Calendar No. 768

101ST CONGRESS
2d Session

SENATE

REPORT
101-416

THE JUDICIAL IMPROVEMENTS ACT OF 1990

REPORT

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ON

S. 2648

together with

ADDITIONAL VIEWS

AUGUST 3 (legislative day, JULY 10), 1990.—Ordered to be printed

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CONTENTS

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THE JUDICIAL IMPROVEMENTS ACT OF 1990

AUGUST 3 (legislative day, JULY 10, 1990.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 2648, as amended]

The Committee on the Judiciary, to which was referred the bill (S. 2648), amending title 28, United States Code, to provide for civil justice expense and delay reduction plans, to authorize additional judicial positions for the courts of appeals and district courts of the United States, and for other purposes, having considered the same, reports favorably thereon, with an amendment in the nature of a substitute, and recommends that the bill, as amended, do pass.

I. PURPOSE

The purpose of this legislation is to promote for all citizens—rich or poor, individual or corporation, plaintiff or defendant—the just, speedy, and inexpensive resolution of civil disputes in our Nation's Federal courts. High costs, long delays and insufficient judicial resources all too often leave this time-honored promise unfulfilled. By improving the quality of the process of civil litigation, this legislation will contribute to improvement of the quality of justice that the civil justice system delivers.

The Federal courts are suffering today under the scourge of two related and worsening plagues. First, the costs of civil litigation, and delays that contribute to those costs, are high and are increasing; they limit access to the courts to only those who can afford to pay the rising expenses; and they undermine the ability of Ameri-

can corporations to compete both domestically and abroad. Second, the Federal courts have a scarcity of resources, particularly Article III judges. This is especially true in jurisdictions that have high drug-related caseloads.

S. 2648, as amended, addresses these problems in comprehensive and straightforward fashion.

Title I, the Civil Justice Reform Act of 1990, requires that every Federal district court develop and implement a civil justice expense and delay reduction plan. Each plan, which will be based on the recommendations and assessment of a local advisory group convened in each district, will apply certain well-accepted principles and guidelines of litigation management. In this way, title I promulgates a national strategy and national framework for attacking the cost and delay problem, while implementing that strategy through a policy of decentralization. Furthermore, by providing for periodic assessment of docket conditions and management practices and for regular opportunities to improve court procedures, title I ensures continuous renewal of the commitment to reduce costs and delays. Finally, title I's numerous information-intensive mechanisms substantially improve existing capacity to communicate techniques for litigation management and cost and delay reduction to all participants in the civil justice system in effective and prompt fashion.

Title II, the Federal Judgeship Act of 1990, creates 77 new Federal district and circuit court judgeships. A judgeships bill was most recently enacted in 1984. Since that time, criminal workloads—particularly as a result of drug caseloads—have increased sharply. Additional resources are necessary, and title II is a comprehensive response to that need. Sixty-six judgeships would be created at the district court level, with particular concentration in those districts suffering under the weight of heavy drug caseloads. Furthermore, 11 new judgeships would be created at the circuit court level.

There are some who believe that the comprehensive reforms promulgated in title I are unnecessary because by adding the judges proposed in title II, costs and delays will, in effect, take care of themselves. The committee emphatically rejects that view. Increasing the number of Federal judges is not the only answer, nor is it a sufficient answer. As Chairman Biden remarked at the March 6 hearing, "we are not . . . in a zero-sum game. This is not a question of do we 'reform the system' or 'do we add more judges.' If the reforms make sense, then they make sense with more judges or fewer judges." (March 6, 1990, Hearing Transcript, at 96-97.)

S. 2648 provides the opportunity to do both—reform the civil justice system and add needed resources. Both titles are necessary to attain and maintain the minimal level of efficiency and economy that is a precondition for the delivery of justice to all citizens. And both titles are necessary if judicial officers are to have sufficient time available for the thoughtful and deliberate adjudication of cases on the merits, since such adjudication is a principal function of the civil justice system.

As summarized by Chairman Biden, S. 2648 "represents the beginning of an effort long overdue, an effort to bring about a civil justice system that is less expensive, more efficient, and more accessible for all Americans." (June 26, 1990, Hearing Transcript, at

7.) The reforms it represents allow the Nation, in Senator Thurmond's words, "to get more judicial bang for the judicial buck." (*Id.* at 11.)

II. Legislative History

A. INTRODUCTION AND CONSIDERATION OF S. 2027

On January 25, 1990, Chairman Biden and Senator Thurmond, joined by Senators Metzenbaum, Heflin, Kohl, Simon, and Specter, introduced S. 2027, the Civil Justice Reform Act of 1990. A companion bill (H.R. 3898) was introduced that same day in the House of Representatives by Congressmen Brooks and Fish, the chairman and ranking minority member of the House Judiciary Committee, and Congressmen Kastenmeier and Moorhead, the chairman and ranking minority member of the Subcommittee on Courts, Intellectual Property and the Administration of Justice.

The Senate Judiciary Committee held a hearing on S. 2027 on March 6, 1990. The committee heard from a broad cross-section of witnesses with extensive Federal civil litigation experience. Testifying in support of the legislation were Partick Head, general counsel, FMC Corp.; Gene Kimmelman, legislative director, Consumer Federation; Stephen Middlebrook, general counsel, Aetna Life & Casualty; and Bill Wagner, immediate past president, Association of Trial Lawyers of America. Judge Richard A. Enslen, U.S. District Court for the Western District of Michigan, also testified in support of S. 2027. Judge Aubrey Robinson, Jr., chief judge, U.S. District Court for the District of Columbia, testified on behalf of the Judicial Conference of the United States.

B. INTRODUCTION AND CONSIDERATION OF S. 2648

On May 17, 1990, Chairman Biden and Senator Thurmond introduced S. 2648, the Judicial Improvements Act of 1990. Title I of S. 2648 constitutes the revised Civil Justice Reform Act of 1990; it incorporates numerous changes to S. 2027. Title II, the Federal Judgeship Act of 1990, creates 77 new judgeships, 11 at the court of appeals level and 66 at the district court level.

The Judiciary Committee held a hearing on S. 2648 on June 26, 1990. Testifying at the hearing were Judge Robert F. Peckham, U.S. District Court for the Northern District of California and chairman of the Judicial Conference task force on the civil justice legislation; Judge Walter F. McGovern, U.S. District Court for the Western District of Washington, and chairman of the Judicial Conference's Committee on Judicial Resources; Judge Diana E. Murphy, U.S. District Court for the District of Minnesota and president of the Federal Judges Association; and Carl D. Liggio, general counsel, Ernst & Young, who testified on behalf of the American Corporate Counsel Association.

Written statements were provided by Congresswoman Barbara F. Vucanovich; Alan B. Morrison, Public Citizen Litigation Group; Harvey M. Silets, president, the Seventh Circuit Bar Association; and Stanley Chauvin, president, American Bar Association.

C. REVISIONS TO THE CIVIL JUSTICE LEGISLATION

The revisions made to the civil justice legislation between the introduction of S. 2027 and the introduction of S. 2648 were substantial both in number and in substance. During the course of that four-month period, the committee received input from individual judges, clients, lawyers, and bar associations from across the country. That input was valuable, throughtful, and critically important to the product that has emerged. It is a testament to the wisdom and experience of judges, clients, and lawyers alike, and it reinforces the policy judgment reflected in the legislation that reform must proceed from the "bottom up"—with local advisory groups, comprised of users of the Federal court system, playing a principal role in the formulation of effective civil justice expense and delay reduction plans.

As summarized by Senator Thurmond, title I "reflects the input, wisdom and practical experience of those who practice before the Federal courts every day." (June 26, 1990, Hearing Transcript, at 11.)

D. NEGOTIATIONS WITH AND INVOLVEMENT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

The Judicial Conference of the United States, the official policy-making arm of the judicial branch, was involved extensively with the committee as it considered the civil justice legislation. The Conference repeatedly asked for and received opportunities—both formally and informally—to express views, make suggestions and offer recommendations on the legislation. Much of that input was valuable and informative, and many of the Conference's specific suggestions have been incorporated into S. 2648 as amended. Because of the committee's substantial concern with the manner in which the Conference's negotiations and discussions ultimately proceeded, however, it is necessary to set forth briefly the relevant background.

Almost immediately upon introduction of S. 2027, the committee, principally through Chairman Biden and Senator Thurmond, commenced extensive discussions and negotiations with the Judicial Conference, which had raised a number of concerns about the original legislation and which had requested that such discussions and negotiations take place. Furthermore, in early February, Chief Justice William Rehnquist designated a special task force—chaired by Judge Peckham and also including Judge Robinson, Judge Sarah Barker, U.S. District Court for the Northern District of Indiana, and Judge John Nangle, U.S. District Court for the Eastern District of Missouri—to work specifically with the committee on the civil justice legislation. Negotiations between the committee and the Peckham task force proceeded for several months, often on a daily basis.

To accommodate the Judicial Conference and to comply with Chief Justice Rehnquist's designation of the Peckham task force as the exclusive Conference body working on the civil justice legislation, the Judiciary Committee neither worked nor in any way communicated with any other Conference committee or subcommittee. Indeed, no other Conference committee or subcommittee expressed

an interest—either formally or informally—in working with the Judiciary Committee on the legislation.

It was not until the Conference submitted its written statement at the June 26 hearing—in which the Conference announced a position of "disfavor" on title I—that the committee learned of the apparently substantial input and involvement of the Conference's Committee on Judicial Improvements. Inexplicably, the Conference's written statement sets forth the vote of the members of the Judicial Improvements Committee on title I, but fails to mention the views of the members of the Peckham task force. (*See* Written Statement of the Judicial Conference, June 26, 1990, Hearing Transcript, at 14.)

While the committee does not challenge the conclusion reached by the Judicial Conference, it does have substantial concern with the process by which that conclusion was reached. The committee complied with the request of the Judicial Conference to work with one body, only to have the Conference seemingly defer to another body—which had no role whatsoever in the discussions and negotiations—at the point of decision. Such actions only serve to undermine the cooperative relationship between Congress and the judicial branch that our citizens rightly expect and deserve.

It is the committee's hope—and, indeed, its expectation—that this troubling process will not recur.[1] Fortunately, there is reason for optimism. In the face of the Conference's final assessment of title I and the process by which that assessment was reached, several individual judges have expressed their unequivocal support for the bill's enactment.

For example, the district court judges in New Jersey—who strongly and publicly opposed the original legislation—now, to a person, support the revised legislation with enthusiasm and vigor. Judge John F. Gerry, chief judge of the U.S. District Court for the District of New Jersey, recently wrote in a letter to Chairman Biden:

> The opposition of the New Jersey federal bench to the original Biden Bill * * * had been widely publicized. * * *
>
> I can now report that the judges of the United States District Court for the District of New Jersey unanimously favor the revisions to civil justice reform represented by S. 2648 and have authorized me to represent that they do not join in the opposition to its passage.

(Letter of Chief Judge John F. Gerry to Chairman Biden, July 3, 1990.)

Another member of the New Jersey court, Judge Dickinson R. Debevoise, was just as clear in his letter when he said:

> I was a critic of the Bill in its original form and expressed myself on the subject in what some have termed extravagent language.

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[1] The committee's concern with the Conference's approach in no way extends to Judge Peckham. The commitment and dedication to improving the state of civil justice that he has amply demonstrated for two decades, and the wisdom and experience that he brought to bear on the legislation, are unparalleled.

> I have reviewed with great care the revised version of the Bill. It seems to me that it meets every objection which I found in the original version and contains many provisions which should lead to improvements in the civil justice system. I cannot understand why the Executive Committee of the Judicial Conference has taken a position against the revised version of the Bill, but at least one of those who originally opposed the measure can be counted among its supporters.

(Letter of Judge Dickinson R. Debevoise to Chairman Biden, July 3, 1990.)

The committee believes that the views expressed by Chief Judge Gerry and Judge Debevoise about the revised civil justice legislation are widely shared. Such support is, of course, critical to effective implementation of the reforms called for in the Civil Justice Reform Act of 1990.

III. Discussion

Title I, the Civil Justice Reform Act of 1990

A. THE PROBLEMS OF COST AND DELAY IN CIVIL LITIGATION

The Civil Justice Reform Act addresses the dual problems of cost and delay in Federal civil litigation. Litigation transaction costs—defined as the total costs incurred by all parties to civil litigation, excluding any ultimate liability or settlement—are high and are increasing in complex as well as in relatively routine cases. In addition, delays throughout the course of litigation not only often inure to the benefit of one side over another but also increase court backlog, often inhibit the full and accurate determination of the facts, interfere with the deliberate and prompt disposition and adjudication of cases and thereby contribute to high litigation transaction costs.

A survey of more than 2,000 Americans in 1987 showed that 71 percent believe that the overall cost of lawsuits is too high, and that 57 percent believe that the system fails to provide resolution of disputes without delay.[2] As summarized by Carl Liggio, general counsel of Ernst & Young: "The costs and delays associated with litigation are mounting in geometric progression." (Written Statement of Carl Liggio, June 26, 1990, Hearing Transcript, at 11.)

Costs and delays have had a particularly serious impact on middle class Americans. In Chairman Biden's words: "For the middle class of this country * * * the courthouse door is rapidly being slammed shut. Access to the courts, once available to everyone, has become for middle-class Americans a luxury that only others can afford." (March 6, 1990, Hearing Transcript, at 2.) Gene Kimmelman, legislative director of the Consumer Federation of America, put it well when he said: "Justice costs too much. * * * It takes too long to get a just solution to disputes in the Federal

[2] (*See* Louis Harris and Associates, Inc., "Public Attitudes Toward the Civil Justice System and Tort Law Reform" (March 1987) at 15, 19.)

courts, in the eyes of many Americans." (March 6, 1990, Hearing Transcript, at 23.)

The issue of access to the courts highlighted by Chairman Biden is particularly important. High and increasing litigation costs cast doubt upon the fairness of the civil justice system and its ability to render justice, because those costs unreasonably impede access to the courts and make it more difficult for aggrieved parties to obtain proper and timely judicial relief or, in some cases, to obtain any relief it all.

The results of a 1989 Harris survey illustrate the relationship between high costs and access to the courts.[3] A substantial majority of more than 1,000 experienced litigators and Federal trial judges said that the high cost of litigation unreasonably impedes access to the courts by the ordinary citizen.[4]

The burden of high litigation costs impacts American businesses as well. American corporations spend more than $20 billion annually on outside counsel defending lawsuits. The outside counsel expenses for some Fortune 100 companies exceed $30 million annually, and in one case exceed $100 million annually. (Dockser, "Companies Rein in Outside Legal Bills," The Wall Street Journal (Nov. 9, 1988).)

A recent survey of corporate law departments, conducted by Ernst & Young for the New York City Bar Association, shows that for half of the businesses polled, legal expenses have increased at a higher rate than that of inflation during the past 5 years. Outside counsel costs were the single most significant component of those expenses, totaling more than 30 percent. As Chairman Biden concluded: "Too much money is wasted on a system that serves no one well, except our economic competitors who benefit by our squandering of resources on document production and depositions instead of research and development." (March 6, 1990, Hearing Transcript, at 3.)

Furthermore, data indicates that for the insurance industry, legal transaction costs—the cost of defending a case—are growing faster than actual liability costs. Stephen Middlebrook, general counsel, Aetna Life & Casualty, testified that damages paid out by the property casualty insurance industry on a line referred to as general liability "have trebled over the last three years, but our legal costs, our costs of defense, have quadrupled." (March 6, 1990, Hearing Transcript, at 47.)

The unfortunate fact is that the civil justice system as we know it today is not fulfilling its basic objective of providing the "just, speedy and inexpensive" resolution of disputes. (See Fed. R. Civ. P.

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[3] The survey, conducted by Louis Harris and Associates, Inc., for the Foundation for Change, Inc., was based on in-depth telephone interviews with 250 private litigators who represent plaintiffs; 250 private litigators who represent defendants; 100 public interest litigators who actively pursue cases in Federal courts; 300 corporate general counsel of companies selected from the 5,000 largest American corporations (based on annual sales revenue); and 147 sitting Federal trial court judges. (Louis Harris and Associates, Inc., "Procedural Reform of the Civil Justice System" (March 1989).)

[4] Sixty-nine percent of the corporate counsel, 85 percent of the public interest litigators, 63 percent of the plaintiff's litigators, 52 percent of the defense litigators, and 56 percent of the Federal trial judges surveyed agreed that transaction costs of Federal litigation unreasonably impede the use of the civil justice system by the ordinary citizen. (Harris Survey, at 16.)

1.) As Judge Jon Newman, U.S. Court of Appeals for the Second Circuit, has written:

> Whether we have too many cases or too few, or even, miraculously, precisely the right number, there can be little doubt that the system is not working very well. Too many cases take too much time to be resolved and impose too much costs upon litigants and taxpayers alike.

(Newman, "Rethinking Fairness," 93 Yale L. J. 1643 (1984).)

And as an American Bar Association task force put it:

> In a word, the public's perception is that excessive costs and delays render the law and lawyers incapable of performing the basic services for which they exist.

(American Bar Association, "Defeating Delay. Developing and Implementing a Court Delay Reduction Program" (1986), at xii.)

* * * * * * *

Ten years ago, then Justice Lewis F. Powell, Jr., foresaw the problems we are witnessing today. Dissenting from the 1980 amendments to the Federal discovery rules promulgated by the Supreme Court, Justice Powell criticized them as "inadequate" and expressed concern that "effective reform" would be delayed for years by what he described as "tinkering" changes. All the while, he said, "litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system." He warned that without substantial change, the rules will "continue to deny justice to those least able to bear the burdens of delay, escalating legal fees and rising court costs." (446 U.S. 997, 998, 1000–1001 (1980) (Powell, J., dissenting).)

As Chairman Biden said:

> Justice Powell's words were prophetic. High costs and excessive delay do combine to deny justice. They do combine to forestall the deliberate and prompt adjudication of disputes. And they do combine to ration commodities that a democracy should never ration—fairness, justice and access to the courts.

(136 Cong. Rec., Jan. 25, 1990.)

Justice Powell's conclusion rings even truer today than it did 10 years ago. That undeniable fact serves as a basic and fundamental predicate for this legislation.

B. CONGRESSIONAL ROLE IN REDUCING COSTS AND DELAYS

Since the introduction of the original civil justice legislation (S. 2027) on January 25, discussion has proceeded on two levels. First, some have challenged both the constitutional authority and the wisdom of Congress legislating in the area of procedural reform. Second, others have raised concerns about and objections to the underlying merits of certain provisions of the legislation.

In introducing the revised civil justice legislation reflected in title I of S. 2648, Chairman Biden and Senator Thurmond responded fully to most, if not all, of the substantive concerns and objec-

tions.[5] What largely remains is an objection to the congressional involvement in procedural reform that the bill represents. For example, the Judicial Conference has argued that title I intrudes into areas that are "clearly the province of the courts," (Written Statement of the Judicial Conference, June 26, 1990, Hearing Transcript, at 11), and that it is inconsistent with the "congressionally mandated" Rules Enabling Act.

The committee finds that both as a matter of constitutional law and as a matter of policy, this argument—most often cloaked in separation of powers terms—is without merit.

1. Congress has undoubted power to enact rules for the courts

a. The Supreme Court has underscored Congress's power to regulate the practice and procedure of the Federal courts

As a matter of constitutional law, Congress plainly has the power to enact rules of court in general and title I of S. 2648 in particular. Nearly 50 years ago, the Supreme Court said in no uncertain terms:

> Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States.

(*Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9–10 (1941).)

Nearly a quarter-century later, Chief Justice Warren reaffirmed Congress' power in *Hannah* v. *Plumer*, 380 U.S. 460 (1964), when he wrote:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts. * * * [Subsequent cases] cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts. * * *

(*Id.* at 472–73.)

(*See also* H.R. Rep. No. 422, 99th Cong., 1st Sess., 5–7 (1985) ("Congressional power to regulate practice and procedure in federal courts has been acknowledged by the Supreme Court since the early days of the Republic and is now assumed without question by the courts." (citation omitted).)

