TRANSCRIPT OF PROCEEDINGS

UNITED STATES SENATE

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COMMITTEE ON THE JUDICIARY

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S. 2648 - THE JUDICIAL IMPROVEMENTS ACT OF 1990

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TUESDAY, JUNE 26, 1990

United States Senate,

Committee on the Judiciary,

Washington, D.C.

The Committee met, pursuant to notice, at 9:04 a.m., in Room SD-226, Dirksen Senate Office Building, Hon. Joseph R. Biden, Jr., Chairman of the Committee, presiding.

Present: Senators Biden, Thurmond, Hatch, and Grassley.

The Chairman. The hearing will come to order. I want to welcome our distinguished panel, whom I will call forward in a minute, but let me explain very briefly what our time constraints are this morning.

There is supposed to be a cloture vote at 10:15, which I hope has been vitiated, which means we will have a little longer. And there is a joint session of Congress, in the minds of many of us, of historic consequence, where Nelson Mandela will be addressing the joint session, in which case we will be compelled to be there.

And so I am going to try to limit--not try--I will limit opening statements to the ranking member and myself, and then we will move right on to the testimony of our four distinguished witnesses: the Honorable Robert F. Peckham, Chief Judge of the U.S. District Court for the Northern District of

justify the Conference's disfavor. I think it is time to lay these arguments to rest as well.

First, some argue that even though the ideas in the bill are worthy of support and merit, it is inappropriate for Congress to be legislating them because procedural reform is within the exclusive province of the judiciary. This argument is often cloaked in terms of separation of power.

As a matter of constitutional law, the argument is without merit. As the Supreme Court said nearly 50 years ago, quote, "Congress has undoubted power to regulate the practice and procedures of the federal courts," end of quote.

As a policy matter, the separation of powers argument fairs little better. The users of the federal court system have no means other than through their democratically-elected representatives to express their dissatisfaction with the civil justice system and to demand reform for that system. For too long, we have ignored these cries for change, and this bill finally, and properly, in my view, acts upon their desires.

The second objection we will hear today is that the legislation is unnecessary in light of the Judicial Conference's 14-point program for reform. I reject this view that the 14 points are sufficient. We need this legislation to establish a statutory national policy for addressing the problems of litigation costs and delay, to set forth specific

cost and delay reduction techniques, and to ensure the implementation of court-developed plans according to certain, yet reasonable timetables. These things are all missing from the Conference's 14 points, and as a result I find the Conference's proposal wholly inadequate.

Third, there are those who oppose the legislation to make a symbolic point, to show their pique at the idea that judges are being identified as to blame for the problems in the civil justice system.

These critics argue that if there is to be any legislation, it ought to focus on lawyers and clients or on abolishing tough criminal sentences or diversity jurisdiction, or something else altogether.

I find this criticism ironic in the extreme. For years, I have heard from judges that they wanted to control the lawyers who abuse the discovery process and who engage in dilatory, wasteful and costly tactics. And I heard that existing rules and procedures don't give the courts the tools they need to rein in these abuses.

Yet, now we are hearing from the same judges who resist this bill, whose only goal is to give them those very tools and expand the authority they need to manage their cases and control discovery.

In my view, the bill before us is a substantively solid bill in all respects. As we learned in no uncertain terms at

does it accomplish the results originally contemplated, but does so in such a way as to give each individual federal district court the autonomy necessary to implement an expense and delay reduction plan.

Each such plan will be developed commensurate with the unique characteristics of the civil docket in each respective district throughout the country. Generally, under the modified provisions of Title I contained in S. 2648, each federal district court will be required to develop and implement a civil justice expense and delay reduction plan. However, in contrast to the original proposal, S. 2648 does not require each plan to provide for the assignment of cases to specific processing tracks.

Specific to each civil justice expense and delay reduction plan, every district must develop a plan within three years of enactment of S. 2648. However, as an incentive, a district court which implements a plan within six months to a year after enactment is eligible to be designated as an early-implementation district and will receive supplemental resources to aid implementation. Additionally, the bill requires the Judicial Conference to develop a model plan for districts to use as a basis for developing their own expense and delay reduction plans.

Mr. Chairman, each plan should reflect a recognition that solutions to problems of cost and delay in civil cases

require significant input from litigants and the trial bar as well as the courts. Therefore, S. 2648 establishes advisory groups to include attorneys and major representative categories of litigants to assess the state of the district court's civil and criminal docket. The advisory groups will make recommendations based upon this assessment to be included in the civil justice expense and delay reduction plan for that particular district.

An additional title in this legislation warrants discussion. It is appropriate to consider the procedural changes in Title I which will reduce the costs and delays confronted by those who seek to resolve their disputes through the civil litigation system within federal courts.

However, any attempt to reform the civil justice system is futile without providing adequate judicial manpower. Title II--maybe we ought to say woman power, too. Title II of S. 2648 creates 77 additional federal judgeships. Recently enacted drug and crime legislation increased the caseload of many judges across the country.

As a result of the needs of the judiciary from the perspective of increased drug and crime-related prosecution and its impact on the federal docket, I believe more judgeships are vitally important. Additionally, this legislation incorporates recommendations made by the Judicial Conference reflecting their assessment of where judicial manpower should

be placed. The result is the provisions that create additional federal judgeships which will address the current needs of the judiciary.

Mr. Chairman, as ranking member, I look forward to continue working with you to create a greater efficiency in the federal court system and to increase the manpower of the federal judiciary. Today, I look forward to hearing from the distinguished panel of witnesses appearing before the committee.

I might say, though, I have another engagement in another committee. I will have to leave after a little, but I will certainly read this testimony of these able and distinguished judges who are here today, and we thank them very much for their appearance.

The Chairman. Thank you, Senator.

Gentlemen and lady, we now invite you to have statements--anything you would like to say, Judges Peckham, McGovern, Murphy, and then, Carl, you will be last.

Senator Hatch. Mr. Chairman, could I just make a short statement?

