STATEMENT BY THE HONORABLE ROBERT F. PECKHAM

about

TITLE I OF S. 2648

Civil Justice Expense and Delay Reduction Plans

Introduction

Senator Biden, Senator Thurmond, and other members of the Committee on the Judiciary: I am Robert F. Peckham, United States District Judge for the Northern District of California and a member of the Judicial Conference of the United States. I appear in my capacity as chairman of Conference's subcommittee on the Civil Justice Reform Act of 1990. My distinguished colleagues, Chief Judge Aubrey Robinson, Chief Judge John Nangle, and Judge Sarah Barker, who have expended extraordinary time and energy in helping formulate the federal judiciary's views on this legislation, are present today and will be happy to respond to any questions from members of the Committee.

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

We also are grateful for the obviously genuine concern about cost and delay in civil litigation that inspires this legislative

initiative. Work on these kinds of problems is not glamorous. It is not likely to generate headlines or to relocate the political sympathies of large groups of voters. But thoughtful people understand that the matters addressed by this kind of legislation are of great importance. One of the most fundamental functions of civilized society is to provide peaceful, respected, and efficient means for people to determine their rights and fairly resolve their disputes. Thus, one of the most telling measures of the quality of any society is the quality of its system of civil justice. That system can be a source of connection or of alientation. People feel more connected to their society when it provides them with a respectworthy, effective means for resolving disputes and reducing tensions. By contrast, people feel more alienated from their society when the means it provides for solving problems is remote, impractical, and accessible only to the privileged and wealthy.

In this country we are blessed with an adjudicatory system that is capable of sophisticated, reliable analysis of the most complex matters. The sponsors of this legislation deserve our commendation, however, for clearly understanding that we will have failed our people in a basic sense if, having evolved such a system, we fail to make its benefits meaningfully available to everyone.

We of the judicial branch compliment Senator Biden, in particular, for devoting so much of his resources, over such a substantial period, to the problems of cost and delay in civil adjudication.

Initiatives by the Federal Judiciary

For decades, the federal judiciary has been unequivocally committed to the values and concerns that inspire this proposed legislation. The very first of the rules that have shaped civil adjudication since 1938 announces that the objective of the system is to "secure the just, speedy, and inexpensive determination of every action." For the first two decades the system appeared to function well under the new rules. It was not until the 1960's that substantial concern about expense and delay began to surface. The judiciary responded with a series of initiatives, including major empirical studies of the discovery process in the late 1960's and, in 1970, significant changes in the Federal Rules of Civil Procedure. There was a second surge of attention to these matters in the late 1970's and the early 1980's, culminating in the adoption in 1983 of extremely important amendments to rules 11, 16, and 26.

The changes in Rule 11 and some of the changes in Rule 26 were designed to encourage more responsible, restrained, and cost-effective approaches by counsel to pleading, motion and discovery

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

Inspired in part by the concerns that prompted the recent changes in the rules, many district courts and many individual judges have initiated important new approaches to case management. In the late 1970's district courts in Florida and California established new systems under which lawyers were required to propose sensible case-development plans prior to the initial status conference with the court and to exchange key information and documents before launching formal discovery. District judges in South Carolina decided to require plaintiffs and defendants, at the time they file their initial pleadings, to share with one another and with the court basic information about the case by responding

to a set of questions drafted by the judges. Judges in San Francisco began experimenting with a two-stage approach to the case-development process. In the first stage, the court limits the parties' discovery and motion work to the core matters that they feel they must learn in order to reasonably ascribe a settlement value to the case. At the close of that first stage, before the parties are forced to spend the substantial additional sums necessary to fully prepare a case for a trial, the court schedules a settlement conference or invites the parties to participate in some alternative dispute resolution procedure. If their good faith efforts to settle the case are not successful, the court permits the parties to proceed with the more expensive discovery and pretrial motion work that must be done to prepare for a full trial of the matter. In Ohio, Michigan, Texas, Alabama and other states judges worked with members of the bar and with special masters to design tailored pretrial systems that permit rational and efficient development of the information necessary to resolve the tens of thousands of asbestos and other mass tort cases that have been filed in the last decade. In New York, judges appointed special committees of lawyers who helped the court design systems for containing discovery abuse and guiding lawyers toward the most cost-effective and productive use of certain discovery tools. In Missouri the court established special procedures (called an "accelerated docket") for expediting pretrial development and trial of less complex cases, including an innovative semi-annual Joint Docket which focuses the energies of all the judges for two week

