

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURT HOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA 19106-1797

MICHAEL E. KUNZ
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May 9, 1991

Abel Mattos, Chief
Court Programs Branch
Administrative Office of the
United States Courts
1120 Vermont Avenue, N.W., Room 1008
Washington, DC 20544

Dear Mr. Mattos:

Attached hereto is a copy of the transcript of the April 23, 1991 meeting of the Eastern District of Pennsylvania Civil Justice Reform Act Advisory Group. Please contact me if you have any questions.

Sincerely,



Michael E. Kunz

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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CIVIL JUSTICE REFORM ACT
ADVISORY GROUP
MEETING

- - -

Ceremonial Courtroom
April 23, 1991
8:30 o'clock a.m.

- - -

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16 MICHAEL E. KUNZ, Clerk of Court
17 U. S. District Court
18 2609 U. S. Courthouse
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22 Also Present: HONORABLE LOUIS H. POLLAK
23 16613 U. S. Courthouse
24 601 Market Street
25 Philadelphia, PA 19106
26
27 HONORABLE MARVIN KATZ
28 13613 U. S. Courthouse
29 601 Market Street
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32 Reporter: A. LEO LEVIN
33 University of Pennsylvania Law School
34 3400 Chestnut Street
35 Philadelphia, PA 19104
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39 Audio Operator: Thomas J. McCann
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45 Proceeding recorded by Electronic Sound Recording:
46 transcript produced by computer-aided transcription service.
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1 MR. LANDIS: Good morning. We're at nearly full
2 strength today. I had a call from Jim Corcoran offering his
3 regrets that he couldn't be here and Mike Baylson is starting
4 a trial, too, and it also is going to involve Mike Rocco. So
5 that they're not going to be present with us today.

6 And her timing is uncanny, because as the first
7 order of business, I want to exercise a point of personal
8 privilege and that is to report that on Saturday, Jennifer
9 Clark was elected a member of the firm of Dechert, Price and
10 Rhoads.

11 (Applause.)

12 MR. LANDIS: A few items of what's going on. I
13 think I told you the last time that the Judicial Center is
14 working on two advisory opinions; one advisory opinion
15 telling us what to do or advising us how to deal with the
16 offer of the West Company of assistance to the work of the
17 advisory groups, the other dealing with the more important
18 policy question of access. I can report that they're still
19 working on the opinion and that we may get a ruling on it
20 sometime in the next month.

21 So meanwhile we have no advice on how to deal with
22 the question of access to our meetings and so far it hasn't
23 presented a particular problem.

24 We're very pleased today to have as our first --
25 won't call him a witness. I'll call him one who can share

1 his experiences as a trial judge with this group and that's
2 our good friend and colleague, Judge Louis Pollak. He has
3 been modestly briefed on the kinds of things that we're
4 dealing with and has been invited to speak totally freely on
5 his views of -- as he sees some of the undertakings we have
6 to do and also any solutions that he may propose for us to
7 consider.

8 Judge Pollak.

9 JUDGE POLLAK: Well, thank you, Chairperson Landis.
10 I'm delighted to be here. I'm doubly delighted. I'm pleased
11 that Bob and Leo invited me to talk with you. You are a group
12 which is doing important service for this Court and I hope in
13 that sense for Article 3 generally. We are really enormously
14 grateful for the glittering assemblage of expert advisors
15 whom you comprise.

16 Our Court, to the extent that we accomplish
17 anything, it's I think very much a consequence of having such
18 wonderful support from the Bar. This is simply the latest
19 example of that.

20 I gather from the Chair's remarks that the question
21 of access to these meetings is an initial and intriguing one.
22 though perhaps not one yet of pressing operative consequence.
23 In personal terms, though, I'm glad that I was able to get
24 access to this meeting notwithstanding that I began by
25 following my mentor, Professor Levin's instructions to report

1 to the ceremonial courtroom, which I did, and it was locked,
2 as I should have expected and I took it that this was merely
3 the byplay of my colleague who has helped me to understand
4 the ways of the world, academic and litigating, for some
5 decades now.

6 But I made my way here and what I'd like to do if
7 this is agreeable to you, Bob, is to comment for a moment
8 about sort of the initial general framework which I see
9 reflected in Roman numeral I of your -- the draft interim
10 tentative outline of the report which ultimately your
11 committee is to produce.

12 And this is not at the expense of addressing with
13 particularity the matters that your committee is instructed
14 to cover under Roman numeral II, and I'm delighted to be
15 interrupted or brought back to base at any point. But my
16 suspicion was that since you are going to be required to
17 cover all of the factors and principles and ingredients and
18 criteria and what not in Roman numeral II in your report, you
19 may be as interested in sort of setting a context for that
20 specific set of principles.

21 And perhaps if I at least began by offering thoughts
22 in a more general way, that might be helpful for you.

23 MR. LANDIS: Please do.

24 JUDGE POLLAK: But I hope you'll all feel free to
25 break in and inquire at any point.

1 I'm probably a particularly apt person for you to be
2 talking to early on since perhaps I'm your prototypical
3 problem judge. In terms of what the Biden bill is addressed
4 to, I'm a pretty slow judge, I think. I think Mike's figures
5 will confirm that I'm a pillar up at the high end of the
6 caseload statistics. And I suppose if your committee could
7 find a way of moving me from high to somewhere in the middle.
8 you could regard that as a gain, at least if you could
9 generalize from that particularized success. But I think I
10 may present a challenge to you, but I hope you can succeed.

11 I've been thinking in the last few days since
12 speaking both to Bob and Leo about this appearance. I've
13 been thinking about what I've been doing for the last couple
14 of years which has led me to feel somewhat mired in
15 activities which are not the activities that I think you, as
16 a committee, would want me to be primarily engaged in, but
17 frankly I would just as soon not being engaged in.

18 I don't pretend to have in my head the figures on
19 case filings, criminal versus civil or the various breakdowns
20 in each of those categories. My sense is that in the -- it's
21 now a dozen years that I've been here -- the balance between
22 criminal and civil filings has not changed markedly if one is
23 just looking at numbers of filings. Mike may tell me I'm
24 wrong on that, but the criminal filings clearly are,
25 numerically speaking, are only a modest fraction of the civil

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1 mid-1989 to now, at least two-thirds, more likely three-
2 quarters of my in-court time has been devoted to criminal
3 cases and most particularly drug cases.

4 Now, I don't offer that as typical. My colleagues
5 may have a different profile, but I suspect that there are a
6 number of comparable profiles. What this means is, starting
7 in the fall of 1989, there was returned a drug conspiracy
8 case involving 41 defendants. In the event only three of
9 those went to trial, but the proceedings which involved the
10 pleas of 25 or 30 some others that did not go to trial --
11 there were some defendants never apprehended -- those
12 proceedings have been extended and intensive. The trial of
13 those that did go to trial was extended and intensive. There
14 still lie ahead the sentencings of these people and that will
15 take large portions of weeks and weeks and weeks to come.

16 Fitting the trial of civil cases into the
17 interstices of that activity has been quite hard, at least
18 it's been very hard for me. So that though when one's not
19 in-court time, one could do one's best to supervise the
20 progress of civil cases toward trial, one had no confidence
21 that when a case was ready for trial, you could offer counsel
22 a courtroom and your time. And so the cases pile up.

23 I guess I would feel less troubled by that, since
24 one regards after all the criminal and civil litigation
25 together as an aggregate of a job that's to be done, I'd feel

1 less concerned about the pushing-aside of civil litigation if
2 I felt that all our hard work in processing drug cases was
3 really generating some important victory somewhere with
4 respect to that intractable problem. It's hard to feel
5 enormous confidence about that. And obviously that takes us
6 beyond the confines of your responsibilities but I simply
7 register the fact that a great deal of the energies which I
8 ought to be devoting to the trial of civil cases have been
9 displaced.

10 Now, if I bring you up to date, for the last four
11 weeks I have actually been able to try two civil cases.
12 Well, one has been tried and the other -- the second is to go
13 to the jury either today or tomorrow. It happens that those
14 two cases are themselves illustrative of problems that beset
15 us in terms of court congestion on the civil side of the
16 docket.

17 The first of the two cases was an asbestos case and
18 it took two weeks. Now, that's the first asbestos case that
19 I've had to try for -- I'm not sure -- three or four years.
20 There are relatively few asbestos cases that actually come to
21 trial in this courthouse so far. Again, I'm sure Mike has
22 the absolute figures and I do not, but I do know that we
23 would be in much worse shape than we are on the asbestos side
24 of things were it not for a marvelous machine which we have
25 in this courthouse which we hope to keep protected and

1 unknown to the outside world, at least to other court
2 systems, called Charles Weiner.

3 And Judge Weiner manages to make hundreds and
4 hundreds and hundreds of asbestos cases get resolved. I
5 think his success in that score is much better than the
6 success of anybody doing a comparable job in any other
7 district in the United States. I think that covers both
8 federal and state courts so far as I know. But he is one
9 extraordinary person with his finger in a dike and we may be
10 overwhelmed very shortly by these tens of thousands of cases
11 which I think we here in Philadelphia have what, is it 7,000
12 cases?

