L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JUL 9 1990

MEMORANDUM TO : JUDGES, UNITED STATES COURTS OF APPEALS
JUDGES, UNITED STATES DISTRICT COURTS
UNITED STATES MAGISTRATES

Recent editions of The Third Branch have apprised you of S.2027, Senator Biden's original "Civil Justice Reform Act", and the Judicial Conference's opposition to the bill as introduced. You were also apprised of the approval by the Judicial Conference of a 14-Point Program to Address the Problems of Cost and Delay in Civil Litigation.

In order that you will be fully informed, I have attached copies of Senator Biden's revised bill, S.2648, and the introductory statement. Title I of S.2648 is an amended Civil Justice Reform Act, and Title II would create 77 additional judgeships in the U.S. courts of appeals and district courts. A hearing on S.2648 was held before the Senate Judiciary Committee on June 26, 1990, and testimony was presented by three judges. On behalf of the Judicial Conference of the United States, Judge Robert Peckham testified on Title I and Judge Walter McGovern testified on Title II. Judge Diana Murphy represented the Federal Judges Association. Copies of all three statements are attached.

Markup of S.2648 could occur in the Senate Judiciary Committee on July 12 or 26. No House action has been scheduled to date.

L. Ralph Mecham

Attachments

cc: Circuit Executives

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resentation for the District's residents. I believe the citizens of the District of Columbia will always be grateful for our State's leadership. Illinoisans have historically spoken out in favor of national representation for the District of Columbia. In the 75th Congress, Senator Lewis of my State introduced legislation to grant DC voting representation in the House, the Senate, and the Electoral College. Chauncey Reed, a Republican from DuPage County who was chairman of the House Judiciary Committee in the 83d Congress, also joined the campaign for national representation for the District of Columbia.

Today, the residents of the District of Columbia outnumber the residents of five States—Wyoming, Alaska, Vermont, Delaware, and North Dakota. They pay more in Federal taxes than those same States as well as three others—Idaho, Montana, and South Dakota, yet they have no voice when Congress votes on these taxes. When President Monroe signed the proclamation to make Illinois the 21st State in 1818, our Illinois population was just 55,211, less than 10 percent of today's District population.

U.S. citizens in the District of Columbia serve in the military and have been subject to the draft. However, they cannot vote for those in Congress who set our defense, foreign, and military policies. Can we just sit back and continue to accept this inequity within our country? I believe we cannot.

THE WINDS OF DEMOCRATIC CHANGE

We have welcomed the Democratic change sweeping Eastern Europe. It is ironic that the residents of Warsaw, Prague, and the other East European capitals all will have voices in their new legislatures, while the citizens of our Capital still do not.

Honoring the District of Columbia's petition for statehood will once and for all end that inequity for these citizens of the United States of America. It is time for their status to evolve to full statehood.●

By Mr. BIDEN (for himself and Mr. THURMOND):

S. 2648. A bill to amend title 28, United States Code, to provide for civil justice expense and delay reduction plans, authorize additional judicial positions for the courts of appeals and district courts of the United States, and for other purposes; to the Committee on the Judiciary.

JUDICIAL IMPROVEMENTS ACT

Mr. BIDEN. Mr. President, I rise today, joined by my very good friend and the distinguished ranking member of the Judiciary Committee, Senator THURMOND, to introduce legislation that will go a long way, in my view, toward improving the delivery of justice in our Nation's courts.

And the sad truth of the matter, Mr. President, is that we do in fact have a long way to go. Our courts are suffering today under the scourge of two related and worsening plagues.

First, costs and delays in civil litigation have gotten so excessive that the middle class has nearly been priced out, if you will, of the civil litigation market.

Access the courts, once available to everyone, has become for middle-class Americans a luxury that only others can afford.

Second, the increasing number and complexity of drug cases threaten to bring many trial courts to a standstill. In some areas, there aren't enough judges to hear all the drug cases. In other areas, the drug cases are being heard, but there aren't any judges left to hear the civil cases.

A sampling of the many available statistics shows: Since 1980, drug-related criminal cases have increased by 229 percent, compared with a 56-percent increase in criminal case filings generally and a 42-percent increase in overall Federal case filings; and the number of drug cases has increased more than 15 percent in 1988 and 1989.

Put simply, in many areas, our courts resemble the Los Angeles Freeway at 5 o'clock on a Friday afternoon—gridlock, with not enough judges to handle the cases.

The legislation that I am introducing today attacks these two related problems straight up and head on.

Title 1 is the civil justice legislation that Senator THURMOND, myself, and others introduced in January, revised after extensive consultation, discussion and negotiation with the Judicial Conference of the United States and many individual judges across the country.

Title 2 would create 77 new Federal district court and circuit court judgeships. As I said as far back as last October, I believe a comprehensive judgeships bill is necessary to ensure that high-intensity drug areas receive the judges that are necessary to hear the increasing volume of drug cases. Title 2 of this legislation accomplishes that objective.

The civil justice title of this legislation reflects a number of changes we have made in the original bill. I believe that these changes make a good bill even better. Briefly, let me highlight three of the principal changes we've made:

First, while we have retained the fundamental principle that the courts need to distinguish between simple cases that need little or no judicial intervention and complex cases that need intense and well-focused judicial management, we have determined that one way of applying that principle—case tracking—ought to be tested in a few districts before it is implemented nationwide.

Second, in response to testimony at the Judiciary Committee's first hearing on the original bill and based on additional information we've recently analyzed, we have decided to restore the full role of magistrates in the pretrial process.

Third, when it comes to that the district courts are required to do under this legislation, we've given the districts more flexibility than they would have had under the original bill. We've set out what we want them to do in terms of core principles and guidelines, rather than more specific requirements.

In a nutshell, these are some of the principal changes we've made in response to questions and concerns that were raised about the original legislation. In my view, these changes improve the bill while maintaining our commitment to comprehensive civil justice reform.

Importantly, the revised civil justice legislation retains and reaffirms our commitment to reform from the bottom up: Each district court must still establish its own civil justice expense and delay reduction plan; and each court must do so after considering the recommendations of an expert advisory group that is to be convened in each district.

Calling for districtwide input is the best way, in my view, to ensure districtwide solidarity for improving the civil justice system.

I want to commend Judge Robert Peckham for his invaluable assistance in developing the changes reflected in title 1 of this legislation. As chairman of the Judicial Conference's task force created to work specifically with us on this bill, Judge Peckham has demonstrated the wisdom, foresight, and ingenuity that has made him one of the most respected judges in the country and a leader in civil justice reform.

Title 2 of this legislation would create 77 new Federal judgeships. It has been crafted to ensure that high intensity drug areas get the resources they so desperately need to hear the cases, preside over the trials, and sentence those who are convicted.

As many of my colleagues know, when it comes to judgeships, the Judicial Conference formulates a series of recommendations about where new judgeships should go. Together with Senator THURMOND, I have studied these recommendations very carefully during the past several months.

We have taken the recommendations seriously, as the Judiciary Committee has always done. But in the end, in this Senator's view, the Judicial Conference's recommendations are just that—recommendations—nothing more, nothing less.

We have, therefore, made changes in what the Judicial Conference has recommended. We have made these changes to make sure that the top 20 districts in terms of drug caseloads get an additional judgeship.

Under the legislation I'm introducing today, places such as Miami, San Diego, Tallahassee, Spokane, WA, Portland, ME, and Charleston, WV, will receive a new judge.

These and other areas are each getting a new judge because under the

drug criteria we've developed, each is clearly suffering under the weight of heavy drug caseloads. And each would not receive a judgeship if we followed the Judicial Conference's official recommendations.

Quite simply, these changes had to be made if we were to fulfill the responsibility I believe we have to ensure that areas with heavy drug caseloads have the judges they need to hear the cases.

Between the judges I've added and the judges officially recommended by the Judicial Conference, the 20 district courts hardest hit by drug cases will each be getting at least one judge.

Mr. President, while it's not yet in this bill, I expect that—with the able assistance of Senator HEFLIN and Senator GRASSLEY—we will be adding a third title. This would include a package of noncontroversial recommendations of the Federal Courts Study Committee.

I have indicated to Senators HEFLIN and GRASSLEY—who were the Senate's Members on the Federal Courts Study Committee—that when these noncontroversial recommendations are finalized, we will be happy to add them to the bill we're introducing today, should that be their desire.

Mr. President, the legislation that Senator THURMOND and I are introducing today strikes at the crisis that's putting a stranglehold on our courts.

It is aimed at making the civil justice system more accessible, more prompt in the resolution of disputes, and less expensive. We've go to restore the confidence that middle class Americans have lost in the ability of the civil justice system to provide a fair forum—a forum they can call upon without having, quite frankly, to hock their savings to do so.

The legislation is also aimed at the drug crisis. By creating 77 new judgeships and concentrating on areas hardest hit by drugs, we will help ensure that drug cases are heard, trials are conducted, and convicted defendants are sentenced.

The Judiciary Committee will hold a hearing on this legislation on Tuesday, June 12. We will then seek to move the legislation out of committee as soon as possible.

We have problems—serious problems, Mr. President—in our courts and in their ability to deliver justice in a fair, timely, and inexpensive manner. The time to act to address these problems is upon us. I urge my colleagues to support this legislation when it comes to the floor.

Mr. President, I ask unanimous consent that the text of the bill be printed in the RECORD.

There being no objection, the bill was ordered to be printed in the RECORD, as follows:

S. 2648

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Judicial Improvements Act of 1990".

TITLE I—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

SEC. 101. SHORT TITLE.

This title may be cited as the "Civil Justice Reform Act of 1990".

SEC. 102. FINDINGS.

The Congress finds that:

(1) The problems of cost and delay in civil litigation in any United States district court must be addressed in the context of the full range of demands made on the district court's resources by both civil and criminal matters.

(2) The court, the litigants, and the litigants' attorneys share responsibility for cost and delay in civil litigation and its impact on access to the courts and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties.

(3) The solutions to problems of cost and delay must include significant contributions by the court, the litigants, and the litigants' attorneys.

(4) In identifying, developing, and implementing solutions to problems of cost and delay in civil litigation, it is necessary to achieve a method of consultation so that individual judicial officers, litigants, and litigants' attorneys who have developed techniques for litigation management and cost and delay reduction can effectively and promptly communicate those techniques to all participants in the civil justice system.

(5) Evidence suggests that an effective litigation management and cost and delay reduction program should incorporate several interrelated principles, including—

(A) the differential treatment of cases that provides for individualized and specific management according to their needs and probable litigation careers;

(B) early involvement of a judicial officer in planning the progress of a case, controlling the discovery process, and scheduling litigation events;

(C) regular communication between a judicial officer and attorneys during the pretrial process; and

(D) utilization of alternative dispute resolution programs in appropriate cases.

