United States District Court
Northern District of California
San Francisco, California 94102

Chambers of
Robert F. Peckham
United States District Judge

April 6, 1990

M E M O R A N D U M

TO: SUBCOMMITTEE ON CIVIL JUSTICE REFORM ACT OF 1990

FROM: BOB PECKHAM

RE: RESPONSES FROM JUDGES RE BIDEN BILL

I am enclosing copies of letters from judges and magistrates commenting on the Biden bill. I will continue to forward such comments to you. I look forward to our meeting.

RFP:ojm
Enclosures

Copy: Robert Feidler (w/encl.)
Karen Siegel "

BB3-38

United States Court of Appeals

Ninth Circuit

March 30, 1990

Joseph T. Sneed
United States Circuit Judge
Post Office Box 547
San Francisco, California 94101-0547

Honorable Robert F. Peckham
District Judge
United States District Court
450 Golden Gate Avenue, Box 36060
San Francisco, CA 94102

Re: **S.2027, "The Biden Bill"**

Dear Bob:

I am not qualified to express detailed criticisms of Senator Biden's bill. I am, however, competent to recognize a prescription for bureaucratic disaster when I see it. Eggs can be candled; cases cannot. In the latter there is too much diversity, too much need for impromptu adjustments, to permit conforming to the rigid structure the Biden Bill would put in place. Moreover, I strongly suspect there is more than one way to manage a case efficiently.

Should the answer given to this criticism by supporters of the Biden Bill be that flexibility remains despite the lock-step bureaucracy of the Bill, my response would be, "Why then do we need the bill"? The likely true answer to that query is, "Most judges do not manage cases as well as others and this will improve the performance of the less competent." This reveals the true character of the Biden Bill. It is an expression of distrust of the ability of many federal district judges to perform their case management duties.

The judiciary of the United States must either demonstrate the error of this view or undertake to eliminate it by means less mechanistic than those set forth in the Biden Bill. Arguably the latter course is necessary and certainly more desirable than the Biden Bill. Incidentally, the Federal Judicial Center is "in good hands" as we all know. Education is its business.

Sincerely,

Joseph T. Sneed

United States District Court
For the District of Oregon
United States Courthouse
620 S.W. Main
Portland, Oregon 97205

Chambers of
James A. Redden
United States District Judge

April 2, 1990

The Honorable Robert F. Peckham
United States District Judge
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Dear Bob,

Thanks for your letter on S. 2027. I am enclosing correspondence to and from this District on that plan. Owen Panner's letter sets forth our ideas in some detail. The very idea of Congress micro-managing our caseload is absurd. I have been in districts that have little case management control and I agree that a plan is needed in those districts. Such a plan can be simple. Ours is. No plan should be as detailed and work-generating as S. 2027. A citizens committee? Good grief! Further, S. 2027 limits the use of magistrates in a manner which will seriously impede our efforts here in Oregon.

Obviously a case management plan, based on individual calendars, should be implemented in each district and be designed to fit the size and nature of that district. It is something that should be done in-house. Perhaps a statute (of questionable constitutionality) could require each district to outline such a plan within a limited time. An "in-house" committee, or the AO, could review and make appropriate suggestions.

An appropriation for the training of judges and clerks' office staff would be helpful.

Although I am reluctant to suggest it, perhaps the Chief Judges Association, or a committee comprised of chief judges, could assist in the implementation of plans. It would probably be more appropriate to do this on a Circuit-wide basis rather than on a nationwide basis.

Our main concern is that Congress will regard S. 2027 as a substitute for the omnibus bill and/or other genuine reform. Here in Oregon we are double and triple set every week well into the fall. We can schedule, but we can't try more than one case at a time.

Very truly yours,

James A. Redden

JAR:jp
enclosures

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
UNITED STATES COURTHOUSE
PORTLAND, OREGON 97205

CHAMBERS OF
OWEN M. PANNER, CHIEF JUDGE

S 2027

March 26, 1990

Honorable Joseph R. Biden
United States Senate
221 Senate Russell Office Building
Washington, D.C. 20510-0802

Dear Mr. Chairman:

Re: S. 2027, The Civil Justice Reform Act of 1990

Thank you for the opportunity to comment on this proposed legislation. While I am sure that there will be great controversy over the requirements of this Act, I doubt that many will dispute most of the findings set forth.

All of us, I'm sure, will agree that each district should have a plan. Most of us do have plans. All of us would not agree that there has been inadequate utilization of available and existing tools to respond to the changing situation.

The district courts of the United States have aggressively and ingeniously utilized all the tools available to them. Adequate personnel and computerization will assist us greatly. It will not solve the problem completely. We are besieged by litigation, both civil and criminal. No amount of planning or organization will make any substantial changes. Litigation increases in volume and complexities constantly. The war on crime, combined with the new sentencing guidelines will continue to put increasing pressure on civil cases.

In this district, when a civil case is filed, an order is issued to the plaintiff and served on the defendants establishing time limits for the conclusion of discovery in 120 days, and lodging of a pretrial order in 150 days. When the date arrives for the lodging of the pretrial order, if there has been no request for an extension, a scheduling conference is held immediately and a trial date is set, usually within 30 to 60 days. if there has been a motion to extend discovery, a conference is immediately held to tailor a schedule for that particular case. A trial date is set at that conference.

The result of this is to track the cases. Simple, straight-forward cases get tried on a fast track and cases that require more attention get that attention, and an expeditious but realistic schedule. This system has worked well for almost ten years. In recent years, however, and particularly since the advent of sentencing guidelines and the war on crime, we are

having trouble. We have always double-set, triple-set and even quadruple-set trial of cases in order to make allowance for settlements. We have a very collegial court and we help each other out so as to avoid postponements. Criminal cases are now forcing postponements regularly. The increasing volume of civil litigation is complicating this problem. No plan will help us. All of the care, scheduling, and setting of trial dates is wasted if there are not sufficient judges to try the cases that have to be tried.

There are many reasons why litigation is expensive and slow in the federal courts. The requirement in the federal system that a trial judge explain every possible reason for the court's decision requires tremendous time and effort. In many state courts the trial judge is presumed to have decided the case properly if there is any basis for the appellate court making that determination. In the federal system, unless the trial judge explains fully the reasons, there is likely to be a reversal. More and more appellate courts are factfinding and decision-making rather than correcting error. The rate of reversals in the system is astonishing. The more reversals there are, the more appeals there are. An informal study run in the Ninth Circuit indicated that almost fifty percent (50%) of the civil cases that involved substantial amounts of money and were handled by competent lawyers on both sides, were reversed. Statistics that indicate lesser percentages include criminal cases where appeals are many times frivolous, as well as frivolous civil appeals.

Trial judges cannot simplify trials under these circumstances. One of our most able district judges, who is now a circuit judge, wisely proclaimed that the federal rules were designed to guarantee that a case never got to trial and, if it did, it never would be concluded. I concur.

We agree that setting an early trial date expedites case disposition. When the trial date is set, things begin to happen. Discovery becomes directed and more efficient and, if the trial date can be held, time and money are saved. The problem comes, however, when it is impossible for judges to hold firm trial dates.

Congress continues to add to our jurisdiction and to provide new guidelines and standards. It is likely to get worse. Legislation has been introduced requiring that lawyers be given an opportunity to question jurors in the voir dire. There is new

legislation pending to create new federal remedies. These will cause further delay. No serious consideration has been given to the elimination of diversity jurisdiction.

The accomplishments of federal trial courts, considering the workload, has been superb. In 1970, the average number of cases filed per judge was 317. In 1989 it was 459. The cases have become more complex. Judges twenty years ago were working efficiently and very hard. We have exceeded the limit in 1990. We are in a crisis. Requiring us to go through more extensive procedures, do more paperwork, make more reports, and go to more meetings to accomplish something that is already being done as efficiently as possible would be counterproductive.

We desperately need more judges as soon as possible. A request by the Judicial Conference of the United States has already been outdated by the increasing statistics. Even with additional judges, serious consideration needs to be given to significant changes. Diversity jurisdiction should be eliminated. Certiorari should be granted to the circuits.

By granting certiorari to the circuits, a great deal could be accomplished. Three-judge panels are writing so much law, so fast, that support can be found for any proposition in any circuit. These panels are under such pressure that decisions are not always well thought out. We have arrived at the point where the circuits are making decisions rather than correcting errors. Certiorari would permit them to sit in larger panels, be more deliberative, and reject more frivolous appeals. It would simplify trials in the district court because lawyers would not be required to posture and plan appeals on issues that were not significant.

The legislation does not touch the circuits and much of the delay occurs there. In the Ninth Circuit, delay at the circuit level is more serious than at the trial level. Additionally, as the Ninth Circuit is now constituted, I receive an average of 15 opinions on the merits from the circuit each working day. Every circuit judge and every trial judge should read every opinion from his or her own circuit. This has become impossible in the Ninth Circuit, and I suspect the same is true in other circuits.

Before new legislation is passed expanding jurisdiction, consideration should be given to the effect that it has on the courts.