13 MR. KUNZ: 5300.

14 JUDGE POLLAK: 5300. That's either the largest or
15 the second or third largest number of any district, any
16 federal district in the United States.

17 I remind you that what happens with the asbestos
18 cases may be subject to change with respect to the federal
19 system as a whole if the multi-district litigation panel,
20 which is going to be considering this matter in New York late
21 next month, concludes that asbestos cases should be brought
22 within the framework of the multi-district litigation system.
23 But that's a matter to be determined by the panel. Up to now
24 the panel has resolutely said no to bringing asbestos cases
25 within the rubric of airplane accidents, securities,

1 whatever, the staple cases that are multi-districted.

2 If Charles Weiner's success can be cloned throughout
3 the federal judicial system, it may be that we can bring some
4 sort of sense to that aspect of the Article 3 process.

5 Frankly I'm kind of bearish about it. It's an example of
6 cases that shouldn't be, in my humble judgment, handled by
7 litigation at all but by a compensation system. Obviously
8 that involves ranges of solutions that lie way beyond our
9 poor power to add or detract.

10 I went from an asbestos case, which incidentally was
11 a verdict for defendants -- we have cautious juries in this
12 district as I think members of this committee know. I went
13 from there to an FELA case, which will go to the jury in the
14 next day, perhaps today, perhaps tomorrow. FELA of course
15 has been a staple of this district's docket and of every
16 other district's docket for decades now. There are very
17 large numbers of cases and most of them get settled, but some
18 of them go to trial.

19 Why should they be in the federal courts at all?
20 You may remember that I guess either two or three years ago
21 Chief Justice Rehnquist singled out FELA and Jones Act cases
22 and Social Security cases and in-state plaintiff versus out-
23 of-state defendant diversity cases as categories of cases
24 that should be removed from the federal district courts. And
25 he also added that Congress should take a cold look at civil

1 RICO with a view to cutting that down.

2 I think the Chief Justice was right with respect to
3 three of those four categories. I think to remove Social
4 Security cases from our docket, even though you will find in
5 the figures that they constitute a big slice of time, I think
6 his remedy was wrong because he proposed simply having Social
7 Security cases be appealed directly to the courts of appeals.
8 That would have had some incremental value for the district
9 courts. It would have drowned the court of appeals. It
10 would have added I think 30,000 cases to their -- nationwide
11 -- to their docket. So distributionally through the court
12 system, I think that's not a change that would have made
13 sense.

14 I think he was absolutely right that FELA and Jones
15 Act cases while they are staple federal cases can as easily
16 be tried exclusively in the state courts, which have
17 concurrent jurisdiction over them now. Surely courts of
18 common pleas are every bit as competent to try those cases as
19 federal district courts. The problem that would be
20 presented, I think, would be that plaintiffs would have to
21 wait even longer to get to trial.

22 My sense is that cutting back on civil RICO is
23 something that is high time and that's illustrative of the
24 general problem of Congress creating causes of action without
25 really thinking much about their impact on the judicial

1 system. Maybe Congress should be encouraged to think that
2 when it generates new causes of action -- and certainly there
3 are reasons for creating new legal claims from time to time -
4 - but Congress might well begin to think that in creating new
5 federal causes of action that filter into the federal courts,
6 they'd better look for categories of cases to remove from the
7 system.

8 The diversity category, obviously, is a very likely
9 target. The Chief Justice made the very modest proposal of
10 removing in-state plaintiff versus out-of-state defendant
11 cases. Any challenge to the diversity jurisdiction will of
12 course run into the loud outcries of the leaders of the Bar.
13 I assume I can generate 20 speeches of rebuttal right around
14 this table. You'll tell me and tell our reporter how wrong it
15 would be to think of tampering with the diversity
16 jurisdiction.

17 Well, those are the -- I bring these to your
18 attention simply because they seem to me contextual factors
19 for you to be thinking about.

20 When you start addressing particular needs of this
21 court, do we need more judges? We always think we need more
22 judges, but frankly, I guess, within the privacy of this room
23 we have to acknowledge that we're pretty well served.
24 Senator Specter has certainly been enormously supportive from
25 his position on the Judiciary Committee of the courts in

1 general and what we would like to think of as his court here
2 in the Eastern District in particular. And we have new
3 appointees or at least new seats for new appointees to
4 occupy, if the appointment process can ever be speeded up.
5 So I can't make the claim that we need more judges, qua
6 judges. We need more women judges, that we clearly do need.
7 I don't know what the scope of this committee's power is, but
8 do what you can on that score.

9 We would not be able to do what work we do do were
10 it not for the extraordinary cohort of magistrates who work
11 so hard and take the laboring oar with respect to Social
12 Security cases, habeas corpus cases, a great deal of
13 supervision of pretrial work for some judges, not so much for
14 others, and so forth.

15 I implore your committee in its report not to say a
16 word that discloses to the outside world what an
17 extraordinary clerk's office and, most particularly, what an
18 extraordinary clerk we have. It is as important to the
19 health of this district that Mr. Kunz be kept right here as
20 it is that Judge Weiner be kept right here. We don't want
21 anybody else to find out what marvels we possess.

22 The one category of support personnel that
23 conceivably a court like ours could use more of, and there
24 would be, I'm sure, differences of view within sorority and
25 fraternity which is our board of judges, is with respect to

1 law clerks. We all are allotted two. At least some of us, I
2 suspect, would think that productivity would improve if we
3 had a third law clerk. It would dilute to some extent the
4 wonderful intimacy of the chambers to have three law clerks
5 rather than two. The court of appeals judges, though, have
6 managed that for many years. I'm not for a moment saying
7 that most or indeed many of our colleagues would want to have
8 a third law clerk and I have misgivings about even that
9 structural alteration, but if you want to know what a slow
10 judge thinks, I think I would be addressing motions more
11 quickly, denying summary judgment and motions to dismiss
12 faster. I suppose occasionally even granting some of those
13 motions if I had a third law clerk.

14 I've spoken at length about things that are in a
15 sense not central to your report. I mean they're not the
16 mandated subjects of your report. Maybe I should pause and
17 find out whether there are particular things that I haven't
18 been talking about that the committee wants my thoughts on.

19 MR. LANDIS: Well --

20 JUDGE POLLAK: I have about ten minutes before I go
21 back to being a FELA judge.

22 MR. LANDIS: Well, speaking for Leo and me, we had
23 thought to give you a blank page and have you write on it.
24 If there are any other --

25 JUDGE POLLAK: So far it's still blank.

1 MR. LANDIS: No, no, no, no, I'm already on to my
2 second page of notes. Are there any other members of the
3 committee who have some specifics that they'd like to have
4 Judge Pollak address?

5 MR. LEVIN: Let me break the ice, all right.

6 MR. LANDIS: Go ahead.

7 MR. LEVIN: And I'm exceedingly grateful and I
8 subscribe to the blank page theory, but in addition I hoped
9 for a kind of dialogue that we would, you know, that we could
10 have. And I'm on my fourth page of notes.

11 MR. LANDIS: I write smaller, Leo, and slower.

12 MR. LEVIN: Let me probe a little bit, if I can.
13 The notion that the Congress maybe ought to contract the
14 jurisdiction but yet you have enough judges. In other words,
15 I would assume -- and all I'm trying to do is to understand
16 the thing. I could see a report which says to Congress -- I
17 mean I can just envision -- you want to give us all this
18 work, you want to give us the in-state diversity, you want to
19 do all these things. Fine, give us the resources. And for
20 that kind of a job, with this kind of a complex criminal
21 thing, we need X additional cadre.

22 If there's enough at the moment, there really is
23 enough, judges, as you put it, qua judges, to do the job,
24 that Congress has currently given -- and I'm not taking away
25 from the idea that we maybe ought to tell Congress it would

1 better not to increase the size and so on -- but I want to
2 explore that relationship, your views of that relationship.

3 Do I make myself clear? I'm not...

4 JUDGE POLLAK: I think, Leo, I did not make myself
5 clear in saying that we had enough judges. In saying that we
6 have enough judges, all I meant was that comparatively
7 speaking I don't think the Eastern District of Pennsylvania
8 is in a position to ask the Judicial Conference to tell
9 Congress that we need more judges more than the Northern
10 District of California or the Southern District of New York
11 or the Eastern District of New York or the District of New
12 Jersey or whatever. I just mean -- I think we in this
13 district are, as compared with other federal districts,
14 reasonably well-staffed. But I think all of us are -- I
15 won't quite say hopelessly but well beyond the point of doing
16 the job thoughtfully and carefully and in the sort of
17 individually tailored way that I think we expect the federal
18 courts to be doing and that to the extent that people insist
19 that diversity should be retained because the state courts
20 don't do the job so well, they're really critical of the
21 state courts for operating it wholesale.