(6) Because the increasing volume and complexity of civil and criminal cases imposes increasingly heavy workload burdens on judicial officers, clerks of court, and other court personnel, it is necessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques.

SEC. 103. AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS.—Title 28, United States Code, is amended by inserting after chapter 21 the following new chapter:

"CHAPTER 23—CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLANS

"Sec.

"471. Requirement for a district court civil justice expense and delay reduction plan.
"472. Development and implementation of a civil justice expense and delay reduction plan.
"473. Content of civil justice expense and delay reduction plans.
"474. Review of district court action.
"475. Periodic district court assessment.
"476. Model civil justice expense and delay reduction plan.
"477. Advisory groups.
"478. Information on litigation management and cost and delay reduction.
"479. Training programs.
"480. Automated case disposition information.
"481. Definitions.

"§ 471. Requirement for a district court civil justice expense and delay reduction plan

"There shall be implemented by each United States district court, in accordance with this title, a civil justice expense and delay reduction plan. The plan may be a plan developed by such district court or a model plan developed by the Judicial Conference of the United States. The purposes of each plan are to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes.

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

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

"(b) The advisory group of a United States district court shall submit to the court a report, which shall be made available to the public and which shall include—

"(1) an assessment of the matters referred to in subsection (c)(1);

"(2) the basis for its recommendation that the district court develop a plan or select a model plan;

"(3) recommended measures, rules and programs; and

"(4) an explanation of the manner in which the recommended plan complies with section 473 of this title.

"(c)(1) In developing its recommendations, the advisory group of a district court shall promptly complete a thorough assessment of the state of the court's civil and criminal dockets. In performing the assessment for a district court, the advisory group shall—

"(A) determine the condition of the civil and criminal dockets;

"(B) identify trends in case filings and in the demands being placed on the court's resources; and

"(C) identify the principal causes of cost and delay in civil litigation, giving consideration to such potential causes as court procedures and the ways in which litigants and their attorneys approach and conduct litigation.

"(2) In developing its recommendations, the advisory group of a district court shall take into account the particular needs and circumstances of the district court, litigants in such court, and the litigants' attorneys.

"(3) The advisory group of a district court shall ensure that its recommended actions include significant contributions to be made by the court, the litigants and the litigants' attorneys toward reducing cost and delay and thereby facilitating access to the courts.

"(d) The chief judge of the district court shall transmit a copy of the plan implemented in accordance with subsection (a) and the report prepared in accordance with subsection (b) of this section to—

"(1) the Director of the Administrative Office of the United States Courts;

"(2) the judicial council of the circuit in which the district court is located; and

"(3) the chief judge of each of the other United States district courts located in such circuit.

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

"(a) A civil justice expense and delay reduction plan developed and implemented under this chapter shall include provisions applying the following principles and guidelines of litigation management and cost and delay reduction:

"(1) systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed to prepare the case for trial, and the judicial and other resources required for the preparation and disposition of the case;

"(2) early and ongoing control of the pretrial process through involvement of a judicial officer in—

"(A) assessing and planning the progress of a case;

"(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months of the filing of the complaint, unless a judicial officer certifies that the trial cannot reasonably be held within such time because of the complexity of the case or the number or complexity of pending criminal cases;

"(C) controlling the extent of discovery and the time for completion of discovery, and ensuring compliance with requested discovery in a timely fashion; and

"(D) setting deadlines for the filing of motions and target dates for the deciding of motions;

"(3) for all cases that the court or an individual judicial officer determines are complex and any other appropriate cases, careful and deliberate monitoring through a discovery-case management conference or a series of such conferences at which the presiding judicial officer—

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

"(B) identifies or formulates the principal issues in contention and, in appropriate cases, provides for the staged resolution or bifurcation of issues for trial consistent with Rule 42(b) of the Federal Rules of Civil Procedure;

"(C) prepares a discovery schedule and plan consistent with any presumptive time limits that a district court may set for the completion of discovery and with any procedures a district court may develop to—

"(i) identify and limit the volume of discovery available to avoid unnecessary or unduly burdensome or expensive discovery; and

"(ii) phase discovery into two or more stages; and

"(D) establishes deadlines for filing motions and target dates for deciding motions;

"(4) encouragement of cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices;

"(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a statement that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel on the matters set forth in the motion;

"(6) authorization to refer appropriate cases to alternative dispute resolution programs that—

"(A) have been designated for use in a district court; or

"(B) the court may make available, including mediation, minitrial, and summary jury trial; and

"(7) enhancement of the accountability of each judicial officer in a district court through semiannual reports, available to the public, that disclose for each judicial officer the number of motions that have been pending for more than six months, the number of bench trials that have been submitted for more than six months, and the number of cases that have not been terminated within three years of filing.

"(b) In formulating the provisions of its civil justice expense and delay reduction plan, each United States district court, in consultation with an advisory group appointed under section 477 of this title, shall consider adopting the following litigation management and cost and delay reduction techniques:

"(1) a requirement that counsel for each party to a case jointly present a discovery-case management plan for the case at the initial pretrial conference, or explain the reasons for their failure to do so;

"(2) a requirement that 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;

"(3) a requirement that all requests for extensions of deadlines for completion of discovery or for postponement of the trial be signed by the attorney and the party making the request;

"(4) a neutral evaluation program for the presentation of the legal and factual bases of a case to a neutral court representative at a nonbinding conference conducted early in the litigation;

"(5) a requirement that, upon notice by the court, representatives of the parties with authority to bind them in settlement discussions be present or available by telephone during any settlement conference; and

"(6) such other features as the district court considers appropriate after considering the recommendations of the advisory group referred to in section 472(a) of this title.

"§ 474. Review of district court action

"(a)(1) The chief judge of a circuit court and the chief judges of each district court in a circuit shall, as a committee—

"(A) review each plan and report submitted pursuant to section 472(d) of this title; and

"(B) make such suggestions for additional actions or modified actions of that district court as the committee considers appropriate for reducing cost and delay in civil litigation in the district court.

"(2) The chief judge of a circuit court and the chief judge of a district court may designate another judge of such court to perform the chief judge's responsibilities under paragraph (1) of this subsection.

"(b) The Judicial Conference of the United States—

"(1) shall review each plan and report submitted by a district court pursuant to section 472(d) of this title; and

"(2) may request the district court to take additional action if the Judicial Conference determines that such court has not adequately responded to the conditions relevant to the civil and criminal dockets of the court or to the recommendations of the district court's advisory group.

"§ 475. Periodic district court assessment

"After developing or selecting a civil justice expense and delay reduction plan, each United States district court shall assess, at least once every two years, the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court. In performing such assessment, the court shall consult with an advisory group appointed in accordance with section 477 of this title.

"§ 476. Model civil justice expense and delay reduction plan

"(a)(1) Based on the plans developed and implemented by the United States district courts designated as Early Implementation District Courts pursuant to section 103(c) of the Civil Justice Reform Act of 1990, the Judicial Conference of the United States may develop one or more model civil justice and expense delay reduction plans. Any such model plan shall be accompanied by a report explaining the manner in which the plan complies with section 473 of this title.

"(2) The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations to the Judicial Conference regarding the development of any model civil justice expense and delay reduction plan.

"(b) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and the House of Representatives copies of any model plan and accompanying report.

"§ 477. Advisory groups

"(a) Within ninety days after the date of enactment of this chapter, the advisory group required in each United States district court in accordance with section 472 of this title shall be appointed by the chief judge of each district court, after consultation with the other judges of such court.

"(b) The advisory group of a district court shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court, as determined by the chief judge of such court.

"(c) In no event shall any member of the advisory group serve longer than four years.

"(d) The chief judge of a United States district court shall designate a reporter for each advisory group, who may be compensated in accordance with guidelines established by the Judicial Conference of the United States.

"§ 478. Information on litigation management and cost and delay reduction

"(a) Within four years after the date of the enactment of this chapter, the Judicial Conference of the United States Courts shall prepare a comprehensive report on all plans received pursuant to section 472(d) of this title. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding such report.

"(b) The Judicial Conference of the United States shall, on a continuing basis—

"(1) study ways to improve litigation management and dispute resolution services in the district courts; and

"(2) make recommendations to the district courts on ways to improve such services.

"(c)(1) The Judicial Conference of the United States shall prepare, periodically revise, and transmit to the United States district courts a Manual for Litigation Management and Cost and Delay Reduction. The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts may make recommendations regarding the preparation of and any subsequent revisions to the Manual.

"(2) The Manual shall be developed after careful evaluation of the plans implemented

under section 472 of this title and the litigation management and cost and delay reduction demonstration programs that the Judicial Conference shall conduct under this title.

"(3) The Manual shall contain a description and analysis of the litigation management, cost and delay reduction principles and techniques, and alternative dispute resolution programs considered most effective by the Judicial Conference, the Director of the Federal Judicial Center, and the Director of the Administrative Office of the United States Courts.

"§ 479. Training programs

"The Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts shall develop and conduct comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation. The curriculum of such training programs shall be periodically revised to reflect such information and analyses.

"§ 480. Automated case disposition information

"(a) The Director of the Administrative Office of the United States Courts shall ensure that each United States district court has the automated capability readily to retrieve information about the status of each case in such court.

"(b)(1) In carrying out subsection (a), the Director shall prescribe—

"(A) the information to be recorded in district court automated systems; and

"(B) standards for uniform categorization or characterization of judicial actions for the purpose of recording information on judicial actions in the district court automated systems.

"(2) The uniform standards prescribed under paragraph (1)(B) of this subsection shall include a definition of what constitutes a dismissal of a case and standards for measuring the period for which a motion has been pending.

"(c) Each United States district court shall record information as prescribed pursuant to subsection (b) of this section.

"§ 481. Definitions

"As used in this chapter the term 'judicial officer' means a United States district court judge or a United States magistrate.".

(b) IMPLEMENTATION.—(1) Within three years after the date of the enactment of this title, each United States district court shall implement a civil justice expense and delay reduction plan under section 471 of title 28, United States Code, as added by subsection (a).

(2) The requirements set forth in sections 471 through 477 of title 28, United States Code, as added by subsection (a), shall remain in effect for seven years after the date of the enactment of this title.

(c) EARLY IMPLEMENTATION DISTRICT COURTS.—

(1) Any United States district court that, no earlier than six months and no later than twelve months after the date of the enactment of this title, develops and implements a civil justice expense and delay reduction plan under chapter 23 of title 28, United States Code, as added by subsection (a), shall be designated by the Judicial Conference of the United States as an Early Implementation District Court.

