ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Memorandum

DATE: June 11, 1990

FROM: Robert E. Feidler - Legislative and Public Affairs Officer

SUBJECT: Attached Paper on S. 2648

TO: Judge Peckham
Mr. Mecham
Mr. Macklin
Ms. Siegel
Mr. Cook

Attached is a "bootlegged" copy of the possible Department of Justice postion on S. 2648. If you have comments, we will need them by 3 p.m. today.

Attachment

U.S. Department of Justice

Office of Legislative Affairs

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U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

Honorable Joseph R. Biden, Jr.
Chairman
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This responds to your request for the views of the Department of Justice on S. 2648, a revised version of S. 2027, a bill to reform the civil justice system.

Title I of S. 2648 would direct United States district courts to adopt certain procedural changes in order to promote the just, speedy, and inexpensive determination of civil actions, and would provide a mechanism for ongoing monitoring of the management of the civil justice system in the United States district courts. Title II would authorize the appointment of an additional 77 circuit and district court judges in order to handle the burgeoning caseloads of the federal courts.

As many of the bill's findings illustrate, there are real concerns with the expense and delay that attend civil litigation in the federal courts. The Department believes that Title I of S. 2648 points in the right direction regarding many of the problems facing civil litigation. We support the thrust of these provisions and look forward to working with the Committee, though we are concerned that, depending on how the local plans are implemented by each district court, several provisions could adversely affect the ability of the Department of Justice to prosecute and defend the interests of the United States. We support the creation of much-needed additional federal judgeships, though we believe that certain modifications of Title II would be appropriate in order to place the new judgeships in the districts evidencing greater need.

TITLE I -- CIVIL JUSTICE REFORM

The Department views judicial reform legislation with an eye toward improving the judicial system in general, and we also bring to that process the unique perspective of being, by far, the largest litigant in the federal courts. The United States alone participated in 26.5% of the 233,293 cases filed in the United States district courts in the reporting year ending June

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30, 1989. Before commenting on the merits of particular measures, we note that as a general matter the Department thinks that it is unwise to impose detailed statutory controls on the internal operations of the executive and judicial branches in the exercise of their constitutional authority. It can be useful, however, for Congress to adopt measures that facilitate the exercise of that authority. Accordingly, we oppose legislation that would impose mandatory requirements on the courts with respect to case management. We favor certain proposals that give the courts additional tools or resources with which to improve the administration of justice.

District Plans

Proposed 28 U.S.C. § 471 would direct each of the 94 district courts to adopt a "Civil Justice Expense and Delay Reduction Plan" for the resolution of civil cases. Under § 477, an advisory group would be appointed within each judicial district to advise the district court on ways to improve the timely disposition of civil cases. Based on the recommendations of the advisory group, each district court is to adopt a Plan under the procedures of § 472. Section 473 provides principles and guidelines of litigation management on which the District Court is to develop such a Plan, and directs that a number of specific methods be considered for inclusion within the Plan. Section 474 provides for the Judicial Councils of the Circuits and the Judicial Conference of the United States to review and suggest modifications to each district's plan, which will help to avoid excessive fragmentation or disuniformity of the Plans among different districts. Section 476 also directs the Judicial Conference, based upon the experience of designated "early implementation districts," to develop one or more model plans for use by other district courts. In addition, the bill provides for new reports on the aging of cases, litigation management training, and standardized automated case disposition standards. An authorization of a $5,000,000 appropriation is provided to support the requirements of the bill.

The original version of this provision in S. 2027 would have encouraged the balkanization of federal procedure into innumerable local procedures, because it would have left each district to devise its own approach without centralized coordination. Even under current practice, the proliferation of local rules already is a problem for the Department and other multi-district litigators, such as multi-state businesses, labor unions, and public interest groups, because one counsel must frequently comply with many different rules.

We recognize that some tailoring of district court operations to address local factors is necessary, and S. 2648 allows flexibility for that. It is of substantial importance, though, to avoid potential degradation of the substantial and needed

degree of uniformity of civil procedure embodied in the Federal Rules of Civil Procedure over the past 50 years. District-level plans adopted without an adequate degree of coordination have been of limited success in dealing with litigation process problems.[1]

In view of the concerns voiced by the bench, bar and Congress over the proliferation of inconsistent and conflicting local rules, the Standing Committee on Rules of Practice and Procedure has established a procedure to review local rules for consistency.[2] Increased inconsistency, even the specter of increased inconsistency, would hamper the Department's efforts in such critical nationwide initiatives as financial institution fraud and defense procurement fraud recovery litigation. Accordingly, we strongly favor the provisions added in S. 2648 to

