TESTIMONY

OF

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UNITED STATES DISTRICT JUDGE

WESTERN DISTRICT OF MICHIGAN
410 WEST MICHIGAN AVENUE
KALAMAZOO, MICHIGAN 49005

SENATE BILL 2027

I have been provided with an opportunity, albeit brief, to study both the Task Force Report and the proposed legislation. While I would recommend a few modifications, I am very encouraged by it and its goal of reducing costly delays in our abilities to render effective civil justice in the district courts in this country. For altogether too long, complex and multiple circumstances have made it increasingly difficult to provide that which civil litigants have every right to expect--prompt resolution of increasingly complex controversies. Dispute resolution is intended, among other things, to return the parties to their former pacific attitudes. Delay and cost inefficiencies exacerbate the

contention and contribute to the dissatisfaction with the system.

It would be difficult for a busy trial judge, like myself, not to be impressed with the constituency and the spirit of the Task Force and the report. Indeed, all of us should be grateful and indebted to these dedicated professionals. The report's analytical and thought provoking thesis offer compelling argument to often illusive solutions to reducing delay and cost. It is clear that the intent of its recommendations is to assist all of us, but most of all the users of our civil justice system. It was neither inappropriate nor presumptive for its authors to utilize the title "Justice for All."

I am equally impressed with the spirit and most of the content of the proposed legislation. Commencing the resolution with the district courts, and not some other entity, is gratifying to those of us who occupy the trial benches in our system. The legislation offers all of us the opportunity, which we all seek, to adopt a plan, tailored to our own venues, to address a nationwide problem in a local fashion. It largely avoids, I think, what many of us

fear--"micro management" by the Congress of our courts, and leaves, instead management to the courts themselves.

I will return to the legislation in the latter part of my testimony. For the moment, I turn to the problem and my thoughts regarding possible resolutions.

I. THE NATURE AND EXTENT OF PROBLEMS OF PROCEDURAL COSTS AND DELAYS

A part of the problem can be gleaned from a study of the ubiquitous civil case filing increase, the "new complexity" of civil filings, and the burden on the trial courts of our country. While not entirely free from contention,[1] most concede that the American public has become increasingly litigious in the past twenty-five (25) years or so.[2] The reasons for this increased litigation are multiple, complex, and not readily susceptible of simplistic reduction. Some of the causes are obvious; others are somewhat more subtle. By way of the most summary of treatments,

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[1] Daniels, We're Not a Litigious Society, 24 The Judge's Journal (Judicial Administration Division, ABA) (1985).

[2] Lieberman, The Litigous Society (1981, 1983).

they include:

A. New Causes of Action

Both the first and third branches of our government have, through official acts, contributed to increased civil litigation over the past twenty-five (25) years. Congress enacted legislation in the 1960s, 70s, and 80s which added causes of action for many civil litigants.[3] The Civil Rights Act of 1964[4] was, perhaps, a harbinger for the legislation which followed. Statutes prohibiting discrimination in employment, in housing, in public accommodations, in the school setting, in federal and state-financed construction and support, in licensing, in labor, and even in the private sector contributed greatly to increased filings in our federal courts in the 1970s and 1980s.

Legislation affecting our environment, our economy, our

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[3] See, e.g., Equal Pay Act of 1963, 29 U.S.C. §206; Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. (Equal Employment Opportunities); Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq.; Civil Rights Act of 1968, 42 U.S.C. §3601 et seq. (Fair Housing); Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, etc.

[4] Pub. L. 88-352, 78 Stat. 241 (1964).

retirement rights, our social security entitlements, state and local revenue sharing, and our federal tax obligations are examples of how legislation has increased the filings in our federal district courts.[5]

The judicial branch has also increased filings in our federal district courts in rulings that certain federal legislation had created a "private cause of action" for individuals. Supreme Court decisions involving theories for tort liability, Bivens causes of action,[6] increased emphasis of congressional post-Civil War statutes on civil rights,[7] state legislative reapportionment,[8] expanded prisoner "rights",[9] mental health rights,[10] abortion,[11] and

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[5] See, e.g., Comprehensive Environmental Response, Compensation, and Liability ("CERCLA") Act of 1980, 42 U.S.C. §9601 et seq.; Employment Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq.

[6] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

[7] See Monell v. Department of Social Services, 436 U.S. 658 1978).

[8] See Reynolds v. Sims, 377 U.S. 533 (1967).

[9] See Hutto v. Finney, 437 U.S. 678 (1978); Estelle v. Gamble, 429 U.S. 97 (1976).

[10] See Youngberg v. Romeo, 457 U.S. 307 (1982); O'Connor v. Donaldson, 422 U.S. 563 (1975).

death penalty decisions,[12] are but a few examples of the reaction of litigants to Supreme Court decisions.

Natural science has contributed to new and very complex litigation. In an effort to rule out the causes of cancer, toxicologists and epidemiologists have offered increasingly new evidence on the incidence of cancer stemming from toxic substances discovered in our environment. Suits against tobacco companies[13] and factories discharging wastes into our rivers, streams, and air,[14] and indeed, asbestos litigation alone provide the clearest examples, nationwide, of litigants' use of new scientific information to litigate the responsibility for cancer producing agents. CERCLA has produced for many judges a litigation nightmare.

In a more or less "typical" situation, both the federal

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[11] See Roe v. Wade, 410 U.S. 113 (1975).

[12] See Gregg v. Georgia. 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

[13] See, e.g., Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479 (3d Cir. 1965), cert. denied, 382 U.S. 987 (1966); Green v. American Tobacco Co., 304 F.2d 70 (5th Cir. 1962).

