AO181
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ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

ROUTING SLIP

TO

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	Deputy Director, Macklin
	General Counsel, Burchill
	Legislative and Public Affairs Office, Feidler
X	Office of Judicial Conference Secretariat, Siegel
	Director, EEO & Special Projects, Robinson
	Assistant Director, Administration, Karam
	Contracts & Services Division, Chief, Simmons
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REMARKS

FROM	DATE
Bob Feidler	1/25/90

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Memorandum

DATE: June 1, 1990

FROM: William R. Burchill, Jr., General Counsel

SUBJECT: Technical Comments on Civil Justice Reform Act

TO: L. Ralph Mecham, Director

This is in response to your request for my comments upon Senator Biden's Civil Justice Reform Act of 1990. I am basing these comments on the version of this legislation embodied in S. 2648, as introduced in the Senate on May 17, 1990. I should begin by stating my recognition that this bill is the product of an evolving process of political compromise and that, in negotiations on the bill, technical legal and drafting problems of the sort that my comments will identify must often take second place to broad conceptual issues. Nevertheless I am happy to offer these comments for whatever purpose they might serve as the bill continues to be refined.

Proposed 28 U.S.C. § 473(b)(2) (P. 10)

This subsection would require each United States district court to consider adopting, as a litigation management and cost and delay reduction technique, a requirement that each party be represented at **each pretrial conference** by an attorney who has "the authority to bind that party regarding all matters" previously identified for discussion or reasonably related thereto.

This requirement seems to me merely declaratory of and redundant with the existing provisions of Rule 16 of the Federal Rules of Civil Procedure. Rule 16(a) now permits the court to direct the attorneys for the parties and any unrepresented parties to appear before it for conferences before trial. Rule 16(c) provides that at least one of the attorneys for each party participating in any pretrial conference "shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed."

Proposed 28 U.S.C. § 473(b)(3) (P. 11)

This subsection would require each district court to consider adopting the requirement that all requests for extensions of deadlines to complete discovery or for postponement of trial shall be signed by the attorney **and the party** making the request. Such a requirement appears at variance with Rule 11, Fed. R. Civ. P., which generally permits pleadings, motions, and other papers to be signed by at least one attorney of record for the party. Rule 11 requires a party's signature only if the party is not represented by an attorney.

I suppose that this variation is not legally significant. Assuming that district courts adopting such a requirement would be doing so under the authority of this statute, Congress has the right to legislate in a manner conflicting with the Federal Rules. The so-called "supersession clause" regarding the Federal Rules (28 U.S.C. § 2072(b)) provides only that, "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Subsequently enacted statutes apparently may vary from the Federal Rules, although it would probably be more orderly to amend the rule or submit the matter to the Judicial Conference for consideration by its Rules Committee.

Proposed 28 U.S.C. § 474(a) (Pp. 11-12)

This section refers in several places to certain actions to be taken by the chief judge "of a circuit court" and the chief judge of each district court. The "circuit court" terminology is anachronistic and no longer legally correct, although this term is often used conversationally to refer to the United States courts of appeals established by 28 U.S.C. § 43(a). I would recommend that these references in the bill be amended to say instead, "chief judge of a circuit" or "chief judge of a court of appeals."

Proposed 28 U.S.C. § 477 (P. 14)

Section 477 would require the chief judges of each district court to appoint an advisory group within 90 days after enactment to perform certain review functions and make reports as required by proposed section 472. The composition of these advisory groups is not defined, except that they "shall be balanced and include attorneys and other persons who are representative of major categories of litigants in such court . . . ." The term of membership on advisory groups is limited to four years, and the chief judge is required to designate a reporter for each advisory group. Plainly this "advisory group" concept is modeled upon the "planning groups" established in each district under the Speedy Trial Act of 1974, as amended, in order to formulate plans for the prompt

trial of Federal criminal cases. I have several recommendations that might be considered to improve this section:

1. Perhaps section 477(b) should require the advisory groups to consist of "attorneys **or** other persons who are representative of major categories of litigants." The use of the disjunctive may be more appropriate because a court might well find that only attorneys fit this description. On the other hand there may be a strong congressional policy preference to include laypersons on the advisory groups.