(2) The chief judge of a district so designated may apply to the Judicial Conference for additional resources, including technological and personnel support and information systems, necessary to implement its civil justice expense and delay reduction plan. The Judicial Conference may, in its discretion, provide such resources out of funds appropriated pursuant to section 105(a).

(3) Within eighteen months after the date of the enactment of this title, the Judicial Conference shall prepare a report on the plans developed and implemented by the Early Implementation District Courts.

(4) The Director of the Administrative Office of the United States Courts shall transmit to the United States district courts and to the Committees on the Judiciary of the Senate and House of Representatives—

(A) copies of the plans developed and implemented by the Early Implementation District Courts;

(B) the reports submitted by such districts pursuant to section 472(d) of title 28, United States Code, as added by subsection (a); and

(C) the report prepared in accordance with paragraph (3) of this subsection.

(d) TECHNICAL AND CONFORMING AMENDMENT.—The table of chapters for part I of title 28, United States Code, is amended by adding at the end thereof:

"23. Civil justice expense and delay reduction plans ..... 471".

SEC. 104. DEMONSTRATION PROGRAM.

(a) IN GENERAL.—(1) During the four-year period beginning on January 1, 1991, the Judicial Conference of the United States shall conduct a demonstration program in accordance with subsection (b).

(2) A district court participating in the demonstration program may also be an Early Implementation District Court under section 103(c).

(b) PROGRAM REQUIREMENT.—(1) The United States District Court for the Western District of Michigan and the United States District Court for the Northern District of Ohio shall experiment with systems of differentiated case management that provide specifically for the assignment of cases to appropriate processing tracks that operate under distinct and explicit rules, procedures and timeframes for the completion of discovery and for trial.

(2) The United States District Court for the Northern District of California, the United States District Court for the Northern District of West Virginia, and the United States District Court for the Western District of Missouri shall experiment with various methods of reducing cost and delay in civil litigation, including alternative dispute resolution, that such district courts and the Judicial Conference of the United States shall select.

(c) STUDY OF RESULTS.—The Judicial Conference of the United States, in consultation with the Director of the Federal Judicial Center and the Director of the Administrative Office of the United States Courts, shall study the experience of the district courts under the demonstration program.

(d) REPORT.—Not later than March 31, 1995, the Judicial Conference of the United States shall transmit to the Committees on the Judiciary of the Senate and the House of Representatives a report of the results of the demonstration program.

SEC. 105. AUTHORIZATION.

(a) EARLY IMPLEMENTATION DISTRICT COURTS.—There is authorized to be appropriated not more than $15,000,000 for fiscal year 1990 to carry out the resource and planning needs necessary for the implementation of section 103(c).

(b) IMPLEMENTATION OF CHAPTER 23.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1990 to implement chapter 23 of title 28, United States Code.

(c) DEMONSTRATION PROGRAM.—There is authorized to be appropriated not more than $5,000,000 for fiscal year 1990 to carry out the provisions of section 104.

TITLE II—FEDERAL JUDGESHIPS

SECTION 201. SHORT TITLE.

This title may be cited as the "Federal Judgeship Act of 1990".

SEC. 202. CIRCUIT JUDGES FOR THE CIRCUIT COURT OF APPEALS.

(a) IN GENERAL.—The President shall appoint, by and with the advice and consent of the Senate—

(1) 2 additional circuit judges for the third circuit court of appeals;

(2) 4 additional circuit judges for the fourth circuit court of appeals;

(3) 1 additional circuit judge for the fifth circuit court of appeals;

(4) 1 additional circuit judge for the sixth circuit court of appeals;

(5) 1 additional circuit judge for the eighth circuit court of appeals; and

(6) 2 additional circuit judges for the tenth circuit court of appeals.

(b) TABLES.—In order that the table contained in section 44(a) of title 28, United States Code, will, with respect to each judicial circuit, reflect the changes in the total number of permanent circuit judgeships authorized as a result of subsection (a) of this section, such table is amended to read as follows:

"Circuits	Number of Judges
District of Columbia	12
First	6
Second	13
Third	14
Fourth	15
Fifth	17
Sixth	16
Seventh	11
Eighth	11
Ninth	28
Tenth	12
Eleventh	12
Federal	12.".

SEC. 203. DISTRICT JUDGES FOR THE DISTRICT COURTS.

(a) IN GENERAL.—The President shall appoint, by and with the advice and consent of the Senate—

(1) 1 additional district judge for the western district of Arkansas;

(2) 2 additional district judges for the northern district of California;

(3) 5 additional district judges for the central district of California;

(4) 1 additional district judge for the southern district of California;

(5) 2 additional district judges for the district of Connecticut;

(6) 2 additional district judges for the middle district of Florida;

(7) 1 additional district judge for the northern district of Florida;

(8) 1 additional district judge for the southern district of Florida;

(9) 1 additional district judge for the middle district of Georgia;

(10) 1 additional district judge for the northern district of Illinois;

(11) 1 additional district judge for the southern district of Iowa;

(12) 1 additional district judge for the western district of Louisiana;

(13) 1 additional district judge for the district of Maine;

(14) 1 additional district judge for the district of Massachusetts;

(15) 1 additional district judge for the southern district of Mississippi;

(16) 1 additional district judge for the eastern district of Missouri;
(17) 1 additional district judge for the district of New Hampshire;
(18) 3 additional district judges for the district of New Jersey;
(19) 1 additional district judge for the district of New Mexico;
(20) 1 additional district judge for the southern district of New York;
(21) 1 additional district judge for the eastern district of New York;
(22) 1 additional district judge for the middle district of North Carolina;
(23) 1 additional district judge for the northern district of Oklahoma;
(24) 1 additional district judge for the western district of Oklahoma;
(25) 1 additional district judge for the district of Oregon;
(26) 3 additional district judges for the eastern district of Pennsylvania;
(27) 1 additional district judge for the middle district of Pennsylvania;
(28) 1 additional district judge for the district of South Carolina;
(29) 1 additional district judge for the eastern district of Tennessee;
(30) 1 additional district judge for the western district of Tennessee;
(31) 1 additional district judge for the northern district of Texas;
(32) 3 additional district judges for the southern district of Texas;
(33) 1 additional district judge for the western district of Texas;
(34) 1 additional district judge for the district of Utah;
(35) 1 additional district judge for the eastern district of Washington;
(36) 1 additional district judge for the northern district of West Virginia;
(37) 1 additional district judge for the southern district of West Virginia; and
(38) 1 additional district judge for the district of Wyoming.

(b) EXISTING JUDGESHIPS.—(1) The existing district judgeships for the western district of Arkansas, the northern district of Illinois, the northern district of Indiana, the district of Massachusetts, the western district of New York, the eastern district of North Carolina, the northern district of Ohio, and the western district of Washington authorized by section 202(b) of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Public Law 98-353, 98 Stat. 347-348) shall, as of the effective date of this title, be authorized under section 133 of title 28, United States Code, and the incumbents in those offices shall hold the office under section 133 of title 28, United States Code, as amended by this title.

(2)(A) The existing two district judgeships for the eastern and western districts of Arkansas (provided by section 133 of title 28, United States Code, as in effect on the day before the effective date of this title) shall be district judgeships for the eastern district of Arkansas only, and the incumbents of such judgeships shall hold the offices under section 133 of title 28, United States Code, as amended by this title.

(B) The existing district judgeship for the northern and southern districts of Iowa (provided by section 133 of title 28, United States Code, as in effect on the day before the effective date of this title) shall be a district judgeship for the northern district of Iowa only, and the incumbent of such judgeship shall hold the office under section 133 of title 28, United States Code, as amended by this title.

(C) The existing district judgeship for the northern, eastern, and western districts of Oklahoma (provided by section 133 of title 28, United States Code, as in effect on the day before the effective date of this title) and the occupant of which has his official duty station at Oklahoma City on the date of enactment of this title, shall be a district judgeship for the western district of Oklahoma only, and the incumbent of such judgeship shall hold the office under section 133 of title 28, United States Code, as amended by this title.

(c) TEMPORARY JUDGESHIPS.—The President shall appoint, by and with the advice and consent of the Senate—
(1) 1 additional district judge for the northern district of Alabama;
(2) 1 additional district judge for the eastern district of California;
(3) 1 additional district judge for the district of Hawaii;
(4) 1 additional district judge for the central district of Illinois;
(5) 1 additional district judge for the southern district of Illinois;
(6) 1 additional district judge for the district of Kansas;
(7) 1 additional district judge for the western district of Michigan;
(8) 1 additional district judge for the eastern district of Missouri;
(9) 1 additional district judge for the district of Nebraska;
(10) 1 additional district judge for the northern district of New York;
(11) 1 additional district judge for the northern district of Ohio;
(12) 1 additional district judge for the eastern district of Pennsylvania;
(13) 1 additional district judge for the eastern district of Texas; and
(14) 1 additional district judge for the eastern district of Virginia.

The first vacancy in the office of district judge in each of the judicial districts named in this subsection, occurring five years or more after the effective date of this title, shall not be filled.

(d) TABLES.—In order that the table contained in section 133 of title 28, United States Code, will, with respect to each judicial district, reflect the changes in the total number of permanent district judgeships authorized as a result of subsections (a) and (b) of this section, such table is amended to read as follows:

"DISTRICTS — JUDGES

Alabama:	
Northern	7
Middle	3
Southern	3
Alaska	3
Arizona	8
Arkansas:	
Eastern	5
Western	3
California:	
Northern	14
Eastern	6
Central	27
Southern	8
Colorado	7
Connecticut	8
Delaware	4
District of Columbia	15
Florida:	
Northern	4
Middle	11
Southern	16
Georgia:	
Northern	11
Middle	4
Southern	3
Hawaii	3
Idaho	2
Illinois:	
Northern	22
Central	3
Southern	3
Indiana:	
Northern	5
Southern	5
Iowa:	
Northern	2
Southern	3
Kansas	5
Kentucky:	
Eastern	4
Western	4
Eastern and Western	1
Louisiana:	
Eastern	13
Middle	3
Western	7
Maine	3
Maryland	10
Massachusetts	13
Michigan:	
Eastern	15
Western	4
Minnesota	7
Mississippi:	
Northern	3
Southern	6
Missouri:	
Eastern	6
Western	5
Eastern and Western	2
Montana	3
Nebraska	3
Nevada	4
New Hampshire	3
New Jersey	17
New Mexico	5
New York:	
Northern	4
Southern	28
Eastern	13
Western	4
North Carolina:	
Eastern	4
Middle	4
Western	3
North Dakota	2
Ohio:	
Northern	11
Southern	7
Oklahoma:	
Northern	3
Eastern	1
Western	6
Northern, Eastern, and Western	1
Oregon	6
Pennsylvania:	
Eastern	22
Middle	6
Western	10
Puerto Rico	7
Rhode Island	3
South Carolina	9
South Dakota	3
Tennessee:	
Eastern	5
Middle	3
Western	5
Texas:	
Northern	11
Southern	16
Eastern	6
Western	8
Utah	5
Vermont	2
Virginia:	
Eastern	9
Western	4
Washington:	
Eastern	4
Western	7
West Virginia:	
Northern	3
Southern	5
Wisconsin:	
Eastern	4
Western	2
Wyoming	2.".