Congress has, of course, delegated some rulemaking authority to the courts. That delegation does not lessen the rulemaking power conferred on Congress by the Constitution. A 1926 report of this committee makes clear that when Congress delegated power to the courts, it never intended to surrender its constitutional role:

> [T]he bill proposed will not deprive Congress of the power, if an occasion should arise, to regulate court prac-

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[5] Regrettably, the Judicial Conference, as noted above, "disfavors" title I, despite the more than 5 months of negotiation between the committee and the task force specifically designated by Chief Justice Rehnquist to work with the committee and despite the substantial changes in the bill—many of which were made in direct response to suggestions by the Conference.

> tice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal. * * * It gives to the court the power to initiate a reformed Federal procedure without the surrender of the legislative power to correct an unsatisfactory exercise of that power.

(S. Rep. No. 1174, 69th Cong., 2d Sess., 7 (1926).)

The Supreme Court's consistent and longstanding recognition of congressional rulemaking authority has produced broad agreement on this point among the leading scholars in the field. Illustrative is the statement of Judge Jack Weinstein, U.S. District Court for the Eastern District of New York:

> Congress's position as possessor and delegator of the rule-making power is now assumed without question by the courts. * * * As a result of the Court's long-standing acknowledgement of the congressional prerogative over rule-making * * * the only questions that have arisen concerning the rule-making power involve the extent and propriety of the delegation of the power to the courts.

(Weinstein, "Reform of Court Rule-Making Procedures" 90 (1977).)

b. Rulemaking power delegated to the courts by the Rules Enabling Act

The Supreme Court's authority to enact rules of procedure is far more limited than Congress' power—the Court has only that authority delegated to it by Congress in the Rules Enabling Act of 1934. (Pub. L. No. 73-415, 48 Stat. 1064 (1934), codified, as amended in 1988, at 28 U.S.C. 2072.) There is general agreement among commentators that Congress empowered the Court only to propose rules of procedure that have no substantive effect, since any other interpretation would run afoul of the Rules Enabling Act's prohibition against rules that "abridge, enlarge or modify any substantive right." [6]

Since Congress' power to enact rules of procedure is limited only by the Constitution, and not the Rules Enabling Act, Congress may pass procedural rules that advance substantive policy goals. Such rules define the area of court rulemaking that is allowed to Congress, but prohibited to the Supreme Court.

Congress has been careful to protect such exclusive rulemaking authority. In a 1985 report on legislation eventually enacted in 1988 to amend the Rules Enabling Act, the House Judiciary Committee described the exclusive rulemaking authority retained by Congress as follows:

> [The Rules Enabling Act] is intended to allocate to Congress, as opposed to the Supreme Court exercising delegated legislative power, lawmaking choices that necessarily

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[6] In relevant part, the Rules Enabling Act states:

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts * * * and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. * * *

(28 U.S.C. 2072.)

and obviously *require consideration of policies extrinsic to the business of the courts.*

(H.R. Rep. No. 422, 99th Cong., 1st sess., 22 (1985) (emphasis added).)

Importantly, the report also refers to Congress' exclusive power to enact procedural rules that "affect its constituencies in their out-of-court affairs." (*Id.*)

c. There are numerous examples of the exercise of congressional rulemaking power

One clear example of Congress exercising its rulemaking power is the 1974 Speedy Trial Act (18 U.S.C. 3152 et seq.). The Speedy Trial Act and the civil justice legislation are quite similar in that both require each district court to formulate a "plan."

Although a Federal Rule of Criminal Procedure addressing the problem of delay in criminal trials already had been proposed by the Supreme Court and had become law, Congress decided to enact legislation. In part, congressional involvement was required by the resources needed to implement the Speedy Trial Act.[7]

Furthermore, Congress determined that legislation was necessary in order to improve the status quo for processing criminal cases in the Federal courts. It viewed Rule 50(b), enacted under the Rules Enabling Act process, as an inadequate reform. As the House Judiciary Committee explained: "The Committee believes that Rule 50(b) and the Model Plan adopted by many district courts is an inadequate response to the need for speedy trial, in that it encourages the perpetuation of the status quo." (H.R. Rep. No. 1508, 93rd Cong., 2d Sess., reprinted in 1974 U.S. Code Cong. & Admin. News 7401, 7406 (1974).)

Other examples of congressional exercise of its rulemaking authority include the Federal Rules of Evidence and the Multi-District Litigation statute, 28 U.S.C. 1407.

Experience demonstrates, therefore, that Congress has in no way waived—either formally or in practice—authority to legislate rules of practice and procedure for the Federal courts.

d. The Civil Justice Reform Act is within the exclusive rulemaking authority of Congress

The Civil Justice Reform Act is within the exclusive rulemaking authority of Congress. Indeed, the limitations of the Rules Enabling Act would bar the Supreme Court from proposing this legislation.

In part, title I proposes a body of component principles to be applied by Federal district courts in developing procedural rules. Numerous provisions are aimed directly at improving the fairness and efficiency of the litigation process. Moreover, they advance other, substantive concerns as well.

For example, title I advances the substantive goal of improving access to the Federal courts. A fundamental premise of the legislation, as the committee has previously noted, is that high and in-

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[7] The House Judiciary Committee report states that the proposed reforms "may require the addition of new judges, clerks, [and] the purchase of computers. * * *" (H.R. Rep. No. 1508, 93rd Cong., 2d Sess. (1974).)

creasing litigation costs cast doubt upon the civil justice system's fairness and its ability to render justice, since those costs unreasonably impede access to the courts, make it more difficult for aggrieved parties to obtain proper and timely judicial relief and, in some cases, to obtain any relief at all.

The legislation also advances the substantive goal of improving the efficiency and competitiveness of American business. High and increasing litigation costs impose a heavy burden on our businesses—large and small—since they are compelled to spend increasingly more money on legal expenses and to divert valuable resources from the essential functions of making better products and delivering quality services at the lowest possible cost. These increased legal expenses come at a time when American businesses are confronted with intense international competition.

A proposal intended to increase access to the courts and to improve the productivity and competitiveness of American business cannot fairly be described as purely procedural. The Civil Justice Reform Act is the type of rulemaking proposal that Congress has considered to be within the exclusive authority of the legislative branch. An initiative of this type—which plainly affects "constituencies in their out-of-court affairs" and which plainly involves "policies extrinsic to the business of the courts" (H.R. Rep. No. 422, 99th Cong., 1st Sess., 22 (1985))—requires the accountability and give and take of the legislative process.[8]

Another clear indication that the Civil Justice Reform Act is within the exclusive rulemaking authority of Congress is found in the bill's authorization of funding to accomplish its purposes. Section 105 of the Act authorizes a total of $25,000,000 to provide resources to Early Implementation Districts, to otherwise assist district courts in the development of their plans and for other purposes. Such funding decisions necessarily require considerations uniquely within the province of Congress.

2. Strong policy reasons also argue in favor of the legislation

As a policy matter, the argument that the courts are exclusively suited to propose initiatives such as the Civil Justice Reform Act fares little better. The act focuses on the users of the Federal court system—for whom, as Chairman Biden made clear, the system exists:

> The users of the federal court system have no means other than through their democratically-elected representatives to express their dissatisfaction with the civil justice system and to demand reform of that system. For too long, we have ignored these cries for change, and this bill finally—and properly, in my view—acts upon their desires.

(June 26, 1990, Hearing Transcript, at 8.)

Senator Thurmond echoed this same view, stating that "it is appropriate to consider procedural changes which will reduce the costs and delays confronted by those who seek to resolve their dis-

[8] See Kane, "The Golden Wedding Year: *Erie Railroad Company* v. *Tompkins* and the Federal Rules," 63 Notre Dame L. Rev. 671, 691, 1988 (recommending "legislative solution" when "political interests demand intervention").

putes through the civil litigation system. We must ensure that the public has confidence in our Federal court system and [its ability] to resolve disputes." (March 6, 1990, Hearing Transcript, at 8.)

While the Rules Enabling Act was recently amended to provide for expanded public comment, the process does not fully allow for the extent of user involvement that has led to the Civil Justice Reform Act or that is contemplated for the advisory groups. As Paul Carrington, current reporter for the Advisory Committee on Civil Rules, explains: "The Rules Enabling Act was avowedly anti-democratic in the sense that it withdrew 'procedural' law-making from the political arena and made it the activity of professional technicians." (Carrington, " 'Substance' and 'Procedure' in the Rules Enabling Act," 1989 Duke L.J. 281, 301.) [9]

When it comes to broad policies of the type embraced in title I of S. 2648, the appropriate source of those policies is Congress, not the courts. The committee finds that there is a compelling need to address the problems of litigation cost and delay through the legislative process.

C. THE BROOKINGS TASK FORCE ON CIVIL JUSTICE REFORM

The genesis for many of the ideas embraced within title I is the report of a Brookings Institution Task Force entitled "Justice For All. Reducing Costs and Delays in Civil Litigation." Convened at Chairman Biden's request, the task force was comprised of authorities from throughout the United States and included leading litigators from the plaintiffs' and defense bar, civil and women's rights lawyers, attorneys representing consumer and environmental organizations, representatives of the insurance industry, general counsels of major corporations, former judges and law professors. As Senator Thurmond said, the Brookings Task Force "was composed of a vast array of individuals representing competing interests within our civil judicial system." (March 6, 1990, Hearing Transcript, at 7.)

The members of the task force met six times between September 1988 and June 1989. Their conclusions are set forth in the form of 12 comprehensive procedural recommendations, four judicial resource recommendations and a series of recommendations for clients and their attorneys. Significantly, the recommendations were forged by consensus, despite the divergent interests represented by the task force members. Indeed, the recommendations in the report are significant not only because they are comprehensive in scope but also because of the diverse group of individuals who stand united behind them. The report reflects a consensus that a comprehensive program for civil justice reform can be successfully implemented and that such reform can significantly reduce litigation costs and delays.

Judge Richard Enslen, U.S. District Court for the Western District of Michigan, aptly described the task force as " 'Users United,' " noting that it represented the "heavy-weight thinking in every spectrum of our judicial system." He added that "to read

[9] This view is based upon the text of the Rules Enabling Act itself, which contains a supersession clause that provides for court-made rules to "trump" congressional statutes that confict with rules promulgated by the courts.

32-909 O - 90 - 2

that task force report and not be impressed as a Federal district judge is to miss, I think, the whole game" (March 6, 1990, Hearing Transcript, at 101), and he concluded that the "report's analytical and thought-provoking thesis offer compelling argument to often elusive solutions to reducing delay and cost." (Written Statement of Judge Richard Enslen, March 6, 1990, Hearing Transcript, at 2.)

The committee is indebted to the members of the task force for the comprehensive nature of their recommendations and for the collective wisdom that those recommendations represent.

D. THE CORNERSTONE PRINCIPLES OF THE CIVIL JUSTICE REFORM ACT

Title I is built upon six essential components aimed at improving litigation management and reducing litigation costs and delays. Briefly, those principles are:

(1) building reform from the "bottom up";
(2) promulgating a national, statutory policy in support of judicial case management;
(3) imposing greater controls on the discovery process;
(4) establishing differentiated case management systems;
(5) improving motions practice and reducing undue delays associated with decisions on motions; and
(6) expanding and enhancing the use of alternative dispute resolution.

1. Building reform that proceeds from "the Bottom Up"

The Civil Justice Reform Act is "based on the principle that reform must come from 'the bottom up'—that is, from those who must live with the civil justice system on a regular basis." (Statement of Chairman Biden, Cong. Rec. S 416, Jan. 25, 1990.) As Senator Thurmond explained:

> [E]ach individual federal district court [has] the autonomy necessary to implement an expense and delay reduction plan. * * * Each plan should reflect a recognition that solutions to problems of cost and delay in civil cases require significant input from litigants and the trial bar as well as the courts.

(June 26, 1990, Hearing Transcript, at 13.)

This "bottom up" principle is implemented most clearly by sections 471 and 472, which require every district court to implement a civil justice expense and delay reduction plan after consideration of the recommendations of a local advisory group. As the Brookings Task Force noted:

> [T]he wide participation of those who use and are involved in the court system in each district will not only maximize the prospects that workable plans will be developed, but will also stimulate a much needed dialogue between the bench, the bar and client communities about methods for streamlining litigation practice.

(*"Justice For All,"* at 12.)

As Bill Wagner, immediate past president of the Association of Trial Lawyers of America, testified, the legislation allows for a "de-

termination of problems in local areas to be made at the local level, in the district [court] level, as opposed to a broad-based national level." (March 6, 1990, Hearing Transcript, at 27.)

The advantages of implementing a national strategy through a policy of decentralization are obvious. There are a remarkable number of gifted and talented judges, magistrates, clerks, and administrators in the Federal court system. They have forsaken the higher salaries they could command in the private sector to devote their considerable expertise to the operation of the courts. Prior to this legislation, there was no adequate means of drawing upon these resources in every district court. Now there is a means of doing so. There is a basis for extending nationally the ideas that have been developed and will continue to be developed at the local level. After all, as Judge Peckam pointed out: "[S]ome of the most important reforms that have happened in the federal judicial system have been locally created and have been spread throughout and later adopted." (June 26, 1990, Hearing Transcript, at 20.) That notion, quite simply, lies at the heart of title I.

It is important, therefore, to provide every district court with the opportunity to adopt a plan carefully crafted in accordance with the needs and demands of local conditions. In Judge Enslen's words:

> Commencing the resolution with the district courts, and not some other entity, is gratifying to those of us who occupy the trial benches in our system. The legislation offers all of us the opportunity, which we all seek, to adopt a plan, tailored to our own venues, to address a nationwide problem in a local fashion.

(Enslen Written Statement, at 2.)

Similarly, Alan Morrison, of Public Citizen Litigation Group, stated that "S. 2648 provides the necessary flexibility so that the plans will both be realistic in terms of the goals set in the law, yet adopted to the needs of the local district courts." (Letter of Alan Morrison to Jeffrey J. Peck, June 13, 1990, at 1.)

The broad membership of the planning groups and the overall planning group mechanism outlined in the legislation will ensure that the entire litigating community share in the development of the plans. As Judge Enslen pointed out, "if the user committee assists in drafting the plan, the users of the system are going to be all the more interested in following it." (March 6, 1990, Hearing Transcript, at 107.) That should ensure, he added, that "each of our proposed plans will have the greatest possible district-wide input and should result in district-wide solidarity for improving our civil justice system." (Enslen Written Statement, at 41.) Similarly, Patrick Head, general counsel of FMC Corp., testified that the "most important part of the plan * * * is that the responsibility for developing these plans and for making them work calls for an investment of effort on the part of all concerned." (Head Written Statement, at 16.)

The Judicial Conference also supports the creation of local advisory groups. As Judge Peckham testified: "These representative lawyers meeting with the judges can have an enormous effect upon the legal culture of a given district and * * * [upon] the improve-

ment of not only court procedure, but also the behavior of counsel and clients." (June 26, 1990, Hearing Transcript, at 19.)

The committee believes that the plans called for in this legislation are required by the realities of the litigation process as it exists in the 1990's. As Judge Enslen put it:

> Without some system-wide approach to reduce increasing costs and delays, how can we expect to address the problems as trial judges? Without a plan, it seems unlikely that solutions will somehow mystically appear. The * * * proposed legislation promote[s] a national approach, aimed at reducing costs and delays. [It] seek[s] to unify us in our commitment to provide just and prompt dispute resolution.

(Enslen Written Statement, at 26.)

Judge Peckham recognizes as well that "there has not been sufficient dissemination, in my judgment, of the many innovations that have taken place throughout the Federal judicial system in any systematic way." (June 26, 1990, Hearing Transcript, at 20.)

The committee finds that through the systemwide approach adopted in this bill, there will be a district-by-district commitment to effective litigation management and the reduction of cost and delay.

2. Promulgating a national, statutory policy in support of judicial case management

a. The benefits of enhanced case management

During the past two decades, there have been major developments in the field known as judicial case management. As the number of cases has increased and the cases themselves have become increasingly complex, judges, court administrators, and other civil justice system experts have recognized the importance of courts exercising early, active, and continuous control over case progress. Indeed, as the Supreme Court recently said in an opinion by Justice Kennedy: "One of the most significant insights that skilled trial judges have gained in recent years is the wisdom and necessity for early judicial intervention in the management of litigation." (*Hoffman-La Roche Inc.* v. *Sperling,* 58 U.S.L.W. 4063, 4074 (Dec. 11, 1989).)

The results of the Harris survey showed broad and widespread support for increasing the role of Federal judges as active case managers. That concept was supported by 83 percent of the plaintiff's lawyers; 80 percent of the defense lawyers; 89 percent of the public interest lawyers; 92 percent of the corporate counsel; and 84 percent of the 150 sitting judges that were surveyed. (Harris Survey, at 54.)

As early as the late 1970's, studies demonstrated the importance of exercising early and active judicial control over cases. The Federal Judicial Center, for example, studied the median disposition times of six urban trial courts. The primary finding was that greater and earlier judicial control over civil cases yields faster rates of disposition. The courts with the least amount of delay characteristically kept stricter control of the case by precise scheduling of the discovery cut-off date and other deadlines. The study concluded

that a "court can handle its caseload rapidly only if it takes the initiative to require lawyers to complete their work in a timely fashion." (Federal Judicial Center, "Case Management and Court Management in United States Courts" (1977), at 17.)

Concerns have been raised that judicial case management is inconsistent with our notions of due process and the proper functioning of the adversarial system. (*See* Resnick, "Managerial Judges," 91 Harv. L. Rev. 374 (1982).) These valid concerns cannot and should not be ignored, for they force us to reaffirm our commitment to impartiality and the adjudicative process. Individual case management, however, is not necessarily inconsistent with the adversarial system. Indeed, the movement toward greater judicial oversight is an attempt to maintain the adversary ideal. As Judge Peckham has said:

> Case supervision is not a fundamental departure from the adversarial model but rather a modification that facilitates its meaningful operation. It does not detract from lawyers' traditional function, but instead assists attorneys in planning the efficient progress of lawsuits.

(Peckham, "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution," 37 Rutgers L. Rev. 253, 265 (1985).)

Judge Alvin B. Rubin, U.S. Court of Appeals for the Fifth Circuit, has offered a compelling statement of why judicial case management is both appropriate and necessary:

> The judicial role is not a passive one. A purely adversarial system, uncontrolled by the judiciary, is not an automatic guarantee that justice will be done. It is impossible to consider seriously the vital elements of a fair trial without considering that it is the duty of the judge, and the judge alone, as the sole representative of the public interest, to step in at any stage of the litigation where his intervention is necessary in the interests of justice. Judge Learned Hand wrote, "[a] judge is more than a moderator; he is charged to see that the law is properly administered, and it is a duty which he cannot discharge by remaining inert."

(Rubin, "The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy and Inexpensive Determination of Civil Cases in Federal Courts," 4 Just. Sys. J. 135, 136 (1979).)

And as Judge Peckham has concluded:

> Judges cannot remain safely on their remote pedestal but must work with attorneys to place reason and civility before contentiousness and resistance. * * * [T]he cause of justice can no longer be served by a laissez faire judicial model. Our controlled inaction is an affirmative choice, an abdication of our responsibility to use our power to assist in restoring the health of our system. * * * [W]e cannot remain blind to the fact that the court's traditional remoteness contributes to the devastating abuses which threaten to subvert our system of due process.

(Peckham, 37 Rutgers L. Rev. at 266.)

b. The importance of early and ongoing pretrial involvement

The significance of the pretrial process in Federal civil litigation today is amply demonstrated by one key statistic: approximately 95 percent of all civil cases do not go to trial. Using the 12-month period ending June 30, 1987, as a representative period, only 11,913 of all civil cases (about 5 percent) actually went to trial. The remaining 225,569 civil cases (about 95 percent) were resolved without going to trial or were dropped at some step in the process. ("Pretrial Management of Civil Cases," General Accounting Office Report to House Judiciary Committee (1988), at 9.)

