Judicature
Aug-Sept. 1990

S. 2648, the Judicial Improvements Act of 1990

Editor's Introduction

The Judicial Improvements Act of 1990 (S. 2648) was introduced in the Senate on May 17. The bill is designed to reduce expense and delay in civil litigation, and is a substitute for the Civil Justice Reform Act (S. 2027), which met active resistence from federal judges when introduced in January.

S. 2648 attempts to overcome the objections of federal judges who are concerned about what they see as legislative micro-management of their dockets and procedures. Title I of the new bill contains a compromise version of the original legislation. Sponsors have also added Title II, which provides for 77 new circuit and district court judgeships. They further anticipate that non-controversial recommendations of the Federal Courts Study Committee will be tacked on to the bill as Title III.

The Senate Judiciary Committee heard testimony on the bill June 26, and it was set for mark-up in late July. A September hearing is expected in the House.

The new bill

The substance of the bill is found in Title I, which mandates that district courts develop and implement civil justice expense and delay reduction plans. The purpose of the plans is to "monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."

Advisory committees. Each district court must establish an advisory committee, including attorneys and other representatives of major litigant categories. The advisory groups will assess the status of the court's civil and criminal dockets and make recommendations for the expense and delay reduction plan. The chief circuit judge and chief district court judges may suggest revisions to the plans.

Provisions. Unlike the original bill, S. 2648 does not insist that plans include such mandatory features as case processing tracks and detailed discovery schedules. However, the language of the bill as introduced on May 17 does require that the plans "shall include provisions applying the following principles and guidelines of litigation management and cost and delay reduction."

- set early and firm trial dates, so that trials are scheduled to occur within 18 months of filing
- control the extent and timeliness of discovery
- set deadlines for filing motions and target dates for deciding motions
- refer appropriate cases to alternative dispute resolution
- publish semiannual reports on all federal judges, detailing motions and bench trials that have been pending for more than six months and cases pending for more than three years

Timetable. Under the new bill, district courts have three years, rather than one, to implement the plans. The Senate has authorized up to $5 million to each district court for implementation of the plans.

Docket assessment. The bill calls for an annual assessment of each district court's civil and criminal dockets, in consultation with the advisory group. Additional plans to improve litigation management must be implemented if the dockets are clogged.

Pilot projects. The bill authorizes $5 million to conduct experimental projects in case-tracking systems in two and alternative dispute resolution in three pilot districts.

New judgeships. The bill authorizes 77 additional district and circuit judgeships.

Following are two commentaries on the Judicial Improvements Act of 1990.

Judge Diana E. Murphy is president of the Federal Judges Association. Judge Murphy testified before the Senate Judiciary Committee on behalf of the Association. Judge Murphy's testimony reflects the concerns of members of the federal judiciary.

Robert Banks was a member of the Brookings Institution-Foundation for Change task force convened in 1988 to study the causes of delay and high costs in the courts. The task force was formed at the behest of Senator Joseph R. Biden, who incorporated many of its recommendations into the pending legislation. □

The concerns of federal judges

Although its goal—improving efficiency and effectiveness—is laudable, S. 2648 does not address the whole workload of the federal courts. It may, in some instances, even be counterproductive.

by Diana E. Murphy

When it was introduced in January, the Civil Justice Reform Act generated widespread concerns among the federal judiciary. This may seem surprising since the judiciary is dedicated to the service of justice and continually seeking ways to improve its service. Furthermore, the federal judiciary was in agreement with the goals behind the legislation. What then gave rise to the almost unanimous opposition of federal judges to this proposed legislation?

No active federal judges were involved in the discussion process which produced the legislation, and perhaps because of this, the total current situation in the federal courts was not considered. Because of the greatly increased criminal workload and significant changes in statutory and procedural requirements connected to the criminal docket, civil cases are drastically impacted in many districts. Moreover, many judges and districts already have effective civil case management programs, and the complicated procedures set out in the statute are unnecessary and would only add to time and expense.

It has not in fact been demonstrated that there are systemwide delays in civil litigation in the federal courts, although there are undoubted instances of lengthy delays. A recently released report of the Rand Corporation (*Statistical Overview of Civil Ligitation in the Federal Courts*) shows that over the past 16 years, the median time from filing to disposition of private civil cases in the federal courts fluctuated between eight and ten months. Many supporters of the legislation say that its main purpose is to reduce time and expense involved in discovery. If this indeed is a major goal of the legislation, it could be better achieved by other means.

In May, Senator Joseph Biden introduced revised legislation, Senate bill 2648, The Judicial Improvements Act of 1990. The current bill represents another effort to make civil litigation in the federal courts more efficient and to assure effective case management. The Federal Judges Association shares those objectives and commends the sponsors for their interest in them. In particular, we support Title II, which creates 77 new and much-needed federal judgeships. Title I concerns us a great deal, however, and we hope that the changes we recommend will be incorporated into the bill as it proceeds through the legislative process.

We recognize that the legislation has been significantly improved since it was first introduced as the Civil Justice Reform Act. Title II is long overdue and will help to relieve some of the backlogs and delays that are occurring in our federal courts. Title I has been improved upon since the first version of the bill was introduced. Improvements include removing the prohibition against the use of magistrates, permitting each district to continue using procedures it has found to work well, implementing the case-tracking system in only two demonstration districts, and providing that review committees will comprise district court judges rather than judicial councils. These changes mitigate some of the adverse effects on the civil justice system that we feel would have resulted from S. 2027 as originally introduced.

