UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
JOHN W. BISSELL
JUDGE

U.S.P.O. & COURTHOUSE
NEWARK, NJ 07102
(201) 645-2517

February 28, 1990

Jeffrey Peck, Esquire
Dirksen Senate Office Building, Rm. 224
Washington, D.C. 20510

Dear Mr. Peck:

I very much appreciate your taking the time to discuss with me yesterday my concerns about the proposed Civil Justice Reform Act of 1990. For the last eleven years I have sat as a trial judge, first in the state courts of New Jersey (1978-'82) and since 1983 as a United States District Judge in the District of New Jersey.

Please accept the enclosed memorandum as the observations of a trial judge, in the trenches, in a court with a heavy volume of civil litigation, with all degrees of complexity, and a very heavy volume of criminal cases to be administered under the Speedy Trial Act and (with increasing frequency) the Sentencing Guidelines. The burden of the criminal caseloads upon our judges is the most significant deterrent to speedier handling of civil cases, and must be recognized as such.

We are also blessed in this District with a corps of excellent magistrates whom we utilize in civil cases to the maximum extent the law permits. The expeditious handling of civil cases, and the available time for district judges to discharge the duties which only they can, should not be imperiled by transferring to judges case-management functions which our magistrates perform so ably.

With this general introduction, I enclose the memorandum which you requested, addressing the bill and Senator Biden's January 25, 1990 statement in more detail. I have limited my circulation of this memo to the persons listed below. You may feel free to circulate it (and this letter) as widely as you choose. Please include in your distribution the members of the Judiciary Committee of the Senate and the House of Representatives as well as Senator Lautenberg's Legislative Aide, Mitchell Osterer, through whom I was referred to you. I would not object if either Judiciary Committee chose to make these materials a part of the record before it.

Thank you for your kind attention to this matter. If you have additional questions or would like further contributions from me, please don't hesitate to ask.

Sincerely yours,

JOHN W. BISSELL

United States District Judge

cc: Honorable A. Leon Higginbotham, Jr.
Honorable Joseph F. Weis, Jr.
Honorable John F. Gerry
All District Court Judges and Magistrates
United States District Court
District of New Jersey
Honorable Robert F. Peckham
L. Ralph Mecham
James E. Macklin, Jr.
Robert E. Feidler
William K. Slate, II

P.S. After completion of this letter and the enclosed memorandum today, I received tomorrow's edition of the New Jersey Law Journal. I enclose their front-page article regarding the present bill, the contents of which are self-explanatory.

FROM: John W. Bissell, USDJ (New Jersey)

TO: Jeffrey Peck, Esquire

RE: Observations of a U.S. District Judge (1983-present) on the Present Senate Bill Entitled "Civil Justice Reform Act of 1990"

I. Page 2 (3) Despite its stated purpose of trying to generate more time for judges "for the thoughtful and deliberate adjudication of cases on the merits, since such adjudication is a principal function of the trial court judge," it imposes burdens on the Article III judges which will reduce available time for trials and significant dispositive motions.

II. Page 16, 18-19 § 471(b)(3) "Discovery case-management conferences" and "monitoring conferences" should be conducted by magistrates. See for example Fed. R. Civ. P. 16 which is fully implemented by our magistrates in the District of New Jersey, including early scheduling conferences.

-- Magistrates will be managing discovery schedules and problems, and can do so by phone. They are the case managers; they take pride in providing this assistance to the judges, and should be utilized to the full extent of their powers.

-- They can be more active in settlement talks, which can begin even at early stages, than the judge who will later hear dispositive motions or conduct a non-jury trial. (Compare recent Fed. Arbitration Statute 28 U.S.C. § 654(b)).

-- Pressure of trial commitments means less time and less accomplished if judge holds such conferences.

III. Page 6 (20) p. 18 Early "firm" trial dates are usually illusory and the trial bar knows it. The more they are fixed and missed, the less credible they become.

-- Our lengthy criminal trials under

		the Speedy Trial Act, particularly drug and organized crime cases, are what kill us as far as civil case availability is concerned, and our inability to meet such "firm" trial dates.
IV.		Legislation would be rushed through before the final report of Judge Weis' Federal Courts Study Committee created by the Federal Courts Study Act (Pub. L. 100-702). Shouldn't Congress and those who would comment on this proposed legislation have the benefit of that report?
V.		The bill could bury judges, magistrates and clerical staff in a barrage of paper, reports, "tracks," etc. that our busy district can't afford with its already stretched resources.
VI.	passim, incl. "backlog" feature § 474	Both in the efforts to speed the preparation of a case and in the logging of time limits for adjudication of such things as pending motions there is the basic confusion of speed and numbers of cases disposed of with quality and "thoughtul and deliberate adjudication." -- threatens the reduction of the judicial process to a numbers game; that's not justice. -- could foster hasty decisions -- could lead to more appeals (to the Courts of Appeals whose backlog problems are even worse than ours).
VII.	§ 471(b)(13) § 475(b)(1)	Serious impact on judicial morale. Don't underestimate this impact upon judicial productivity. It is as important as the morale of management in any business. These public reports are unnecessary, demeaning, and could promote undue haste or slight of hand in dispositions. The local legal tabloids will have a field day. Judges and magistrates are currently accountable through reports within the judicial system, and we respond to those reports. Please recognize us as professionals and let us function that way, with flexibility, dignity and respect as judges, not as tracked case managers repeatedly evaluated in public in numerical

terms. The adverse impact of this sort of approach on judicial morale in the Superior Court of New Jersey has become legendary.