The provisions for financial support to properly equip the courts are excellent. The provision for more education in court management would be helpful. Accurate reports on delays in individual courts and by individual judges can help us solve some isolated problems and expedite disposition in courts that are suffering from delay.

We do have a crisis in the judiciary. In an effort to do absolutely perfect justice in every case, we have structured guidelines, factors, rules, and statutes that have made discovery, preparation, trials and appeals extremely complex. For every litigant that we have dispensed "perfect" justice to, we have deprived thousands of the ability to get their case heard and disposed of because of the time and expense involved. The judiciary is in a crisis and we thank you for your efforts to help in that regard. A regimen for scheduling will not make a significant difference.

Very truly yours,

Owen M. Panner
Chief Judge

OMP/mh

cc: Chief Judge Alfred T. Goodwin
Judge Joseph F. Weis, Jr.

United States Senate

COMMITTEE ON FINANCE
WASHINGTON, DC 20510-6200

March 21, 1990

The Honorable James Redden
United States District Court
for the District of Oregon
United States Courthouse
620 S.W. Main
Portland, Oregon 97205

Dear Jim:

Thanks for your recent letter pointing out possible pitfalls in the Civil Justice Reform Act. I can certainly understand your concerns about Congress telling Federal judges how they should manage cases.

The provision which would limit the role of magistrates is reportedly highly controversial and likely to be removed from the bill before it leaves the committee. I will certainly keep an eye on this and other aspects of the bill as it moves through the process. Above all, I will do everything in my power to ensure that the Civil Justice Reform Act does not endanger new judgeships for Oregon.

Speaking of judgeships, the Senate Judiciary will be holding the confirmation hearing on Judge Bob Jones on April 4. Senator Heflin will preside, and I will be testifying on Judge Jones' behalf.

As always, I appreciate your comments. Best regards.

Sincerely,

Bob

BOB PACKWOOD

United States District Court
For the District of Oregon
United States Courthouse
620 S.W. Main
Portland, Oregon 97205

Chambers of
James A. Redden
United States District Judge

March 14, 1990

The Honorable Mark O. Hatfield
United States Senator
711 Senate Hart Office Building
Washington, D.C. 20510

Re: S. 2027: Civil Justice Reform Act of 1990

Dear Mark,

S. 2027: Civil Justice Reform Act of 1990 is apparently on the fast track. It would tell us federal trial judges how to manage civil cases. I guess the Senate Judiciary Committee wants to give us the benefit of their scheduling genius as demonstrated by the expeditious manner in which they are handling the Omnibus Judge Bill.

A very dangerous part of the bill would limit the role of magistrates in case management and would really screw up the detail in the District of Oregon.

Our management plan, in place for five years or so, is "adopted" in large measure by S. 2027, and I suppose we can simply ignore some of the sillier parts of the bill that will hurt more than help. Senators Biden and Thurmond have announced the measure is on the "fast track," although they do agree to another hearing. I doubt whether the fast track will slow down enough to make the bill workable.

I am very serious when I say implementation will slow down our procedures, increase costs to the litigants, and waste vast amounts of time and paper.

Another very dangerous aspect is the clear likelihood that passage of this will delay the Omnibus Bill on the theory that the newly installed "efficiencies" of S. 2027 will obviate the necessity for new judges. Surely, a "trial period" will be called for. If this is the idea, we hope you raise hell on our behalf. Looking at my April calendar, I note that I have

at least two, usually four and sometimes six trials scheduled each working day of the month. I am set like that through September. I don't need legislation telling me how to schedule cases, I need legislation giving me help in trying them.

By the way, how are we doing on Judge Burns' replacement?

Very truly yours,

James A. Redden

JAR:jp
CC: Oregon Members of Congress

MEMORANDUM

TO: Judge Panner

FROM: Judge Redden

SUBJECT: S. 2027: Civil Justice Reform Act of 1990

DATE: March 14, 1990

I understand that the FJA is going to take a position on the Civil Justice Reform Act. The best thing to do with it would be to forget it, or use it as a vehicle for real reform. I am certain that the Congress will reject either suggestion, although there may be more hope on the House side. By "real reform" I mean substantial changes in the Rules of Federal Procedure, and modifying diversity, cert. for the Circuit, etc.

Another approach that might be helpful to this is to point out to these folks that most districts are different, with different problems and different solutions. This bill will require an extremely time-consuming committee to be appointed in each district which will contain, by the bill, at least ten members. It will tie up a considerable amount of time of the Chief Judge, the Clerk and a Magistrate from every district, to say nothing of the time of otherwise already busy people. That is a typical academic/legislative approach to everything, and it makes no sense.

The second big problem is the micro-management that this bill constitutes. I doubt that it's constitutional, but I don't suppose we ought to throw that up at them unless they get serious.

The third problem is "overkill." This is going to require regularly scheduled conferences which will be totally useless and does not recognize the benefit of quick telephone conferences which solve most problems, and need not be a part of some master plan.

Another bad aspect of the bill is the enormous amount of paperwork it is going to cause each district, the Circuit Council and the Federal Judicial Center. Everybody devises and writes up plans, submits them to each other for further study and further submission and then all report back to an eagerly waiting Congress who will ignore the whole mess.

There is a germ of good idea here. We know from working in other districts that some districts have no plan, and operate as this district formerly did. Congress could authorize, fund and mandate the creation of general outlines and the teaching of management to selected judges magistrates and clerks.

If they funded the Federal Judicial Center adequately, seminars could be held in every Circuit which would include the Chief Judge, a magistrate and a clerk. In about three days they could all be taught a system which would work in their districts. With the threat of foolish legislation like S. 2027 hanging over their heads, even our most reluctant brethren would begin to move it.

United States District Court
EASTERN DISTRICT OF CALIFORNIA
5116 U.S. COURTHOUSE
1130 O STREET
FRESNO, CA 93721

CHAMBERS OF
ROBERT E. COYLE
CHIEF JUDGE

March 30, 1990

Hon. Robert F. Peckham
U. S. District Judge
P. O. Box 36060
San Francisco, CA 94102

Re: Biden Bill, S.2027

Dear Bob:

While I plan on sending you additional comments, I thought you might be interested in the enclosed although you might well have seen it previously.

Very truly yours,

Bob

ROBERT E. COYLE, Chief Judge
Eastern District of California

REC:mos

RESOLUTION OF

NATIONAL CONFERENCE OF FEDERAL TRIAL JUDGES

BE IT RESOLVED: That for the reasons stated in the letter dated March 6, 1990 from Chief Judge Barefoot Sanders to Honorable L. Stanley Chauvin, Jr., President of the American Bar Association, the National Conference of Federal Trial Judges opposes the enactment of S.2027, the proposed Civil Justice Reform Act of 1990.

DATED: March 9, 1990.

NATIONAL CONFERENCE OF
FEDERAL TRIAL JUDGES

By: _____
BAREFOOT SANDERS
Immediate Past Chair, NCFTJ, and
Chair, Committee to Review S.2027

United States District Court

NORTHERN DISTRICT OF TEXAS
1100 COMMERCE STREET
DALLAS TEXAS 75242

CHAMBERS OF
JUDGE BAREFOOT SANDERS

March 6, 1990

Mr. L. Stanley Chauvin, Jr.
President
Board of Governors
American Bar Association
P.O. Box 1748
Louisville, Kentucky 40201

RE: S.2027, Civil Justice Reform Act of 1990

Dear Mr. President:

As Immediate Past Chair of the National Conference of Federal Trial Judges, I write in behalf of the Conference to express our alarm and deep concern about the provisions of S.2027, the proposed Civil Justice Reform Act of 1990. I also write as the Chief Judge of a metropolitan area court, the Northern District of Texas. I am assigned about 500 civil (and 100 criminal) cases per year; 80% of my cases are less than one year old and I consider my docket to be current.

The federal trial judges see S.2027 as an attempt by Congress to micro-manage the courts, and to require the courts to micro-manage lawyers. The bill has two apparent, and worthy, goals -- decreasing the costs of litigation and increasing the speed of resolution of civil cases. Unfortunately, the bill will serve neither of these goals; in fact, the problems are more likely to be exacerbated than ameliorated. I think I am typical of most federal judges when I state that S.2027 would permanently mangle my docket, increase the cost of litigation, and delay the disposition of civil cases. Moreover, because of the Speedy Trial Act requirements for criminal cases, passage of S.2027 would result in a head-on collision between the civil dockets and the criminal dockets in all federal district courts.

Underlying the bill seems to be an assumption that judges and lawyers are simpletons or worse, who must be closely monitored and carefully guided lest they disserve the public interest.

First, let me put in perspective some of the misconceptions motivating this bill. One of its announced goals is to reduce the cost of litigation. S.2027 assumes that the excessive costs of litigation are caused by the delay in resolution of civil litigation; that premise has not been documented and I doubt that it can be. Delay in trying a case rarely has an effect on the amount of time and money spent on the case since the amount of effort involved in preparing a case for trial is relatively finite. A longer period for discovery will rarely increase the cost of suit, unless one believes, as the bill assumes, that lawyers either prolong discovery to run up fees or wander aimlessly about pursuing whatever discovery comes to mind.