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1/ In 1972, for example, the Judiciary adopted Criminal Rule 50(b), which required that each district court adopt a plan for the speedy disposition of criminal cases. 406 U.S. 981, 999 (1972). See 18 U.S.C. § 3771. At about the same time, the Supreme Court established a four-part test for a trial court to consider in determining whether a defendant's Sixth Amendment right to a speedy trial had been violated. Barker v. Wingo, 407 U.S. 514 (1972). However, those plans were inconsistent among districts and frequently inflexible within a district; only two years later Congress intervened and enacted the Speedy Trial Act of 1974, 18 U.S.C. § 3161. Rule 50(b) was amended in 1976 to require only that district court plans conform to the requirements of that Act. 425 U.S. 1159, 1166 (1976). The extent of the Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, 93 Stat. 327, Aug. 2, 1979, clearly points out the difficulty of managing a judicial process by statute.

We note that 18 U.S.C. § 3006A mandates that each district court develop a plan for providing counsel to indigent defendants, and 28 U.S.C. § 1862 requires the district courts to have plans for the management of the jury wheel. These processes are purely administrative and have been quite successful. These processes differ in both kind and degree from the current proposal because the current proposal reaches far beyond the administration of the district courts to the litigation process itself.

2/ The development of recent changes in the Rules Enabling Act began in 1983. The House Judiciary Committee, in the report accompanying the 1988 amendments to the Rules Enabling Act, cited the Judicial Conference's action in establishing the Local Rules Project as a reason for not enacting new requirements. See H.R. Rep. No. 889, 100th Cong., 2d Sess. 28-29 (Aug. 26, 1988).

allow greater coordination of individual district plans by the circuit councils and the Judicial Conference, and to direct the Judicial Conference to prepare model plans.

We also believe that the purely administrative district plans envisioned by S. 2648 may be productive in improving the disposition of civil cases, without unnecessarily formalizing the civil litigation process. We were concerned that raising these plans to the level of formal local rules, as envisioned in S. 2027, would have threatened to hinder the administration of a number of nationwide litigation efforts. Accordingly, S. 2648 has made a major improvement over the original provisions of S. 2027.

Case Tracking Systems

Proposed new 28 U.S.C. § 473(a) would require each district court to develop a system of differentiated case management based on the complexity of each case, needed preparation time, anticipated trial length and resource requirements. The Attorney General supported this concept in his statement before the Federal Courts Study Committee last January.[3/] We can see no reason why such plans cannot be developed and implemented under controlled circumstances by district courts where they can be beneficial, without legislative or rules changes.

The structuring of a case tracking plan, however, is critical to its success.[4/] Our Civil Division Commercial Litigation Branch's experience with a similar case management plan in

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3/ Statement of the Honorable Dick Thornburgh, Attorney General of the United States, before the Federal Courts Study Committee, Concerning the Future of the Federal Courts (Jan. 31, 1990).

4/ We note, for example, that there may be some systemic pro-plaintiff bias in the track assignment process, because the initial assignment is to be made on the basis of information provided by the plaintiff and the judge must resolve any objections to that assignment within thirty days of the filing of the complaint, which means the parties must address the issue even earlier, at a time when the defendant is often much less familiar with the case than the plaintiff. How serious this concern might be, however, depends at least in part on how significant the differences between tracks turn out to be, how susceptible to manipulation of the pleadings the track distinctions will be, and how willing the courts are to exercise their authority to change track designations upon motion.

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the Claims Court suggests both the benefits and the kinds of problems that such a proposal might create.[5/]

In at least one respect, the Civil Rules already respond in a different way to the concerns that give rise to the tracking proposal. Rule 16 already requires a more complete and cogent analysis of the case early in the judicial proceedings and requires the court to hold a conference that can -- and not infrequently does -- lead to the rapid disposition of the entire case, not merely its assignment to a "track." While we believe that there is much merit to the tracking concept, we are concerned that any such tracking system on the federal courts not be legislated so narrowly or restrictively as to cause more mischief than it could hope to solve. Accordingly, we agree with the bill's purpose in ensuring that case tracking is considered and implemented while leaving the details to be worked out by the individual courts.

Pretrial and Settlement Conferences

Several sections of the bill would require the district courts to consider implementation of actions that potentially would conflict with the Attorney General's authority to manage and administer the legal affairs of the United States. See 28 U.S.C. §§ 516-519. The Attorney General has, through the offices of the United States Attorneys and the Assistant Attorneys General, delegated specific authorization to proceed with the prosecution and defense of the interests of the United States.[6/] However, these delegations are limited. We can foresee numerous occasions in which a district court plan might easily appear to mandate that Departmental attorneys undertake actions not authorized by the Attorney General.

