all Government actions based on contracts whether expressed or implied in law or in fact. This provision would extend to obligations which are based on quasi-contracts. In all such contract matters, the action would be barred unless it were brought by the Government within 6 years after the right of action accrues, or within 1 year after a final decision in a required administrative proceeding, whichever is later. This last provision, which has the effect of tolling the running of the statute of limitations during mandatory administrative proceedings, is necessary because of the great number and variety of such proceedings made possible by current statutes. An administrative proceeding ordinarily consumes a considerable period of time and, as has been noted, the bill would permit the Government a year after the final administrative decision in which to present its case for judicial determination. An example of such an administrative proceeding are those which involve appeals under the 'disputes' clause of Government contracts.

"In a proviso to subsection (a), there is a provision that later partial payment or written acknowledgment of a debt will start the 6-year period running all over again. This provision embodies a familiar principle of law which is embodied in the law of many States. The obligation of a debt will continue where a debtor has acknowledged the debt and indicated his willingness to discharge the obligation.

"TORT ACTIONS—3 YEARS

"Subsection (b) of section 2415 provides that tort actions, that is, actions based on damage or injury from a wrongful or negligent act, must be brought by the United States within 3 years after the right of action first accrues. This 3-year statute applies to all Government tort actions except those that are expressly referred to in this subsection and are governed by a 6-year statute. These specific actions are those which are of a type which might not be immediately brought to the attention of the Government or would only be uncovered after some investigation. Included to this category of actions are those based upon a trespass on lands of the United States, including trusts or restricted Indian lands, and also actions to recover damages resulting from fire to such lands. Similarly, actions to recover for diversion of money paid under a grant program and actions for conversion of property of the United States are subject to a 6-year limitation.

"EXCEPTION AS TO GOVERNMENT ACTIONS AS TO TITLE TO REAL AND PERSONAL PROPERTY

"Subsection (c) makes it clear that no one can acquire title to Government property by adverse possession or other means. This is done by providing that there is no limit time within which the Government must bring actions to estab-

lish title to or right of possession of real or personal property of the United States. In other words, there is no statute of limitations applying to Government actions of this type.

"RECOVERY OF ERRONEOUS PAYMENTS

"Subsection (d) provides a 6-year statute of limitations for Government actions to recover money erroneously paid to civilian employees or members of the uniformed services of the United States. While payments of this type might be described as analogous to payments incident to a contract, it was felt that this type of overpayment of compensation should be the subject of a separate provision in the bill. Overpayments of this type usually occur in the process of auditing agency account books. The problems posed by this type of Government claim have been the subject of discussion by this committee on a number of occasions in connection with other legislation. The provisions of this subsection, when joined with the provisions of H.R. 13657 providing for a compromise of Government claims, for the first time provide for an equitable and realistic solution which is in the interest of both the Government and the individual concerned. In connection with the legislation before the committee in the 88th Congress, the Comptroller General expressed the opinion that a 6-year statute of limitations applicable to such collections would be in the interest of the Government. In a report to the committee dated May 3, 1961, the Comptroller General stated that the audit experience of the General Accounting Office supported this conclusion. In this connection he stated:

" 'Viewed in the light of our audit experience and the periods fixed in connection with the records disposal programs of the various departments and agencies, and in line wtih the periods fixed in the present limiting provisions applicable in the case of suits in the Court of Claims (28 U.S.C. 2501), forged or altered checks (31 U.S.C. 129), and dual compensation (31 U.S.C. 237a), a period of 6 years would appear sufficient to adequately safeguard the Government's interest.'

"The testimony presented in support of this bill at the hearing on April 6, 1966, further supports this conclusion. Whatever the nature or basis of the claim, it seems reasonable to give the Government the 6-year time period for discovering and acting upon these claims.

"RECOMMENCEMENT OF ACTIONS PREVIOUSLY DISMISSED WITHOUT PREJUDICE

"Subsection (e) of section 2415 provides for the situation where an action has been dismissed without prejudice by providing that the Government may recommence the action within 1 year regardless of whether the action would then be barred by this section. As was noted in the analysis of sections, the defendant in such a recommenced action is similarly not barred from interposing any claim which would not have been barred in the original action. The committee observes that this is in line with the underlying purpose of the bill of extending fair treatment to private litigants while providing adequate protection for the interests of the Government. In this connection, the Government is given a reasonable period for the recommencement of an action which it had originally brought in a timely matter and, at the same time, the opposing party is permitted to assert any claim which he might have interposed in the original action. This latter provision insures that the private party will not be placed in a disadvantageous position because the option is given the Government to recommence an action which had previously been dismissed without prejudice.

"OFFSET AND COUNTERCLAIMS

"Subsection (f) of section 2415 contains carefully drafted provisions permitting the Government to assert its claims by way of offset or counterclaim in actions brought against the United States. Where the United States finds itself involved in litigation, it very often is to the interest of the Government to assert claims by way of counterclaim and the provisions of this subsection represent a very practical implementation and classification of the Government's rights in this regard. It is expressly provided that the limitations provided in the section will not prevent the assertion of a claim by the United States against the opposing party in such an action, or a coparty, or a third party when the claim of the United States arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. This merely gives the Government the

right to a full hearing of all aspects of the case arising out of the same transaction or occurrence. When the claim of the United States does not arise out of the transaction or occurrence that is the subject of the opposing party's claim and is time barred, it may only be asserted by the United States to the degree that it offsets the other claim and cannot exceed the amount of the opposing party's recovery.

"The testimony at the hearing on the bill noted the fact that this bill does not affect the authority of each agency to offset on its own books and without resort to court any claim it may have against a person to whom it is about to make a payment based on the same or an unrelated transaction. There is a 10-year statute of limitations which applies to claims against the United States filed with the General Accounting Office. This provision is found in title 31 of the United States Code, sections 71a and 237. This bill therefore does not affect that agency's authority to offset a claim presented within that time period any debt which the same claimant owes to the United States.

"TAX ACTIONS

"In subsection (h) of the new section, it is expressly provided that nothing in the act is to apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

"DATE OF ACCRUAL

"Any right of action subject to the provisions of the section which accrued prior to the date of enactment is by subsection (g) of the section deemed to have accrued on the date of enactment of the bill into law.

"EXCLUSIONS

"Section 2415 establishes statutes of limitation for the general causes of action referred to in that section. Section 2416 added to title 28 by the bill specifies important exclusions of time which will not be applied in computing the limitations period established in section 2415. The provisions of this section provide exclusions which are also generally found in law governing state statutes of limitation. Paragraph (a) excludes the periods when the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico.

"Paragraph (b) excludes the time during which the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason.

"Paragraph (c) of section 2416 excludes the time when the facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances. This provision is required because of the difficulties of Government operations due to the size and complexity of the Government. It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose. Such an official is the one likely to know whether the material fact does involve the possibility of a cause of action which may be asserted against the Government. The committee understands that the principal application of this exclusion will probably be in connection with fraud situations. An example would be where the affirmative act of a wrongdoer has served to conceal the fraudulent act. This type of exclusion is to be found in the law of many States in both fraud and tort limitations. The material facts that are not known must go to the very essence of the right of action.

"Paragraph (d) excludes the period during which the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States. In other words, a state of war declared by Congress under the Constitution.

"GENERAL DISCUSSION

"As has been stated this committee has determined that this bill fills a clearly defined need which exists in the law today. In the report filed in behalf of the General Accounting Office on this bill, the Comptroller General stated that as

a matter of fairness, persons dealing with the Government should have some protection against an action by the Government when the act occurred many years previously. The emphasis on fairness referred to by the Comptroller General and by the Department of Justice in recommending the legislation is a very important consideration and the principal basis for the bill. The limitation periods fixed in the bill are similar to those fixed by Federal and State law for the same types of actions. While State laws, of course, show a variety of periods, it is possible to generalize and state that many jurisdictions provide a 6-year statute of limitation as to contract action and the limitations for tort proceedings in most cases are from 2 to 3 years. It is readily apparent that the provisions of this bill were drafted in recognition of these facts. This committee further notes that it is significant that the statute of limitations applicable to actions in the Court of Claims is 6 years and similarly the period for barring civic actions against the United States governed by section 2401(a) of title 28 of the United States Code is also fixed at 6 years. The committee is further advised that in a recent report the Government Operations Committee noted the need for the statute of limitations as is provided in this bill. In House Report 1344 of the 89th Congress, on page 16 that committee noted that there was a need for legislation providing for a statute of limitations which would apply to suits by the Government arising out of contracts, and further observed that the objective of that legislation would have the effect of ending the possibility of contracts litigation after a fixed period.

"The bill in referring to actions by the 'United States or an officer or agency thereof' obviously includes the definition of 'agency' as defined and used within title 28. As used in that title, agency includes 'any departments, independent establishment, commission, administration, authority, board, or bureau of the United States, or any corporation in which the United States has a proprietary interest unless the contract shows that such term was intended to be used in a more limited sense' (28 U.S.C. 451). Therefore, the term applies to Federal corporations and the limitations provided by this bill would be exclusive as to the contract and tort actions covered by the bill. It is also clear that the enactment of this bill will not subject an agency of the United States, including a corporation to any State statute of limitations.

"The committee points out that the bill does not affect existing statutes of limitations. For example, section 235 of title 31, United States Code, concerns false claims against the Government and provides that actions on such matters must be brought within 6 years. Suits for the enforcement of civil fines, and penalty of forfeiture must be brought within 5 years (28 U.S.C. 2462) ; 12 United States Code, section 1703(b) provides a 2-year period applicable to suits by the Federal Housing Authority for the recovery of an overpayment on a guarantee of a home improvement loan. There are other such statutes in the law at the present time. Not all of them are consistent with the limitations proposed in this bill. In view of the specialized nature of the other provisions, the committee has concluded that they would be better dealt with at a subsequent time on an individual basis, if in fact any change would appear to be desirable.