Demands on the courts

To be frank, however, many judges continue to believe the subject matter of Title I—civil justice expense and delay reduction—would be best addressed by the rules process. More importantly, we are concerned because this legislation only deals with one aspect of the work of the federal courts. The numbers of civil

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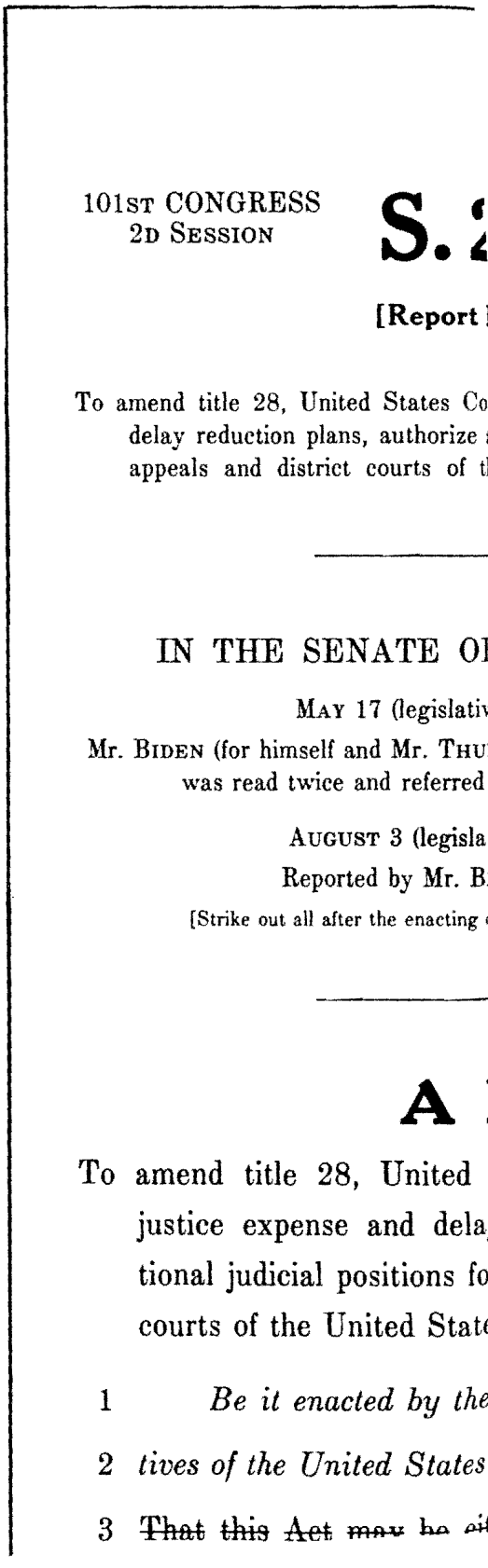
This article is adapted from Judge Murphy's statement before the U.S. Senate Judiciary Committee on June 26, 1990.



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The need for reform

The citizenry is frustrated with high litigation costs and delay in our courts. It is up to the bench and bar to seek solutions together, and one way is through support of S.2648.

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by Robert Banks

Given my position as President of the American Judicature Society, it is important that I begin with the statement that the views expressed herein are my own and not those of the Society. Few reform proposals generate unanimous support and certainly this one does not. My views may be fundamentally contrary to those of many of our members, principally with some who are sitting judges on the federal bench, and thus I am mindful of the need to recognize the divergence. As a demonstrable showing of the need for the Society to harbor differing viewpoints, our Chair, Judge Diana Murphy, has written an assessment of the proposed legislation which, while it cannot represent the views of all federal judges and differs from mine, is a thoughtful expression of concern genuinely felt by the federal judiciary. It is with some temerity that I express my disagreement with a leading jurist of the stature of Judge Murphy, but the strength of any organization is its ability to air differing viewpoints and certainly that must be so of learned organizations such as AJS.

The attention to our courts is indeed long overdue and the need for reform of our judicial system cannot be gainsaid. The failure of our court-based dispute resolution mechanisms has reached crisis proportions. The decade of the 80s was characterized by ever increasing delays and ever increasing costs for those who would exercise their basic right to resolve disputes in court. While law became one of the highest paid professions, litigants came to know the reality that "justice delayed is justice denied." The expense of litigating grew to such heights that the average American knew courts only through journalistic reporting and through the various entertainment media. The civil courts have become irrelevant to the daily lives of most of our citizenry. Even the largest of business enterprises began to search for other means to resolve disputes. The growth of alternative dispute resolution was directly the result of crowded court calendars complicated by the inherent expense of delay. The disease will not be overcome without new treatments.

In a Louis Harris survey of 400 private litigators "more than half of the federal judges, corporate counsel and public interest litigators surveyed believe that the costs of litigating civil cases in the United States today are a "major problem."[1] The respondents to the Harris poll agree that the most important cause of high litigation costs or delays is abuse by attorneys of the discovery process, which leads to "overdiscovery" of cases rather than to attempts to focus on controlling issues.... A majority of the lawyers and even the judges surveyed also believe that the failure of judges to control the discovery process is another important cause of high litigation costs.