The second goal of S.2027 is to increase the speed with which civil cases are resolved. Yet the assumption that civil cases in the federal system drag on too long for lack of effective judicial management throughout the system is simply not supported by evidence. Indeed, a fair and in-depth review of the annual statistics compiled by the Administrative Office for the U.S. Courts will reveal that delay in civil dockets is not system-wide. Civil case delay comes from huge increases in criminal dockets in many districts, a shortage of judges in some districts, and the backlog of asbestos cases, and savings and loan-type cases, in a few districts. In more and more districts civil cases are being crowded out by the increasing volume of criminal cases, principally drug cases and, in my own district, bank and savings and loan fraud.

Yet the bill in no way addresses this problem. Instead, it imposes a number of requirements on district judges which will only add to our administrative workload, decreasing the amount of time we have available for actually deciding cases. I will address a few of the many areas of special concern which federal trial judges have about S.2027.

1. Track coordinator. (Section 471(b)(2)). Judges now can and do use Fed.R.Civ.P. 16 to set different schedules for different kinds of cases. Under S.2027 some functionary in the district clerk's office will perform this judicial task. Lawyers who disagree with the decision of the clerk's office can appeal to the judge, who can overrule the clerk, but only after holding a conference or filing a

statement of reasons within 30 days. All of this takes time and paper work, and will cause delay. Judges and lawyers do not need, and it is contrary to sound management principles to require, another level of decision making which scheduling by a track coordinator will create.

2. Mandatory scheduling conferences. (Section 471(b)(3)). Some judges now use these effectively. For others like myself they are a waste of time. In my experience, a written status report per Rule 16(b), followed by a scheduling order, suffices. I understand that the mandatory conference can be waived in all except complex cases, but why the uniform requirement that all such cases be the subject of a conference which must be presided over by a judge, regardless of other factors? In complex cases I suggest that it depends on the lawyers, and the type and complexity of the case, as to when and whether a scheduling conference should be held. An artificial time limit is obviously worse than useless. And, of course, personal attendance by attorneys at a scheduling conference increases the cost of litigation -- e.g., attorney's fees and the expense of a transcript of the conference.

Moreover, the bill requires that the scheduling conference be held within 45 days, but the matters the judge must decide at the conference may not be ripe then -- e.g., principal issues in contention, receptivity to settlement, calendaring future conferences. It is a rare complex case, indeed, where the parties know in the first 45 days (before any significant discovery) whether and how the case can be settled. Further, the judge will have to expend considerable time preparing for and holding these scheduling conferences if they are to be meaningful. In the meantime what happens to criminal trials? civil trials? decisions on pending motions? Scheduling conferences are best left to judicial discretion, as they now are.

As I consider S.2027's enthrallment with paper and procedure, I think of one judge in my district who has tired of Rule 16(b). Soon after a responsive pleading is file he sets discovery and pretrial order deadlines, and a trial date, and leaves the case alone unless requested by counsel to intervene. He is current in his docket; he has no complaints from lawyers or litigants. Importantly, he has observed no change in the speed of case dispositions since he abandoned status reports and detailed scheduling orders. There is a lesson in this, I believe.

3. Motions. (Section 471(b)(13)). A report listing the number of motions pending more than 60 days before each judge in a circuit is now circulated to all judges in the circuit every quarter. I assume this section of the bill is designed to encourage some sort of publicity about delays in deciding motions. If so, it is silly. Who will read it? Might it not be counterproductive? Of course, the easiest way to stay current on motions (if that is considered to be an end in itself) is simply to deny any motion which takes more than a few minutes to decide.

It seems to me that the very notion of exerting pressure on a judge by the threat of adverse publicity is antithetical to the purpose of Article III of the Constitution.

4. Discovery. (Section 471(b)(7)). S.2027 would (presumably) curtail excessive and expensive discovery by requiring constant and minute supervision by the judge. I find it ridiculous for the court to be compelled to tell lawyers how and when to conduct discovery. The lawyers know the case better than the judge; if the lawyers agree on a reasonable discovery program (and most do) why should the judge interfere? Currently, if the lawyers do not agree on discovery, the court can intervene and any dispute can be heard by the court or a designated magistrate. Experience teaches that the way to control discovery is to fix a firm, credible trial date after consulting with the lawyers, as most judges now do. S.2027 will not further this.

The bill demeans magistrates, who are an essential element of good case management, by providing that only the judge can hold discovery or case management conferences, monitor complex cases, etc. This is a damaging step backward in judicial administration.

My experience -- and yours also, I suspect -- is that accelerated discovery (which would often be required by the bill), actually drives up litigation costs. It is also my experience that most lawyers conduct discovery in a professional and orderly way. When discovery gets out of hand, motions for protective orders and sanctions, if appropriate, are now available.

5. Backlogs. (Section 474). The notion that cases more than 12 months old are automatically part of a "backlog" is foolish. Some cases simply should not be tried within 12 months of being filed. Granted, a complex, multi-party case can be prepared and tried within 12 months but only with great expense incurred in accelerated discovery, and with tremendous hardship on small firms and less well-to-do clients.

6. The Human Factor. S.2027 wholly fails to recognize that some judges simply move cases faster than other judges. The proposed detailed procedures and paperwork required by the bill will not change this one whit. I am personally familiar -- no doubt you are, too -- with court situations where all judges receive the same type and number of case assignments, yet some judges, though working long hours and following identical pretrial procedures, will dispose of half as many cases as others.

The thesis of S.2027 is that mandated and exotic procedures and more paperwork will make all judges equally competent as managers and produce equal results. This proposition simply does not accord with common sense and judicial experience.

S.2027 makes no distinction between districts and judges that are current, regardless of the procedures they are using, and those that are not. All will be forced to wear the same hair shirt of additional conferences, additional procedures, and additional paperwork. I reiterate -- the problem of delay is not a system-wide problem, but one which is attributable to ascertainable causes, which do not include lack of case management.

If S.2027 is enacted, lawyers, clients and judges will all be the losers. The lawyers will spend more time on useless matters for which they will charge and for which clients will pay. And the judges will spend more time on procedure than on substance.

S.2027 is shallow and misbegotten. The American Bar Association should oppose it.

Sincerely yours,

BAREFOOT SANDERS
CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

cc: Judge William M. Hoeveler
Chair, National Conference of Federal Trial Judges

Judge Marvin E. Aspen
Chair-elect, National Conference of Federal Trial Judges

Ms. Marina B. Jacks
American Bar Association, Chicago

Ms. Irene Emsellem
American Bar Association, Washington, D.C.

APR 5 1990

United States District Court
District of Arizona
Tucson, Arizona 85701

William D. Browning
Judge

April 3, 1990

The Hon. Robert F. Peckham
District Judge Representative
U. S. District Court
P. O. Box 36060
San Francisco, CA 94102

Dear Bob:

Your letter of March 27th, asking for immediate input concerning Senator Biden's "Court Reform" Bill (S. 2027) has prompted me to again review the materials in my office concerning this bill.

In short, it is a disaster. It is also a misleading and inaccurate analysis of what the federal courts of this country, that I am familiar with, are doing. I see nothing in this bill nor in its requirement for an "expense and delay reduction plan" which is not already being effectively done by conscientious district courts across the country. I am sure that there are those among us who are not conscientiously pursuing case management, case movement, case expense and time control measures, but I suspect the legislative body has its inefficient or insensitive members as well. In any event, the entire system shouldn't be burdened when a small minority are the problem.

Senator Biden's bill is a make work bill which would add an unwarranted layer of statistical and clerical work, in most cases which must be performed by the judge, in an already crowded and time intensive judicial environment.

To the extent it excludes magistrates from the process, it is a dangerous suggestion which will only increase demands upon Article III Judges' time.

Senator Biden's bill speaks to goals and solutions as if they were new found wisdom. There is absolutely nothing in the bill that is not now being tried in one form or another by judges with varying degrees of success. The cost of litigation is admittedly high and indeed, in my opinion, too high. We are disenfranchising that segment of society which pays its own legal bills. However, that is a function of legal expense and not the lack of attention to litigation by courts. We do not control the legal bills, nor do we control the zeal and thoroughness by which the lawyer a party

selects prepares his or her case. We can and do deal with abuse and we can deal with misuse of the process if the parties invite our attention to it. United States District judges, with all of the demands on them placed by criminal case loads, do not have time to become ferrets. I believe that we can effectively deal with problems which are crystallized and brought to our attention and I applaud all of the case management techniques which Senator Biden's bill would seek to put into place. My criticism is they are in place.

My Rule 16 conferences cover every item contained in the bill and I have handled small and massive cases in my short tenure on the bench and I do not believe another layer of bookkeeping and reporting requirements is either desirable or will be fruitful.

By adding a layer of bureaucracy and recordkeeping, as well as allowing appeals from procedural decisions by the Court, such as whether a case has been properly assigned to "initial track assignment" creates satellite work and litigation which is not needed and increases delay and expense.