SEC. 204. VIRGIN ISLANDS.

(a) IN GENERAL.—The President shall appoint, by and with the advice and consent of the Senate, one additional judge for the District Court of the Virgin Islands, who shall hold office for a term of 10 years and until a successor is chosen and qualified, unless sooner removed by the President for cause.

(b) AMENDMENT TO ORGANIC ACT.—In order to reflect the change in the total number of permanent judgeships authorized as a result of subsection (a) of this section, section 24(a) of the Revised Organic Act of the Virgin Islands (68 Stat. 506; 48 U.S.C. 1614(a)) is amended by striking "two" and inserting "three".

SEC. 205. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title, including such sums as may be necessary to provide appropriate space and facilities for the judicial positions created by this title.

SEC. 206. EFFECTIVE DATE.

This title shall take effect on the date of enactment of this title.

Mr. THURMOND. Mr. President, today I rise along with Senator BIDEN to introduce the Judicial Improvements Act of 1990. This bill is designed to meet the needs of the Federal judiciary by developing within the Federal courts a procedure for implementing civil justice expense and delay reduction plans and to provide for additional Federal judgeships necessary to handle the increased criminal and civil caseload.

Title I is derived from the Civil Justice Reform Act introduced by Senator BIDEN and myself. Our goal is to reduce litigation costs and to increase the administrative efficiency of the civil litigation process in the Federal courts.

Over recent years, the workload of the Federal court system has increased dramatically. It is this committee's responsibility to assure that the manpower and equipment necessary to meet this increased workload is provided. Currently, there is a feeling among many members of the bench and bar that civil litigation in the Federal court system is much too costly and takes far too much time to resolve disputes.

Based upon these concerns, the legislation we are introducing today embodies principles from which each Federal district court will develop their own plan for creating greater efficiencies in the civil litigation process.

Mr. President, it is appropriate to consider procedural changes which will reduce the costs and delays confronted by those who seek to resolve their disputes through the civil litigation system. However, any attempt to reform the civil justice system is futile without providing adequate judicial manpower.

Title II of the bill will create 77 additional Federal judgeships. Recently enacted drug and crime legislation increased the caseload of many judges across the country. As a result of the needs of the judiciary from the specter of increased drug and crime related prosecution and its impact on the Federal docket, I believe more judgeships are vitally important. Additionally, we incorporated recommendations made by the Judicial Conference reflecting their assessment of where judicial manpower should be placed. The result is a provision to create additional Federal judgeships which we believe will adequately address the current needs of the judiciary.

Mr. President, as ranking member, I look forward to working with the chairman of the Judiciary Committee to create greater efficiency and increase the manpower in the Federal courts.

By Mr. KENNEDY:

S. 2649. A bill to provide for improved drug abuse treatment and prevention; to the Committee on Labor and Human Resources.

DRUG ABUSE TREATMENT AND PREVENTION IMPROVEMENT ACT

● Mr. KENNEDY. Mr. President, today I am introducing the Drug Abuse Treatment and Prevention Improvement Act of 1990.

Drug abuse in America continues to be a disease of epidemic proportions. Its symptoms have spread to every corner of our society and beyond. The epidemic manifests itself in shattered lives, devastated families, and overburdened courtrooms, classrooms, and emergency rooms throughout the country.

Historians remind us that we have been fighting one drug war or another for decades. But the release of the Bush administration's first antidrug strategy last September brought a new sense of energy to our efforts.

Eight months after the release of the strategy, it is too soon to say whether these efforts have borne fruit. In some pockets of society, encouraging historical trends have continued. But many of us remain concerned that the national drug strategy is seriously defective because it lacks balance. The President and his advisers fail to recognize the prominent role that treatment and prevention must play in combating drug abuse.

The long-term solution to the drug epidemic will not be found in distant cocafields in Colombia, or in overcrowded holding cells in inner-city police precincts. Instead, real gains against drugs will be made when schoolchildren are persuaded that drugs use is harmful, when communities rally to create a climate in which drug use is unacceptable, and when treatment is offered to all who wish to rid themselves of a drug habit.

The administration persists in the belief that crime control can solve the tangle of social factors that contribute to the self-destructive behavior of drug use. For the past 2 years, the administration has sent antidrug budgets to Congress in which 70 percent of the resources are devoted to reducing the supply of drugs, and only 30 percent to reducing demand.

Drug Policy Director William Bennett has used his office as a bully pulpit, but he has largely preached the gospel of law enforcement. He has stubbornly refused to pay more than lipservice to the fundamental goal of treatment on request and, on occasion, he has belittled the importance of drug education.

The most recent evidence of the administration's misplaced priorities is the legislative package it transmitted to Congress yesterday. This massive proposal is brimming with new threats to civil liberties, new criminal penalties, imposing forfeiture provisions, and novel interdiction strategies. Yet it contains no proposals for drug abuse prevention and only two treatment-related proposals.

Whatever the merits of the supply-side proposals in the legislative package submitted yesterday, it is clear that they are the product of considerable effort and attention. It is equally clear that virtually no energy has been expended to devise bold and innovative means of reducing the demand for drugs.

Just as Congress last year redressed some of the budgetary imbalance in the President's drug strategy, the legislation I propose today is intended to redress the legislative imbalance. The bill contains a number of innovative demand reduction proposals that have either been generated by the legislative process in the past year or that have otherwise come to my attention. This proposals represent a comprehensive effort to improve the manner in which this country delivers drug treatment and prevention services to its citizens.

Title I of the bill improves and expands the categorical grant programs administered by the Department of Health and Human Services. These programs are designed to target populations that have an especially acute need for services. They will enable the Federal Government to sponsor model programs that can eventually be replicated by the States. The bill will sharpen the focus of current programs, such as the one for pregnant and post partum addicts and their infants. In addition, new grants will be offered for training treatment and prevention professionals, for drug treatment in the criminal justice system, for rural substance abuse, for more drug treatment in the national capital region, and for comprehensive community-based drug prevention.

Title II of the bill revises the ADAMHA Block Grant Program. The block grant is the prinicpal means by which the Federal Government distributes treatment resources. We must engage in a multiyear strategy to fund this program at a level that will assure treatment on request for every addict seeking it.

First, the bill authorizes $2 billion for this program in fiscal year 1991, a

PREPARED STATEMENT

OF

HONORABLE WALTER T. MCGOVERN
SENIOR JUDGE, UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, AND
CHAIRMAN OF THE COMMITTEE ON JUDICIAL RESOURCES
JUDICIAL CONFERENCE OF THE UNITED STATES

BEFORE
THE COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ON

S. 2648, JUDICIAL IMPROVEMENTS ACT OF 1990, TITLE II
FEDERAL JUDGESHIPS

TUESDAY
JUNE 26, 1990

Mr. Chairman and members of the Committee, I am Walter McGovern, Senior Judge of the U.S. District Court for the Western District of Washington, and Chairman of the Judicial Conference Committee on Judicial Resources. I am here today as a representative of the Judicial Conference of the United States to speak in support of Title II of S.2648, the provision to create 77 additional judgeships for the U.S. courts of appeals and the U.S. district courts. On behalf of the Judiciary, I express our appreciation for your leadership role in introducing legislation to address the pressing judgeship needs of the Federal courts. We thank you for your efforts to provide the resources so badly needed in the Judiciary. The authorization of the 77 additional judgeships in this bill is absolutely essential to the well being of the Federal Judicial System. But, Mr. Chairman, as I will describe in greater detail later in my statement, the present needs of the Judiciary for new judgeships is now near 100.

It has been nearly six years since additional judgeships were last authorized for the Federal courts. During that time we have seen tremendous changes in both the volume and the complexity of the workload of the courts. Numerous pieces of legislation in recent years have had a strong impact on the courts. The implementation of the sentencing guidelines, new

initiatives to fight the war on drugs, and the advent of mandatory minimum sentences, have all resulted in substantial additional work for the courts, and all have the potential to increase the burdens even more in the coming years.

Since the last judgeships were authorized in 1984, the number of criminal cases filed in the district courts has grown by nearly 30 percent. Drug cases alone have increased by nearly 130 percent and now represent approximately 30 percent of all criminal cases. With the recent increases in the law enforcement and prosecutorial staff in the Department of Justice, we can expect a continuation of this trend, perhaps at an increasing rate. The changing nature and volume of the criminal caseload is of particular concern, as it relates to the need for judgeships, because of the special demands and the requirements of these types of cases.

The civil caseload of the district courts has not followed as consistent a pattern as criminal over the last six years, but nevertheless, it still represents the large majority of case filings in district courts. Civil filings have fluctuated considerably, primarily because of Social Security cases and student loan defaults, neither of which require substantial judge involvement. The remaining civil caseload had increased consistently since 1984, until the recent temporary reduction resulting from the May 1989 change in diversity jurisdiction.

After the initial impact of the change in the jurisdictional amount for diversity cases, we can expect civil filings to return to the increasing trend of past years. Even with the current volume of cases, there are many courts which cannot devote the proper time to the civil docket because of the demands associated with criminal cases. In the courts hardest hit by the drug caseload, judges are devoting an increasing portion of their time to the criminal docket at the expense of the civil cases. This will occur with increasing frequency unless appropriate resources are provided to deal with all cases in the district courts, both civil and criminal.

In the courts of appeals, the situation is similar to that of the district courts. New filings have grown by nearly 30 percent since 1984 and by 13 percent in just the last two years. A portion of the increase can be traced to the implementation of the sentencing guidelines and the authorizing legislation providing the right to appeal the sentence imposed. The workload of the courts of appeals has also risen as a direct result of the drug caseload of the district courts. In 1984 appeals of drug cases represented only 6 percent of all appeals. Since that time drug appeals have grown by more than 120 percent and now represent more than 12 percent of all appeals filed. The judges of the courts of appeals resolve an increasing number of cases each year, yet the backlog continues to grow. The current pending caseload is nearly 40 percent above that of 1984. In

just the last year, the number of pending appeals of criminal cases has grown by nearly 30 percent. I mention this increase in the backlog to emphasize the seriousness of the situation we face today. The workload of many of the courts has reached crisis proportions, and if it is not resolved soon with the addition of the necessary resources, we will feel the effects for many years to come.

