MEMORANDUM

TO: JOSEPH R. BIDEN, JR., CHAIRMAN
RE: THE CIVIL JUSTICE REFORM ACT

I. SUMMARY

There are three questions pertaining to Congress's constitutional authority to legislate in this area:

(1) Does Congress have the power to pass the legislation?

(2) Is Congress's power exclusive? and

(3) If Congress enacts the Civil Justice Reform Act, can it delegate to the courts the power to implement the Act?

The answer to the first question is: yes, Congress has the power to enact the legislation. This is not a close question, as the power clearly exists.

The answer to the second question is that Congress's power is exclusive. There is a clear distinction between rules of procedure that advance substantive goals -- which only Congress can propose -- and rules of procedure that do not advance substantive goals -- which the Supreme Court can propose. The Civil Justice Reform Act of 1990 advances substantive goals. The Criminal Speedy Trial Act of 1974 is also an example of a set of procedural rules that only Congress was able to propose.

The answer to the third question also is yes. Congress may delegate to the courts the authority to develop and implement plans to accomplish the substantive policy goals of the Civil Justice Reform Act. Such a delegation constitutes a further refinement of the scope of the courts' rulemaking authority and is consistent with the manner in which earlier reforms were implemented under the Speedy Trial Act.

II. THE NATURE OF PROCEDURAL RULES

Rules of procedure concern the management of the litigation process. As John Hart Ely put it, they are designed to make the litigation process "a fair and efficient mechanism for the resolution of disputes."

Some "procedural" rules have a "substantive" component. Rules of this type have dual legislative goals -- one relating to the management of litigation, and the other relating to a substantive concern.

An example of a rule that is both procedural and substantive is a statute of limitations. A statute of limitations accomplishes the procedural (i.e., litigation management) goals of reducing the size of a court's docket and preventing trials based on stale evidence. It also accomplishes the substantive purpose of terminating the possibility of a lawsuit after the passage of the designated period.

An example of a purely procedural rule is a rule designating the proper form for a complaint. Such a rule affects the litigation process, but advances no substantive goals.

III. CONGRESSIONAL VERSUS SUPREME COURT RULEMAKING AUTHORITY

A. Congress's Power to Enact Rules for the Courts

Congress's authority to enact rules of procedure is defined and limited by the Constitution. As a 1985 House Judiciary report said:

> "Congressional power to regulate practice and procedure in federal courts has been acknowledged by the Supreme Court since the early days of the Republic and is now assumed without queston by the courts." (H.R. Rep. No. 422, 99th Cong., 1st Sess., 5-7 (1985)(citiation omitted).)

In Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941), the Supreme Court stated:

> "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States."

In 1964, Congress's power to enact rules of procedure was reaffirmed by Chief Justice Warren writing for the Supreme Court in Hanna v. Plumer, 380 U.S. 460, 472-73 (1964) -- a leading case on federal rulemaking authority:

> "[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts....[Subsequent cases] cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts...."

The delegation of rulemaking authority to the courts does not lessen the power conferred on Congress by the Constitution. The following passage from a 1926 report of the Senate Judiciary Committee clearly indicates that when Congress delegated power to the courts, it never intended to surrender its constitutional role:

> "[T]he bill proposed will not deprive Congress of the power, if an occasion should arise, to regulate court practice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal....It gives to the court the power to initiate a reformed Federal procedure without the surrender of the legislative power to correct an unsatisfactory exercise of that power." (Sen. Rep. No. 1174, 69th Cong., 2nd Sess., 7 (1926).)

The Supreme Court's consistent and longstanding recognition of congressional rulemaking authority has produced broad agreement on this point among the leading scholars in this field. The following statement by Judge Jack Weinstein is typical:

> "Congress's position as possessor and delegator of the rule-making power is now assumed without question by the courts....As a result of the Court's long-standing acknowledgement of the congressioanl prerogative over rule-making...the only questions that have arisen concerning the rule-making power involve the extent and propriety of the delegation of the power to the courts." (Weinstein, J., Reform of Court Rule-Making Procedures 90 (1977).)

B. Rulemaking Power Delegated to the Courts by the Rules Enabling Act

The Supreme Court's authority to enact rules of procedure is far more limited than Congress's power -- the Court has only that authority delegated to it by Congress in the Rules Enabling Act of 1934. The portion of the Rules Enabling Act delegating authority to the Supreme Court -- and limiting that authority -- reads as follows:

> "(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts...and courts of appeals. (b) Such rules shall not abridge, enlarge or modify any substantive right...." (28 U.S.C. Sec. 2072.)

There is general agreement among commentators that Congress empowered the Court in this provision only to propose rules of procedure that have no substantive effect.

Under the present system, judicial rulemaking authority is triggered when the Judicial Conference of the United States transmits a draft rule to the Supreme Court. If it chooses, the Supreme Court can then transmit the proposed rule to Congress, but must do so between the time Congress begins a regular session and May 1. Congress then has until December 1 of that year to disapprove, modify, or further delay the effective date of the proposed rule. If Congress takes no action, the proposed rule becomes effective on December 1.