The importance of early and active pretrial involvement is widely recognized and understood by judges, clients, and lawyers alike. For example, Judge Peckham said in response to a question from Senator Thurmond:

> [I]ntellectually active involvement by the assigned judge early in the pretrial period is an essential component of a district judge's role. Early in the pretrial period, judges should help counsel open lines of communication, clarify positions, identify issues whose early resolution will streamline the pretrial process or position the case efficiently for productive settlement negotiations, and plan a sensible, cost-effective discovery and motion practice.

(Answer of Judge Robert F. Peckham to Written Question No. 1 of Senator Thurmond.)

Patrick Head, general counsel to FMC Corp., which has roughly 500 cases in civil litigation at any one given time, agrees:

> The issues involved in a case often need focus and clarification up front, at the beginning. With greater confidence about what the real issues will be, lawyers can spend less time worrying about, and gathering information on, matters that aren't real issues. If the judge assigned to the case takes an active role in helping the parties focus the issues and narrow the scope of discovery, it would eliminate most concern about being blind-sided, and thus would promote more carefully tailored discovery.

(Head, Written Statement, at 4.)

The drafters of the most recent amendments to rule 16 of the Federal Rules of Civil Procedure share this view as well. After extensive study, they concluded:

> Empirical studies reveal that when a trial judge intervenes personally at an early stage to assume judicial control over a case and to schedule dates for completion by the parties of the principal pretrial steps, the case is disposed of by settlement or trial more efficiently and with less cost and delay than when the parties are left to their own devices.

(Advisory Committee Notes, Rule 16.)

c. The importance of setting early, firm trial dates

Several experts and substantial data indicate that setting early, firm trial dates is one of the most effective tools in case management. Prof. E. Donald Elliott, Yale Law School, has written:

> Perhaps the most important single element of effective managerial judging is to set a firm trial date * * *. This creates incentives for attorneys to establish priorities and "narrow the areas of inquiry and advocacy to those they believe are truly relevant and material" and to "reduce the amount of resources invested in litigation."

(Elliott, "Managerial Judging and the Evolution of Procedure," 53 U. Chi. L. Rev. 306, 313, 314 (1986).)

Similarly, Wayne Brazil, a magistrate in the U.S. District Court for the Northern District of California and a leading court reform expert, reported in 1981 that

> data produced by our interviews and by other studies indicate that fixing early and firm dates for the completion of trial preparation and for the trial itself is probably the single most effective device thus far developed for encouraging prompt and well-focused case development.

(Brazil, "Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions," American Bar Foundation Journal (1981) 873, 917.)

A recent study of 26 urban trial courts by the National Center for State Courts found that a firm trial date policy is related to faster case processing times. (National Center for State Courts, Examining Court Delay. The Pace of Litigation in 26 Urban Trial Courts (1989), at 32–34.)

An American Bar Association task force on litigation costs and delay concluded that a firm trial date is an absolutely vital feature of any case management system. The task force identified four reasons "why judges, lawyers, and academics agree on this concept:"

> Settlement probabilities are increased dramatically when enforced early evaluation devices are backed by a certain trial date;
>
> Where the court requires counsel to adhere to schedules for the completion of events, credibility is enhanced when the court also complies with time deadlines;
>
> No attorney wants or will assemble a case of witnesses and parties only to be frustrated when the trial does not begin when scheduled; and
>
> A firm trial date is cost-effective for the trial attorney because it allows efficient and predictable scheduling of the only commodity the attorney has to sell—time.

(American Bar Association, "Defeating Delay. Developing and Implementing a Court Delay Reduction Program." (1985) at 39.)

The Harris survey of more than 1,000 participants in the civil justice system also found strong support for scheduling early and firm trial dates: 79 percent of the plaintiff's litigators, 76 percent of defendants' and public interest litigators, 85 percent of the corpo-

rate counsel and 89 percent of the Federal judges surveyed agree with this view. (Harris Survey, at 55.)

d. The utilization of magistrates

S. 2027 provided that an article III judge, and not a magistrate, should preside over dicovery-case management conferences and otherwise reduced the role of magistrates in the pretrial process. For several reasons, this provision was changed in title I of S. 2648.

First, as Judge Enslen testified, fewer cases may settle if an Article III judge presides over each conference, because the judge—who will eventually preside over the trial, should one occur—"cannot be as frank with parties nor them with the judge." (March 6, 1990, Hearing Transcript, at 108).

Second, as Judge Enslen also testified, permitting magistrates to conduct the management conference "effectively utilizes the time of the magistrate, leaving the Article III judge to perform adjudicatory duties." (Enslen Written Statement, at 44.)

Importantly, given the increasingly heavy demands of the civil and criminal dockets and the increasingly high quality of the magistrates themselves, the committee believes that magistrates can and should play an important role, particularly in the pretrial and case management process.[10]

The committee finds that a national, statutory policy in support of judicial case management—encompassed in part by early and ongoing pretrial involvement, the setting of early, firm trial dates and the appropriate utilization of magistrates—is necessary to combat the growing problem of high and increasing litigation costs and delays that contribute to those costs.

3. Imposing greater controls on the discovery process

a. Discovery abuse is a principal cause of high litigation costs

Perhaps the greatest driving force in litigation today is discovery. Discovery abuse is a principal cause of high litigation transaction costs. Indeed, in far too many cases, economics—and not the merits—govern discovery decisions. Litigants of moderate means are often deterred through discovery from vindicating claims or defenses, and the litigation process all too often becomes a war of attrition for all parties. As Prof. Maurice Rosenberg has written:

> Costs of discovery can be so high that they force settlements that would not occur, or, more likely, force settlements on different terms than would otherwise have been reached. * * * Discovery practice in federal litigation has taken on a life of its own. The first principle is "when in doubt, discover."

(Rosenberg, 137 U. Pa. L. Rev. at 2203, 2204.)

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[10] While the legislation provides for the exercise of the full role of magistrates in the pretrial process, valid questions have been raised about the full extent of the magistrates' constitutional authority. Indeed, three recent Supreme Court decisions, *Northern Pipeline Construction Co.* v. *Marathon Pipeline,* 458 U.S. 50 (1982), *Granfinanciera* v. *Nordberg,* 109 S. Ct. 2782 (1989), and *Gomez* v. *United States,* 109 S. Ct. 2237 (1989), raise questions about what issues may be handled by non-Article III judicial officers. Accordingly, the committee agrees with the recommendation of the Federal Courts Study Committee (Report of the Federal Courts Study Comittee (April 1990) at 80) that the Judicial Conference should conduct an indepth study of the constitutional parameters within which magistrates may properly exercise authority.

The concern expressed by the Pound Conference 15 years ago rings just as true today:

> There is a very real concern in the legal community that the discovery process is now being overused. Wild fishing expeditions * * * seem to be the norm. Unnecessary intrusions into the privacy of the individual, high costs to the litigants, and correspondingly unfair use of the discovery process as a lever toward settlement have come to be part of some lawyers' trial strategy.

(Erickson, "The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-First Century," 76 F.R.D. 277, 288 (1978).)

Excessive and abusive discovery has been recognized as a serious problem for some time. More than 10 years ago, a study of Federal trial judges in two district courts found that they perceived "unnecessary, expensive, overburdening discovery as a substantial threat to the efficient and just functioning of the federal trial system for civil litigation." (C. Ellington, "A Study of Sanctions for Discovery Abuse" (1979) at 37.) In 1980, a study of lawyers in Chicago found that 49 percent of those practicing in Federal courts believe that "overdiscovery" is a major abuse of the discovery process. (Brazil, "Civil Discovery: Lawyers' Views of its Effectiveness, its Principal Problems and Abuses," American Bar Foundation Research Journal (1980), at 787.)

More recently, the Harris survey of more than 1,000 participants in the civil justice system found that the most important cause of high transaction costs or delays that increase those costs is perceived to be lawyers who abuse the discovery process. (Harris Survey, at 21.)[11] The most frequently cited types of lawyer abuse leading to high transaction costs are lawyers who "over-discover" cases rather than focus on controlling issues and lawyers and litigants who use discovery as an adversarial tool to raise the stakes for their opponents. (*Id.* at 25.)[12] In the Harris survey, a majority of each respondent group indicated that discovery costs constituted a higher percentage of total transaction costs than any other category of costs incurred. (*Id.* at 26.)

The same conclusions were reached in an earlier yet still recent survey of 200 Federal and 800 State judges. Abuse of the discovery process was identified more often than any other factor as a major cause of delay. "Approximately 80 percent of all of the judges polled said they have had at least some problems with the discovery process. In addition, the overwhelming majority of the 161 federal judges [of 200 interviewed] and 503 state judges [of the 800 interviewed] who said that litigation costs are excessive identified

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[11] Sixty-two percent of the plaintiff's and defense litigators, 63 percent of the public interest litigators, 80 percent of the corporate counsel, and 71 percent of the judges said that this was the most important cause.

[12] Seventy-eight percent of the judges, 86 percent of the corporate counsel, 59 percent of the public interest litigators, 75 percent of the defense litigators, and 68 percent of the plaintiff's litigators said that lawyers who "over-discover" cases are a major cause of high costs. Seventy-one percent of the judges, 77 percent of the corporate counsel, 71 percent of the public interest litigators, 65 percent of the defense litigators, and 64 percent of the plaintiff's litigators said that the use of discovery as an adversarial tool is a major cause of high costs.

discovery practices as the cause." (Taylor, "Judges Identify Causes of Delay in Civil Litigation," Litigation News (December 1988) at 3.)

Put simply,

> discovery dominates. The journey from the complaint to resolution is a slow trek across the badlands of discovery. The dominance of civil discovery has changed what it means to be a litigator. There are "litigation associates" who only do document review and interrogatory drafting. Some firms encourage lawyers to specialize, and to spend their entire professional lives taking depositions. The day is fast approaching—if it is not already here—when litigators will not try cases; they will just discover each other to death. Discovery affects how the public, and clients, see trial lawyers. Few aspects of litigation are more criticized than foot-thick interrogatories and endless depositions. And who can doubt that discovery is a main cause of the escalating cost of lawsuits? The bill for a case not ended quickly will mostly cover discovery.

("Discovery," Litigation (Fall 1988) at 7.)

Finally, as Judge Enslen points out, "even when discovery is not abused, or when it is unclear, discovery is extremely expensive to litigants, very time consuming for their lawyers, and further adds to delays in trial dates." (Enslen Written Statement, at 11.)

The committee finds that there is a compelling need for judicial officers to control discovery and its attendant costs.

b. Effective means of controlling discovery

Several district courts have developed successful techniques for controlling discovery. One such approach, first suggested by Judge Peckham (see Peckham, "A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution," 37 Rutgers L. Rev. 253, 268–69 (1985)), and subsequently recommended by others as well (*see*, e.g., "Final Report of the Committee on the Pretrial Phase of Civil Cases," 115 F.R.D. 454, 456 (1986); American Bar Association, "Defeating Delay. Developing and Implementing a Court Delay Reduction Program" (1986) at 38), involves phasing discovery into two or more stages.

The first stage is limited to developing information needed for a realistic assessment of the case. If the case does not terminate after this stage, a second stage of discovery would commence. The purpose of this second stage is to prepare the case for trial. Limiting discovery initially to those crucial issues that highlight the essential strengths and weaknesses of a case will often lead to considerable savings of time and money for clients and the court system. As Judge Peckham has summarized:

> The goal of two-tiered discovery is to decrease the exorbitant costs associated with full-blown discovery by disposing of cases before reaching the second stage of discovery. Given the overwhelming percentage of cases that are disposed of short of trial, it is important for the court and parties to obtain enough information to sort out those

> cases which might be resolved by dispositive legal motions, settlement, or alternative dispute resolution techniques.

(Peckham, 37 Rutgers L. Rev. at 269.)

Another means of phasing discovery is to divide the use of interrogatories according to the stage of the case. The U.S. District Court for the Southern District of New York currently utilizes such a rule, which limits the type of interrogatories that may be served at particular stages of the litigation. (Rule 46, Southern District Civil Rules; *see also* "Restriction of Interrogatories Works in N.Y.," National Law Journal (July 11, 1988) at 15–18.)

In addition to phasing discovery, time standards for the completion of discovery—implemented as part of an overall case management system—can be an important technique for reducing costs and delays. For example, a recent study by the National Center for State Courts found that while time standards are

> not a panacea * * * they can be an important part of a comprehensive program to reduce or prevent delays. First, they express an important concept: that timely disposition of the courts' business is a responsibility of the judiciary. Second, they provide goals for the court and the participants in the litigation process to seek to achieve, both in managing their total caseloads and in handling their individual cases. Third, they can lead directly to the development of systems for monitoring caseload status and the progress of individual cases, as participants in the process seek to manage their dockets more effectively in order to achieve their goals.

(Mahoney, et al., "Changing Times in Trial Courts" (National Center for State Courts 1988), at 63.)

A 1981 Government Accounting Office report is consistent with these findings. After reviewing 782 files on cases that took a year or more to terminate in nine Federal district courts, the GAO found the establishment of time standards for different stages of the cases to be the critical factor in effective case management. (Government Accounting Office, "Better Management Can Ease Federal Civil Case Backlog" (1981), at i.)

The legislation leaves it to the district courts to determine whether to adopt presumptive time standards for the completion of discovery. They may also choose to adopt presumptive time standards for case disposition.

4. Establishing systems for differentiated case management

While all litigants must have equal access to the courts, not all lawsuits are equal in size or complexity. This principle is embraced in the concept of "Differentiated Case Management (DCM)," which is designed to make an early assessment of each case filed in terms of the nature and extent of judicial and other resources required for preparation and disposition of the case.

Singling out different categories of cases for different procedural treatment is a departure, of course, from the theory of "trans-substantive procedure"—that is, the application of the same procedural norms to all cases. Several commentators have suggested a dif-

ferentiated approach. *See, e.g.,* Lundquist and Flegal, "Discovery Abuse—Some New Views About an Old Problem," 2 Rev. Litigation 1, 7 (1981) ("[D]iscovery rules should be revised to fit the particular nature of litigation in specialized areas. Discovery rules in antitrust cases inherently need to be different than rules for less complex civil litigation."); Rosenberg, "The Federal Civil Rules After Half a Century," 36 Me. L. Rev. 243, 243-44 (1984) (there is no need to rely "on a single set of monolithic rules of universal application."); Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," 135 U. Pa. L. Rev. 909, 991 (1987) ("There exist substantially different types of cases that may warrant different processes.").

A differentiated case management system combines three core elements. First, it is "event-oriented," so that certain events in each litigation are viewed as important benchmarks in ascertaining case progress. Second, it controls the periods of time between case events and incorporates methods to supervise and control these intervals in order to make them more predictable. Third, it recognizes that while cases may be classified by broad definitions, each case is unique; thus, procedures are accommodated to fit the characteristics of each case.

One means of implementing the concept of differentiated case management is through formal case tracking systems.[13] Prof. Maurice Rosenberg has argued that

> the federal district courts and busy trial-level courts in the state systems need to diversify their procedures to satisfy the varied needs of the cases. Furthermore, they must be ready to make trade-offs. Sometimes they must give up the ideal procedures for processes that will better achieve simpler and less costly dispositions.
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> * * * * * * *
>
> Recent experience suggests that many of the emerging procedural needs of a judicial system can best be met by creating different tracks for different types of cases and then routing the cases through the most suitable processing channels. This permits simple, streamlined procedures in cases that cannot use the more elaborate procedures the rules contemplate. Particularly, it allows cutting down on pretrial discovery.

(Rosenberg, 36 Me. L. Rev. at 244.)[14]

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[13] The Harris survey of more than 1,000 participants in the civil justice system showed remarkably strong support for case tracking: 90 percent of the plaintiff's and defense litigators; 89 percent of public interest litigators; 87 percent of corporate general counsel; and 78 percent of the Federal trial judges surveyed support it. (Harris Survey at 57.)

[14] Some may argue that the transaction costs of tracking are too high, since lawyers will argue about which case category is appropriate and clients will have to pay for those arguments. Prof. Stephen N. Subrin, Northeastern University School of Law, concisely rejects this argument, noting:

> This misses the point. Case-by-case management developed because the transaction costs of procedural rules with broad attorney latitude were too high. As a result of federal local rules and state experimentation, the judiciary has already demonstrated that it thinks the transaction costs of ad hoc case-by-case management are also too high. Judges are already turning to formal limitations and definitions in order to reduce transactions costs.

(Subrin, "Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns," 137 U. Pa. L. Rev. 1999, 2049 (1989).)

Tracking systems have been utilized for civil cases in three jurisdictions: Bergen County, New Jersey Superior Court; Camden County, New Jersey Superior Court; and the Second Judicial District Court, St. Paul (Ramsey County), Minnesota. Each of these projects establishes multiple tracks with differing provisions regarding pretrial discovery, court events, and timeframes.

The Differentiated Case Management Project in Bergen County uses three basic tracks with regularized, active management of a case as it progresses. (*See* "Differentiated Case Management Project: Assessment of the Bergen Experience" (1988); Bakke & Solomon, "Case Differentiation: An Approach to Individualized Case Management," 73 Judicature 17 (1989).) Track One is for "expedited" cases and is designed to accommodate the special needs of cases that can be processed quickly because, in part, they will involve minimal pretrial discovery and other pretrial proceedings, and will require little or no judicial intervention. Track Two is for "complex" cases and is designed to accommodate cases for which timely disposition is likely to require more intensive judicial intervention and control. Track Three is for "standard" cases—cases that do not fall into the other two categories.

The Camden County project establishes three tracks as well: simple and expedited tracks, which can be requested by the attorneys, and a complex track to which a case can be assigned only with the approval of the presiding judge. Special subtracks have been established for certain types of cases.

The Ramsey County project has developed three tracks, the dispositional time frames of which are triggered by the filing of a Joint at Issue Memorandum (JIM) 90 days after the attorneys certify that a case is at issue. Cases assigned to the expedited track are to be disposed of within 90 days of the JIM; cases assigned to the standard track are to be disposed of within 305 days of the JIM; and cases assigned to the complex track are to be disposed of within a maximum of 2 years of the JIM. For expedited cases, the only court "event" scheduled is the trial. For standard cases, a Joint Disposition Conference of the attorneys is scheduled 45 days after track assignment, a Judicial Settlement Conference held 15 days thereafter, and the trial scheduled within 30 days of the settlement conference. Complex cases are assigned to an individual judge for a case management conference at which a schedule for requisite subsequent events and an applicable timetable are established.

A formal assessment of DCM projects is currently being conducted by the National Center for State Courts. According to a recent interim report, the jurisdictions participating in the pilot programs

> have experienced a significant reduction in processing time for cases included in the program and have increased court efficiency, as evidenced by their disposition of a greater number of cases in a shorter period of time without increased resources.

(Cooper, "Overview of the BJA Pilot Differentiated Case Management (DCM) and Expedited Drug Case Management (EDCM) Program" (July 1990) at 5.)

More specifically, in St. Paul, the pending caseload has been reduced from 2008 to 680 (66 percent) within 8 months. After the DCM program had been operational for 1 year, only 8 percent of the DCM cases were more than 1 year old, while 33 percent of the pre-DCM cases were more than 18 months old. Furthermore, more trials have been conducted since the program began, a fact that local officials attribute to the elimination of scheduled events that were frequently continued and the additional time that this leaves for judges to conduct trials. (*Id.*)

In Camden, the court has been able to handle an approximately 80-percent increase in civil filings with no additional judicial resources and no increase in pending caseload. The court has also noted no increase in motions despite the increase in case filings, a fact that is attributed to the continued case monitoring and informal resolution of many pretrial discovery problems that, prior to the DCM program, would have been addressed through motions. (*Id.*)

As originally introduced, the civil justice legislation provided for the development of case tracking systems in all Federal district courts. In light of concerns raised by the Judicial Conference regarding whether case tracking had been adequately tested, those provisions were revised. Title I of S. 2648 now provides for case tracking systems to be tested in two district courts.