periods on trying the matters that demand less than five days of jury time. And all over the country individual judges have become more assertive in their efforts to help counsel identify issues or areas of inquiry which, if pursued early in the pretrial period, could either dispose of the case in its entirety or equip the parties to resolve the matter more efficiently.

These and many other innovations in the field of case management have been accompanied by similarly creative work in alternative dispute resolution. In the late 1970's federal courts in Pennsylvania, Connecticut and California began important experiments with non-binding arbitration programs. Since those early beginnings some 15 additional courts have established non-binding arbitration programs. Recently completed studies by the Federal Judicial Center show that such court-annexed arbitration programs enjoy widespread support in the bar. Approaching problems of cost and delay in yet another fashion, district courts in western Washington, Kansas, Michigan, and the District of Columbia, working with large groups of dedicated lawyers, have implemented very successful mediation programs. The non-binding summary jury trial procedures that were pioneered in the Northern District of Ohio have been used and refined in a number of courts. Judges in the District of Massachusetts refined the mini-trial concept, developed initially in the private sector, into various forms of non-binding summary bench trials. In Connecticut judges set up machinery for impaneling teams of experts to render advisory

opinions to help parties settle complex construction cases and other matters involving advanced technologies. Led by a task force of local lawyers, the northern District of California established the first early neutral evaluation program in 1985. The District of Columbia and the Eastern district of California recently added similar ENE programs to the ADR services they offer. And all across the country judges and magistrates, responding to requests from counsel, have been devoting progressively more time and energy to settlement conference work.

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

recommend possible solutions.

Then in late April the Conference adopted an ambitious 14-point program designed to assess and address cost and delay in every district court in the country. In each district the program will be launched by the appointment of a balanced group of experienced local attorneys. This advisory group, working with district judges, will begin its work by conducting a systematic, detailed assessment of the court's civil and criminal dockets, focusing not only on current conditions but also on trends in filings and in demands on the court's resources. Then the group will attempt to identify the principal causes of any cost or delay problems that it perceives. By proceeding systematically, and by working with data that is specific to each individual court, these advisory groups will be well-positioned to determine whether changes are in order and, if so, what they should be. They will recommend any measures that they feel, given the particular character of needs and circumstances in their district, hold some promise of reducing cost or delay. Most significantly, the advisory groups will not confine their analyses and recommendations to court procedures, but also will examine how lawyers and clients handle litigation, searching for ways these players in the litigation drama can contribute to reducing expenses and delays.

Each district court will carefully review the assessments, analyses and recommendations submitted by its advisory group, and

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

In addition to these grass roots initiatives, the Judicial Conference will conduct demonstration programs in districts of different sizes and case mixes to experiment with different methods of reducing cost and delay (including ADR programs) and different case management techniques. Each demonstration program will be carefully studied, and lessons learned will be shared with all judicial officers in the country. Building from these sources, as well as the experiences of other courts, the Conference will arrange for publication of a Manual for Litigation Management and Cost and Delay Reduction that will describe and analyze the most effective techniques and programs. Another important part of the Conference program will emphasize education and training: we will establish substantial new programs to assure that all judicial officers and appropriate court personnel understand the most current case management strategies and other programs for cost and delay reduction.