In particular, proposed § 473(b)(2) directs the district courts to consider requiring that an attorney representing a party have authority to bind that party regarding all matters previously identified by the court for discussion at the con-

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5/ The Commercial Litigation Branch spends an enormous amount of time filing motions in individual cases in order to obtain exceptions from various aspects of the procedures set forth in the Claims Court case management plan because they simply would not be effective in specific cases. There appears to be no pattern to these motions; various provisions appear to be inappropriate in different kinds of cases. This would occur even under the more specifically tailored plans which would be required under the bill.

6/ See, e.g., 28 C.F.R. § 0.13 (delegation of authority to designate attorneys to appear; authorization of redelegation).

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ference and all reasonably related matters. Such a mandate, as applied to the United States, could conflict with the Department's chain of command and policy-implementation functions which are essential tools in managing some 65,000 cases filed each year. For example, a pretrial conference on discovery could raise issues of attorney-client or executive privilege, which are matters frequently requiring decisions by the highest officials of the Department, and only after consultation with the affected agencies. While such a requirement might be imposed on private counsel and their clients, the United States should be clearly exempted from the possibility of imposition of a requirement inconsistent with the Department's need to maintain centralized control over litigation.

Additionally, subsection (b)(5) directs the district courts to consider requiring that an attorney representing a party attend a settlement conference with full authority to settle the case. Again, the Department of Justice does not delegate such broad authority to its some 6,000 attorneys. See 28 C.F.R. §§ 0.160-0.169. The Attorney General has authorized the Deputy Attorney General to exercise his authority to settle all claims against the United States. 28 C.F.R. § 0.161(b). The Assistant Attorneys General have been authorized to settle or close claims which do not exceed $750,000, with limitations. Id. §§ 0.160, 0.164. Pursuant to § 0.168, the Assistant Attorneys General have redelegated certain settlement authority; for example, the Civil Division authorizes the United States Attorneys and Branch Directors of the Civil Division to settle claims up to $200,000, while the Environment and Natural Resources Division delegates settlement authority to the United States Attorneys and Section Chiefs of the Division ranging from $100,000 to $300,000, depending upon the type of claim.7/

In order to retain necessary litigation control to protect the public fisc, the Department necessarily reserves settlement authority to senior officials in the United States Attorneys' Offices or in the litigating divisions in Washington, and does not delegate such authority broadly to trial counsel. The Department makes every effort to participate in settlement negotiations, but cannot realistically send officials with full settlement authority to each settlement conference.

It goes without saying that the United States may not pay any settlement that is not authorized by law and, accordingly, the Department can not settle a case unless it is clear that the

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7/ See, e.g., Civil Division Directive 163-86, 53 Fed. Reg. 4010 (Feb. 11, 1988); Land and Natural Resources Division Directive 7-76, as amended. The delegations of settlement authority by each litigating division are set forth in the Appendix to Subpart Y, 28 C.F.R. Part 0.

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United States is liable for damages, the amount of damages is clear, and the payment is properly authorized. As the Attorney General noted in recent testimony before the Committee, in 1989, over $21 billion in claims against the United States were defeated while $123 million in claims were paid -- less than six-tenths of one percent of the amount claimed.[8/] At the same time, the United States should not settle its affirmative claims for less than it is due; the government secured judgments and settlements of $521 million in 1989. Maintaining proper control over such wide-ranging litigation involving vast sums requires a degree of centralized control quite inconsistent with the delegation of full settlement authority to trial counsel.

Accordingly, while the district courts may wish to consider requiring that attorneys appear for settlement conference with the full authority to settle the case in some kinds of litigation, that requirement cannot be applied generally to cases involving claims by or against the United States.

TITLE II -- ADDITIONAL JUDGESHIPS

Title II of the bill would create new judgeships in the courts of appeals and the district courts. We believe that the judiciary must have adequate resources. The Administration supports a justified expansion of judicial personnel at this time, just to handle existing caseloads. As we proceed with new criminal and civil prosecutorial initiatives, these needs will become more acute.

In 1978 and 1984, Congress authorized substantial new judgeships. Those new judgeships were the product, in large part, of a substantial, detailed analysis of the existing caseloads of the courts provided by the Judicial Conference of the United States. In 1980, the Conference developed a weighted caseload analysis based on a detailed survey of judicial time commitments to handle various different kinds of cases. Using that analysis, the Conference generates a "weighted caseload" for each district court to reflect a fair prediction of the amount of judicial resources needed to effectively adjudicate cases actually being filed. This weighted caseload, prepared by the Administrative Office of the United States Courts, is reviewed by the individual district court to which it applies, the Judicial Council of the Circuit, a subcommittee and a committee of the Judicial Conference and the full Judicial Conference before a recommendation is made to the Congress for authorization of additional judgeships.

