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UNITED STATES COURTS

WASHINGTON, D.C. 20544

March 29, 1990

MEMORANDUM TO THE CHIEF JUSTICE

Subject: Your Meeting with Senator Biden

In keeping with your request, here are some possible discussion points you might use with Senator Biden when you meet with him on April ~~2nd~~ 3th!

1. There is strong opposition to S. 2027 (the Biden bill) particularly among the district court judges who feel that it represents congressional micro-management of the courts. For example, there are 45 "shalls" in the bill. Perhaps Senator Biden could achieve his objectives better by setting up a series of pilot court experiences, the courts to be chosen by the Judicial Conference making participation voluntary and utilizing many of the proposed approaches embraced in the Biden bill.

2. Accompanying a voluntary pilot program could be renewed emphasis and re-examination on the part of the Advisory Committee on Civil Rules and the full Rules Committee of the Judicial Conference of Rule 16. The congressionally mandated Rules Enabling Act procedures, which include involvement by Congress, are the appropriate way to effect court procedural changes.

3. Since the Biden bill deals solely with the civil side of the docket, and since many of our current caseload problems are created by the heavy workload on the criminal side of the docket due to the Speedy Trial Act, sentencing

guidelines, the war on drugs, etc., perhaps Senator Biden might wish to treat these problems also, and not just the civil cases in isolation.

4. Probably the most dramatic and urgently needed step Senator Biden could take to assist the processing of civil cases would be for him to couple his civil reform legislation with the Judicial Conference's request for 76 new judgeships, 60 of whom would be district judges. Without judicial manpower and the funds to support the reforms he wishes to make, the civil docket is unlikely to be diminished in any substantial way.

For your information, the Subcommittee of the Executive Committee which is spearheading the Conference's strategy on this bill, has held a series of recent telephone conferences. Another is scheduled for Friday morning, March 30th. If anything comes from that teleconference which would be of value in your April 2nd Biden meeting, I will pass it on.

Ralph pi

L. Ralph Mecham

**STATEMENT OF PRINCIPLES**

**RE S.2027**

The subcommittee of the Judicial Conference's Executive Committee endorses the following concepts:

1. The chief judge in each district court should appoint a representative advisory committee to:

   a. assess the state of the court's civil and criminal dockets, describing not only current conditions, but also trends both in the nature of filings and in the kinds of demands being placed on the court's resources, and

   b. recommend ways of reducing the cost of civil litigation and of shortening the time between filing and disposition.

2. In preparing such recommendations, the advisory committees should consider the following:

   a. the problems of cost and delay in civil litigation cannot be considered in isolation; rather, they must be examined in the context of the full range of demands made on the district court's resources.

   b. all of the major players in the litigation community share responsibility for the problems of cost and delay in civil litigation; thus, for solutions to be effective and equitable, they must include significant contributions not only by courts, but also by lawyers and clients.

3. In determining how lawyers and clients can contribute to solving these problems, especially the excessive costs often associated with civil discovery, advisory committees and courts should consider whether it would be appropriate, prior to the initial status or scheduling conference under Rule 16, to require counsel to meet and confer, and file a statement designed to limit discovery and prepare the case expeditiously for resolution by settlement, motion, or trial.

4. In proposing solutions to cost and delay problems, advisory committees and courts should assess, among other things, the settlement process, including the advisability of implementing or experimenting with ADR programs.

5. Each district court should consider the recommendations made by its advisory committee and should implement appropriate measures through established procedures for adopting local rules.

6. The Judicial Conference should conduct a demonstration program in three to five districts in order to experiment with and assess the relative effectiveness of various methods of reducing cost and delay and various case management techniques. After thorough evaluation, the results of such experiments should be made available to every district court and to the committees of the Judicial Conference that are charged with responsibility for considering and recommending additions to federal procedural rules.

7. The Congressionally-mandated rulemaking process should be used for implementing any cost or delay reduction measures that are proven successful through the demonstration programs and that are suitable for national implementation by procedural rule.

8. Substantial additional resources should be committed to training judicial officers in case management techniques.

9. District courts cannot experiment with and identify the most effective and appropriate measures for reducing cost and delay, and cannot implement the most successful case management techniques, without infusions of substantial additional resources. Effective systems for containing costs and reducing delay cannot be established without fully automated dockets, ready access to more complete data about the status of each case, more support personnel, and the appointment of a truly adequate number of new judicial officers.

10. Effective case management requires full and flexible use of all judicial personnel. It would be counter-productive to impose artificial restraints on the roles magistrates can play in case management.

11. It is essential that any system of case management that is adopted preserve in district judges the authority and flexibility to tailor procedures and schedules that are appropriate to the needs of each suit.

The subcommittee of the Judicial Conference's Executive Committee *cannot* agree to the following:

1. The notion that there is a single case management system or plan that will satisfy the needs of every district.

2. The case tracking system provided for in S.2027 (many of the problems with which are set forth in the Description and Preliminary Analysis adopted by the Judicial Conference on March 13, 1990), including the requirement for clerical tracking coordinators.