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

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

The Current Version of the Legislation

Title I of S. 2648 represents a vast improvement over the version of the bill that the Judicial Conference felt constrained to oppose earlier this year. Before discussing specific provisions of the current version of the bill, we would like to express our sincere appreciation to Senator Biden and his staff for the

openness of mind with which they have considered our analysis of the legislation as it was first proposed and for their responsiveness to many of the concerns we have expressed. The vigorous dialogue we have had over the past three months has led to many important changes in the bill, changes that we feel make the legislation much more likely to serve as a constructive force in pursuit of the goals we share.

We are especially pleased that the current version of the statute explicitly acknowledges that cost and delay are problems for which all the players in the adjudicatory arena share responsibility: judges, lawyers, and parties. These are truly community problems, problems whose subtlety and tenacity demand nothing short of community solutions. Thus we applaud the current version of the bill for asking advisory groups and district courts to look for solutions not just from judges and procedural rules, but also from attorneys and clients and the approaches they take to litigation.

As our earlier summary of judicial initiatives in these areas makes clear, much of the current version of the bill is consistent with the 1983 amendments to the rules of civil procedure, the policy statement about individualized case management that the Judicial Conference adopted on March 13th of this year, and the 14-point program approved by the Conference in late April. Among these areas of consistency, two with which we are particularly

pleased are the statute's firm endorsement of the notion that case management should be case specific and tailored to meet the specific needs of individual cases and the bill's clear recognition that circumstances and problems may vary greatly from district to district, so that, within certain parameters, the approaches to case management and cost containment that are most appropriate and effective may vary considerably in different areas.

The latter insight obviously informs what is perhaps the most significant difference between the legislation as originally proposed and the current version of the statute, which reflects an approach that promises to be much more constructive and instructive than its predecessor. S. 2027 would have imposed one largely untested, detailed, and quite expensive system on all courts simultaneously. Perhaps as a result of the dialogues that ensued after the bill was first introduced, its sponsors have opted for a quite different program. Instead of imposing one system from the top down on all courts, the current version of the legislation would build much more sensibly from the bottom up, asking a limited number of courts to experiment intensively with a range of management and ADR systems, while simultaneously permitting all other courts to work with an open slate, fashioning creatively whatever measures they feel will be specifically responsive to their own circumstances and the needs of their own litigants. We heartily endorse this fundamental change in the thrust of the proposed statute, which we believe now reflects real promise.

We note that the statute's call for a demonstration program, while not identical to the Conference's position, is informed by a similar spirit and objective. We believe that thoughtfully designed, carefully controlled, adequately supported, and thoroughly analyzed experiments with a series of different approaches to case management and other programs that are designed to reduce cost and delay offer an extraordinary opportunity for real breakthroughs in our understanding of the litigative process and how to bring it closer to fulfilling the promise of Rule 1. We also applaud the introduction of the concept of "implementation districts," with the promise of additional financial assistance for courts that develop their programs with extra dispatch.

Another important point of consistency between the proposed legislation and the Judicial Conference's 14-point program is the significant role that would be accorded to local advisory groups. Structuring these groups so that they are balanced and reflective of major categories of litigants will enable them to carry out one of the statute's most important mandates: to recommend solutions that include, in the words of the bill, "significant contributions by the court, the litigants, and the litigants' attorneys." Asking local advisory groups to pull a lead oar in assessing current conditions and proposing responsive measures also assures conformance with the new thrust of the statute, which emphasizes building from district-specific ground up. In this regard, we want

to emphasize that many of the most constructive programs that have been implemented by federal courts in the last decade are the products, at least in part, of contributions by local committees of practitioners working with judges. Lawyer groups have helped design and staff innovative case management procedures or court-sponsored ADR programs in Seattle, San Francisco, Kansas City, Philadelphia, Detroit, New York, Raleigh, and Washington, D.C. In these and many other cities, members of the bar have volunteered countless hours to improving local discovery practices and case management procedures and to supplying the person-power for settlement, mediation, arbitration, and early neutral evaluation programs.