"Suits for injunction and other extraordinary relief are not covered by this bill nor by any existing statute. The testimony presented at the hearing on the bill emphasized that a statute of limitations is inconsistent with injunctive relief where prompt action may be essential to accomplish the purpose of the injunction. An injunction is sought when prompt action is essential to prevent irreparable harm, or is required to forestall a significant change in position. The Government must decide to seek an injunction at once or not at all. It also must be recognized that the Government brings the injunction in order to protect and defend Government activities and programs. It simply is not sensible to diminish the power of the Government to utilize an injunction to accomplish these ends.

"CONCLUSION

"In recommending this legislation, the committee feels that it will provide a greater fairness as regards private individuals who deal with the Government while adequately providing for the interests of the Government. The Government will be barred from asserting old and stale claims in the courts and the necessity for the early assertion of claims will require increased efficiency in Government claims proceedings. The committee recommends that the bill, with the corrective amendments, be considered favorably.

"ANALYSIS OF THE BILL

"The bill would amend title 28 of the United States Code by adding two new sections to chapter 161 of that title, a chapter which contains the general provisions applying to the United States as a party in litigation.

"Section 2415 defines the time limitations for the United States to bring actions in the U.S. courts.

"Subsection (a) provides that every civil action brought for money damages by the United States founded upon an express or implied contract will be barred unless the complaint is filed within 6 years after the right of action accrues or within 1 year after a final decision in administrative proceedings applicable to the case or required by contract or law. The subsection contains a proviso which states that a partial payment or written acknowledgment of the debt after the running of the statute will cause the right of action to be deemed to accrue again at the time of each payment or acknowledgment.

"Subsection (b) provides that every action for money damages brought by the United States founded upon a tort shall be barred unless the complaint is filed within 3 years after the right of action first accrues. A proviso to this subsection makes an exception as to specified types of actions and provides that as to those actions, the statute of limitations will be 6 years. These are actions where the Government is entitled to have a longer period of time to determine whether the Government has been damaged and whether it has the right to bring suit. They include actions resulting from a trespass on lands of the United States, including trust or restricted Indian lands; actions to recover damages resulting from fire to such lands; actions to recover for diversion of money paid under a grant program; and actions for conversion of property of the United States.

"Subsection (c) expressly provides that nothing in the new section shall be construed to limit the time in which the Government may bring an action to establish the title to, or right of possession of, real or personal property.

"Subsection (d) provides a 6-year limitation for actions by the Government to recover money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to a member or dependent of a member of the uniformed services of the United States incident to that individual's employment or services. As is the case in subsection (a), a partial payment or written acknowledgment of the debt will have the effect of causing the right of action to accrue again at the time of each payment or acknowledgment.

"Subsection (e) concerns the situation in which a timely action is brought by the United States and is thereafter dismissed without prejudice. In that case, the action may be recommenced within 1 year after such a dismissal regardless of whether the action would otherwise then be barred by this section. When an action is recommenced in this manner, the defendant is likewise not barred from interposing any claim which would not have been barred in the original action.

"Subsection (f) provides that the provisions of section 2415 do not prevent the assertion of any claim of the United States against an opposing party, coparty, or third party, arising out of the transaction or occurrence which is the subject matter of the opposing party's claim embodied in an action against the United States. A claim of the United States that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may if time barred be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

"Subsection (g) provides that any right of action subject to the provisions of section 2415 which accrues prior to the date of enactment of the bill shall, for the purposes of the section, be deemed to have accrued on the date of the bill's enactment into law.

"Subsection (h) provides that nothing in this act applies to actions brought under the Internal Revenue Code or incident to the collection of taxes imposed by the United States.

"SECTION 2416

"Section 2416 provides for specified exclusions in the computation of limitation periods fixed by section 2415. The time that the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico is excluded. Similarly, the time that a defendant is exempt from legal process because of infancy, mental incompetency, diplomatic immunity, or any other reason is also excluded. When the facts ma-

terial to the Government's right of action are not known and reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances, the statute will not run. There shall be excluded from the limitation period established in section 2415 all periods during which the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States.

"Section 2 of the bill makes the necessary amendment to the table of sections at the head of chapter 161 of title 28, so as to include reference to the two new sections."

The bill as transmitted to the Congress by the Department of Justice was amended in several respects by the Committee on the Judiciary of the House of Representatives. The committee discussed the purpose of the amendments as follows:

"The committee amendment to subsection (d) of section 2415 adds the same proviso as is found in subsection (a) of the section. This language provides that a partial payment or a written acknowledgment of the debt will have the effect of causing the right of action to accrue again at the time of each payment or acknowledgment.

"Subsection (e) is amended in three instances to make corrections in language. The word 'recommended' was used in two instances where the word should have been 'recommenced'. In line 12 of page 3, the words 'this action' should have read 'this section'. The committee amendments make the necessary corrections."

The Department of Justice has advised the committee that it has no objection to the amendments made by the House of Representatives.

The committee believes that the bill is meritorious and recommends it favorably.

The ACTING PRESIDENT pro tempore. Is there objection to the present consideration of the bill?

There being no objection, the bill was considered, ordered to a third reading, read the third time, and passed.

COLLECTION OF CLAIMS OF THE UNITED STATES

The Senate proceeded to consider the bill (H.R. 13651) to avoid unnecessary litigation by providing for the collection of claims of the United States, and for other purposes which had been reported from the Committee on the Judiciary, with an amendment, on page 2, line 15, after the word "that", to strike out "the compromise of which does not exceed $5,000," and insert "do not exceed $20,000,".

Mr. ERVIN. Mr. President, H.R. 13651 seeks to ease court congestion and improve and accelerate the disposition of Government claims.

Each year, tens of thousands of Government claims arise out of the great variety of Government activities. Many of the agencies in which these claims arise have limited authority to take effective collection action with respect to such claims. With few exceptions, the agencies have no authority to negotiate a compromise when the amount of the indebtedness, or even the fact of the indebtedness, is in dispute or where there is a question as to the debtor's financial capacity to pay.

Because of this lack of agency authority, many claims are referred routinely to the General Accounting Office and the Department of Justice for collection when they could be disposed of more satisfactorily at the agency level. The proposed legislation should permit more effective collection efforts by the agencies.

It also should reduce the volume of private relief legislation before Congress each year. A substantial number of these bills involve relieving Government personnel, especially servicemen, from liability to refund erroneous payments they had received. In most cases these errors were entirely the fault of the Government, and the individual is left with no remedy except such legislation. During the first session of this Congress, for instance, 16 percent of all private bills were for this purpose.

This bill would impose upon Government agencies the obligation to seek to collect debts due the United States as a result of their activities, and would afford them the flexibility to compromise claims when compromise is warranted or to suspend collection action on claims when they are found to be uncollectable or inequitable Agencies would not, however, be authorized to compromise or terminate a collection activity on a claim which exceeds a principal amount of $20,000. Neither could they act upon claims as to which there are indications of fraud or misrepresentation, or which arise out of antitrust violations.

Efforts at collection and compromise would be considered by the agency under regulations prescribed by the agency head and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General.

It is clear that the legislation will not increase or diminish the existing authority of the head of any agency to litigate claims, nor will it diminish existing authority to settle, compromise, or close claims, nor will it affect the authority of Congress to consider private claim bills.

Mr. President, I ask unanimous consent to have printed in the RECORD an excerpt from the report (No. 1331), explaining the purposes of the bill.

There being no objection, the excerpt was ordered to be printed in the RECORD, as follows:

PURPOSE

The purpose of the proposed legislation, as amended, is to authorize heads of agencies or their designees to compromise claims that do not exceed $20,000, and are claims for money or property arising out of activities of the agency or are referred to it. Collection action may be terminated or suspended where the individual has no present or prospective financial ability to pay any significant amount or where the cost of collection is likely to exceed the amount of recovery.

STATEMENT

A companion Senate bill, S. 3143, has been introduced by Senator SAM J. ERVIN, JR.

In its favorable report on the bill the Committee on the Judiciary of the House of Representatives said:

"The bill, H.R. 13651, is one of a group of three bills introduced in accordance with the recommendations of an executive communication transmitted to the Congress by the Department of Justice. The committee has considered these bills along with the bill H.R. 14182, providing for the award of costs in litigation involving the Government. These four bills—H.R. 13650, H.R. 13651, H.R. 13652, and H.R. 14182—have the common purpose of providing for a more fair and equitable treatment of private individuals and claimants when they deal with the Government or are involved in litigation with their Government.

"The committee is familiar with many of the problems which prompted the Department of Justice to recommend the legislation, and the committee feels that this bill embodies a practical and well drafted means to deal with those problems. Much of the difficulty derives from the fact that existing law, with a few exceptions, restricts the authority of the agencies to deal adequately and realistically with claims of the United States arising out of their respective activities. If the agency cannot collect the amount it believes due the Government, it can do little more than refer it to the General Accounting Office which in turn must attempt collection on the same basis. Very few of the agencies can compromise such claims; that is, accept a lesser amount in full settlement even if such a settlement would be in the interest of the Government and justified by normal practice in business in the light of the debtor's ability to pay and the risks and costs inherent in litigation. Similarly the agencies cannot terminate or suspend efforts to collect a claim even when the very futility of these efforts serves to add to the cost of government and therefore compound the loss to the United States. It is not until the matter is finally referred to the Department of Justice that it is possible to make a compromise settlement. The committee notes that it is the present inflexibility in the law which has resulted in recurrent appeals to the Congress for relief. Many of the cases which ultimately became the subjects of private relief bills could have been resolved promptly and equitably on the agency level if the provisions of this bill were a part of the law.