22 So that's the only sense in which I meant that we
23 have enough judges.

24 MR. LANDIS: Yes, John. All right. Go ahead, John,
25 and then --

1 MR. SHELLENBERGER: It doesn't matter.

2 MR. LANDIS: All right, Sy, you've been yielded to.

3 MR. KURLAND: Judge Pollak, I was a little surprised
4 by some of your remarks from the standpoint that we're
5 focusing here on things like discovery control in civil
6 cases, control of motions in cases, how to get a differential
7 case management program and the description that you gave
8 honestly as to, you know, the things that concern you seem to
9 indicate that the majority of the work that's consuming your
10 time is managing these very complex criminal cases that come
11 up only a very small percentage of which come to trial and,
12 you know, Judge Weiner dealing with this tremendous caseload
13 that he has which is an administrative problem and these FELA
14 cases and Jones Act and, you know, Social Security-type
15 cases.

16 And that the real thrust of what we're sort of
17 dealing with and addressing ourselves to is not where the
18 real thrust of the time the court is really being spent when
19 you get right down to it. It's in these areas that sort of
20 you wonder why you yourself have to be bothering doing all of
21 these cases.

22 JUDGE POLLAK: Well, Sy, I'm not -- in speaking to
23 you about matters that I'm engaged in that are different from
24 the items covered in the mandated part of your report, the
25 management of the discovery process. All the rest of it I'm

1 not for a moment trying to suggest the unimportance of that.
2 It's not merely that Congress requires us to address it, it
3 is critical.

4 What I was trying to express really to you is a
5 concern that, though if instructed, I can set a, quotes,
6 "firm trial date," we'll have a conference and we'll develop
7 a plan for the management of this civil case, big or small,
8 and for the purposes of this discussion we'll call it one of
9 the large Kurland cases, but I can tell you, Sy, that we're
10 going to go to trial in February of '92 with a case that
11 you're going to file tomorrow, but you won't believe me and I
12 won't believe myself because though it may be written down in
13 our plan, in February of '92, I think the high probability is
14 that I'm going to be in court on a drug case.

15 And so that doesn't mean that it's unimportant to
16 undertake these things, but I don't want to enlarge your
17 sense that we're going to change the world this way.

18 MR. KURLAND: Well, then that's pretty much in
19 accord with what you said to Professor Levin with the judges,
20 that what your description does is not negate the rest of the
21 problems, it just emphasizes. The ones that you see.

22 MR. LANDIS: John, did you have a comment or
23 question?

24 MR. SHELLENBERGER: I have maybe two related
25 questions. Do you have any sense of what in your view an

1 average federal civil case, what the time from filing to
2 trial should be. I don't mean the most complex, I don't
3 meant the most routine, but a case that goes to trial, how
4 much time should that take?

5 JUDGE POLLAK: A year.

6 MR. SHELLENBERGER: Can I ask the second part?

7 JUDGE POLLAK: Yeah.

8 MR. SHELLENBERGER: If you didn't have all these
9 criminal cases and you had time to do civil cases, you say
10 you're a slow judge. If we forced you or what we recommend
11 would force you to be faster, would there be a cost in that?
12 Would we be giving something up by forcing you to be faster?

13 JUDGE POLLAK: I don't think you would be giving up
14 very much. No. I think I'd get motions decided faster and
15 probably --

16 MR. SHELLENBERGER: As well?

17 JUDGE POLLAK: -- it might be healthy. I mean that
18 would move -- you know, that would bring some cases along for
19 at least trial readiness or dispose of them quicker. And I
20 can -- I'm prepared to believe that it probably would be a
21 healthy thing for me, though I think I'm one of -- I'm not
22 sure that you should draft rules that are directed just at
23 sinners because most of my colleagues -- I look immediately
24 to my left and to my far right -- they're not slow. And I
25 don't think that what they need are prods, though I don't see

1 that these are costly to us. I'm not distressed about what's
2 proposed.

3 MR. LANDIS: Ed, did you have a question or a
4 comment?

5 MR. MULLINIX: I have a question for Judge Pollak,
6 if I may. Judge, do you think there's any validity to the
7 notion that putting some members of the court exclusively on
8 criminal cases and other members --

9 JUDGE POLLAK: No.

10 MR. MULLINIX: -- of the court exclusively on civil
11 cases and --

12 JUDGE POLLAK: Excuse me. Do I have to wait for the
13 end of your question?

14 (Laughter.)

15 MR. MULLINIX: Obviously you wouldn't do that on a
16 permanent basis but rotating in and out, it would at least
17 alleviate the problem of having to fit the needs of civil
18 cases into the interstices of the demands of criminal cases.

19 JUDGE POLLAK: I would be very distressed if we
20 moved one inch, one centimeter in that direction, Ed, I
21 really would. I'd much rather have the luck of the draw
22 determine what we're doing at any particular point. And I
23 don't think that there are any inefficiencies that are
24 created by the fact that a particular judge isn't known to be
25 assigned to criminal cases for six months or whatever.

1 MR. LANDIS: Mike.

2 MR. CHURCHILL: I have a related question, though.
3 Would there be any use in your view that some procedure that
4 if you got backed up with a major criminal trial or set of
5 them that you could assign off some of the cases that are now
6 trial ready, that you've managed up to the point of getting
7 everybody ready for trial?

8 JUDGE POLLAK: I think that's certainly a reasonable
9 thing to explore. I don't have any principal problem with
10 that provided that any such reassignment would be random,
11 just as the original assignment was or like that.

12 MR. LANDIS: Alice.

13 MS. BALLARD: Just as a follow-up to that idea,
14 maybe you could reinstitute the notice of a right to
15 disposition by a magistrate at that point. I mean I know I
16 have cases sitting on trial lists and now I'm sort of
17 thinking, well, gee, that's a good idea, Michael, maybe we
18 could handle them that way.

19 JUDGE POLLAK: Obviously the more we can utilize
20 magistrates or for trial purposes, it seems to me all of us
21 benefit. We --

22 MS. BALLARD: It seems like now you have to choose
23 the magistrate at the beginning. And the idea of being able
24 to choose one at the end isn't really ever thought of.

25 JUDGE POLLAK: Well, I don't think there's anything

1 that forecloses moving to magistrate trial quite late in the
2 progress of a case.

3 MR. LEVIN: In the 1990 amendment I think will
4 facilitate that. The December 1990, there's a provision
5 about what you may do advising litigants after the first time
6 about the availability of magistrates and that may help along
7 that line.

8 MR. LANDIS: Eve.

9 MS. KLOTHEN: How big a benefit would it be to have
10 additional magistrates for the court?

11 JUDGE POLLAK: I guess that would be -- I think we
12 would agree that they would be a useful additional resource.

13 MR. LANDIS: I wouldn't.

14 JUDGE POLLAK: You wouldn't?

15 MR. LANDIS: I was going to --

16 JUDGE POLLAK: Well, some of us would agree. Others
17 of us wouldn't agree.

18 (Laughter.)

19 MS. KLOTHEN: I have one other somewhat related
20 question. You had indicated that you thought more law clerks
21 would be very helpful. Would you need authorization for that
22 or is that merely a question of additional funding for those
23 positions?

24 JUDGE POLLAK: I think that's -- it certainly would
25 require Judicial Conference approval. I'm not sure whether

1 it's statutory. Do you know, Leo? I think it's probably at
2 least an issue for the Judicial Conference.

3 MR. LANDIS: Yes, but it is also a question of
4 funding.

5 JUDGE POLLAK: And also money is, I'm sure. I mean
6 in that sense, yes, it's going to require funding.

7 MS. KLOTHEN: Right. But going beyond that?

8 JUDGE POLLAK: Yes.

9 MR. LANDIS: Dick and then Art.

10 MR. ROSENBLEETH: Judge Pollak, do you have any idea
11 of the breakdown of your out-of-court time in terms of
12 criminal and civil?

13 JUDGE POLLAK: Out of court, the vast bulk of what
14 you do that you're in chambers is civil.

15 MR. ROSENBLEETH: And that's motions and --

16 JUDGE POLLAK: Yeah. Yeah.

17 MR. ROSENBLEETH: What about with regard to
18 management of...

19 JUDGE POLLAK: There's a lot of time that's on the
20 phone with counsel and motions, discovery stuff, but too
21 often -- and here I will be critical of the Bar -- too much
22 of that policing involves matters that counsel really ought
23 to have worked out for themselves. But I'm at least one of
24 those who thinks that it is important to be available to
25 counsel by phone when they're stuck in a deposition and

1 stuck.

2 MR. ROSENBLEETH: I just have one other question.
3 Without getting into the specifics of the potentials that are
4 available, what is your view on the so-called alternative
5 dispute resolution techniques which would be -- involve non-
6 magistrates, non-court personnel, those kinds of things?

7 JUDGE POLLAK: I have a sense of being interested --
8 I'm receptive to the idea and I profess ignorance as to what
9 real experience has been with them and what we can hope for,
10 but I'm all for exploring.

11 MR. LANDIS: Art.

12 MR. RAYNES: I want to try to get a feel from your
13 own personal experience on your docket. Let's take a look at
14 these on the civil side, the FELA and the diversity cases and
15 the civil RICO. How much of your time is spent in actually
16 dealing with those cases, say for trial, as distinguished
17 from the time that you would spend on criminal cases. We
18 know from Mike Kunz what the numbers are on the filings, but
19 I don't know whether we have statistics on whether or not
20 those are -- I don't want to say labor intensive -- but I
21 mean court intensive work, that is, on those kinds of views
22 on those kinds of cases as distinguished to the criminal
23 cases.