I am sure that the Committee members are aware of the fact that the Judicial Conference makes recommendations for additional judgeships every two years. Under normal circumstances, the 1990 recommendations would have been considered at the September 1990 Conference session. In recognition of the growing workload trends and the potential for consideration of judgeship legislation during this session of Congress, the Conference accelerated the process of developing recommendations for 1990. This was done in an effort to provide the Congress with the present needs of the Judiciary and in response to your letter of January 25, 1990, to the Administrative Office of the U. S. Courts, in which you requested an update on the 1988 Judicial Conference recommendations. On June 6, 1990, the Conference approved recommendations for 96 additional judgeships, 20 for the courts of appeals and 76 for the district courts. We realize that these recommendations were approved too late to be included in the bill you are considering today. I have attached a draft

bill containing these recommendations at Exhibit 1 for Committee consideration.

The recommendations contained in the draft bill resulted from the 1990 Biennial Survey of Judgeship Needs which falls within the jurisdiction of the Committee on Judicial Resources, which I chair. I would like to briefly explain the process we use to arrive at our recommendations. The survey and analysis of judgeship needs are conducted by the Subcommittee on Judicial Statistics which consists of five members of the full Committee. Every two years the Subcommittee requests that each court review its judgeship requirements and submit a detailed justification explaining the basis of any request for additional positions. The Subcommittee considers these requests in conjunction with the recommendation of the appropriate circuit judicial council. Using this information and the most recent workload statistics, the Subcommittee then develops a recommendation on the judgeship needs of each court for consideration by the Committee. The Committee reviews the analysis of the Subcommittee and then forwards its recommendations to the Judicial Conference for final consideration. A more detailed explanation of this process is attached to my statement at Exhibit 2. I want to emphasize the fact that a judgeship request from the Judiciary does not reach the Congress until it has been reviewed by four separate panels of judges: the judicial council; the Subcommittee; the Committee; and the Conference. This process does not result in Conference

endorsement of all judgeships requested by the courts. The Conference recommendations have always been less than the court requests. Nor does the process rely on any estimates of potential caseload growth. Even though there have always been substantial delays in obtaining authorization for additional judgeships, all recommendations are based on current caseload information. As a result, the Conference recommendations are on the conservative side, and represent our minimum requirements. In fact, if we were to project our needs as of January 1993, probably the earliest date when the judgeships created by this bill could be in place, our request would be for well over 100 additional judgeships.

The recommendations for 96 additional judgeships were based on workload data through calendar year 1989 and represent what the Judicial Conference deems as the minimum number needed to deal effectively with the existing caseload of the courts. There are many differences between the Conference proposal and S. 2648. I will not attempt to point out all of those today, but would urge the Committee to increase the number of judgeships included in your bill and incorporate all of the judgeships recommended by the Conference. The judgeships which are not included in S. 2648 are just as necessary as those which are included. While many of the districts for which the Conference has recommended additional judgeships may not have a heavy criminal docket, the need to serve the many civil litigants in those courts is, as you

frequently emphasize, no less important. In order to assist the Committee in evaluating each of the Conference recommendations, I have provided a copy of the Survey used for developing the Conference proposal.

In closing I again express the support of the Judicial Conference for legislation authorizing additional judgeships. While the Conference evaluates judgeship requirements every two years, it is much less frequent that legislation is enacted to provide those resources. Courts which have a pressing need for additional resources are likely to have a critical need in just a few years if the resources are not provided now. This makes it even more important that the most recent Conference recommendations be given full consideration by the Congress at this time. Again, we thank you for your leadership on this bill. We recognize that it is in many ways a thankless task which you have undertaken, but we want to assure you of our appreciation and support. Very few pieces of legislation are of landmark proportions--this bill qualifies. Absent meaningful cuts in the Federal courts' jurisdiction, the additional judicial positions added by this bill are essential to the operation of justice and the Federal Judiciary. We stand ready to provide any assistance which the Committee may need in processing this important legislation to authorize additional judgeships for the courts.

STATEMENT OF FEDERAL JUDGES ASSOCIATION
S. 2648, THE JUDICIAL IMPROVEMENTS ACT OF 1990

U.S. SENATE JUDICIARY COMMITTEE
JUNE 26, 1990

THE HONORABLE DIANA E. MURPHY, PRESIDENT
UNITED STATES DISTRICT JUDGE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Mr. Chairman and members of the Committee, I appreciate the opportunity to appear before you today to offer the comments of the Federal Judges Association on S. 2648, The Judicial Improvements Act of 1990. Title I represents efforts to make civil litigation in the federal courts more efficient and to assure effective case management. We share those objectives and commend the sponsors for their interest in them. We support Title II creating 77 new and much-needed federal judgeships. Title I concerns us a great deal, however, and we hope that the changes we will recommend here today will be incorporated into the bill as it proceeds through the legislative process.

Mr. Chairman and Senator Thurmond, we sincerely appreciate your willingness to listen to our concerns and to consider our suggestions and comments. You and your staffs have been cordial and courteous. We intend to continue to work with you to insure that any legislation addressing the processing of cases through the Federal Courts is effective and workable.

The Federal Judges Association is an independent voluntary dues-paying organization which a majority of Federal District and Circuit Judges have joined. The purpose of the Federal Judges Association is to seek the highest quality of justice for the people of the United States and to preserve and protect the ability of the federal judiciary to attract and retain the best qualified men and women for judicial service.

At the outset, we would like to recognize that the legislation has been significantly improved since it was first introduced. Title II is long overdue and will help to relieve

some of the backlogs and delays that are occurring. Title I has been improved from the original S. 2027 by removing the prohibition against the use of magistrates, by eliminating many mandatory procedures and permitting districts to continue to use procedures that they have found to work well in different localities, by shifting the tracking system to only two demonstration districts, and by providing for review by committees made up of district court judges rather than by the judicial councils. These changes mitigate some of the adverse affects on the civil justice system that we feel would have resulted from S. 2027 as originally introduced.

To be frank, however, many judges continue to believe the subject matter of Title I would be best addressed by the rules process. More importantly, we are concerned because this legislation only deals with one aspect of the work of the federal courts. The numbers of civil and criminal cases have increased steadily, as have their complexity. Congress has created new areas of federal jurisdiction and mandated time-consuming new procedures. Even with the new judgeships fully staffed, the federal judiciary will be strained to the limit. We need more time to do our work and to render wise decisions according to developing law. The lower federal courts also need adequate time to commit their reasons to writing in a complete and thoughtful manner to enable meaningful appellate review. In the long run, no management system for civil litigation in federal trial courts can be effective without adequate numbers of judges, relief from

crushing criminal caseloads, and reduction in time-consuming processes. The priorities of the Speedy Trial Act, the burgeoning criminal caseload, and lengthy sentencing hearings consume essentially all of many courts' time.

The Constitution created a government with three equal and separate branches. Each branch has important responsibilities which impact the administration of our civil justice system. But if you read the findings contained in section 102 of S. 2648, two of the branches of government appear to be absolved of any responsibility for the perceived problems in that system. Section 102(2) and 102(3) place the blame for cost and delay in civil litigation solely on the courts and the litigants and their attorneys. The roles of Congress and the President also need to be considered. Enactment of many statutes impacts on the caseload and procedural requirements of the federal courts and contributes to cost and delay. Adequate resources are needed for the administration of the courts, including personnel and up-to-date technology. For a variety of reasons, judicial vacancies sometimes remain unfilled for very long periods. A comprehensive approach should at least recognize other causes of the perceived problems.

In the long run, effective management systems in the federal courts cannot succeed unless Congress and the Executive branch are aware of the impact of their actions on the litigation process and of their responsibility to contribute to its solutions.

Mr. Chairman, I would like now to move to several of the specific concerns that the Federal Judges Association has with the bill. Section 472 provides for the appointment of advisory groups; for the study and compilation of reports on civil and criminal dockets and the causes of cost and delay; and for the advisory groups to make recommendations that "include significant contributions to be made by the court, the litigants and the litigants' attorneys toward reducing cost and delay." The requirements of section 472 will take considerable time and resources away from the important work of the courts. It may well result in greater delays and costs in civil litigation. In addition, section 472 presumes that in every federal district there is unnecessary delay and cost and that in each district all specified parties, including the court, are at fault. I would suggest that most federal courts are operating as efficiently as is possible, given their resources and the statutory constraints under which they operate.

Section 473 requires each federal district to establish a Civil Justice Expense and Delay Reduction Plan. The required content of these plans would set impossible targets in many cases and thereby mislead litigants, the bar and the public. The requirement that the trial is to occur within 18 months absent special certification establishes an expectation that cannot be fulfilled at the present time in many districts primarily due to the volume and length of criminal trials. Eighteen months would more properly be viewed as a goal for disposition of each civil

case. For similar reasons, no firm trial dates are possible for civil cases in many districts. While it is well recognized that firm trial dates lead to settlement of cases, the bar learns when courts are taken over by criminal cases that the target trial dates are not firm regardless of any plan's language. In addition, no meaningful target dates for deciding motions are possible at the outset of the case -- at that time there is no knowledge of the number or complexity of motions to be made in a case, or across the docket, or what type of trials or emergency hearings may be ongoing when the motions are brought.

For these reasons section 473 should not require that the district plans "apply" such principles. Either the section should be eliminated so that districts would be free to fashion a plan appropriate to their circumstances or section 473 should be amended to provide that all advisory groups and districts consider such principles in fashioning their plans.

Section 475 requires complete docket assessment in each district at least once every two years in consultation with the advisory group. This provision requires that the court be involved in almost constant review and assessment with complicated and time-consuming procedures. Such reassessment, if required at all, should be no more often than every three years.

Although the review process is greatly improved in the current draft, section 474 still includes the chief circuit judge on the review committee. Many judges, both circuit and district, believe the section should be amended to include only chief

district judges. The reasons for this are that most chief circuit judges have no experience or expertise in trial court management, issues created by the district plans may be raised on appeal, and as one respected circuit judge says "not because it would do any particular harm, but because it is simply unnecessary."

Section 477 provides that the chief district judge shall appoint each district's advisory group after consultation with the other judges of the court and that the chief judge shall determine the balance of the advisory group and representatives of "major categories of litigants" in the court. This procedure differs from the standard statutory authority for operating the district court in 28 U.S.C. § 137, and any final plan would have to be adopted by all the judges of the district court under sections 471 and 472. It follows that the whole court needs to be involved in selecting the advisory group.

The development of the plan, implementation of the plan, review of the plan by the circuit committee and the Judicial Conference, use of an advisory group and its appointment, and ongoing reporting and assessment required by the statute institute a whole new area of procedure. These complex, time-consuming and sometimes repetitive procedures will necessarily take away from other work without any evidence whatsoever that they will result in benefits to the system. The legislation is based on an assumption that it will result in greater efficiency and speed in civil cases, but there is no hard evidence available

on the cause and effect of the procedural requirements and no comprehensive look at the overall problems and their causes in the Federal courts.