2. The four-year limitation on advisory group membership should be reconsidered. Particularly in the smaller judicial districts it may prove difficult to locate the requisite number of qualified persons who are willing to serve in this capacity. This limitation may be disruptive of continuity and unduly truncate the service of group members.

3. Most important, I recommend adding a provision clarifying the status of the advisory group members and reporters as independent contractors rather than court employees, so as to ascertain that they (and possibly their partners) shall not be banned by the criminal conflict of interest laws (chapter 11 of title 18, U. S. Code, as amended by title IV of the Ethics in Government Act of 1989, Public Law No. 101-194) from practice before the court. This became a problem with the reporters to the Speedy Trial Act planning groups, particularly in small judicial districts where the size of the Federal bar is limited.

Proposed 28 U.S.C. § 478(c) (P. 15)

This subsection would charge the Judicial Conference with preparing and updating a Manual for Litigation Management and Cost and Delay Reduction. It is further provided that the Directors of the Administrative Office and the Federal Judicial Center may make recommendations regarding the Manual's content. This seems an anomalous function to vest in a collective body such as the Conference, although it may make sense if read to mean that the Conference shall simply approve a Manual drafted by its staff. It might be better to provide that such Manual shall be prepared and revised by either the Administrative Office or the Center (or both) under the supervision and direction of the Conference.

Proposed 28 U.S.C. § 479 (P. 16)

This section would require that the Directors of the Federal Judicial Center and the Administrative Office shall develop and conduct comprehensive education and training programs regarding civil litigation management and cost reduction. The dual involvement of both Directors seems to me appropriate, particularly because you sit as a member of the Center's Board. Nevertheless the training function for the Judiciary is preeminently vested in the Center (28 U.S.C. § 620(b)(3)), and perhaps a clarification should be added here that such training programs shall be financed by the Center. This would seem reasonable in view of the fact that the Center receives the primary judicial appropriation for training, whereas the Administrative Office receives only very limited resources for incidental operational training.

Section 103(c) (P. 18)

Section 103(c) provides that those district courts which implement a civil justice expense and delay reduction plan between six and 12 months after enactment of this Act shall be designated as "Early Implementation District Courts" and may apply to the Judicial Conference for additional resources, which the Conference may in its discretion provide. As we have discussed, it seems questionable to designate a policymaking body such as the Conference to perform this function rather than an operational entity such as the Administrative Office. Of course, if the Director of the Administrative Office were substituted for the Conference in this role, the Conference would still be involved in the process by virtue of its supervision and direction of our activities under 28 U.S.C. § 604(a).

Section 104(b)

This section would mandate that a demonstration program be conducted by the Judicial Conference to experiment with differentiated case management and cost and delay reduction. Ironically, since this is defined as an experimental program, the bill then proceeds to specify which district courts shall experiment with which techniques. It is not clear to me whether the enumerated district courts are to be the exclusive participants in the demonstration program or not, particularly because section 104(a)(2) states that a participating district court may also be an Early Implementation District Court.

Subsection (b) then specifies that the Western District of Michigan and the Northern District of Ohio shall experiment with systems of differentiated case management, while the Northern District of California, Northern District of

West Virginia, and Western District of Missouri shall experiment with "various methods of reducing cost and delay in civil litigation, including alternative dispute resolution . . . ." Obviously such methods should include arbitration, which is now expressly authorized by statute in chapter 44 of title 28. Nevertheless the authorization of that chapter is limited to the district courts enumerated by 28 U.S.C. § 658, which includes ten named courts and ten additional districts to be approved by the Judicial Conference. I note that Northern California and Western Missouri are among those courts explicitly authorized by section 658(a) to utilize arbitration; Northern West Virginia is not among these courts but may have been or presumably could be approved by the Conference for such participation under section 658(b).

These are the comments that occur to me upon initial review of this version of the "Biden bill." If I can be of further assistance as this legislation proceeds, please advise.

cc: Robert E. Feidler
Peter G. McCabe

United States District Court
Northern District of California
San Francisco, California 94102

Chambers of
Robert F. Peckham
United States District Judge

FACSIMILE TRANSMISSION

TO: Karen Siegel

FROM: Judge Peckham

DATE: 5/30/90

NO. OF PAGES INCLUDING COVER 9

RE: Biden Bill

COMMENTS:

Transmitted by: [signature]

FAX #: (408) 291-2689
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United States District Court
Northern District of California
San Francisco, California 94102

Chambers of
Robert F. Peckham
United States District Judge

May 30, 1990

MEMORANDUM

TO: JUDGES ROBINSON, NANGLE and BARKER

FROM: BOB PECKHAM

RE: BIDEN BILL

This is Judge Sam Pointer's suggested substitution for 28 U.S.C. § 473(a)(2)(B).