In what is surely an impolitic statement, I have some difficulty in understanding how a body like the U.S. Senate which operates under the most restrictive, archaic and obstructionist rules permitting pettiness to prevail and honoring shadow over substance, can possibly arrogate unto themselves the ability to <u>procedurally</u> manage the work of the judiciary.

The Biden Bill is based upon a false assumption that the federal courts are not doing their work and are not, on a daily basis, coming to grips with the problems which Senator Biden's bill seek to address. We are, and I think are doing so successfully. It is an engine which is required to power a constantly changing machine as new congressional legislation, new private rights of action, more complex litigation and other, as yet unforeseen, demands upon the system. We don't need a new engine, we need to fine tune, from time to time, the engine we have and to provide the tools to those of our brothers and sisters who are willing to work.

There is nothing in Senator Biden's objectives, goals and desires which is anything but laudatory, however, the methodology is unwieldy, unnecessary, time-intensive and self-defeating in its application. I would hope that the Senate would defeat it while

at the same time holding the United States Courts accountable for their ability to manage and process litigation as they have so effectively done throughout their history.

Best personal regards,

William D. Browning
U. S. District Judge

WDB:jp

P.S. Sorry this ran too long--I got carried away.

United States District Court
Eastern District of Washington
950 United States Courthouse
Post Office Box 2136
Spokane, Washington 99210

Chambers of
Robert J. McNichols
Chief Judge

Telephone
(509) 456-6830
FTS 439-6830

March 29, 1990

Honorable Robert F. Peckham
Senior United States District Judge
Northern District of California
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, CA 94102

Re: S. 2027, "THE BIDEN BILL"

Dear Bob:

I have reviewed the proposed legislation, the statement of the Judicial Conference, and the testimony of Aubrey Robinson. I don't know that I can add a great deal more which would be constructive.

Frankly, I believe the Congress is misguided in these efforts to tinker with the internal functioning of the court. As a practical matter, except for all the reporting and paperwork which the bill would require, most districts are managing their civil docket as promptly and efficiently as they can, considering the impact of the criminal cases.

I tend to agree with Aubrey Robinson that (1) the goal of achieving prompt and efficient management of civil cases is a sound one; and (2) the provisions of the proposed legislation may impair rather than enhance the ability of the Judiciary to achieve that goal.

The fundamental flaw which I see in the proposed legislation is the premise that the Congress is better able to manage civil litigation than is the Judiciary.

It would seem to me that an alternative to the legislation would be to persuade the Congress to permit the Judiciary, through the appropriate committees of the Conference, to address the issue through the rulemaking authority with modifications of existing rules and adoption of new rules, if necessary. This would still

leave the Congress with the final word, and the real input would come from the judges and lawyers who must deal with the problems on a day by day basis.

If Congress could ever be made aware of the mess it has created in the criminal area since 1984, it might be inclined to leave the area of civil litigation to the courts.

Sincerely,

Robert J. McNichols

Bob
Hope to see you in Alaska!

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

A. LEON HIGGINBOTHAM, JR.
Chief Judge

22613 United States Courthouse
Independence Mall
601 Market Street
Philadelphia, PA 19106-1792
(215) 597-9157

March 29, 1990

Honorable Robert Peckham
District Court Judge for the
Northern District of California
P.O. Box 36060
450 Golden Gate Ave.
San Francisco, CA 94102

RE: Civil Justice Reform Act of 1900

Dear Bob:

I know you have received several suggestions as to how the Biden court reform bill should be approached. I have left the issue of analysis primarily to the district court judges in this circuit, since they are the ones most affected by it and they have the greatest expertise. I am enclosing a memorandum from Judge Jay C. Waldman, who for many years was the chief of staff and ranking deputy to Attorney General Thornburgh. His memo makes a great deal of sense to me. It also confirms my belief that what we need at times like this is for the Judicial Conference to hire private lawyers such as a John Gibbons or a Fred Lacy with the understanding that they could spend substantial time preparing arguments and a response to such a bill. It is unfair and inefficient for busy trial judges to have to wage this battle almost alone. I am sending a copy of this letter to Aubrey Robinson, who has made an effective presentation to the Senate, to the other members of your committee, and to Bill Nealon, our district representative to the Judicial Conference. Bill may be sending you comments from other judges in the circuit.

With my appreciation to you and the committee for its work on this important matter, I am

Sincerely,

Leon

A. Leon Higginbotham, Jr.

ALH/pd

cc: Judge Nealon
Judge Waldman
Judge Barker
Judge Nangle

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CHAMBERS OF
JAY C. WALDMAN
JUDGE

5918 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA, PA 19106
(215) 597-9644

M E M O R A N D U M

TO: Honorable John P. Fullam, Chief Judge

FROM: ~~Honorable~~ Jay C. Waldman

DATE: March 28, 1990

RE: Corrected Copy of March 27, 1990 Memorandum

Attached please find a corrected copy of my memorandum of March 27, 1990, regarding the Civil Justice Reform Act of 1990.

The word "authorized" in the third line of the next to last paragraph should, of course, have been "authored," and the word "form" in the thirteenth line of that paragraph should be "from."

JCW:imi

Attachment

cc: Honorable Leon A. Higginbotham, Jr.
Chief Judge

Honorable Louis C. Bechtle
Chief Judge - Designate

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

CHAMBERS OF
JAY C. WALDMAN
JUDGE

5918 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA, PA 19106
(215) 597-9644

MEMORANDUM

TO: Honorable John P. Fullam, Chief Judge

FROM: Honorable Jay C. Waldman

DATE: March 27, 1990

RE: Civil Justice Reform Act of 1990

This memo is an attempt to respond to your request at the Board of Judges meeting yesterday.

While I have testified, lobbied and participated in "mark-up" sessions on Capitol Hill on a number of occasions, with few exceptions I have not done so for many years. In short, I possess no particular wisdom in this area. It is my impression, however, that some version of this bill is likely to pass.

I do not believe that arguments broadly based on the concept of separation of powers are likely to be persuasive at this juncture. I believe that arguments premised on the exaggerated perception of the need for "reform" or the efficiency of the federal courts vis-a-vis many state courts would be received with even less enthusiasm. I believe that the best approach is to commend the Chairman for his interest in judicial efficiency and to suggest certain modifications that might better address the source of his concerns and better reflect the daily realities of managing a docket. I believe that we should offer constructive changes and not just carp and criticize the whole endeavor.

No plan will be realistic or productive if it does not take account of at least the following three realities:

1) The vast majority of civil cases settle. If this percentage (approximately 90%) were reduced in any appreciable way, our system would collapse without the addition of substantially more judges, even if judges spent every working minute in the courtroom. Thus, the real issue is how to settle civil cases more efficiently and not how to try them more expeditiously.

2) Most delay in the progress of civil litigation results from stipulations or agreements among counsel to extend deadlines (for filing pleadings, responding to motions, concluding discovery, etc.) imposed by the Federal Rules or the courts, and by the filing of non-meritorious but time-consuming motions.

3) Increasingly, civil litigation is preempted in many districts for varying amounts of time by the influx of drug cases and the Speedy Trial Act. This problem will be exacerbated by U.S. Attorney-district attorney agreements, such as the one recently consummated in Philadelphia, under which increasing numbers of routine drug cases developed by local law enforcement will be sent to federal authorities for prosecution. Under the Philadelphia agreement, assistant district attorneys will be designated as special assistant U.S. attorneys to handle these cases. While partly motivated by federal preventive detention provisions and generally longer federal sentences, these agreements also reflect the increasing problem state courts have in processing their cases.

This leads to the following specific observations about this bill.

The provision calling for a monthly publication of the number of motions outstanding for 30 days, how many opinions each judge has authored and how many trials each has conducted creates a false perception of efficiency, or lack thereof, and may prompt judges to allocate their time and efforts in a way that does not promote real efficiency within the system. A judge should be thorough as well as efficient. Judges should not be discouraged from carefully considering potentially meritorious dispositive motions, preparing for complex trials and spending time on settlement efforts. If Congress is going to adopt a measure for performance, it ought to be the total number of matters resolved each month or quarter, and the average time for processing a matter from filing to closure. This would be a more accurate measurement of "efficiency," and would put a premium on resolving cases quickly and without costly trials. The number of motions outstanding for more than 30 days fairly constitutes a measure of efficiency only if it is accompanied by the numbers of motions filed and decided that month, as well.

The provision imposing on judges a non-delegable duty to conference every case 45 days after an answer has been filed would create inefficiency. In a district where an average docket is 400 cases per year, and given that no group of attorneys likely can get into and out of any discussion in less than one-half hour, this requirement will result in judges spending about 200 hours or one working month per year on conferences. Judges should be free to conference those cases, at

such times, as reason and experience indicate will likely be productive.

The provision requiring judges to issue scheduling orders with fixed deadlines in each case within 45 days of the filing of an answer is a good one and begins to address the problem. If fixing a firm trial date, however, is read as prohibiting the use of trial pools, the requirement will promote inefficiency. When a case unexpectedly settles or must be continued, a judge should be able to call another case on very short notice.