The Chairman. Please do. I am sorry. I didn't see you come in, Senator. I am sorry.

Senator Hatch. Thank you, Mr. Chairman. There is no more important or urgent step, it seems to me, that Congress can take to reduce delay in the federal judicial system than

the creation of additional judgeships.

The bill we consider today, sponsored by Chairman Biden and our ranking Republican member, Senator Thurmond, creates 77 new federal judgeships, including 11 appellate judgeships. And I want to commend the Chairman for his statesmanship in seeking this increase. Chairman Biden does not have to press for this increase while a Republican is President. Rather than take a narrow, partisan view of the dire need for new federal judgeships, the Senator from Delaware has done the responsible thing.

It will not be possible for us to obtain this increase without the persistent and skillful leadership of the Senator from Delaware, and we all know this. Our federal civil and criminal justice systems will be better for his efforts in this regard.

Another portion of this bill is the revised version of the Chairman's Civil Justice Reform Act. This original legislation, in my opinion, had many flaws. It met with intense criticism from federal district court judges and a number of bar groups, much of it justified, in my view.

The Chairman said at our March 6, 1990, hearing on the original bill that he would work with the judges to revise and improve the bill. He has done so, as we all knew he would. The civil justice reform portion of the bill is a more modest intrusion into the workings of the federal

judiciary than the earlier bill. Nevertheless, I am frank to say that I continue to have strong reservations about the need to do anything more in this particular area than increase funding for automation and judicial training.

With the addition of a sunset provision on this part of the bill, however, added at my request, these provisions will be applied on a temporary basis. Congress and the courts will then have a chance to evaluate this experiment after several years of its operation.

So, again, I want to compliment the distinguished Chairman and ranking member of this committee for their leadership in these areas and for their willingness to work out some of the details and work with the judges, and express my personal appreciation to both of them.

Thank you, Mr. Chairman.

Senator Thurmond (presiding). We will be very pleased to hear from you distinguished people now. Judge Peckham, we will hear from you first.

STATEMENT OF A PANEL CONSISTING OF THE HONORABLE ROBERT F. PECKHAM, CHIEF JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES; THE HONORABLE WALTER T. MC GOVERN, JUDGE, UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES; THE HONORABLE DIANA E. MURPHY, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, AND PRESIDENT, FEDERAL JUDGES ASSOCIATION; AND CARL D. LIGGIO, GENERAL COUNSEL, ERNST AND YOUNG, NEW YORK, NEW YORK, ON BEHALF OF THE AMERICAN CORPORATE COUNSEL ASSOCIATION

STATEMENT OF JUDGE PECKHAM

Judge Peckham. All right. I am Robert F. Peckham, United States District Judge from the Northern District of California, and a member of the Judicial Conference. I appear as Chairman of the Conference's Subcommittee on the Civil Justice Reform Act of 1990. We appreciate this opportunity to be present and express the position of the Executive Committee of the Judicial Conference, as we appreciate the many opportunities that we have had through our staffs to discuss with the Senator's general counsel during the process of the development of this legislation.

And then there would be a dissemination among the courts of the better plans, with comment and recommendation.

I must candidly say that one of the problems has been that there has not been sufficient dissemination, in my judgment, of the many innovations that have taken place throughout the federal judicial system in any systematic way. Under the 14-point program, such will happen.

There will be a clearinghouse, and that will not only act in the way that I have just described, but it also will allow the committee to evaluate these plans and make recommendations to the Advisory Committee on Civil Rules so that the rulemaking process can be triggered to add the national rules with respect to those programs and innovations that seem to be appropriate for system-wide application.

I would like to just say in passing that I think some of the most important reforms that have happened in the federal judicial system have been locally created and have been spread throughout and later adopted. And so I commend the legislation in that regard, and point out that it is a basic part of our 14 points.

Further, I would point out that we provide for five demonstration districts to experiment and to be carefully monitored, and those reports, too, will be carefully evaluated by the Conference, and then those which seem to be of benefit to the entire system can be put forth through the rulemaking

process.

There will also be model plans developed for those districts that may wish to have such assistance in carrying out their responsibilities under the Judicial Conference plan.

And I want to stress, too, that training and education is essential, and along with the advisory group activity, the national clearinghouse function that I have just described--training and education through the Federal Judicial Center--is most important in order for judges to learn to know what is going on throughout the country so that programs can be adopted in the particular district if it is appropriate for that district and its needs.

We have all agreed on the extension of automated dockets, and there again is a subject we could talk about a long time. We just have not had the data that we need in order to make some of the value judgments about the use of judicial time and about the effectiveness of some of the programs that we have.

Now, what I think is a very, very important point in our 14-point program is that the Judicial Conference has fixed responsibility in a new committee, the Committee on Court Administration and Case Management, to coordinate this extensive, multi-dimensional effort.

The director of the Federal Judicial Center is an ex

officio member of that committee in order to coordinate the research and educational programs. Also, we have a common member with the Advisory Committee on Civil Rules so that new rules can be initiated where it is appropriate in light of what is learned through the plans that come up from the districts.

It promises to be a very exciting and challenging time for the Judicial Conference. This new committee is meeting the third week of July to start the implementation of this program. Judge Schwarzer, the Director of the Federal Judicial Center, is already planning extensive education programs on case management, and Judge Grady and his Advisory Rules Committee are, for instance, now considering a rule which would make for early disclosure for voluntary exchanges of discovery at the beginning of a case.

Now, quite frankly, Senator, I want you to know that it was your prod by the introduction of this legislation that caused us to examine and to come forward with the 14 points.

The Chairman. Judge, if I could interrupt, quite frankly, it was your action as an individual judge that created the attention and drew the attention to a panel of distinguished practitioners and former judges made up of everyone from public interest lawyers, to the corporate 100, to the defense bar and the plaintiff's bar, that attracted my attention. It was your personally.