There are several additional components of the proposed statute that are substantially similar to provisions of the Judicial Conference's 14-point program. For example, the legislation would establish machinery for dialogue about the nature of cost and delay problems and the best approaches to solutions between each district court and a circuit-wide committee of district judges. For each district, the circuit-wide committee, in which the chief judge of the court of appeals also would participate, would review the assessments and recommendations prepared by the advisory group, as well as the measures implemented by the court. Then, drawing on what it has learned in the reports from and actions by other courts, the circuit-wide committee would offer its own perspective and suggestions for consideration by the

district court. Thus the statute would provide a vehicle by which courts in the same circuit could compare their circumstances and share insights and constructive ideas.

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

The current version of the bill also shares with the Judicial Conference's program a clear commitment to the importance of vigorous, sophisticated programs for educating and training both judicial officers and court staff. We emphatically endorse the legislation's explicit call for "comprehensive education and training programs to ensure that all judicial officers, clerks of court, courtroom deputies and other appropriate court personnel are thoroughly familiar with the most recent available information and analyses about litigation management and other techniques for reducing cost and expediting the resolution of civil litigation." We also are gratified that the sponsors of the bill recognize that meaningful compliance with this important mandate can be achieved only if Congress provides real additional financial resources. Given this additional support, the Judicial Conference and the Federal Judicial Center will be well positioned to carry out this mandate; the Conference already has established the means to guide and coordinate this important educational effort through its new Committee on Case Management and Dispute Resolution, a Committee in which the Federal Judicial Center, the Administrative Office, and the Advisory Committee on Civil Rules all are directly represented.

The Conference and the sponsors of the bill also agree about the importance of extending the capabilities of electronic dockets so that in all courts the judges and clerks will have ready access to the information they need not only to monitor and manage their

cases but also to understand how both counsel and the court are expending their resources in each individual matter. We also believe that further refinement of nationally uniform standards or criteria for categorizing actions and identifying different events and junctures in the pretrial period would be most useful.

The sponsors of this bill demonstrate the sincerity of their commitment to helping the courts, the bar, and litigants attack the problems of cost and delay by promising substantial financial support for these ambitious undertakings. Because the problems of cost and delay are so complex, have so many sources, and have yielded in the past so reluctantly to reform efforts, we cannot hope to launch meaningful assaults on them without significant augmentation of already strained resources. For this reason, we urge the enactment of the proposed statute's fiscal provisions.

One additional aspect of the revised statute warrants special commendation. We infer from the inclusion of a realistic sunset provision that the sponsors of this legislation are committed to preserving the vitality of the Congressionally designed rule-making process. As noted earlier, that process has served well the need for responsible, deliberate consideration of ways to improve procedural rules, consideration uncompromised by undue influence from special interest groups. As introduced, S. 2027 threatened to eviscerate the rule making process by imposing detailed procedural prescriptions without the benefit of the analysis,

debate, and careful consideration from the judicial family and the bar at large that have been the hallmarks of rule-making under the system Congress established more than 50 years ago. Under the revised statutory scheme, it is clear that insights gained and ideas tested through the district court programs will be forwarded to the appropriate rule-making committees, which, capitalizing on the systems they have developed for securing the views of a wide range of interested lawyers, law professors, judicial officers and litigants, will consider which measures commend themselves to national implementation.

Some of the Specific Provisions of the Bill about which Real Concern Persists

As one might expect when dealing with a subject as complex as this, there are several specific provisions in the revised statute about which we continue to feel substantial concern. Without purporting to be exhaustive, we focus here on three such provisions. In describing these matters our goal is to contribute toward making approaches to the problems of cost and delay as realistic and constructive as possible. In the section that follows we will articulate some of the broader concerns about this kind of legislation that members of the judicial family have shared with us during the past four months.