The recognition of across the board dissatisfaction with a service provided by government is the business of politicians. A problem with the courts must inevitably attract the attention of those in congressional committees overseeing the judicial system and so it should not be surprising that Senator Joseph Biden, himself a lawyer, grew interested in the crisis affecting our dispute resolution system. As a direct result of his personal interest, an organization known as the Foundation for Change was formed to look into the causes of the problem. With the support of some major corporations and the involvement of the Brookings Institution, the Foundation gathered together a unique group of advisors of whom I was privileged to be one.[2] With

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1. Louis Harris and Associates, PROCEDURAL REFORM OF THE CIVIL JUSTICE SYSTEM (1988).
2. Litan, *Speeding up civil justice*, 73 JUDICATURE 164 (1989).

Murphy (continued from page 112)

and criminal cases have increased steadily, as have their complexity.[1] Congress has created new areas of federal jurisdiction and mandated time-consuming new procedures.[2] Even with the new judgeships fully staffed, the federal judiciary will be strained to the limit. We need more time to do our work and to render wise decisions according to developing law. The lower federal courts also need adequate time to commit their reasons to writing in a complete and thoughtful manner to enable meaningful appellate review. In the long run, no management system for civil litigation in federal trial courts can be effective without adequate numbers of judges, relief from crushing criminal caseloads, and reduction in time-consuming processes. The priorities of the Speedy Trial Act, the burgeoning criminal caseload, and lengthy sentencing hearings consume essentially all of many courts' time.[3]

The Constitution created a government with three equal and separate branches. Each branch has important responsibilities which impact the administration of our civil justice system. But if you read the findings contained in section 102 of S. 2648, two of the branches of government appear to be absolved of any responsibility for the perceived problems in that system. Section 102(2) and 102(3) place the blame for cost and delay in civil litigation solely on the courts and the litigants and their attorneys. The roles of Congress and the President also need to be considered. Enactment of many statutes impacts on the caseload and procedural requirements of the federal courts and contributes to cost and delay. Adequate resources are needed for the administration of the courts, including personnel and up-to-date technology. For a variety of reasons, judicial vacancies sometimes remain unfilled for very long periods. A comprehensive approach should at least recognize other causes of the perceived problems.

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 its solutions.

Specific concerns

The Federal Judges Association has several specific concerns with S. 2648. Section 472 provides for the appointment of advisory groups to study civil and criminal dockets and compile reports on the causes of cost and delay. The advisory groups are to make recommendations that "include significant contributions to be made by the court, the litigants and the litigants' attorneys toward reducing cost and delay." The requirements of section 472 will take considerable time and resources away from the important work of the courts. It may well result in greater delays and costs in civil litigation. In addition, section 472 presumes that in every federal district there is unnecessary delay and cost and that in each district all specified parties, including the court, are at fault. I would suggest that most federal courts are operating as efficiently as is possible, given their resources and the statutory constraints under which they operate.

Section 473 requires each federal district to establish a Civil Justice Expense and Delay Reduction Plan. The required content of these plans would set impossible targets in many cases and thereby mislead litigants, the bar and the public. The requirement that trials are to occur within 18 months, absent special certification, establishes an expectation that cannot be fulfilled at the present time in many districts, primarily due to the volume and length of criminal trials. Eighteen months would more properly be viewed as a goal for disposition of each civil case. For similar reasons, no *firm* trial dates are possible for civil cases in many districts. While it is well recognized that firm trial dates lead to settlement of cases, the bar learns when courts are taken over by criminal cases that the target trial dates are not firm regardless of any plan's language.

Similarly, it is impossible to set meaningful target dates for deciding motions at the outset of the case—at that time there is no knowledge of the number or complexity of motions to be made in a case, or across the docket, or what type of trials or emergency hearings may be ongoing when the motions are brought.

For these reasons section 473 should not require that the district plans "apply" such principles. Either the section should be eliminated so that districts would be free to fashion a plan appropriate to their circumstances or section 473 should be amended to provide that all advisory groups and districts *consider* such principles in fashioning their plans.

Section 475 requires complete docket assessment in each district at least once every two years in consultation with the advisory group. This provision requires that the court be involved in almost constant review and assessment with complicated and time-consuming procedures. Such reassessment, if required at all, should be no more often than every three years.

Although the review process is greatly improved in the current draft, section 474 still includes the chief circuit judge on the review committee. Many judges,

1. The federal courts have more criminal cases than ever before. This is partly because of the war on drugs. Congress has greatly increased the number of prosecutors and investigative agents which has led to a corresponding increase in the number of drug cases prosecuted in the federal courts. But not all of the lengthy trials are related to this public concern. In many districts lengthy white collar crime cases involving allegations of fraud and racketeering are taking months to try.

2. More criminal cases are also going to trial than in the past because of the effect of the mandatory minimum sentencing statutes and the new federal sentencing guidelines. It is within the power of Congress to set statutory minimum sentences, and consistent with its concern about crime, such statutes have proliferated. The mandatory minimum depends upon the amount of drugs that a defendant has to distribute or that are involved in a conspiracy of which a defendant is a member and defendant's prior record. A required life sentence can arise by being involved in the distribution of 50 grams of crack or 5 kilos of cocaine if a defendant has two prior felony drug convictions. Without all these factors the mandatory minimum may be 20 or 30 years. These sentences are without the benefit of parole. Even a lookout in a crack house where 5 grams of crack are being distributed is subject to a minimum of 5 years. If a gun is involved, there can be an additional 5 year minimum consecutive sentence. The effect of the sentences can be compounded by aspects of the sentencing guidelines. Drugs not involved in a particular conviction can also be considered. If an individual qualifies as a career offender, such as having been convicted of two burglaries prior to the instant offense, the sentence is correspondingly increased. In one recent case, the sentencing range increased from 92-115 months to 262-327 months by application of the career offender provision. The net effect is that fewer defendants are opting to plead guilty because they are unwilling to accept the likely consequences.

