

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

April 6, 1990

MEMORANDUM TO THE SUBCOMMITTEE ON THE BIDEN BILL

SUBJECT: The Biden Bill (S.2027)

Attached is a memorandum from the Chief Justice detailing his meeting earlier this week with Senator Biden.

Also, following transmittal to Senator Biden's staff on March 30, 1990, of the Statement of Principles agreed to by the Subcommittee, and further discussions with Biden's staff on Tuesday of this week, the attached revised bill was prepared by Bob Feidler and Greg Scott. Judge Peckham has authorized its dissemination to you but this authorization should in no way be construed as agreement to the contents of the draft. You will note that the draft as prepared reflects many of the principles the Subcommittee agreed to; however, the bill applies nationwide and does not limit its application to just a few pilot districts. The draft does provide that the Judicial Conference may conduct demonstration programs as it may see fit.



L. Ralph Mecham

Attachments

cc: Honorable Charles Clark
Honorable Wayne D. Brazil

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 6, 1990

TO: Members of the Executive Committee of the
Judicial Conference

FROM: The Chief Justice *Wm*

On Tuesday, April 3rd, Senator Biden and I met to discuss matters pending before the Judiciary Committee which are of interest to the Judicial Conference. We did not discuss the substantive provisions of S.2027, "The Civil Justice Reform Act of 1990," in any detail, but we did discuss a timetable for trying to work out disagreements about the bill. Senator Biden assured me that he would not move S.2027 out of the Judiciary Committee before May 1st and that if by that date there is constructive negotiation going on between the District Judges on the Executive Committee and his Committee, he would wait beyond that time to move the bill. He feels he must move it "no later than June," to quote his memorandum exactly, in order to ensure consideration by the Senate and the House during the present Congress.

Senator Biden also recognizes that the four District Judges on the Committee cannot bind the Judicial Conference to approval or disapproval of any compromise product, and he is aware, because I told him, of the possibility of polling the Judicial Conference by mail ballot should that be appropriate. I would hope, if that were to be done, that there might be at least three alternatives: "approve," "do not oppose," and "oppose."

There was some discussion of which was the preferable method of negotiation: staff to staff, principle to principle, or some combination. I don't believe Senator Biden expressed any preference on that point, and I suggested to him that the most logical principal to represent the judges in any such negotiations would be Bob Peckham, who I understand is the Chairman of the District Judges Subcommittee of the Executive Committee.

PROPOSED REVISION
April 6, 1990

SEC. 3. AMENDMENT TO TITLE 28, UNITED STATES CODE.

(a) Civil Justice Expense and Delay Reduction Plans and Case Management Training.--(1) Title 28, United State Code, is amended by adding at the end of part I the following new chapter:

**"CHAPTER 23--CIVIL JUSTICE EXPENSE
AND DELAY REDUCTION**

"SUBCHAPTER I--CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

"Sec.

- "471. Model civil justice expense and delay reduction plans.
- "472. Requirement for a district court civil justice expense and delay reduction plan.
- "473. Development and implementation of a civil justice expense and delay reduction plan
- "474. Content of civil justice expense and delay reduction plans.
- "475. Judicial Conference continuing review of civil case management.
- "476. District court periodic review of civil case management.
- "477. Advisory committees.
- "478. Automated semiannual report on caseload processing.
- "479. Manual for litigation management.

"SUBCHAPTER II--CASE MANAGEMENT TRAINING

"Sec.

- "481. Judicial case management training programs.

**"SUBCHAPTER I--CIVIL JUSTICE EXPENSE AND DELAY
REDUCTION PLANS**

"§ 471. Model civil justice expense and delay reduction plans

"(a) The Judicial Conference of the United States shall develop one or more model civil justice expense and delay reduction plans. Each such plan shall provide for facilitating the adjudication of civil cases on the merits, streamlining discovery, and improving judicial case management with a view to

ensuring just, speedy, and inexpensive resolution of civil actions while retaining the independence of a judge to meet the unique needs of individualized cases.

"(b) In developing each model plan under subsection (a), the Judicial Conference shall consult with an advisory committee appointed in accordance with section 477 of this title.