The first of these troublesome provisions appears in subparagraph (B) of section 473(a)(2), which seems to require judicial officers to fix firm trial dates early in the life of each action and that such dates be no more than 18 months after the complaint was filed unless the assigned judge certifies that trial cannot be commenced within that period either because of the complexity of the case or the pendency of criminal matters. Many of our most effective case managers feel that approaching the setting of trial dates in this manner is both unrealistic and unwise. They point out, among other things, that a case's complexity is only one of a great many reasons for which it might not be feasible, early in the pretrial period, to fix a sensible trial date. Damages may not be ascertainable in that time frame, injuries may not have stabilized, interlocutory appeals may not have been resolved, necessary tests may not have been completed, key witnesses may not be available, information discoverable only overseas may remain unknown. In short, there are many different reasons, in addition to case complexity, for which it could be quite unfair to compel a trial to go forward within 18 months of the filing of the complaint. It also is important to point out that cases evolve in unpredictable ways, assuming shapes as parties and causes of action are added or changed over the course of the pretrial period that are wholly unforeseeable at the outset. This fact of litigation life means that in some cases a judge cannot determine what an appropriate trial date might be until the matter has evolved into something approaching the form it will take at the

trial.

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

These considerations persuade us that the statute would be improved if it gave judges more flexibility in fixing the trial date, for example, by requiring that early in the pretrial period they fix either the date for trial or a date or specific juncture by which the trial date will be set.

A second troublesome provision of the revised statute appears in subparagraph (D) of section 473(a)(2), which would require the setting of "target dates for the deciding of motions." Apparently this provision would be satisfied either by a local rule that created presumptive time frames within which all motions would be resolved or by a requirement that in each case individual judges set such target dates. One difficulty with either approach derives from the fact that there can be huge differences between different motions. Deciding a motion for summary judgment in a case involving 15 causes of action, some of which sound in antitrust laws, some of which sound in securities laws, some of which arise under patent rights, and some of which rely on civil RICO, obviously will require the commitment of vastly greater resources, and take much more time, than deciding a discovery motion about where a deposition is to be taken. There can be vast differences even between various kinds of discovery motions, some of which, for example, call for careful elucidation of privilege law, then its application to thousands of documents. Given the great range of demands that motions can make, court-wide targets for the deciding of motions, even by category, would have to be too broad to be of much use. Artificially narrow time frames, by contrast, would pressure courts to sacrifice quality of analysis and reliability of results for the sake of compliance with abstract mandates. It would be unseemly, at best, thus to pit justice against a false form of efficiency.

Nor is the solution to require each judge to set in each case individualized target dates for deciding the motions that counsel might file. At no point in the life of a case can a judge reliably predict the number or the kinds of motions that will be filed or, more importantly, what the character of particular motions might be. For example, without being able to foresee their specific character, and the demands they would impose, a promise by a judge to decide all discovery motions in a given case within 15 days simply would not be meaningful. Moreover, experienced judges understand that they cannot predict the nature of demands that will be made on them by other cases, civil and criminal. Demands for immediate consideration of applications for temporary restraining orders, for approval of wiretaps, for review of detention orders, or for stays of orders issued by other courts are just some examples of the kinds of substantial and unforeseeable interruptions to which the best laid plans of conscientious judges are vulnerable. Nor can judges predict with certainty how long individual trials will last. Of course, judges also have no control over the rate or nature of civil and criminal filings. And a spate of criminal arrests can force a judge's attention away from civil work, especially if some of the defendants refuse to waive time.

The point should be clear: to establish artificial time frames within which judges should rule on motions would be neither

realistic nor helpful. Worse yet, it could unfairly damage the morale and the reputation of the conscientious judicial officers who refuse to cut big quality corners simply to create an appearance of punctuality. Finally, such a system might foster an instinct in some judges simply to deny even potentially well made motions, especially motions for summary judgment, when they feel that the under the relevant time frames they cannot devote the attention to such matters that they deserve. If we adopt rules that encourage judges to deny motions that should be granted, simply because that is the least risky course, we both delay disposition of cases and compel litigants to incur completely unjustifiable expenses. Thus we strongly recommend removal from this legislation of the provision that calls for the setting of "target dates for the deciding of motions."