5. Reducing the costs and delays associated with motion practice and decisions

A significant problem in Federal litigation is the undue delay often associated with the resolution of motions. A certain degree of time between the completion of briefing and the decision is not only expected but desired, of course, since the centerpiece of our civil justice system is the thoughtful and deliberate adjudication of cases on the merits. In too many instances, however, the timeframe is unreasonably long.

This problem was aptly summarized by Alan Morrison, who said in his letter to the committee: "[T]he single most important problem that we encounter in moving civil cases in federal district courts is the failure of judges to decide pending motions, particularly dispositive motions." (Morrison letter, at 1.) Mr. Morrison explains:

> [F]or a variety of reasons, some understandable and some not, district judges often sit on cases for extraordinarily long periods of time, thereby seriously injuring parties from the fact of delay alone. Indeed, delays are so long in some cases that the parties have simply withdrawn the complaints because time has passed the controversy by.

(*Id.*)

Patrick Head testified that in one case, his company had to wait 2 years following trial before the trial judge issued the opinion in the case. In another case, the court took 10 months to rule on a dispositive motion. (Head Written Statement, at 4.)

Prompt and timely decisions on motions is an objective for which all judicial officers must strive. The American Bar Association has recommended that "[m]atters under submission to a judge or judi-

cial officer should be promptly determined." (American Bar Association, "Defeating Delay," section 2.53, at 182.) The ABA commentary explains:

> Judges who are not consistently prompt in their decisions cannot expect attorneys to be prompt in their preparation. Lawyers should not be forced to protest delay in the decision of a submitted matter, and yet decisional delay is a major cause of docket delay.

(*Id.* at 183.)

Judge Enslen testified about the importance of timely decisions on motions. Acknowledging that he would rather not be mandated to resolve motions on a certain date, he added that he has

> discovered by experience that a meaningful settlement conference cannot take place without the resolution of all pending dispositive motions. Furthermore, a trial cannot take place without resolution of the same. . . . Resolution of these motions is a condition precedent, and an important one, to possibilities of terminating the litigation on the earliest possible date.

(Answer of Judge Enslen to Written Question 2(a) submitted by Senator Hatch.)

Stephen Middlebrook added, in response to a written question from Senator Hatch about whether it was necessary to set target dates for decisions on motions:

> I believe it is essential. One of the greatest sources of waste in the system is the cost of pursuing discovery on issues which become moot when a motion is ultimately resolved. *Setting a target for resolution of motions will be enormously helpful to counsel, their clients, and judges in structuring the timing of discovery.*

(Answer of Stephen Middlebrook to Written Question 2(a) from Senator Hatch; emphasis added.)

A related problem is the increase in the number of civil cases that are more than 3 years old. A March 1989 Judicial Conference report showed, for example, that the number of civil cases pending more than 3 years has climbed during the past 5 years from 15,646 to 22,391. According to the Administrative Office of the United States Courts, the percentage of civil cases more than 3 years old has risen in 5 years from 6.3 percent of the total in 1984 to 9.2 percent in 1989. This represents an increase of 46 percent.

6. Expanding and enhancing the use of alternative dispute resolution

As one expert commentator has put it:

> [A]n optimal dispute resolution service is one that produces just results at the end of just procedures. It is, in addition, accessible, fair, expeditious, concerned, and protective of the dignity and privacy of the parties. All in all, such a system is likely to inspire confidence in the integrity, impartiality and commitment to justice of those who staff it. That is an immense challenge, one that no single

> method of dispute resolution could possibly surmount in all types of cases. Common sense suggests that meeting the standards of the ideal system will require deploying a whole battery of dispute-resolving mechanisms, variously directed, variously driven and variously employed.

(Rosenberg, "Resolving Disputes Differently: Adieu to Adversary Justice," 21 Creighton L. Rev. 801 (1988).)

To this end, the last 15 years have witnessed the burgeoning use of dispute resolution techniques other than formal adjudication by courts. As the Federal Courts Study Committee stated in its report:

> [F]ederal and state courts have adopted and adapted supplemental and alternative techniques to standard procedures for processing civil litigation. The stated objectives of these techniques are to reduce cost, delay, and antagonism, and at the same time to preserve the time of judges for the disputes that most need their attention.

(Report of Federal Courts Study Committee (April 1990) at 81-82.)

While the data is not yet complete, studies of various ADR programs have shown generally favorable results. (*Id.* at 83.) As the Federal Courts Study Committee concluded: "Experience to date provides solid justification for allowing individual federal courts to institute ADR techniques in ways that best suit the preferences of bench, bar and interested publics." (*Id.*) The committee strongly agrees with this assessment.

Four principal ADR techniques are briefly explored below. The committee's highlighting of these is not intended to signal any disapproval of other excellent techniques also currently employed.[15]

a. Summary jury trials

The summary jury trial, developed originally by Judge Thomas D. Lambros, U.S. District Court for the Northern District of Illinois, was borne out of a need to develop a settlement alternative that preserved the involvement of a jury in the decisionmaking process. It recognizes that often the only bar to settlement of a case is a difference of opinion on how a jury will perceive evidence presented at trial.

While the governing principles are flexible, a summary jury trial usually involves a summarized presentation of the case to an "advisory jury" for the purpose of showing the parties—as well as the lawyers and the judge—"how a jury reacts to a dispute." (Lambros, "The Summary Jury Trial—An Alternative Method of Resolving Disputes," Judicature (February-March 1986) at 286.) The procedure is generally nonbinding, and thus does not impair the constitutional right of any party to proceed to a full-blown jury trial. Judge Lambros reports, however, that a full jury trial is "almost always unnecessary because the procedure fosters settlement of the dispute." (*Id.*)

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[15] For example, some jurisdictions have experimented with the "multi-door courthouse" approach, originally proposed by Harvard Law School Professor Frank E.A. Sander. Others have used "settlement weeks" in an effort to reduce costs and delays. In addition, the Center for Public Resources has devoted substantial energies to the resolution of business disputes.

To achieve the goal of facilitating settlement, the summary jury trial is generally conducted in open court with appropriate formalities. Clients are required to attend. Counsel are expected to be ready to proceed to trial and to present to the jury the best possible summation of their claims. The summary jury trial most often takes less than 1 full day. (*Id.*)

Judge Enslen reported that the Western District of Michigan has tried approximately 60–70 summary jury trials since 1983. All but two settled before trial. He added that the mere scheduling of a summary jury trial results in settlement before the scheduled summary jury trial date in 75 percent of the cases. (Enslen Written Statement, at 31–32.)

b. Mediation

Mediation, which generally involves the use of a neutral third party to resolve a dispute, is usually private, voluntary and informal. In some State jurisdictions, parties are required to attempt mediation before they can proceed to trial.

c. Mini-Trial

A minitrial is an extrajudicial procedure for converting a legal dispute from a "court-centered" problem to a "business-centered" problem. Put differently, a minitrial puts resolution of a business legal dispute back into the hands of the litigants whose dispute it was in the first place.

The underlying theory of a minitrial is that the parties may be able to resolve a dispute themselves if the litigants with settling authority become educated about the strengths and weaknesses of their case and their opponents' case. To educate them, the lawyers and experts for each party, in an informal proceeding supervised by a jointly selected neutral, give summary presentations of their best case before the senior executives of each side. The executives, therefore, play the roles of judge and juror. They then attempt to negotiate a settlement. If they are deadlocked, the neutral can help provide an incentive to settle by indicating what a likely trial outcome would be by submitting to each side a nonbinding opinion assessing each side's case.

A minitrial thus provides business-oriented litigants with information to undertake a litigation-risk analysis. Ideally, the legal dispute then becomes a negotiation between opposing businesses, and hopefully produces a settlement. Even if the case does not settle, however, the minitrial will have educated the litigants about future possibilities and assisted the lawyers in their preparation for trial.

d. Early neutral evaluation

One important alternative dispute resolution technique is early neutral evaluation, or "ENE." It has achieved great success in the U.S. District Court for the Northern District of California. The centerpiece of the ENE program is a confidential, nonbinding case evaluation conference, attended by all counsel and their clients, and hosted by a neutral member of the private bar who has substantial litigation experience and who is an expert in the principal subject matter of the lawsuit. This conference takes place early in

the pretrial period so that the parties will be in a position to use what they learn and accomplish during the proceeding to make the case development and settlement processes more rational, less expensive and less time-consuming.

In a survey of lawyers who participated in the ENE program in the Northern District of California, strong majorities found that it contributed to communication across party lines, to issue clarification, to prospects for settlement and to setting the groundwork for cost-effective discovery. Indeed, almost 90 percent of the lawyers whose cases had been compelled to participate in ENE expressed the view that the program should be expanded to more cases.

E. THE JUDICIAL CONFERENCE'S "14 POINT PROGRAM"

In response to the introduction of the Civil Justice Reform Act, the Judicial Conference has adopted a "14 Point Program." The Conference had "hop[ed] that adoption of this ambitious, unprecedented undertaking would persuade the sponsors of S. 2027 that legislation in this area was unnecessary." (Judicial Conference Written Statement, June 26, 1990, Hearing Transcript, at 13.) While the committee commends the Conference for adopting the "14 Point Program," the committee rejects the view that it renders the legislation unnecessary.[16] Indeed, a careful examination of the "14 Point Program" demonstrates precisely why a legislative approach is needed.

The Civil Justice Reform Act proposes general and widely accepted principles of litigation management and cost and delay reduction. These principles include: the treatment of complex cases in a different procedural manner than simple cases; the early and ongoing assessment and control of cases by judges and/or magistrates; the convening of discovery-case management conferences in complex litigation; the setting of target dates for the resolution of motions; and the prohibition on filing discovery motions unless counsel have first made a good-faith effort to resolve the dispute informally.

These principles and guidelines are, by definition, general and flexibile. The district courts are given the discretion to mold the principles and guidelines to their local conditions. Importantly, these principles have the potential to benefit every district court in the United States. The legislation, in Senator Thurmond's words, "embodies principles from which each individual district court will develop their own plan for creating greater efficiencies in the civil litigation process." (June 26, 1990, Hearing Transcript, at 11.)

In contrast, the Judicial Conference's "14 Point Program" does not advocate a single principle of litigation management. Furthermore, while the legislation requires each district court to imple-

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[16] Moreover, it is quite possible that the "14 Point Program" would not have been launched if not for the committee's consideration of this bill. As Judge Peckham told Chairman Biden, "it was your prod by the introduction of this legislation that caused us to examine and to come forward with the 14 points." (June 26, 1990, Hearing Transcript, at 22.) Judge Peckham added:

> It would be fair to say that neither the policy statement of March 13 by the Judicial Conference on case management nor the "14 Point Program" approved in late April, would have been developed, at those times, absent the introduction and attendant urgencies created by S. 2027.

(Answer of Judge Peckham to Written Question No. 1 of Chairman Biden.)

ment its plan within three years—a reasonable, yet certain, timetable—the "14 Point Program" imposes no outer time limits at all on when the Conference must complete action. Indeed, the Conference concedes that its "14 Point Program" is "open-ended." (Answer of Judge Peckham to Written Question No. 2 from Senator Thurmond.)

With regard to whether the Conference's "14 Point Program" renders title I of the legislation unnecessary, Chairman Biden and Carl Liggio, testifying on behalf of the 8,000 members of the American Corporate Counsel Association, had the following exchange:

> Chairman BIDEN. Do you believe that the objectives of this bill can be achieved without the legislation?
>
> Mr. LIGGIO. [T]he objectives of this bill could be achieved without legislation. There is no doubt in my mind that they could. *The question is will they be, and regrettably I do not think they will be without this sort of a catalytic push to it.*
>
> The very fact that we see the response from the Judicial Conference with their 14 points in response to this bill, I think, is evidence of that, *but I believe we need to push the next step over and beyond that,* and that is why I support the bill. (June 26, 1990, Hearing Transcript, at 50; emphasis supplied.)

As summarized by Chairman Biden:

> We need this legislation to establish a statutory national policy for addressing the problems of litigation costs and delay, to set forth specific cost and delay reduction techniques, and to ensure the implementation of court-developed plans according to certain, yet reasonable, timetables. These things are all missing from the Conference's 14 Points, and as a result I find the Conference's proposal wholly inadequate.

(June 26, 1990, Hearing Transcript, at 9.)

* * * * * * *

As the witnesses at the Judiciary Committee's first hearing illustrate, never before has the Consumer Federation, the Business Roundtable, the trial bar and the insurance industry been in agreement on a major initiative relative to the courts. (March 6, 1990, Hearing Transcript, at 25.) Explaining the basis for such an unprecedented consensus, Stephen Middlebrook, stated:

> Lengthy delays and costly procedures really benefit none of us in the long run. They also detract from what I think is our united professional responsibility, which is * * * to achieve just results through timely procedures, and to do so with reasonable economy to our clients.

(March 6, 1990, Hearing Transcript, at 36.)

As Mr. Middlebrook summarized, the reforms encompassed in the legislation are "just as real and just as dramatic as any substantive reform that has ever been effected." (March 6, 1990, Hearing Transcript, at 37.) Gene Kimmelman agreed, noting that the Consumer Federation of America "endorses the Civil Justice

Reform Act as really the best method of cleaning up our legal system and significantly reducing legal expenditures without harming or reducing any citizen's right to fair judicial process." (March 6, 1990, Hearing Transcript, at 24.)

Title II, the Federal Judgeship Act of 1990

A. INTRODUCTION

Title II of the bill authorizes additional article III judicial positions for the district courts and courts of appeals of the United States. The 66 district court judgeships and 11 circuit court judgeships authorized are based, in part, on the 1988 recommendations of the Judicial Conference of the United States for new judges. The judgeships authorized are also based on an analysis of weighted drug caseloads for each of the 94 district courts.

Importantly, while many of the authorized judgeships track the specific recommendations of the Judicial Conference, several follow changes made by the committee.[17] As Chairman Biden stated upon introduction of S. 2648:

> We have taken the recommendations [of the Judicial Conference] seriously, as the Judiciary Committee has always done. But in the end, * * * the Judicial Conference's recommendations are just that—recommendations. Nothing more, nothing less.

(Statement of Chairman Biden, Cong. Rec. S 6473, May 17, 1990.)

Senator Biden added:

> I know of no other part of the Federal Government where regional agencies call national headquarters, ask for a multi-million dollar commitment of resources, and then are given by the Congress exactly what they want, no questions asked.

(June 26, 1990, Hearing Transcript, at 5.)

The Judiciary Committee has always had the authority to evaluate the Nation's need for additional judgeships "by whatever method seems most appropriate and reliable in light of prevailing conditions." (S. Rep. 95-117, at 11.)[18] In title II, changes were made in the Judicial Conference's recommendations principally "to ensure that high-intensity drug areas get the resources they need to hear the cases, preside over the trials and sentence those who are convicted." (Statement of Chairman Biden, Cong. Rec. S 6473, May 17, 1990.)

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[17] When S. 2648 was introduced on May 17, the Judicial Conference had officially recommended the creation of 76 new judgeships. Its recommendations for 96 new judgeships were not transmitted to the committee until June 22, two business days before the committee's hearing on the bill.

[18] It is the committee's hope that no member of the Judicial Conference, including any member of the Administrative Office of the U.S. Courts, will continue to presume that the Conference's recommendations on judgeships carry the force of law. That mistaken presumption seriously undermined the Conference's relationship with the committee during its consideration this year of this important legislation. There simply is no basis for the Conference to arrogate to itself authority and responsibility expressly committed by the Constitution to the legislative branch.

B. THE NEED TO FOCUS ON DISTRICTS WITH HEAVY DRUG CASELOADS

The data strongly demonstrates the need to focus on drug caseloads in evaluating the Judicial Conference's recommendations and overall judgeship needs. For example, a 1989 report of the Judicial Conference states: "The increase in criminal filings is directly attributable to the focus on drug-related crimes. Drug cases have increased more than 15 percent each of the last 2 years, while non drug-related cases have actually declined." ("Impact of Drug Related Criminal Activity on the Federal Judiciary," Report of the Judicial Conference (1989).)

More specifically, since 1980, drug-related criminal case filings have increased by 229 percent, compared with a 56-percent increase in criminal case filings generally and a 42-percent increase in overall case filings. Drug-related criminal cases now constitute 24 percent of criminal filings (up from 11 percent in 1980), and 44 percent of criminal trials (up from 26 percent in 1980). (*Id.* at 14.)

When the committee undertook its independent evaluation of the Judicial Conference's recommendations—which included ranking each of the 94 Federal district courts in terms of their "weighted" drug caseloads [19]—it became clear that certain areas with clearly high drug caseloads were not slated to receive a single new judgeship. In identifying those areas, the committee focused in particular on the 20 districts with the highest drug caseloads.[20]

With this emphasis, there was a clear need to add judgeships to: the U.S. District Court for the Southern District of Florida (Miami); the U.S. District Court for the Southern District of California (San Diego); the U.S. District Court for the Northern District of Florida (Tallahassee); the U.S. District Court for the Eastern District of Washington (Spokane); the U.S. District Court for the District of Maine; the U.S. District Court for the Northern District of West Virginia; the U.S. District Court for the Southern District of West Virginia; the U.S. District Court for the Middle District of North Carolina; and the U.S. District Court for the Middle District of Georgia. Each of these districts received a new judgeship, even though the Judicial Conference had not recommended one in its then-pending official recommendations, because of high-weighted drug caseloads.

With the judges added by the committee and the judges officially recommended by the Judicial Conference, the 20 district courts hardest hit by drug cases will each be receiving a new judge.

C. DEFICIENCIES IN THE JUDICIAL CONFERENCE'S RECOMMENDATIONS

1. Court of appeals recommendations

Upon reviewing the Judicial Conference's recommendations for court of appeals judgeships, two significant, related problems emerged, both of which the committee urges the Conference to rec-

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[19] Chairman Biden and Senator Thurmond requested data on weighted drug caseloads in a Jan. 25, 1990, letter to the Administrative Office of the U.S. Courts.

[20] The Senate had already expressed its strong sense that focusing on those 20 district courts was the appropriate area of emphasis. On October 23, 1989, the Senate unanimously approved an amendment by Chairman Biden to S. 1711, the National Drug Control Strategy Initiative, to authorize the appointment of 20 additional district court judges in districts with heavy caseloads of drug-related prosecutions. (*See* Cong. Rec., Oct. 5, 1989, at S 12728–12732.)

tify prior to the submission of its next set of recommendations. First, the precise standard used by the Judicial Conference in developing recommendations for circuit court judgeships is entirely unclear, since there is no weighted caseload system. Second, the recommendations themselves appear to be driven more by the specific requests made by circuit judicial councils than by hard, factual analysis.

A principal problem with the Conference's court of appeals recommendations is that caseload statistics are of little, if any, utility because the Conference has no weighted caseload system at the appellate level. Judge McGovern made that quite clear during his testimony, stating: "We do not have a weighted case factor that we use at the appellate level as we do for the trial level." (June 26, 1990, Hearing Transcript, at 54–55.)

In fact, other than treating prisoner petitions as constituting one-half of a case, the Conference makes no other concession to the vast differences in types of appeals, as the following exchange makes clear:

> Chairman BIDEN. [The lack of weighting system] would mean that the Conference treats an appeal on an odometer-tampering case or a Social Security case * * * the same as a complex antitrust case taken up on a appeal? There is no difference?
>
> Judge MCGOVERN. Yes, sir.

(June 26, 1990, Hearing Transcript, at 55.)

Thus, as Chairman Biden said,

> the same 255 cases for one appellate judge could, in fact, take one-half, one-third, three-quarters the time to dispose of as 255 cases for another court of appeals judge based upon what is up on appeal.

(*Id.* at 56.)