Not only are more defendants going to trial, the sentencing guidelines and other statutes require lengthy collateral proceedings. The guidelines are complex, and courts require a considerable amount of time to perform the calculations and consider the legal and factual arguments raised by the parties. If there is a contested factual matter, evidentiary hearings are required. In addition there are many forfeiture proceedings brought related to these cases and victim hearings required by another statute.

3. The Speedy Trial Act, which applies to all criminal cases, requires that these cases be tried within 70 days of the defendant's original appearance. Since judges are assigned new criminal cases each month, this requires a steady processing of criminal cases.

both circuit and district, believe the section should be amended to include only chief district judges. One respected circuit judge objects to the provision "not because it would do any particular harm, but because it is simply unnecessary." Most chief circuit judges have no experience or expertise in trial court management. Furthermore, issues created by the district plans may be raised on appeal.

Section 477 provides that the chief district judge shall appoint each district's advisory group after consultation with the other judges of the court and that the chief judge shall determine the balance of the advisory group and representatives of "major categories of litigants" in the court. This procedure differs from the standard statutory authority for operating the district court in 28 U.S.C. §137, and any final plan would have to be adopted by all the judges of the district court under sections 471 and 472. It follows that the whole court needs to be involved in selecting the advisory group.

The development, implementation and review of the plan by the circuit committee and the Judicial Conference, use of an advisory group and its appointment, and ongoing reporting and assessment required by the statute 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 whatsoever 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 no comprehensive look at the overall problems and their causes in the federal courts.

For all these reasons, the proposed legislation seems unrealistic to many. Like any institution, the federal courts have finite limits. No matter how dedicated and hard-working, federal judges cannot do the impossible. The public, the bar, and the Congress need to look at today's realities in the courts and make a conscious choice of priorities. □

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the exception of sitting judges, every element of the bar was represented. Defense lawyers, corporate general counsel, former federal judges, plaintiffs' attorneys, public interest lawyers, government lawyers and law professors all accepted the invitation because of a common concern over the workings of our judicial system. While no sitting judge served officially as an advisor of the Foundation, particular judges did participate in the deliberations and contributed as much as any advisor recognized in the Foundation report.

We began work knowing the great disparity of views that we had, but all accepted the challenge in the spirit of compromise because we recognized the seriousness of the problem confronting the courts. We also were not unmoved by Senator Biden's remarks at our initial gathering. While eschewing a threatening tone, he advised us that the noise level was rising in the constituency he served. If we did not move forward with reform, he counseled, the populace would demand change and change in such an environment would not necessarily produce the positive results that were desired.

The judicial response

Unfortunately, the response of the judiciary to S.2648 and its predecessor in large part seemed oblivious to the political environment. The initiative taken by Senator Biden was expected to generate controversy, particularly amongst the federal judges, and our expectations were met. Unfortunately, the judges were perceived to be more interested in their prerogatives than in the public interest. Percepts may be wrong, but they are themselves facts in the political arena.

The federal judiciary have made some suggestions that this legislation threatens its independence, and violates the separation of powers doctrine. It is not unreasonable, however, that when the public expresses dissatisfaction with the cost and delay of civil justice, the representatives of the people—Congress—seek to improve the efficiency of the judicial branch. S. 2648 in no way impacts upon the decisional output of the judiciary that the guarantee of independence was designed to protect.

I further question assertions of the primary expertise of judges in dealing with procedural issues. The relationship between the bench and the bar is symbiotic, and we as lawyers and litigants are willing to accept our not insignificant role in causing delay and expense. It is precisely because we contribute to the problem that we, too, have valid insights into possible solutions.

The need for solutions

It is the time for the bench and the bar to cooperate with the Congress and reach out for a chance to find solutions. Some think the system is not working and the public attitude toward the courts and the bar in general is not one of patience. Given the public attitude about the courts, is it any wonder that clear needs of the judiciary have gotten so little attention from politicians? Without doubt, the legislative and executive branches—not to mention the trial bar—share with the judiciary the blame for the present breakdown of the system. The need for Congress to test the impact of new legislation on the courts should continue to be pressed and the White House must put a higher priority on judicial appointments. These issues, however, are not the ones being addressed in the current legislation and improving the efficiency of the courts cannot be a bargaining chip for other reforms.

The public must believe that the judges are doing all they can before sympathy can be expected for other reforms. It may not seem fair, but it is reality. This is not the time for finger pointing or blame assessment. The fact is that our judicial system is desperately in need of repair and each branch of government and the bar itself must dedicate their efforts to improving the operation of the courts. S.2648 is a demonstration of interest in the problems which confront us. It should be warmly embraced as that needed first step because congressional help is essential to solving the problem. Everyone must accept that change is necessary. The bar and the bench have dallied too long. The finger pointing that has gone on within the profession has blocked solutions, exasperated reformers and dismayed the public. We must support not what is right for us but that which is necessary to pre-

serve the basic system of justice that our citizenry requires.