The judicial community also has concerns about subparagraph (7) of section 473(a). That paragraph would require semiannual public disclosure, for each judicial officer, of the number of motions and court trials pending longer than six months and of the number of cases that remain on the docket three years or more after filing. We will not repeat here the points just made about the untoward effects that the setting of artificial deadlines can have on the quality of judicial work and on the morale of the conscientious, but we would be remiss if we failed to note that we have many of those same concerns about this provision. In addition, we must emphasize the importance, in the implementation

of any such system, of developing sophisticated, sensitive criteria for identifying the circumstances in which particular motions, trials, or cases fall within these categories. It would be quite unfair and misleading, for example, to consider a case to have been pending for three years if, during that period, all proceedings in the district court had been stayed for two years by virtue of the defendant's bankruptcy. Similarly, interlocutory appeals can effectively freeze a case at the trial court level for a substantial period. These and many other similar matters must be carefully accounted for in any fair reporting system.

Broader Concerns and Conclusion

In this final section of our statement we address the most sensitive issues raised by this kind of legislative initiative. It is our intention to speak respectfully and in a constructive spirit, appreciating that the sponsors of this legislation share with us the same fundamental values and seek to promote through the proposed statute objectives to which we are fully committed.

Perhaps in part because no active member of the judicial family was asked to serve on the task force whose work informed the first version of this legislation, S. 2027 caught most judges by surprise and led some to worry openly about its implications for some basic institutional values. There were two principal (not

unrelated) subjects of these broader concerns. One was over potential damage to the rule making process. The other was over the distribution of responsibility and power between the legislative and the judicial branches. While this is not an appropriate place to explore abstract arguments about constitutional principles, to ignore this subject altogether would be unfair to the thoughtful, constructively motivated judges who have shared with us their deeply felt concerns about the importance of honoring the principles of separation of powers that play such a central role in the shape of our form of government. And while we have come to no definitive conclusion about the consistency of the bill in its substantially revised form with these basic constitutional norms, we continue to feel some unease in this area. Just as we respect the sincerity of the concerns that inspire the sponsors of this bill, we ask that they attend with sensitivity to the constitutional implications of their work as they continue their consideration of this statute during the remainder of the legislative process.

Similarly, we ask that our legislators consider carefully how their work might effect the rule-making process that we believe has served both Congress and the courts so well for so long. As you fully appreciate, Congress recently reviewed and re-codified that process, taking care to build into it procedures that assure that before nationally applicable rules of procedure are imposed they are considered most deliberately by thoughtful and experienced

judges, lawyers, and law professors over a substantial period of time, and that the lawyers and litigants into whose world the new rules would intrude are given ample opportunity to articulate their reactions, point out potential problems, and add suggestions. As we who have sat on the bench for some time have discovered, sometimes painfully, procedural matters are extraordinarily complex. New rules can have a great many unforseen consequences. And it takes the most considered deliberation to be sure that the dynamic between new programs and established practices is constructive. Thus it is crucial that inputs from all affected quarters be sought before procedural change is imposed.

The general concerns articulated above support what is perhaps our most basic reservation about Title I of S. 2648. We are troubled by the fact that through this statute in its current form Congress would articulate what are clearly procedural principles and compel every district court in the country to adopt plans that conform to those principles. While some of the principles thus articulated are consistent with policies and rules already adopted by the Judicial Conference, others venture into new procedural territory. For all the reasons set forth here, we believe that nationally applicable procedural norms should be imposed only through the rule making process. Thus we urge revision of the proposed legislation so that instead of imposing procedural concepts, it imposes a duty in each advisory group and in each district court to carefully consider adoption of practices and

programs that are consistent with the principles now set forth in paragraph (a) of section 473.

In conclusion, permit us to repeat that we appreciate greatly the changes that have been made in the proposed statute and the consideration its sponsors have given to our views. For the reasons and in the respects set forth in detail above, the Judicial Conference is in agreement with the provisions of the proposed legislation that are consistent with its March 13 policy statement and the 14-point program adopted in late April, but cannot endorse those provisions that are inconsistent with those documents.

Thank you.

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