"§ 472. Requirement for a civil justice expense and delay reduction plan

"There shall be in effect for each United States district court, in accordance with this subchapter, a civil justice expense and delay reduction plan.

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

"(a) Each United States district court shall implement a civil justice expense and delay reduction plan by local rule in accordance with the provisions of section 2071 of this title. The plan may be a model plan developed by the Judicial Conference of the United States or a plan developed by such court.

"(b) The civil justice expense and delay reduction plan for a court shall be selected or developed, as the case may be, after consideration of the recommendations of an advisory committee appointed in accordance with section 477 of this title.

"(c) The judicial council of the circuit in which a district court is located--

"(1) shall review and evaluate the civil justice expense and delay reduction plan developed by such district court pursuant to this section; and

"(2) may exercise the authority provided in section 2071(c)(1) of this title to modify or abrogate any such plan that does not meet the requirements of section 474(a)(1) of this title.

"(d) The Judicial Conference of the United States may review and evaluate any determination of a council under subsection (c) of this section.

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

"(a) Subject to subsection (d) of this section, each civil justice expense and delay reduction plan in effect pursuant to section 472 of this title--

"(1) shall include the features described in subsection (b); and

"(2) may include such features as those described in subsection (c).

"(b) The required features referred to in subsection (a)(1) are provisions for the following:

"(1) Individualized and case-specific court management of civil cases through a system of differentiated case management that provides for the following:

"(A) An early court assessment of each case filed in such court, considering such criteria as--

"(i) case complexity determined on the basis of the number of parties involved, the number of claims and defenses raised, the legal difficulty of the issues presented, the factual difficulty of the subject matter, and any other appropriate factors;

"(ii) the amount of time reasonably needed to prepare the case;

"(iii) the anticipated trial length; and

"(iv) the judicial resources and other resources necessary for the preparation and disposition of the case.

"(B) Allocation of the level of court supervision and resources necessary for each case consistent with the circumstances of the case.

"(C) Establishment of appropriate procedures for monitoring case progress and for ensuring compliance with deadlines established for the completion of case events.

"(D) Expeditious processing of each case by counsel and judicial system officials consistent with the necessary tasks.

"(2) Early involvement of a judicial officer in planning the progress of the case, controlling discovery, and scheduling necessary events, including completion of discovery and commencement of trial.

"(3) An ongoing program for training all judicial officers, clerks of court, and courtroom deputy clerks in case management techniques.

"(c) The features referred to in subsection (a)(2) are the following:

"(1) A requirement that counsel for each party to a case jointly propose a discovery-case management plan for the case at the initial pretrial conference provided for under Rule 16 of the Federal Rules of Civil Procedure.

"(2) A requirement that, within a specified period after issue is joined in a case, counsel for each party exchange--

"(A) a list of all persons that, to the counsel's knowledge or belief, have knowledge of matters relevant to the assertions contained in the party's complaint or answer, as the case may be;

"(B) all documents that, to the counsel's knowledge or belief, support the positions of the party; and

"(C) a certification that the counsel has made a good-faith effort to identify all such persons and documents.

"(3) A requirement that a discovery-case management conference be held in each complex case, and in each case in any other category of cases subject to such requirement as

specified in the plan, within 120 days after the date on which the issues are joined.

"(4) Requirements that the judicial officer presiding at a discovery-case management conference--

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

"(B) attempt to identify or formulate the principal issues in contention and, in appropriate cases, provide for the staged resolution or bifurcation of issues consistent with Rule 20(b) of the Federal Rules of Civil Procedure;

"(C) prepare a discovery schedule and plan that is consistent with the complexity of the case, the amount in controversy, and the resources of the parties and includes--

"(i) deadlines for completion of discovery, subject to extension only by order of the court for good cause shown or upon the court's finding that the extension will not cause a delay in the commencement of trial; and

"(ii) if appropriate, deadlines for completion of intermediate steps in discovery;

"(D) establish at the conference--

"(i) the dates or deadlines for the filing, hearing, and deciding of motions;

"(ii) the date or dates of additional pretrial conferences, including the final pretrial conference; and

"(iii) the date for trial or, in a complex case, a deadline for the commencement of the trial specified in terms of a period after completion of discovery;

"(E) in each complex case, establish a series of monitoring conferences for the purposes of establishing the focus and pace of discovery, refining issues, and developing stipulations; and

"(F) address any other appropriate matters.