8/ Statement of the Honorable Dick Thornburgh, Attorney General, before the Senate Committee on the Judiciary, at 19 (April 3, 1990).

Based upon this process, the Judicial Conference recommended the creation of 59 additional district court judgeships on October 12, 1989, including 38 permanent positions and 21 temporary positions, as well as 8 conversions of temporary positions to permanent.[9/] Most recently, on June 4, the Judicial Conference recommended creating a total of 76 additional district judgeships, including 47 permanent and 29 temporary positions, plus 6 conversions, in light of 1989 caseload figures. We believe that these requests are justified.

S. 2648 would authorize 66 additional district judgeships, including 52 permanent and 14 temporary positions, as well as 8 conversions. We believe that these numbers should be evaluated for adjustment in light of the most recent Judicial Conference request.

There are several significant distinctions between the allocation of additional judgeships recommended by the Judicial Conference and the provisions of S. 2648. We recognize an interest in targeting additional judgeships in areas of most pressing need and greatest projected growth. The Judicial Conference recommendations are predicated on past filings, and do not respond to planned caseload adjustments predicated on governmental policy, such as the increased prosecutorial focus on the war on drugs, financial institution fraud, government corruption currently embodied in operations ILL-WIND and UNCOVER, and other major initiatives.

However, we believe that certain changes are called for in the allocation of positions in S. 2648. Specifically, we believe that the district courts for the Southern District and Western District of Texas clearly require more new judges than would be provided in S. 2648. Just to handle existing caseloads, the Judicial Conference has requested seven additional judgeships for the Southern District of Texas, and three additional judgeships for the Western District of Texas. By contrast, S. 2648 would provide four fewer judges for the Southern District and two fewer judges for the Western District.

9/ A "permanent" judgeship is one without restriction. A "temporary" judgeship is one that includes the condition that the first vacancy that occurs more than five years after the new judgeship is first filled can not be filled and therefore lapses. The effect of the "temporary" judgeship is to provide an extra judgeship for a minimum of five years, or until a vacancy occurs thereafter. "Converted" judgeships are those "temporary" judgeships previously created where the restriction is lifted and the President may fill the next vacancy occurring, no matter when it occurs.

These limitations will hamper the ability of those two districts to handle even existing caseloads, yet both of them clearly face rapid caseload increases attributable largely to the war on drugs. The Southwest Border has been designated as a high-intensity drug trafficking area, and the Department has committed substantial additional investigators and prosecutors to those two districts. Without additional judgeships to handle the burgeoning caseload, we are concerned that the Department's efforts will be severely restricted and that, in light of the time constraints of the Speedy Trial Act, cases that should be prosecuted may be lost.

Moreover, we note that, in the Northern District of Texas, S. 2648 would authorize only one additional judgeship in contrast with the Judicial Conference's request for two positions. While a single position might be arguable, the fact remains that the Dallas Task Force has brought, and will continue to bring, substantial savings and loan fraud cases. This district is currently undermanned and will be increasing undermanned in the future.

The Attorney General has stated many times that the justice system is a pipeline: investigators need prosecutors to bring the cases; prosecutors need judges to try the cases; judges need prison space to mete out sentences in accordance with the law. We have already made substantial commitments of resources for additional investigators, prosecutors and prison beds; clearly, the weak point in the criminal justice pipeline often is the availability of judges in the district courts.

As with the district courts, the courts of appeals are already behind in their attempts to process their burgeoning caseloads effectively. To meet past demands, the Judicial Conference requested 16 additional judgeships in 1989 and its most recent survey recommends 20 additional judgeships; S. 2648 provides only 11. Here again, the demands for judicial resources are increasing. Based purely on caseload, the Department believes that as many as 22 additional judgeships are already needed. As new investigators and new prosecutors bring new cases before the district courts, additional appeals are bound to occur, putting further stress on an already strained judicial process.

Accordingly, we support the efforts and recommendations of the Judicial Conference in requesting additional judgeships, as well as S. 2648, with modifications.

In sum, the Department supports the principles embodied in S. 2648. We hope that these comments will assist the Committee in the further development of the bill and other proposals for needed civil justice reforms. The Department will be pleased to continue to work with the Committee on these issues.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

Bruce C. Navarro
Assistant Attorney General