I don't want to get you in too much trouble, but it was you personally among--and I think Carl will acknowledge it--you personally who were quoted more than anyone else in those meetings that took place over a year at the Brookings Institution, which was not, I might add, as I am sure you know, some meeting where I brought together a bunch of political supporters and said, now, let us figure how we can take care of the judges. It was not that at all.

And so I probably have just ruined your reputation among your colleagues, but it was your innovative efforts at the local level that everyone said, and they recommended to me, by the way, what Peckham does, why can't that be done throughout the federal court system.

So I appreciate you giving the commission some credit for prompting the Conference, but you, in fact, were the thing that prompted the commission.

Judge Peckham. Well, you are very kind, Senator.

The Chairman. It is true. I want to share the blame here as best I can.

[Laughter.]

Judge Peckham. Well, now comes perhaps to some ears a discordant note.

The Chairman. That is fine; that is what this is all about.

Judge Peckham. I come to bring you the position of the

Executive Committee of the Conference and tell you why we can't endorse the bill. First, we have just told you about the 14-point program of the Judicial Conference, and we feel that that will have the same effective impact that the legislation will have.

But, secondly, the Executive Committee fears that the statute would circumvent the procedures established and recently re-endorsed by Congress in the Rules Enabling Act, and set a precedent for unwise departures from the rulemaking process.

We feel that there is a great balance in the provisions of the Rules Enabling Act, that it took ten years in gestation from 1924 to 1934. And as I indicated, it has been revisited and recently re-endorsed. It allows a deliberative process at the beginning. It allows comment from judges and scholars and lawyers.

But in the end, of course, the ultimate power is with the Congress, as it should be in a democratic society, to accept the rule, to reject the rule, or to modify the rule, and judges feel very strongly about that, particularly when it relates to procedural matters that go to the core of the performance of their judicial function. And I think that that more than anything lies at the root of the response of the Executive Committee and the Conference to the legislation in this way. Further, the nature of some of the provisions

that remain would deprive the judge of the flexibility required to manage cases most effectively.

My time is probably expiring, but let me just quickly mention the--.

The Chairman. It never expires for a judge.

Judge Peckham. --the 18-month provision. We feel that such a standard can be inspirational, can be a goal, as the ABA standard is, for the disposition of business of trial courts, but that to mandate it and allow only the two categories for going beyond criminal congestion in the particular district or in the court of that particular judge and the complexity of the particular case is too limiting.

I would suggest that trial judges be given more flexibility to set trial dates by requiring that early in the trial period they fix either the trial date or a date or a specific juncture by which the trial date will be set.

I have always preached that the setting of an early trial date is most important, that it sets the framework for the trial. I still am of that view, but I must say that in the course of carrying out the work in this chair of this committee that I have found there are many very excellent judges who dispose of their cases with promptness and with quality that set up a schedule and that manage their cases very thoroughly, but do postpone the setting of the trial date until the pre-trial conference or a juncture before

The Chairman. I want to thank you, Judge, and I apologize for trying to limit the time a little bit so we can have an exchange.

Judge Peckham. Fine.

The Chairman. As I say, we are going to have to end at 10:30, but let me just say very briefly to you, Judge, that I think the criticisms and the recommendations made have been solid ones that you have made and your committee has made. And I appreciate your candor, and I understand full well in this case--quite frankly, my frustration is not directed at this part of the process. I fully understand.

I have never known any branch of the government, I have never known any independent agency that has been inclined to want to give up any control over anything. We Senators don't like it, judges don't like it, Presidents don't like it, nobody likes it. And I understand it, and it is totally legitimate and I have no quarrel with it.

But I think that as I look at the recommendations and the changes that have been made, at the heart of this is judges, as you said, feel very strongly about the intent of the Rules Enabling Act, which is another way of saying let us take care of our own house, we can do it very well, thank you, and you guys need not come in and tell us how to--or the phrase the President uses all the time is micro-managing. No one likes any other branch of government micro-managing. But

I appreciate your testimony.

The Chairman. Now, Judge McGovern, before you begin, let me make it clear to you that although I made reference to you, my reference to you is in your capacity as being the person for whom I assume--there is a fellow who I really wish was before us today, Mr. Ralph Mecham. I assume he works for you and the Conference, and so I treat the comments he made, and many of them are quoted by him--and also Judge Robinson, and I was shocked to read some of the statements that he made about this committee--as part of your overall committee.

So they weren't directed to you personally, but just like me, I head the committee, and the committee gets criticism so it is me. It happens on your watch. This guy, Mecham said some outrageous things, in my view, before all of you, and I didn't hear anybody chastising him for anything. If my staff did that to me, they would either be fired and/or chastised and you would be given an apology.

But having said that, let us carry on, you and me, because we have much to talk about.

STATEMENT OF JUDGE MCGOVERN

Judge McGovern. Thank you, Mr. Chairman and members of the committee. I am Walter McGovern, a district judge from the Western District of Washington. I reside in Seattle. As I heard the Chairman's opening statement, I was wondering if it was not possible for Mr. Mandela to appear one hour earlier than presently contemplated.

[Laughter.]

Judge McGovern. I today represent the Judicial Conference of the United States to speak in support, Mr. Chairman, of Title II of Senate bill 2648, the provision to create 77 additional judgeships for the United States courts of appeals and the U.S. district courts.

Legislation to provide additional judgeships for the federal courts is absolutely essential if we are to meet the demands of the current caseload, not to mention the anticipated growth in the near future. Hopefully, Mr. Chairman, my opening statement here will answer most of the concerns of your committee.

Additional judgeships were last authorized in 1984 in legislation to provide 61 additional judgeships for the federal district courts and 24 additional judgeships for the courts of appeals.

During the six years since the legislation was enacted, the courts have seen substantial changes in the volume and in

the complexity of their workload. Legislation providing for the sentencing guidelines, new initiatives to fight the war on drugs, and mandatory minimum sentences are but a few of the factors which have resulted in additional work for the courts. Additionally, each of these factors has the potential to increase the burdens even more.