24 JUDGE POLLAK: All of the civil cases are labor
25 intensive as compared with the criminal cases out of court.

1 There's relatively little out-of-court work to be done in
2 moving criminal cases to trial. They become time-consuming
3 at the trial stage or at the plea stage or the sentencing
4 stage. Then a lot of time is consumed, but not otherwise.

5 MR. LANDIS: Art, we have three judges who have
6 kindly agreed to come to share their wisdom with us and I
7 don't intend to cut off the discussion with Judge Pollak but
8 we do have Judge Katz who is here, who has joined us and also
9 our own colleague, Judge Kelly. So I'd invite Judge Pollak
10 to stay with us if he wishes, but it will --

11 JUDGE POLLAK: It will be at the delay of another --

12
13 MR. LANDIS: I was going to say, with all that labor
14 intensive civil work you've got waiting for you, I won't
15 presume to do that. But I do offer the thanks of the
16 Committee for joining us, Judge Pollak, and for leading off.

17 JUDGE POLLAK: Thank you all.

18 MR. LANDIS: Thank you, Judge Pollak.

19 JUDGE POLLAK: If there comes any later point where
20 you want me to be responsive to your real questions, you
21 know, please summon me back. And it's a great pleasure to
22 meet with you and again our thanks to you all for what you're
23 doing.

24 MR. LANDIS: Thank you, Judge Pollak.

25 Judge Katz, would you like to slide over here to the

1 middle. Or it doesn't make any difference, but I think maybe
2 you'll be nearer the center of the eyes of the committee.

3 JUDGE KATZ: Judge Pollak said that I may now scotch
4 his heresies. I do agree on two points that Judge Pollak
5 made and my anecdotal experience is different from his on all
6 the others.

7 On the two points with which I agree, we do have a
8 superb manager in Mike Kunz. He's just remarkable. He's
9 innovative. He's forced upon us the computers. I'm trying
10 to learn the Lexus and the word processor and the law clerks
11 use it all the time and to great advantage. I used to be a
12 very good hard copy researcher but I find that now by the
13 time I get close to the book, they have the case and have
14 shepherdized it, so it's discouraging. But certainly on that
15 point, I'm in agreement.

16 And also I'm in agreement that Senator Specter has
17 been enormously supportive, at least in my case, and in the
18 case of others as well, in getting judges for this court. I
19 find the quality of the judges is excellent. No one came here
20 to retire. Everybody came here to work. People take the
21 work seriously, not themselves, but the work.

22 The court is a collegial one. Many of us have lunch
23 every day in our lunchroom.

24 I think the fact that we have an individual calendar
25 is perhaps helpful. That is, if you have to decide cases,

1 for example, in a context of a committee of three, as the
2 court of appeals does in most of its cases, perhaps that's
3 less inducing to a sense of collegiality overall than our
4 court which has basically an individual calendar with the
5 exception of the asbestos cases which Judge Weiner
6 administers.

7 Let me tell you my anecdotal experience on the other
8 matters which is different from Judge Pollak's. I find that
9 I haven't been spending more time in criminal cases after the
10 sentencing guidelines, which are imposed on us, than I did
11 before. Now, that's just my impression. I don't keep time
12 records, although I have a vague notion that there are some
13 time records in existence which are kept by the clerks. I
14 have never seen them. I shouldn't say that.

15 They once came in a large book from the
16 administrative office in Washington and there was some
17 breakdown of time records, but the print was so small that
18 when I looked at it I could not read it with my glasses and
19 as part one of the Gramm-Rudman type inquiries we were asked
20 how we could economize on the judicial branch budget and
21 someone responded that we could perhaps do away with the book
22 which no one ever looked at and the administrative office
23 responded that they would continue to keep the time records
24 but they would no longer send the book to the judges who had
25 raised the issue of economy.

1 So perhaps there are records somewhere which can
2 give you a meaningful answer. I don't know what the time
3 records but our deputy clerks do turn in sheets, I think --
4 I've never seen one -- of how much time we spend I think in
5 court or in chambers or something like that. And the
6 information may be available to you in that regard.

7 My anecdotal experiences is perhaps skewed. I had a
8 drug case recently which I think were 18 defendants and all
9 but one pleaded guilty and that case went to trial and took
10 three days. Basically the drug cases that -- this drug case,
11 for example, it was all on recorded telephone conversations.
12 And with one defendant they played the portion of the
13 telephone conversations in which he had participated and that
14 was the case.

15 And perhaps I'm influenced by the fact that I tried
16 the roofers case before the sentencing guideline where there
17 were 13 union people and two lawyers and a third group of
18 three alleged organized crime people. I broke it into three
19 trials and I tried the union people over several months and
20 the lawyers, I forget how long that case took and the three
21 alleged organized crime people pleaded guilty. So it seemed
22 like an enormous amount of time in that one case and my
23 recollection may be skewed by that subjective impression, but
24 overall I don't think I'm trying more criminal cases now than
25 before the sentencing guidelines.

1 I share Lou's question about the usefulness. I
2 don't know the answer about the usefulness of proceeding with
3 all of these federalized drug cases. They're very depressing
4 to try. And I think there's a political pressure that builds
5 up to federalize those cases and perhaps others like people
6 who have a felony record and gun cases, are arrested with a
7 weapon which is a federal offense because of a perceived
8 difficulty in the state courts in dealing with those kinds of
9 cases with promptness and I don't know what the answer is in
10 that regard.

11 On the asbestos cases, my anecdotal experiences,
12 I've been here since August of 1983 and I have tried three
13 asbestos cases through to verdict, two defense verdicts, one
14 verdict for I think \$75,000. They were all fear of cancer
15 cases, as the jargon goes. That is to say, the people didn't
16 have any physical symptoms. I forget what you call the
17 condition. And they were afraid that at some time in the
18 future they would contract cancer. The cases were all
19 similar in that regard and the results, as I've told you,
20 were quite different.

21 I don't know what a multi-district panel is going to
22 do. I'd be delighted to see them find some solution. More
23 than half of my civil docket consists of asbestos cases.
24 Clearly more than half of my civil docket. And I don't know
25 of an alternative except trying them one case at a time,

1 except for Judge Kelly, the other Judge Kelly's experiment in
2 the class action with the school district cases which I think
3 is an interesting and useful experiment. I'll be very
4 interested to see how that comes out.

5 As a policy matter, my own view is that, as a
6 legislative solution, it should be some kind of workmen's
7 compensation, but that's my own view. And as far as I can
8 see, the problem is that these companies can't settle all the
9 cases because they don't have the money so basically they're
10 litigating for the use of the money. And when the cases are
11 listed for trial -- I've had hundreds listed for trial --
12 certainly hundreds. That's fair to say. And they go to
13 Charlie Weiner and they go away. I don't know what happens
14 to them, but they work something out. And I think that's
15 what the shooting's all about in the asbestos cases. I could
16 be wrong about that.

17 On the FELA cases, I've only tried a couple of those
18 through to verdict. They were both similar. It was somebody
19 who hurt his back lifting and in one case the person got a
20 million dollars, the other case the person got nothing. And
21 the lawyers were relatively evenly matched in both cases.
22 Things blur after a while at my age, but the cases seem
23 relatively similar and I don't have any words of wisdom on
24 the FELA.

25 The Jones Act cases, I guess I've been here almost

1 eight years, I've never tried one. I don't know where they
2 are. A lawyer came in, once I tried to have a Longshoreman's
3 Act case and I tried one of those, and he seemed very
4 knowledgeable. I asked him, you know, something about where
5 are the Jones Act cases and he said, you know, there was a
6 depression in the American shipping industry or something
7 like that and in any event they haven't burdened my docket.

8 On the Social Security cases, it doesn't really
9 matter to me if they go here or they go to the court of
10 appeals, but they should go somewhere and there should be an
11 inexpensive way, from what I've seen of the Social Security
12 cases, to correct administrative errors. And it should be --
13 what do they call it in the rules? Speedy -- fair, speedy
14 and inexpensive, is that what we're supposed to do under Rule
15 1. That's a clear case where we ought to apply it to all the
16 cases in my view, but certainly to the Social Security cases.

17 On the RICO, the civil RICO cases, I've only tried
18 one of those through to verdict since I've been here. Most
19 of them -- I guess I've seen more than one and I know sitting
20 in the court of appeals I get the sense that they have a lot
21 of RICO business in the court of appeals and I think the
22 judge-made law now is to cut back on the federalized fraud
23 notion in RICO, whether that's a wise idea or not, I don't
24 know.

25 On the third law clerk, I disagree. I think two's

1 enough and I think -- my own preference is not to overdo the
2 law clerks and, for example, the motions I do myself and I
3 think there's -- two law clerks is enough for me. I don't
4 speak for anyone else.