Some other proposals that might help quench the Committee's thirst for procedural reform without exacerbating current problems include the following:

1) Direct that all districts maintain court-annexed arbitration programs.

2) Mandate that judges grant extensions of scheduling deadlines only upon a finding of necessity or good cause, even when the attorneys stipulate to an extension. This will deter abuses, and create a record of the kinds of reasons for delay suitable for future study and analysis.

3) Require that a lawyer seeking an extension certify that his client approves. This should help to address the corporate and insurance company complaints about the length and attendant cost of litigation. They can instruct their lawyers to not request or consent to any delay. Conversely, parties who authorize extensions cannot later credibly be heard to complain about delay.

4) Require judges to resolve discovery disputes and decide discovery-related motions within 30 days, absent exceptional cause.

5) Legislatively repeal case law that weakens the impact of Fed. R. Civil P. 11 and 37.

6) Provide additional resources, including support staff as well as new judges. Authorize an additional law clerk for each active district judge, or authorize funds for floating clerks or staff attorneys such as the circuit courts have.

The foregoing is not particularly profound, but may be of some utility to those representing us before the Congress and those who asked that you solicit our views.

JCW:imi

cc: Honorable Leon A. Higginbotham, Jr.
Chief Judge

Honorable Louis C. Bechtle
Chief Judge - Designate

United States District Court
Eastern District of Washington
949 United States Courthouse
P. O. Box 1432
Spokane, Washington 99210-1432
(509) 353-2180
FTS 439-2180

Justin L. Quackenbush
Chief Judge

April 2, 1990

PERSONAL & CONFIDENTIAL

Hon. Alfred T. Goodwin
Chief Judge
United States Court of Appeals
P.O. Box 91510
Pasadena, CA 91109-1510

Re: Biden Bill and Quarterly Statistics Reports

Dear Chief:

As Owen Panner, Barbara Rothstein, and I were returning from Palm Springs, we discussed the fact that if all the district courts were complying with Fed. R. Civ. P. 16 (b), which requires a scheduling and trial order to be entered within 120 days of the filing of the complaint, we would have a complete defense to Sen. Biden's bill. It has been my observation that in many districts, including this district, the Rule is ignored by many judges.

We also discussed the quarterly filings of cases under advisement. It was suggested that it may well be that accurate reports are not being filed in some instances. Yesterday's paper had the enclosed article about a motion that has been under advisement by a federal judge from another district in this circuit for between 18 months and 2 years. Since I am a member of the Statistics Committee, I checked this judge's last quarterly filing and sure enough, the filing stated that he had nothing under advisement for more than 60 days.

The purpose of this letter is not to "tell" on another judge. However, this is an example of the type of inaction that undoubtedly was the basis for the conclusions reached in the study which led to the Biden Bill. I hope the enclosed story does not reach Sen. Biden. I sense that this may be more of a problem than anyone has realized. There also appears to be a problem in other districts with the accuracy of the quarterly reports.

There has been a problem is this district with failure to timely schedule Rule 16 conferences. Despite my suggestions in this district, the attitude seems to be that such matters are strictly within the discretion of the judge assigned the case and the Chief Judge has nothing to say about the matter. That is probably correct.

At the present time there is no requirement that judges report the number of their cases which have not been scheduled as required by Rule 16. It may be that a reporting requirement would result in greater compliance with Rule 16 and might even diffuse, to some extent, the need for the Biden Bill, although that is a matter that you and Bob Peckham would be more familiar with.

Because of the nature of the complaint in the above-referenced newspaper article, and because it could be used to support the Biden Bill, I am sending it to your personal attention, even though it does not involve a judge from this district. I am not forwarding it to the other recipients of this letter.

Very truly yours,

JUSTIN L. QUACKENBUSH
Chief United States District Judge

cc: Judges Peckham, Rothstein, & Panner

MARTIN PENCE
JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
POST OFFICE BOX 50128
HONOLULU, HAWAII 96850

March 22, 1990

Honorable Robert F. Peckham
Senior U. S. District Judge
P. O. Box 36060
450 Golden Gate Avenue
San Francisco, CA 94102

re: Senate Bill 2027

My dear Bob,

I just received Al Goodwin's memo of March 15 regarding your report on the Biden bill, S 2027, apparently mandating the master calendar system. Since I didn't see your report, I can only hope that you had in it a detailed history of San Francisco's problems during the years it had the master calendar system. It was during the 1960's that I was in and out of the San Francisco court many times, while George B. Harris was Chief Judge. I don't know how many times I was given "old" cases for hearings on motions. Without any exception, every one of the files showed that the cases had been bounced from judge to judge to judge, with no attempt on the part of any judge to push the case to a speedy conclusion.

If one is interested in horror stories or conspicuously bad examples of what happens to cases under a master calendar system, one but needs to refer to the cases that fell on Ollie Carter's desk. I only too vividly recall George Harris plaintively asking me, as a fellow chief judge, what he could do to get Ollie to decide any and all of the motions and/or cases that fell to Ollie under the master calendar. As to every suggestion that I might make regarding how Ollie might be pushed into moving the cases along, George replied, "I've already tried that."

As you know, the reason that the circuit abandoned the master calendar system was to stop its musical chair routine and make each individual judge responsible for moving the cases along.

At the present time, as I have observed it, the Ninth Circuit's system of using the pressure and authority of the Judicial Council of the Circuit to enforce action on the part of dilatory judges is working most successfully. I agree with you that the wheel does not need to be re-invented.

Aloha,

MARTIN PENCE
Senior U. S. District Judge

cc: Honorable Alfred T. Goodwin
Chief Judge

United States Court of Appeals
Ninth Circuit
The Pioneer Courthouse
555 S. W. Yamhill Street
Portland, Oregon 97204

Chambers of
John F. Kilkenny
Senior Circuit Judge

APR 4 1990

March 29, 1990

Mr. Robert Peckham
United States District Judge
Northern District of California
P.O. Box 36060
San Francisco, California 94102

RE: S.2027, "THE BIDEN BILL"

Dear Bob:

I wholeheartedly oppose the entire legislation.

The courts need a few years, if not longer, to analyze and interpret enormous amounts of legislation already passed by the Congress including the guidelines on certain legislation, including but not limited to the Sentencing Guidelines. God knows when the Circuit will finally work out a formula on these guidelines.

Moreover, the move to give the attorneys the privilege of questioning their prospective jurors would be a disaster. Then we would face what is happening in most states, an enormous waste of time in the selection of a jury in any important case.

Sincerely,

John F. Kilkenny

JFK:ni

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA, VIRGINIA 22320-2449

March 27th, 1990

CHAMBERS OF
ALBERT V. BRYAN, JR.
CHIEF JUDGE

(2)

P.S. Frank:
This is our response to your inquiry. Hope you don't mind our going straight to the source.
Albert

(1)

The Honorable Joseph R. Biden, Jr.
United States Senate
Washington, D. C. 20510

Re: Senate Bill 2027

My dear Senator Biden:

The Eastern District of Virginia has, for at least the past several years, been among the top ranked courts in the country for the minimum time between filing and disposition and between issue and trial of civil cases. For the year 1989, the court was ranked first in "issue to trial" and second in "filing to disposition." On behalf of the nine active judges and four senior judges who sit on this court, I write to express our concern over possible passage of S. 2027.

(3)
Albert:
No problem
Many thanks
Best regards
FJ

It is our unanimous feeling that imposing the regimen that S. 2027 mandates would, in our court, impede, not further, the "just, speedy and inexpensive determination" of civil actions which the bill recites as its objective.

This court has a substantial and varied civil docket, including many complex cases. The truth of the matter is, however, that except for the exceptional case, 95% of the cases, including complex ones, do not need the "massaging" that S. 2027 envisages. We have had such exceptional cases, e.g., the Dalkon Shield cases and the asbestos cases. These warrant and have received extensive and successful attention to expedite their fair resolution under existing procedures and with innovative ones devised by the judges involved.

cc: Judge Robert Peckham

We object, as strenuously as we can consistent with our respect for the concerns of our coordinate branch of government, to having "fixed" that which "ain't broke." Should you think it productive, I would be glad to discuss in more detail with any member of your staff, our reasons for feeling that S. 2027 is unnecessary.

Very truly yours,

A. V. B. Jr.

Albert V. Bryan, Jr.

cc: All Eastern District
of Virginia Judges

H. Theodore Hartman

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
312 NORTH SPRING STREET
LOS ANGELES, CALIFORNIA 90012

CHAMBERS OF
JAMES M. IDEMAN
UNITED STATES DISTRICT JUDGE

213/894-0413
FTS 798-0413

MEMORANDUM

To: Judge Robert Peckham
District Judge Representative to the
Judicial Conference of the United States

From: Judge James M. Ideman

Re: S.2027, "The Biden Bill"

Date: March 29, 1990

I strongly oppose this bill. In its present form, it would be a disaster for our court.