The recent changes in the criminal workload of the courts are well known to the members of this committee. I have documented some of those changes in my prepared statement earlier submitted, so I will not repeat the supporting statistics at this time.

However, I do want to point out that the burdens associated with the criminal caseload in some courts are rapidly reaching the point where judges can no longer devote any of their time, unfortunately, to the civil docket. This situation will become much more common unless additional resources are provided to deal with all aspects of the court's caseload.

I am also compelled to point out to you that the judgeship needs will expand dramatically as the federal courts are exposed to more and more causes of action, civil and criminal. Congress understands that in adding new federal causes of action, you must also provide the resources for the courts to handle the resulting caseload.

The judgeships provided by this bill go a long way toward

meeting our present needs, but fall short of expected need, should vast new categories of litigation be added to the federal courts.

The present caseload of the courts indicates a need for 96 additional judgeships--20 for the courts of appeals and 70 for the district courts. This need is based on the most recent assessment by the Judicial Conference. I have provided the details of these needs on a court-by-court basis in the exhibits which were attached to my written statement.

I realize that the committee has not had the benefit of these recent recommendations until now, and has not had an opportunity to review the basis for the Conference proposal. I would, however, urge the committee to review our recommendations carefully and incorporate all the judgeships identified by the Conference as necessary to address the current caseload demands.

In closing, I again express the support of the Judicial Conference for legislation authorizing these additional judgeships. The introduction of this legislation gives the judiciary some hope that relief for the overwhelming caseloads in many of our courts is now in sight. We are pleased that you have introduced this legislation, Mr. Chairman, and express our appreciation for your leadership in this very important endeavor. We stand ready to provide the assistance which the committee may need in addressing the needs of the

court.

Thank you for listening to me.

[The prepared statement of Judge McGovern follows:]

The Chairman. Thank you very much.

Judge Murphy.

STATEMENT OF JUDGE MURPHY

Judge Murphy. Mr. Chairman, Senator Thurmond, Senator Grassley, we appreciate very much the opportunity to be here this morning to talk with you about the Judicial Improvements Act of 1990.

I am Diana Murphy. I am a federal district judge in the District of Minnesota, and President of the Federal Judges Association. The Federal Judges Association is an independent, voluntary, dues-paying organization which the majority of district and circuit judges have joined.

We appreciate the cooperation that we have had from the staff and the committee, and we recognize and share the objectives behind this legislation. We do have some concerns about the legislation, and I will try not to repeat things that have been said by the previous speakers because I know the time is limited.

I hope that you will consider some of the specific recommendations that we have made in our written statement and that I will try to touch on this morning in modifying or incorporating them into the bill as it proceeds through the legislative process.

We recognize that this has been significantly improved from its original form, and I won't go through the improvements and the beneficial addition of Title II because of the limitation of time.

It has already been mentioned that many judges believe the subject matter of Title I would be best addressed by the rules process, and I won't say anything more about that. Section 102(1) of S. 2648 recognizes that the problems of delay and expense in civil litigation need to be considered in the context of the entire workload of the federal courts, but we think that some of the provisions of the bill lose track of that goal.

And it has been mentioned that the criminal caseload has so increased in the number of cases and complexity, and I would just like to take a moment to give a personal note. Senator Biden, you mentioned some of your frustration with this process, and I think some of the way judges have reacted in response has been because of individual frustration because of their own experiences.

I started a civil jury trial in November involving one of the largest American corporations, a commercial litigation, a jury trial. It was estimated to take about two months, and after two weeks we had to interrupt the trial to try a criminal case because of the Speedy Trial Act. Since then, I have just tried one criminal case after another. I am in the middle of a white collar crime case that we have had three months in and it is estimated it is going to take two more months.

Meanwhile, I am really caused a lot of concern by the

fact that the parties in the civil case begun in November--the lawyers and the jurors are left dangling, waiting for when we can restart that case, and this isn't an uncommon occurrence.

The Chairman. That is why, Judge, I might add, we put so much emphasis on the 20 districts that had the largest criminal caseloads and drug caseloads. That is the very reason why we did it. We may be wrong, but that was our rationale.

Judge Murphy. I appreciate that, and I understand that you did that. But, of course, the District of Minnesota is not one of those that was included and isn't commonly thought of as perhaps having such a--.

The Chairman. If you have a problem, you can imagine what it is in the Southern District of Florida.

Judge Murphy. Yes, I understand that.

Even with the new judgeships fully staffed, the federal judiciary will be strained to the limit. We need time to render wise decisions, to commit our reasons to writing for meaningful appellate review.

Sections 102(2) and (3) place the blame for cost and delay solely on the courts, the litigants and their attorneys. And we are very mindful of the fact that the other branches of government have some role in this, and we hope that the Congress and the President--.

Senator Thurmond. Mr. Chairman, pardon me just a minute. I am going to have to leave to go to another commitment. Again, I want to thank you distinguished people for coming here, and we will read the testimony carefully and give it the utmost consideration. Mr. Chairman, I want to ask you to excuse me at this time because I have to go.

If you will answer a few questions for the record, we would appreciate it.

The Chairman. I will submit the questions in writing.

[The questions of Senator Thurmond follow:]

/ COMMITTEE INSERT

The Chairman. Thank you, Senator.

We apologize for the interruption, Judge.

Judge Murphy. I am happy to be interrupted by Senator Thurmond.

At any rate, many statutes have increased the causes of actions and the kinds of procedures that the courts must apply, and so it has to be looked at in its entirety and can't be resolved on a piecemeal basis.

I would like to move on to some specific concerns that we hope could be amended in the bill. Section 473, in its first part, mandates certain content of the plans. The second section of 473 requires only that the district courts and advisory groups consider certain management techniques. We think the bill would be far better if the rest of Section 473 could also be requirements that the advisory groups and the district courts consider, rather than the present language in the first part of it requiring that these principles be applied.