"(5) A requirement that, in each complex case, 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.

"(6) Authority to permit some or all participants in a case to participate in any conference by telephone if the case is not a complex case.

"(7) Procedures for waiving any discovery case management conference in any case--

"(A) which is not complex or is otherwise suitable for expedited disposition; and

"(B) in which the court can issue, within the period specified in the plan, a standard order scheduling--

"(i) a trial date;

"(ii) discovery, including discovery deadlines; and

"(iii) dates for filing and deciding substantive and discovery motions.

"(8) Procedures for providing, on the basis of the complexity of the case, for--

"(A) identifying and limiting the volume of discovery available in order to avoid unnecessary or unduly burdensome or expensive discovery;

"(B) phased use of depositions upon oral examination, depositions upon written questions, interrogatories to parties, production of documents and things and entry upon land for inspection and other purposes, and requests for admissions;

"(C) voluntary exchange of information; and

"(D) new and more cooperative discovery devices.

"(9) Provisions that--

"(A) each discovery motion, except a motion brought by a person appearing pro se or brought pursuant to Rule 26(c) of the Federal Rules of Civil Procedure by a person who is not a party, must be accompanied by a statement that counsel for the movant

has made a reasonable, good-faith effort to reach agreement with opposing counsel on the matters set forth in the motion; and

"(B) attorneys fees may be awarded against a party if the party's counsel has not made such an effort.

"(10) Procedures for resolving motions necessary to meet established trial dates and discovery deadlines, including the adoption of time guidelines for the filing and disposition of substantive and discovery motions.

"(11) Procedures for ensuring that the parties to a civil case have the opportunity to consent to trial of the case by a United States magistrate.

"(12) An alternative dispute resolution program for use in appropriate cases.

"(13) A neutral evaluation program for the presentation of the legal and factual bases of a case to a neutral court representative at a non-binding conference conducted early in the litigation.

"(14) A requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement decisions be present or available by telephone during any settlement conference.

"(15) Procedures for enhancing the accountability of each judge of the district court through--

"(A) regular reports of the judge's pending undecided motions and caseload progress to the other

judges in the judicial circuit in which such district court is located; and

"(B) to the extent provided for by the judicial council of such circuit in the discretion of the council, public disclosure of any such report.

"(16) Procedures for identifying, and reviewing from time to time, functions performed in a district by magistrates with a view to determining which functions within constitutional and statutory limits can best be performed by judges or by magistrates.

"(17) Procedures for judges to exchange information about their roles in adjudicating contested motions and other matters.

"(18) Such other features as the district court considers appropriate after considering the recommendations of the advisory committee referred to in section 473(b) of this title.

"(d) The features of a civil justice expense and delay reduction plan implemented under this subchapter shall be consistent with the Federal Rules of Civil Procedure.

"§ 475. Judicial Conference continuing review of civil case management

"The Judicial Conference of the United States--

"(1) shall review, on a continuing basis, civil case management by the United States district courts;

"(2) may develop and implement such additional case management procedures, studies and demonstration projects, and standards for the review required by section 476 of this title as the Judicial Conference determines appropriate; and

"(3) may waive the applicability of any provision of this subchapter to a court participating in a demonstration project carried out pursuant to paragraph (2) to the extent that such provision is inconsistent with the demonstration project.

"§ 476. District court periodic review of civil case management

"Each district court shall review biennially the civil case management procedures for such court and revise the rules of such court as appropriate to improve court management of civil cases. In performing the review, the court shall consult with an advisory committee appointed in accordance with section 477 of this title.

"§ 477. Advisory committees

"(a) Each advisory committee required by this subchapter shall include the following:

"(1) At least one district court judge.

"(2) At least one United States magistrate.

"(3) At least one district court clerk.

"(4) Such representatives of the public as the advisory committee appointing official considers appropriate.

"(5) Such attorneys as the advisory committee appointing official determines necessary to ensure that

major categories of United States district court litigants are represented on the advisory committee.

