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April 24, 1990 DICTATED BUT NOT READ

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From: Michael E. Tigar

Re: S 2027

This is a followup to my earlier memorandum about my conversation with Chief Judge Charles Clark. I think that the objectives of the Biden bill are laudable, and reflect our concern with the difficulties in getting cases to trial and with controlling such things as discovery abuse in the civil process. The federal judges have a number of objections, but their most cogent one seems to be this: The bill mandates procedures for the federal courts by statute in areas traditionally reserved for the rule-making process. I believe that the federal rules of civil procedure, at least as originally conceived, reflected a worthwhile partnership among judges, lawyers, and academics to shape federal practice. Every instance of congressional meddling with the rules has resulted in confusion and difficulty. I am persuaded that the objectives of the Biden bill should be met through a rule-making process in which the three groups that produce the civil rules would participate.

I believe the legislation should create a rule-making body along the lines of the existing committees. In addition, that body would report to the Supreme Court under the same procedure now used for the other procedural rules. The bill could--and in my view should--be quite detailed in its direction to the committee to come up with procedures for managing the flow of litigation eliminating the perceived abuses. In this way, the legislation would not

*Spur 5/19/90*

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wholly abandon the choice of priorities to the rule-making body, but could make a strong congressional statement about the need for reform. However, the details of reform should, in this as in other fields, be left to those most immediately concerned.

Please let me have your thoughts on this, so that we can begin to reach accord with the judges.

For your information, I attach a copy of the Judicial Administration Division position. I trust that the Division will be reconsidering, and that we can move toward some sort of consensus.

MET/jjp  
VIA FAX  
bcc: Hon. Hayden W. Head, Jr.  
Hon. George P. Kazen  
Hon. Charles Clark