Rules of court that are both substantive and procedural are beyond the limits of the Supreme Court's delegated rulemaking authority. If the Supreme Court were to propose a rule that impacted upon a substantive concern, that proposal would run afoul of the Rules Enabling Act's prohibition against rules that "abridge, enlarge or modify any substantive right."

Since Congress's power to enact rules of procedure is limited only by the Constitution, and not the Rules Enabling Act, Congress may pass procedural rules that advance substantive goals. Such rules define the area of court rulemaking that is allowed to Congress, but prohibited to the Supreme Court under current law.

Congress has been careful to protect its exclusive rulemaking authority. In a 1985 report, the House Judiciary Committee commented on legislation eventually enacted in 1988 that amended the Rules Enabling Act. The 1985 House Report describes the exclusive rulemaking authority retained by Congress as follows:

> "[The Rules Enabling Act] is intended to allocate to Congress, as opposed to the Supreme Court exercising delegated legislative power, lawmaking choices that necessarily and obviously require consideration of policies extrinsic to the business of the courts...." (H.R. Rep. No. 422, 99th Cong., 1st Sess., 22 (1985).)

Importantly, the report also refers to Congress's exclusive power to enact procedural rules that "affect its constituencies in their out-of-court affairs." (Id.)

IV. EXAMPLES OF CONGRESS'S EXCLUSIVE RULEMAKING POWER

A. Federal Rules of Evidence

In 1973, the Supreme Court proposed a uniform set of evidence rules for the federal courts. Congress deferred the effective date of the Supreme Court's proposal, held hearings, and then, in December 1974, enacted its own version of the Federal Rules of Evidence. Previously, federal courts applied state rules of evidence.

The stated reason for Congress's intervention was that the rules proposed by the Supreme Court were substantive in nature and, therefore, outside of the rulemaking power delegated to the Supreme Court. The House Judiciary Committee report stated:

> "After six days of hearings, the Subcommittee on Criminal Justice concluded that, on balance, there should be an evidence code. However, recognizing that rules of evidence are in large measure substantive in their nature or impact, the Subcommittee and the Full Committee concluded they were not within the scope of the enabling acts which authorize the Supreme Court to promulagate rules of practice and procedure." (H.R. Rep. No. 650, 93rd Cong., 1st Sess., 2 (1973).)

Justice Douglas, in his dissent from the Supreme Court's proposal, echoed the House Judiciary Committee's view:

> "I can find no legislative history that rules of evidence were to be included in 'practice and procedure' as used in [the Rules Enabling Act]....The words 'practice and procedure' in the setting of the Act seem to me to exclude rules of evidence. They seem to me to be words of art that describe pretrial procedures, pleadings, and procedures for preserving objections and taking appeals." (Letter of Justice Douglas dissenting from the Supreme Court's proposed Rules of Evidence, October Term, 1972.)

Congress's concern about the substantive nature of the Supreme Court's proposal was directed at the treatment of testimonial privileges. Most states recognize a number of testimonial privileges, including the husband-wife and physician-client privilege. In these instances, the confidentiality of particular relationships has been judged to take precedence over obtaining relevant information at trial.

The Supreme Court's proposed rules of evidence eliminated or narrowed certain testimonial privileges. Although procedural -- in the sense they concerned getting at the truth -- these rules also had the substantive impact of inhibiting important relationships existing wholly outside the courtroom. For this reason, the House Judiciary Committee and Justice Douglas concluded that only Congress had the authority to enact the Federal Rules of Evidence.

B. Speedy Trial Act

The Speedy Trial Act was passed by Congress in 1974. Its goal was to reduce crime by reducing delays in the trial of criminal defendants. The Speedy Trial Act resembles the Civil Justice Reform Act in that it required each district court to formulate a "plan." In both purpose and method, the two laws are similar.

Although a Federal Rule of Criminal Procedure addressing the problem of delay in criminal trials already had been proposed by the Supreme Court and had become law, Congress decided to enact its own legislation.

In part, congressional involvement was required by the resources needed to implement the Speedy Trial Act. The report of the House Judiciary Committee states that the proposed solutions, "may require the addition of new judges, clerks, [and] the purchase of computers...." (H.R. Rep. No. 1508, 93rd Cong., 2nd Sess., (1974).) Judge Jack Weinstein, an authority in this field, commented:

> "Since no speedy trial rule will work unless the courts are granted the personnel to make the rule a reality, congressional expression on the policy of speedy trials was desirable." (Weinstein, J., Reform of Court Rule-Making Procedures 108 (1977).)