GOVERNMENT SUITS—STATUTE OF LIMITATIONS

(House Report (Judiciary Committee) No. 1534, May 16, 1966 [To accompany H.R. 13652]: Senate Report (Judiciary Committee) No. 1328, June 24, 1966 [To accompany H.R. 14652]; Cong. Record, Vol. 112 (1966))

DATES OF CONSIDERATION AND PASSAGE: HOUSE, JUNE 6, 1966; SENATE, JUNE 27, 1966

The Senate Report is set out.

SENATE REPORT No. 1328

The Committee on the Judiciary, to which was referred the bill (H.R. 13652) to establish a statute of limitations for certain actions brought by the Government, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE

The purpose of the bill is to establish statutes of limitations which will apply to contract and tort actions brought by the United States.

STATEMENT

A similar Senate bill, S. 3142, was introduced by Senator Sam J. Ervin, Jr. In its favorable report on the bill, the Committee on the Judiciary of the House of Representatives said:

The bill, H.R. 13652, is one of three bills introduced in accordance with the recommendations of an executive communication from the Department of Justice. These bills, H.R. 13650, H.R. 13651, and H.R. 13652, have the common purpose of improving existing procedure for the disposition of monetary claims by and against the Government. These subjects now comprise the bulk of civil litigation of the Government. The three bills just mentioned, along with H.R. 14182, providing for payment of costs by the United States when judgment is entered against it, are intended to improve claims procedures and to provide more balanced and fair treatment of litigants in civil actions involving the Government. The committee has considered these bills as a group. Their enactment will reduce unnecessary litigation and court congestion, speed up meritorious settlements and cut down on unproductive paperwork. At the same time, the private litigants can be assured of a more fair and balanced treatment when dealing with the Government.

The bill H.R. 13652 was the subject of a hearing on April 6, 1966. At that hearing it was noted that the Government litigation covered by the bill arises out of activity which is very similar to commercial activity. Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. Therefore it is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity.

Statutes of limitation have the salutary effect of requiring litigants to institute suits within a reasonable time of the incident or situation upon which the action is based. In this way the issues presented at the trial can be decided at a time when the necessary witnesses, documents, and other evidence are still available. At the same time, the witnesses are better able to testify concerning the facts involved for their memories have not been dimmed by the passage of time. The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice. Stale claims can neither be effectively presented nor adjudicated in a manner which is fair to the parties involved. Even if the passage of time does not prejudice the effective presentation of a claim, the mere preservation of records on the assumption that they will be required to substantiate a possible claim or an existing claim increases the cost of keeping records. As time passes the collection problems invariably increase. The Government has difficulty in even finding the individuals against who it may have a claim for they may have died or simply disappeared. These problems have been brought to the attention of the committee previously in connection with other legislation. This bill provides the means to resolve these difficulties.

CONTRACT ACTIONS

Subsection (a) of new section 2415 added by the bill provides for a 6-year limitation which would apply to all Government actions based on contracts whether expressed or implied in law or in fact. This provision would extend to obligations which are based on quasi-contracts. In all such contract matters, the action would be barred unless it were brought by the Government within 6 years after the right of action accrues, or within 1 year after a final decision in a required administrative proceeding, whichever is later. This last provision, which

has the effect of tolling the running of the statute of limitations during mandatory administrative proceedings, is necessary because of the great number and variety of such proceedings made possible by current statutes. An administrative proceeding ordinarily consumes a considerable period of time and, as has been noted, the bill would permit the Government a year after the final administrative decision in which to present its case for judicial determination. An example of such an administrative proceeding are those which involve appeals under the "disputes" clause of Government contracts.

In a proviso to subsection (a), there is a provision that later partial payment or written acknowledgment of a debt will start the 6-year period running all over again. This provision embodies a familiar principle of law which is embodied in the law of many States. The obligation of a debt will continue where a debtor has acknowledged the debt and indicated his willingness to discharge the obligation.

TORT ACTIONS

Subsection (b) of section 2415 provides that tort actions, that is, actions based on damage or injury from a wrongful or negligent act, must be brought by the United States within 3 years after the right of action first accrues. This 3-year statute applies to all Government tort actions except those that are expressly referred to in this subsection and are governed by a 6-year statute. These specific actions are those which are of a type which might not be immediately brought to the attention of the Government or would only be uncovered after some investigation. Included in this category of actions are those based upon a trespass on lands of the United States, including trusts or restricted Indian lands, and also actions to recover damages resulting from fire to such lands. Similarly, actions to recover for diversion of money paid under a grant program and actions for conversion of property of the United States are subject to a 6-year limitation.

EXCEPTION AS TO GOVERNMENT ACTIONS AS TO TITLE TO REAL AND PERSONAL PROPERTY

Subsection (c) makes it clear that no one can acquire title to Government property by adverse possession or other means. This is done by providing that there is no time limit within which the Government must bring actions to establish title to or right of possession of real or personal property of the United States. In other words, there is no statute of limitations applying to Government actions of this type.

RECOVERY OF ERRONEOUS PAYMENTS

Subsection (d) provides a 6-year statute of limitations for Government actions to recover money erroneously paid to civilian employees or members of the uniformed services of the United States. While payments of this type might be described as analogous to payments incident to a contract, it was felt that this type of overpayment of compensation should be the subject of a separate provision in the bill. Overpayments of this type usually occur in the process of auditing agency account books. The problems posed by this type of Government claim have been the subject of discussion by this committee on a number of occasions in connection with other legislation. The provisions of this subsection, when joined with the provisions of H.R. 13651 providing for a compromise of Government claims, for the first time provide for an equitable and realistic solution which is in the interest of both the Government and the individual concerned. In connection with the legislation before the committee in the 88th Congress, the Comptroller General expressed the opinion that a 6-year statute of limitations applicable to such collections would be in the interest of the Government. In a report to the committee dated May 3, 1961, the Comptroller General stated that the audit experience of the General Accounting Office supported this conclusion. In this connection he stated:

"Viewed in the light of our audit experience and the periods fixed in connection with the records disposal programs of the various departments and agencies, and in line with the periods fixed in the present limiting provisions applicable in the case of suits in the Court of Claims (28 U.S.C. 2501), forged or altered checks (31 U.S.C. 129), and dual compensation (31 U.S.C. 237a), a period of 6 years would appear sufficient to adequately safeguard the Government's interest."

The testimony presented in support of this bill at the hearing on April 6, 1966, further supports this conclusion. Whatever the nature or basis of the claim, it seems reasonable to give the Government the 6-year time period for discovering and acting upon these claims.

RECOMMENCEMENT OF ACTIONS PREVIOUSLY DISMISSED WITHOUT PREJUDICE

Subsection (e) of section 2415 provides for the situation where an action has been dismissed without prejudice by providing that the Government may recommence the action within 1 year regardless of whether the action would then be barred by this section. As noted in the analysis of sections, the defendant in such a recommenced action is similarly not barred from interposing any claim which would not have been barred in the original action. The committee observes that this is in line with the underlying purpose of the bill of extending fair treatment to private litigants while providing adequate protection for the interests of the Government. In this connection, the Government is given a reasonable period for the recommencement of an action which it had originally brought in a timely manner and, at the same time, the opposing party is permitted to assert any claim which he might have interposed in the original action. This latter provision insures that the private party will not be placed in a disadvantageous position because the option is given the Government to recommence an action which had previously been dismissed without prejudice.

OFFSETS AND COUNTERCLAIMS

Subsection (f) of section 2415 contains carefully drafted provisions permitting the Government to assert its claims by way of offset or counterclaim in actions brought against the United States. Where the United States finds itself involved in litigation, it very often is to the interest of the Government to assert claims by way of counterclaims and the provisions of this subsection represent a very practical implementation and classification of the Government's rights in this regard. It is expressly provided that the limitations provided in the section will not prevent the assertion of a claim by the United States against the opposing party in such an action, or a coparty, or a third party when the claim of the United States arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. This merely gives the Government the right to a full hearing of all aspects of the case arising out of the same transaction or occurrence. When the claim of the United States does not arise out of the transaction or occurrence that is the subject of the opposing party's claim and is time barred, it may only be asserted by the United States to the degree that it offsets the other claim and cannot exceed the amount of the opposing party recovery.

The testimony at the hearing on the bill noted the fact that this bill does not affect the authority of each agency to offset on its own books and without resort to court any claim it may have against a person to whom it is about to make a payment based on the same or an unrelated transaction. There is a 10-year statute of limitations which applies to claims against the United States filed with the General Accounting Office. This provision is found in title 31 of the United States Code, sections 71a and 237. This bill therefore does not affect that agency's authority to offset a claim presented within that time period any debt which the same claimant owes to the United States.

TAX ACTIONS

In subsection (h) of the new section, it is expressly provided that nothing in the act is to apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

DATE OF ACCRUAL

Any right of action subject to the provisions of the section which accrued prior to the date of enactment is by subsection (g) of the section deemed to have accrued on the date of enactment of the bill into law.

EXCLUSIONS

Section 2415 establishes statutes of limitation for the general causes of action referred to in that section. Section 2416 added to title 28 by the bill specifies important exclusions of time which will not be applied in computing the limitations period established in section 2415. The provisions of this section provide exclusions which are also generally found in law governing State statutes of limitation. Paragraph (a) excludes the periods when the defendant or the res is outside of the United States, its territories and possessions, the District of Columbia, of the Commonwealth of Puerto Rico.

Paragraph (b) excludes the time during which the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason.

