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As I See It

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The Federal Courts Study Committee has issued a report recommending about 100 changes in federal procedure and jurisdiction. Senator Biden has introduced a bill, S. 2027, to speed up federal civil litigation. There are some 67 vacancies in the federal judiciary, and pending legislation would create 75 more judge-ships.

By the time you read these words, legislative hearings and intense negotiations among the Judicial Conference, the ABA and Congressional leaders may well have changed this landscape of disputes and problems. It is almost certain, however, that the issues will still be alive. All of us, and our clients, are going to be affected by pending changes in the federal court system. I want to express my own views about these questions. As I do so, please be aware of three important facts: first, my term is about up, so I am a lame duck becoming lamer; second, the Section's entire Council, and not its officers, make Section policy, and they do so only after a full debate that involves the several hundred people in positions of Section leadership; third, ABA policy is usually made by the House of Delegates, where our 60,000-member Section has just two votes.

I believe that vacant federal judge-ships must be filled now. People disagree about fault. I tend to think the White House staff is dragging its feet. Since the President nominates and the Senate has the right of advise and consent, it ought to be possible for Senatorial and executive branch leaders to agree on a package of nominees to fill these vacancies. For example, in the Northern District of Texas, there are three vacancies on a 10 judge court. Yet, the docket pressures caused by drug and savings and loan cases are intense. One result has been that distinguished and long-serving judges like Eldon Mahon and Halbert Woodward, who have taken senior status, have postponed their vacation and retirement plans just to shoulder part of the burden.

Congress would be justified in withholding approval of additional judge-ships until the current ones are filled.

I also believe that Senator Biden is correct in saying that federal civil litigation must be speeded up. Complex cases must be controlled to prevent excess

discovery and undue delay. The Litigation Section has supported the goals of Senator Biden's proposed legislation.

However, changes in federal procedure should not be a subject of detailed Congressional legislation. Since 1937, the rulemaking process has yielded excellent results, and the Civil Rules Advisory Committee should be directed to formulate rules to get cases moving. If necessary, individual districts could develop auxiliary rules to meet local conditions.

Of course, no rules can get a civil case to trial in districts where judges are handling dockets of over 1,000 drug cases each, as in parts of Texas and Florida.

My own view, which many do not share, is that lawyers are overdiscovering complex cases. Litigation budgets do not seem to restrain lawyers in big cases, nor induce them to focus narrowly on the issues to be tried. Judicial time is a scarce resource, and when some cases consume undue amounts of it, other litigants must suffer.

Although some litigators will accuse me of heresy, I think the discovery rules must place absolute limits on interrogatories, dictate form interrogatories, and limit the time of depositions without leave of court.

Some lawyers use interrogatories simply to require overly detailed statements of claim to feign surprise when an opponent makes a slight shift of position. This bushwhacker theory of discovery is the very thing the federal rules were designed to end.

Other proposals will be debated over the coming months, including federal habeas corpus and diversity jurisdiction. Your Section has taken strong positions on both of these. I hope you will write me with your views on federal court reform, so that the Section's debates will be enriched.

A final word: I know that most litigation takes place in state courts. Your Section is active in movements to improve state judicial machinery. In May, I was opening keynote speaker at a Conference on the Future and the Courts, funded by the State Justice Institute. I outlined my thoughts on what must be done to assist overburdened state justice systems. Leaders of your Section took an active role in planning this conference. L