Congress also determined that legislation was necessary in order to improve upon the status quo for processing criminal cases in the federal courts. Without a legislative initiative, the judiciary would be left on its own to achieve significant criminal justice reform. Rule 50(b), enacted through the Rules Enabling Act, was viewed by Congress as an inadequate reform. As the House Judiciary Committee stated:

> "The Committee believes that Rule 50(b) and the Model Plan adopted by many district courts is an inadequate response to the need for speedy trial, in that it encourages the perpetuation of the status quo." (H.R. Rep. No. 1508, 93rd Cong., 2nd Sess. (1974).)

V. THE CIVIL JUSTICE REFORM ACT

The Civil Justice Reform Act is within the exclusive rulemaking authority of Congress. The limitations of the Rules Enabling Act bar the Supreme Court from proposing this legislation.

The restriction on delegated rulemaking power imposed by the Rules Enabling Act can be described in at least three ways: (1) the Supreme Court cannot propose rules of procedure that advance substantive goals; (2) only Congress can enact rules of procedure that, while addressing litigation management, directly implicate other policies as well; and (3) procedural rules affecting politically organizable interests must be enacted by the legislative branch. Regardless of which of these standards is applied, the conclusion is the same: Only Congress can enact the Civil Justice Reform Act.

The Civil Justice Reform Act proposes a body of component principles to be applied by district courts in developing procedural rules. The provisions of the bill that require district courts to establish case tracking systems, firm trial dates and discovery deadlines are aimed directly at improving the efficiency and fairness of the litigation process. While improved management of the litigation process is a core objective of this legislation, it advances other, substantive

concerns as well. For example, S.2027 addresses the substantive goal of increasing access to the federal courts, as set forth in paragraph 5 of the findings:

> "High and increasing litigation costs cast doubt upon the system's fairness and its ability to render justice, since those costs unreasonably impede access to the courts, make it more difficult for aggrieved parties to obtain proper and timely judicial relief, and, in some cases, to obtain any relief at all."

Paragraph 6 of the findings advances the substantive goal of improving the efficiency and competitiveness of American business:

> "High and increasing litigation costs also burden American businesses, which are compelled to spend increasingly more money on legal expenses at a time when they are confronted with intense international competition and to divert valuable resources from the essential functions of making better products and delivering quality services at the lowest possible cost."

A proposal intended to increase access to the courts and to improve the productivity and competitiveness of American business cannot fairly be described as purely procedural. The Civil Justice Reform Act is the type of rulemaking proposal Congress has considered to be under the exclusive authority of the legislative branch.

Access to the courts -- whether a litigant is able to bring a lawsuit at all -- and business productivity are, without question, "policies extrinsic to the business of the courts." (H.R. Rep. No. 422, 99th Cong., 1st Sess., 22 (1985). The day-to-day affairs of a number of groups, including the business community, the insurance industry, public interest and consumer groups, will be affected by the proposals in the Civil Justice Reform Act. The legislation, therefore, affects Congress's "constituencies in their out-of-court affairs." (Id.) Policy initiatives of this type require the accountability of the legislative process and cannot be proposed by the Supreme Court.

Another clear indication that the Civil Justice Reform Act is within the exclusive rulemaking authority of Congress is found in the bill's authorization of funding to accomplish its purposes. The bill authorizes funds to assist the district courts in the development of their civil justice expense and delay reduction plans, to provide automated systems to implement the plans, and for other purposes. The decision to fund a program is necessarily a choice that requires considerations inappropriate for the judicial branch. As shown by the experience of the Criminal Speedy Trial Act, only Congress has the power to provide these resources.

Finally, unlike technical rulemaking changes made by the Supreme Court, the Civil Justice Reform Act will create a new body of civil justice objectives, principles and procedures. In the past, the Supreme Court's proposals have been limited to amendments or additions to existing procedural codes. Typically, the Supreme Court proposes limited revisions that amend specific rules of the Federal Rules of Procedure. The Civil Justice Reform Act goes well beyond such specific amendments and instead proposes a comprehensive set of principles applicable to all civil litigation in the federal courts.

VI. CONGRESSIONAL DELEGATION OF AUTHORITY TO IMPLEMENT CIVIL JUSTICE PLANS

The Civil Justice Reform Act directs each United States district court to:

> "develop a civil justice expense and delay reduction plan...with a view toward facilitating deliberate adjudication on the merits in appropriate cases, streamlining discovery, improving judicial case management, and renewing its commitment to the just, speedy, and inexpensive resolution of civil disputes." (S.2027, Sec. 3, amending 28 U.S.C. 471(a)(1).)

There is strong precedent for congressional delegation of this type of authority to the courts. Under the Speedy Trial Act, district courts were charged with the task of developing plans that included:

acknowledged: "Further refinement of the scope of delegation [to the courts] will undoubtedly prove necessary." (H.R. Rep. No. 422, 99th Cong., 1st Sess., 22 (1985).)

In directing each district court to develop the details of its civil justice expense and delay reduction plan, Congress has further refined the scope of its delegation of rulemaking authority. This refinement is consistent with the manner in which earlier reforms of federal criminal procedure were implemented under the Speedy Trial Act.