Paragraph (c) of section 2416 excludes the time when the facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances. This provision is required because of the difficulties of Government operations due to the size and complexity of the Government. It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general propositon, the responsible official would be the official who is also responsible for the activity out of which the action arose. Such an official is the one likely to know whether the material fact does involve the possibility of a cause of action which may be asserted against the Government. The committee understands that the principal application of this exclusion will probably be in connection with fraud situations. An example would be where the affirmative act of a wrongdoer has served to conceal the fraudulent act. This type of exclusion is to be found in the law of many States in both fraud and tort limitations. The material facts that are not known must go to the very essence of the right of action.

Paragraph (d) excludes the period during which the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States. In other words, a state of war declared by Congress under the Constitution.

GENERAL DISCUSSIONS

As has been stated this committee has determined that this bill fills a clearly defined need which exists in the law today. In the report filed in behalf of the General Accounting Office in this bill, the Comptroller General stated that as a matter of fairness, persons dealing with the Government should have some protection against an action by the Government when the act occurred many years previously. The emphasis on fairness referred to by the Comptroller General and by the Department of Justice in recommending the legislation is a very important consideration and the principal basis for the bill. The limitation periods fixed in the bill are similar to those fixed by Federal and State law for the same types of actions. While State laws, of course, show a variety of periods, it is possible to generalize and state that many jurisdictions provide a 6-year statute of limitation as to contract action and the limitations for tort proceedings in most cases are from 2 to 3 years. It is readily apparent that the provisions of this bill were drafted in recognition of these facts. This committee further notes that it is significant that the statute of limitations applicable to actions in the Court of Claims is 6 years and similarly the period for barring civil actions against the United States governed by section 2401(a) of title 28 of the United States Code is also fixed at 6 years. The committee is further advised that in a recent report the Government Operations Committee noted the need for the statute of limitations as is provided in this bill. In House Report 1344 of the 89th Congress, on page 16 that committee noted that there was a need for legislation providing for a statute of limitations which would apply to suits by the Government arising out of contracts, and further observed that the objective of that legislation would be to provide a fair procedure which would have the effect of ending the possibility of contracts litigation after a fixed period.

The bill in referring to actions by the "United States or an officer or agency thereof" obviously includes the definition of "agency" as defined and used within title 28. As used in that title, agency includes "any departments, independent establishment, commission, administration, authority, board, or bureau of the United States, or any corporation in which the United States has a proprietary interest unless the contract shows that such term was intended to be used in a more limited sense" (28 U.S.C. 451). Therefore, the term applies to Federal corporations and the limitations provided by this bill would be exclusive as to the contract and tort actions covered by the bill. It is also clear that the enactment of this bill will not subject an angency of the United States, including a corporation to any State statute of limitations.

The committee points out that the bill does not affect existing statues of limitations. For example, section 235 of title 31, United States Code, concerned false claims against the Government and provides that actions on such matters must be brought within 6 years. Suits for the enforcement of civil fines, and penalty of forfeiture must be brought within 5 years (28 U.S.C. 2462); 12 United States

Code, section 1703(b) provides a 2-year period applicable to suits by the Federal Housing Authority for the recovery of an overpayment on a guarantee of a home improvement loan. There are other such statutes in the law at the present time. Not all of them are consistent with the limitations proposed in this bill. In view of the specialized nature of the other provisions, the committee has concluded that they would be better dealt with at a subsequent time on an individual basis if in fact any change would appear to be desirable.

Suits for injunction and other extraordinary relief are not covered by this bill nor by any existing statute. The testimony presented at the hearing on the bill emphasized that a statute of limitations is inconsistent with injunctive relief where prompt action may be essential to accomplish the purpose of the injunction. An injunction is sought when prompt action is essential to prevent irreparable harm, or is required to forestall a significant change in position. The Government must decide to seek an injunction at once or not at all. It also must be recognized that the Government brings the injunction in order to protect and defend Government activities and programs. It simply is not sensible to diminish the power of the Government to utilize an injunction to accomplish these ends.

CONCLUSION

In recommending this legislation, the committee feels that it will provide a greater fairness as regards private individuals who deal with the Government while adequately providing for the interests of the Government. The Government will be barred from asserting old and stale claims in the courts and the necessity for the early assertion of claims will require increased efficiency in Government claims proceedings. The committee recommends that the bill, with the corrective amendments, be considered favorably.

ANALYSIS OF THE BILL

The bill would amend title 28 of the United States Code by adding two new sections to chapter 161 of that title, a chapter which contains the general provisions applying to the United States as a party in litigation.

Section 2415 defines the time limitations for the United States to bring actions in the U.S. courts.

Subsection (a) provides that every civil action brought for money damages by the United States founded upon an express or implied contract will be barred unless the complaint is filed within 6 years after the right of action accrues or within 1 year after a final decision in administrative proceedings applicable to the case or required by contract or law. The subsection contains a proviso which states that a partial payment or written acknowledgement of the debt after the running of the statute will cause the right of action to be deemed to accrue again at the time of each payment or acknowledgment.

Subsection (b) provides that every action for money damages brought by the United States founded upon a tort shall be barred unless the complaint is filed within 3 years after the right of action first accrues. A proviso to this subsection makes an exception as to specified types of actions and provides that as to those actions, the statute of limitations will be 6 years. These are actions where the Government is entitled to have a longer period of time to determine whether the Government has been damaged and whether it has the right to bring suit. They include actions resulting from a trespass on lands of the United States, including trust of restricted Indian lands; actions to recover damages resulting from fire to such lands; actions to recover for diversion of money paid under a grant program; and actions for conversion of property of the United States.

Subsection (c) expressly provides that nothing in the new section shall be construed to limit the time in which the Government may bring an action to establish the title to, or right of possession of, real or personal property.

Subsection (d) provides a 6-year limitation for actions by the Government to recover money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to a member or dependent of a member of the uniformed services of the United States incident to that individual's employment or services: As is the case in subsection (a), a partial payment or written acknowledgment of the debt will have the effect of causing the right of action to accrue again at the time of each payment of acknowledgment. Subsection (e) concerns the situation in which a timely action is brought by the United States and is thereafter dismissed without prejudice. In that case,

the action may be recommended within 1 year after such a dismissal regardless of whether the action would otherwise then be barred by this section. When an action is recommenced in this manner, the defendant is likewise not barred from interposing any claim which would not have been barred in the original action.

Subsection (f) provides that the provisions of section 2415 do not prevent the assertion of any claim of the United States against an opposing party, co-party, or third party, arising out of the transaction or occurrence which is the subject matter of the opposing party's claim embodied in an action against the United States. A claim of the United States that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may if time barred be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

Subsection (g) provides that any right of action subject to the provisions of section 2415 which accrues prior to the date of enactment of the bill shall for the purposes of the section, be deemed to have accrued on the date of the bill's enactment into law.

Subsection (h) provides that nothing in this act shall apply to actions brought under the Internal Revenue Code or incident to the collection of taxes imposed by the United States.

Section 2416

Section 2416 provides for specified exclusions in the computation of limitation periods fixed by section 2415. The time that the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico is excluded. Similarly, the time that a defendant is exempt from legal process because of infancy, mental incompetency, diplomatic immunity, or any other reason is also excluded. When the facts material to the Government's right of action are not known and reasonable could not be known by an official of the United States charged with responsibility to act in the circumstances, the statute will not run. There shall be excluded from the limitation period established in section 2415 all periods during which the United States in a state of war declared pursuant to article I, section 8, of the Constitution of the United States.

Section 2 of the bill makes the necessary amendment to the table of sections at the head of chapter 161 of title 28, so to include reference to the two new sections.

The bill as transmitted to the Congress by the Department of Justice was amended in several respects by the Committee on the Judiciary of the House of Representatives. The committee discussed the purpose of the amendments as follows:

The committee amendment to subsection (d) of section 2415 adds the same proviso as is found in subsection (a) of the section. This language provides that a partial payment or a written acknowledgement of the debt will have the effect of causing the right of action to accrue again at the time of each payment or acknowledgement.

Subsection (e) is amended in three instances to make corrections in language. The word "recommended" was used in two instances where the word should have been "recommenced". In line 12 of page 3, the words "this action" should have read "this section". The committee amendments make the necessary corrections.

The Department of Justice has advised the committee that it has no objection to the amendments made by the House of Representatives.

The committee believes that the bill is meritorious and recommends it favorably.

Attached and made a part of this report are (1) a letter dated, March 10, 1966, to the Vice President of the United States and (2) a letter dated, April 13, 1966, from the Comptroller General.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., March 10, 1966.

The VICE PRESIDENT,
U.S. Senate,
Washington, D.C.

DEAR MR. VICE PRESIDENT: Enclosed for your consideration and appropriate reference are three legislative proposals; (1) to amend the Federal Tort Claims Act to authorize increased agency consideration of tort claims against the Gov-

ernment, and for other purposes; (2) to establish a statute of limitations for certain actions brought by the Government; and (3) to avoid unnecessary litigation by providing for the collection of claims of the United States, and for other purposes.

These proposals are designed to improve the disposition of monetary claims by and against the Government—claims which now comprise the bulk of civil litigation involving the Government. The proposals should ease court congestion, avoid unnecessary litigation, speed up settlements, and reduce the number of stale claims. Such results would, of course, not only benefit private litigants but be beneficial to the courts, the agencies, and the Department of Justice.

I. AMENDMENT TO TORT CLAIMS ACT

The first of these proposals would amend the Federal Tort Claims Act. That act, with limited exceptions, makes the United States liable for the negligence, wrongful act, or omission, of a Government employee while he is acting within the scope of his office or employment, under circumstances in which a private person would be liable under the law of the place where the act or omission occurred. A person who has a substantial claim arising under the act must bring an action in a Federal district court (28 U.S.C. 1346(b)). He can seek administrative settlement of his claim only if the claim is for less than $2,500 (28 U.S.C. 2672).