Given the obviously varied nature of appellate cases, the lack of any system to differentiate among those cases in terms of the judicial time they require makes any realistic evaluation next to impossible. The committee urges the Judicial Conference to develop a weighted caseload system at the appellate level.

Perhaps because no weighted caseload system exists or perhaps because of some other reason, the Judicial Conference's court of appeals recommendations bear a striking similarity to the requests that are made by the circuit judicial councils. In fact, with respect to the Judicial Conference's recommendations for court of appeals judgeships that were available when S. 2648 was introduced, "every single recommendation * * * corresponds exactly to what the circuit council of each circuit asked for." (Opening Statement of Chairman Biden, June 26, 1990, Hearing Transcript, at 4.) [21]

[21] According to the 1988 Biennial Survey prepared and supplied by the Administrative Office of the U.S. Courts, the District of Columbia Circuit Council requested no judgeships, and the Judicial Conference recommended none; the First Circuit Judicial Council requested no judgeships, and the Conference recommended none; the Second Circuit Judicial Council requested no judgeships and the Judicial Conference recommended none; the Third Circuit Judicial Council requested two judgeships, and the Judicial Conference recommended two; the Fourth Circuit Judicial Council requested four judgeships, and the Judicial Conference recommended four; the

Continued

Illustrative of the seemingly "whatever you want, you get approach" (*id.* at 5) of the Judicial Conference's court of appeals recommendations is the sequence of events that occurred regarding the Sixth Circuit. In 1988, the Sixth Circuit Judicial Council requested no new judgeships. The Judicial Conference complied with that request, and it recommended no additional judgeships. The Conference then amended that recommendation to request five new judgeships—"a rather large jump," in Chairman Biden's words, "unless one assumes that something other than the facts are driving the recommendations. * * *" (*Id.*)

When the committee evaluated the data regarding the Sixth Circuit, it concluded that one additional judgeship was warranted. Furthermore, title II creates one new judgeship for the Eighth Circuit, rather than the two recommended by the Judicial Conference. Adding two to the Eighth Circuit would have resulted in 571 filings per circuit panel, and 353 pending cases per panel. These figures are lower than those for several other circuits that would receive no new judgeships under the Judicial Conference's recommendations.[22]

2. District court recommendations

Some district courts slated to receive a new judgeship under the Judicial Conference official recommendations are not authorized under title II. These districts generally rank low in terms of weighted drug caseloads and/or barely meet, if they meet at all, the Judicial Conference's threshold for recommending a new judge.

IV. Vote of the Committee

On July 12, 1990, the Committee on the Judiciary, a quorum being present, approved an amendment in the nature of a substitute and, by a vote of 12 to 1, ordered the bill, S. 2648, the Judicial Improvements Act of 1990, favorably reported.

Fifth Circuit Judicial Council requested one judgeship, and the Judicial Conference recommended one; as discussed, *infra*, when the Sixth Judicial Council requested no judgeships, the Judicial Conference recommended none, and when the Sixth Circuit Judicial Council requested five judgeships, the Judicial Conference recommended five; the Seventh Circuit Judicial Council requested no judgeships, and the Judicial Conference recommended none: the Eighth Circuit Judicial Council requested two judgeships, and the Judicial Conference recommend two; the Ninth Circuit Judicial Council requested no judgeships, and the Judicial Conference recommended none; the Tenth Circuit Judicial Council requested two judgeships, and the Judicial Conference recommended two; and the Eleventh Circuit Judicial Council requested three, and the Judicial Conference recommended three.

With respect to the 1990 Biennial Survey, the only information provided by the Administrative Office pertains to circuit courts that the Judicial Conference has recommended to receive additional judgeships. For each of those circuits, the Judicial Conference's recommendation corresponds exactly to the number of new judgeships requested by the circuit council of that circuit. Judge McGovern did testify, however, that one of the Judicial Conference's 1990 recommendations did not correspond to the request of a circuit council. (*See* June 26, 1990, Hearing Transcript, at 58.)

[22] For example, for the calendar year ending June 30, 1989, the Seventh Circuit's filings were 737 per panel and the pending cases were 620 per panel. The First Circuit's filings were 644 per panel, and pending cases were 380 per panel.

The vote on the bill was as follows:

YEAS—12	NAYS—1
Biden	Heflin
Kennedy*	
Metzenbaum	
Leahy*	
DeConcini	
Simon	
Kohl*	
Thurmond	
Hatch*	
Grassley*	
Specter	
Humphrey	

*By proxy.

Senator Simpson was not present and did not vote.

V. TEXT OF S. 2648, AS REPORTED

[101st Cong., 2d sess.]

A BILL To amend title 28, United States Code, to provide for civil justice expense and delay reduction plans, authorize additional judicial positions for the courts of appeals and district courts of the United States, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Improvements Act of 1990".

TITLE I—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

SEC. 101. SHORT TITLE.

This title may be cited as the "Civil Justice Reform Act of 1990".

SEC. 102. FINDINGS.

The Congress finds that:

(1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.

(2) The courts, the litigants, the litigants' attorneys, and the Congress and the executive branch, share responsibility for cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.

(3) The solutions to problems of cost and delay must include significant contributions by the courts, the litigants, the litigants' attorneys, and by the Congress and the executive branch.

(4) In identifying, developing, and implementing solutions to problems of cost and delay in civil litigation, it is necessary to achieve a method of consultation so that individual judicial of-

ficers, litigants, and litigants' attorneys who have developed techniques for litigation management and cost and delay reduction can effectively and promptly communicate those techniques to all participants in the civil justice system.

(5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including—

(A) the differential treatment of cases that provides for individualized and specific management according to their needs, complexity, duration, and probable litigation careers;

(B) early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling hearings, trials, and other litigation events;

(C) regular communication between a judicial officer and attorneys during the pretrial process; and

(D) utilization of alternative dispute resolution programs in appropriate cases.

(6) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction-principles and techniques.

SEC. 103. AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS.—Title 28, United States Code, is amended by inserting after chapter 21 the following new chapter:

"CHAPTER 23—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

"§ 471. Requirement for a district court civil justice expense and delay reduction plan

"There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate de-

liberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

"§ 472. Development and implementation of a civil justice expense and delay reduction plan

"(a) The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected, as the case may be, after consideration of the recommendations of an advisory group appointed in accordance with section 478 of this title.

"(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include—

"(1) an assessment of the matters referred to in subsection (c)(1);

"(2) the basis for its recommendation that the district court develop a plan or select a model plan;

"(3) recommended measures, rules and programs; and

"(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

"(c)(1) In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall—

"(A) determine the condition of the civil and criminal dockets;

"(B) identify trends in case filings and in the demands being placed on the court's resources; and

"(C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation.

"(2) In developing its recommendations, the advisory group of a district court shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys.

"(3) The advisory group of a district court shall ensure that its recommended actions include significant contributions to be made by the court, the litigants and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts.

"(d) The chief judge of the district court shall transmit a copy of the plan implemented in accordance with subsection (a) and the report prepared in accordance with subsection (b) of this section to—

"(1) the Director of the Administrative Office of the United States Courts;

"(2) the judicial council of the circuit in which the district court is located; and

"(3) the chief judge of each of the other United States district courts located in such circuit.

"§ 473. Content of civil justice expense and delay reduction plans

"(a) A civil justice expense and delay reduction plan developed and implemented under this chapter shall include provisions apply-

ing the following principles and guidelines of litigation management and cost and delay reduction:

"(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

"(2) early and ongoing control of the pretrial process through involvement of a judicial officer in—

"(A) assessing and planning the progress of a case;

"(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months of the filing of the complaint, unless a judicial officer certifies that the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

"(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

"(D) setting deadlines for the filing of motions and target dates for the deciding of motions;

"(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer—

"(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

"(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

"(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—

"(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

"(ii) phase discovery into two or more stages; and

"(D) establishes deadlines for filing motions and target dates for deciding motions;

"(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

"(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

"(6) authorization to refer appropriate cases to alternative dispute resolution programs that—

"(A) have been designated for use in a district court; or

"(B) the court may make available, including mediation, minitrial, and summary jury trial.

"(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider adopting the following litigation management and cost and delay reduction techniques:

"(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

"(2) a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

"(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

"(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

"(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

"(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

"§ 474. Review of district court action

"(a)(1) The chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee—

"(A) review each plan and report submitted pursuant to section 472(d) of this title; and

"(B) make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.

"(2) The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such court to perform the chief judge's responsibilities under paragraph (1) of this subsection.

"(b) The Judicial Conference of the United States—

"(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

"(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

"§ 475. Periodic district court assessment

"After developing or selecting a civil justice expense and delay reduction plan, each United States district court shall assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. In performing such assessment, the court shall consult with an advisory group appointed in accordance with section 478 of this title.

"§ 476. Enhancement of judicial accountability through information dissemination

"(a) To enhance the accountability of each judicial officer in a district court, the Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer—

"(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

"(2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and

"(3) the number and names of cases that have not been terminated within three years of filing.

"(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semiannual report prepared under subsection (a).

"§ 477. Model civil justice expense and delay reduction plan

"(a)(1) Based on the plans developed and implemented by the United States district courts designated as Early Implementation District Courts pursuant to section 103(c) of the Civil Justice Reform Act of 1990, the Judicial Conference of the United States may develop one or more model civil justice and expense delay reduction plans. Any such model plan shall be accompanied by a report explaining the manner in which the plan complies with section 473 of this title.

"(2) The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations to the Judicial Conference regarding the development of any model civil justice expense and delay reduction plan.

"(b) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives copies of any model plan and accompanying report.

"§ 478. Advisory groups

"(a) Within ninety days after the date of enactment of this chapter, the advisory group required in each United States district court in accordance with section 472 of this title shall be appointed

by the chief judge of each district court, after consultation with the other judges of such court.

"(b) The advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge of such court.

"(c) In no event shall any member of the advisory group serve longer than four years.

"(d) The chief judge of a United States district court may designate a reporter for each advisory group, who may be compensated in accordance with guidelines established by the Judicial Conference of the United States.

"(e) The members of an advisory group of a United States district court and any person designated as a reporter for such group shall be considered as independent contractors of such court when in the performance of official duties of the advisory group and may not, solely by reason of service on or for the advisory group, be prohibited from practicing law before such court.

"§ 479. Information on litigation management and cost and delay reduction

"(a) Within four years after the date of the enactment of this chapter, the Judicial Conference of the United States Courts shall prepare a comprehensive report on all plans received pursuant to section 472(d) of this title. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding such report to the Judicial Conference during the preparation of the report. The Judicial Conference shall transmit copies of the report to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives.

"(b) The Judicial Conference of the United States shall, on a continuing basis—

"(1) study ways to improve litigation management and dispute resolution services in the district courts; and

"(2) make recommendations to the district courts on ways to improve such services.

"(c)(1) The Judicial Conference of the United States shall prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding the preparation of and any subsequent revisions to the Manual.

"(2) The Manual shall be developed after careful evaluation of the plans implemented under section 472 of this title and the litigation management and cost and delay reduction demonstration programs that the Judicial Conference shall conduct under this title.

"(3) The Manual shall contain a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts.

"§ 480. Training programs

"The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts shall develop and conduct comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation. The curriculum of such training programs shall be periodically revised to reflect such information and analyses.

"§ 481. Automated case information

"(a) The Director of the Administrative Office of the United States Courts shall ensure that each United States district court has the automated capability readily to retrieve information about the status of each case in such court.

"(b)(1) In carrying out subsection (a), the Director shall prescribe—

"(A) the information to be recorded in district court automated systems; and

"(B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.

"(2) The uniform standards prescribed under paragraph (1)(B) of this subsection shall include a definition of what constitutes a dismissal of a case and standards for measuring the period for which a motion has been pending.

"(c) Each United States district court shall record information as prescribed pursuant to subsection (b) of this section.

"§ 482. Definitions

"As used in this chapter the term 'judicial officer' means a United States district court judge or a United States magistrate.".

(b) IMPLEMENTATION.—(1) Within three years after the date of the enactment of this title, each United States district court shall implement a civil justice expense and delay reduction plan under section 471 of title 28, United States Code, as added by subsection (a).

(2) The requirements set forth in sections 471 through 478 of title 28, United States Code, as added by subsection (a), shall remain in effect for seven years after the date of the enactment of this title.

(c) EARLY IMPLEMENTATION DISTRICT COURTS.—

(1) Any United States district court that, no earlier than six months and no later than twelve months after the date of the enactment of this title, develops and implements a civil justice expense and delay reduction plan under chapter 23 of title 28, United States Code, as added by subsection (a), shall be designated by the Judicial Conference of the United States as an Early Implementation District Court.

(2) The chief judge of a district so designated may apply to the Judicial Conference for additional resources, including technological and personnel support and information systems, necessary to implement its civil justice expense and delay re-

duction plan. The Judicial Conference may provide such resources out of funds appropriated pursuant to section 105(a).

(3) Within eighteen months after the date of the enactment of this title, the Judicial Conference shall prepare a report on the plans developed and implemented by the Early Implementation District Courts.

(4) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and House of Representatives—

(A) copies of the plans developed and implemented by the Early Implementation District Courts;

(B) the reports submitted by such districts pursuant to section 472(d) of title 28, United States Code, as added by subsection (a); and

(C) the report prepared in accordance with paragraph (3) of this subsection.

(d) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part I of title 28, United States Code, is amended by adding at the end thereof:

"23. Civil justice expense and delay reduction plans ..... 471".

SEC. 104. DEMONSTRATION PROGRAM.

(a) IN GENERAL.—(1) During the four-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a demonstration program in accordance with subsection (b).

(2) A district court participating in the demonstration program may also be an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENT.—(1) The United States District Court for the Western District of Michigan and the United States District Court for the Northern District of Ohio shall experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures and timeframes for the completion of discovery and for trial.

(2) The United States District Court for the Northern District of California, the United States District Court for the Northern District of West Virginia, and the United States District Court for the Western District of Missouri shall experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution, that such district courts and the Judicial Conference of the United States shall select.

(c) STUDY OF RESULTS.—The Judicial Conference of the United States, in consultation with the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall study the experience of the district courts under the demonstration program.

(d) REPORT.—Not later than March 31, 1995, the Judicial Conference of the United States shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report of the results of the demonstration program.

SEC. 105. AUTHORIZATION.

(a) EARLY IMPLEMENTATION DISTRICT COURTS.—There is authorized to be appropriated not more than $15,000,000 for fiscal year 1990 to carry out the resource and planning needs necessary for the implementation of section 103(c).

(b) IMPLEMENTATION OF CHAPTER 23.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1990 to implement chapter 23 of title 28, United States Code.

(c) DEMONSTRATION PROGRAM.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1990 to carry out the provisions of section 104.

TITLE II—FEDERAL JUDGESHIPS

SECTION 201. SHORT TITLE.

This title may be cited as the "Federal Judgeship Act of 1990".

SEC. 202. CIRCUIT JUDGES FOR THE CIRCUIT COURT OF APPEALS.

(a) IN GENERAL.—The President shall appoint, by and with the advice and consent of the Senate—

(1) 2 additional circuit judges for the third circuit court of appeals;

(2) 4 additional circuit judges for the fourth circuit court of appeals;

(3) 1 additional circuit judge for the fifth circuit court of appeals;

(4) 1 additional circuit judge for the sixth circuit court of appeals;

(5) 1 additional circuit judge for the eighth circuit court of appeals; and

(6) 2 additional circuit judges for the tenth circuit court of appeals.

(b) TABLES.—In order that the table contained in section 44(a) of title 28, United States Code, will, with respect to each judicial circuit, reflect the changes in the total number of permanent circuit judgeships authorized as a result of subsection (a) of this section, such table is amended to read as follows:

"Circuits	Number of Judges
District of Columbia	12
First	6
Second	13
Third	14
Fourth	15
Fifth	17
Sixth	16
Seventh	11
Eighth	11
Ninth	28
Tenth	12
Eleventh	12
Federal	12.".

SEC. 203. DISTRICT JUDGES FOR THE DISTRICT COURTS.

(a) IN GENERAL.—The President shall appoint, by and with the advice and consent of the Senate—

(1) 1 additional district judge for the western district of Arkansas;

(2) 2 additional district judges for the northern district of California;
(3) 5 additional district judges for the central district of California;
(4) 1 additional district judge for the southern district of California;
(5) 2 additional district judges for the district of Connecticut;
(6) 2 additional district judges for the middle district of Florida;
(7) 1 additional district judge for the northern district of Florida;
(8) 1 additional district judge for the southern district of Florida;
(9) 1 additional district judge for the middle district of Georgia;
(10) 1 additional district judge for the northern district of Illinois;
(11) 1 additional district judge for the southern district of Iowa;
(12) 1 additional district judge for the western district of Louisiana;
(13) 1 additional district judge for the district of Maine;
(14) 1 additional district judge for the district of Massachusetts;
(15) 1 additional district judge for the southern district of Mississippi;
(16) 1 additional district judge for the eastern district of Missouri;
(17) 1 additional district judge for the district of New Hampshire;
(18) 3 additional district judges for the district of New Jersey;
(19) 1 additional district judge for the district of New Mexico;
(20) 1 additional district judge for the southern district of New York;
(21) 1 additional district judge for the eastern district of New York;
(22) 1 additional district judge for the middle district of North Carolina;
(23) 1 additional district judge for the northern district of Oklahoma;
(24) 1 additional district judge for the western district of Oklahoma;
(25) 1 additional district judge for the district of Oregon;
(26) 3 additional district judges for the eastern district of Pennsylvania;
(27) 1 additional district judge for the middle district of Pennsylvania;
(28) 1 additional district judge for the district of South Carolina;
(29) 1 additional district judge for the eastern district of Tennessee;
(30) 1 additional district judge for the western district of Tennessee;

(31) 1 additional district judge for the northern district of Texas;

(32) 3 additional district judges for the southern district of Texas;

(33) 1 additional district judge for the western district of Texas;

(34) 1 additional district judge for the district of Utah;

(35) 1 additional district judge for the eastern district of Washington;

(36) 1 additional district judge for the northern district of West Virginia;

(37) 1 additional district judge for the southern district of West Virginia; and

(38) 1 additional district judge for the district of Wyoming.

(b) EXISTING JUDGESHIPS.—(1) The existing district judgeships for the western district of Arkansas, the northern district of Illinois, the northern district of Indiana, the district of Massachusetts, the western district of New York, the eastern district of North Carolina, the northern district of Ohio, and the western district of Washington authorized by section 202(b) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Public Law 98-353, 98 Stat. 347-348) shall, as of the effective date of this title, be authorized under section 133 of title 28, United States Code, and the incumbents in those offices shall hold the office under section 133 of title 28, United States Code, as amended by this title.

(2)(A) The existing two district judgeships for the eastern and western districts of Arkansas (provided by section 133 of title 28, United States Code, as in effect on the day before the effective date of this title) shall be district judgeships for the eastern district of Arkansas only, and the incumbents of such judgeships shall hold the offices under section 133 of title 28, United States Code, as amended by this title.

(B) The existing district judgeship for the northern and southern districts of Iowa (provided by section 133 of title 28, United States Code, as in effect on the day before the effective date of this title) shall be a district judgeship for the northern district of Iowa only, and the incumbent of such judgeship shall hold the office under section 133 of title 28, United States Code, as amended by this title.

(C) The existing district judgeship for the northern, eastern, and western districts of Oklahoma (provided by section 133 of title 28, United States Code, as in effect on the day before the effective date of this title) and the occupant of which has his official duty station at Oklahoma City on the date of enactment of this title, shall be a district judgeship for the western district of Oklahoma only, and the incumbent of such judgeship shall hold the office under section 133 of title 28, United States Code, as amended by this title.