We want to control civil litigation and bring it to a speedy conclusion. And I recently saw the report of the Minnesota Federal Practice Committee sent to you. I had no role in preparing that report, but I noticed with pleasure that that committee said that in Minnesota there was a speedy handling of the civil cases, and it was largely because of the role of the judges and the magistrates.

The Chairman. You are not under oath and I am not going to ask you to be under oath, but I would ask you a straight-up question. Don't you get frustrated at the fact that some of your other 700-plus colleagues--in your view, don't you think they don't handle their caseloads well? Honest to God, in your heart, do you believe that it is being done well throughout the system? That is a heck of a question to ask you. You are an honorable person, but I feel compelled to ask you that.

Judge Murphy. Well, I would say this, Mr. Chairman. I was a State judge before coming on the federal judge. I have been very impressed with the quality and dedication of the federal judges I have met, and I believe that they are all attempting to resolve their caseload in the best way possible.

The Chairman. Judge, there is life for you after the bench in the State Department.

[Laughter.]

Judge Murphy. Not all judges are as effective managers as some others, and I would recognize that and I think you are asking me to recognize that.

The Chairman. No. I am asking you for your honest opinion. I just want to know whether you think that, or whether you sit there, like a lot of other people do, in frustration, and say why is that happening.

Go ahead. I apologize for the interruption.

Judge Murphy. Well, I won't go into the reasons, some of which Judge Peckham has talked about, why the 18-month requirement without special certification is a problem. Also, the present need to require that a motion disposition deadline be set isn't going to work because you don't know at the beginning of the case how many motions or how complex they are going to be, or how many motions in your other cases or what kind of emergency hearings or trials you will have at the time that they are brought. We want to have realistic goals, and therefore I believe, as I have said, that 473 should be amended in the fashion that we have indicated.

Also, Section 475 requires a complete docket assessment every two years. We think if this is required, it should be no more often than three years because of the time involved. Section 472 and some of the other sections presume that in every federal district court there is unnecessary delay and cost, and set up a lengthy procedure for appointment of advisory groups.

This is really not necessary in districts that are current and have an effective plan in place. So perhaps there could be some shorthand method by which the circuit-wide committee could review plans that may already be in place. We would suggest that.

We would just point out, in closing, that the require-ments of the statute--the development of the plan, its

implementation, the review by the circuit committee and the Judicial Conference, the use of the advisory group and its appointment, the ongoing reporting and assessment--really institute a whole new area of procedure.

These complex, time-consuming and sometimes repetitive procedures will necessarily take away from other work without any evidence that they will result in benefits to the system. The legislation is based on an assumption that it will result in greater efficiency and speed in civil cases, but there is no hard evidence available on the cause and effect of the procedural requirements, and not a comprehensive look at the overall problems and their causes in the federal courts.

Again, Mr. Chairman, thank you for this opportunity. We are happy to answer any questions, and we would hope, if Title III is introduced, that we would have the time to be able to review that on comment on it.

Thank you.

[The prepared statement of Judge Murphy follows:]

The Chairman. Thank you, Judge.

Mr. Liggio, welcome.

STATEMENT OF MR. LIGGIO

Mr. Liggio. Thank you, Mr. Chairman, Senator Grassley. It is a pleasure to be here in support of Title I of the civil justice expense and delay reduction plans. I am here on behalf of the American Corporate Counsel Association, which is a bar association for lawyers who represent private sector companies. We have approximately 8,000 members, of whom 2,500 are the senior legal officers of the entities they represent. ACCA supports this bill and recognizes the significant issues that it is attempting to deal with.

My own experience is 27 years associated with the law either as a trial lawyer or as a manager of litigation as general counsel of an international business entity. I have had an opportunity in these 27 years to very closely watch the system and see what has happened to it and the problems that we are facing in the cost of litigation today, a cost which even the largest of businesses no longer is able to effectively afford.

I am in a somewhat unique position this morning, in that I think I can agree with almost every remark that has been said both by the Chairman, Senator Thurmond, and my three distinguished panel members. The comments are--.

The Chairman. We will start calling you Mr. Secretary, then.

Mr. Liggio. No. It is just the opportunity that has

been presented to me by such erudite comments and thoughts by everyone today.

I reach a slightly different result on Title I of the bill that is presented by my three distinguished panel members. I reach that result in support of this bill because I believe, as you, Senator Biden, have said, it is but a first step in trying to deal with the very significant problem that we have out there. Like you say, it is not going to be a panacea; it is not going to be a solution to every problem. But it is the first step in trying to deal with a very significant problem.

In my judgment, the two most critical components of the bill are contained in Section 473(A)(3)(b) and Section 473(A)(3)(c). (A)(3)(b) deals with issue refinement and (A)(3)(c) deals with the discovery issues. The reason I view these as the most significant portions of the bill is that my study of the litigation process over the years finds that close to 95 percent of our costs generally for litigants is in this area.

The discovery area is the most significant of this. I have studied some 20 years of litigation from my firm and looked at where our costs are, and over that 20-year period over 80 percent of our costs are in the discovery area--the virtually uncontrolled discovery that goes on.

The Chairman. Eighty percent?

Mr. Liggio. Eighty percent, Senator.

I also find, as a public accounting firm, we are a frequent target of subpoenas for other parties in litigation. We average in excess of 500 subpoenas a year to our firm; that is two every single working day. These are broad-based discovery requests asking for virtually every piece of paper in our file for all of our clients. This poses a substantial cost not only as a third party to the litigation, but also to the litigants themselves who, when they get this information, have to process it.

Lawyers have no incentive really to try to control this aspect of the costs because they make their money by piece-work, and the more pressure they can put on the discovery process, the more the burdens of litigation may force a settlement or a result which is not necessarily aimed at achieving justice under those particular facts.

Fifteen percent of our time is spent in dealing with issues and issue refinement, some of which, I believe, by more effective management by the lawyers, as well as the judiciary, could result in substantial cost savings. And that is why I picked the (A)(3)(b) and the (A)(3)(c) sections of the bill as the most important parts of it because it will begin to force us to address very significant problems.