5 On the question of discovery control that was
6 raised, I think -- well, I have to tell you, it's an area of
7 concern to me and I think it's because of the limitations of
8 my own legal education. You know, they say we are what we
9 were as children and in law school they only taught one case
10 in procedure in my law school which was D'Agardi versus
11 Durning (ph) and it was basically notice pleading and -- now,
12 from what I hear, there's an effort to deal with perceived
13 discovery abuses by getting back to what in my law school was
14 called fact pleading or code pleading or common law pleading
15 and those were dirty words in my law school. The notions
16 varied, but for example, one is that when you file the
17 Complaint within 30 days you provide a list of the people
18 having information and a summary of what they're going to
19 say, a list of the documents and you furnish them, you attach
20 your expert reports and then when the answer is filed, the
21 same thing. And there are lots of variations on the proposal
22 of Judge Schwarzer (ph) who's at the Federal Judicial Center
23 and is very interested in that. And Judge Pointer, a very
24 bright guy, who taught in our new judge school, is very
25 interested in working on it and there's a lot of stuff in the

1 works and it looks like there's going to be something like
2 that to get around the perceived abuses of discovery.

3 I haven't seen that. I get the motions, I rule on
4 them. I try to save the trees as much as possible. I write,
5 you know, a note on the order trying to explain in as few
6 words as I can why I've ruled on a discovery motion. I very
7 rarely write a memorandum. But that's just me and that's --
8 there's certainly another point of view. I'm just giving you
9 my anecdotal experience.

10 On case management, I don't understand really what
11 all the fancy stuff is on case management. To me case
12 management is what they call a credible trial date. And then
13 Sy Kurland settles his case, he doesn't come and bother you.
14 But the rest of it seems to me largely superfluous. For
15 example, I think one of the difficulties of the discovery
16 control devices, getting us back to the fact pleading is --
17 you have to have a procedure to test the sufficiency of the
18 disclosure. Did you disclose the witnesses? Did you
19 disclose the documents? Did you attach the right expert
20 reports? Are they sufficiently complete? So that has to be
21 built into the rule.

22 And of course you have to have a level of sanctions.
23 What happens if you didn't disclose the people the
24 information, disclose the documents, disclose the expert
25 reports, at trial, you know, you're going to be stuck, are

1 you going to be cut some slack, are you going to -- what's
2 going to happen.

3 So the difficulty that I see, among others, with the
4 trend toward what I'll call in a pejorative way fact pleading
5 is it's going to lead to a whole new layer of motion
6 practice, testing the sufficiency of the fact pleading and
7 some dumb lawyer is going to get kicked out of court even
8 though his client has a meritorious case and, you know. And
9 the answer is, well, he should carry insurance.

10 But it gets back to the notion of common law
11 pleading and that whole debate and I must confess the
12 deficiencies of my own legal education and my own bias in
13 that regard. And finally on alternative dispute resolution,
14 my own personal view, it's a complete waste of time.

15 But I'm willing, you know, to participate. We have
16 a program, as you know, for mediators. My own view is that
17 the cases that will go away would go away anyway and that if
18 the judge scheduled a conference they would go away at the
19 conference and if they won't go away, then however skillful,
20 the mediator isn't going to do anything and it's just sort of
21 something that sounds good and is really just going to result
22 in another trip to the courthouse that isn't going to serve a
23 useful purpose.

24 I invite you to ask me whatever you wish and what's
25 really on your mind and I would just say that if I may

1 presume, I would say that the most useful function your group
2 could perform is to find out what's happening.

3 Now, for example, Lou, my beloved brother Lou, told
4 you his anecdotal experience. I told you my anecdotal
5 experience. They're different. And we'd love to have your
6 anecdotal experiences, we'd love to have your views, we'd
7 love to have your pontifications, but if you could find out
8 what's happening on any question that interests you, that
9 would be, in my opinion, the most useful exercise.

10 MR. LANDIS: Thank you very much, Judge Katz. Sy.

11 MR. KURLAND: Judge, I want to discuss with you
12 something that I had -- my office had in relation with you.
13 that doesn't -- that you didn't address in any of your
14 remarks. And that's the problem in disposition of these
15 prisoner civil rights cases.

16 I supervised that program in my office and I think
17 we had two of them that were out of your office and both of
18 them followed the same type of pattern which I think happens
19 in many of the other cases. We get assigned to those cases
20 and fairly quickly in the cases we determine, after talking
21 to the prisoner or finding out what it is, that it's really a
22 piece of junk, but we are counsel for the prisoner. We can't
23 say this is a piece of junk when there's a motion to dismiss
24 filed that we can win because it's not filed well on the
25 other side.

1 And we also then are faced with the responsibility
2 of having to determine whether to make discovery or not or
3 else we're -- because many of these cases result in
4 malpractice cases.

5 We sit with those cases and unless they're closely
6 supervised in our firms, young lawyers who are given the
7 cases and who take it much more seriously and are concerned
8 about malpractice spend many many hours, many -- you know, a
9 lot of time on those cases and a lot of office expense and
10 they're not resolved.

11 What I did in connection with one or two such cases
12 that we had in front of you was to tell the lawyer to order
13 the case down for trial and to ask for a pretrial conference.
14 So that somehow or other we could get at an early stage in
15 front of the judge and the judge could tune in, so to speak,
16 as to what this case is more than just the pleading. Then
17 you make the decision for us that you're not going to permit
18 a lot of discovery, you want this case tried right away or
19 you want a motion filed in front of you or you want a couple
20 hundred dollars put on the table to get rid of it for this
21 guy's complaint about losing the tooth.

22 But when you took control, when we did get in front
23 of you -- and I think I asked them to file a motion for a
24 pretrial conference just to get there -- when you did take
25 control of those cases and you issued the orders minimizing

1 the discovery and issuing the trial date, we then were not
2 faced with the dilemma of having to worry about malpractice
3 suits or worry about fulfilling your responsibility.

4 And both of those cases that I recall, one I think
5 they paid \$200 or another they paid a hundred and fifty, they
6 were not serious cases. And I find that 80 percent of those
7 cases that we have in front of judges like yourself are those
8 kind of cases where if there was a system instituted where
9 you could promptly have pretrial conferences after the
10 assigned lawyer interviews the people and you can in a way
11 find out, okay, tell me what this one is really about. Is
12 there something here or is this just another one of, you
13 know, the same guy back again with another complaint. If it
14 is, let's have the hearing, et cetera. We could save an
15 awful lot of office legal time that's input into those cases.

16 And I agree with you on the -- I think the return to
17 fact pleading which is what a lot of this stuff is really all
18 about and it's really all intended I don't think so much for
19 efficiency as to curb lawyer abuse in the institutional
20 litigation that's not warranted.

21 JUDGE KATZ: The pro se cases are an extremely
22 difficult problem. I try to sort out from the pro se
23 complaint whether to appoint lawyers. It's very very hard to
24 do and I'm not sure I have clear standards. But basically in
25 the case that Sy -- the cases that Sy was talking about --

1 Mr. Allah is the guy's name -- and the cases are now over.
2 Those cases are now over, he has many more.

3 Mr. Allah was a very difficult person and he was
4 really a pain to his jailers. And he had a rather severe and
5 painful medical condition. And as best I could make out, the
6 people were so angry at him, including the doctors, the
7 nurses, the jailers, the guards, that they wouldn't let him
8 get treated for his painful medical condition.

9 Sy's recollection is incorrect in a couple of
10 regards. First of all, I scheduled the pretrial conference.
11 I've never seen a motion for a pretrial conference and I
12 listed the case for trial promptly. And the case was settled
13 for \$7500 and your office did not take a fee which I regret.

14 I don't know what the real merit of the cases was
15 because they were not tried but you did so well for Mr. Allah
16 that I think he has 16 or 17 more and the question is what --
17 he's in a different jail and claims that they're still not
18 taking care of the same painful medical condition and the
19 question is, with the \$7500 that you got him whether he may
20 proceed in forma pauperis, but I will not appoint you to
21 litigate that issue.

22 (Laughter.)

23 JUDGE KATZ: I'm sorry, I apologize.

24 MR. LANDIS: That's okay.

25 MR. LITVIN: Judge, I was --

1 MR. LANDIS: All right, Jerry, sorry.

2 MR. LITVIN: I was pleasantly shocked by so many of
3 the things you said because you and I have had radically
4 different career paths for 40 years and on some --

5 JUDGE KATZ: We grew up in the same neighborhood,
6 however.

7 MR. LITVIN: Well, till age three. But I come out
8 almost where you do on everything and therefore you must be
9 right. But I do want to make one comment and ask a question.
10 I just loved when you said that case management means setting
11 a trial date. I say the same thing in 20 minutes but you
12 said it much better. And I think there's an awful lot there
13 in that statement and I think we, this group, ought to be
14 exploring that. I think that has great value.

15 But I do have this question. You said that you
16 believe that alternative dispute resolution is a waste of
17 time. If by that you mean having judges sitting with lawyers
18 and trying to hammer out settlements and if by that you mean
19 having the judge or someone else mediate, then I agree with
20 you, those cases are going to go away anyway and why waste
21 judges or magistrates or others having lawyers talk to one
22 another. I think it's really counterproductive. But are you
23 including other aspects of ADR when you say it's a waste of
24 time?