(c) TEMPORARY JUDGESHIPS.—The President shall appoint, by and with the advice and consent of the Senate—

(1) 1 additional district judge for the northern district of Alabama;

(2) 1 additional district judge for the eastern district of California;

(3) 1 additional district judge for the district of Hawaii;

(4) 1 additional district judge for the central district of Illinois;

(5) 1 additional district judge for the southern district of Illinois;

(6) 1 additional district judge for the district of Kansas;

(7) 1 additional district judge for the western district of Michigan;

(8) 1 additional district judge for the eastern district of Missouri;

(9) 1 additional district judge for the district of Nebraska;

(10) 1 additional district judge for the northern district of New York;

(11) 1 additional district judge for the northern district of Ohio;

(12) 1 additional district judge for the eastern district of Pennsylvania;

(13) 1 additional district judge for the eastern district of Texas; and

(14) 1 additional district judge for the eastern district of Virginia.

The first vacancy in the office of district judge in each of the judicial districts named in this subsection, occurring five years or more after the effective date of this title, shall not be filled.

(d) TABLES.—In order that the table contained in section 133 of title 28, United States Code, will, with respect to each judicial district, reflect the changes in the total number of permanent district judgeships authorized as a result of subsections (a) and (b) of this section, such table is amended to read as follows:

"DISTRICTS	JUDGES
Alabama:	
Northern	7
Middle	3
Southern	3
Alaska	3
Arizona	8
Arkansas:	
Eastern	5
Western	3
California:	
Northern	14
Eastern	6
Central	27
Southern	8
Colorado	7
Connecticut	8
Delaware	4
District of Columbia	15
Florida:	
Northern	4
Middle	11
Southern	16
Georgia:	
Northern	11
Middle	4
Southern	3
Hawaii	3
Idaho	2
Illinois:	
Northern	22
Central	3

Southern	3
Indiana:	
Northern	5
Southern	5
Iowa:	
Northern	2
Southern	3
Kansas	5
Kentucky:	
Eastern	4
Western	4
Eastern and Western	1
Louisiana:	
Eastern	13
Middle	2
Western	7
Maine	3
Maryland	10
Massachusetts	13
Michigan:	
Eastern	15
Western	4
Minnesota	7
Mississippi:	
Northern	3
Southern	6
Missouri:	
Eastern	6
Western	5
Eastern and Western	2
Montana	3
Nebraska	3
Nevada	4
New Hampshire	3
New Jersey	17
New Mexico	5
New York:	
Northern	4
Southern	28
Eastern	13
Western	4
North Carolina:	
Eastern	4
Middle	4
Western	3
North Dakota	2
Ohio:	
Northern	11
Southern	7
Oklahoma:	
Northern	3
Eastern	1
Western	6
Northern, Eastern, and Western	1
Oregon	6
Pennsylvania:	
Eastern	22
Middle	6
Western	10
Puerto Rico	7
Rhode Island	3
South Carolina	9
South Dakota	3
Tennessee:	
Eastern	5
Middle	3
Western	5

Texas:	
Northern	11
Southern	16
Eastern	6
Western	8
Utah	5
Vermont	2
Virginia:	
Eastern	9
Western	4
Washington:	
Eastern	4
Western	7
West Virginia:	
Northern	3
Southern	5
Wisconsin:	
Eastern	4
Western	2
Wyoming	3.".

SEC. 204. VIRGIN ISLANDS.

(a) IN GENERAL.—The President shall appoint, by and with the advice and consent of the Senate, one additional judge for the District Court of the Virgin Islands, who shall hold office for a term of 10 years and until a successor is chosen and qualified, unless sooner removed by the President for cause.

(b) AMENDMENT TO ORGANIC ACT.—In order to reflect the change in the total number of permanent judgeships authorized as a result of subsection (a) of this section, section 24(a) of the Revised Organic Act of the Virgin Islands (68 Stat. 506; 48 U.S.C. 1614(a)) is amended by striking "two" and inserting "three".

SEC. 205. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title, including such sums as may be necessary to provide appropriate space and facilities for the judicial positions created by this title.

SEC. 206. EFFECTIVE DATE.

This title shall take effect on the date of enactment of this title.

VI. SECTION-BY-SECTION ANALYSIS

Title I

SECTION 101

Section 101 establishes the short title of title I as the "Civil Justice Reform Act of 1990."

SECTION 102

Section 102 contains Congress' findings that the problems of cost and delay in civil litigation must be addressed in the context of both civil and criminal matters; that all three branches of Government, as well as litigants and their attorneys, share responsibility both for the current problems and for developing solutions; and that the development and implementation of effective solutions will depend on prompt, effective, and ongoing communication of

certain fundamental principles, guidelines, and techniques for litigation management to all civil justice system participants.

SECTION 103

Section 103(a) creates a new chapter 23 in title 28 of the United States Code. The new chapter contains the provisions necessary for the development and implementation of civil justice expense and delay reduction plans in all 94 Federal district courts, and for the ongoing communication by and among all civil justice system participants of all relevant information pertaining to cost and delay reduction.

The sections of the new chapter are described as follows:

Section 471

Section 471 sets forth the requirement that each U.S. district court implement a civil justice expense and delay reduction plan. It states that each district court may choose to develop its own plan in accordance with the remaining sections of title I, or, instead, may choose a model plan developed by the Judicial Conference. Regardless of the method selected, the purpose of implementing a plan is to facilitate deliberate adjudication of civil cases on the merits; monitor discovery; improve litigation management; and ensure the just, speedy, and inexpensive resolutions of civil disputes.

While not specified in the text of this provision, it is the committee's intent that title I not apply to cases transferred to a bankruptcy court. Once a case has been returned to a district court, however, the provisions of this legislation would apply.

It is possible that, within one district, there may be several different divisions with largely different dockets, needs, and demands. For example, the Eastern District of Virginia has three divisions: Alexandria, Richmond, and Norfolk. As three distinct areas with three distinct caseloads and needs, each may want to develop a separate plan. For such districts, the chief judge of the court, in consultation with other members of the court, should determine whether a separate planning group should be convened in each division. If such a determination is made, the chief judge should certify the need for separate planning groups by letter to the Director of the Administrative Office of the United States Courts. While the presumption is that each district court should have only one plan, that presumption may be rebutted by a showing of clear need.

Section 472

Section 472 sets out the manner in which civil justice expense and delay reduction plans are to be developed and implemented.

Subsection (a) provides that the district court shall develop or select a civil justice expense and delay reduction plan only after it has carefully considered the recommendations of the advisory group to be appointed in each district pursuant to section 478.

In accordance with subsection (b), each advisory group must set forth the basis for its recommendation that the district court either develop a plan or select a Judicial Conference-developed model plan. A report containing this recommendation and the group's ra-

tionale must be submitted to the court and be made available to the public.

Importantly, should the advisory group recommend that the district court develop its own plan, the group must also set forth, in its report, the measures, rules, and programs that it recommends the court develop as well as an explanation of the manner in which the recommended plan complies with section 473, particularly the principles and guidelines of section 473(a). Given the obvious importance of the matters to be included in the report, it is expected that the reports will be comprehensive.

In the context of developing and preparing its recommendations, each advisory group must, in accordance with section 472(c), promptly complete a thorough assessment of the state of the court's civil and criminal dockets. Together with the substance of the actual recommendations, this assessment is one of the most important functions that the advisory groups will perform. Never before has the opportunity existed to examine, on a district-by-district basis, the state of each district court's docket. The potential benefits of the 94 district court assessments are enormous.

Subsection (c)(1) directs each advisory group, in performing its assessment, to determine the condition of the civil and criminal dockets; to identify trends in case filings and in the demands being placed on the court's resources, including lack of sufficient judicial personnel or administrative staff; and to identify the principal causes of cost and delay in that particular district. The focus on demands being placed on the court's resources will be particularly instructive, because it will provide Congress and the judicial branch with input on this important question from the actual users of the Federal court system. No such mechanism currently exists. Pursuant to section 472(b)(1), each of the matters specified in subsection (c)(1) is to be included in the report the advisory group submits to the court and makes available to the public.

Each court must also ensure that the advisory group has access to caseload data and other relevant statistics so that it can undertake the assessment called for in subsection (c)(1).

Subsection (c)(2) makes clear that, in developing its recommendations, each advisory group must carefully consider the particular needs and circumstances of its district court, the litigants in that court and the litigants' attorneys. In accord with Congress' findings, subsection (c)(3) instructs each advisory group to ensure that its recommendations include significant contributions by the court, the litigants, and the litigants' attorneys. Contributions by one source alone will not be sufficient to address adequately the cost and delay problems. All participants in the civil justice system must shoulder responsibility for reducing costs and delays and facilitating access to the courts.

Subsection (d) of section 472 pertains to transmittal of the plan ultimately implemented by each district court and the report prepared by each advisory group. It directs the chief judge of the district court to transmit the plan and report to the Director of the Administrative Office of the United States Courts; the judicial council of the circuit in which the district court is located; and the chief judges of each of the other district courts located in that circuit. In this way, each court within a particular circuit will be fully

aware of the actions taken elsewhere in that circuit to reduce costs and delays.

Section 473

Section 473, which sets forth the content of the civil justice expense and delay reduction plans, is of critical importance to the effective implementation of title I. S. 2027, the predecessor of title I of this bill, mandated the inclusion of 15 fairly detailed provisions in each plan. In order to accommodate concerns raised by the Judicial Conference and to provide district courts more flexibility in implementing this legislation, section 473 of title I adopts a two-tiered approach to the content of the plans.

First, subsection (a) sets forth six binding but general principles and guidelines of litigation management and cost and delay reduction to be applied by every district court in the manner the court, upon the recommendations of the advisory group, chooses. By their very nature, these principles and guidelines, while binding on each court, are intended to be flexible. The committee recognizes that such flexibility is necessary in light of the diversity of caseloads, types of litigation, local characteristics of the caseflow process, and the number of judicial officers and support staff available across different Federal jurisdictions. Each district court, therefore, should have sufficient flexibility to formulate the specific details of its plan within certain well-defined and uniformly applied parameters.

Second, subsection (b) sets forth six specific discretionary techniques for each district court and its advisory group to consider as they develop the district's plan.

Section 473(a)

The first binding principle of litigation management, set forth in subsection (a)(1) of section 473, is the systematic, differential treatment of cases. This means that each plan must include a method of tailoring the level of individualized and case-specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case. One such method is case tracking; that is clearly not the only method, however, and the committee expects that many districts may already have in place methods for systematically tailoring the level of judicial case management to the needs of the case—for formally recognizing that some cases need more management and other less.

As to the need for such a system, the committee adopts the rationale of the second circuit, which said four years ago:

> Certain categories of cases may not need individualized management, or any management, while other types will ordinarily require tailored handling. In many cases, management costs are small: they may involve no more than scheduling regular pretrial conferences and seeing that the parties adhere to a discovery schedule. In the larger cases, management costs are higher *but in most cases so*

are the benefits to the parties in terms of reduced discovery expenses and a speedier resolution of the controversy.

(115 F.R.D. at 456; emphasis added.)

Subsection 473(a)(2) sets forth the second binding principle of litigation management. It requires each plan to provide for the early and ongoing control by a judge or magistrate of the pretrial process by: assessing and planning the progress of the case (subsection (a)(2)(A)); setting early, firm trial dates (subsection (a)(2)(B)); controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion (subsection (a)(2)(C)); and by setting deadlines for the filing of motions and target dates for the deciding of motions (subsection (a)(2)(D)).

Setting early, firm trial dates is an integral guideline for any district court plan. Importantly, subsection (a)(2)(B) provides that these dates be set so that the trial is scheduled to occur within 18 months of the filing of the complaint, unless the judge or magistrate certifies that the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases.

It is anticipated that districts will vary in the manner in which they apply the principle that trial dates should be set "early" in the litigation. Some may apply the principle according to the complexity of the case, so that trial dates in simpler cases are set earlier in the life of such cases than they are set in complex cases. Others may identify a specific case event by which the trial date must be set. As with all of the binding principles and guidelines, the legislation is intended to provide the district courts with the flexibility they need to manage their dockets in an efficient and fair manner.

The 18-month standard is, of course, the outside timeframe. Many districts may generally be able to schedule trials to occur in a shorter timeframe, and nothing in subsection (a)(2)(B) should be construed to preclude such a practice.

The exceptions provided in subsection (a)(2)(B) are important for several reasons. First, they acknowledge that the demands of the individual case, as well as the parameters imposed on civil litigation by the increasing number of criminal—particularly drug—cases, simply make it impossible to schedule a trial within 18 months of the filing of the complaint. Second, the certification process will establish a record in each district court—both for the individual litigants and for the public at large—regarding that court's ability to fulfill what the committee believes is a fundamental obligation of the civil justice system: a trial date that is timely, reasonable, and fair. For some districts, certification may become the norm because of the overwhelming drug caseload. That will stand not as an indictment of the district but as a clear, fact-based indication that the district does not have adequate resources to respond fully and fairly to its civil caseload.

With respect to case "complexity" in section 473(a)(2)(B), several factors are relevant beyond merely the number of parties. Cases should be examined in terms of the number of claims and defenses raised, the legal difficulties of the issues presented and the factual

difficulty of the subject matter. Other factors may also be relevant, and those listed herein are intended to be illustrative and not exclusive.

Another integral component of any district's plan will be its application of the principle set forth in subsection (a)(2)(C). Every district must make a commitment to controlling the extent of discovery and the time for its completion. Furthermore, to ensure that litigants or counsel with large resources do not impede the appropriate discovery rights of litigants or counsel with small resources, this provision also requires that a judge or magistrate ensure compliance with appropriate requested discovery in a timely fashion.

The authority provided in this subsection is intended to supplement the authority to limit discovery currently provided for in the Federal Rules of Civil Procedure, principally in Rule 26(b)(1). The 1983 amendments to this rule were clearly a step in the right direction in the effort to control discovery. But the problems of excessive and abusive discovery remain substantial, and additional measures are necessary. As a special committee of the Second Circuit stated in a recent report on the pretrial phase of civil cases: "Since pretrial processing expenses, especially for discovery, are frequently overly costly in relation to the stakes, mechanisms designed to curb aggressive, redundant, disproportionate or obstructionist behavior should be encouraged and evaluated." (115 F.R.D. at 455.)

As a result, subsection (a)(2)(C) gives judges and magistrates the additional authority to control discovery. The tools they might use include phasing discovery into several stages and phasing the use of interrogatories. With this clear statutory mandate, it is hoped that judges and magistrates will no longer be unsure about the degree to which they can act to reduce discovery expenses.

The fourth element of early and ongoing control of the pretrial process pertains to setting deadlines for the filing of motions and target dates for the deciding of motions, as required in subsection (a)(2)(D). To avoid any possible ambiguity regarding setting target dates, it should be made clear that the committee does not intend by this provision to require that target dates for all motions be set at the outset of the case. Nothing in the text requires or even suggests that a judicial officer must set target dates for all motions at the outset of each case. Rather, it is expected that target dates will be set periodically throughout the life of the case, as some motions are filed and as others are decided. In addition, it is not the intent of this provision that identical timeframes be imposed for all motions of a certain type.

Flexibility is the hallmark of this provision, as it is with others. The guiding rationale is simply that setting target dates will likely reduce the delay found in some courts in deciding motions.

Section 473(a)(3) sets forth the third binding principle or guideline of litigation management and cost and delay reduction. It requires careful and deliberate monitoring, through a discovery-case management conference or series of conferences, of all cases that the court or an individual judge or magistrate determines are complex or any other appropriate cases. Many courts already rely heavily on such conferences in complex litigation. They do so because such conferences are very useful in monitoring the overall

progress of the case and, in particular, in controlling discovery expense. After all, the bulk of the costs in complex cases are incurred through the discovery process, and the potential for discovery abuse is the greatest in such cases. As a result, complex cases require particularly strong control by the court. This provision will ensure that all courts use such conferences in complex cases and in any other cases they see fit to do so.

Because so many complex cases have been and continue to be characterized by excessive transaction costs, subsection (a)(3) sets forth four core objectives of the discovery-case management conference. These are the issues that, at a minimum, should be addressed, and their listing should not be construed as precluding discussion of other matters.

Subsection (a)(3)(A) instructs the judge or magistrate presiding over the discovery-case management conference to explore the parties' receptivity to and the propriety of settlement.

Subsection (a)(3)(B) requires that the presiding judicial officer identify or formulate the principal issues in contention and, when appropriate, order the staged resolution or bifurcation of issues for trial. The staged disposition of issues by judicial rulings can be particularly productive in reaching a timely and fair adjudication of the case on the merits, and can go a long way toward reducing litigation costs. Narrowing the contested legal or factual issues can pave the way for more expeditious discovery and even settlement. Indeed, a dispute can often be resolved fairly, quickly, and inexpensively once a core issue is decided.

Subsection (a)(3)(C) requires that the presiding judge or magistrate prepare a discovery schedule and plan. In complex cases—where discovery costs are widely recognized as excessive—clear, concise, and firm planning regarding discovery is essential.

In formulating its plan, the court may, in accordance with subsection (a)(3)(C), set presumptive time limits for the completion of discovery in complex cases and in any other cases the court or an individual judicial officer deems appropriate. The Federal Rules establish consistent and uniform time limits for several procedures (*see, e.g.*, rule 6 (time limits generally); rule 12(a) (time limit for answering); rule 15(a) (time limit for amending the pleadings); rule 56 (time limit for summary judgment)), and it is appropriate for the district courts to consider additional time limits for discovery.

A "presumptive" time limit is one that limits, often by case category, the time within which discovery must be completed. The limit is presumptive in the sense that it can be extended for good cause. Such time limits can encourage litigants and their attorneys to narrow the areas of inquiry to those that are truly relevant and material; establish priorities for completion of the most important tasks as quickly as possible; and devote more attention to weighing the value of uncovering every single item of "relevant" material against the value of resolving the dispute more fairly quickly, and inexpensively.

Subsection (a)(3)(D) makes clear that the requirement to establish deadlines for filing motions and target dates for deciding motions applies to complex cases as well.

The fourth binding principle of litigation management is self-explanatory. Section 473(a)(4) requires each district court to encour-

age more cost-effective discovery through the voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices. The more voluntary and cooperative the discovery process can be made to be, the fewer costs will be incurred by all parties.

The fifth binding principle of litigation management is also self-explanatory. Aimed at conserving judicial resources, section 473(a)(5) requires each district court to adopt a provision prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good-faith effort to reach agreement with opposing counsel on the matters set forth in the motion. A recent study found that 52 Federal district courts currently have local rules that require a conference between the parties prior to their bringing any discovery motion. (Judicial Conference Committee on Rules of Practice and Procedure, Report of the Local Rules Project (1989).) This provision would extend this practice to all 94 district courts.

This requirement will reduce the "litigation within litigation" that exists when discovery disputes are brought to the court because the lawyers cannot agree on the scope or nature of discovery, or on how their dispute fits within prevailing law.

The sixth and final binding principle or guideline of litigation management pertains to alternative dispute resolution. Section 473(a)(6) authorizes each district court to refer appropriate cases to ADR programs that have been designated for use in a district court or that the court may make available, including mediation, mini-trial, and the summary jury trial.

This provision is based on the committee's view that active judicial case management should encompass the exploration of alternative means of resolving disputes. Some doubt has been raised as to whether the summary jury trial is an authorized procedure permissible in the Federal courts. (*See Hume* v. *M&C Management,* No. C87-3104 (N.D. Ill., Feb. 15, 1990).) While the authority for a summary jury trial does appear to lie in Rules 1 and 16 of the Federal Rules of Civil Procedure and in the court's "inherent power to manage and control its docket," (Lambros, "Summary Jury Trials and Other Alternative Methods of Dispute Resolution," 103 F.R.D. 461, 469 (1984)), subsection (a)(6) eliminates any doubt that might exist in some courts.

Taken together, the six principles in section 473(a) are aimed at defining the issues to be litigated and limiting pretrial activity to relevant matters; controlling pretrial discovery and other activity to avoid unnecessary expense and burden; arriving at a settlement in appropriate cases as early as possible or attempting to identify methods for resolving it as expeditiously and economically as possible; facilitating an adjudication on the merits in appropriate cases; and ensuring that any trial will be well focused and well prepared.