3. Statutory limitations on the use of U. S. magistrates.

4. The notion that local advisory groups can be empowered to impose procedural rules or schedules on district courts.

5. The criteria for measuring judicial productivity set forth in S.2027. Any effort to assess the productivity of individual judicial officers or courts must be based on a sophisticated, comprehensive set of data that takes into account the full range of relevant quantitative and qualitative factors.

Biden

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WASHINGTON, D.C. 20544

March 1, 1990

MEMORANDUM TO THE CHIEF JUSTICE

Subject: Biden (Speedy Trial Run Amok) Bill -- Judge Schwarzer's Views

At the Federal Judicial Center Board meeting in Phoenix, you described the Biden Bill, S. 2027, as "speedy trial run amok" for civil cases. Ironically, that same day the Board approved one of the leading supporters of the Biden bill to be Director of the Federal Judicial Center. Attached is a letter which Judge Schwarzer sent on February lst to Senator Biden's General Counsel, Jeffrey Peck, endorsing the bill. Biden has broadcast Schwarzer's support for the bill both in the Senate speech when he introduced it and later as well.

You also said at Phoenix that the Judicial Center Board and the Judicial Conference "need not take the same position" on legislation or proceed in "lock step." I agree with you, among other reasons because the statute deliberately makes the Center independent of the Judicial Conference. However, the Biden bill might pose an interesting test case. I believe the Judicial Conference will strongly oppose the legislation in its present form. I am not sure that it would be helpful either to the standing of the Center or to its new Director with judges generally if the Director endorses a bill vigorously opposed by the vast majority of judges. Moreover, Biden and the Senate could be in serious doubt about the position of the Judiciary if its two principle agencies are in sharp disagreement, or Biden could divide and conquer.

The above example in a sense is hypothetical since I have been told by Senator Biden's staff that although originally Judge Schwarzer agreed to testify for the bill at the hearings on March 6th he has since withdrawn.

In the meantime, the Executive Committee at its February 14th New Orleans meeting acted on the Biden bill. Chief Judge Clark appointed the four district judges to a special subcommittee, chaired by Judge Peckham, to consider the bill. A teleconference on the legislation was held Wednesday afternoon at 4:15.

It was agreed that Aubrey Robinson will appear and express concern about the lack of time and notice afforded the Judiciary. He will then endorse the bill's general objectives but will point to serious problems that need to be thoroughly explored, and future hearings held.

I have not seen so much judicial interest in a bill since the pay raise was passed. One reason for the opposition is the fact that Biden seems to be trying to railroad the bill without adequate consideration. The Brooking Study took a year or two to complete and the Judiciary was not consulted or asked to participate or to comment. Two or three judges were involved on their own such as Judge Schwarzer. Now, Biden insists on going ahead with the hearings on March 6th even though we pointed out that the Conference would be meeting just a week thereafter and might be in a position to make some constructive comments soon thereafter. But he refused our request for delay. However, he probably will hold later hearings.

I have not reached Judge Schwarzer yet but Judge Peckham tells me that he has conferred with him and I have the sense that Schwarzer is staying out of the line of fire for now.

L. Ralph Mecham

Attachment

WILLIAM W SCHWARZER
UNITED STATES DISTRICT JUDGE
450 GOLDEN GATE AVENUE
SAN FRANCISCO, CALIFORNIA 94102

February 1, 1990

Jeffrey J. Peck, Esq.
General Counsel
Committee on the Judiciary
United States Senate
Washington, D. C. 20510-6275

Dear Mr. Peck

Thank you for sending me a copy of the bill incorporating the proposed Civil Justice Reform Act of 1990. I have reviewed it and am satisfied that it is an innovative and constructive approach to dealing with some of the problems affecting civil litigation in the federal courts which deserves support.

I take its principal significance to be an at least tacit commitment by Congress that civil litigation stands on a comparable footing with criminal litigation in the federal courts and has an equal claim to judicial resources, and that federal courts shall not become primarily criminal, i.e. drug courts.

Following are some suggestions concerning the text of the bill; further reflection may lead me to make additional suggestions in the future. I believe that these suggestions are self-explanatory, but I would emphasize that the bill should not suggest that complex cases should necessarily be assigned to a single track, the essence of case management being to adapt the procedure to the needs of the case.

p.5, l.24: add "and (H) early and ongoing availability of means to resolve disputes other than through adjudication;"

p.7, l. 10: add after "process" "and to the early resolution and termination of cases;"

p. 14, l.16: insert after "raised" "the parties' resources and the magnitude of the amounts and issues at stake,"

p. 17, l.16 and p. 18, l.9: change "the complex track" to "a complex track".

p. 18, l.14: insert after (H) "address whether the case may be tried before a magistrate with the parties' consent, and".

p. 18, l.23, p. 20, l.6, p. 21, l.1: change "the track" to "a track".

p. 30, l. 20: insert after "have" "resulted in the earlier disposition or termination of cases and".

I'll be glad to discuss the bill with you at your convenience.

Sincerely yours,

William W Schwarzer

cc: Robert E. Feidler