JMI:lg

APR 3 1990

United States District Court
Northern District of California
United States Courthouse
San Francisco, California 94102

Chambers of
J. P. Vukasin, Jr.
United States District Judge

M E M O R A N D U M

TO: Judge Robert F. Peckham

FROM: Judge J. P. Vukasin, Jr.

SUBJ: S.2027, "The Biden Bill"

DATE: April 2, 1990

Thank you for giving us an opportunity to give input on this.

My views are:

1. Running civil and criminal calendars on independent parallel tracks will unavoidably lead to conflicts. What does a trial judge do when a firm civil trial date and a mandated criminal trial date conflict?

2. The proposed public reporting requirements will unavoidably lead to unjust criticism of judges and bring unfair and unnecessary criticism of the courts.

3. You are not going to convert "bad judges" into "good judges" with this kind of legislation.

APR 2 1990

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

March 29, 1990

FRANK A. KAUFMAN
United States District Judge
Baltimore, Maryland 21201

Honorable Robert F. Peckham
Chairman, Subcommittee of the
Executive Committee of the Judicial
Conference of the United States
United States District Court
P.O. Box 36060
450 Golden Gate Avenue
San Francisco, California 94102

Dear Bob:

Re: S. 2027 - The Biden Bill

I am enclosing letters from Chief Judge Harvey dated March 27, 1990 on behalf of himself, and from Judges Motz and Smalkin on behalf of themselves, respectively dated March 28, 1990 and March 22, 1990. These are individual letters from three judges of the United States District Court for the District of Maryland. I am also enclosing a copy of my memorandum of March 23, 1990 which was sent to each circuit, district and bankruptcy judge and magistrate of the Fourth Circuit. I will be sending along the views of the various courts and judges of the Fourth Circuit as soon as I receive them.

Despite the fact that Judge Smalkin's letter is addressed to Senator Biden, he asked me to forward his letter to you as chairman of the subcommittee and to leave it up to you as to whether the letter would or would not be sent to Senator Biden or simply retained for consideration and use by your committee. Judge Motz's letter has been sent by him directly to Senator Biden.

Sincerely,

Frank A. Kaufman

cc: Honorable Alexander Harvey, II
Honorable J. Frederick Motz
Honorable Frederic N. Smalkin

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MARYLAND
BALTIMORE, MARYLAND 21201

ALEXANDER HARVEY II
CHIEF JUDGE

March 27, 1990

MEMORANDUM TO JUDGE FRANK A. KAUFMAN,
FOURTH CIRCUIT DISTRICT REPRESENTATIVE
TO THE JUDICIAL CONFERENCE OF THE UNITED STATES

RE: S.2027 "The Biden Bill"

In your memorandum of March 23, 1990 to all judicial officers in the Fourth Circuit, you indicate that you have been asked to obtain the views of judicial officers in this Circuit concerning the Biden Bill so that such views may be transmitted to Judge Peckham. My comments on this Bill are contained herein.

My principal objection to the Biden Bill is that for many courts, like ours, this legislation will have a serious adverse effect on the ability of the court to process civil litigation promptly and efficiently. There is absolutely nothing new about the objectives of the Bill. Certainly for at least 20 years many different arms of the federal judiciary have been striving to accomplish efficient docket control in the civil area so as to minimize cost and delay. Representatives of the Brookings Institute and those administrative assistants in Congress who drafted this Bill have apparently never been active litigators in federal court. They have suddenly discovered concepts which active trial attorneys and federal trial judges have always known. Means for accomplishing the objectives of the Bill have for many years been pursued by federal trial judges and related agencies in many different ways, including, inter alia:

(1) amendments to the Civil Rules;

(2) the adoption of and amendments to Local Rules;

(3) procedures adopted by Judicial Councils including in this Circuit regular reporting by judges and magistrates of three-year old cases and of opinions held sub curia;

(4) new judges seminars sponsored by the Federal Judicial Center;

(5) annual workshops held by the Federal Judicial Center;

(6) programs at Judicial Conferences; and

(7) procedures set forth in the Manual for Complex Litigation (Second), which was written by judges for judges.

Congress, apparently unaware of what we have been doing, suddenly wants to legislate docket control. The result will be greater inefficiencies and delay. The traditional Congressional approach to problems has been adopted here, namely the creation of a costly bureaucracy. There are mandatory reporting requirements, and the volume of statistics which will be produced necessarily will require the adding of additional personnel to analyze the figures so that they may have some meaning.

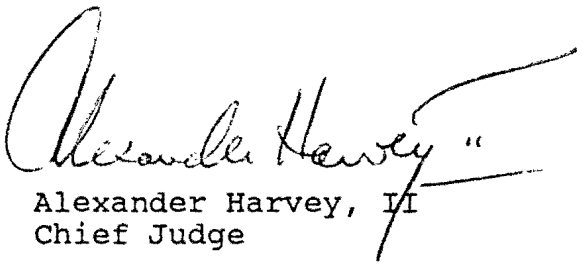
One of the key requirements of the Bill is that each court develop a comprehensive plan to reduce costs and delay. This Court already has such a comprehensive plan which has worked very well in reducing costs and delays in civil litigation, namely our Local Rules. These Rules are regularly amended by a Committee made up of active trial attorneys and members of our Bench. Our Rules work. In the last four years, by dint of hard work by all of our judges and the application of our Local Rules and procedures, the number of civil cases pending has been reduced by 1,000. This has occurred even though we have never during that period of time been up to full strength. Were the complicated procedures set forth in the Biden Bill to become law, I believe that we would be much less efficient than we have been in the past.

Whatever Congress enacts, individual judges will continue to manage their own dockets, as they have in the past. Flexibility is needed, not a rigid imposition of nationwide standards. It would seem to me that there is no way that the requirements of the Biden Bill can be effectively enforced. Adequate enforcement can be accomplished only if individual dates in each individual case are monitored by some one other than the judge assigned to the case. Obviously, monitoring of this sort would not be possible.

One cannot read Senator Biden's remarks delivered on January 25, 1990 when he introduced this Bill without wondering whether he truly comprehends the manner in which civil litigation is handled today in most of our federal courts. The Senator indicates a necessity for expanding training without noting the programs being presently sponsored by the Federal Judicial Center. He relies on the views of "law professors and other independent experts on judicial management who have examined

these issues." These experts have certainly never managed a civil docket. It is the views of the active trial judges themselves which should be heeded by Congress and not those of self-appointed outside experts.

I appreciate the opportunity to express my views concerning this legislation.



Alexander Harvey, II
Chief Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(301) 962 0782
FTS 922 0782

March 28, 1990

The Honorable Joseph Biden
Chairman
Senate Judiciary Committee
Washington, D.C. 21220

Dear Senator Biden:

I have reviewed with great interest the "Civil Justice Reform Act of 1990," which you have introduced in the Senate. I agree with you completely that the district courts should manage their cases effectively, and I think that I can say without undue pride that since I was appointed to the bench in 1985, I have been able to run my own docket well. I am writing to you, not because I am in opposition to what your proposed legislation seeks to accomplish, but because I fear that in certain respects its provisions would exacerbate rather than resolve the problems which the district courts face.

If I may, I would like first to describe briefly the manner in which I manage my own cases in order to establish a context for expressing the concerns which I have. I will then point out certain provisions in the proposed legislation which would interfere with the procedures which I follow, and conclude by recommending that the proposed legislation set goals for district courts to seek to attain instead of dictating specific management techniques. Obviously, I am speaking only for myself. Other judges and the Judicial Conference may have broader criticisms of the proposed legislation. However, I am reluctant merely to let others speak to what I think is a matter of the utmost importance to those of us who are laboring in the field.

My Present System

The system which I am about to describe is my own but it does not differ substantially from the systems used by many colleagues here in the District of Maryland. Our respective management techniques vary in only small respects (based upon our individual styles and experience).

1. As soon as an answer is filed (either as the defendant's initial response or after the denial of a preliminary motion), I usually issue a scheduling order. The dates set in the order depend upon the nature of the case, i.e,. I "track" cases as your proposed legislation suggests. If the case is a relatively simple one in which I think it likely that no summary judgment motion will be filed (or will be denied, if filed), I set a rather short discovery and status report deadline (90 to 120 days from the date of the order), a summary judgment motions deadline (30 days thereafter) and a trial date. If the case is a slightly more complex one which I think may be resolved by summary judgment, I set a similar schedule except that I do not set a trial date. The reason that I do not do so is that the setting of trial dates which realistically will not be met confuses the scheduling process and, in my opinion, is counterproductive to effective case management.

2. If my preliminary review of the file discloses that the case is particularly complex, I immediately hold a conference with counsel to set an agreed upon schedule. Usually in such a case I do set a trial date (even though it is possible that the case will be resolved on summary judgment) since the trial is likely to be a year or more in the future and to wait to set its date would cause undue delay.