VIII. Should most of the suggestions here be considered by the Federal Courts Study Committee and perhaps be addressed by revisions to the Fed. R. Civ. P. or Local Rules? An immutable legislative overlay of mandatory minutiae is not the best approach.

IX. Page 22 § 471(b)(10) A full shopping list of alternative dispute resolution techniques in any one federal court is not necessarily the best approach. Focus and emphasis on one, such as the court-annexed arbitration program in the United States District Court for the District of New Jersey, is better for now.

X. Page 31 § 478 The professed purpose of "increasing the time of judges that is available for trial of cases and for the adjudication of cases on the merits," is admirable but regretably contradicted by the administrative overlay of reporting and judicial case management obligations that would be placed upon the Article III judges.

XI. Neither the bill nor Senator Biden's accompanying statement takes into account the Article III judge's commitments to criminal cases, including pretrial, trial, post-trial and the increased time imposed by guideline pleas and guideline sentences.

-- That will only increase with the accelerated drug war and with more (and eventually all) sentences governed by the guidelines.

XII. State court case management systems, such as New Jersey, are not suitable models for the federal courts nationwide. They are implemented through judges who only sit on civil cases, often further compartmentalized within civil litigation (equity, law, taxation, matrimonial, etc.). Each federal judge is assigned a full range of civil and criminal cases from the moment of filing.

-- In state systems: (1) you also have a confined area (county) not a statewide

district.

-- (2) You have assignment and assistant assignment judges who aren't committed to regular trial work and have the opportunity to administer complex case management programs.

-- (3) You often have master calendar systems where a judge has very few cases directly assigned to him and where there are several judges available to try a case called for trial on its "firm" date.

-- (4) State courts don't have the equivalent of a United States Magistrate as a resource for pretrial conferences (of all types) and front line case management. We have that asset, we make full use of our magistrates in New Jersey, and should continue to do so.

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U.S. Judges Blast Speed-Up Bill

Bar Leaders Agree Biden Plan Won't Work

By Henry Gottlieb

The Senate Judiciary Committee has accomplished a rare feat: Pushing U.S. District Judge Dickinson Debevoise to the brink of losing his cool.

Normally the model of patrician equanimity, Debevoise is fighting mad about legislation that Judiciary Committee Chairman Joseph Biden is advancing as a remedy for slow civil justice in federal trial courts. "It's an absolute monstrosity," says Debevoise. And he is not the only judge or lawyer in New Jersey who thinks so.

Chief Judge John Gerry, some of his colleagues on the bench, and leaders of the state's federal bar are so angry about some of the provisions they are declaring their willingness to step to the front ranks of any national effort to kill the bill.

Granted, they say, slow civil justice is a problem in New Jersey's federal courts. The average case that went to trial last year took 26 months to get there, the fifth-slowest pace in the nation's 94 judicial districts. But for the moment, in New Jersey, the cure proposed by Biden is causing more angst than the ailment.

Says Richard Collier, chairman of the New Jersey State Bar Association's Federal Practice and Procedure Committee: "We want to derail it before it zips through." Stephen Orlofsky, another member of the committee, says, "so far, the reaction has been uniformly and resoundingly negative." Deepening the lawyers' sinking feelings is their view that Biden's plan adopts features that remind them of New Jersey's tightly managed state court system.

What's in the Bill?

The proposal introduced on Jan. 25 by Biden, a Delaware Democrat, was co-sponsored by the committee's ranking Republican, Strom Thurmond, of South Carolina, and was based on a Brookings Institution study conducted by a 36-member task force of lawyers, judges, professors, and court professionals.

The bill pays homage to three articles of faith among court managers. The first one says that cases are disposed of most efficiently when deadlines are established for each stage of litigation. Second, speeding cases means speeding discovery, motion practice, and settlements, because 95 percent of federal filings are resolved before trial. Third, hands-on management by judges gets things done.

PHOTOGRAPH BY BILL KOSTROUN

PROMISES FIGHT: U.S. District Judge Dickinson Debevoise says a new bill designed to remedy slow civil justice in federal trial courts is "an absolute monstrosity."

U.S. Judges Blast Bill

CONTINUED FROM **Page One**

The legislation would require each district to develop separate tracking plans for easy and complex cases — a so-called differentiated case management system similar to experiments New Jersey courts are now running in Bergen and Camden counties.