Our system needs more than repair; it needs renovation. We must focus on the basic objectives for the system and override past prerogatives and procedures that stand in the way of their achievement. The halcyon days of small dockets, erudite opinions and gentlemanly conduct are gone and cannot return. With them has gone the luxury of non-management and inefficiency. Our judges must manage and be accountable. Accountability is not inconsistent with the protections afforded the federal bench by Article III.

As Senator Biden has warned, the voter will not tolerate much longer the failure of our court system. Like every other part of our government, the judiciary has no sinecure that overrides the common weal. In the last analysis, the system relies on the good will of the populace and not upon god given prerogatives. Those who know the system best and understand its importance must aggressively take the lead in bringing it into the twenty-first century in good stead. Rather than fighting the political bodies on jurisdictional grounds, we must stick to substantive issues if we intend to achieve positive reforms. We really have no other choice. Congress ultimately must change the system to meet the desires of the electorate if current trends continue. We believe that S.2648 will produce positive reform that speaks directly to the concerns articulated by a frustrated citizenry.

How S.2648 can help

S. 2648 in reality is very sympathetic to the courts. It would leave judges considerable leeway to design their own rules. S.B. 2648 gives the bench the opportunity to cooperate with the Congress to solve the problems. Following are just a few of the issues the federal courts could pursue under the aegis of the bill.

Case tracking. Setting cases on different discovery tracks based on their complexity addresses the problem procedural expert Maurice Rosenberg refers to as "cadillac-style procedures" that are often used to process "bicycle-sized lawsuits."

The State of New Jersey has experimented with a three-track system that could serve as a useful model for federal reform. Preliminary findings in Bergen County, NJ show that after the introduction of case tracking, the number of civil cases disposed of within six months of filing shot up from 7 to 18 per cent. During this same period, 87 per cent of cases were terminated within one year of filing, comparing favorably with the American Bar Association Standard calling for disposition of 90 per cent of cases within one year of filing.[3]

Discovery cutoff. Setting discovery cutoff times and firm trial dates also gives litigators the proper incentives to reduce delay and cost. A recent study by the National Center for State Courts finds from data across numerous state courts that while time standards are not a panacea, "they can be an important part of a comprehensive program to reduce or prevent delays."[4]

Semiannual reports on docket status. The publication of status reports on district court dockets will also prove to be an effective case management procedure. A similar system initiated in the Manhattan District Attorney's office served to reduce backlog dramatically.[5]

I urge the judiciary to support the approach and make it work. The next proposal could work changes that will not only hurt the courts but thereby cause fundamental changes in our system of justice. Perhaps in the end that is what is necessary, but the bench must be the leader in reform and accept input from those who might be less learned, but whose point of view demands respect. □

3. Bakke and Solomon, *Case differentiation: an approach to individualized case management*, 73 JUDICATURE 21 (1989). Track One applies to "simple cases" that can be resolved fairly quickly. Track Two applies to "complex" cases characterized by the need for early and intense judicial involvement. Track Three applies to "standard" cases, requiring no deviation from usual judicial procedure.

4. Mahoney, CHANGING TIMES IN TRIAL COURTS (Williamsburg, VA: National Center for State Courts, 1988).

5. See Church and Heuman, *The limits of crash programs*, 74 JUDICATURE 73 (1990).

ROBERT S. BANKS is a law management consultant.

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JUDGES SAY NO to proposed legislation on federal courts.

Congressional leaders are pushing legislation aimed at reducing delay and expense in civil lawsuits. But representatives of the Judicial Conference, the policy-making arm of the federal courts, told the Senate Judiciary Committee the conference opposes a bill that would require each federal trial court to develop and adopt a plan to cut civil litigation costs and delay.

The conference supports another provision of the legislation that would create 77 new federal judgeships, but believes more additions are needed to handle mounting caseloads, Judge Walter McGovern testified. The Judicial Conference has recommended 96 new judgeships.

The bill in question has bipartisan support: Judiciary Committee Chairman Joseph Biden of Delaware introduced it jointly with the panel's ranking Republican, Strom Thurmond of South Carolina. The committee is expected to vote on the legislation next month, and the creation of more judgeships is expected to pass easily. There is probably a majority on the Judiciary Committee willing to support some kind of system designed to manage civil cases more efficiently, committee staff members said.

Some Democratic lawmakers have privately expressed surprise and anger that Mr. Biden would lead an effort to expand the federal judiciary during a Republican administration. The president nominates federal judges, and the nominees require confirmation by the Senate.

Republicans have praised Mr. Biden's action on judgeships as demonstrating his willingness to be a conciliator on a sharply divided committee. "Rather than take a narrow, partisan view of the dire need for new federal judgeships, the senator from Delaware has done the responsible thing," said Sen. Orrin Hatch (R., Utah).

As to the case-management proposal, Judge Robert Peckham of the Judicial Conference testified that such legislation would duplicate a management program recently adopted by the conference. Judge Peckham also said that as a constitutional matter of separation of powers, Congress shouldn't interfere with the procedures of the judiciary. He softened his criticism by saying that federal judges have long supported the "concerns that inspire this proposed legislation."