Our experience under the Federal Tort Claims Act has demonstrated that of all awards allowed in cases filed under the act, 80 percent are made prior to trial. Since tort claims against the Government tend to arise in a few agencies, these agencies have considerable experience in settling such claims. We therefore propose that a procedure be instituted under which all claims would be presented to the appropriate agencies for consideration and possible settlement before court action could be instituted. A claim would first be considered by the agency whose employee's activity allegedly caused the damage and which possesses the greatest information concerning that activity. As a result, it is expected that meritorious claims would be settled more quickly, without the need for expensive and time-consuming litigation or even for filing suit.

In order to provide the agencies with sufficient authority to settle a broad range of claims, the proposal would give them authority to consider and settle any claim under the Tort Claims Act, irrespective of amounts. Settlement and awards in excess of $50,000 would require the prior approval of the Attorney General.

Finally, in order to encourage claimants and their attorneys to make use of this new administrative procedure, the attorney's fees allowable under the act would be raised from the present 10 percent of the administrative award and 20 percent of the settlement of judgment after filing suit to 20 percent and 25 percent respectively.

II. STATUTES OF LIMITATIONS AGAINST CERTAIN GOVERNMENT ACTIONS

The second proposal would establish statutes of limitations for certain types of actions brought by the Government. The general rule is that there is no limitation of time against the Government for bringing an action unless it is specifically authorized by statute. There are a few exceptions to this rule. For example, a civil suit brought by the Government on a false claim must be filed within 6 years; suits for penalties or forfeitures under the customs laws must be brought within 5 years; 2 years is the limit within which the Federal Housing Administration must sue to recover an overpayment on a guarantee of a home improvement loan. There are, however, no time bars against the great majority of Government claims.

More time limitations appear desirable for a number of reasons. Application of statutes of limitation in tort and contract actions would make the position of the Government more nearly equal to that of private litigants. A corollary to this objective is the desirability of encouraging trials at a sufficiently early time so that necessary witnesses and documents are available and memories are still fresh.

Another reason for proposing limitations is to reduce the costs of keeping records and detecting and collecting on Government claims—costs that after a period of years may exceed any return by way of actual collections. Further consequences to be expected from this measure are the encouragement of the agencies to refer their claims promptly to the Department of Justice for collection; the avoidance of judicial hostility to old claims asserted by the Government; and the minimiz-

ing of collection problems arising with respect to debtors who have died, disappeared, or gone bankrupt.

Accordingly, it is proposed that statutes of limitations be applied to important general areas where none are now in effect. The proposal would impose a 6-year limitation on the assertion of Government claims for money arising out of an express or implied contract or a quasi-contract. This time bar corresponds to the 6-year limitation on those who sue the Government on similar claims under the Tucker Act.

Suits in tort are to be brought within 3 years, except those based on trespass to Government lands and those brought for the recovery of damages resulting from the fire on such lands, and actions for conversion of Government property for which the limitation period will be 6 years.

A 6-year limitation would be imposed upon suits by the Government to recover erroneous overpayments of wages and other benefits made to military and civilian employees of the Government.

III. EXPANSION OF AGENCY AUTHORITY TO SETTLE GOVERNMENT MONETARY CLAIMS

The third proposal seeks to ease court congestion and improve and accelerate the disposition of Government claims.

Each year, tens of thousands of Government claims arise out of the great variety of Government activities. Many of the agencies in which these claims arise have limited and inadequate authority to take effective collection action with respect to such claims. With few exceptions, the agencies have no authority to negotiate a compromise when the amount of the indebtedness, or even the fact of the indebtedness, is in dispute or where there is a question as to the debtor's financial capacity to pay.

Because of this lack of agency authority, many claims are referred routinely to the General Accounting Office and the Department of Justice for collection when they could be disposed of more satisfactorily at the agency level. The proposed legislation should permit more effective collection efforts by the agencies.

It would impose upon Government agencies the obligation to seek to collect debts due the United States as a result of their activities, and would afford them the flexibility to compromise claims when compromise is warranted or to suspend collection action on claims when they are found to be uncollectible by virtue of there being no assets available for payment. Agencies would not, however, be authorized to compromise or terminate a collection activity on a claim which exceeds a principal amount of $20,000. Neither could they act upon claims as to which there are indications of fraud or misrepresentation, or which arise out of antitrust violations.

Efforts at collection and compromise would be considered by the agency under regulations prescribed by the agency head and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General.

It is clear that the legislation will not increase or diminish the existing authority of the head of any agency to litigate claims, nor will it diminish existing authority to settle, compromise, or close claims.

In conclusion, the enactment of these three proposals would have most beneficial consequences. Uncollectible claims of the Government could be disposed of by agency action without resort to litigation, tort claims against the Government could be settled without the necessity for filing suit, and claims of the Government will have to be brought, and, in fact, may only be brought, while they are still relatively fresh. The removal from the courts of litigation which is essentially unnecessary, should enable the courts and the Department of Justice to devote more time to other pressing matters and should permit claims of the United States to be satisfied more expeditiously.

In order to achieve these desirable objectives, I recommend the introduction and prompt enactment of these proposals.

The Bureau of the Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the administration's program.

Sincerely,

_____, _____,

Attorney General.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., April 13, 1966.

B–158275.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your letter of March 29, 1966, requesting our views on H.R. 13652.

The bill would establish a statute of limitations for certain actions brought by the Government by adding sections 2415 and 2416 to title 28, United States Code. In general, those sections would bar (1) every action for money damages brought by the United States which is founded upon any express or implied contract unless the complaint is filed within 6 years after the right of action first accrues, with certain exceptions provided therein; (2) every action which is founded on tort, also with certain exceptions, unless the complaint is filed within 3 years after the right of action first accrues; and (3) every action for the recovery of money erroneously paid to or on behalf of civilian and military personnel incident to their employment or services unless the complaint is filed within 6 years after the right of action accrues.

The establishment of a time limitation on the bringing of suits by the United States appears to be a matter primarily for the Congress to decide. However, we think that, as a matter of fairness, persons dealing with the Government should have some protection against an action by the Government which arose from a transaction occurring many years previously and therefore we recommend favorable consideration of the bill by your committee.

The word "recommended" in lines 10 and 13, page 3 should be "recommenced."

Sincerely yours,

FRANK H. WEITZEL,
Assistant Comptroller General of the United States.

TITLE VII—MISCELLANEOUS

SEC. 701. (a) Retroactive compensation or salary shall be paid by reason of this Act only in the case of an individual in the service of the United States (including service in the Armed Forces of the United States) or the municipal government of the District of Columbia on the date of enactment of this Act, except that such retroactive compensation or salary shall be paid (1) to an officer or employee who retired during the period beginning on the first day of the first pay period which begins on or after July 1, 1966, and ending on the date of enactment of this Act for services rendered during such period and (2) in accordance with the provisions of the Act of August 3, 1950 (Public Law 636, Eighty-first Congress), as amended (5 U.S.C. 61f–61k), for services rendered during the period beginning on the first day of the first pay period which begins on or after July 1, 1966, and ending on the date of enactment of this Act by an officer or employee who dies during such period. Such retroactive compensation or salary shall not be considered as basic salary for the purpose of the Civil Service Retirement Act in the case of any such retired or deceased officer or employee.

(b) For the purposes of this section, service in the Armed Forces of the United States, in the case of an individual relieved from training and service in the Armed Forces of the United States or disharged from hospitalization following such training and service, shall include the period provided by law for the mandatory restoration of such individual to a position in or under the Federal Government or the municipal government of the District of Columbia.

(c) For the purpose of determining the amount of insurance for which an individual is eligible under the Federal Employees' Group Life Insurance Act of 1954, all changes in rates of compensation or salary which result from the enactment of this Act shall be held and considered to be effective as of the date of such enactment.

Approved July 18, 1966.

GOVERNMENT SUITS—STATUTE OF LIMITATIONS

PUBLIC LAW 89-505; 80 STAT. 304

H.R. 13652—An Act to establish a statute of limitations for certain actions brought by the Government

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

Title 28 of the United States Code is amended by adding thereto the following two new sections:

"§ 2415. Time for commencing actions brought by the United States

"(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for miney damages brought by the United States or an officer or agency thereof which is founded upon any contract expressed or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

"(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided*, That an action to recover damages resulting from a trespass on lands of the United States, including trust or restricted Indian lands; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues.

"(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

"(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: *Provided*, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

"(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommenced within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommenced the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

"(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

"(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

"(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

"§ *2416. Time for commencing actions brought by the United States—Exclusions*

"For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

"(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

"(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

"(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

"(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States."

SEC. 2. The table of sections at the head of chapter 161 of title 28 of the United States Code is amended by adding at the end thereof the following items:

"2415. Time for commencing actions brought by the United States.
"2416. Time for commencing actions brought by the United States—Exclusions."

Approved July 18, 1966.

TORT CLAIMS—AGENCY CONSIDERATION

PUBLIC LAW 89-506; 80 STAT. 306

H.R. 13650—An Act to amend the Federal Tort Claims Act to authorize increased agency consideration of tort claims against the Government, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That: (a) The first paragraph of section 2672 of title 28, United States Code,[29] is amended to read as follows:

"The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided,* That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee."

(b) The second paragraph of section 2672 of title 28, United States Code, is amended to read as follows:

[H. Rept. 1534, 89th Cong., second sess.]

ESTABLISHING A STATUTE OF LIMITATIONS FOR CERTAIN ACTIONS BROUGHT BY THE GOVERNMENT

The Committee on the Judiciary, to whom was referred the bill (H.R. 13652) to establish a statute of limitations for certain actions brought by the Government, having considered the same, report favorably thereon with amendments and recommend that the bill do pass.

The amendments are as follows:

Page 3, line 7: Strike "accrues," and insert "accrues: *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment."