Section 473(b)

The second tier of the two-tiered approach to the content of the civil justice expense and delay reduction plans is set forth in section 473(b), which provides six specific techniques that each district court, in consultation with its advisory group, is to consider in formulating the provisions of its particular plan.

Subsection (b)(1) sets forth an additional method for courts to consider in the effort to reduce discovery costs. Counsel for each party could be required to present jointly a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so. Such cooperative discovery has great potential to reduce the parties' discovery cost and to conserve judicial resources that otherwise would be spent on monitoring and controlling discovery.

Subsection (b)(2) asks the district courts to consider a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters that the court has previously indicated would be discussed at the conference and all reasonably related matters.

For those districts that choose to adopt such a requirement, it will be necessary to provide some form of an exemption for Department of Justice (and, perhaps, other government) attorneys. Absent such an exemption, this requirement—despite the Attorney General's delegation of specific authorization through the offices of United States Attorneys and Assistant Attorneys General—might be construed to mandate that Department attorneys undertake actions not authorized by the Attorney General. For example, a pretrial conference on discovery could raise issues of attorney-client privilege, which frequently require decisions by high-ranking Department officials after consultation with the affected agencies. The need for an exemption under such circumstances is clear.

The committee hopes that many district courts will choose to adopt the requirement set forth in subsection (b)(3), that all requests for extention of deadlines for completion of discovery or for trail be signed by the attorney and the party making the request. Such a requirement, which would supplement the existing requirements of Rule 11 of the Federal Rules of Civil Procedure, is warranted in the current litigation environment, in which requests for continuances are pervasive and often lead to substantial additional expenditures. It is anticipated that the number and frequency of such requests would be reduced by requiring attorneys to obtain the written consent of their clients.

For those districts that choose to adopt the neutral evaluation program set forth in subsection (b)(4), it is expected that the program utilized successfully in the U.S. District Court for the Northern District of California, under the leadership and expertise of Judge Peckham and Magistrate Wayne Brazil, will serve as the model.

Subsection (b)(5) invites the district courts to adopt a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conferences. The committee believes that cases are more likely to be settled when the clients themselves are present, in person or by telephone, during any court-sponsored settlement conference. The presence of the client makes it difficult, if not impossible, for the attorneys to delay settlement discussions—often for weeks or months—by asserting that they must get back to their clients.

Rule 16(a)(5) of the Federal Rules of Civil Procedure currently authorizes district courts to conduct a conference with the "attor-

neys for the parties and any unrepresented parties" for the purpose of "facilitating the settlement of the case." This provision was the subject of *G. Heileman Brewing Co.* v. *Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989), in which the magistrate in a contract action ordered that the pretrial conference be attended on both sides by a "corporate representative with authority to settle." Oat was represented at the conference only by an attorney, accompanied by another lawyer representing Oat's principal officers. Finding that no one attending the conference had authority to settle, the court found Oat in violation of the order and assessed a sanction of cost and fees of Heilman in attending the conference.

On appeal, the Seventh Circuit affirmed en banc by a 6-to-5 vote, relying on the "inherent authority" of the district court to manage its docket. The majority acknowledged that the district court could not compel settlement, but found that it could compel the parties to discuss settlement at a neutral conference.

By specifically authorizing this technique for use by district courts, it is the committee's intent to acknowledge agreement with the majority in *Heileman.*

As was the case with subsection (b)(2), those district courts that choose to adopt the requirement set forth in subsection (b)(5) should account for the unique situation of the Department of Justice. The Department does not delegate broad settlement authority to all trial counsel, but instead reserves that authority to senior officials in the United States Attorneys' Offices or in the litigating divisions in Washington. Clearly, the Department cannot realistically send officials with full settlement authority to each settlement conference.

Finally, subsection (b)(6) allows each district court to consider any other provisions that it considers appropriate after considering the recommendations of its advisory group.

Section 474

Section 474 provides a comprehensive approach to review of the civil justice expense and delay reduction plans submitted pursuant to section 472(d). Subsection (a)(1) establishes a committee, comprised of the chief judges of each district court in a circuit and the chief judge of the court of appeals for that circuit, to review each plan and advisory group report and to suggest additional actions or modified actions to the submitting court that the review committee believes will reduce cost and delay. Subsection (a)(2) provides that the chief judge of a court of appeals and the chief judge of a district court may designate another judge on their respective courts to perform their responsibilities under subsection (a)(1).

Subsection (a)(2) ensures that the Judicial Conference is involved in the review process. It instructs the Conference to review each civil justice expense and delay reduction plan and each advisory group report. It also authorizes the Conference to request any district court to take additional action to reduce cost and delay if the Conference determines that such court had not adequately responded to the demands and conditions of its civil and criminal dockets or to the recommendations of its advisory group.

Section 475

Section 475, by creating a process of continuous review and renewal, is critically important to improving the long-term health and operation of the civil justice system. It requires each district court, after developing or selecting a civil justice expense and delay reduction plan, to assess annually the condition of both its civil and criminal dockets. The objective of this review is to ensure that each court determines whether additional actions could be taken to reduce cost and delay and to improve the court's litigation management practices. Importantly, each court must consult with an advisory group in conducting this review.

Section 476

Section 476 is aimed at reducing the delays and resulting costs associated with decisions on motions and matters submitted after bench trials, and at reducing the number of cases that have not been terminated within 3 years of filing. Subsection (a) requires the Director of the Administrative Office of the United States Courts to prepare every 6 months a report—available to the public—that discloses for every district court judge and every magistrate: (1) the number of motions that have been pending for more than 6 months and the name of each case in which such motion has been pending; (2) the number of bench trials that have been submitted for more than 6 months and the name of each case in which such trials are under submission; and (3) the number and names of cases that have not been terminated within 3 years of filing.

The semiannual reports required by subsection (a) must include, therefore, not only numerical reporting but also a listing of each case falling within each category. The names of the cases are important, and constituted an addition made by the substitute amendment. Some cases are extraordinarily complicated, while others are simple. By identifying the names of the cases, the public can better assess whether the timeframe associated with deciding the motion, adjudicating the trial or disposing of the case was reasonable. Providing a numerical total only would not inform the public whether certain cases that have not been decided are of great importance to the public.

Subsection (b) is designed to ensure uniformity of reporting by applying the standards for categorization or characterization of judicial actions in the manner prescribed in section 481. The committee expects that the standards prepared by the Director of the Administrative Office will ensure that, in measuring the relevant timeframes, all judicial officers are treated equally.

The committee strongly believes that in developing the standards for measurement and the report itself, the Director of the Administrative Office should include information on attorney's fees motions and on motions for sanctions under Rule 11 and 28 U.S.C. 1927. Delays of a year or two on attorneys' fees motions in particular are quite common, and it is important for the reporting required under this section to include such motions. As to motions for sanctions, the committee notes that the Supreme Court recently remarked upon and criticized a nearly four-year delay from the filing of a

sanctions motion to the ruling by the court. *See Cooter & Gell* v. *Hartmarx Corp.*, No. 89-275 (June 11, 1990).

In considering the definition of the kinds of motions to be included, the committee expects, therefore, that motions for attorney's fees and motions under Rule 11 will be included.

Section 477

Section 477 provides for the development by the Judicial Conference of one or more model civil justice expense and delay reduction plans. Subsection (a)(1) specifies that any model plan or plans developed must be based on the plans developed and implemented by district courts designated as Early Implementation District Courts in accordance with section 103(c) of the Civil Justice Reform Act. Importantly, this provision reinforces the committee's intent that any model plan comply with the requirements regarding the content of the civil justice expense and delay reduction plans set forth in section 473 by requiring the preparation of a report explaining the manner in which such compliance was reached.

Subsection (a)(2) allows the Director of the Federal Judicial Center and the Director of the Administrative Office to make recommendations to the Judicial Conference regarding the development of any model plan.

Under subsection (b), the Director of the Administrative Office must transmit to all district courts, the Senate Judiciary Committee and the House Judiciary Committee copies of any model plan or model plans and the report required by subsection (a)(1).

Section 478

Section 478 pertains to the local advisory groups, which play a principal and critically important role in this legislation.

Subsection (a) requires that the appointment of the advisory group in each district court occur within 90 days of enactment of this legislation. The committee believes that this provides sufficient time to select members of a group, without delaying unduly the commencement of a group's work. Subsection (a) also provides for the appointment of members of an advisory group by the chief judge of each district court, after consultation with the other judges of the court.

Subsection (b) pertains to the membership and composition of each advisory group. It mandates that each advisory group be balanced, and that each include attorneys and other persons who are representative of major categories of litigants in the particular court in which the advisory group will work.

The composition of an advisory group is critical. The process for selecting members of an advisory group should ensure that each of the major categories of litigants in the district are represented. Lawyers who represent the Federal, State, and local governments in the district court should typically be included. It is anticipated that in most, if not all, districts, the U.S. attorney or his or her designee would be a member of the advisory group. It is important that lawyers practicing in law firms of diverse sizes, in corporations, and for public interest groups representing different philosophic positions, should they litigate in the particular district, be represented.

The size of the advisory group should be left to the appointing authority, but it is anticipated that the group will be sufficiently large to accommodate the major categories of litigants in the district.

Balance is also vitally important to the successful operation and functioning of an advisory group. It is anticipated that an equivalent number of plaintiff's and defense lawyers, corporate and public interest lawyers representing different philosophic positions, will be included.

Drawing upon this kind of expertise will enable each district court to maximize the prospects that workable plans will be developed and will stimulate a much-needed dialogue about methods for improving the fairness of the civil justice system and for streamlining litigation practice.

Subsection (c) limits the term of any member of an advisory group to no more than four years.

Subsection (d) allows the chief judge of a district court to designate a reporter for each advisory group to record the group's deliberations and prepare the report required under section 472(b).

Subsection (e) responds to a specific suggestion made by the Judicial Conference. It provides that the members of any advisory group and any person designated as a reporter should be considered as independent contractors and may not, solely by serving on or for the advisory group, be banned from practicing law before the court they are advising.

In terms of the funds available to the district courts pursuant to section 105 of the Act, it is expected that a substantial sum allotted to each district will be used by the advisory groups to conduct any studies and analyses that are necessary to develop the recommended provisions of the plan.

Section 479

Section 479 implements the legislation's objective of expanding, in unprecedented proportions, the degree, availability, and dissemination of information on litigation management and cost and delay reduction.

Subsection (a) requires the Judicial Conference to prepare a comprehensive report on all civil justice expense and delay reduction plans within four years of enactment. Once completed, the report is to be transmitted to all district courts, this committee and the House Judiciary Committee.

Subsections (b) and (c), highly information-intensive in nature, have the potential to make dramatic and significant contributions to the improvement of civil justice in this Nation. Subsection (b) requires the Judicial Conference, on a continuing basis, to study ways to improve litigation management and dispute resolution services in the district courts and to make recommendations to those courts on ways to improve such services.

Subsection (c) requires the Conference to prepare, periodically revise and transmit to the district courts a Manual for Litigation Management and Cost and Delay Reduction. The Manual is to be developed after careful evaluation of the civil justice expense and delay reduction plans implemented under this Act and the demonstration programs to be conducted. The Manual will surely become

an invaluable tool since, in accordance with subsection (c)(3), it will contain a description and analysis of the litigation management tools, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office.

Section 480

Section 480 is similar in objective to section 479. It provides for enhanced and expanded education and training programs to ensure that all judicial officers and court personnel are thoroughly familiar with the most current available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation.

This expanded training is necessary for several reasons. First, with the development and implementation of the district court plans, new information—descriptive and statistical—will be generated and will need to be transmitted to the courts. Second, there are many judges who have experimented successfully with various procedural approaches outlined in this legislation. In addition, there are law professors and other independent experts on judicial management who have examined these issues. Expanded training will enable the accumulated learning on the subject to be better transmitted throughout the Federal judiciary.

Section 481

Section 481 pertains to the automation of case information. Subsection (a) directs the Director of the Administrative Office to ensure that each district court has the automated capability to retrieve readily information about the status of every pending case. Under subsection (b)(1), the Director will prescribe standards for uniform categorization and characterization of judicial actions for the purpose of recording information on those actions in the district court automated systems. Subsection (b)(2) provides that the uniform standards will include a definition of what constitutes a dismissal of a case and the standards for measuring the period for which a motion has been pending.

Section 482

Section 482 defines the term "judicial officer" to include U.S. district court judges as well as U.S. magistrates. This provision reinforces the change made in S. 2648, which restored the full role of magistrates in the pretrial process, a role that had been reduced in S. 2027.

SECTION 103 (B)

Subsection (b) of section 103 of the Civil Justice Reform Act pertains to implementation of the Act.

Subsection (b)(1) requires that the civil justice expense and delay reduction plans for each district court be implemented within three years of enactment of the Act.

Subsection (b)(2) subjects section 471 through 478 of the Civil Justice Reform Act to a seven-year sunset provision so that those sec-

tions can be thoroughly tested. Upon the expiration of the seven-year period following enactment, Federal district courts are no longer required to operate pursuant to the civil justice expense and delay reduction plans mandated by title I. Congress and the courts will then have a chance to evaluate those provisions and, if warranted, reauthorize them.

SECTION 103 (C)

Subsection (c) of section 103 of the Civil Justice Reform Act establishes Early Implementation Districts (EIDs). Under subsection (c)(1), the Judicial Conference shall designate as an EID every district court that develops and implements a civil justice expense and delay reduction plan no earlier than 6 months and no later than 12 months after the date of enactment. This is aimed at encouraging district courts and advisory groups to implement their plans with all deliberate speed, without forcing them to move so rapidly so as to undermine the spirit of the legislation.

Subsection (c)(2) allows the chief judge of an EID to apply to the Judicial Conference for additional resources—including technological and personnel support and information systems, such as computers and court personnel—necessary to implement its civil justice expense and delay reduction plan. The Judicial Conference may then provide such resources out of the funds appropriated pursuant to section 105(a) of the Act.

Pursuant to subsections (c)(3) and (c)(4), the Judicial Conference shall prepare a report on the plans developed and implemented by the EID's, with the report and the EIDs' plans then transmitted to the district courts, this committee and the House Judiciary Committee.

SECTION 103 (D)

Subsection (d) of section 103 of the Act makes a technical and conforming amendment to the table of chapters for part I of title 28 of the United States Code.

SECTION 104

Section 104(a) of the Act directs the Judicial Conference to conduct a civil justice demonstration program during the four-year period beginning on January 1, 1991. Subsection (b) makes clear that a district court participating in the demonstration program may also be an Early Implementation District Court under section 103(c) of the Act.

In accordance with the consent granted by the included courts, subsection (b)(1) directs the U.S. District Court for the Western District of Michigan and the U.S. District Court for the Northern District of Ohio to experiment with case-tracking programs that specifically provide for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures, and timeframes for the completion of discovery and for trial. The committee refers these two courts to the case-tracking programs underway in Bergen County and Camden County, NJ, and in Ramsey County, MN, for guidance in the development of its pro-

grams. The committee does not intend, however, for the demonstration courts to be bound by the procedures adopted by those jurisdictions.

Two important questions in case tracking relate to the classification of cases and the identification of the different rules that should apply to each distinct type. While the legislation leaves to the two pilot district courts and the Judicial Conference the discretion to design the case-tracking systems to be tested, it is the committee's view that the most promising tracking approach is to classify by scale and complexity rather than by the substance of the claims presented.

In accordance with the consent granted by the included courts, subsection (b)(2) directs the U.S. District Court for the Northern District of California, the U.S. District Court for the Northern District of West Virginia, and the U.S. District Court for the Western District of Missouri to experiment with various methods of reducing cost and delay, including alternative dispute resolution, that such courts and the Judicial Conference may select.[23]

Subsection (c) directs the Judicial Conference, in consultation with the Director of the Federal Judicial Center and the Director of the Administrative Office, to study the experience of the district courts under the demonstration program.

Subsection (d) requires the Judicial Conference, no later than March 31, 1995, to transmit a report on the results of the demonstration program to this committee and the House Judiciary Committee.

SECTION 105

Section 105 of the Civil Justice Reform Act authorizes to be appropriated up to $15,000,000 to carry out the resource and planning needs of the Early Implementation District Courts; up to $5,000,000 to implement chapter 23 of title 28 of the United States Code, as added by the act; and up to $5,000,000 to carry out the demonstration program.

Title II

SECTION 201

Section 201 contains the short title of title II, the "Federal Judgeship Act of 1990."

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[23] The Judicial Conference objects to those parts of subsection (b) that identify the districts that will participate in the demonstration programs. The Conference states that "as a matter of policy it is preferable to permit this kind of decision to be made within the judiciary, where the Judicial Conference and Federal Judicial Center can participate." (Answer of Judge Robert F. Peckham to Written Question No. 5 from Senator Thurmond.)

All five districts named in the legislation volunteered to participate in the pilot programs through direct or indirect discussions with the committee. As Senator Thurmond indicated, it is better "to have districts involved in this demonstration program project * * * voluntarily assume * * * any * * * extra burdens associated with such a program than for individual districts to have such a program forced upon them by the Judicial Conference." (Written question No. 5 from Senator Thurmond to Judge Robert F. Peckham.)

Thus, it is clear that in identifying the pilot districts, the committee worked with the judiciary; the Conference objects to the fact that the decision was not made "within" the judiciary. The committee believes that the key factor is that the legislation does not mandate the participation of individual courts without their consent. Whether the volunteer districts are selected through direct discussions by the committee with the districts or "within the judiciary" is less important and raises the specter of elevating form over substance.

SECTION 202

Section 202 provides for the creation of 11 new circuit court of appeal judgeships. Subsection (a) allocates those judgeships as follows: Two additional circuit court judges for the third circuit; four additional circuit court judges for the fourth circuit; one additional circuit court judge for the fifth circuit; one additional circuit court judge for the sixth circuit; one additional circuit court judge for the eighth circuit; and two additional circuit court judges for the tenth circuit.

Subsection (b) amends the table contained in section 44(a) of title 28, United States Code, to reflect the changes in the total number of permanent circuit court judgeships authorized as a result of the 11 new judgeships authorized in subsection (a) of section 202.

SECTION 203

Section 203 provides for the creation of 51 new district court judgeships. Subsection (a) allocates those judgeships as follows: One additional district judge for the Western District of Arkansas; two additional district judges for the Northern District of California; five additional district judges for the Central District of California; one additional district judge for the Southern District of California; two additional district judges for the District of Connecticut; two additional district judges for the Middle District of Florida; one additional district judge for the Southern District of Florida; one additional district judge for the Middle District of Georgia; one additional district judge for the Northern District of Illinois; one additional district judge for the Southern District of Iowa; one additional district judge for the Western District of Louisiana; one additional district judge for the District of Maine; one additional district judge for the District of Massachusetts; one additional district judge for the Southern District of Mississippi; one additional district judge for the Eastern District of Missouri; one additional district judge for the District of New Hampshire; three additional district judges for the District of New Jersey; one additional district judge for the District of New Mexico; one additional district judge for the Southern District of New York; one additional district judge for the Eastern District of New York; one additional district judge for the Middle District of North Carolina; one additional district judge for the Northern District of Oklahoma; one additional district judge for the District of Oklahoma; one additional district judge for the District of Oregon; three additional district judges for the Eastern District of Pennsylvania; one additional district judge for the Middle District of Pennsylvania; one additional district judge for the District of South Carolina; one additional district judge for the Eastern District of Tennessee; one additional district judge for the Western District of Tennessee; one additional district judge for the Northern District of Texas; three additional district judges for the Southern District of Texas; one additional district judge for the Western District of Texas; one additional district judge for the District of Utah; one additional district judge for the Eastern District of Washington; one additional district judge for the Northern District of West Virginia; one additional district

judge for the Southern District of West Virginia; and one additional district judge for the District of Wyoming.

