UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

CHARLES CLARK
CHIEF JUDGE
245 EAST CAPITOL STREET, ROOM 302
JACKSON, MISSISSIPPI 39201

July 3, 1990

(601) 353-0911

The Hon. Avern Cohn
United States District Judge
219 Federal Building and US Courthouse
Detroit, Michigan 48226

Dear Judge Cohn:

Thank you for your perceptive letter of June 26. The Executive Committee certainly wants to learn from experience. We especially want to avoid another vituperative attack such as Senator Biden made on the whole of the judiciary at the hearing held on the date of your letter. I have distributed copies of your letter to the committee. We will continue to explore the antecedents to the "Biden Bills" and seek to learn how to improve our communications with Congress.

On a broader note, I wonder if better responses to caseload pressure do not exist. Such empirical support as does exist for the conclusion that district judges can benefit the judicial process by more active "management" seems to points both ways. There are a number of intriguing unanswered questions here. We would have liked to have been "in the loop" as this matter was maturing. Serving on a court that disposes of more appeals on the merits than any other, I know the value of internal statistics. That doesn't make me an advocate of public dissemination, which could serve to improperly embarrass one or two colleagues who had serious personal problems last year but are usually top producers.

Judge Peckham's group did a marvelous job and thought out a lot of angles. I don't agree that the Conference program fell short of meaningful change.

I appreciate the spirit in which your letter was written and assure you we will take to heart the message about improving relations with Congress. This is a constant battle but one we will keep trying to win.

Cordially,

Charles Clark

cc: Executive Committee Members

RRLI-U

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
219 FEDERAL BUILDING AND U.S. COURTHOUSE
DETROIT, MICHIGAN 48226

CHAMBERS OF
ALEIN GTHN
DISTRICT JUDGE

June 26, 1990

Honorable Charles Clark
Chief Judge
U.S. Court of Appeals
for the Fifth Circuit
Room 302
245 East Capitol Street
Jackson, Mississippi 39201

Dear Chief Judge Clark:

I write to suggest the Judicial Conference retrospectively examine the antecedents of the Biden Bill. After a good deal of thinking I believe the Bill is a self-inflicted wound. What it signifies is a dissatisfaction with the manner in which private civil cases move through our courts and the expense of litigating such cases. Rightly or wrongly American industry, and that includes particularly Aetna Insurance Company, believes the solution lies in aggressive case management.

The signs were there for all to see that Congress would be asked to do something about expense and delay. The Lou Harris poll, Procedural Reform of the Civil Justice System, was the beginning. There was no judicial response that I know of to its findings. The Brookings Institution report, Civil Justice For All, was the next step. However naive the Brookings Insititution, and the Rand Corporation which was involved, may have been as to cause and solution, the report predicted what was to come. Two federal judges are listed as advisors to the self-selected committee which recommended Congressional action. Again, so far as I can tell, except a Tom Jones memorandum to the Magistrates Committee of the Judicial Conference, there was judicial response.

Precisely who drafted the Civil Justice Reform Act of 1990, S. 2027 is unknown to me. Senator Biden was clearly misinformed about how federal judges manage cases. We ought to know how that misinformation was given him. We ought to know why the Senator did not wait for the Federal Courts Study Committee to report. We ought to know why the Rand Corporation, which recently reported that there has been no slow down in moving private civil cases through our courts, involved itself in a report which denigrated the work of magistrates and ignored the impact of criminal cases. We ought to know why the report premised its recommendations, and so did Senator Biden, on the view that all districts suffer from

delay and excessive expense to litigate, and that the solution is a uniform change in the way cases are managed.

Several years back I recall the Brookings Institution recommended ways communication between Congress and federal judges could be improved. Obviously its recommendations remain to be implemented.

Lastly, the Judicial Conference recommendations for case management changes should be compared to the requirements of the Bill. However wrong Congressional micro-management may be, the Judicial Conference recommendations fall short of meaningful change as explicated in the Biden Bill, particularly with regard to reporting requirements on the state of individual dockets. Certainly the time has come to publish individual statistics on average time from filing to disposition and of undisposed of cases more than three years old.

As you may know I acted as a gunslinger a couple of weeks ago at Yale, attacking the good faith of the proponents of the Biden Bill. I listened carefully to the formal and informal responses. I was struck by the lack of real knowledge about how well we do our jobs, by and large, and how frustration with the expense of litigation has lead to the conclusion that mandating changes in procedure, uniformly applied, led to the naive conclusion that federal district judges can make a change by putting square pegs into round holes.

Unless we learn from this experience, bad recommendations for change will continue to plague us. We can learn much by exploring how we are where we are, whatever the ultimate form the Bill takes. We can also begin to meet the perceptions that we are not doing our job as well as we could.

Best personal regards,

Avern Cohn

CC: L. Ralph Mecham,
Director, Administrative Office
of the United States Courts