[14] See, e.g., Hancock v. Train, 426 U.S. 167 (1976).

government and the state government bring a CERCLA action against a "polluting industry." Two or three hundred, or more, individuals, noting the governmental accusation, file non-class action lawsuits against the "polluting industry." Actions involving as many as ten or twenty insurance companies are filed where each insurer questions its duty to defend and/or indemnify. The "polluting industry" files for bankruptcy, increasing the district court's problem and emphasizing the importance of the insurance company litigation. The "polluting industry" files cross suits against other parties. Other parties file cross and counter suits against other corportations and individuals. In the above scenario, lawyers estimate that discovery will take two to four years and ultimate trials a year or more. The district court drops to its knees.

In addition, science has prolonged life, and new legal debates rage over when life terminates and when life-prolonging devices can be removed. A physician's responsibilities to the patient, to the family, and to society provide other examples of

scientific knowledge causing the courts new and complex problems.[15]

In addition to new and more complex civil case filings, an increasingly centralized government, business environment, and society play a role, in my opinion, and in the opinion of others, to increased filings. In a simpler time, and in a more rural setting, people resolved many of their disputes in the family, the neighborhood, the school, the church, and business entities. As the government centralized, along with the business community, and as families dispersed across the country, smaller communities dissolved and became less capable of resolving disputes among their members. The citizen, feeling frustrated by computerized answers from his or her government or from the manufacturer of a product, began to turn more and more to the courts for answers to unresolved disputes and complaints.[16] At the same time, the lack of trust in the government and institutions, perhaps prompted in part by the

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[15] See Note, Withholding Treatment from Birth-Defective Newborns: The Search for an Elusive Standard, 31 Wayne L. Rev. 187 (1984).

[16] Marvin Harris, America Now: The Anthropology of a Changing Culture, 41; 166-174 (But the whole book is worth reading--read the Introduction 7-16 if nothing else) (1981).

Watergate scandals, caused society to be less trusting of the ruling class. Hence, lawsuits against schools, teachers, and Boards of Education involving school discipline; against manufacturers for product implied warranties; malpractice suits against doctors, lawyers, dentists, and other professionals highlighted in this lack of confidence--further adding to the caseloads of our courts.

B. Other Factors which Contribute to Procedural Costs and Delays.

1. Criminal Law Responsibilities. Additional litigation, this time criminal, has also increased civil litigation delays. Consider, for example, complex criminal syndicalism statutes,[17] the Omnibus Crime Control Act of 1984,[18] and its 1986 and 1987 amendments. This legislation greatly increased the time spent by district courts and probation officers during the sentencing phase of criminal litigation. Almost every Presentence Report

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[17] See Racketeering and Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. §1961 et seq.

[18] Pub. L. 98-473, title II, 98 Stat. 1837, 1976 (1984).

prior to sentence now results in a hearing, often lasting for hours. Many hours have thus been added to the responsibilities of the district judge and his or her staff over the past few years.

Furthermore, the nature of criminal litigation has changed drastically in the past three or four years. Ten years ago I probably devoted less than five percent (5%) of my time to criminal litigation. I would find it unusual to have more than two or three trials a year on criminal matters. In the past year or so, however, I have spent months on end trying nothing but criminal cases, particularly drug-related offenses.

Furthermore, we are promised that additional Assistant United States Attorneys will be authorized to deal specifically with illegal drugs. I have been told by my Chief Judge that the U.S. Attorney in our district has advised him in our district of seven probable new positions.

In short, the "war on drugs", additional prosecutions, and the complex nature of conspiracy causes of action have and will continue to greatly reduce the ability of federal district courts

to respond to their civil litigation responsibilities.

2. Discovery. You are all aware of the ubiquitous discovery-abuse debate. However, you may be less aware that even when discovery is not abused, or when it is unclear, discovery is extremely expensive to litigants, very time consuming for their lawyers, and further adds to delays in trial dates. A typical "average" non-weighted case generally produces hundreds of written interrogatories, many oral depositions, motions to produce, motions to admit, etc. Furthermore, litigation within litigation exists where there is a discovery dispute brought to the court because the lawyers cannot agree on how their dispute fits within prevailing law. Nearly every "frequent" litigator complains about discovery costs and delays. The Harris Poll referred to in the Task Force Report adds additional legitimacy to these local complaints.

3. Miscellaneous Court Responsibilities Affecting Civil Litigation. Most states, including mine, are busily engaged in building additional prisons. As the prison populations increase dramatically, as they have in Michigan, the burden on the federal

district courts increases in almost direct proportion. You cannot imagine the deluge of prisoner civil filings in our district courts. They not only include habeas corpus petitions, but they include many private causes of action, often brought under Section 1983 of the Post-Civil War statutes.

Social security disability lawsuits also occupy a lot of time for our district courts. Recommendations will be apparently coming before your body to create an administrative resolution for these social security matters. However, on this date, no relief is in sight.

C. The Extent of the Problem in the 1980s.

Whatever are the principal causes, it cannot be seriously doubted that our federal courts are overloaded, and that in the 1980s the filings increased. In the federal district courts alone there was a 63% increase in new case filings in the six years from 1980 through 1985.[19] Possibly of greater significance, however, was

[19] Federal Court Management Statistics, 1985: Prepared by the Administrative Office of the United States Courts, at 167 (from 188,487 cases filed in 1980 to 299,164 in 1985).

the complexity, as determined by "weighted" filings. Of the actions per judgeship filed in 1985, fully 96% had some complexity above the average case.[20] While this crush of cases was being filed in 1985, the federal district judges increased their terminations by eleven (11%) percent in civil cases and almost five (5%) percent in criminal cases.[21] "Federal judges are working longer hours and more days than ever before but, like Alice in Wonderland, they cannot run fast enough even to stay in the same place."[22]

Civil filings reduced somewhat in the last year or so, and the judges responded by disposing of more matters than ever before, and addressed newer and more complex problems than in any other time in the history of our courts.