Page 3, line 10: Strike "recommended" and insert "recommenced".

Page 3, line 12: Strike "this action" and insert "this section".

Page 3, line 13: Strike "recommended" and insert "recommenced".

PURPOSE OF THE AMENDMENTS

The committee amendment to subsection (d) of section 2415 adds the same proviso as is found in subsection (a) of the section. This language provides that a partial payment or a written acknowledgement of the debt will have the effect of causing the right of action to accrue again at the time of each payment or acknowledgment.

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[29] 28 U.S.C.A. § 2672.

Subsection (e) is amended in three instances to make corrections in language. The word "recommended" was used in two instances where the word should have been "recommenced". In line 12 of page 3, the words "this action" should have read "this section". The committee amendments make the necessary corrections.

PURPOSE

The purpose of the proposed legislation, as amended, is to establish statutes of limitations which will apply to contract and tort actions brought by the United States.

ANALYSIS OF THE BILL

The bill would amend title 28 of the United States Code by adding two new sections to chapter 161 of that title, a chapter which contains the general provisions applying to the United States as a party in litigation.

Section 2415 defines the time limitations for the United States to bring actions in the U.S. courts.

Subsection (a) provides that every civil action brought for money damages by the United States founded upon an express or implied contract will be barred unless the complaint if filed within 6 years after the right of action accrues or within 1 year after a final decision in administrative proceedings applicable to the case or required by contract or law. The subsection contains a proviso which states that a partial payment or written acknowledgment of the debt after the running of the statute will cause the right of action to be deemed to accrue again at the time of each payment or acknowledgment.

Subsection (b) provides that every action for money damages brought by the United States founded upon a tort shall be barred unless the complaint is filed within 3 years after the right of action first accrues. A proviso to this subsection makes an exception as to specified types of actions and provides that as to those actions, the statute of limitations will be 6 years. These are actions where the Government is entitled to have a longer period of time to determine whether the Government has been damaged and whether it has the right to bring suit. They include actions resulting from a trespass on lands of the United States, including trust or restricted Indian lands; actions to recover damages resulting from fire to such lands; actions to recover for diversion of money paid under a grant program; and actions for conversion of property of the United States.

Subsection (c) expressly provides that nothing in the new section shall be construed to limit the time in which the Government may bring an action to establish the title to, or right of possession of, real or personal property.

Subsection (d) provides a 6-year limitation for actions by the Government to recover money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to a member or dependent of a member of the uniformed services of the United States incident to that individual's employment or services. As is the case in subsection (a), a partial payment or written acknowledgment of the debt will have the effect of causing the right of action to accrue again at the time of each payment or acknowledgment.

Subsection (e) concerns the situation in which a timely action is brought by the United States and is thereafter dismissed without prejudice. In that case, the action may be recommenced within 1 year after such a dismissal regardless of whether the action would otherwise then be barred by this section. When an action is recommenced in this manner, the defendant is likewise not barred from interposing any claim which wou'd not have been barred in the original action.

Subsection (f) provides that the provisions of section 2415 do not prevent the assertion of any claim of the United States against an opposing party, coparty, or third party, arising out of the transaction or occurrence which is the subject matter of the opposing party's claim embodied in an action against the United States. A claim of the United States that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may if time barred be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

Subsection (g) provides that any right of action subject to the provisions of section 2415 which accrues prior to the date of enactment of the bill shall, for the purposes of the section, be deemed to have accrued on the date of the bill's enactment into law.

Subsection (h) provides that nothing in this act shall apply to actions brought under the Internal Revenue Code or incident to the collection of taxes imposed by the United States.

Section 2416

Section 2416 provides for specified exclusions in the computation of limitation periods fixed by section 2415. The time that the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico is excluded. Similarly, the time that a defendant is exempt from legal process because of infancy, mental incompetency, diplomatic immunity, or any other reason is also excluded. When the facts material to the Government's right of action are not known and reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances, the statute will not run. There shall be excluded from the limitation period established in section 2415 all periods during which the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States.

Section 2 of the bill makes the necessary amendment to the table of sections at the head of chapter 161 of title 28, so as to include reference to the two new sections.

STATEMENT

The bill, H.R. 13652, is one of three bills introduced in accordance with the recommendations of an executive communication from the Department of Justice. These bills, H.R. 13650, H.R. 13651, and H.R. 13652, have the common purpose of improving existing procedures for the disposition of monetary claims by and against the Government. These subjects now comprise the bulk of civil litigation of the Government. The three bills just mentioned, along with H.R. 14182, providing for payment of costs by the United States when judgment is entered against it, are intended to improve claims procedures and to provide a more balanced and fair treatment of litigants in civil actions involving the Government. The committee has considered these bills as a group. Their enactment will reduce unnecessary litigation and court congestion, speed up meritorious settlements and cut down on unproductive paperwork. At the same time, the private litigants can be assured of a more fair and balanced treatment when dealing with the Government.

The bi'l H.R. 13652 was the subject of a hearing on April 6, 1966. At that hearing it was noted that the Government litigation covered by the bill arises out of activity which is very similar to commercial activity. Many of the contract and tort claims asserted by the Government are almost indistinguishable from claims made by private individuals against the Government. Therefore it is only right that the law should provide a period of time within which the Government must bring suit on claims just as it now does as to claims of private individuals. The committee agrees that the equality of treatment in this regard provided by this bill is required by modern standards of fairness and equity.

Statutes of limitation have the salutary effect of requiring litigants to institute suits within a reasonable time of the incident or situation upon which the action is based. In this way the issues presented at the trial can be decided at a time when the necessary witnesses, documents, and other evidence are still available. At the same time, the witnesses are better able to testify concerning the facts involved for their memories have not been dimmed by the passage of time. The committee feels that the prompt resolution of the matters covered by the bill is necessary to an orderly and fair administration of justice. Stale claims can neither be effectively presented nor adjudicated in a manner which is fair to the parties involved. Even if the passage of time does not prejudice the effective presentation of a claim, the mere preservation of records on the assumption that they will be required to substantiate a possible claim or an existing claim increases the cost of keeping records. As time passes the collection problems invariably increase. The Government has difficulty in even finding the individuals against whom it may have a claim for they may have died or simply disappeared. These problems have been brought to the attention of the committee previously in connection with other legislation. This bill provides the means to resolve these difficulties.

CONTRACT ACTIONS

Subsection (a) of new section 2415 added by the bill provides for a 6-year limitation which would apply to all Government actions based on contracts whether express or implied in law or in fact. This provision would extend to obligations which are based on quasi-contracts. In all such contract matters, the action would be barred unless it were brought by the Government within 6 years after the right of action accrues, or within 1 year after a final decision in a required administrative proceeding, whichever is later. This last provision, which

has the effect of tolling the running of the statute of limitations during mandatory administrative proceedings, is necessary because of the great number and variety of such proceedings made possible by current statutes. An administrative proceeding ordinarily consumes a considerable period of time and, as has been noted, the bill would permit the Government a year after the final administrative decision in which to present its case for judicial determination. An example of such an administrative proceeding are those which involve appeals under the "disputes" clause of Government contracts.

In a proviso to subsection (a), there is a provision that later partial payment or written acknowledgement of a debt will start the 6-year period running all over again. This provision embodies a familiar principle of law which is embodied in the law of many States. The obligation of a debt will continue where a debtor has acknowledged the debt and indicated his willingess to discharge the obligation.

TORT ACTIONS

Subsection (b) of section 2415 provides that tort actions, that is, actions based on damage or injury from a wrongful or negligent act, must be brought by the United States within 3 years after the right of action first accrues. This 3-year statute applies to all Government tort actions except those that are expressly referred to in this subsection and are governed by a 6-year statute. These specific actions are those which are of a type which might not be immediately brought to the attention of the Government or would only be uncovered after some investigation. Included in this category of actions are those based upon a trespass on lands of the United States, including trusts or restricted Indian lands, and also actions to recover damages resulting from fire to such lands. Similarly, actions to recover for diversion of money paid under a grant program and actions for conversion of property of the United States are subject to a 6-year limitation.

EXCEPTION AS TO GOVERNMENT ACTIONS AS TO TITLE TO REAL AND PERSONAL PROPERTY

Subsection (c) makes it clear that no one can acquire title to Government property by adverse possession or other means. This is done by providing that there is no time limit within which the Government must bring actions to establish title to or right of possession of real or personal property of the United States. In other words, there is no statute of limitations applying to Government actions of this type.

RECOVERY OF ERRONEOUS PAYMENTS

Subsection (d) provides a 6-year statute of limitations for Government actions to recover money erroneously paid to civilian employees or members of the uniformed services of the United States. While payments of this type might be described as analogous to payments incident to a contract, it was felt that this type of overpayment of compensation should be the subject of a separate provision in the bill. Overpayments of this type usually occur in the process of auditing agency account books. The problems posed by this type of Government claim have been the subject of discussion by this committee on a number of occasions in connection with other legislation. The provisions of this subjection, when joined with the provisions of H.R. 13651 providing for a compromise of Government claims, for the first time provide for an equitable and realistic solution which is in the interest of both the Government and the individual concerned. In connection with the legislation before the committee in the 88th Congress, the Comptroller General expressed the opinion that a 6-year statute of limitations applicable to such collections would be in the interest of the Government. In a report to the committee dated May 3, 1961, the Comptroller General stated that the audit experience of the General Accounting Office supported this conclusion. In this connection he stated:

"Viewed in the light of our audit experience and the periods fixed in connection with the records disposal programs of the various departments and agencies, and in line with the periods fixed in the present limiting provisions applicable in the case of suits in the Court of Claims (28 U.S.C. 2501), forged or altered checks (31 U.S.C. 129), and dual compensation (31 U.S.C. 237a), a period of 6 years would appear sufficient to adequately safeguard the Government's interest."