Attachment

Copy: Chief Judge Clark
Karen Siegel

MAY 2 3 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
HUGO L. BLACK UNITED STATES COURTHOUSE
BIRMINGHAM, ALABAMA 35203

CHAMBERS OF
SAM C. POINTER, JR.
CHIEF JUDGE

May 18, 1990

The Honorable Robert F. Peckham
Senior U. S. District Judge
P. O. Box 36060
450 Golden Gate Avenue
San Francisco, CA 94102

Re: Civil Justice Reform Act of 1990

Dear Bob:

Frank McFadden, a former colleague on this court who more recently served on the Brookings Institute Task Force, has, with consent of Jeff Peck, forwarded to me a copy of the most recent draft of the proposed Civil Justice Reform Act of 1990. I understand that Mr. Peck mailed you a copy of this draft in a letter dated May 10th.

I leave to others the debate concerning the appropriateness of legislation to address problems of litigation costs and delays. Rather, I simply want to focus on one particular part of the proposed Act that gives me great concern. This is the portion that would include in a new 28 U.S.C. § 473(a)(2) a requirement that the district court plans include provisions for early control of pretrial proceedings by--

> "(B) setting early, firm trial dates, such that the trial is scheduled to occur within eighteen months of filing, unless a judicial officer certifies that the trial cannot reasonably be held within such time because of the number or complexity of pending criminal cases".

You can perhaps best understand the nature of my concern if at the outset I indicate alternative language for this provision. My suggestion is that, <u>if</u> any such provision is to be included in legislation, the language should be modified to read in substance something like the following:

> "(B) establishing a trial date or a date by which the parties shall be ready for trial, which date shall be as early as is practicable (and, should such trial not be commenced within eighteen months of filing, a judicial officer shall certify the reasons why the trial was not commenced during that period)".

I.

Before discussing why I believe this provision should be changed, let me outline my qualifications for commenting on case management techniques.

(1) This court, despite above-average case filings, has an outstanding record in the efficient disposition of cases.

- For ten straight years the Northern District of Alabama has had the lowest median time for disposition of criminal cases of any district court within the fifty states.[1]

- During this same period this court has consistently had among the lowest median times for disposition of civil cases, as well as having among the fewest pending civil cases over three years old. In the most recent statistics published by the A.O. (for the year ending 6/30/89), our median time for disposition of civil cases was 6 months (4th best in the country), and we had only 22 civil cases that had been pending more than 3 years (an average of less than 3 per judge to whom cases were assigned).

(2) During my almost twenty years on the bench I have personally taken an active, "hands-on" approach to case management, both in routine cases and in complex cases, and have been relatively successful in promptly disposing of litigation.

- Although I have continued to take a full share of criminal and civil cases during my seven years as Chief Judge of the court, my pending caseload is among the lowest in the nation, and I have had relatively few cases to report on the "quarterly" reports. (As of today's date, I have only 181 civil cases pending--with a median age of 4.26 months--and only two matters that have been under submission for more than 30 days.)

- I have handled several very complex cases--including the first two national class-action antitrust cases that were tried to a jury--and am the principal author of the *Manual for Complex Litigation, Second*, which to

1. For the year ending 6/30/89, AO statistics show our court as number 2 in median disposition time for criminal cases, surpassed by Guam.

some degree may have inspired that part of the proposed legislation calling for development of a Manual for Litigation Management.

I mention the above "credentials" not to boast, nor do I suggest that our successes are simply the result of good management techniques on the part of myself and other members of this court. Rather, I do so to emphasize that we are committed to the fundamental goals expressed in the draft legislation and are concerned that any legislation not contain provisions that would frustrate our ability to continue to resolve all types of litigation fairly, efficiently, and economically.