II. THE MERITS OF CONVENING DISTRICT COURT PLANNING GROUPS

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[20] Id. ("Weighted filings figures for 1980 through 1985 were based on the weights developed from the 1979 Time Study conducted by the Federal Judicial Center. A detailed discussion of the 1979 Time Study can be found in the 1979 Federal District Court Time Study, published by the Federal Judicial Center in October 1980"); 453 "weighted" cases out of a total of 474 were filed per judge in 1985.

[21] Id.

[22] Chief Justice Burger, 1985 Year End Report of the Judiciary 3 (1986).

AND DEVELOPING IN EACH DISTRICT A "CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN"

To consider the merit of such a district-wide plan is to question whether each judge, within each district, should be responsible for managing his or her own caseloads. I believe that such a plan is required by the realities of the 1990s. However, there are judges, academics, and others who dispute the necessity or the efficacy of such individualized management.

To many, this question is no longer in debate. With the adoption of the Federal Rules of Civil Procedure in the 1930s, many state and federal courts have moved away from the central assignment system into a case management system requiring personal judicial responsibility.[23] The vast majority of state and federal

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[23] "Necessarily, pretrial procedures envisages the invocation of initiative on the part of the judge. It transforms him from his traditional role of moderator passing on questions presented by counsel, to that of an active director of litigation. [It makes it] possible to dispose of the contest properly with the least possible waste of time and expense. By exercising his authority to the fullest extent in this direction, the pretrial judge not only advances the cause of the administration of justice, but also enhances the respect for the courts on the part of the pubic." Pretrial Procedure Abridged Report of the Comm. on Pretrial Procedure to the Judicial Conference of the District of Columbia, 4 Fed. R. Serv. 1015 (1941).

courts currently utilize the personal assignment basis for case management. Prior to such adoption, most trial courts had left scheduling largely to the lawyers. The court would not schedule a civil case until the lawyers announced this readiness. In the past twenty (20) years, federal trial courts have significantly changed their method of operation to resolve problems of permitting lawyers to set trial dates often caused by pre-trial discovery delays.[24] In 1969, most metropolitan federal district courts transferred from a master calendar system to an individual assignment system.[25]

However, some courts continue with a central assignment/master calendar system. Civil cases are not assigned to a judge for trial until the trial date itself. As the case progresses, after filing, different judges assume different responsibilities, usually on a rotating basis. One judge may hear

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[24] Peckham, A. Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 Rutgers L. Rev. 253 (1985).

[25] Id. at 257.

motions, both dispositive and non-dispositive; another may conduct pre-trial conferences; and still another may hold settlement conferences. As a consequence, no single judge has any management responsibility, and the case progresses (or does not) according to the pace of the lawyers. If a lawyer desires a hearing, he or she simply requests the Clerk of the Court to schedule the matter by issuing a praecipe.

The individual assignment system, by contrast, places a civil case on the calendar of a single judge who is responsible for it until its disposition. This requires the judge to manage and monitor it through the various stages leading to trial, and then, if it hasn't been settled or dismissed, to try it.

Proponents of the central assignment/master calendar system argue that the calendar moves promptly during "trial months." Judges are not predisposed to any consideration of the merits or the lawyers, and can take a fresh judicial approach to the issues, parties, and lawyers at trial.

Those who oppose personal management systems point out

that the judge who has been involved in various motions and, more importantly, in settlement discussions or pre-trial conferences, may well form a bias toward a recalcitrant party or lawyer, may tend to pre-judge issues and people, and may ultimately believe the vast majority of cases ought to be settled and not tried.[26] After all, they point out that a case disposed of is a case disposed of. The judge who disposes of a case in a two or three hour settlement conference receives the same "credit" as the judge who conducts a sixteen week trial. Furthermore, the judge who settles the case is "appeal-free" and will not be called upon to make various evidentiary rulings, compose jury instructions, or perform other judicial functions.

The central assignment proponents also argue that the executive and legislative branches have already usurped much Article III initiative by the creation of special courts,[27] and that "adjunct" courts, attached to Article III courts themselves, also

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[26] Resnik, Managerial Judges, 91 Harv. L. Rev. 374 (1982).

[27] Resnik, The Mythic Meaning of Article III Courts, 56 Colo. L. Rev. 581 (1985).

may have already intervened on some Article III powers. Of course, the latter reference is principally to the bankruptcy court and to federal magistrates. It is argued that federal district judges are very apt to adopt decisions from these tribunals without rehearing testimony in order to "siphon off work."[28] A managing judge, they fear, may further erode the adjudication process by assigning to others--neutrals--certain judicial "power" in an effort to settle cases. The litigating public, it is urged, ought to be assured that those matters remaining within the judicial branch of the government will have a free and uncompromised right to litigate their disputes in a judicial forum free from arm twisting judges who are motivated to look statistically superior by disposing of an increasing number of civil cases.