Mr. Chairman, we appreciate this opportunity to present our views on S. 2648 and we will be happy to answer any questions that the Committee may have. We will continue to work with the Committee and its staff to address problems faced by the federal courts and are confident that working together, we can resolve many of the problems. Thank you for your attention and consideration.

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STATEMENT BY THE HONORABLE ROBERT F. PECKHAM

about

TITLE I OF S. 2648

Civil Justice Expense and Delay Reduction Plans

Introduction

Senator Biden, Senator Thurmond, and other members of the Committee on the Judiciary: I am Robert F. Peckham, United States District Judge for the Northern District of California and a member of the Judicial Conference of the United States. I appear in my capacity as chairman of the Conference's subcommittee on the Civil Justice Reform Act of 1990. My distinguished colleagues, Chief Judge Aubrey Robinson, Judge John Nangle, and Judge Sarah Barker, who have expended extraordinary time and energy in helping analyze the proposed statute, learn the views of federal trial judges from around the country, and formulate recently adopted Judicial Conference policies and programs on case management and cost and delay reduction, are present today and will be happy to respond to any questions from members of the Committee.

Please permit me to begin by expressing, on behalf of all of the judges in the federal courts, our appreciation for being given the opportunity here today, on March 6, and on other occasions in the past to share with your Committee and its staff some of our thoughts about Title I of S. 2648 and its predecessor, S. 2027.

At the outset we also would like to acknowledge the concern about cost and delay in civil litigation that Senator Biden and the co-sponsors of Title I share with federal judges. Work on these kinds of problems is not glamorous, but thoughtful people understand its importance. As our daily experiences as judges demonstrate, one of the most fundamental functions of civilized society is to provide peaceful, respected, and efficient means for people to determine their rights and fairly resolve their disputes. Thus, one of the most telling measures of the quality of any society is the quality of its system of civil justice. In this country we are blessed with an adjudicatory system that is capable of sophisticated, reliable analysis of the most complex matters. As the overview of judicial initiatives that we offer in the next section clearly shows, for decades members of the federal bench have understood the fundamental importance of making the benefits of this system meaningfully available to all members of our society.

Initiatives by the Federal Judiciary

The federal judiciary has long been committed, unequivocally, to the values and concerns that inspire this proposed legislation. The very first of the rules that have shaped civil adjudication since 1938 announces that the objective of the system is to "secure the just, speedy, and inexpensive determination of every action." For the first two decades the system appeared to function well

under the new rules. It was not until the 1960's that substantial concern about expense and delay began to surface. The judiciary responded with a series of initiatives, including major empirical studies of the discovery process in the late 1960's and, in 1970, significant changes in the Federal Rules of Civil Procedure. There was a second surge of attention to these matters in the late 1970's and the early 1980's, culminating in the adoption in 1983 of extremely important amendments to Rules 11, 16, and 26.

The changes in Rule 11 and some of the changes in Rule 26 were designed to encourage more responsible, restrained, and cost-effective approaches by counsel to pleading, motion and discovery practices. The changes in Rule 16 and other changes in Rule 26 were designed (1) to assure that judicial officers "will take some early control over the litigation" in all categories of cases save those routine matters that are exempted by local rule, (2) to encourage courts to devote the appropriate level of management attention to different kinds of cases (avoiding "over-regulation of some cases and under-regulation of others"), (3) to assure that judges and magistrates have the authority and the procedural tools necessary to move their cases through the pretrial process as efficiently as the needs of justice permit, (4) to encourage "greater judicial involvement in the discovery process," and (5) to provide both counsel and court with additional, more direct means for preventing or correcting "redundant or disproportionate discovery."

Inspired in part by the same concerns that prompted the recent changes in the rules, many district courts and many individual judges have initiated important new approaches to case management. While space does not permit us to acknowledge all of the many courts which have adopted creative approaches to case management, we point to a few examples here simply to suggest something of the spirit and of the range of ideas that the federal bench recently has brought to this field. In the late 1970's, district courts in Florida and California established new systems under which lawyers were required to propose sensible case-development plans prior to the initial status conference with the court and to exchange key information and documents before launching formal discovery. District judges in South Carolina decided to require plaintiffs and defendants, at the time they file their initial pleadings, to share with one another and with the court basic information about the case by responding to a set of questions drafted by the judges. Judges in San Francisco began experimenting with a two-stage approach to the case-development process. In the first stage, the court limits the parties' discovery and motion work to the core matters that they feel they must learn in order to reasonably ascribe a settlement value to the case. At the close of that first stage, before the parties are forced to spend the substantial additional sums necessary to fully prepare a case for a trial, the court schedules a settlement conference or invites the parties to participate in some alternative dispute resolution procedure. If

their good faith efforts to settle the case are not successful, the court permits the parties to proceed with the more expensive discovery and pretrial motion work that must be done to prepare for a full trial of the matter. In Ohio, Michigan, Texas, Alabama, and other states, judges worked with members of the bar and with special masters to design tailored pretrial systems that permit rational and efficient development of the information necessary to resolve the tens of thousands of asbestos and other mass tort cases that have been filed in the last decade. In New York, judges appointed special committees of lawyers who helped the court design systems for containing discovery abuse and guiding lawyers toward the most cost-effective and productive use of certain discovery tools. Courts in Oklahoma and Virginia have adopted innovative strategies for moving cases rapidly toward disposition. And all over the country individual judges have become more assertive in their efforts to help counsel identify issues or areas of inquiry which, if actively pursued early in the pretrial period, could either dispose of the case in its entirety or equip the parties to resolve the matter more efficiently.

These and many other innovations in case management have been accompanied by similarly creative work in the field of alternative dispute resolution. In the late 1970's federal courts in Pennsylvania, Connecticut, and California began important experiments with non-binding arbitration programs. Since those early beginnings some 15 additional courts have established non-

binding arbitration programs. Recently completed studies by the Federal Judicial Center show that such court-annexed arbitration programs enjoy widespread support in the bar. Approaching problems of cost and delay in yet another fashion, district courts in western Washington, Kansas, Michigan, and the District of Columbia, working with large groups of dedicated lawyers, have implemented very successful mediation programs. The non-binding summary jury trial procedures that were pioneered in the Northern District of Ohio have been used and refined in a number of courts. In addition to their innovations in case management, district judges in Oklahoma have extended the availability of the summary jury trial to many kinds of cases and have implemented a vigorous arbitration program. Judges in the District of Massachusetts refined the mini-trial concept, developed initially in the private sector, into various forms of non-binding summary bench trials. In Connecticut, judges set up machinery for impaneling teams of experts to render advisory opinions to help parties settle complex construction cases and other matters involving advanced technologies. Led by a task force of local lawyers, the Northern District of California established the first early neutral evaluation program in 1985. The District of Columbia and the Eastern District of California recently added similar ENE programs to the ADR services they offer. And all across the country judges and magistrates, responding to requests from counsel, have been devoting progressively more time and energy to settlement conference work.

While time does not permit us to cite all of the recent judicial innovations in case management and ADR, this brief overview suggests something of the energy and creativity that federal courts have committed to combating problems of cost and delay in civil litigation. As considerable as these commitments have been, federal judges recognize that work on the problems of cost and delay remains to be done. That recognition is reflected not only in the current work by the Advisory Committee on Civil Rules, which is actively considering rule changes that would compel more direct, less expensive sharing of information early in the pretrial period, but also in two important actions recently taken by the Judicial Conference of the United States. On March 13th of this year the Conference unanimously adopted a policy statement that included an intensified commitment to individualized case management and a recommendation that each district court convene an advisory group to help isolate causes of cost and delay and to recommend possible solutions.

Then, in late April, the Conference adopted an ambitious 14-point program designed to assess and address cost and delay in every district court in the country. Recognizing the valuable contributions that thoughtful lawyers have made to the administration of justice in so many jurisdictions, this program accords a central role to local advisory groups, with balanced representation from a cross-section of the bar. Such groups already exist in many courts, e.g., under the Congressional mandate

reflected in the 1988 amendments to 28 U.S.C. 2077, or in the form of federal practice committees. Under the Judicial Conference's 14-point program, each district retains the discretion to ask an already existing committee (perhaps augmented somewhat to assure the appropriate representative balance) to perform the functions contemplated for the local advisory group, or to appoint a new committee for these purposes. While preserving in each court necessary flexibility in these matters, the Conference assumes that many courts will elect to combine the responsibilities imposed by 2077 and its program in one committee in order to avoid the resource drains that can attend the proliferation of committees with overlapping assignments.

Under the Conference program, each advisory group, working with district judges, will begin its work by conducting a systematic, detailed assessment of the court's civil and criminal dockets, focusing not only on current conditions but also on trends in filings and in demands on the court's resources. Then the group will attempt to identify the principal causes of any cost or delay problems that it perceives. By proceeding systematically, and by working with data that is specific to each individual court, these advisory groups will be well-positioned to determine whether changes are in order and, if so, what they should be. They will recommend any measures that they feel, given the particular character of needs and circumstances in their district, hold some promise of reducing cost or delay. Most significantly, the

advisory groups will not confine their analyses and recommendations to court procedures, but also will examine how lawyers and clients handle litigation, searching for ways these players in the litigation drama can contribute to reducing expenses and delays.

Each district court will carefully review the assessments, analyses and recommendations submitted by its advisory group, and will implement the proposals that appear feasible and constructive. To enrich idea pools and to assure that all potentially useful solutions are considered, each district will share its advisory group's assessments and recommendations with a circuit-wide committee of district judges and with the Judicial Conference, both of which may recommend additional measures for consideration by individual courts.

In addition to these grassroots initiatives, the Judicial Conference will conduct demonstration programs in districts of different sizes and case mixes to experiment with different methods of reducing cost and delay (including ADR programs) and different case management techniques. Each demonstration program will be carefully studied, and lessons learned will be shared with all judicial officers in the country. Building from these sources, as well as the experiences of other courts, the Conference will arrange for publication of a Manual for Litigation Management and Cost and Delay Reduction that will describe and analyze the most effective techniques and programs. Another important part of the

Conference program will emphasize education and training: we will establish substantial new programs to assure that all judicial officers and appropriate court personnel understand the most current case management strategies and other programs for cost and delay reduction.

To coordinate this extensive, multi-dimensional effort, the Judicial Conference has created a new Committee on Court Administration and Case Management. The Director of the Federal Judicial Center, or his designee, shall serve ex-officio on this Committee, to assure appropriate integration of research and judicial education programs. To assure that the learning that is generated by this new Conference program appropriately flows into the Congressionally mandated rule-making process that has worked so well for more than 50 years, a member of Conference's Advisory Committee on Civil Rules will serve regularly on the new Committee on Court Administration and Case Management.