While my comments are largely based upon my experience as a judge on the Northern District of Alabama, I have had some additional exposure to the procedures used in other courts as a result of serving on the Standing Committee on Rules of Practice and Procedure and as a liaison from that Committee to the Advisory Committee on Civil Rules.

II.

There are three basic principles incorporated in proposed section 473(a)(2)(B) with which--whether as a part of legislation or as a part of a self-imposed plan--I do not disagree.

- I agree that a judicial officer should be involved in control of the pretrial process, and that this should be both "early" and "on going." (In virtually all of my cases I personally conduct a scheduling conference as soon as the initial attorneys for plaintiff and defendant are known--typically within the first 60 days after filing--and then have additional status or pretrial conferences as needed and appropriate. In these conferences I am not merely a neutral bystander, but am active in exploring ways to reduce the cost and time of the litigation.)

- I agree that one of the most effective controls is to establish very early a potential date by which a trial (or trials) could be fairly conducted and then to fashion procedures for completing pretrial proceedings consistent with that timetable. I also agree that the potential date should be "early", provided that is evaluated in light of the circumstances of the particular case.

- I agree that most civil cases would, with proper controls and dedication, be ready for trial within eighteen months. (Indeed, twelve months is

sufficient for most civil cases.)

III.

There, however, are two elements of proposed § 472(a)(2)(B) which I believe, based on my experience, would be a disaster: first, the mandate that early in the litigation--presumably at the time of the initial conference-a "firm trial date" be established; and second, the mandate that the trial of civil cases necessarily occur within 18 months of filing, subject only to priorities created by criminal cases.

A. "Firm trial date"

Establishment of a "firm trial date" not only is a directive to the litigants to conduct pretrial proceedings and make necessary arrangements with all witnesses and other courts so as to be ready for trial at the time set, but also should represent a commitment by the court to be available for trial at that time. Postponements or continuances should be granted only for compelling reasons, and, if granted too frequently, will diminish the indirect control on discovery that trial dates otherwise can provide.

In considering when trial dates should be established, two facts should be kept in mind: (1) the longer the period between the setting of the trial date and the trial date itself, the greater is the potential for unanticipated events that may justify a rescheduling of the trial; and (2) the larger the number of cases that have firm trial dates, the greater is the disruption caused when a trial has to be rescheduled.

From time to time in selected cases I have established a firm trial date early in the litigation. My experience teaches me, however, that this should be done only with special cases--either (1) complex cases that will require many months for discovery, involve a potentially lengthy trial, and have numerous parties, attorneys, or witnesses,[2/] or (2) relatively simple cases that can be ready for a short trial within the next six to eight weeks. I have found that for most litigation, however, the selection of a firm trial date should not be made this early--that there are too many variables not only with respect to the case in question, but also with respect to other cases that are pending or may be filed in the interim.

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2. Even with complex cases, setting of a firm trial date at the initial conference is not always desirable. See *Manual for Complex Litigation, Second,* §§ 21.24 (at initial conference court should consider establishment of a "tentative or firm trial date"), 21.421 (cautioning against early setting of firm trial date unless court will in fact be able to conduct the trial at approximately the time indicated, absent exigent circumstances), 21.61 (setting of trial date at final pretrial conference).

With typical cases, I establish at the initial scheduling conference, after consulting with counsel, a date for completion of discovery, appropriate limitations on the scope or extent of discovery, and a date by which the parties shall (upon sufficient advance notice) be ready for trial. Normally these dates will then be reviewed at a subsequent status or pretrial conference held 45-60 days before the trial readiness date, and shortly thereafter a trial docket with firm trial dates will be published. This approach accomplishes the same objective as early establishment of a firm trial date--providing a control on the time and cost of discovery and other pretrial procedures--while affording flexibility to meet unanticipated problems and indeed facilitating a more effective scheduling of trials.

My own practice in scheduling trials is that, with routine jury cases, two to four cases should be set on a Monday of the trial week, two or three on the Tuesday of the trial week, and one or two on the Wednesday of the trial week. The expectation is that most will settle, but the determination of what day of the week, and what week of the month, to schedule the trial of a particular case is an art, not a science. In making that judgment, I depend upon the information about the estimated length of trial and settlement possibilities gathered at the time of a conference with counsel that occurs when the case is nearly ready for trial, rather than the initital estimates that were given at outset of the case and frequently prove to be inaccurate.