One academic has frequently been quoted as an outspoken critic of personal case management by each judge. That academic charges that emphasis on judicial case supervision is a departure from the traditional role of judges and appears to be inconsistent

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[28] Id. at 605-06.

with our notions of due process and the adversarial system.[29]

Another academic who is critical of personal management systems believes that adjudication, in the traditional sense, is far more likely to do justice than case management or the utilization of alternative dispute resolution techniques. That academic calls for a renewed appreciation of traditional adjudication.[30]

These academics, joined by some judges, have voiced valid concerns which cannot be ignored. Indeed, I am, as are many of my fellow judges, deeply indebted to them for pointing out real concerns about impartiality and traditional adjudication. Nevertheless, I believe that individual case management, with all of its potential evils, is a necessity in the latter stages of the Twentieth Century.

First of all, the judiciary needs to be held accountable. If judges are merely called upon to try lawsuits or hear contested

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[29] Resnik, supra note 27.

[30] Fiss, Out of Eden, 94 Yale L. J. 1669, 1672 (1985).

motions on weekdays, we can work at our own pace, mindless of the mounting pressure of the increasing number of unresolved civil cases. We can turn our attention to more glorious ways of accountability--perhaps by penning the erudite 75-page opinion which will be sure to be debated in the legal journals following publication in Federal Supplement.

Federal judges often come to the trial bench following highly competitive careers. Many were active and often able trial lawyers. Others pursued, full or part-time, political careers or were academics competing with their collegial brethren. Still others were engaged in business enterprises. When we reached the bench, our competitive instincts did not simply dissipate. Instead, they revealed themselves in other fora. Opinion writing, conducting the celebrated trial, writing law review articles, publishing books, addressing public audiences, and receiving awards are some of the ways in which we "compete" in an effort to still

our demons who continue to demand proof of our worth.[31]

The monthly, semi-annual, and annual statistics forwarded to us by court administrative offices are instant and constant reminders of how we "stand" in relation to our colleagues with regard to disposing of those cases assigned to us. We are assailed with data concerning the length of time between filing and disposition; median times between filing and trial; effective use of jurors; pending civil and criminal caseloads; and even our "rating" within the Circuit and the U.S.[32] We are thus urged to be productive and are held "accountable" for our management skills.

Those of us who came to the bench from the trial bar are well aware that the busy trial lawyer, left to his or her own devices, rarely races to judgment. As lawyers, we most of all disliked an order scheduling events from filing to trial, and preferred, instead, uncertain trial dates (or if a date certain,

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[31] From my own observations, conversations, and by examining my own soul.

[32] See e.g., Federal Court Management Statistics, 1985: Prepared by the Administrative Office of the United States Courts.

far in the future); an unspecified period of time in which to discover, and the leisurely filing of nondispositive and dispositive motions. Realizing that most settlements occur close to the trial date, the case management oriented judge orders an event scheduling, which includes a chronological staging leading to a certain trial date.[33]

A judge who is responsible for his or her own caseload, feeling the responsibility of ultimately concluding marathon discovery, also brings to the litigant, through the lawyer, some hope that their case will not be "lost" in the paper shuffle of the busy clerk's office. Knowing at the outset that the litigation will terminate, and on a reasonable schedule, assures parties and the lawyers that some end is in sight.

Whether we like it or not, personal case management appears to be with us today and in the immediate future. We are assisted in this new management by new hardware and software, by

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[33] See my own "Order Scheduling Events" appended to this testimony.

case managers, by management oriented clerks, and by judges who feel the responsibility of satisfying the statistical necessity of looking productive. While it is certainly possible that the management oriented judge may become too acquainted with the litigation, the parties, and their lawyers, this possibility, articulated by the academics, is but another challenge to be overcome by the fair-minded judge. Further, it cannot be said that the danger of pre-disposition is unique to case management judges. An easily biased judge, much like a juror, can be as swayed, one supposes, by an opening statement or by the first few hours of trial.

"Impartiality is a capacity of mind--a learned ability to recognize and compartmentalize the relevant from the irrelevant and to detach one's emotional from one's rational faculties."[34] Judge Peckham argues that a judge must be able to develop and possess these faculties in order to exercise the power inherent in his or her Article III status. He points out that a judge who

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[34] Peckham, supra, note 24, at 262 n.2.

presides over a pre-trial suppression hearing where a defendant proclaims, under oath, ownership of seized evidence to establish standing is, nonetheless, permitted to sit on the trial and issue further rulings.[35]

In the pre-trial setting, a judge can assign a settlement conference to a magistrate, or some other judge and thus assist in reducing possibilities for partiality. A responsible judge in any litigation is constantly assailed with motions, pleadings, and conduct which assault the judge's notions of impartiality. Regardless, vigilance and responsibility must go with the robe.

Charges that judicial supervision weakens the adversarial system present a most serious issue. That system, however, in its current form, is precisely what has made civil litigation so expensive and has seriously bogged down the courts. The academics I mentioned earlier argue that the responsibility for improving the system lies with the lawyers, whereas Judge Peckham and I place the

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[35] Id. at 262-63.

responsibility primarily with the judge.[36] But responsibility on the part of the judge does not detract from the lawyers' function. Rather, it is intended only to assist attorneys in planning the efficient progress of lawsuits.[37]

Some of the dangers can be mitigated at least, by the employment of some of the alternative dispute resolution techniques proposed in the legislation, and discussed by me later, by utilizing non-judges in non-binding fashions. The use of case managers and magistrates can also remove from the judge's view a myriad of lawyer requests, particularly for continuances and for relief from administrative orders. Indeed, such non-judicial managers are at the very essence of a well-managed trial court.[38]

The dangers discussed in case management cannot and should not be permitted to derail the judiciary from the responsibility of effectively managing a civil caseload in the face

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[36] Id. at 265.