Each district would be free to set its own deadlines for discovery and motions. But for all districts, a judge, not a magistrate, would be required to hold a mandatory discovery and case management conference within 45 days of the first responsive pleading in a case. At the conference, issues would be identified, discovery schedules would be set, a pretrial conference date would be set, and in simple cases, a trial date also would also be established.

If the districts fail to devise a plan within a year, one is imposed on them from Washington.

The bill also contains a provision aimed at judges who are slow to make interim rulings. Four times a year, the courts would publish a report listing each judge's list of motions unresolved for more than 30 days, and how long they have been pending.

Distaste for Micromanagement

Gerry and Debevoise have no argument with the goal of the bill or its philosophical underpinnings. They just don't like the idea of what Gerry calls "an endless string of efforts in Congress to micromanage the business of the courts." What's more, the judges say, this particular bill would make things worse, especially in New Jersey. Debevoise lists three main objections:

- The bill ignores the root cause of civil trial delays — the crushing case load of criminal cases, which take precedence under speedy trial rules for criminal matters. What's the use of setting rigid deadlines for civil cases that won't be adhered to because of the crush of criminal business?

- The bill reduces the role of magistrates in scheduling and hands it back to the judges. This would be a time-consuming step backward in New Jersey, where several magistrates have earned reputations for moving cases quickly, Debevoise and Gerry say. "We [the judges] are a sweatshop and we've got to keep sweating on productive things, not things that take more time," Debevoise says. "In New Jersey, we've been able to hold our heads above water because of the magistrates' work."

- The bill would require each judge and district clerk to devote more attention to record keeping, which is already an overly time-consuming burden, Debevoise says. Additional records are especially onerous, he says, because most of the fiats in the Biden bill have already been instituted informally in New Jersey. For example, cases in this state are already on tracks. Judicial productivity is enforced by collective discipline, he says. Early conferencing of cases is already an established tool in the district, the judges say.

Gerry, who circulated memos about the bill to the 13 other judges and nine magistrates in the district, says he has heard no dissent from his negative opinion about the bill. He says judges around the country as well are beginning to express concern about the bill, but he says he knows of no organized opposition yet.

Three leaders of the state's federal bar say they agree with the judges' analysis. The president of the Association of the Federal Bar of New Jersey, Bruce Goldstein, of Saiber, Schlesinger, Satz & Goldstein in Newark, says he is most upset about what he perceives as an attempt to gut the magistrates' work.

At the State Bar's federal section, Orlofsky, a partner with Blank, Rome, Comisky & McCauley in Cherry Hill, and Collier, of Collier, Jacob & Sweet in Somerset, say they are prepared to work with their counterparts in other states to fight the bill.

Lipscher Connection

Orlofsky says one of the things that turned him off about Biden's proposal was the incantation of Robert Lipscher's name in Biden's introductory speech on the Senate floor.

Lipscher, director of New Jersey's Administrative Office of the Courts, is considered a seer among the nation's court managers, but he has been a lightning rod for the Bar's denunciations of court administration in New Jersey. Orlofsky says Biden's use of Lipscher's comments on differentiated case management to buttress the efficacy of the legislation, "made me laugh." Lipscher declines to comment.

The judiciary committee is scheduled to hold hearings on the bill this month, and an aide to the senator says the panel is willing to make changes. "We studied it carefully, and we think it's a very good bill, but it's not the holy grail," the aide says.

He says the committee is aware that the crush of criminal cases is not adequately addressed in the legislation and that a bill to be introduced later this year — presumably legislation calling for creation of new judgeships — will deal with the problem.

'Fear of God' in Litigants

Robert Litan, a senior fellow at Brookings who was reporter for the task force study, says there was a consensus among the members of the study group that the magistrates' system has not worked because only judges can "put the fear of God into the litigants. Things get lost in the black hole of the magistrates' offices."

He also says that New Jersey judges might be overreacting to fears of central control. The key feature of the bill is its provision that each court sets its own set of deadlines, taking into account its own circumstances, Litan says. "It may be that in New Jersey you already have the best system; in that case, if it ain't broke, don't fix it," he says.

If nothing else, the fight over this bill is likely to focus additional attention among New Jersey practitioners on the record of the District Court in moving cases. In the year ending June 30, 1989, 6 percent of the cases in the district were more than three years old — about average for the nation. And the civil case load per judge, 414 cases, also was about average. At the same time, the figures show that New Jersey judges were victimized by complexity. When the degree of difficulty was factored in, the average judge in only 11 districts had as big a civil workload as each of the 14 New Jersey judges.

The addition of large, multi-defendant, mob trials that tie up judges for months has put the district deeper in the hole in the past few years, Gerry says. New Jersey also suffers from the absence of a large cadre of senior judges, who help clear cases but are not counted in the workload statistics. New Jersey has only two senior judges, Mitchell Cohen, in Camden and Clarkson Fisher, in Trenton.

U.S. Magistrate Jerome Simandle, who sits in Camden, expresses the same concerns voiced by Gerry and Debevoise, but he says the legislation will spark a necessary debate. As long as the bill serves as a "catalyst" for discussion, that's fine he says, but not if it ends up being the remedy. ■