As my prepared remarks which I have submitted to the committee indicate, this doesn't get at the root problem, but

at least it starts us thinking about how we can address the significant issues that are there.

Like my distinguished panel members--the judiciary is not to blame for this problem. There is enough blame to go around to lawyers, members of the bar, the corporate bar, of which I am a representative, the plaintiff's bar, the legislatures themselves, which leave too many open issues, and some courts which don't take control of it.

But the fact is we do have a problem. This is a first step. We support it. I don't like every provision of the bill, and I am sure that at some point, if this is enacted, there are going to be provisions in here which I will be very unhappy with when I have to deal with them in trying to explain my conduct before a federal judge some place in this country.

Nevertheless, I believe this is an important step to trying to get at a major problem that we have, and for that reason I and the American Corporate Counsel Association support Title I of this bill.

My absence of comments on Title II is not meant to be taken that I don't support more judgeships. Personally, I do, but we have not addressed that as a policy matter in ACCA and I do not feel it would be appropriate for me to comment on that.

Thank you, Senator.

[The prepared statement of Mr. Liggio follows:]

The Chairman. Thank you very much.

Senator Grassley and I have a total of about 22 minutes here between us, and we can divide the time.

Senator Grassley. I won't need more than one or two minutes.

The Chairman. Well, fine. If you have another engagement, I can let you go.

Senator Grassley. No.

The Chairman. Let me start with you, sir. Do you believe that the objectives of this bill can be achieved without the legislation?

Mr. Liggio. Oh, Senator, the objectives of the bill could be achieved without legislation. There is no doubt in my mind that they could. The question is will they be, and regrettably I do not think they will be without this sort of a catalytic push to it.

The very fact that we see the response from the Judicial Conference with their 14 points in response to this bill, I think, is evidence of that, but I believe we need to push the next step over and beyond that, and that is why I support the bill.

The Chairman. Now, let me also set the record straight on another point. It was not my intention when I--I was going to say drafted; that would not be exactly correct--when this commission made a series of recommendations to me, which

I--there were 35 members of a committee set up by a foundation and the Brookings Institution, of which I was the catalyst only in the sense that I set them up and brought 35 people together at a table who--the joke at the first meeting was that they had never sat down at the table with one another and did not speak to one another, including retired federal judges and corporate counsel and plaintiff's counsel, and every stripe representing the bar that was heretofore at odds with one another on many issues.

They met over a year period with serious meetings. There were six major meetings under the leadership of the Brookings Institution, and they submitted to me a series of recommendations which I only barely modified, and took to my colleague, Senator Thurmond, for his critical analysis. He concluded it made sense, as did the chairman of the House Judiciary Committee. And so that is how we got to where we are.

It was not my intention at the outset to combine this with the judgeship bill. I want to make it clear--and, again, I say to you, Judge McGovern, to take back to your friends, this was a request made of me by half a dozen of my colleagues on the other side of the aisle.

The honest-to-goodness truth is, the reason they wanted them combined is they were fearful, I suspect, that Democrats would not support a judgeship bill, and they wanted them

combined because they believed that there was enough support in the Congress among Democrats and Republicans for these changes in order to ensure that a judgeship bill be passed.

But I want to make it clear, it was not the Senator from Delaware, the Chairman of this Committee, who requested that. That was not my intention, because I believe both can stand on their own, stand on their merits, and move separately. So that is how we got to where we are.

Now, let me ask you, Judge McGovern, if I may, with regard to the newer recommendations, the most recent recommendation, I should say, made by the Conference--and I appreciate your endorsement of the present proposal in terms of the number of judges.

I would like, just for the record and for people who may be watching this--and I don't want to get into a lot of detail, and this is not meant in any way to put you on the spot. I mean that sincerely.

But there is an impression left out there at this moment that what you do and what we do is we just kind of sit around and say, well, 76 sounds like a good number, or 94 or 110; let us just go ahead and ask for that many judges.

Now, you have a methodology by which you, the Conference, make recommendations to the Congress and to the President as to how many new judges you think are necessary. We have an equally detailed methodology, which we will submit for the

record, and would be happy, in fact, to answer any questions from you about if you would like to ask us any questions. We can make this a two-way street this morning.

[The information referred to follows:]

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The Chairman. They differed; they differed in several important respects. One was the emphasis on those areas, Judge Murphy, that had particularly heavy criminal caseloads as a consequence of the significant influx of drug cases.

For example, I found it personally amazing that in the last recommendation, the only one we had to work with, the one that we had to work with up until Friday--and you will acknowledge that--that recommendation of 70-some judges did not have any new judges for the Southern District of Florida. I found it astounding. And there was one for San Diego in the Southern District of California, which I found absolutely astounding. There, the caseloads are up, you know, several hundred percent in terms of criminal cases.

Now, as I understand it, the Judicial Conference uses a statistical guideline of one judge for every 225 case participations, is the phrase you all use, as the Conference puts it.

Now, is it true that except for treating petitions filed by prisoners as constituting one-half of a case--a petition filed by a prisoner is not treated as a case; it is treated as one half of a case--the Conference makes no other concession to the differences in the types of appeals when we are talking about the courts of appeals? I am talking about the courts of appeals now.

Judge McGovern. That is correct, Mr. Chairman. We do

not have a weighted case factor that we use at the appellate level as we do for the trial level. We, through the Federal Judicial Center, have in the past tried to create really a very rational approach on a weighted factor for the appellate court, but as of this date, we have not been able to do so, Mr. Chairman.

The Chairman. I am not being critical. I just want to make sure we understand what we are talking about. So, that would mean that the Conference treats an appeal on an odometer-tampering case or a Social Security case--that is weighted the same as a complex antitrust case taken up on a appeal? There is no difference?

Judge McGovern. Yes, sir.