[37] Id.

[38] D. Saari, American Court Management--Theories and Practices 61-114 (1982).

of expanding litigation and the new complexity in civil filings. Accountability, the use of management strategies involving others than the judge, and the improved use of alternative dispute resolution techniques will, at the very minimum, reduce these dangers.

It is obvious then that I strongly believe in individualized judicial case management. However, whether I believe in it or not may be largely immaterial. Without some system-wide approach to reduce increasing costs and delays, how can we expect to address the problems as trial judges? Without a plan it seems unlikely that solutions will somehow mystically appear. The Task Force Report and the proposed legislation promote a national approach, aimed at reducing costs and delays. They seek to unify us in our commitment to provide just and prompt dispute resolution. And they do so, in my judgment, without requiring uniformity and conformity in enacting our own localized plans.

In essence, the proposed legislation mandates only that each district court have a management plan, while requiring that

each plan contain certain components. How those plans are developed is wisely, I think, left to each court and its user committee. While I entertain some reservations about some of its provisions, I remain confident that compromise and accommodation can be achieved without damage to the work product. I am delighted that Congress appears eager and able to assist us and our constituency--the litigating public. Together we can mount a national campaign to resolve disputes in a more timely fashion. Alone, I fear, we cannot.

III. THE DEGREE TO WHICH I UTILIZE CASE MANAGEMENT TECHNIQUES SET FORTH IN S.2027

As indicated in the previous section, I favor each judge effectively managing his or her own assigned caseload. Acting on that conviction, I have developed a case management system which seems consistent with the cases assigned to me. However, my colleagues in the Western District of Michigan all effectively manage their caseloads albeit somewhat differently than do I.

As in proposed Section 471, I require a mandatory

discovery-case management conference in all civil cases assigned to me, which conference includes not only the lawyers, but their clients as well. Prior to this conference, a written order is sent to the lawyers setting forth the agenda for the conference, which agenda must include any ADR technique favored by the lawyers, probable costs of discovery, probable time needed for discovery, a suggested series of deadlines for discovery, motion filings, etc. It also, pointedly, requires the parties and lawyers to discuss settlement before or at the early conference. Excluded from this mandatory conference are pro se cases, prisoner-initiated litigation, habeas corpus matters, and social security appeals (the latter always coming to our Court with cross motions for summary judgment, and consequently amenable to early resolution).

Unlike the requirement on page 15 of the proposed legislation, most of those conferences are presided over by a magistrate assigned by me. The value, in my opinion, of the use of a magistrate for this conference is discussed elsewhere in this testimony. Discussed at each conference are all of the items on

pages 16, 17, and 18 of the legislation. A written order follows this early conference with deadlines established by the judge or magistrate who handles the conference.

It is before, during, and after that early conference that the case is placed on a schedule deadline similar to the tracks discussed in Section 471. From experience, the magistrate or I determine the complexity of the litigation and set our deadlines accordingly. Our system mimics the system set forth in Section 471, without using the word "track," except for cases assigned to court-annexed arbitration. Suggested by Section 471, I have a firm policy on granting continuances, and it is in the early order.

Furthermore, as required by Section 471, we have a series of procedures for disposing of motions. In our program on disposition of motions, we segregate the non-dispositive from the dispositive. Dispositive motions are always resolved before the trial term commences for the individual case or cases, and we try to resolve all motions within twenty (20) days from receipt of the

last pleading. We are not always successful in this regard, however.

I do not, as suggested in Section 471, have a two-stage discovery process--one to identify the issues; and a later one to prepare for trial. However, that is exactly the procedure that I follow in the complex case, one of the "tracks" identified in the proposed legislation. In fact, in the complex case, I often employ a five-step discovery process, which includes separating liability discovery from damage discovery, where appropriate.

I require the lawyers to certify, under the provisions of Rule 11, that they have made a good faith effort to resolve a discovery dispute before bringing the dispute to court.

Perhaps most importantly, we have since about 1984 or 1985 required an ADR procedure which is available for all civil cases, excluding pro se and social security litigation. The Western District of Michigan, indeed, has a Rule which not only indicates the court's desire to employ court-annexed ADR, but specifies the ADR procedures available.

It should be remembered that the lawyers are asked to select an ADR procedure at the time of the early mandatory management conference. If the lawyers do not believe that an ADR procedure is amenable to the litigation, they are required to explain why, and that subject is taken up at the conference. When the court issues its scheduling order, following the mandatory management conference, the ADR procedure is thereby ordered. However, it is frequently true that an ADR process is ordered after the initial conference as additional management discloses the potential advisability of adopting such a procedure.

Since 1983, I have utilized the following ADR techniques:

1. Summary Jury Trials. Our district has tried approximately sixty to seventy summary jury trials in the seven years since they were first initiated in January 1983. All but two of those cases settled before trial. Furthermore, the mere scheduling of a summary jury trial results in settlement before the scheduled summary jury trial date in seventy-five (75%) percent of the cases. More and more I am utilizing summary jury trials in the

complex case where a lengthy complex trial is predicted--often a massive environmental case such as I described earlier in this testimony.

2. Mini Trials. I do not know how often my colleagues have used mini trials, but I have utilized three of them. All three settled, and one, a patent case, before the mini trial when the lawyers agreed with me that the mini trial ought to be converted to a binding arbitration type of mini trial without the possibility of appeal. In short, the lawyers agreed to be bound by the neutral's resolution at the mini trial.