The Biden-Thurmond case-management proposals had already been made more flexible in response to objections from the Judicial Conference that Congress was trying to "microregulate" judges.

* * *

STEPHEN B. MIDDLEBROOK

Business Planning in the Courtroom

The Senate Judiciary Committee will vote during the month of July on a bill the goals of which would seem unobjectionable: the reduction of transaction costs and delay in civil litigation in the federal courts.

Unfortunately, the subjects of the proposed legislation—federal judges—are objecting. Indeed, judges have been the bill's most vocal critics, arguing that Congress should not tinker with the procedures at play in their courts.

The criticism is misplaced. The bill is not about tinkering, and it is not about "micro-management" (as judges have also charged). Rather, legislators are pursuing a modest but eminently sensible goal: to encourage judges to adhere to the judicial equivalent of sound business planning principles.

The Biden bill on civil litigation is not, as judges are complaining, congressional micro-managment of the judiciary. It's just good management practice.

When Sen. Joseph Biden Jr. (D-Del.) first introduced his proposal this past January—drawing on a Brookings Institution task-force study written by representatives of wide-ranging and divergent interests—criticism from the judiciary was most intense. The Judicial Conference, the policy arm of the federal judiciary, put its opposition on the record.

In response, Biden joined with Sen. Strom Thurmond (R-S.C.) to submit a new bill, S. 2648, in May. The new proposal sought to accommodate the judges' concerns by, for example, transforming some of the more detailed original requirements into broad principles and guidelines.

As a result, the American Bar Association, which had opposed the original Biden bill, has now endorsed the general principles reflected in the new bill. The ABA has specifically expressed support for Congress' intent that federal District Courts develop plans to reduce cost and delay by taking into consideration the guidelines set out in the bill. (Although the ABA recommends further changes in the legislation, it has not indicated that failure to adopt its proposed changes would result in withdrawal of its support.)

Judges Dig In

In contrast, the Judicial Conference has dug in. Its representative told the Judiciary Committee on June 26 that the organization remains opposed to the bill because the legislation is "an intrusion into matters that should remain the province of the judiciary."

Why the judges have taken such a hard line to such a benign piece of legislation is puzzling—especially because the bill really does have significant potential to reduce waste and delay in litigation, an unassailable goal that most judges support most of the time. Perhaps the problem is that the judges are seeing the ghost of legislative intrusion into judicial independence. In fact, all that is really being advocated is a framework within which an independent judiciary could become more accountable and efficient.

S. 2648 would require every U.S. District Court, in consultation with a local advisory group, to develop a civil justice expense and delay reduction plan. The advisory group would assess the court's civil and criminal dockets, consider the demands made on the court and the local resources available to meet these demands, and develop a plan—subject to review by a variety of judicial actors—for optimal use of these resources. In the world outside the courtroom, this is known as straightforward business planning.

The bill contains guidelines, reflecting case-management principles, that many judges already use with considerable success. These judges have demonstrated that it is possible to manage the litigation process efficiently without sacrificing fair treatment of individual cases. Biden and the bill's backers seek to institutionalize some of the judiciary's proven case-management techniques.

One of these techniques is early judicial involvement in discovery planning and case control. In adopting this approach, the bill would seek to stimulate early case settlement—thus reducing the common practice of eve-of-trial settlements, which results in much greater costs. Because 95 percent of all federal civil cases settle rather than go to trial, the effect of earlier settlements could be substantial.

Nuts-and-Bolts Discovery

The bill also endorses "staged" discovery. This technique, pioneered by Senior (formerly Chief) Judge Robert Peckham of the Northern District of California, focuses first-stage discovery on a dispute's nuts and bolts. The facts obtained in this first wave of discovery can enhance settlement discussions. If, under this approach, the parties fail to settle, they may proceed to full discovery.

The bill also would require judges to set target dates for deciding motions. Currently, when a motion is filed, the parties have little idea when or if the judge will take action on it. Discovery generally proceeds on relevant issues as if the motion had never been filed. The potential for waste is obvious: A decision on the motion could make these issues moot, which would make the discovery relating to these issues irrelevant. If judges would tell litigants when their motions are likely to be resolved, the lawyers could structure discovery in accordance with that expectation.

These are only a few of the Biden bill's cost-saving features. To develop more information about potentially valuable management devices, the bill would also create and fund at least five demonstration programs. For example, "tracking systems" would place cases on different tracks according to complexity, with each track having different rules governing discovery and time limits. The bill would also have the courts evaluate, on a periodic basis, how well they are dealing with demands for judicial services.

The Biden bill sends an important message to trial and appellate judges from those who use and depend upon the courts. The message is that citizens cannot allow these courts to evolve unfettered by any efforts to control cases individually or in the aggregate. Rather, as innovative judges have demonstrated, case-management techniques must and can be introduced into the judiciary without upsetting the balance between efficiency and equitable treatment of litigants.

Stephen B. Middlebrook is senior vice president and general counsel of Aetna Life & Casualty and a member of the American Lawyer Media, L.P., National Board of Contributors. Middlebrook was a member of the Brookings Institution task force on civil justice reform mentioned in this article.

PROCESS REFORM. A streamlined system of civil justice — including case tracking and time limits on discovery — would be implemented in the federal courts under proposed legislation that has won broad support.