The Chairman. Now, as I suspect from your comment, the Conference realizes the shortcoming in that, and I acknowledge the difficulty in trying to figure out a weighted basis for appeals. But the only point I want to make--and I will drop it now--is that for the public and for the Texas Lawyer and for the other publications who cover this, if they don't already know, and they seem not to know by the way they write the articles, there is nothing etched in stone.

It is not as if there is a clearly understandable, rational reason why one court of appeals district would get "x" number of judges and another "y" number of judges. It is the best effort, but the best effort, at best, is lacking. I

am not suggesting the way I weighted them is any less or more appropriate.

But it is not that you say 255 appeals warrants a new circuit court of appeals judge. It could be vastly different. The same 255 cases for one appellate judge could, in fact, take one-half, one-third, three-quarters the time to dispose of as 255 cases for another court of appeals judge based upon what is up on appeal.

And so I will not go through what I was planning on going through, Judge, since I have gotten out of my system the 27 other areas in which we could point out that there is no golden rule or golden mean to determine this.

I would hope that you would leave here taking, at least, my word for it that the effort that was made here was an honest, best effort to do two things, to get you, the nation--and when I proposed these judges, I was not particularly popular with a number of my colleagues, as you might guess.

But my view is, regardless of who is going to appoint the judges, who is going to send the judges down, Democrat or Republican, the nation needs more judges, period. And the way in which we came about this was to come as close to your recommendations as possible, emphasizing what we collectively thought as a policy matter. We may be wrong.

We should first take care of the 20 districts in the district court cases where there are the most significant

increases in drug cases--we may be wrong, but that is a policy judgment that we have made--and then try to accommodate all the rest of the judgeships you suggested, obviously, displacing 20 somewhere in there because some are not displaced; some overlapped. Some of the 20 districts were the very same places that you recommended judges.

For example, I read a recent article, a criticism, from one of the judges that Texas got short-changed. In the first recommendation, the only one we had to work with, Texas got every judge they asked for.

And, again, for the record, the vast majority of Senators on this committee, in keeping with what practice had been for the past 150 years--did not keep with the practice of the last 150 years, and that is seek more judges in their district, whether they needed them or not.

As I think it is fair to say, the Chairman of the committee, the Senator from Delaware, could have added two judges to Delaware if he wanted to, and who would make a case against it? But there are no new judges in Delaware. There are no new judges in Vermont. There are no new judges, if you go down the list of the Democrats on this committee--the party in control, the party in power, the party who will determine whether or not there is or is not a bill. That party did not ask for new judges in their districts, if you look at the numbers, beyond what was recommended in those

districts.

Now, there are a couple of cases where there is a disagreement as to whether or not you think the numbers do or do not justify. And I just hope that we can put to bed this process of recrimination, and I just want to tell you, as far as I am concerned, I determined, rightly or wrongly--and you can do whatever you want; you are absolutely within your right and power to suggest it.

But to the extent that there is an attempt to characterize the good-faith efforts of this committee in ways that make it appear to be less than honorable--to that extent, it is something that does affect the relationship of this committee with the Conference. That may be of no consequence to you at all, and it need not be, but from my standpoint it matters.

And I would also point out, is there any circuit court that asked for new judges, Judge, that didn't get exactly what they asked for?

Judge McGovern. Yes, sir. My recollection is there was one.

The Chairman. This is in your new recommendations?

Judge McGovern. In our new recommendations.

The Chairman. In your old recommendations, were there any?

Judge McGovern. I do not recall, Mr. Chairman.

The Chairman. I can tell you there were none; there were none at all. And I don't know enough to know about your recommendations that came up to me on Friday.

Judge Peckham, I--.

Judge McGovern. Mr. Chairman?

The Chairman. Yes.

Judge McGovern. May I make a remark?

The Chairman. Sure, you may, anything you would like to say.

Judge McGovern. We are running on the same track, Senator. We both seek for Congress and for the judiciary and for the litigants and for the other users of the courts exactly the same thing. We want a fair day in court and a speedy trial and a speedy resolution of the problems. I know that is what your constituents want, and that is what our litigants want. And I am really pleased that we are running along that same track.

Thank you, Mr. Chairman.

The Chairman. I have no doubt that that is what the court wants. I just was absolutely, I must tell you--I have been on this committee for 15 years. I was absolutely flabbergasted at the response that these recommendations received, including the judgeships, and I was personally offended. I thought it was cheap politics.

I mean, you know, I expect that in my business, but I

didn't expect it coming the other way. We could have passed this bill, this reorganization thing, eight months ago, Judge. Every major player in this body to whom other colleagues listen on these matters was strongly supportive.

The Chief Justice called me and I went to see him. I said, Chief, what do you want? He said, I want time; I want the Conference to sit down with you. I said fine, and we delayed it four months, in good faith. Then I read this malarkey that comes out of your meetings and I say, whoa, wait a minute. I deal with business groups and labor unions and I get more straightforward, honest dealing than I do with the Judicial Conference.

So I hope that now that I have gotten my part out of my system--not ever in my career have I not supported more judges. Not ever in my career have I not supported everything from increases in salary to increases in discretion for the federal courts.

I have an inordinate amount of respect for the courts, but I will not tolerate being on the other end of the invectives coming from the courts without responding because we are coequal branches of government. No one is knighted. The only difference is you are there for life and we have to explain our actions every six years.

Judge, you sound like you want to say something. Please go ahead.

Judge Peckham. Well, Senator, I did not feel that our discussions should be characterized in the way that you have. Perhaps you weren't addressing those, but I thought that we did make a reasoned analysis of the bill initially, that we did come forward with our own declarations. We took a positive approach, as I indicated in my statement, and I just wanted to note that.

The Chairman. Judge, I want to make it clear, in the private discussions that has not been the case. In the private discussions, you all say you guys are all wet; we think you are doing it wrong. There is no problem with that.

But the public discussions quoting people from the Conference on both these issues in the Conference itself did not characterize it that way. The average person, the average lawyer reading the publications that relate to this could not come away with any impression other than that there is a view on the part of the Conference that both with regard to Title I and Title II, this is just one political power game that is going on here. The fact that it is Democrats and Republicans who take the same view seems not to be mentioned.