The testimony presented in support of this bill at the hearing on April 6, 1966, further supports this conclusion. Whatever the nature or basis of the claim, it seems reasonable to give the Government the 6-year time period for discovering and acting upon these claims.

RECOMMENCEMENT OF ACTIONS PREVIOUSLY DISMISSED WITHOUT PPREJUDICE

Subsection (e) of section 2415 provides for the situation where an action has been dismissed without prejudice by providing that the Government may recommence the action within 1 year regardless of whether the action would then be barred by this section. As was noted in the analysis of sections, the defendant in such a recommenced action is similarly not barred from interposing any claim which would not have been barred in the original action. The committee observes that this is in line with the underlying purpose of the bill of extending fair treatment to private litigants while providing adequate protection for the interests of the Government. In his connection, the Governmen is given a reasonable period for the recommencement of an action which it had origially brought in a timely manner and, at the same time, the opposing party is permitted to assert any claim which he might have interposed in the original action. This latter provision insures that the private party will not be placed in a disadvantageous position because the option is given the Government to recommence an action which had previously been dismissed without prejudice.

OFFSETS AND COUNTERCLAIMS

Subsection (f) of section 2415 contains carefully drafted provisions permitting the Government to assert its claims by way of offset or counterclaim in actions brought against the United States. Where the United States finds itself involved in litigation, it very often is to the interest of the Government to assert claims by way of counterclaim and the provisions of this subsection represent a very practical implementation and classification of the Government's rights in this regard. It is expressly provided that the limitations provided in the section will not prevent the assertion of a claim by the United States against the opposing party in such an action, or a coparty, or a third party when the claim of the United States arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. This merely gives the Government the right to a full hearing of all aspects of the case arising out of the same transaction or occurrence. When the claim of the United States does not arise out of the transaction or occurrence that is the subject of the opposing party's claim and is time barred, it may only be asserted by the United States to the degree that it offsets the other claim and cannot exceed the amount of the opposing party's recovery.

The testimony at the hearing on the bill noted the fact that this bill does not affect the authority of each agency to offset on its own books and without resort to court any claim it may have against a person to whom it is about the make a payment based on the same or an unrelated transaction. There is a 10-year statute of limitations which applies to claims against the United States filed with the General Accounting Office. This provision is found in title 31 of the United States Code, sections 71a and 237. This bill therefore does not affect that agency's authority to offset a claim presented within that time period any debt which the same claimant owes to the United States.

TAX ACTIONS

In subsection (h) of the new section, it is expressly provided that nothing in the act is to apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

DATE OF ACCRUAL

Any right of action subject to the provisions of the section which accrued prior to the date of enactment is by subsection (g) of the section deemed to have accrued on the date of enactment of the bill into law.

EXCLUSIONS

Section 2415 establishes statutes of limitation for the general causes of action referred to in that section. Section 2416 added to title 28 by the bill specifies important exclusions of time which will not be applied in computing the limitations period established in section 2415. The provisions of this section provide exclusions which are also generally found in law governing State statutes of limitation. Paragraph (a) excludes the periods when the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico.

Paragraph (b) excludes the time during which the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason.

Paragraph (c) of section 2416 excludes the time when the facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with responsibility to act in the circumstances. This provision is required because of the difficulties of Government operations due to the size and complexity of the Government. It is not intended that the application of this exclusion will require the knowledge at the highest level of the Government. Responsibility in such matters may extend down into lower managerial levels within an agency. As a general proposition, the responsible official would be the official who is also responsible for the activity out of which the action arose. Such an official is the one likely to know whether the material fact does involve the possibility of a cause of action which may be asserted against the Government. The committee understands that the principal application of this exclusion will probably be in connection with fraud situations. An example would be where the affirmative act of a wrongdoer has served to conceal the fraudulent act. This type of exclusion is to be found in the law of many States in both fraud and tort limitations. The material facts that are not known must go to the every essence of the right of action.

Paragraph (d) excludes the period during which the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States. In other words, a state of war declared by Congress under the Constitution.

GENERAL DISCUSSION

As has been stated this committee has determined that this bill fills a clearly defined need which exists in the law today. In the report filed in behalf of the General Accounting Office in this bill, the Comptroller General stated that as a matter of fairness, persons dealing with the Government should have some protection against an action by the Government when the act occurred many years previously. The emphasis on fairness referred to by the Comptroller General and by the Department of Justice in recommending the legislation is a very important consideration and the principal basis for the bill. The limitation periods fixed in the bill are similar to those fixed by Federal and State law for the same types of actions. While State laws, of course, show a variety of periods, it is possible to generalize and state that many jurisdictions provide a 6-year statute of limitation as to contract action and the limitations for tort proceedings in most cases are from 2 to 3 years. It is readily apparent that the provisions of this bill were drafted in recognition of these facts. This committee further notes that it is significant that the statute of limitations applicable to actions in the Court of Claims is 6 years and similarly the period for barring civil actions against the United States governed by section 2401(a) of title 28 of the United States Code is also fixed at 6 years. The committee is further advised that in a recent report the Government Operations Committee noted the need for the statute of limitations as is provided in this bill. In House Report 1344 of the 89th Congress, on page 16 that committee noted that there was a need for legislation providing for a statute of limitations which would apply to suits by the Government arising out of contracts, and further observed that the objective of that legislation would be to provide a fair procedure which would have the effect of ending the possibility of contracts litigation after a fixed period.

The bill in referring to actions by the "United States or an officer or agency thereof" obviously includes the definition of "agency" as defined and used within title 28. As used in that title, agency includes "any department, independent establishment, commission, administration, authority, board, or bureau of the United States, or any corporation in which the United States has a proprietary interest unless the contract shows that such term was intended to be used in a more limited sense" (28 U.S.C. 451). Therefore, the term applies to Federal corporations and the limitations provided by this bill would be exclusive as to the contract and tort actions covered by the bill. It is also clear that the enactment of this bill will not subject an agency of the United States, including a corporation to any State statute of limitations.

The committee points out that the bill does not affect existing statutes of limitations. For example, section 235 of title 31, United States Code, concerned false claims against the Government and provides that actions on such matters must be brought within 6 years. Suits for the enforcement of civil fines, and penalty of forfeiture must be brought within 5 years (28 U.S.C. 2462) ; 12 United

States Code, section 1703(b) provides a 2-year period applicable to suits by the Federal Housing Authority for the recovery of an overpayment on a guarantee of a home improvement loan. There are other such statutes in the law at the present time. Not all of them are consistent with the limitations proposed in this bill. In view of the specialized nature of the other provisions, the committee has concluded that they would be better dealt with at a subsequent time on an individual basis, if in fact any change would appear to be desirable.

Suits for injunction and other extraordinary relief are not covered by this bill nor by any existing statute. The testimony presented at the hearing on the bill emphasized that a statute of limitations is inconsistent with injunctive relief where prompt action may be essential to accomplish the purpose of the injunction. An injunction is sought when prompt action is essential to prevent irreparable harm, or is required to forestall a significant change in position. The Government must decide to seek an injunction at once or not at all. It also must be recognized that the Government brings the injunction in order to protect and defend Government activities and programs. It simply is not sensible to diminish the power of the Government to utilize an injunction to accomplish these ends.

CONCLUSION

In recommending this legislation, the committee feels that it will provide a greater fairness as regards private individuals who deal with the Government while adequately providing for the interests of the Government. The Government will be barred from asserting old and stale claims in the courts and the necessity for the early assertion of claims will require increased efficiency in Government claims proceedings. The committee recommends that the bill, with the corrective amendments, be considered favorably.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D.C., March 10, 1966.

The SPEAKER,
House of Representatives,
Washington, D.C.

DEAR MR. SPEAKER: Enclosed for your consideration and appropriate reference are three legislative proposals: (1) to amend the Federal Tort Claims Act to authorize increased agency consideration of tort claims against the Government, and for other purposes; (2) to establish a statute of limitations for certain actions brought by the Government; and (3) to avoid unnecessary litigation by providing for the collection of claims of the United States, and for other purposes.

These proposals are designed to improve the disposition of monetary claims by and against the Government—claims which now comprise the bulk of civil litigation involving the Government. The proposals should ease court congestion, avoid unnecssary litigation, speed up settlements, and reduce the number of stale claims. Such results would, of course, not only benefit private litigants but be beneficial to the courts, the agencies, and the Department of Justice.

I. AMENDMENT TO TORT CLAIMS ACT

The first of these proposals would amend the Federal Tort Claims Act. That act, with limited exceptions, makes the United States liable for the negligence, wrongful act, or omission, of a Government employee while he is acting within the scope of his office or employment, under circumstances in which a private person would be liable under the law of the place where the act or omission occurred. A person who had a substantial claim arising under the act must bring an action in a Federal district court (28 U.S.C. 1346(b)). He can seek administrative settlement of his claim only if the claim is for less than $2,500 (28 U.S.C. 2672).

Our experience under the Federal Tort Claims Act has demonstrated that of all awards allowed in cases filed under the act, 80 percent are made prior to trial. Since tort claims against the Government tend to arise in a few agencies, these agencies have considerable experience in settling such claims. We therefore propose that a procedure be instituted under which all claims would be presented to the appropriate agencies for consideration and possible settlement before court action could be instituted. A claim would first be considered by the agency whose employee's activity allegedly caused the damage and which possesses the

greatest information concerning that activity. As a result, it is expected that meritorious claims would be settled more quickly, without the need for expensive and time-consuming litigation or even for filing suit.

In order to provide the agencies with sufficient authority to settle a broad range of claims, the proposal would give them authority to consider and settle any claim under the Tort Claims Act, irrespective of amount. Settlement and awards in excess of $50,000 would require the prior approval of the Attorney General.