3. Occasionally, in complex cases where counsel think it advisable, I hold periodic conferences during the discovery period, as contemplated by the proposed legislation, to monitor the progress of the case and structure its development. However, such cases are the exception and not the rule. In most cases early conferences would be a total waste of time. I have found that discovery can be effectively managed by (1) our Local Rules which, for example, limit the number of interrogatories and requests for production which can be filed without court order, (2) prompt rulings (usually in short opinions in letter form) concerning written discovery disputes and (3) my making myself available by telephone when disputes arise during a deposition. Over the next year I intend to experiment with another discovery management technique: including in my scheduling order a limit on the number of hours (varying according to the nature of the case and the amount in controversy) of deposition testimony which can be taken.

4. At the discovery deadline counsel are required to submit a status report to me, stating, among other things, whether either side intends to file a summary motion (within the deadline which has already been set). If counsel indicate that a summary judgment motion will be filed, I ordinarily wait to set a conference with counsel until the motion has been filed, briefed and decided. (I customarily issue my decision within 30 days of the date after the last brief has been filed.) Otherwise, immediately after receiving the status report, I hold a conference at which I set a trial date (if one has not already been set), a pre-trial conference date and deadlines for the submission of the pre-trial order, motions in

limine, proposed jury instructions, etc. During the conference I also explore the question of settlement with counsel, asking them if they believe that a settlement conference (usually with a magistrate) would be helpful.

My experience has been that under the system which I have just outlined trials in routine cases are held within six to eight months of the date that they come to issue. I do not seek to impose an arbitrary deadline for trials in more complex cases (there is a risk of judges overmanaging as well as undermanaging their docket) but I think I can fairly say that these cases are reached for trial on a schedule which counsel and the parties find to be entirely acceptable.

My Concerns About Certain Aspects of the Proposed Legislation

Although it works extremely well for me, I do not believe that my case management system is perfect or that it should be imposed upon others. By the same token I do not believe that when I am already doing my job effectively, someone else's system should be imposed upon me. Thus, to the extent that the proposed legislation would have that effect, I think it is unwise. Furthermore, there are certain provisions in the proposed legislation which would directly interfere with effective techniques which I am presently employing.[1] These sections are as follows:

1. Section 471(b)(2) provides that the clerk of court (or other person to whom case tracking authority is delegated) will be responsible for initial case tracking and that disputes concerning case tracking will first be raised with the clerk. I am sure that I speak for most judges and knowledgeable lawyers when I say that clerks' offices tend to be bureaucratic and that cases are far more effectively managed by a judge and her or his staff than by a clerk's personnel. Moreover, counsel will be far more inclined to quarrel with the clerk than they would with a judge concerning scheduling matters, thereby increasing rather than decreasing the cost of litigation. If some judges would like to delegate scheduling responsibility to the clerk, they should be free to do so. However, such a practice should not be forced upon them. I am effectively "tracking" my own cases now by issuing scheduling

[1]Although our magistrates in Maryland are extremely able and provide great assistance to me in various respects, e.g., trying certain cases by consent of the parties, holding evidentiary hearings in prisoner cases and conducting settlement conferences, I do not ordinarily ask them to help me in resolving discovery disputes and in other case management matters. However, many of my colleagues both here in Maryland and in other districts do utilize magistrates in these respects, and to the extent that the proposed legislation discourages their use, I believe that it is ill-advised.

orders with different deadlines in different types of cases, and there is no reason to transfer that power and responsibility from me to someone who would not do as good a job.

2. Section 471(b)(3) contemplates that "discovery-case management conferences" will be the norm. They should be the exception. I know that district judges are sometimes viewed as being constant complainers, but, in truth, we are extremely busy. In addition to our civil docket, we carry heavy criminal caseloads, and in the civil area itself we not only have many cases to try but also many weighty motions to decide.[2] We simply do not have time to hold conferences for the sake of holding conferences, and in most cases "discovery-case management conferences" are unnecessary. If scheduling orders are issued promptly, if judges are recognized as having the authority to limit the amount of discovery[3] and if judges (or magistrates) are available to resolve discovery disputes as they arise, most cases will be effectively managed without more. Front-end conferences should be reserved for the few cases in which they genuinely will assist the progress of the litigation.

3. Several subsections of section 471(b) provide that trial dates should be set early on. As I indicated above, I agree that in some types of cases (routine ones where successful summary judgment motions are unlikely or very complex ones where a trial date a year or more away must be set), this is appropriate. However, trial calendars become meaningless if they contain dates for trials unlikely to be held, and therefore I believe that in cases which may well be resolved by motion it is not conducive to sound management to set a trial date at too early a stage.

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[2]Any analysis of the crisis in civil litigation must include a realistic assessment of the burdens imposed by the federal courts' extensive criminal docket. This is not to say, however, that it is at all inappropriate to focus upon improved management of the civil caseload. To the extent that district judges can enhance their performance, they should do so.

[3]I note in that respect that the "Local Rules Project" of the Judicial Conference's Committee on Rules of Practice and Procedure has taken the position that local rules adopted by fifty-nine district courts (including Maryland) limiting the number of interrogatories are invalid as being inconsistent with the Federal Rules of Civil Procedure which contain no such limitation. If the Project's view were to prevail, district judges would be stripped of one of the important tools which they have to prevent discovery abuse. Moreover, the Project's position epitomizes the danger of an overly rigid approach to management questions and of curtailing (by national rule or legislation) the power of individual district courts - confronted with the day-to-day reality of docket management - from adopting management techniques which they find to be valuable.

4. Section 471(b)(10) requires that each district court have "a comprehensive alternative dispute resolution plan." I certainly have no objection to alternative dispute resolution procedures. However, I do believe that the current enthusiasm for alternative dispute resolution is somewhat inflated. My experience demonstrates that although most meritorious claims are eventually settled, it is the imminence of trial which is the final catalyst to settlement. This is not to say that alternative dispute resolution procedures do not have an important role in the process. In Maryland we use settlement conferences, conducted by our magistrates and attended by representatives of the parties as well as by counsel, to great effect.[4] However, it is the certainty that issues not amicably settled will be judicially decided which ultimately results in dispute resolution. Therefore, management and reporting procedures should not be so rigid and cumbersome that they require judges to spend substantial time outside of the courtroom or away from their motions work. In other words, we should control our system of management rather than being controlled by it.

5. Unlike, I am sure, many of my colleagues, I have no objection to section 471(b)(13) which would require the establishment of "procedures for the regular publication of pending undecided motions and caseload progress for each individual judge . . . ." Although such procedures might have the unfortunate effect of discouraging judges from helping one another (as we do here in Maryland) because of concern about their individual statistics, I agree that, particularly because we have life tenure, we should be held publicly accountable. However, there is another provision which I find somewhat offensive. Section 471(b)(6)(B) requires that if two or more extensions of a discovery deadline are granted, "the judges granting such extensions shall report the case to the Administrative Office of the United States Courts." As a practical matter, this reporting requirement is not onerous. However, it symbolizes one of the things which I think is wrong with government today: it appears to suggest that constitutional officers are responsible to the bureaucracy, not that the bureaucracy is responsible to constitutional officers. It is this which I believe

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[4] I note, however, that for the past year Judge Joseph Young, one of our senior judges, has on an experimental basis held settlement conferences in a number of cases shortly after they have been filed. His experiment has confirmed what our general experience has been: that cases hardly ever can be resolved at that juncture. Since this is so, the considerable time which would be consumed in the front-end discovery management conferences contemplated by the proposed legislation, see section 471(b)(3)(A), is not justified as an early effort to achieve settlement.

many judges find to be the most demeaning aspect of the proposed legislation.

All things being equal, I would probably prefer that Congress leave entirely to the courts the question of managing their own cases. However, I appreciate the concerns which have led to the proposed legislation and agree that the problems which it seeks to address are matters of significant public interest. I also am enough of a realist to suspect that I would have little hope of convincing you that no Congressional action in the area is advisable. However, I do hope that what I have said may persuade you that the proposed legislation should be somewhat modified to delete the provisions mandating the adoption of particular management techniques and to substitute in their stead specific goals, e.g., differential case tracking, the prompt decision of motions, the expeditious scheduling of trials and increased control over discovery, for the district courts to reach by management techniques of their own choosing. I think that this modification would in the long run result in far better caseload management and be more compatible with the doctrine of the separation of powers.

I very much appreciate your consideration of my views.

Respectfully,

J. Frederick Motz
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

CHAMBERS OF
FREDERIC N. SMALKIN
UNITED STATES DISTRICT JUDGE

101 W. LOMBARD STREET
BALTIMORE, MARYLAND 21201
(301) 962-3840
FTS 922-3840

March 22, 1990

Hon. Joseph R. Biden, Jr.
Chairman
Senate Judiciary Committee
Washington, D.C. 20510

Re: Civil Justice Reform Act of 1990, S. 2027 & H.R. 3898

Dear Senator Biden:

I (and many of my colleagues) have been following with great interest your bill to "reform" the federal courts' handling of civil cases. I am writing to give you my views on the bill, as someone with over three years' experience as a District Judge, ten years' experience as a federal magistrate, and a current (and, I think, well-managed) civil caseload. (Of my civil cases that do not settle or go out on motions, almost all are tried within a year to fourteen months of filing.)