During my nineteen years on the bench in following this procedure, I have never had to continue the trial of a case from the week in which it was set because it couldn't be reached, though each trial week I wonder if this will be the week for that to occur. I do not believe this method for setting trials could be used if the actual trial dates were being set at an early scheduling conference.

There are many reasons why setting of firm trial dates for all civil cases at the initial scheduling conference will aggravate the problems of efficient scheduling of trials. Among these are the following: (1) time must be allotted for cases that will settle during pretrial proceedings; (2) time must be allotted for cases that will be resolved by summary judgment during pretrial proceedings; (3) estimates of the trial length given at the initial scheduling conference frequently are in error because of developments during discovery, rulings on legal issues, additions or reductions in the parties or issues, etc.; (4) unanticipated and unavoidable delays sometimes occur during pretrial proceedings as a result of illness, third-party or foreign discovery, changes in the law, etc.;[3] (5) scheduling conflicts do arise--

3. This particular problem can be addressed by building in additional time for contingencies when setting the trial date. This solution, however, results in unnecessary prolongation of pretrial proceedings in the majority of cases in which such problems do not arise.

either those that tie up the court (*e.g.*, intervening criminal cases or other civil trials that should be given priority) or those that affect the attorneys, parties, and witnesses.

In a court such as the Northern District of Alabama there is the additional problem created by divisional trials. We have seven statutory divisions where trials are held, several of which have relatively small case filings. The question of when to hold trials in the smaller divisions involves not merely when cases are ready for trial, but when there are enough cases that are trial ready to justify the calling of a jury for that division.

The matters mentioned in the two preceding paragraphs create some problems even when trial dates are routinely set only 6-8 weeks prior to trial. They would constitute major impediments to effective case management if firm trial dates were routinely set at the outset of all cases.

B. 18-month Trial Deadline.

I have already noted my belief that most civil cases could be ready for trial within 12 months from date of filing. However, to mandate that trial be held within 18 months from filing (subject only to the press of criminal cases) is unwise.

First, there are a few cases in which--apart from problems involving the demands of other litigation--trial should not be held during the first 18 months, either for reasons of fairness or efficiency. I cite three examples: (1) the two national class action antitrust cases I mentioned earlier were ones that, though moved to trial expeditiously, could not have been tried in the first 18 months; (2) on a few occasions I have had personal injury cases in which the trial needed to held more than 18 months after the suit was filed because of uncertainties regarding the extent and permanency of the plaintiff's injuries; and (3) in "multiple" litigation it is sometimes most economical to try one case first--and get an appellate ruling--before proceeding with trial or perhaps even discovery in the related cases. On this later point, I note also that in some cases trials need to be postponed to await the ruling of an appellate court in other litigation involving the same legal issues.

Second, the demands of other litigation will sometimes prevent trial of a case within the first 18 months. This most frequently will occur as a result of criminal cases--which is covered in the proposed legislation--but it can occur because of other civil litigation as well, particularly if there are unfilled judgeships on the court. Our court has rarely had this problem, but there are several courts in which the 18 month mandate would be totally unworkable.

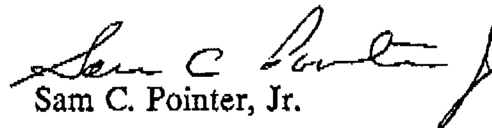
IV.

I am aware that some have said that the proposed legislation is not directed at, or needed for, courts like the Northern District of Alabama. It would nevertheless affect us; and even the most recent draft would interfere significantly with our ability to continue in a good record of case management.

In suggesting language for an alternative draft of proposed 28 U.S.C. § 473(a)(2)(B) as given on the first page, I have done so in a way that would allay my concerns, while retaining the basic thrust of the sponsors' objectives, including that of judicial accountability. I do not, of course, intend to be viewed as a supporter of the legislation.

I am taking the liberty of sending a copy of this letter to Messrs. McFadden and Peck, as well as to Senators Heflin and Shelby. I hope that will not be viewed as encroaching on the authority of your committee.

Sincerely,



Sam C. Pointer, Jr.

cc: Messrs. McFadden and Peck
Senators Heflin and Shelby