3. Court-Annexed Arbitration. The district in which I serve is one of the federal court pilot districts for court-annexed arbitration. Arbitrators are utilized in this district on cases having a value of less than $100,000 and on a "fast track" as described by proposed legislation Section 471. We utilize a single arbitrator, a lawyer with at least five years' trial experience, who has been approved by all the judges in the district.

As of the end of 1989, 1,376 cases have been placed in

arbitration. While only 21% of the arbitration decisions are accepted after hearings have been held, 86% of cases referred to the arbitration track have settled without trial. While these two figures amount to more than 100%, the reason for that disparity is caused by cases which were removed from the arbitration track by the court, by the parties, and by cases still on the track but where hearings have not been held. (January 2, 1990 Arbitration Report from the Western District of Michigan).

Exit questionnaires given to arbitrators, lawyers, and clients indicate an overall acceptance of the arbitration program, as attested to by a report prepared by the Federal Judicial Center about one year ago.

4. Mediation. Our court-annexed mediation is not, in fact, mediation. Instead, it is another form of court-annexed arbitration. The term was "borrowed" from a Michigan state court system which utilizes three lawyers, much as our program in court-annexed arbitration utilizes one. The mediation panel acts, however, more like mediators than one might expect. Following a

formal hearing, which follows modest pleading submissions, the mediators set a value on the case for settlement purposes rather than, as in arbitration, "deciding the case."

1,067 cases have been placed in mediation in our Court as of January 2, 1990. Similar to the arbitration statistics, 29% of the litigants and their clients accepted the mediation decisions, but 85% of the cases which were referred to the mediation track were disposed of without trial. Once again, the numerical differences are occasioned by cases being removed from mediation, and from cases "remaining in the pipeline." (Report from the Western District of Michigan as of January 2, 1990).

5. Use of "Special Masters" or other Neutrals for Settlement Purposes. I have utilized as a court appointed expert, or as a special master, an individual, acceptable to the lawyers and the parties, for the purposes of assisting in settlement. This has always been in very complex, multi-party lawsuits. For example, a special master settled a twenty-five year old Native American/sports fishermen dispute involving fishing on the Great

Lakes. A fifteen year settlement followed a six month procedure developed by the special master. I have also utilized this kind of an individual in multi-party, complex environmental disputes described earlier in this testimony. All cases assigned to a "settlement master" have been settled save one environmental dispute which is ongoing.

6. The Settlement Conference. I require a settlement conference, indeed, usually more than one, in every case which is headed for trial. A settlement conference is mandated by my Pretrial Order after discovery has been completed. Frequently, a second settlement conference is held before or after the originally scheduled date. It should be remembered that settlement is one of the subject matters of the early mandated management conference.

In all instances, when a case has not settled before the scheduled trial date, a settlement conference is conducted by me twenty-four (24) hours before the selection of a jury in jury cases. The lawyers are advised, for example, that they must be present with their clients at 8:30 a.m. on a Monday. Should the

case not settle, trial will commence on Tuesday at 8:30 a.m. In one recent trial calendar, nine consecutive conferences resulted in settlement, leaving no cases ready for trial. On the most recent trial calendar in my Court, last month, thirteen of fifteen scheduled jury trials were terminated by settlement on the day before trial or by judicial rulings. The only two which did not settle were adjourned because (1) one of clients had fired his lawyer on the day before trial; and (2) one of the lawyers was engaged in protracted litigation in another court.

Of course, as indicated earlier, a firm trial date, as mandated by the legislation, is set at the "order scheduling events" following the mandatory management conference. Indeed, for my entire ten plus year experience on the federal district court, a firm trial date has always been a part of the order scheduling events. However, increasingly it is difficult to enforce that order. As the criminal docket requires more and more of an Article III judge's time, and as complex civil litigation sees no boundaries for trial time, it is difficult for the lawyers to

believe that the "date certain" is, indeed, all that "certain."

In summary, I believe that I already have a "plan" which resembles Section 471 of the proposed legislation except for identifying "tracks" and conducting two stage discovery in all cases. The one thing which I do not do is Early Neutral Evaluation. I have long been interested in doing it, however, because of my respect for and my professional relationship with Judge Peckham and Magistrate Brazil. I would be delighted to utilize ENE, and I believe our Court will probably do so before the legislation becomes effective. I have studied the program thoroughly, and I have nothing but admiration for it.

I have pointed out, earlier, some raw numbers and percentages regarding ADR techniques used in our Court, and I now turn to whether our overall case management, on an individualized judicial basis, helps us reduce our caseload. A significant caveat is required before proceeding, because I don't know that it is possible to prove that case management resulted in reductions in caseload.

From 1984 through 1989, our district had four judges. However, there was a vacancy in the four judge district for fifteen months. While we now have a senior judge who handles a modest caseload for us, I suspect that is more than offset by the vacancy which existed for such a long period of time.

While our filings are down from 1984, it appears that the reason for that reduction is the smaller number of social security appeals on disability claims. Huge social security filings all over the country, in particular in Michigan, peaked in 1984 and 1985. There has been a reduction in those filings, which are treated differently as I have pointed out in my testimony, because they are always resolved by summary judgment for one side or the other.

Of greater interest to me, is the number of terminations in 1989 compared to 1984; and the number of pending cases per judge between 1984 and 1989.

In the case of terminations, our judges terminated 2,449 cases in 1989 compared to 2,194 in 1984. This, of course, is an

management of cases has increased our ability to dispose of cases more quickly with resulting cost reductions.

