3/22 Draft

PROPOSED RESPONSES TO COMMITTEE QUESTIONS

Questions for Judge Robinson

Senator Thurmond

1. *S.2027 requires each federal district court to develop its own "Civil Justice Reform Plan" which is to include provisions for assigning cases of differing degrees of complexity to different "tracks". Do you believe this is a sound and workable approach? Why or why not?*

No, we do not believe that mandating a plan for all courts which includes the imposition of a case "tracking" system is a sound or workable approach. The goal of enhancing and perfecting the delivery of civil justice is one that is shared by the judiciary and the proponents of S.2027. We agree with many of the principles the bill has set forth: early involvement by a judicial officer to control the pace and cost of cases; utilization of status conferences; the setting of target dates for completion of various pretrial stages of a case; staged discovery; close supervision of discovery; prompt decisions on discovery; the development and use of computerized systems to monitor the progress of cases; increase education of judges, magistrates, clerks of court and other court personnel; experimentation with alternative forms of dispute resolution; and case management. Most federal district courts currently applying these and other creative and innovative case management principles and applying them successfully.

The evolution of case management methods are the result of years of experimentation, study and review of what works and we continue to struggle to improve and be innovative in our management techniques. The Federal judges of this country are second to no one in our desire, efforts and knowledge of what is needed to run our courts and maximize the delivery of justice.

At the same time there have been strong concerns raised over the means by which this bill attempts to arrive at these common goals. As applied by the proposed legislation the concept of "tracking" of cases in not workable and would likely be counter productive to the case management efforts of federal judges. A principle premise of the bill is that "the same set of generic procedures need not, and should not, apply to all type of cases." However, since the mid-1930's one of the principal concepts promoted by federal procedural theoreticians has been that the system is healthiest if its essential structure consists of one, uniformly applicable set of relatively simple rules, rules that

leave individual judges and lawyers considerable room to fashion specific case-development programs to fit the needs of particular cases. Many judges now commonly perform a "triage" function of sorting cases by complexity and required resources and then tailor procedures and deadlines to the specific needs of each case. This is a critically important and productive exercise. A legislated mandate to mechanically assign cases to rigid tracks would have a detrimental effect of these efforts.

2. *Judge Robinson, do you believe that if we make greater use of pre-trial and status conferences, as proposed in S.2027, judges will be better able to monitor and limit abusive discovery and schedule early and firm trial dates.*

Yes. Discreet involvement by a judicial officer at an early stage in those case where necessary will promote efficient case management, but such involvement need not be by a judge, need not be in every case and should not be imposed in a mechanistic manner. Rule 16 of the Federal Rules of Civil Procedure currently provides judges with a wide variety of tools with which to develop efficient and effective schedules in their cases. However, not all cases require the methods made available to judges by Rule 16 and the rule does not mandate what procedures to use in all cases. Applying the concepts of Rule 16 in a mandatory fashion is an excessive measure that would result in enormous increase in costs and would actually result in a slowing of civil cases. In addition, Rule 16 specifically provides for the use of magistrates as an effective pre-trial tool. The 1981 GAO study on case management referred to in section 2(24) of S. 2027 encouraged district courts to make greater use of magistrates and, indeed, magistrates are an indispensable pre-trial tool for freeing judge time to concentrate on trying and moving cases along. A diminution of the role of magistrates in this process would be impractical and just plain wrong.

3. *Judge Robinson, is it proper in your opinion for Congress to direct district courts to develop and implement within twelve months a "Civil Justice Reform Plan".*

Twelve months is an insufficient period of time to implement a mandatory plan as proposed by the bill. The bill contemplates a great deal of input from the bar and public but it does not provide enough time to allow effective participation by these groups. In many cases a complete revision of local rules and practices would be required and such revisions are normally accomplished after much effort and a longer period of time than provided for in the bill. In addition, the requirements in the bill for automation is not feasible under the current five year plan which was approved by Congress.

It is clearly appropriate for each district court to have a specific civil case management plan. It is our unequivocal belief that if such a plan is to be a requirement, it is best formulated and implemented by the Judicial Conference.

4. *Judge Robinson, the latest figures supplied by the Judicial Conference indicates that as of 1989, some 95 additional judgeships need to be created to meet current caseload requirements. Would it not be wise to include in an civil justice reform plan the judgeships necessary to provide speedy and effective resolution of disputes?*

Yes, the most effective step that can be taken toward resolving the perceived crisis facing the civil and criminal justice systems is providing the new judges which the Conference has requested. However, the number of judgeships requested by the Conference does not take into consideration the requirements of this bill. The Judicial Impact Statement prepared by the Administrative Office on S.2027 estimates that the requirements of the bill would necessitate considerable additional judge time - 162 FTE's of judge time in the first year and 82 FTE's of judge time thereafter. Thus, the present legislation is seriously deficient in ignoring the pressing need for additional judgeships.

Senator Hatch

Questions for Judges Robinson and Enslen

1. *Could you identify those measures that the bill requires to be in each "civil justice expense and delay reduction plan" which can be undertaken without legislation, and those measures which require legislative action?*

As the witnesses on the Task Force who testified on S.2027 pointed out, the reforms proposed by the bill are all basically procedural. I concur in this belief and would further point out that since these requirements are procedural in nature they would not require legislation and those procedures found to be beneficial could be implemented administratively by the Judicial Conference.