And I just think that does a disservice to both branches of the government, and I think it does a disservice to the legitimate intentions that you have and that I have, and I hope we put at end to it.

You see, the problem I have is if I had a staff member speak out and characterized the Conference as a bunch of under-worked, old men and women who thought that they were God, who had a job for a life whether or not they were competent any longer and who would get paid in full even after they retire, I expect I would get a letter instantly from you. And I expect you would be sorely disappointed if I kept that person on my staff or I did not publicly disassociate myself with those remarks.

Well, that is what happened, and no one in the Conference has publicly disassociated themselves from those remarks. There has been no official Conference response. It just sits out there and lingers, as if that doesn't happen on my watch.

If I am responsible, why are you not responsible? I would like to ask you that. Why not? Why have I not heard--why has there not been a public repudiation of these kinds of characterizations?

Judge Peckham. Well, Senator, I have heard, you know, rumors of them. I have heard comments about them. I haven't seen them.

The Chairman. I will send you copies of them, Judge.

Judge Peckham. Well, I would appreciate seeing them. I mean, I have not been privy to them.

The Chairman. Well, I don't mean you, particularly; I just mean the Conference generally. Enough of this, I guess.

I will send them to you. I just want you to know I think we should treat each other with respect. I believe we have done that with regard to the judgeships. I think there has at least been, in part, conspiracy by silence of what has happened here, and I don't see anybody jumping to the microphone now either.

I yield to my colleague from--I will have no more questions. I will submit the rest in writing.

[The questions of the Chairman follow:]

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Judge Peckham. Senator, may I introduce the formal statement? I don't know if that is a proper offer to make or whether it would automatically just be part of the record.

The Chairman. Yes. Everyone's statement will be printed in the record in full, in addition to the additional comments that have been made.

Judge Murphy. Could I just make one comment, Mr. Chairman?

The Chairman. Yes, Judge.

Judge Murphy. I would just like to say that obviously there are differences of opinion on some of these things, but truly all of the judges I know have great respect for this body. To the extent that some things were said in the battle of the moment, please don't misunderstand that we do have respect and understand its constitutional role.

I know that a lot of people think of federal judges thinking of themselves as gods, but I can tell you from the inside out, I certainly don't feel that way and I think most of my colleagues don't either.

The Chairman. Well, Judge, I do appreciate that. And, please, I hope none of you will take it personally if I go to the floor and start making comments about judges, generally. You will not be offended, I know. None of you will write about it, and so when I do that tomorrow on the floor of the Senate, absent an apology from the Conference, then don't be

offended, please. I am not speaking of you or any one of you.

By the way, the fact that I mention some of you by name, don't be offended by that either, all right? So when I mention you, Judge McGovern, by name, don't be offended at all. And you, Judge Murphy, don't be offended. I have great respect for you; I have great respect for the bench.

That is what you just said to me. End of comments by me. It is over as far as I am concerned, but I do think you ought to, as we say in my church, examine your conscience.

The Senator from Iowa.

Senator Grassley. Mr. Chairman, I have a short statement I want to submit for the record, and I highlight in that statement the fact that I appreciate very much your good-faith efforts to make changes in the original bill. Thank you very much.

The Chairman. You are welcome. Thank you for the comments, Senator.

[The prepared statement of Senator Grassley follows:]

Senator Grassley. In regard to a statement that Judge Murphy had that I agree with, she says on page 3, "In the long run, effective management systems in the federal courts cannot succeed unless Congress and the Executive Branch are aware of the impact of their actions on the litigation process and of their responsibility to contribute to the solutions." I want to tell her that I agree entirely. I have long felt that Congress pays too little attention to the judicial impacts of its actions, and I think that your suggestions are right on the mark.

Hopefully, through some changes we are trying to bring about as a result of the Courts Study Committee, we will have greater consideration by the Congress of the judicial impact of our decisionmaking here.

Thank you, Mr. Chairman.

The Chairman. Thank you.

I thank all of you. We will continue, as we progress through this process, to take into consideration your concerns and weigh them against the panel of witnesses that we heard the last time who strongly support Title I. We will weigh them against your legitimate and forthright recommendations and concerns about whether or not ultimately this should be legislated.

There are those who contemplated, including myself, whether or not there should be some grace period given to see

whether they are, in fact, implemented. I am not disposed to that at the moment, but I will not fail to consider that.

With regard to the judges, there will be new judges. There will be a significant number of additional judges, and I suspect that whether I chair this committee next year or ten years from now that we will continue to have to add to the number of judges.

If we in the Congress mean what we say that we want to move expeditiously on providing for access to the courts for civil litigants, as well as the ability of the criminal justice system to function, we have to provide more judges; we have to provide more prosecutors and public defenders. We have to make the system work. That is our responsibility. And if we don't, the blame should be put at our door.

Lastly, Judge Murphy, I fully agree with you that much of what we have done at the federal level in the Congress and at the Executive level has created and enhanced and required additional workload for the federal court system.

As I heard Bob Dole say in another context the other day, he said when he got here, I think it was in 1962, or whenever it was, the total federal budget was under $200 billion. Now, the interest on the debt well exceeds $200 billion.

Much has changed. We have to change with the times. I just hope that we can go back to dealing with the kind of

relationship this committee has always had with the courts in the past, and that is one of where we have disagreements, we do it face to face, person to person, and we hammer out our differences. In this case, quite frankly, there are not so fundamental, as far as I can see it.

Judge, tell the Conference we will also--after we pass these 70-some judges, we will immediately begin to consider the recommendations made in the new proposal. It is not something that is a dead letter; it is not something that is a dead issue.

I thank you all very much for being here and I look forward to both of us enhancing the quality of justice in this country. Thank you all very, very much for your time.

The hearing is adjourned.

[Whereupon, at 10:37 a.m., the committee was adjourned.]