As this description of judicial initiatives makes clear, federal courts have made combating cost and delay in civil litigation one of their highest priorities for many years. Thus, when we respond to Title I of S. 2648 we do so against this extensive background of our own front-line efforts to address the concerns that inspire this proposed legislation.

The Evolution of the Judiciary's Position on the Proposed Legislation

Perhaps because no active judicial officer was asked to serve on the task force whose work informed the first version of this legislation, S. 2027 caught the vast majority of federal judges by surprise when it was introduced in late January of this year. Reacting quickly to set up machinery to examine this legislative initiative, the Executive Committee of the Judicial Conference appointed the subcommittee that I chair in early February. Despite our heavy trial schedules, we began immediately to study the proposed statute. While the very short time prior to the first hearings on March 6 did not permit us to complete a detailed analysis of the many components of the bill, Judge Robinson, speaking on that occasion for us, articulated some of our fundamental concerns about legislation that would reach into areas so clearly procedural, so clearly the province of the courts and the Congressionally mandated rule-making process.

By March 13th we had developed a substantial written analysis of some of the key provisions of S. 2027. On that day the Judicial Conference of the United States, during its regularly scheduled semi-annual meeting, voted unanimously to adopt the analysis we had prepared, to oppose S. 2027 as drafted, and to endorse a policy statement (alluded to above) re-affirming its commitment to individualized case management. Because it was prepared under

such time pressure, our written analysis focused primarily on those provisions of the bill that would have represented the most radical and troublesome departures from the approaches to case management that the judiciary had worked so hard over the preceding two decades to refine. Despite this necessary emphasis on unproven, detailed procedural prescriptions, our analysis of S. 2027 clearly articulated the view that this kind of legislation "imperils the vitality of the rule-making process."

During the latter half of March and the first half of April we continued to consider how best to respond to the concerns and purposes that inspired Senator Biden's legislative initiative. Two dominant themes emerged from our many hours of work during this period: (1) responsibility for the kinds of procedural matters covered by S. 2027 should remain in the judiciary, and (2) the most constructive course was not to superimpose nationally one uniform and unproven new system, but to ask each district to assess its own needs and to tailor appropriate responses to them, while simultaneously committing the Judicial Conference to conducting, in a limited number of volunteer courts, carefully designed experiments that would assess the effectiveness of a range of different approaches.

These themes play major roles in the comprehensive, 14-point program that the Judicial Conference adopted in late April, a program designed explicitly to achieve the purposes and to promote

the underlying values that Chairman Biden articulated in introducing S. 2027. We presented and explained the Conference's program to the Chairman's staff in late April and early May, hoping that adoption of this ambitious, unprecedented undertaking would persuade the sponsors of S. 2027 that legislation in this area was unnecessary. While the Chairman and the Committee's staff listened and responded to many of our concerns about S. 2027 as introduced, we failed to persuade the Chairman that legislation was not necessary. Given that failure, the Executive Committee authorized the legislative specialists in the Administrative Office of the United States Courts to submit to the Committee's staff various proposals that the subcommittee felt would improve the proposed legislation.

The Committee's staff responded positively to many of these suggestions, and on May 17 the Chairman and Senator Thurmond introduced, as Title I of S. 2648, a substantially modified version of the original bill. In ways we specify in a subsequent section of this statement, some of the significant provisions in the revised version of the proposed statute are consistent with the Judicial Conference's policies and its 14-point program. There remain, however, important respects in which the two approaches differ (we discuss some of these matters in some detail in a subsequent section). Moreover, even the modified version of the statute would compel the judiciary to adopt programs and to develop practices or local rules that conform to principles set forth in

the proposed statute, principles that are undeniably "procedural."

The subcommittee tried to persuade the Chairman not to insist on mandating conformity with procedural principles. For reasons we elaborate below, the failure of that effort leaves the bill in a posture that the strong majority of federal judges disfavor. Moreover, it is only in the days immediately prior to the final preparation of this statement that many judges have had the opportunity both to study the modified version of the proposed legislation and to discuss with other judges in some detail issues raised by it. For example, the Conference's Committee on Judicial Improvements, which has judicial representatives from each of the federal circuits, was unable to meet and consider Title I of S. 2648 until the third week of June. At that very recent meeting, however, the Committee voted unanimously to oppose the revised bill, in part because its members believe that the statute would represent a legislative intrusion into matters that should remain the province of the judiciary.

We also must report that many judges have expressed to us their deep personal concern that the proposed statute seems to reflect a fundamental lack of confidence by the Congress in the federal judiciary. These judges feel strongly not only that any such lack of confidence is unfounded and unfair, but also that before it enacts any statute that carries that imputation, Congress should be quite confident that the measure really is necessary.

Given the judicial initiatives described above, especially the Judicial Conference's recent adoption of its 14-point program, it is difficult for judges to understand why Title I of S. 2648 is necessary.

In light of the sentiments that it now perceives to be shared by the majority of federal judges, the Executive Committee has concluded that the Conference's 14-point program is the appropriate vehicle for pursuing the objectives underlying Title I of S. 2648 and that legislation in this procedural arena is not in the interests of sound judicial administration.

Fundamental Concerns About the Legislation

Before discussing specific provisions of the proposed statute, we would like to elaborate some of the fundamental concerns that underlie the Executive Committee's position. In doing so, we address the most sensitive issues raised by this kind of legislative initiative. We speak respectfully and in a spirit that we hope will be perceived as constructive.

We fear that enactment of this statute could result in real harm to the rule-making process that has served both Congress and the courts so well for so long. As you fully appreciate, Congress recently reviewed and re-codified that process, taking care to build into it procedures that assure that before nationally

applicable rules of procedure are imposed they are considered most deliberately by thoughtful and experienced judges, lawyers, and law professors over a substantial period of time, and that the lawyers and litigants into whose world the new rules would intrude are given ample opportunity to articulate their reactions, point out potential problems, and add suggestions. As we who have sat on the bench for some time have discovered, sometimes painfully, procedural matters are extraordinarily complex. They can not only influence, but fix, the outcome of litigation. New rules can have a great many unforseen consequences. And it takes the most considered deliberation to be sure that the dynamic between new programs and established practices is constructive. Thus it is crucial that inputs from all affected quarters be sought before procedural change is imposed. For reasons we do not understand, Title I of S. 2648 has not been drafted through such a process. Thus one of the primary bases for our opposition to the statute is our belief that nationally applicable procedural norms should be imposed only through that rule-making process.

Some thoughtful judges also have suggested that when Congress considers enactment of legislation that covers the kinds of procedural matters that are at the core of the judicial function, it ventures into areas of constitutional sensitivity. Rather than explore the constitutional arguments that are raised by this suggestion, we wish to emphasize our view that simply as a matter of wisdom of policy it would not be sensible to pass legislation

that could deprive judges of the discretion they need to determine in individual cases how best to use procedural tools to reduce delay and litigant expense.

Some of the More Detailed Provisions of the Bill Which Require Specific Comment

There are several detailed provisions of the revised statute about which we feel a special need to comment. The first to which we direct the Committee's attention appears in subparagraph (B) of section 473(a)(2), which apparently would require judicial officers to fix firm trial dates early in the life of each action and that such dates be no more than 18 months after the complaint was filed unless the assigned judge certifies that trial cannot be commenced within that period either because of the complexity of the case or the pendency of criminal matters. Many of our most effective case managers feel that approaching the setting of trial dates in this manner is both unrealistic and unwise. They point out, among other things, that a case's complexity is only one of a great many reasons for which it might not be feasible, early in the pretrial period, to fix a sensible trial date. Damages may not be ascertainable in that time frame, injuries may not have stabilized, interlocutory appeals may not have been resolved, necessary tests may not have been completed, key witnesses may not be available, information discoverable only overseas may remain unknown. The unpredictable flow of criminal cases before a judge may make the

setting of a early trial date unrealistic. In short, there are many different reasons, in addition to case complexity, for which it could be quite unfair to compel a trial to go forward within 18 months of the filing of the complaint. It also is important to point out that cases evolve in unpredictable ways, assuming shapes as parties and causes of action are added or changed over the course of the pretrial period that are wholly unforeseeable at the outset. This fact of litigation life means that in some cases a judge cannot determine what an appropriate trial date might be until the matter has evolved into something approaching the form it will take at the trial.

Lawyers and litigants respond most constructively to assertive case management that is realistic. They are not impressed by generic, formula based scheduling orders. Nor are they long moved by the imminence of false dates. They learn quickly what a court or judge can and cannot do. Recent experience with fast-tracking in some state courts shows that setting trial dates that the court cannot honor, and that lawyers know cannot be honored, is devastating both to lawyer morale and to the overall case management credibility of the court. Simply put, lawyers will not prepare for an event that they know will not happen on the date fixed. Thus, it is imperative that the trial dates that are set be realistic. And realistic means assuring at least two things: (1) that the informational needs of the case can be satisfied within the time frame allowed, and (2) that there is a reasonable

prospect that the court will be in a position to commence the trial on the date set. The approach in the revised version of the bill fails adequately to take into account the complexity, fluidity, and unpredictability of a federal court's work. As a constant fact of their professional lives, individual judges are compelled to try to balance and blend literally hundreds of competing and sometimes unforeseeable demands for their time.

These considerations persuade us that a provision like this must give judges more flexibility in fixing the trial date, for example, by requiring that early in the pretrial period they fix either the date for trial or a date or specific juncture by which the trial date will be set.

A second troublesome provision of the revised statute appears in subparagraph (D) of section 473(a)(2), which would require the setting of "target dates for the deciding of motions." Apparently this provision would be satisfied either by a local rule that created presumptive time frames within which all motions would be resolved or by a requirement that in each case individual judges set such target dates. One difficulty with either approach derives from the fact that there can be huge differences between different motions. Deciding a motion for summary judgment in a case involving 15 causes of action, some of which sound in antitrust laws, some of which sound in securities laws, some of which arise under patent rights, and some of which rely on civil RICO,

obviously will require the commitment of vastly greater resources, and take much more time, than deciding a discovery motion about where a deposition is to be taken. There can be vast differences even between various kinds of discovery motions, some of which, for example, call for careful elucidation of privilege law, then its application to thousands of documents. Given the great range of demands that motions can make, court-wide targets for the deciding of motions, even by category, would have to be too broad to be of much use. Artificially narrow time frames, by contrast, would pressure courts to sacrifice quality of analysis and reliability of results for the sake of compliance with abstract mandates. It would be unseemly, at best, thus to pit justice against a false form of efficiency.