IV. THE BASIS, IN MY VIEW, FOR EXTENDING THE USE OF CASE MANAGEMENT TECHNIQUES TO A SYSTEM-WIDE BASIS.

It would be presumptive of me, to say the least, to suggest imposing upon my colleagues a case management plan which I have been using for several years. Notwithstanding that reservation, I do have a view about the proposed legislation.

First of all, I am impressed with the constituency and the recommendations of the Task Force. The Task Force itself represents, in my view, a vast, broad cross-section of judicial interests and disciplines. I have to be impressed, therefore, with its recommendations that there be a system-wide attack on excessive costs and delays in the process of our civil justice system. Furthermore, I am persuaded that each and every colleague of mine throughout this country is as concerned as I am about excessive delays and costs to the users of our civil justice system. Of course, we are all interested in the entire system delivering civil

justice more rapidly and at less cost.

Since I believe all of my colleagues share the view expressed above, it seems appropriate to me for Congress to require that each district court adopt its own plan for cost and delay reduction, taking into account its own peculiar problems and resources. Furthermore, I am pleased that the legislation contemplates a committee composed of the principal users of the court system. That should ensure that each of our proposed plans will have the greatest possible district-wide input and should result in district wide solidarity for improving our civil justice system. As I read the legislation, however, it is unclear whether or not district judges actually adopt the plan, following committee action. Were the committee, for example, to adopt the plan, there would be a real intrusion in Article III responsibility. A slight modification of the language would simply require a district court to "adopt" rather than to "implement" a plan.

While the plan does mandate that certain things must be included in it, happily, for the most part, the content of the plan

is left to the district. For example, while "tracking" must be a part of the plan, the legislation does not attempt to dictate to district courts how many tracks, or what kinds of tracks there ought to be. Rather, the legislation wisely leaves that matter for the district courts. Common sense dictates that different discovery periods would be assigned to different cases, from the most complex to the simplest. Most of us, I am sure, already manage this way, although we may not call it "tracking." Rule 16 of the Federal Rules of Civil Procedure, requiring a conference, already suggests that each case be considered on its own weight. This legislation attempts to impose no specific time limits for given categories of cases, again wisely leaving that to the district court plan.

For me, however, there is one troubling provision involving the early case management conference. As currently drafted, the legislation requires an Article III judge, instead of a magistrate, to conduct that conference. I can see no advantage to a mandate requiring the presence of an Article III judge at that

early conference. In the past three or four years, our Court has conducted, as indicated in an earlier section, the early case management conference set forth in this legislation, but it has principally been conducted by a United States Magistrate.

Experience has demonstrated to me that it is advantageous, as a docket management tool, to raise the question of settlement at the earliest possible time, and indeed Rule 16 currently requires such a discussion. Attorneys and sophisticated litigants are almost always reluctant to be the first to raise the subject of settlement. The magistrate assigned to my Court therefore raises the subject of settlement at every discovery-case management conference. He advises me that in nearly all cases he finds that the attorneys and the parties are willing to frankly discuss with him the merits and demerits of their case, but he and I doubt that the same degree of frankness would be enjoyed were the trial judge conducting the conference. Furthermore, it would be improper for the trial judge to be involved in this frank a discussion, not only at an early stage, but at any stage of his or

her participation. Both my magistrate and I estimate that a significant number (we believe it to be five [5%] percent) actually settle at the early conference. The greater advantage, however, is that the parties almost always leave having a better idea of what their real differences are, rather than what they perceived them to be based upon negotiating and litigating postures, and this facilitates earlier settlements.

I also believe that there is another advantage to permitting magistrates to conduct the management conference. It effectively utilizes the time of the magistrate, leaving the Article III judge to perform adjucatory duties. These considerations are among the explicit goals articulated by Congress in creating our magistrate system.

I am aware that the Task Force recommended the use of Article III judges. I can only surmise that is because some of its members believed that the conference lost some of its significance in the minds of attorneys when a magistrate rather than an Article III judge presided. I have asked all of the magistrates assigned

to this Court and they have informed me that it is a rare occasion, indeed, that any attorney ever takes a frivolous position when appearing before them. If that should occur in some districts, I suspect that it is more of a reflection of how the magistrates are perceived by the Article III judges, and what duties or powers those judges have permitted the magistrates to perform. If that suspicion be true, one way to address the concerns of the Task Force is to leave the matter of who presides at the conference to the discretion of the district court in adopting its plan. I therefore strongly urge that the legislation be modified in this respect, to include the spirit of flexibility which it otherwise demonstrates so well.

Were I to conclude that the proposed legislation imposed Congress's will on an unwilling district court system, I would not be testifying before this Committee today. At first blush, I thought the legislation might be a kind of "micro management" by Congress, but my careful analysis of both the Task Force's report and the legislation persuades me that this is far from true. True

"micro management" would require district courts to set trial within so many days, to cut-off discovery within a certain period, to require a specific ADR program in a given kind of case, to file and decide motions within a specific time frame, etc. This legislation mandates only components of a plan, but it does not mandate the specifics of the plan itself.

Indeed, the legislation permits district courts of this country, with the assistance of its user committees, to manage its own affairs. We have a system-wide problem, and we need a system-wide resolution. The "bottom up" approach (to borrow a term from the Task Force) should relieve the concerns of those judges who feared a "top down" approach. I believe S. 2027 demonstrates that it is possible for two of our branches to work effectively for a common objective, and I thank the drafters for demonstrating their concern with our problem. Perhaps, if the proposal becomes law, both branches will have produced something closer to "Justice for All" than we now witness. Should we stride towards anything less?