"(b) The advisory committee appointing official--

"(1) in the case of an advisory committee referred to in section 471 of this title, shall be the Chairman of the Judicial Conference of the United States; and

"(2) in the case of an advisory committee for a court under section 472 or 476 of this title, shall be the chief judge of such court, who should consult with other judges of the court in the exercise of the appointing authority.

"§ 478. Automated semiannual report on caseload processing

"(a)(1) On January 15 and July 15 of each year each United States district court shall prepare a report on caseload processing by each judicial officer of that court and shall make the report available to each judge in the judicial circuit of such court.

"(2) The semiannual report for a court shall contain, for each judicial officer of such court, information relevant for understanding the performance of such judicial officer's responsibilities during the reporting period. The Judicial Conference of the United States shall prescribe the information to be included in the semiannual report for a court.

["(3) The judicial council of a circuit may, in the discretion of the council, direct that a semiannual report for a district court in such circuit be made available to the public.]

"(b) The Director of the Administrative Office of the United States Courts shall ensure that the United States district courts' automated dockets have the program capability readily to retrieve the information prescribed by the Judicial Conference for the semiannual report pursuant to subsection (a) of this section.

"(c) In order to facilitate the preparation of semiannual reports under subsection (a) of this section, the Director shall standardize court procedures for categorizing or characterizing judicial actions, including defining what constitutes a dismissal and how long a motion has been pending.

"§ 479. Manual for litigation management

"The Director of the Administrative Office of the United States Courts, under the direction of the Judicial Conference of the United States, shall prepare a manual for litigation management. The manual shall contain the following:

"(1) A discussion of civil justice expense and delay reduction plans, including the rationale for using such plans, the effectiveness of the use of such plans for increasing the availability of time for trials and deliberate adjudication of cases on the merits, and the advantages of using such plans.

"(2) Basic case management procedures, a discussion of the effectiveness of such procedures, and model local rules for case management.

"(3) Other litigation management matters considered appropriate by the Judicial Conference.

"SUBCHAPTER II--CASE MANAGEMENT TRAINING

"§ 481. Judicial case management training programs

"The Director of the Federal Judicial Center shall take such action as may be necessary to expand current judicial training programs to include a new curriculum and emphasis on case management so that the accumulated learning on management and adjudicatory techniques is communicated on a regular and formal basis to all district court judges, magistrates, clerks of the district courts, and other court personnel the Director considers appropriate."

(2) Table of Contents.--Part I of the table of contents of title 28, United States Code, is amended by adding at the end thereof the following:

"23. Civil Justice Expense and Delay Reduction.....471".

(b) Implementation.--(1) Initial implementation of sections 471 through 474 of title 28, United States Code (as added by subsection (a)), shall be accomplished as follows:

(A) The Judicial Conference of the United States shall complete the preparation of the model plan or plans required under section 471 of such title not later than September 30, 1991.

(B) Each court covered by section 472 of such title shall develop or select a civil justice expense and delay reduction plan not later than July 1, 1992.

(C) Action on each civil justice expense and delay reduction plan pursuant to section 473(c) of such title shall be completed not later than September 30, 1992.

(D) The first civil justice expense and delay reduction plan developed or selected for a court covered by section 472 of such title shall take effect not later than October 1, 1992.

(2) The first periodic review pursuant to section 476 of title 28, United States Code (as added by subsection (a)), shall be completed not later than December 31, 1991.

SEC. 4. REPORTS.

(a) Report Requirement.--The Judicial Conference of the United States shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives an interim report and a final report on the implementation of subchapter I of chapter 23 of title 28, United States Code, as added by section 3(a).

(b) Interim Report.--The interim report shall be submitted not later than October 1, 1993.

(c) Final Report.--The final report shall be submitted not later than January 1, 1995, and shall be sufficiently detailed for Congress to assess the scope and success of the implementation of subchapter I of chapter 23 of title 28, United States Code.

SEC. 5. AUTHORIZATION.

(a) Civil Justice Expense and Delay Reduction.--There is authorized to be appropriated not more than \$_____ for the implementation of subchapter I of chapter 23 of title 28, United States Code, as added by section 3.

(b) Judicial Case Management Training.--There is authorized to be appropriated for the Federal Judicial Center not more than \$1,000,000 for implementation of section 481 of title 28, United States Code, as added by section 3.