Nor is the solution to require each judge to set in each case individualized target dates for deciding the motions that counsel might file. At no point in the life of a case can a judge reliably predict the number or the kinds of motions that will be filed or, more importantly, what the character of particular motions might be. For example, without being able to foresee their specific character, and the demands they would impose, a promise by a judge to decide all discovery motions in a given case within 15 days simply would not be meaningful. Moreover, experienced judges understand that they cannot predict the nature of demands that will be made on them by other cases, civil and criminal. Demands for immediate consideration of applications for temporary restraining

orders, for approval of wiretaps, for review of detention orders, or for last minute consideration of habeas corpus petitions in capital cases are just some examples of the kinds of substantial and unforeseeable interruptions to which the best laid plans of conscientious judges are vulnerable. Nor can judges predict with certainty how long individual trials will last. Of course, judges also have no control over the rate or nature of civil and criminal filings. And a spate of criminal arrests can force a judge's attention away from civil work.

The point should be clear: to establish artificial time frames within which judges should rule on motions would be neither realistic nor helpful. Worse yet, it could unfairly damage the morale and the reputation of the conscientious judicial officers who refuse to cut big quality corners simply to create an appearance of punctuality. Finally, such a system might foster an instinct in some judges simply to deny even potentially well made motions, especially motions for summary judgment, when they feel that the under the relevant time frames they cannot devote the attention to such matters that they deserve. If we adopt rules that encourage judges to deny motions that should be granted, simply because that is the least risky course, we both delay disposition of cases and compel litigants to incur completely unjustifiable expenses. Thus we strongly oppose any provision that calls for the setting of "target dates for the deciding of motions."

The judicial community also has concerns about subparagraph (7) of section 473(a). That paragraph would require semiannual public disclosure, for each judicial officer, of the number of motions and court trials pending longer than six months and of the number of cases that remain on the docket three years or more after filing. We will not repeat here the points just made about the untoward effects that the setting of artificial deadlines can have on the quality of judicial work and on the morale of the conscientious, but we would be remiss if we failed to note that we have many of those same concerns about this provision. In addition, we must emphasize the importance, in the implementation of any such system, of developing sophisticated, sensitive criteria for identifying the circumstances in which particular motions, trials, or cases fall within these categories. It would be quite unfair and misleading, for example, to consider a case to have been pending for three years if, during that period, all proceedings in the district court had been stayed for two years by virtue of the defendant's bankruptcy. Similarly, interlocutory appeals can effectively freeze a case at the trial court level for a substantial period. These and many other similar matters must be carefully accounted for in any fair reporting system. At a minimum, any provision such as this should explicitly authorize the director of the Administrative Office, in consultation with the appropriate committees of the Judicial Conference, to establish sophisticated criteria for determining the length of time during

which cases or motions should be deemed "pending."

We also feel constrained to comment on an aspect of the proposed formal findings that would precede the statute. Those findings suggest that the court, litigants, and counsel "share responsibility for cost and delay in civil litigation and its impact on access to the courts." It does not seem appropriate, however, to omit Congress and the executive branch from the list of those who share in this responsibility. In recent years, in particular, Congress has imposed additional burdens on the federal courts in both civil and in criminal matters, e.g., through ERISA, imposition of mandatory minimum sentences and Sentencing Guidelines. Actions by the executive branch also can exacerbate cost and delay problems, e.g., when the Department of Justice elects to prosecute routine drug cases in federal court (instead of permitting such matters to proceed in state courts). There also have been numerous instances of extreme delay in making nominations for judicial vacancies. We would hope that as part of a truly comprehensive effort to attack the problems of cost and delay, Congress would undertake to identify how its actions (and inactions), as well as those of the Executive branch, adversely affect the adjudicatory process as well as docket conditions in federal courts.

There are obvious ways in which Congress and the Executive could contribute meaningfully to solutions. Congress could create

the additional judgeships for which the need is so pressing, and the Executive could promptly fill judicial vacancies. Similarly, Congress should continue to fund adequately the work of the federal courts. Because the problems of cost and delay are so complex, have so many sources, and have yielded in the past so reluctantly to reform efforts, we cannot hope to launch meaningful assaults on them without significant augmentation of already strained resources. We should note here that while we appreciate the funding provisions of Title I in its current form, we have reason to fear that the monies there contemplated may fall far short of the real cost of meaningful compliance with the various provisions of the statute. Promptly after it is completed we will share with this Committee the financial impact analysis of this legislation that the Administrative Office has been asked to undertake.

Finally, we note that the current version of Title I identifies by name the five district courts in which the demonstration program would be conducted. Without in any way reflecting on the districts there named, we feel that the selection of districts for participation in any such demonstration would be better left with the Judicial Conference and the district courts. A host of considerations should play roles in the selection of these districts in order to maximize the learning potential of these procedural experiments. It is essential, for example, that the courts selected represent the widest possible range of caseload and lawyer-culture mixes. The Judicial Conference, working with

representative district judges, the Administrative Office, and the Federal Judicial Center, has the resources and data necessary to make the wisest decisions in these kinds of matters.

Important Respects in Which the Judicial Conference's 14-Point Program Largely Anticipates the Current Version of the Bill

In this section we point to several of the respects in which the current version of Title I and programs and policies already adopted by the Judicial Conference largely converge. Noting these several areas of convergence should make it clearer why we feel that the proposed legislation is unnecessary.

The statute would firmly endorse the notion that case management should be case specific and tailored to meet the specific needs of individual cases and would acknowledge, at least implicitly, that circumstances and problems may vary greatly from district to district, so that, within certain parameters, the approaches to case management and cost containment that are most appropriate and effective may vary considerably in different areas.

The latter insight obviously informs what is perhaps the most significant difference between the legislation as originally proposed and the current version of the statute. S. 2027 would have imposed one largely untested, detailed, and quite expensive system on all courts simultaneously. Perhaps as a result of the

dialogues that ensued after the bill was first introduced, its sponsors have opted for a quite different program. Instead of imposing one system from the top down on all courts, the current version of the legislation would build much more sensibly from the bottom up, asking a limited number of courts to experiment intensively with a range of management and ADR systems, while simultaneously permitting all other courts to fashion measures they feel will be specifically responsive to their own circumstances and the needs of their own litigants. Were these undertakings not constrained by the mandatory principles that are set out in section 473(a), these provisions would parallel rather closely the Judicial Conference's approach.

We note that the statute's call for a demonstration program, while not identical to the Conference's position, reflects a similar spirit and set of objectives. We believe that thoughtfully designed, carefully controlled, adequately supported, and thoroughly analyzed experiments with a series of different approaches to case management and other programs that are designed to reduce cost and delay offer an extraordinary opportunity for real breakthroughs in our understanding of the litigative process and how to bring it closer to fulfilling the promise of Rule 1.

Another important point of consistency between the proposed legislation and the Judicial Conference's 14-point program is the significant role that would be accorded to local advisory groups. Structuring these groups so that the lawyers who serve on them

reflect the perspectives of major categories of litigants will enable the groups to recommend solutions that include, in the words of the bill, "significant contributions by the court, the litigants, and the litigants' attorneys." It is important to emphasize here that many of the most constructive programs that have been implemented by federal courts in the last decade are the products of local committees of practitioners working with judges. Lawyer groups have helped design and staff innovative case management procedures or court-sponsored ADR programs in Seattle, San Francisco, Kansas City, Philadelphia, Detroit, New York, Raleigh, and Washington, D.C. In these and many other cities, members of the bar have volunteered countless hours to improving local discovery practices and case management procedures and to supplying the person-power for settlement, mediation, arbitration, and early neutral evaluation programs.

There are several additional components of the proposed statute that are substantially similar to provisions of the Judicial Conference's 14-point program. For example, the legislation would establish machinery for dialogue about the nature of cost and delay problems and the best approaches to solutions between each district court and a circuit-wide committee of district judges. For each district, the circuit-wide committee, in which the chief judge of the court of appeals also would participate, would review the assessments and recommendations prepared by the advisory group, as well as the measures implemented

by the court. Then, drawing on what it has learned in the reports from and actions by other courts, the circuit-wide committee would offer its own perspectives and suggestions for consideration by the district court. Thus the statute would provide a vehicle for communication among courts in the same circuit that is substantially similar to the vehicle created by the Conference's program.

Also like the Conference's program, the bill contemplates a national clearinghouse of information about conditions and solutions. It asks the Conference, acting through the appropriate committees, the Administrative Office of the United States Courts, and the Federal Judicial Center, to bring together and to review not only the reports and recommendations made by the local advisory groups, but also the responsive procedures and programs that the district courts adopt. The statute also calls upon the Conference to prepare, within four years, a comprehensive report, describing the steps taken by the district courts. Building on this extensive data base, as well as the lessons learned from the demonstration districts, the Conference would arrange for publication and widespread dissemination of a Manual for Litigation Management and Cost and Delay Reduction. Periodically updated and refined, this Manual would become an invaluable resource for all district courts, describing and analyzing a host of different approaches to expense and delay reduction through innovative case management and ADR techniques.

The current version of the bill also shares with the Judicial Conference's program a clear commitment to the importance of vigorous, sophisticated programs for educating and training both judicial officers and court staff. The Conference, like the sponsors of the bill, seeks implementation of a "comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation." If Congress provides it with the substantial additional financial support that will be necessary to make such an undertaking meaningful, the Judicial Conference and the Federal Judicial Center will be well positioned to carry out this mandate. The Conference already has established the means to guide and coordinate this important educational effort through its new Committee on Court Administration and Case Management, a committee on which the Federal Judicial Center, the Administrative Office, and the Advisory Committee on Civil Rules all are directly represented.

The Conference and the sponsors of the bill also agree about the importance of extending the capabilities of electronic dockets so that in all courts the judges and clerks will have ready access

to the information they need not only to monitor and manage their cases but also to understand how both counsel and the court are expending their resources in each individual matter. This is yet another area in which we urge the Congress to appropriate the funds necessary to permit the courts to achieve goals that we clearly share.

Conclusion

The Executive Committee of the Judicial Conference recognizes that many of the purposes of the proposed legislation are consistent with the Judicial Conference's March 13 policy statement and its 14-point program. However, the Executive Committee cannot endorse Title I of S. 2648 because:

1. The Judicial Conference has adopted and is presently implementing a program which will accomplish the purposes of Title I of S. 2648;

2. The legislation would represent unwise legislative intrusion into procedural matters that are properly the province of the judiciary;

3. The statute would circumvent the procedures established and recently re-endorsed by Congress in the Rules Enabling Act; and

4. The mandatory nature and the rigidity of some of the provisions of the bill would impair judges' ability to manage the dockets most effectively and would tend to defeat the aims of cost and delay reduction.

Thank you for affording us this opportunity to express our views.