ATTACHMENT TO RICHARD A. ENSLEN'S TESTIMONY

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF MICHIGAN

,

Plaintiff,

v File No.

,

Defendant.
_____/

ORDER SCHEDULING EVENTS

To insure readiness of this case for trial, to initiate disposition by settlement, dismissal, or other means, and to facilitate the completion of discovery,

IT IS HEREBY ORDERED:

A. Joinder and/or amendment will be completed by **April 1, 1990.**

B. The deadline for filing motions is **June 15, 1990.**

The filing of motions should not stop the discovery process.

C. Discovery* is to be completed by **June 1, 1990.**

1. DISCOVERY SHALL proceed regardless of the motions pending before this Court.

2. COUNSEL SHALL FILE A DISCOVERY REPORT within ten (10) days after the date given above for discovery completion. Said report is to be submitted by each party, detailing, by date, the

discovery undertaken. It shall further contain dates for conference of counsel at which documentary and physical exhibits are inspected, made available for copying, and marked as trial exhibits and the names of trial witnesses and expert witnesses, if any, disclosed in accordance with Rule 26(b)(4)(A)(i), Federal Rules of Civil Procedure.

3. TIME EXTENSIONS FOR DISCOVERY, joinder or pleading deadlines will rarely be granted unless filed within 60 days of this Order. It is the policy of this Court to deny extensions. Discovery extensions are granted only for good cause shown and the failure to promptly file a discovery motion presumptively negates subsequent assertions of good cause because of delay. All such requests for extension therefore must be made by written motion (See Federal and Local Rules) and may be set for hearing by the Court. All counsel and parties may be required to be personally present at said hearing.

D. This case is set for final pretrial on **September 21, 1990** at **2:30 p.m.**

E. **Jury trial** in this matter is set for the **October 29, 1990** trial term. A schedule of the week your case will be tried will be forwarded one month prior to trial.

F. Your case will be set for **mediation** (ADR method).

GENERAL INFORMATION:

*DISCOVERY: Discovery dispute rulings by the Court may result in the imposition of monetary or dismissal sanctions. The

following procedure will be observed in resolving discovery disputes:

1. Written motion and brief must be filed with the Court by the moving party. The motion must contain the following:

a. specific information requested;

b. the date the parties met (by telephone or in person) to resolve the problem(s);

c. the result of the meeting;

d. short statement of the applicable law.

2. Without waiting for a responsive pleading, the Court will issue an Order for Oral Hearing on the discovery dispute. The Court's Order will describe:

a. date and time of the hearing, and;

b. due process notice that sanctions may be imposed on the lawyers and/or parties at the hearing.

3. At the hearing, the discovery issue will be resolved and sanctions may be awarded the least culpable discovery disputant(s).

INTERROGATORIES: THIS COURT REQUIRES THAT WRITTEN INTERROGATORIES NOT EXCEED 30 QUESTIONS. Deviations from this rule require the party proposing to ask in excess of 30 questions to seek leave of the Court to do so by: filing a motion; an affidavit setting forth the reasons why additional questions are required; and a complete list of all interrogatory questions proposed.

BRIEF LENGTH: All motions require briefs. Briefs submitted on dispositive motions may not exceed 20 pages (See Local Rule 30,

as amended); briefs submitted on non-dispositive motions may not exceed 10 pages (See Local Rule 30, as amended).

IT IS SO ORDERED.

Dated:

RICHARD A. ENSLEN
U.S. District Judge

HONORABLE RICHARD ALAN ENSLEN
UNITED STATES DISTRICT JUDGE
FOR THE WESTERN DISTRICT OF MICHIGAN

CAREER CHRONOLOGY:

Private Practice 1958-65
Peace Corps Director, Costa Rica 1965-67 (Appointed by R. Sargent Shriver)
District Judge (Michigan) 1968-70
Private Practice 1970-79
Federal District Judge 1979 through present (Appointed by President Jimmy Carter)

EDUCATION:

Kalamazoo College 1949-51
Western Michigan University 1954-55
Wayne State University (LL.B. 1958)
University of Virginia (LL.M. 1986)

PROFESSIONAL ACTIVITIES:

Board of Directors-American Judicature Society 1983-85
Member: Special Committee on Dispute Resolution-American Bar Association 1983-19__
Member: The American Law Institute
Member: Executive Committee-Wayne State University Law School 1980-85
Fellow: Michigan State Bar Foundation

FACULTY:

Adjunct Professor-Political Science Department - Western Michigan University 1982-19__

PUBLICATIONS:

Co-author of The Constitutional Law Dictionary:
Volume One, Individual Rights, ABC-CLIO, 1985 (Supplement 1987)
Volume Two, Governmental Powers (1987)
Co-author of Constitutional Law Deskbook, Lawyers Co-Operative Publishing Company (1987)
Author, "ADR: Another Acronym, or a Viable Alternative to the High Cost of Litigation and Crowded Court Dockets? The Debate Commences," 18 N.M.L.Rev. 1 (1988)
Author, "Should Judge's Manage their Caseloads?", Judicature, December 1986-January 1987
Book Review, H. Norris, "Some Reflections on Law, Lawyers, and the Bill of Rights: A Collection of Writings." Detroit College of Law Law Review (1987)

HONORS:

1984 Outstanding Practical Achievement Award-Center for Public Resources, New York, Legal Program Awards for Excellence and Innovation in Alternative Dispute Resolution and Dispute Management
1982 Distinguished Alumni Award-Western Michigan University
1980 Distinguished Alumni Award-Wayne State University Law School

MILITARY:

United States Air Force 1951-54