"The civil justice system as we know it today is not fulfilling its basic objectives of providing...just, speedy and inexpensive resolution of disputes," said Sen. Joseph R. Biden Jr., D-Del., who introduced the package Jan. 25 with bipartisan backing.

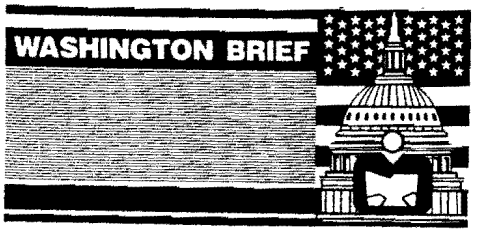
The plan is based on recent recommendations by the Washington-based think tank, the Brookings Institution that convened a wide-ranging task force that included lawyers from all sectors of the bar.

Their report won praise from groups as diverse as the Consumer Federation, the Association of Trial Lawyers of America and the American Insurance Association.

Each federal district court would be required to develop, within a year, its own plan for case tracking under the legislation.

The plans would use so-called differentiated case management, in which cases are reviewed early on and assigned to various litigation tracks. Time limits are established, depending on the procedural requirements of different types of cases.

Each district court would be required to set trial dates at no later than 120 days before the discovery cut-off date. Discovery also would be limited, but Senator Biden said the plans would "ensure sufficient flexibility is retained for those cases warranting extensions of time."



The courts also would be urged to develop alternative dispute resolution programs, which already are in use in some federal courts. The bill, for example, requires district courts to develop "early neutral evaluation" programs, in which parties attend a nonbinding case evaluation conference hosted by a neutral member of the bar who is an expert in the subject matter of the lawsuit. Such a program currently is in place in the Northern District of California.

Wednesday, October 25, 1989

CHICAGO DAILY LAW BULLETIN

Federal crackdown on civil delays urged

WASHINGTON (AP) — Judges must crack down on lawyers to prevent non-criminal cases in federal courts from taking too long and costing too much, a special task force is telling Congress.

"The excessive cost and delay associated with litigating civil cases in America should no longer be tolerated and can be forcefully addressed through procedural reform, more active case management by judges and better efforts by attorneys and their clients," says a report the task force made public today.

The report is the result of a nine-month study by a 36-member group of lawyers and law professors. The study was conducted at the suggestion of Sen. Joseph Biden, D-Del., who chairs the Senate Judiciary Committee.

Biden called the report's recommendations "an important and encouraging start" and said his committee "will give a high priority to civil justice reform."

The report focuses on federal courts, but the task force said its recommendations could be applied to state and local courts as well.

The task force urged Congress to provide "a mix of suggestions and incentives" to spark change, "and then let those who use the system fill in the details."

"Our core recommendations allow each federal court . . . to develop its own set of reforms for reducing delay and litigation costs within some broad parameters that Congress would establish through federal legislation," the report says.

The task force recommended:

• That Congress require all federal trial judges to streamline the pretrial exchange of information between both sides of a lawsuit. Discovery accounts for an estimated 60 percent of all federal litigation costs.

• Each trial court's streamlining plan should include a system of assigning differing "tracks" to cases of different complexity. Fixed timetables and deadlines for completion of discovery and the start of a trial would depend on what track a case is assigned.

• Judges should adopt "a firm and consistent policy for minimizing continuances" or exceptions to the deadlines.

• Clients, either in person or by telephone, should participate in any court-sponsored settlement conferences. That would make it "impossible for the attorneys to delay settlement discussions, often for weeks or months, with the time-honored excuse, 'Let me get back to you after I've discussed this with my client.' " the task force report said.

• Judges should not rely on magistrates as heavily as some now do in keeping track of civil cases that have not yet gone to trial.

The report also recommended giving trial judges more administrative support by increasing staffs, using computers more and raising judges' salaries.

And the report called for cooperation from lawyers.

"The nation needs — and must get — a substantial commitment from the bar to address this challenge as well," it said. "There is a consensus that some litigation costs are incurred as a direct outgrowth of the incentives that have been built into the private legal industry itself."

The task force noted that the legal profession increasingly is dominated by escalating lawyer salaries and heavier demands for billable hours.

"The time has come for the profession to examine the impact of costs on the delivery of legal services and the critical question whether increasing costs have impeded access to the courts," the task force report said.

Business and the Law | Stephen Labaton

Biden's Challenge To Federal Courts

"THE real problem here is that Federal judges have lifetime tenure," said a senior Judiciary Committee aide last week, lamenting Article III of the Constitution. "That would make it difficult to make judges accountable and force them to follow the Biden Act."

Better known as the Civil Justice Reform Act of 1990, the Biden Act has set off a rare and bitter confrontation between Joseph R. Biden, the chairman of the Senate Judiciary Committee, and the nation's leading Federal judges.

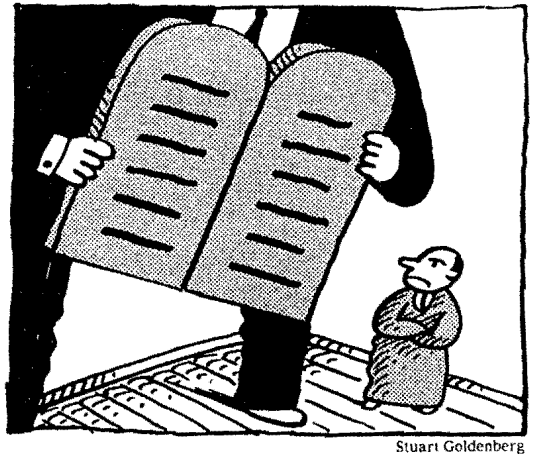
The committee staff; Mr. Biden, Democrat of Delaware, and Strom Thurmond of South Carolina, the committee's ranking Republican, all say the legislation is the only way to make judges manage their caseloads effectively. It aims to make the judiciary more accountable for keeping the court system efficient.