25 JUDGE KATZ: Now, let me be clear or at least make

1 an attempt to be clear. What I was referring to specifically
2 was the new program under -- which our court promulgated a
3 rule where lawyers serve as mediators early on and if it's
4 the odd digit or the even digit, you go to a lawyer who's
5 graciously given his time to come to the courthouse and
6 mediate at a very early stage, I think, shortly after the
7 Complaint and Answer are filed, if not I'm mistaken, and
8 that's what I was speaking about.

9 For example, to just contrast it with something
10 else, we have an arbitration program which is superb and you
11 go to three lawyers who arbitrate the case, they render a
12 decision, you take a de novo appeal and you can try it again
13 if you're dissatisfied with the result and that's been
14 marvelous in my experience. But I was referring to the new
15 mediation business. I'm sorry.

16 MR. LANDIS: Andre and then we'll work -- Mike, I'm
17 sorry. Mike I think was up first.

18 MR. CHURCHILL: Just in the quest for more
19 information, I'd be interested in getting a picture of your
20 docket in terms of the amount of time you spend. What amount
21 of time is spent on criminal matters in your view and how
22 much, because the issue's been raised about diversity and the
23 statement has been suggested I guess that a great deal of the
24 filings never find their way in front of the judge because of
25 the arbitration program, what percentage of your time do you

1 think you spend on diversity matters?

2 JUDGE KATZ: The answer is I don't know and I'd love
3 to find out. I really think somebody makes out time sheets.
4 I don't anymore. I gave it up I had such a bad reaction to
5 try to bill 1500 hours of time in those days.

6 (Laughter.)

7 JUDGE KATZ: I just couldn't get back to it, you
8 know. There is somebody who I think makes out timesheets.
9 You know, I could tell you stuff and it wouldn't have any
10 basis in fact. I simply don't know. I'm sorry.

11 MR. CHURCHILL: But you think Judge Pollak's
12 suggestion that he's spending somewhere around two-thirds to
13 three-quarters of his time on criminal matters is not typical
14 for you?

15 JUDGE KATZ: I think -- yes, I think that he's -- I
16 don't spend that much time on criminal cases, I don't think.
17 You know it's a much smaller part of my time, but I couldn't
18 tell you how much. I honestly don't know. I'm sorry.

19 MR. LANDIS: Andre.

20 MR. DENNIS: With respect to the civil cases, the
21 asbestos civil cases on your docket, you said you tried three
22 cases, I believe, and over half of your civil case docket is
23 asbestos cases. How much time do you spend on those cases,
24 those asbestos cases, that you have not tried?

25 JUDGE KATZ: None.

1 MR. LANDIS: Art.

2 MR. RAYNES: Going back to what Jerry said about
3 case management is the best thing to move cases by listing
4 the case for trial, I guess nothing stimulates settlement
5 discussion more than a firm trial date other than a big
6 verdict. Sometimes if there's a big verdict that stimulates
7 settlement discussions too.

8 There has been some talk about having the early
9 settlement negotiations with the judge and there's talk
10 around that for a judge trying to hammer out a settlement may
11 not be -- as Jerry says, may be counterproductive. However,
12 do you find that when you have -- when you are the trial
13 judge and you do have a trial date and then you get the
14 parties together, that those meetings then are productive?

15 JUDGE KATZ: Yes.

16 MR. LANDIS: Dan.

17 MR. RYAN: Judge, if you were to take all of your
18 activities, judicial activities, and put them on a scale of
19 one to ten from the most effective use of your time down to
20 the least effective or the wasting of your time, what would
21 be down at the bottom?

22 JUDGE KATZ: Boy, that's a good question.

23 MR. LITVIN: Don't say the lunches with the other
24 judges.

25 MR. LANDIS: Yeah, and admission against interest.

1 (Laughter.)

2 JUDGE KATZ: Well, the most effective I think where
3 the taxpayers get the most out of it is to be in court and
4 try cases, civil, criminal, whatever. I think that's the
5 most effective.

6 And I guess the least effective, I don't know. You
7 know, there was -- Judge Seitz wrote an opinion recently in
8 the court of appeals, I forget the case, but he called --
9 what is it, motions under 12B6, those motions to dismiss.
10 What did he call it? A relic of common law and code
11 pleadings. So, you know, you have to pile on papers and all
12 of that stuff and go through all of that with a 12B6 motion
13 and I read them. I mean myself. I don't like to use law
14 clerks for that because they're too busy. But that's not, in
15 my view, an effective use of a judge's time, to try to I
16 guess -- I don't know what the notion is. I always think
17 it's like to educate me early on about how strong the case or
18 how weak the case or something like that.

19 MR. LANDIS: John.

20 MR. SHELLENBERGER: According to the Red Book, you
21 use a trial pool, you don't assign cases for dates certain,
22 is that your practice?

23 JUDGE KATZ: Oh, it's a fiction. Yes, I do use a
24 trial pool but actually all of my cases are assigned for a
25 date certain. It's a fiction.

1 MR. SHELLENBERGER: At what point are they assigned
2 to date certain?

3 JUDGE KATZ: When they get in the trial pool.

4 MR. SHELLENBERGER: I guess maybe I can follow up on
5 that because one of the --

6 JUDGE KATZ: Yes, sure. Go ahead.

7 MR. SHELLENBERGER: -- criteria, one of our
8 principles is for early assignment -- early establishment of
9 trial dates and in light of your comment that establishment
10 of the trial date helps the case settle, would it be feasible
11 to assign a fixed trial date certain at an earlier stage in
12 the case?

13 JUDGE KATZ: I don't think so because there's always
14 a problem about, you know, the discovery and so on and then,
15 you know, people may need more time or this, that and the
16 other thing and it's hard to know very early on just when the
17 case will be in a trial posture. I adjust it and then when
18 it does get into a trial posture, it goes into a trial pool
19 and then at that point every case has a date certain. I
20 don't use the local rule to assign a case on a 48 hours
21 notice or is it 24 hours notice, something like that. It's
22 just a fiction.

23 MR. LANDIS: Thank you very much, Judge Katz. We
24 appreciate your coming here and giving us your views and we'd
25 be delighted to have you stay while Judge Kelly presents it,

1 but...

2 JUDGE KATZ: I've got some of my --

3 MR. LANDIS: I saw you get a signal at the doorway a
4 little while ago, so...

5 JUDGE KATZ: -- lawyers in my courtroom, so forgive
6 me.

7 MR. LANDIS: All right. Thank you very much, Judge
8 Katz.

9 JUDGE KATZ: Please ask me anything later. I'll be
10 willing to come back.

11 MR. LANDIS: Okay. Great.

12 All right. Judge Kelly, you're one of our group, so
13 that you're going to be around here any time, so that you
14 will be under continual examination. But why don't you...

15 JUDGE KELLY: I came with a couple of ideas and I
16 have to start my case at 11:00 o'clock today.

17 MR. LANDIS: Okay.

18 JUDGE KELLY: And I'm trying a defendant who's 84
19 years of age. So I figure I'd better not be late.

20 (Laughter.)

21 JUDGE KELLY: As a matter of fact, if we weren't so
22 prompt at trying those cases, I think maybe some other law
23 would take care of it.

24 Just as I sit here, I didn't plan to mention a
25 couple of things but the other judges did, so I should

1 probably tell you where I stand.

2 FELA cases. I came here -- I was sworn in July 17th
3 of 1987. I tried one FELA case, went back to the chambers,
4 said to the secretary, we're going to put those charge forms
5 in our computer. So we loaded the computer up with FELA
6 charges and we haven't used them since. They just aren't a
7 problem.

8 The Jones Act cases I have no problem with.
9 Asbestos cases, I have never tried an asbestos case. I
10 presided -- well, I didn't want to. The lawyers were picking
11 a jury and I try not to go into the courtroom when they're
12 picking civil juries, but it took them all morning and I went
13 up to find out what was going on and to that extent I got
14 involved in it and then they finally settled. But those were
15 unusual lawyers.

16 I don't think about asbestos cases. I want to know
17 how many non-asbestos cases I have. That's what I'm
18 interested in. My impression of asbestos cases is if you
19 want to try some, I'm ready, but if all the judges were ready
20 to start trying asbestos cases, my impression is that they're
21 not spread out among enough people in the Bar. I think the
22 same firms would be involved in most of those cases. So they
23 just are not -- thanks to Judge Weiner, they're just not a
24 part of my concern.

25 Civil RICO cases. I've had to try many of them and

1 they are a problem, mainly because the issues just aren't
2 developed by the time trial comes around. And I now have a
3 three-page questionnaire that I send out as discovery is
4 about to start telling the attorney for the plaintiff that
5 these are the things I want you to be able to answer by the
6 time discovery is over because I find that just people's
7 ideas of what constitutes civil RICO are so diverse and it's,
8 you know, understanding. I think civil RICO is being
9 interpreted more narrowly than criminal RICO which is the
10 reverse of what it should be. But I would love to see those
11 cases go away.

12 Getting to some of my comments. As far as support
13 personnel, with the increase of the use of electronic
14 material, the docket clerks, people like that, have to become
15 -- that has to be a more permanent position rather than just
16 an entry level position. So that we have to compensate those
17 people because they have to make judgments as to what they
18 put in the computer. The courtroom deputy, our system just
19 doesn't work without a really effective courtroom deputy.
20 That's the person listed in the Legal Intelligencer or under
21 our name and I guess that might be the best way to start out
22 to tell you.