Subsection (b)(1) provides for the conversion, upon the effective date of title II, of eight "temporary" district court judgeships created by section 202(b) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 into "permanent" judgeships. The judgeships so converted are the existing judgeships for the Western District of Arkansas; the Northern District of Illinois; the Northern District of Indiana; the District of Massachusetts; the Western District of New York; the Eastern District of North Carolina; the Northern District of Ohio; and the Western District of Washington.

Subsection (b)(2)(A) provides for the conversion of the two existing district court judgeships for the Eastern and Western Districts of Arkansas into judgeships for the Eastern District of Arkansas only. Subsection (b)(2)(B) provides for the conversion of the existing district judgeship for the Northern and Southern Districts of Iowa into a judgeship for the Northern District of Iowa only. Subsection (b)(2)(C) provides for the conversion of the existing judgeship for the Northern, Eastern, and Western Districts of Oklahoma into a judgeship for the Western District of Oklahoma only.

Subsection (c) provides for the creation of 14 "temporary" district court judgeships, with one such judgeship allocated to each of the following districts: The Northern District of Alabama; the Eastern District of California; the District of Hawaii; the Central District of Illinois; the Southern District of Illinois; the District of Kansas; the Western District of Michigan; the Eastern District of Missouri; the Northern District of New York; the Northern District of Ohio; the Eastern District of Pennsylvania; the Eastern District of of Texas; and the Eastern District of Virginia. Such districts are "temporary" in that the first vacancy in the office of district judge in each of these districts, occurring 5 years or more after the effective date of title II, will not be filled.

Subsection (d) amends the table contained in section 133 of title 28, United States Code, to reflect the changes in the total number of permanent district court judgeships authorized as a result of the 51 new judgeships authorized in subsection (a) of section 203.

SECTION 204

Subsection (a) of section 204 provides for the creation of one additional district judge for the District Court of the Virgin Islands, who, upon appointment by the President with the advice and consent of the Senate, will office for a term of 10 years and until a successor is chosen or qualified, unless removed sooner by the President for cause. Subsection (b) amends section 24(a) of the Revised Organic Act of the Virgin Islands to reflect the increase in judgeships for the Virgin Islands authorized by subsection (a).

SECTION 205

Section 205 authorizes to be appropriated such sums as may be necessary to carry out the provisions of title II, including sums necessary to provide appropriate space and facilities.

SECTION 206

Section 206 provides that title II shall take effect upon enactment.

VII. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, July 31, 1990.

Hon. Joseph R. Biden, Jr.,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 2648, the Judicial Improvements Act of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Robert D. Reischauer,
Director.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 2648.
2. Bill title: Judicial Improvement Act of 1990.
3. Bill status: As ordered reported by the Senate Committee on the Judiciary, July 12, 1990.
4. Bill purpose: Title I of S. 2648 would require that:

Each district court, within three years of enactment, implement a civil justice expense and delay reduction plan to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes;

The Judicial Conference of the United States, within four years of enactment, prepare a comprehensive report on all the civil justice expenses and delay reduction plans;

The Judicial Conference prepare a Manual for Litigation Management and Cost and Delay Reduction;

The Federal Judicial Center and the Administrative Office of the United States Courts (AOUSC) develop and conduct comprehensive education and training programs to ensure that all appropriate court personnel are familiar with litigation management and other techniques for reducing cost and expediting the resolution of civil litigation;

Each district court have the automated capability to readily retrieve information about the status of each case in such court; and

The Judicial Conference conduct a demonstration program to experiment with systems of differentiated case management and with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution.

Title I authorizes the appropriation of $25 million for fiscal year 1991 to carry out the requirements of the title.

Title II of S. 2648 would authorize the establishment of an additional 11 circuit court judgeships and an additional 52 permanent and 14 temporary district circuit judgeships. Title II also would make permanent 8 temporary district court judgeships established in 1984.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1991	1992	1993	1994	1995
Title I:					
Estimated authorization level	25	15	20	30	30
Estimated outlays	23	15	20	29	30
Title II:					
Required budget authority	1	5	9	10	10
Estimated outlays	1	5	9	10	10
Estimated authorization level	4	27	37	35	32
Estimated outlays	4	25	36	35	32
Total:					
Estimated authorization level/budget authority	30	47	66	75	72
Estimated outlays	28	45	65	74	72

The costs of this bill would fall within budget function 750.

Basis of estimate: CBO assumes that the funds specifically authorized for Title I will be appropriated prior to the beginning of fiscal year 1991. The estimate of outlays is based on historical spending rates.

Based on information provided by the AOUSC, CBO estimates that there would be recurring costs of about $30 million annually associated with Title I of the bill (once the plans are fully implemented). These costs would be in addition to any costs associated with the 14-Point Program recently adopted by the Judicial Conference of the United States to improve civil case management in the courts.

CBO's estimate assumes that the additional 11 circuit court judgeships and 66 district court judgeships will be filled during fiscal years 1991–1993 (25 percent during the last six months of fiscal year 1991, 50 percent during fiscal year 1992, and 25 percent during fiscal year 1993). Based on information from the AOUSC, CBO estimates that the costs associated with a circuit court judgeship would be approximately $700,000 for the first year and $550,000 annually thereafter, and that the costs associated with a district court judgeship would be approximately $850,000 for the first year and $550,000 annually thereafter.

The estimate further assumes that only one of the temporary district court judgeships that would be made permanent by S. 2648 will be filled as a result of S. 2648. (Six of the judgeships are filled currently and are not assumed to become vacant by the end of fiscal year 1995; one of the judgeships is vacant but can be filled under current law.) It is assumed that this judgeship will be filled during fiscal year 1991.

The estimated budget authority for Title II includes only the salaries of the circuit court and district court judges (considered to be an entitlement); all other costs associated with the judgeships are

considered to be discretionary and are included in the estimated authorization level for Title II.

6. Estimated cost to State and local governments: None.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Mitchell Rosenfeld.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

VIII. Regulatory Impact Statement

Pursuant to paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the committee, after due consideration, concludes that the act will not have a direct regulatory impact.

IX. ADDITIONAL VIEWS OF MR. HATCH

There is no more urgent and important step Congress can take to reduce delay in our Federal judicial system than the creation of the 77 additional judgeships authorized by title II of this bill. Moreover, this increase, at a minimum, is necessary to permit our Federal courts to handle an increasingly heavy criminal docket. The number of drug cases being tried, together with an anticipated increase in cases generated by illegal conduct in the savings and loan industry, put additional pressure on Federal judges. Thus, the increase in judgeships mandated by the bill is inextricably bound up in the Nation's fight against crime and drugs.

Title I of this bill is a revised version of earlier legislation, introduced as the Civil Justice Reform Act. This original legislation, in my opinion, had many flaws. It met with intense criticism from Federal district court judges and a number of bar groups, much of it justified, in my view.

The revised version appearing here as title I, requiring each Federal district court to adopt a civil justice and delay reduction plan, is a more modest intrusion into the workings of the Federal judiciary. I continue to have strong reservations about the need for Congress to meddle at all in this fashion in the judicial branch. Aside from the increased funding for automation and judicial training, I believe it is best to encourage the Judicial Conference, individual judges, and district courts to work for improvements in case handling.

With the addition of a sunset provision in the mandatory provisions of title I, added at my request, these provisions will be applied on a temporary basis. Congress and the courts will then have a chance to evaluate this experiment after several years of its operation.

Finally, I do not share the report's criticism of the Judicial Conference's conduct in its negotiations with regard to the bill. First, that the Judicial Conference sought to engage in negotiations with the sponsors of the forerunner of title I never left me with the impression that the Judicial Conference was bound to endorse or be neutral on the language finally proposed by its sponsors. The Civil Justice Reform Act, as introduced, was an extremely intrusive piece of legislation—the product, in large part, of a task force on which not a single sitting Federal district court judge was a member. Indeed, that the sponsors of this original bill—to their great credit—significantly revised it is the most telling indication of the need for substantial input from the judiciary. Thus, the report's expression of regret that the Judicial Conference "disfavors" title I of the bill is somewhat puzzling.

Second, I never understood the designation of a four-judge task force—the Peckham task force—to represent the sole or final views of the Judicial Conference or of the Federal judiciary as a whole.

Indeed, the committee benefitted greatly from the input of a wide variety of judges outside of the Judicial Conference.

On a bill of such great importance to the Federal trial bench, and which so deeply intruded into the workings of the judiciary, the committee should not be surprised that four judges would not have the final word on this matter or that many Federal judges disfavor the final product in title I. The four-judge task force helped mitigate the intrusiveness of the bill; and they, and their colleagues who commented on the bill throughout its consideration, performed a vital public service.

ORRIN G. HATCH.

X. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 2648, as reported, 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, UNITED STATES CODE

JUDICIARY AND JUDICIAL PROCEDURE

PART 1—ORGANIZATION OF COURTS

* * * * * * *

CHAPTER 3—COURT OF APPEALS

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§ 44. Appointment, tenure, residence and salary of circuit judges

(a) The President shall appoint, by and with the advice and consent of the Senate, circuit judges for the several circuits as follows:

Circuits	Number of Judges
District of Columbia	12
First	6
Second	13
Third	[12] *14*
Fourth	[11] *15*
Fifth	[16] *17*
Sixth	[15] *16*
Seventh	11
Eighth	[10] *11*
Ninth	28
Tenth	[10] *12*
Eleventh	12
Federal	12

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CHAPTER 5—DISTRICT COURTS

* * * * * * *

§ 133. Appointment and number of district judges

The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows:

Districts	Judges
Alabama:	
Northern	7
Middle	3
Southern	3
Alaska	3
Arizona	8
Arkansas:	
Eastern	[3] *5*
Western	[1] *3*
Eastern and Western	2
California:	
Northern	[12] *14*
Eastern	6
Central	[22] *27*
Southern	[7] *8*
Colorado	7
Connecticut	[6] *8*
Delaware	4
District of Columbia	15
Florida:	
Northern	[3] *4*
Middle	[9] *11*
Southern	[15] *16*
Georgia:	
Northern	11
Middle	[3] *4*
Southern	3
Hawaii	3
Idaho	2
Illinois:	
Northern	[20] *22*
Central	3
Southern	3
Indiana:	
Northern	[4] *5*
Southern	5
Iowa:	
Northern	[1] *2*
Southern	[2] *3*
Northern and Southern	1
Kansas	5
Kentucky:	
Eastern	4
Western	4
Eastern and Western	1
Louisiana:	
Eastern	13
Middle	2
Western	[6] *7*
Maine	[2] *3*
Maryland	10
Massachusetts	[11] *13*
Michigan:	
Eastern	15
Western	4
Minnesota	7

Mississippi:	
Northern	3
Southern	[5] *6*
Missouri:	
Eastern	[5] *6*
Western	5
Eastern and Western	2
Montana	3
Nebraska	3
Nevada	4
New Hampshire	[2] *3*
New Jersey	[14] *17*
New Mexico	[4] *5*
New York:	
Northern	4
Southern	[27] *28*
Eastern	[12] *13*
Western	[3] *4*
North Carolina:	
Eastern	[3] *4*
Middle	[3] *4*
Western	3
North Dakota	2
Ohio:	
Northern	[10] *11*
Southern	7
Oklahoma:	
Northern	[2] *3*
Eastern	1
Western	[4] *6*
Northern, Eastern, and Western	[2] *1*
Oregon	[5] *6*
Pennsylvania:	
Eastern	[19] *22*
Middle	[5] *6*
Western	10
Puerto Rico	7
Rhode Island	3
South Carolina	[8] *9*
South Dakota	3
Tennessee:	
Eastern	[4] *5*
Middle	3
Western	[4] *5*
Texas:	
Northern	[10] *11*
Eastern	6
Southern	[13] *16*
Western	[7] *8*
Utah	[4] *5*
Vermont	2
Virginia:	
Eastern	9
Western	4
Washington:	
Eastern	[3] *4*
Western	[6] *7*
West Virginia:	
Northern	[2] *3*
Southern	[4] *5*
Wisconsin:	
Eastern	4
Western	2
Wyoming	[2] *3*

* * * * * * *

"CHAPTER 23—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

§ 471. Requirement for a district court civil justice expense and delay reduction plan

There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

§ 472. Development and implementation of a civil justice expense and delay reduction plan

(a) The civil justice expense and delay reduction plan implemented by a district court shall be developed or selected, as the case may be, after consideration of the recommendations of an advisory group appointed in accordance with section 478 of this title.

(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include—

(1) an assessment of the matters referred to in subsection (c)(1);

(2) the basis for its recommendation that the district court develop a plan or select a model plan;

(3) recommended measures, rules and programs; and

(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

(c)(1) In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall—

(A) determine the condition of the civil and criminal dockets;

(B) identify trends in case filings and in the demands being placed on the court's resources; and

(C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation.

(2) In developing its recommendations, the advisory group of a district court shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys.

(3) The advisory group of a district court shall ensure that its recommended actions include significant contributions to be made by the court, the litigants and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts.

(d) The chief judge of the district court shall transmit a copy of the plan implemented in accordance with subsection (a) and the report prepared in accordance with subsection (b) of this section to—

(1) the Director of the Administrative Office of the United States Courts;

(2) the judicial council of the circuit in which the district court is located; and

(3) the chief judge of each of the other United States district courts located in such circuit.

§ 473. Content of civil justice expense and delay reduction plans

(a) A civil justice expense and delay reduction plan developed and implemented under this chapter shall include provisions applying the following principles and guidelines of litigation management and cost and delay reduction:

(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case;

(2) early and ongoing control of the pretrial process through involvement of a judicial officer in—

(A) assessing and planning the progress of a case;

(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months of the filing of the complaint, unless a judicial officer certifies that the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with appropriate requested discovery in a timely fashion; and

(D) setting deadlines for the filing of motions and target dates for the deciding of motions;

(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer—

(A) explores the parties' receptivity to, and the propriety of, settlement or proceeding with the litigation;

(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—

(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

(ii) phase discovery into two or more stages; and

(D) establishes deadlines for filing motions and target dates for deciding motions;

(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

(6) authorization to refer appropriate cases to alternative dispute resolution programs that—

(A) have been designated for use in a district court; or

(B) the court may make available, including mediation, minitrial, and summary jury trial.

(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 478 of this title, shall consider adopting the following litigation management and cost and delay reduction techniques:

(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

(2) a requirement that each party be represented at each pretrial conference by an attorney who has the authority to bind that party regarding all matters previously identified by the court for discussion at the conference and all reasonably related matters;

(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

(4) a neutral evaluation program for the presentation of the legal and factual basis of a case to a neutral court representative selected by the court at a nonbinding conference conducted early in the litigation;

(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

§ 474. Review of district court action

(a)(1) The chief judges of each district court in a circuit and the chief judge of the court of appeals for such circuit shall, as a committee—

(A) review each plan and report submitted pursuant to section 472(d) of this title; and

(B) make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.

(2) The chief judge of a court of appeals and the chief judge of a district court may designate another judge of such court to perform the chief judge's responsibilities under paragraph (1) of this subsection.

(b) The Judicial Conference of the United States—

(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

§ 475. Periodic district court assessment

After developing or selecting a civil justice expense and delay reduction plan, each United States district court shall assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. In performing such assessment, the court shall consult with an advisory group appointed in accordance with section 478 of this title.

§ 476. Enhancement of judicial accountability through information dissemination

(a) To enhance the accountability of each judicial officer in a district court, the Director of the Administrative Office of the United States Courts shall prepare a semiannual report, available to the public, that discloses for each judicial officer—

(1) the number of motions that have been pending for more than six months and the name of each case in which such motion has been pending;

(2) the number of bench trials that have been submitted for more than six months and the name of each case in which such trials are under submission; and

(3) the number and names of cases that have not been terminated within three years of filing.

(b) To ensure uniformity of reporting, the standards for categorization or characterization of judicial actions to be prescribed in accordance with section 481 of this title shall apply to the semiannual report prepared under subsection (a).

§ 477. Model civil justice expense and delay reduction plan

(a)(1) Based on the plans developed and implemented by the United States district courts designated as Early Implementation District Courts pursuant to section 103(c) of the Civil Justice Reform Act of 1990, the Judicial Conference of the United States may develop one or more model civil justice and expense delay reduction plans. Any such model plan shall be accompanied by a report explaining the manner in which the plan complies with section 473 of this title.

(2) The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations to the Judicial Conference regarding the development of any model civil justice expense and delay reduction plan.

(b) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives copies of any model plan and accompanying report.

§ 478. Advisory groups

(a) Within ninety days after the date of enactment of this chapter, the advisory group required in each United States district court in accordance with section 472 of this title shall be appointed by the chief judge of each district court, after consultation with the other judges of such court.

(b) The advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge of such court.

(c) In no event shall any member of the advisory group serve longer than four years.

(d) The chief judge of a United States district court may designate a reporter for each advisory group, who may be compensated in accordance with guidelines established by the Judicial Conference of the United States.

(e) The members of an advisory group of a United States district court and any person designated as a reporter for such group shall be considered as independent contractors of such court when in the performance of official duties of the advisory group and may not, solely by reason of service on or for the advisory group, be prohibited from practicing law before such court.

§ 479. Information on litigation management and cost and delay reduction

(a) Within four years after the date of the enactment of this chapter, the Judicial Conference of the United States Courts shall prepare a comprehensive report on all plans received pursuant to section 472(d) of this title. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding such report to the Judicial Conference during the preparation of the report. The Judicial Conference shall transmit copies of the report to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives.

(b) The Judicial Conference of the United States shall, on a continuing basis—

(1) study ways to improve litigation management and dispute resolution services in the district courts; and

(2) make recommendations to the district courts on ways to improve such services.

(c)(1) The Judicial Conference of the United States shall prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding the preparation of and any subsequent revisions to the Manual.

(2) The Manual shall be developed after careful evaluation of the plans implemented under section 472 of this title and the litigation management and cost and delay reduction demonstration programs that the Judicial Conference shall conduct under this title.

(3) The Manual shall contain a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts.

§ 480. Training programs

The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts shall develop and conduct comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation. The curriculum of such training programs shall be periodically revised to reflect such information and analyses.

§ 481. Automated case information

(a) The Director of the Administrative Office of the United States Courts shall ensure that each United States district court has the automated capability readily to retrieve information about the status of each case in such court.

(b)(1) In carrying out subsection (a), the Director shall prescribe—

(A) the information to be recorded in district court automated systems; and

(B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.

(2) The uniform standards prescribed under paragraph (1)(B) of this subsection shall include a definition of what constitutes a dismissal of a case and standards for measuring the period for which a motion has been pending.

(c) Each United States district court shall record information as prescribed pursuant to subsection (b) of this section.

§ 482. Definitions

As used in this chapter the term "judicial officer" means a United States district court judge or a United States magistrate.

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TITLE 48—UNITED STATES CODE

TERRITORIES AND INSULAR POSSESSIONS

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CHAPTER 12—THE VIRGIN ISLANDS

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§ 1614. Judges of District Court

(a) APPOINTMENT; TENURE; REMOVAL; CHIEF JUDGE; COMPENSATION.—The President shall by and with the advice and consent of the Senate, appoint [two] *three* judges for the District Court of the Virgin Islands, who shall hold office for terms of ten years and until their successors are chosen and qualified, unless sooner removed by the President for cause. The Judge of the district court who is senior in continuous service and who otherwise qualifies under section 136(a) of Title 28 shall be the chief judge of the court. The salary of a judge of the district court shall be at the rate prescribed for judges of the United States district courts. Whenever it is made to appear that such an assignment is necessary for the proper dispatch of the business of the district court, the chief judge of the Third Judicial Circuit of the United States may assign a judge of a court of record of the Virgin Islands established by local law, or a circuit or district judge of the Third Judicial Circuit, or a recalled senior judge of the District Court of the Virgin Islands, or the Chief Justice of the United States may assign any other United States circuit or district judge with the consent of the judge so assigned and of the chief judge of his circuit, to serve temporarily as a judge of the District Court of the Virgin Islands. The compensation of the Judges of the * * *

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