The area of arbitration and other forms of Alternative Dispute Resolution are regulated by statute. The Judicial Improvements Act of 1987 limits court annexed arbitration programs in district courts to 10 previously established mandatory programs and 10 new programs by consent of parties only. There-

fore, affirmative legislation would be required to expand arbitration.

Legislation would also be required to appropriate sufficient funds for automation, training and additional personnel if all the procedures contained in the bill were implemented by the judiciary.

Questions for all Witnesses, Both Panels

1. a) *Even Judge Enslen, who already does much of what the bill would impose on all judges, doesn't utilize all of the bill's required procedures. Are all of these procedures appropriate for every kind of District, rural and urban, and for every judge?*

No, not every one of these procedures is suited for every District Court. There are enormous differences among the District Courts in the size of their caseload, the mix of the cases before the court, the extent to which there is a criminal case crisis in the court, the resources available to the court, the traditions and practices of the local bar, and state procedures and traditions. Some of the practices mandated are not needed in every district court and would not be workable in certain districts.

Similarly there are many differences in the way judges effectively manage their cases. For example, many judges use magistrates and other court personnel to manage and move cases along and these successful procedures would be eliminated by the bill's provisions mandating that only a judge preside at certain hearings.

b) *If some judges or District Courts have no appreciable case backlog, does it make sense to make all of them undertake the exercises required by the bill?*

No, it would make no sense to require all courts to implement the bill's procedures. Many judges and courts have no appreciable backlog. These judges have developed procedures which are effective in their district and these practices should not be disturbed or displaced by an array of mandated procedures which may or may not be more effective.

As you observed at the hearing, Senator, the bill's attempt to treat all districts and judges alike is misguided because there are districts and judges which "may be functioning well without utilizing a number of the techniques this bill would

impose on them. And going through the hoops required by this bill may be a waste of judicial time for some of these districts and some of these judges."

c) *This bill requires the judge, not a magistrate to preside over the initial discovery conference. Some districts, unlike districts in large cities like New York or Washington, have more than one seat of court. Forcing the judges there to run between those seats of court, attending conferences a magistrate can handle may slow, not speed, justice. Could you comment on this?*

Yes, we strongly agree that without the use of magistrates to assist in moving cases, the federal judiciary would grind to a halt. In addition to the savings in judicial time that the use of magistrates provides, it is important to note that many magistrates have become specialists in discovery, case management, and fostering settlements. As Judge Enslen observed, litigants are apt to be more frank in assessing the merits of their cases before magistrates and more likely to settle cases. The bill's restrictions on the use of magistrates are counterproductive.

d) *The firm and early setting of a trial date is aimed at ensuring that trial will commence on the designated date. But it also ensures that trial won't start any earlier. I understand that some judges in more rural districts and even some in urban districts still use the so-called trailing calendar. Under this procedure, a firm trial date is rarely set, but counsel know that their case is subject to being tried at any time after it has come of issue, and on short notice. This may spur the litigants and attorneys into speeding the process along.*

Did the Task Force consider this possibility, that in some courts a firm, early trial date may not be so beneficial or that this alternative might be more effective?

We cannot provide a definitive answer as to whether the Task Force considered this possibility since no sitting judges or court managers were invited to serve on the Task Force. Upon review of the Task Force report, it appears that the Task Force did not consider whether such alternate procedures were effective. The Task Force and the bill fail to recognize the need for flexibility in procedures and that measures other than those mandated may be as, or more, effective than the required procedures.

2. a) *Is it necessary for Congress to pass a bill requiring judges to develop "procedures for resolving motions necessary to meet the trial dates and the discovery deadlines established pursuant to the plan, including the adoption of time guidelines for the filing and disposition of substantive and discovery motions" ?*

No, legislation is not required to develop such procedures. To the extent there is a problem in this area, the Judicial Conference and the Circuit Councils can require that a court adopt certain procedures or can adopt rules to deal with problems. Goals set by the Conference or by Circuit Councils are more likely to be accepted that procedures mandated by legislation.

b) *If particular judges aren't deciding motions in a timely manner before trial, are there less intrusive ways to address the situation, such as having the Judicial Conference work with the judge?*

Yes, we agree that isolated problems require isolated solutions. There are better ways to deal with such problems that by painting with such a broad brush. There may be a variety of reasons causing individual judges to experience difficulties in disposing of motions. The Circuit Councils, the Chief Judges of the District Courts and the Judges of the District Courts collectively have the authority to deal with such problems on an individual basis by working with the judge and by such measures as reassigning cases or using visiting judges if necessary. This is a human problem best resolved by a collegial effort on the part of judges, not by legislation.

c) *Under this bill, what happens if a judge does not adhere to the delay reduction plan, and misses a deadline or largely ignores the plan?*

The bill makes no provision for enforcement and, I might add, we believe that there would be a grave question relating to the separation of powers if it attempted to do so. The bill's limitations in this area only serve to underline the fact that the bill deals with matters that are best left to the judiciary to resolve now that the introduction of this legislation has provided the impetus.