23 I think one of the points that I'd like to make here
24 is this. I think the best thing that ever happened to the
25 federal system is the individual calendar. I think it's the

1 best system that anybody has devised yet for a large court
2 because it isolates a workload on a specific judge. You put
3 them together and then you look at it periodically to see
4 who's winning and then it gives that judge a certain amount
5 of satisfaction in his own accomplishments, it lets lawyers
6 know that there is a judge who has control over their case.
7 And I say that not because anybody is thinking of doing away
8 with that, but I say it because I think that there is a
9 process that we're undertaking that has that effect. And
10 that's why when Judge Pollak touched on it in one of the
11 questions that was asked of him, do you think that we should
12 have more magistrates, and he felt maybe it would be helpful.
13 He asked me and I didn't.

14 And this is the reason. The idea of assigning a
15 workload to a particular judge and then seeing what he does
16 with it over a period of time, or she does, and the idea that
17 that judge can lay off his workload on to some other judicial
18 officer just doesn't make sense. In other words, assigning
19 habeas corpuses to that person, assigning trials to that
20 person, assigning your Social Security cases to that person,
21 assigning all the discovery to that person, I think that that
22 is what you should look into. This isn't a question of
23 whether the magistrates -- you know, a lot of the magistrates
24 do a better job than I'll ever do with them, I'm sure, but
25 that's not the issue. The issue is in doing that aren't we

1 in effect diluting the individual calendar system that I
2 thought was so effective in any event. That's the first
3 effect of that.

4 I think the second is that the -- in discovery where
5 the practice of some judges is to give the magistrate that is
6 assigned to them the decision to do their discovery. I know
7 the perception here among judges that I've talked to, older
8 judges that have been to other -- have experience with other
9 court systems, is that that extends the amount of time that a
10 case takes to get to trial in a very considerable fashion.

11 So I think it would be interesting perhaps for this
12 group to maybe individually poll the judges within our court
13 to ask them, if we just designed a questionnaire, you know,
14 would you please indicate which of the following matters you
15 automatically assign to magistrates, which of these do you
16 sometimes assign to magistrates and things of that nature.
17 And to find out, and maybe you could then look and compare
18 the practice with the statistics to see is it helping the
19 judge or is it delaying his trial.

20 If you had time, maybe we could -- I don't know
21 whether we're allowed to or not, just poll another district
22 where that is -- for example, giving discovery to the
23 magistrates to handle is the practice for the whole district.
24 What effect does that have on litigation in that district?
25 And I think New Jersey is one of those areas. I think that

1 would be enlightening. I don't know whether we have time to
2 do that, as I say.

3 So if someone asked me, would you add more
4 magistrates? No, I would make Jim Melinson a district court
5 judge. I wouldn't add magistrates. That's the way I would
6 handle it because, you know, I think they have to decide what
7 does a magistrate do and what does a district court judge do.
8 Should they do away with magistrates entirely and have only
9 district court judges or -- I don't even know how this all
10 started. Maybe Leo might be able to tell us. But when the
11 practice of assigning things to magistrates -- when did it
12 start? Was it because magistrates were very able people who
13 were sitting there with not enough interesting things to do?
14 And they get into discovery, you know, and other things, and
15 they're very interesting and...

16 But I think there's a real blurring of those
17 functions and I think that's something that we should look
18 into, because, one, I think it adds time to the litigation
19 and, two, it undermines, as far as I know, the individual
20 calendar system because it allows a judge to turn over part
21 of her work or his workload to someone else.

22 The other thought I had, and this really would --
23 the notion of assigning some judges to criminal, to hear
24 criminal cases only. It wouldn't work around here. I think
25 for one thing the United States Attorney, Mike Baylson, I

1 guess left, but I think he -- they wouldn't have enough --
2 they need more courtrooms. I think their people would be
3 backed up if there were a limited number of judges available
4 for them to go to. I don't think that would work and I want
5 to make it clear that is not what I'm talking in this
6 suggestion, but I would like just to see maybe the
7 possibility of, in large courts, experimenting with
8 specialization of trial judges in certain fields and not
9 officially, I'm not talking about making another tax court or
10 anything like that, but having judges within a large court
11 system who specialize in handling, say, class action security
12 cases, things of that nature. When I finish one of those
13 cases, I have the feeling -- and I just finished one
14 yesterday so it's fresh in my mind -- I've put it out of my
15 mind. Most of the things I learned in that process I won't
16 even deal with again until the next one comes in.

17 I just think it would be interesting to have a trial
18 judge or trial judges who maybe would volunteer on a certain
19 basis to do that just to see what the effect of having a
20 judge who was as expert in that as the lawyers who appear
21 because the lawyers who do appear in those cases, in my
22 experience, have been really very much experts in the field.
23 I think it would help other judges on the bench having
24 someone who was an expert in a particular field and then that
25 judge would be in a position to make suggestions. He would

1 get or she would get to know a lot about it and then perhaps
2 be in a position to make suggestions for how to handle cases
3 like that. You know, even perhaps a senior judge would be in
4 a position to volunteer to try something like that in
5 difficult cases.

6 I know that judges don't want to hear that. They
7 don't want to hear that -- we're like lawyers, we don't want
8 to hear that we can't do anything or do it all well, but it's
9 purely an experiment or maybe a pilot project that we could
10 look into.

11 When I heard the discussion about limiting civil
12 jurisdiction, and it just struck me that if we want to limit
13 our civil jurisdiction, it's going to take Congress to act,
14 but we increase our criminal jurisdiction -- Mike Baylson can
15 increase our criminal jurisdiction just by indicting
16 different types of crimes. The last six weeks, I would say,
17 I've tried three felons caught with firearms. One of them is
18 waiting to be tried for murder in City Hall. So anyway, my
19 point is it might be difficult to limit jurisdiction on the
20 civil side but it's not very difficult to increase the number
21 of criminal cases that we're going to be taking.

22 One thing I do as far as trying to get a case moving
23 along, I send out a letter as soon as the case is assigned to
24 me telling the attorney for the plaintiff that it has been
25 assigned and I ask him to promptly obtain service upon the

1 defendant and advise my chambers when service has been made
2 so that I may issue an appropriate pretrial scheduling order.
3 In the event that you're not able to obtain service upon the
4 defendant within 30 days of the filing of the Complaint, I
5 ask that you advise me in writing as to the efforts that
6 you've made to obtain service during the period.

7 I've only been doing that for less than two months,
8 but it has really had an effect and I think that the time
9 within which to serve a Complaint could be restricted a lot
10 more than it is now and in the difficult case they can
11 certainly come in and get extension, request an extension of
12 the judge.

13 I think that, and I don't know how much this group
14 would have concern with it, but I think that we should use or
15 attempt to use all of the modern electronic facilities that
16 are developed to see if they can help the court system. I'm
17 presently involved in the experiment using a video camera as
18 a transcript -- as the official court record and we have just
19 started that. Things like that have a way of developing a
20 lot of offshoot benefits that nobody ever anticipated and so,
21 you know, there's no end to it.

22 I just noticed yesterday as the jury was being
23 picked the camera picking up counsel sitting at counsel table
24 conferring with the client during every stage, you know, as
25 to every strike. Of course you can't hear it, but at least

1 if any issue ever came up as to, well, I wasn't part of that
2 process, it's right there. In civil cases, plaintiff in a
3 retrial, most of that expense is borne by a plaintiff who has
4 to bring in an expert again for the second time, the
5 possibility of just using the video of the witness who has
6 testified the first time and save the plaintiff a lot of
7 money or the defendant. But I think it's usually plaintiffs
8 who have the problem with that.

9 So I think they should be encouraged to try those
10 things. We don't know how well it's going to work. But it's
11 really foolish of us not to at least try them and give them a
12 chance.

13 I think that's about all I had. I'd be happy to
14 answer any questions.

15 MR. LANDIS: Are there any questions of Judge Kelly,
16 bearing in mind that he will be with us at our other meetings
17 and we are pressing on? Alice.

18 MS. BALLARD: I was interested in your reaction to
19 Judge Pollak's view that the mandatory minimum sentences have
20 increased the number of criminal trials. Do you think that's
21 true in your case?

22 JUDGE KELLY: I could see it in a couple of cases,
23 yes, but I don't think it's had a great impact overall. It
24 delays our sentencing because of the length of time to do a
25 presentence report now, but I think what the United States

1 Attorney would probably tell you -- I think it has a way of
2 having, in these large defendant cases, sort of a race to get
3 to his office first so that you can cooperate and get them to
4 make a recommendation to depart downward. I really can't
5 say. I don't really think it's had an effect. I was
6 accustomed to using it in the state court and when everybody
7 -- you know, there were a lot of misgivings about it -- or
8 here. But I don't think -- I don't really think it's had
9 that much effect.

10 There was something else that I was going to say
11 when -- I lost it. Go ahead.

12 MR. LANDIS: Any other questions or comments? John.

13 JUDGE KELLY: Yes.

14 MR. SHELLENBERGER: What do you think is a
15 reasonable time for a standard civil case to go to trial?

16 JUDGE KELLY: I think a year. I don't disagree with
17 Judge Pollak on that. We've tried them in less time and the
18 lawyers always seem to be so surprised that they comment on
19 it to the jury when they're making their opening statement
20 about it. I think that's rather prompt.