Finally, in order to encourage claimants and their attorneys to make use of this new administrative procedure, the attorney's fees allowable under the act would be raised from the present 10 percent of the administrative award and 20 percent of the settlement of judgment after filing suit to 20 and 25 percent respectively.

II. STATUTES OF LIMITATIONS AGAINST CERTAIN GOVERNMENT ACTIONS

The second proposal would establish statutes of limitations for certain types of actions brought by the Government. The general rule is that there is no limitation of time against the Government for bringing an action unless it is specifically authorized by statute. There are a few exceptions to this rule. For example, a civil suit brought by the Government on a false claim must be filed within 6 years; suits for penalties or forfeitures under the customs laws must be brought within 5 years; 2 years is the limit within which the Federal Housing Administration must sue to recover an overpayment on a guarantee of a home improvement loan. There are, however, no time bars against the great majority of Government claims.

More time limitations appear desirable for a number of reasons. Application of statutes of limitation in tort and contract actions would make the position of the Government more nearly equal to that of private litigants. A corollary to this objective is the desirability of encouraging trials at a sufficiently early time so that necessary witnesses and documents are available and memories are still fresh.

Another reason for proposing limitations is to reduce the costs of keeping records and detecting and collecting on Government claims—costs that after a period of years may exceed any return by way of actual collections. Further consequences to be expected from this measure are the encouragement of the agencies to refer their claims promptly to the Department of Justice for collection; the avoidance of judicial hostility to old claims asserted by the Government; and the minimizing of collection problems arising with respect to debtors who have died, disappeared, or gone bankrupt.

Accordingly, it is proposed that statutes of limitations be applied to important general areas where none are now in effect. The proposal would impose a 6-year limitation on the assertion of Government claims for money arising out of an express or implied contract or a quasi-contract. This time-bar corresponds to the 6-year limitation on those who sue the Government on similar claims under the Tucker Act.

Suits in tort are to be brought within 3 years, except those based on trespass to Government lands and those brought for the recovery of damages resulting from fire on such lands, and actions for conversion of Government property for which the limitation period will be 6 years.

A 6-year limitation would be imposed upon suits by the Government to recover erroneous overpayments of wages and other benefits made to military and civilian employees of the Government.

III. EXPANSION OF AGENCY AUTHORITY TO SETTLE GOVERNMENT MONETARY CLAIMS

The third proposal seeks to ease court congestion and improve and accelerate the disposition of Government claims.

Each year, tens of thousands of Government claims arise out of the great variety of Government activities. Many of the agencies in which these claims arise have limited and inadequate authority to take effective collection action with respect to such claims. With few exceptions, the agencies have no authority to negotiate a compromise when the amount of the indebtedness, or even the fact of the indebtedness, is in dispute or where there is a question as to the debtor's financial capacity to pay.

Because of this lack of agency authority, many claims are referred routinely to the General Accounting Office and the Department of Justice for collection when they could be disposed of more satisfactorily at the agency level. The pro-

posed legislation should permit more effective collection efforts by the agencies.

It would impose upon Government agencies the obligation to seek to collect debts due the United States as a result of their activities, and would afford them the flexibility to compromise claims when compromise is warranted or to suspend collection action on claims when they are found to be uncollectible by virtue of there being no assets available for payment. Agencies would not, however, be authorized to compromise or terminate a collection activity on a claim which exceeds a principal amount of $20,000. Neither could they act upon claims as to which there are indications of fraud or misrepresentation, or which arise out of antitrust violations.

Efforts at collection and compromise would be considered by the agency under regulations prescribed by the agency head and in conformity with such standards as may be promulgated jointly by the Attorney General and the Comptroller General.

It is clear that the legislation will not increase or diminish the existing authority of the head of any agency to litigate claims, nor will it diminish existing authority to settle, compromise, or close claims.

In conclusion, the enactment of these three proposals would have most beneficial consequences. Uncollectible claims of the Government could be disposed of by agency action without resort to litigation tort claims against the Government could be settled without the necessity for filing suit, and claims of the Government will have to be brought, and, in fact, may only be brought, while they are still relatively fresh. The removal from the courts of litigation which is essentially unnecessary, should enable the courts and the Department of Justice to devote more time to other pressing matters and should permit claims of the United States to be satisfied more expeditiously.

In order to achieve these desirable objectives, I recommend the introduction and prompt enactment of these proposals.

The Bureau of the Budget has advised that there is no objection to the enactment of this legislation from the standpoint of the administration's program.

Sincerely,

NICHOLAS DEB. KATZENBACH,
Attorney General.

(The draft of proposed legislation referred to in the communication and introduced as H.R. 13652 is as follows:)

A BILL To establish a statute of limitations for certain actions brought by the Government

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That Title 28 of the United States Code is amended by adding thereto the following two new sections:

§ 2415. Time for commencing actions brought by the United States

(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later. *Provided,* That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damage brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: *Provided,* That an action to recover damages resulting from a trespass on lands of the United States, including trust or restricted Indian lands; an action to recover damage resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues.

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States

or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues.

(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommended within one year after such dismissal, regardless of whether the action would otherwise then be barred by this action. In any action so recommended the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a coparty, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim may, if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

§ 2416. Time for commencing actions brought by the United States—Exclusions

For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which—

(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

(d) the United States is in a state of war declared pursuant to Article I, Section 8, of the Constitution of the United States.

SEC. 2. The table of sections at the head of chapter 161 of title 28 of the United States Code is amended by adding at the end thereof the following items:

2415. Time for commencing actions brought by the United States.
2416. Time for commencing actions brought by the United States—exclusions.

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, D.C., April 13, 1966.

B–158275.

Hon. EMANUEL CELLER,
Chairman, Committee on the Judiciary,
House of Representatives.

DEAR MR. CHAIRMAN: Reference is made to your letter of March 29, 1966, requesting our views on H.R. 13652.

The bill would establish a statute of limitations for certain actions brought by the Government by adding sections 2415 and 2416 to title 28, United States Code. In general, those sections would bar (1) every action for money damages brought by the United States which is founded upon any express or implied contract unless the complaint is filed within 6 years after the right of action first accrues, with certain exceptions provided therein; (2) every action which is founded on tort, also with certain exceptions, unless the complaint is filed within 3 years after the right of action first accrues; and (3) every action for the recovery of money erroneously paid to or on behalf of civilian and military personnel incident to their employment or services unless the complaint is filed within 6 years after the right of action accrues.

The establishment of a time limitation on the bringing of suits by the United States appears to be a matter primarily for the Congress to decide. However, we think that, as a matter of fairness, persons dealing with the Government should have some protection against an action by the Government which arose from a transaction occurring many years previously and therefore we recommend favorable consideration of the bill by your committee.

The word "recommended" in lines 10 and 13, page 3, should be "recommenced."

Sincerely yours,

FRANK H. WEITZEL,
Assistant Comptroller General of the United States.

CHANGES IN EXISTING LAW

In compliance with paragraph 2 of clause 3 of rule XIII of the rules of the House of Representatives, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman) :

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

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CHAPTER 161. UNITED STATES AS A PARTY GENERALLY

SEC.

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2415. Time for commencing actions brought by the United States.
2416. Time for commencing actions brought by the United States—Exclusions."

* * * * * * *

"§ 2415. Time for commencing actions brought by the United States

"(a) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later: Provided, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgment.

"(b) Subject to the provisions of section 2416 of this title, and except as otherwise provided by Congress, every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort shall be barred unless the complaint is filed within three years after the right of action first accrues: Provided, That an action to recover damages resulting from a trespass on lands of the United States, including trust or restricted Indian lands; an action to recover damages resulting from fire to such lands; an action to recover for diversion of money paid under a grant program; and an action for conversion of property of the United States may be brought within six years after the right of action accrues.

"(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

"(d) Subject to the provisions of section 2416 of this title and except as otherwise provided by Congress, every action for the recovery of money erroneously paid to or on behalf of any civilian employee of any agency of the United States or to or on behalf of any member or dependent of any member of the uniformed services of the United States, incident to the employment or services of such employee or member, shall be barred unless the complaint is filed within six years after the right of action accrues: Provided, That in the event of later partial payment or written acknowledgment of debt, the right of action shall be deemed to accrue again at the time of each such payment or acknowledgement.

"(e) In the event that any action to which this section applies is timely brought and is thereafter dismissed without prejudice, the action may be recommended within one year after such dismissal, regardless of whether the action would otherwise then be barred by this section. In any action so recommended

the defendant shall not be barred from interposing any claim which would not have been barred in the original action.

"(f) The provisions of this section shall not prevent the assertion, in an action against the United States or an officer or agency thereof, of any claim of the United States or an officer or agency thereof against an opposing party, a co-party, or a third party that arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. A claim of the United States or an officer or agency thereof that does not arise out of the transaction or occurrence that is the subject matter of the opposing party's claim, may if time-barred, be asserted only by way of offset and may be allowed in an amount not to exceed the amount of the opposing party's recovery.

"(g) Any right of action subject to the provisions of this section which accrued prior to the date of enactment of this Act shall, for purposes of this section, be deemed to have accrued on the date of enactment of this Act.

"(h) Nothing in this Act shall apply to actions brought under the Internal Revenue Code or incidental to the collection of taxes imposed by the United States.

"§ 2416. Time for commencing actions brought by the United States—Exclusions

"For the purpose of computing the limitations periods established in section 2415, there shall be excluded all periods during which

"(a) the defendant or the res is outside the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico; or

"(b) the defendant is exempt from legal process because of infancy, mental incompetence, diplomatic immunity, or for any other reason; or

"(c) facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances; or

"(d) the United States is in a state of war declared pursuant to article I, section 8, of the Constitution of the United States.

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