The first aspect of the bill that, frankly, upsets me is that it attempts to micro-manage the process of judging, by forcing all federal courts into a mold that some judges have found useful, but that might not have validity in all courts and in all places throughout the country. With all due respect to the participants in the Brookings study (none of whom, I note, was an active judge), the data are simply insufficient to support this attempt at legislative usurpation of the judicial case management function.

The second aspect of the bill that is very upsetting is that neither it, nor the study from which it derives, takes into account the fact that a system that depends for its validity upon the assignment of firm trial dates (as does that proposed in the bill) is a fantasy, given the reality of today's federal criminal caseload. That caseload, given priority by the Speedy Trial Act and ever-increasing as the result of the Drug War's new statutes, agents, and prosecutors, is simply wiping out the civil trial calendar in many districts, as it will soon do in all of them. Until we have adequate judicial resources to deal with this problem, or until the recommendations of the Federal Courts Study Commission can be implemented, firm civil trial dates are no more than wishful thinking in almost every district in this country, and legislation will not make it otherwise.

A third troubling aspect of the bill is its denigration of the role of the magistrate in the management of civil trials. This is uncalled-for, and it does a great disservice to the dedicated corps of magistrates, many of whom are experts in civil case management and very effective at it.

Finally, the bill debases the entire judiciary, treating us as if we were inferior functionaries. The members of the Article III trial judiciary are persons, who, if the words of their commissions are to be believed, were chosen for their "Wisdom, Uprightness, and Learning." We have already had our sentencing discretion gutted by the enactment of guideline sentencing, which has immensely complicated and prolonged criminal cases. Now, our management discretion in civil cases is to be gutted by enforced and burdensome tracking, conferencing, and reporting procedures that will waste valuable judge time that could be better used for the actual trial of cases. This is not even to mention the waste of money and the encouragement of pettifogging over clerical matters that would grow out of the bill.

I most strenuously urge that this bill not be enacted as introduced. It is based upon faulty premises, and it unjustifiably demeans the constitutional officers of a co-ordinate branch of the Government.

I respectfully request that this letter be made a part of the bill's legislative history.

Sincerely yours,

Frederic N. Smalkin
United States District Judge

FNS/fns

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

L. RALPH MECHAM
Secretary

March 23, 1990

MEMORANDUM TO ALL JUDICIAL OFFICERS IN THE FOURTH CIRCUIT

FROM: Judge Frank A. Kaufman, District Judge Representative to the Judicial Conference of the United States

SUBJECT: S. 2027, "The Biden Bill"

Many of you are familiar with S. 2027 ("the Biden bill"), and its House counterpart, H.R. 3898. Last week, the Judicial Conference of the United States voted unanimously to oppose these bills in their present form. A subcommittee of the Conference's Executive Committee, chaired by District Judge Bob Peckham, would welcome receiving thoughts and recommended suggestions on the bills from judges throughout the judiciary. As your district judge representative to the Judicial Conference, I have been asked to obtain the views of the judicial officers in our circuit, and transmit them to Judge Peckham.

Senator Biden has announced his intention to process the legislation on a "fast track", and markup could occur as early as May. Since discussions with Senator Biden's staff are already underway, it is essential that I know your views as soon as possible.

You will shortly receive from Ralph Mecham copies of the bill, a detailed analysis of it, a Conference-approved reaffirmation of case management, and a copy of the testimony presented on behalf of the Conference by Chief Judge Aubrey Robinson. It would be easiest for me if one judge in each district, and one judge on the court of appeals, could be designated to canvass the judicial officers, and then provide me with your comments. I want to ensure that our views are taken into account, and so the sooner I receive them the better.

UNITED STATES DISTRICT COURT
UNITED STATES COURT HOUSE
Los Angeles, California 90012

JOHN R. KRONENBERG
Magistrate

March 30, 1990

The Honorable Robert F. Peckham
United States District Judge
United States District Court
Northern District of California
San Francisco, CA 94102

Re: S.2027, "The Biden Bill"

Dear Judge Peckham:

I have reviewed the subject of this letter and find myself in total agreement with the Judicial Conference in opposing it in its present form.

The effect of the enactment of this Bill would be to force the Courts into a procedural straightjacket which would mandate the time-consuming processing of every case filed. Given the number of cases which are filed and go no further together with the number of cases which are settled without Court effort this would create a monstrous mechanism whose principle achievement would be the multiplication of labor.

The Bill also mandates action, by the district judge which can and is now delegated to Magistrates. It further mandates that a Magistrate be a bystander at meetings and discussions where his participation may never be required. It is the consensus of the Magistrates of this district that we would be spending a great deal of our productive time standing by at meetings while the district judges participate in many pretrial matters now delegated to Magistrates.

In short, I and my colleagues see the enactment of this Bill as a disaster far eclipsing that already imposed by the sentencing guidelines.

The time and effort mandated by this process could be better spent in educating the judiciary in case management as found necessary.

Kindest personal regards,

JOHN R. KRONENBERG
United States Magistrate

JRK:ycg

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

JOHN L. WEINBERG
UNITED STATES MAGISTRATE

March 30, 1990

407 U.S. COURTHOUSE
SEATTLE, WA 98104
(206) 442-5774

Hon. Robert F. Peckham
United States District Judge
P. O. Box 36060
450 Golden Gate Avenue
San Francisco, CA 94102

Re: The Biden Bill

Dear Judge Peckham:

One of the offensive features of the Biden bill is the flat prohibition against United States Magistrates conducting initial status conferences in all cases, or continuing case management conferences in complex cases.

Both the commentary prepared by the Administrative Office, and Chief Judge Robinson's statement, address these provisions in a general way. But the Ninth Circuit can present at least one concrete example of how these precise services by a magistrate can be crucial in a complex case.

That example is the very complex litigation in Nevada arising from the fire at the MGM Grand in Las Vegas. Judge Bechtle from Philadelphia was assigned to the case, and conducted hearings in Las Vegas from time to time. But the regular supervision was done by (then) United States Magistrate Philip Pro. I am confident you could present a ringing endorsement by Judge Bechtle and/or from counsel of the magistrate's contribution to the effective management of that case.

Thank you for inviting suggestions, and for considering this one.

Sincerely yours,

John L. Weinberg
United States Magistrate

JLW/jsp

DARAL G. CONKLIN
UNITED STATES MAGISTRATE
DISTRICT OF HAWAII
P. O. BOX 50122
HONOLULU, HAWAII 96850

TELEPHONE
(808) 541-1308

March 27, 1990

Honorable Robert F. Peckham
P. O. Box 36060
San Francisco, California 94102

Re: Civil Justice Reform Act of 1990

Dear Judge Peckham:

The memorandum dated March 16 and distributed by the Administrative Office arrived yesterday. You will no doubt rue the day you permitted your name to be used as the reference to whom we should write.

I practiced civil litigation for 30 years. I am a member of ABOTA, to which organization Circuit Judge J. Clifford Wallace belongs. I have been a magistrate for four years. I am 64 years old, and hence will not be around that long. I have no axe to grind.

Because of that, I believe I am entitled and qualified (a) to speak with a degree of knowledge and experience as a litigator, and (b) to say what I want about magistrates. Here goes.

1. The proposed act will accomplish the opposite of what it intends, in that it will increase the non-court time of district judges, with a corresponding great increase of paper flow to those judges. Disrict judges as well as plumbers can attest that too much paper clogs the system.

2. As the recent national time-study shows, the courts are already spending 50% of time on drug cases alone, just drug cases, and the high tide of that problem has not yet been seen.

3. Magistrates are beasts of burden. They should be used as such, but under the proposed act, the horses are loaded and the mules sent out to pasture. If the Biden bill provided just the opposite, namely, that magistrates not judges were to perform the statutory tasks, there would be merit to the bill, even though it does entail cumbersome paperwork.

4. Recent legislation has (a) increased magistrates' salaries, and (b) provided a very attractive retirement package. The absolutely certain result, mark my word, will be

that in 1991, less than one year from now, a lot of old duffers will retire as magistrates, and a crop of younger, highly experienced attorneys will be attracted to apply. Now is the time to implement the machinery to utilize that new crop of vigorous beasts of burden.

But the proposed legislation would make them mere household pets, while the district judges would be swamped, and attorneys would embark upon a new form of war by paper, to the greater expense of their clients.

5. As you and I well know, there is one and only one way, a simple way, to relieve any real or perceived civil calendar congestion: give them a trial date that is firm and can be met by the trial court, and stick to it. Most lawyers are scared to go to trial, and it is the looming of that event which makes cases settle. Litigators know this, judges know this, and statistics prove it.

Having now vented my spleen about the Civil Injustice Reform Act, I stop. However, if it should come to pass that the Judicial Conference would want sample "beasts of burden" to appear to testify in opposition to the bill, I volunteer to fly to Washington at my own expense, so to do, under the direction of the Conference.

I wish you good luck and success in your endeavors.

Respectfully Submitted,

Daral G. Conklin
United States Magistrate

DGC:gc

cc: All District Judges
District of Hawaii