21 Did somebody ask? Yes. Oh, I'm sorry.

22 MR. CHURCHILL: Just what percentage of your time is
23 now spent on criminal matters?

24 JUDGE KELLY: I would think maybe 25 percent. Judge
25 Katz mentioned statistics that he thought were available as

1 to what -- I remember when I was in the state court looking
2 at statistics for the federal court and I remember thinking,
3 gee, I think I tried as many state court criminal cases as
4 the whole Eastern District. I was --

5 MR. KUNZ: You were correct.

6 JUDGE KELLY: -- charged as a criminal -- what?

7 MR. KUNZ: You were correct.

8 JUDGE KELLY: But those statistics are available.
9 And then when I got here, you know, I realized that -- the
10 first year there were not many criminal trials. Then some of
11 the big drug cases came in.

12 Incidentally, just on the drug cases, talking about
13 electronic things in the courtroom that spin off, we have in
14 our courtroom the system that allows the jurors to just plug
15 their earphones in to an outlet in the jury box to hear tape
16 recordings and of evidence that is presented at trial. We
17 had a trial that involved I think nine defendants that none
18 of them spoke English. It would have required a number of
19 interpreters sitting between all of them mumbling during
20 trial. We were able to just plug the interpreters into a
21 microphone that went to the earphones of the nine defendants
22 and really able to use one interpreter in the courtroom
23 rather than many. And it limited that constant din that you
24 get in a courtroom when you have the interpreter.

25 And that's just one of the offshoots of these things

1 that you just don't even imagine, nobody even thought about
2 it when it was first put in. So I really encourage the use
3 of it because I think that pilot money is nothing compared to
4 the... Yes?

5 MS. KLOTHEN: I just wanted to narrow Mike's
6 question a little bit. I think Judge Pollak said that he
7 spends perhaps up to two-thirds of his court time on criminal
8 cases. Can you tell us about what percentage of your court
9 time is spent on criminal cases?

10 JUDGE KELLY: That's what I --

11 MS. KLOTHEN: Okay. That's what you were
12 addressing? Okay.

13 JUDGE KELLY: Yeah. Because I really -- we're not
14 required -- there's not too much in the way of pretrial
15 problems in that.

16 MS. KLOTHEN: Mm-hmm. And the pretrial work on the
17 criminal cases is assigned to magistrates or do you do that
18 yourself?

19 JUDGE KELLY: I do it myself, yeah.

20 MR. LANDIS: Thank you very much, Judge Kelly. We
21 have a couple of fairly important housekeeping matters and
22 one of them is far from housekeeping. It's a more
23 substantive matter.

24 We do have meetings scheduled on May 7th and May
25 23rd. One of those, and I can't remember which one, was

1 originally set for the Bar Association. We've encountered
2 some housing problems there so that meeting, whichever one it
3 was -- or putting it more directly, the rest of our meetings
4 will be in the ceremonial courtroom unless we're shut out for
5 other reasons and then we'll have it here.

6 We also should look ahead to other meeting dates and
7 if we keep to the schedule that we've so far kept to, which
8 at least for now seems to be a fairly -- give us fairly
9 reasonable intervals, the next successive dates would be June
10 6th and the date after that would be June 20th.

11 May I have a show of hands on the availability of
12 each of you here on June 6th?

13 Yes.

14 MR. LITVIN: Yeses or noes?

15 MR. LANDIS: I mean unavailable. Sorry. The ones
16 who can't make June 6th. There's two, three.

17 MR. LITVIN: Bob, I'm starting a trial out of town
18 on June 3rd that's going to take about two weeks, so --

19 MR. LANDIS: Okay. Well, then that --

20 MR. LITVIN: It's not that date, it's those two
21 weeks.

22 MR. LANDIS: Okay. All right. So there are two who
23 can't make that.

24 How about June 20th? One. Well, then, I think with
25 respect to those who can't make those dates, I think since

1 the substantial majority can, we'll go then with June 6th,
2 9:00 o'clock in the courthouse here and June 20th, also 9:00
3 o'clock, holding to our two-hour adjournment time.

4 Each of you has received the letter that was the
5 joint product of Leo Levin and me to generate the expertise
6 that we have around this table, because we were all selected
7 based on the requirements of the statute to get significant
8 representation of the whole gamut of litigants and interests
9 in the Eastern District and now is the time for us to draw on
10 our own resources beyond listening to other experts and other
11 people who come before us.

12 And so, what we've suggested is that each of us sit
13 down, think through the elements of the report that we need
14 to address and in a fairly -- I won't hold to the two-page
15 limit that my good colleague has suggested is desirable.
16 Take any amount of space that you want to take but give us
17 your thoughts on your own views of what we need to address
18 and also other sources, other resources, other individuals,
19 other groups of individuals whom we should take into account
20 as we go forward with the fact-finding thing. And it would
21 be very helpful if you could focus on that. I'm sure that a
22 lot of you have been thinking about these things ever since
23 you got the word from Chief Judge Bechtel that you're going
24 to be involved in this.

25 So that I do hope that this can be done in time for

1 exchange of these documents before our next meeting. That's
2 the kind of deadline that everybody sitting around this table
3 is accustomed to dealing with every day anyway.

4 Any questions about that, Dan?

5 MR. RYAN: Yeah, Bob. I think in view of the
6 deadlines that we have, it might not be a bad idea for you or
7 Leo to write to and elicit views from some of the more
8 obvious sources, such as the American College and I jotted
9 down ten different groups, all of whom are aware of the
10 committees --

11 MR. LANDIS: Yeah.

12 MR. RYAN: -- around the country and I've gotten a
13 couple of letters --

14 MR. LANDIS: Right.

15 MR. RYAN: -- and so forth and they only have until
16 August, I guess, to --

17 MR. LANDIS: Yeah, August is our deadline. That's
18 right.

19 MR. RYAN: Yeah, so wouldn't it be appropriate to at
20 least go after the more obvious ones --

21 MR. LANDIS: Okay.

22 MR. RYAN: -- and then they can't say they didn't
23 have any input --

24 MR. LANDIS: Right.

25 MR. RYAN: -- as a minimum, and maybe they'll have

1 some good ideas.

2 MR. LANDIS: Good idea. Andre.

3 UNIDENTIFIED SPEAKER: Maybe it would make sense.
4 Could you send me your list and then maybe the two of us can
5 work to put some of those --

6 MR. LANDIS: Yeah.

7 UNIDENTIFIED SPEAKER: -- on the agenda for each of
8 our next --

9 MR. LANDIS: Andre.

10 MR. DENNIS: Picking up on that comment, I was
11 wondering whether it made sense to ask the same of our judges
12 here. We're not going to be able to have everyone in, but we
13 want to have input from each.

14 MR. LANDIS: Well, I should add this, that already a
15 letter has gone out along these lines to the whole court,
16 that is, all the senior judges, all the active judges, so
17 that every judge has received such a letter and has been
18 asked to consider giving us the information that they want
19 and giving them the option of either presenting it in writing
20 or coming to join us at meetings or having a member of the
21 committee call on them to discuss this in chambers with the
22 request that we be permitted to record the discussions. So
23 that those individual discussions can be made generally
24 available to everyone.

25 That has gone forward to the court. It went out on

1 Friday. It was hand delivered to all the judges and with a
2 request that they call in and let us know what their
3 preference is.

4 If it turns out that we're faced with a large number
5 of judges who wish to come into a meeting such as this, then
6 we may need to deal with them in panels and groups, but so
7 far, that's been done and we'll be eliciting -- getting their
8 responses I think very quickly.

9 MR. LEVIN: Just as a matter of inquiry, has this
10 group gotten a copy of the letter that went out to the
11 judges?

12 COUNSEL SPEAKING AT ONCE: Yes.

13 UNIDENTIFIED SPEAKER: Yes, it was distributed with
14 Bob Landis' letter of the 19th.

15 MR. LEVIN: Fine.

16 MR. LANDIS: Okay.

17 MR. LEVIN: Yeah. And also -- that's all right,
18 because there -- I also got a copy of the very draft outline
19 and although I don't see the time to discuss it today, I do
20 suggest if any of you have any ideas at all, at the moment
21 that outline really tracks the statute and the statute almost
22 has what commas we have to put in the final report. Please
23 give me a buzz, I'd be grateful for advance notice and then
24 I'm sure from what Bob has told me we'll have time to discuss
25 it as our work proceeds.

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MR. LANDIS: All right. Any other comments or observations for the good and welfare of the project and the organization?

And hearing none, we're adjourned.

(Proceedings adjourned at 11:00 o'clock a.m.)

* * *

CERTIFICATION

1 I hereby certify that the foregoing is a correct
2 transcript from the electronic sound recording of the
3 proceedings in the above-entitled matter.

4
5 Geraldine C. Laws
6

4/30/91

7 Geraldine C. Laws
8 Laws Transcription Service

Date

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10 Elizabeth Power
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