But to many Federal judges, accountability is a buzzword for introducing politics into the Federal Rules of Civil Procedure. The judges fear that this new method of legislating court procedure can set the dangerous precedent of subjecting court rules to political whimsy. They contend that the act would violate the separation of powers doctrine by having the legislature manage the workings of the courts.

• • •

The sweeping bill proposed by Senator Biden seeks to make civil litigation less costly and faster in a variety of commercial, employment discrimination and other disputes.

The bill is moving quickly through Congress and is widely expected to be approved because it has bipartisan support in both Houses. It has also received the blessings of a number of prominent lob-



Stuart Goldenberg

bying interests, including the American Trial Lawyers Association, the American Insurance Association, the Consumer Federation of America and the Business Roundtable.

But many judges and several prominent law professors say the legislation is tantamount to dealing with bad weather by outlawing hail.

"Almost all of the judges are against it," said Maurice Rosenberg, a professor of civil procedure at Columbia Law School. "There is a recognition that it is a good idea to be committed to reducing expenses and delays. But I'm afraid in many ways it actually increases costs and delays."

In part, the heavy opposition from the bench derives from the position that the bill implicitly attributes the crisis in the Federal courts to the failure of judges to keep cases moving. The judges read this view into the proposal because it makes mandatory many rules that have long been discretionary.

"They are trying to take examples of judges who have been bogged down and extrapolate it to apply to the whole judiciary," said James L. Oakes, the chief judge of the United States Court of Appeals for the Second Circuit, one of the nation's busiest jurisdictions, which includes New York, Vermont and Connecticut. "To the extent that it does lay blame on the judges, it's a bad rap."

If adopted, the Biden legislation will require judges to decide significant issues first and put cases on one of three different time tracks, depending upon their complexity. Judges will have to sharply curtail the pretrial fact-finding process that lawyers call discovery. The progress of caseloads will be monitored by a new system of reporting that has been criticized for adding more work and paperwork for judges.

The proposal also requires judges to hold early conferences apprising the parties of alternatives to the Federal courts, like arbitration and mediation, and to set firm trial dates, within four months of the completion of discovery, to put pressure on the parties for an early settlement.

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Judges questioned how firm trial dates in civil cases could possibly be mandated. In many jurisdictions, judges are having great difficulty trying civil cases quickly because of an enormous increase in criminal cases, particularly drug prosecutions. The Constitution and the Speedy Trial Act require that criminal cases be moved ahead of the civil caseload.

The legislation is based on a report prepared last year by the Brookings Institution. It concluded that the rising costs of litigation are draining valuable resources from American business, making it less competitive.

The bill represents the first Congressional effort in many years to become actively involved in writing detailed court procedure, an area that has long been left in the hands of an advisory committee of legal scholars set up by the judiciary and intended to be insulated from political pressure.

A committee aide said the legislation was drafted "after we drew the conclusion that judges' drawing up the rules is insufficient."

Judiciary Panel Hits Cost Cutting

By Charley Roberts
Daily Journal Staff Reporter

WASHINGTON — The policymaking body of the federal judiciary warned Congress Tuesday that legislation aimed at cutting costs and delays in resolving civil cases raises serious separation of powers concerns and could actually be counterproductive.

"There has been a strong reaction that the bill is extraordinarily intrusive into the internal workings of the judicial branch," Judge Aubrey E. Robinson Jr. testified on behalf of the Judicial Conference of the United States.

"These are procedural matters which should be handled through the normal, congressionally-mandated Rules Enabling Act process," he said.

Robinson, the chief judge for the district court for the District of Columbia, politely told the Senate Judiciary Committee that if Congress wants to expedite case resolution, it should create more federal judgeships.

He noted the conference has asked for 76 new judgeships this year, of which 60 would be in the district courts, but real number needed is nearly 100.

"The Speedy Trial Act, fueled by a growing drug caseload, has, in many districts, imperiled the timely and efficient resolution of civil cases," said Robinson.

He cited the situation in the Southern District of Texas where the chief judge has said that, "without prompt relief, by the end of the year there will be no civil cases heard in that district."

Disputed Issues

Sen. Joseph Biden, the Delaware Democrat who chairs the committee and is sponsoring the bill, disputed the constitutional and practical issues raised and said that while he is willing to work with the conference on revisions, he intends to seek passage of the measure before Congress adjourns in October.

But he did promise to introduce legislation shortly to create 20 or more new federal judgeships.

While Sen. Strom Thurmond of South Carolina, the ranking Republican on the panel, endorsed Biden's bill, Sens. Orrin Hatch, R-Utah, and Charles Grassley, R-Iowa, joined Robinson in criticizing its intrusion on the courts.

"I daresay that federal judges, who review the meaning of many of the laws we enact, probably have several detailed — and choice — ideas on how we can better conduct our business," said Hatch. "I am equally confident that the Congress would not look kindly on having those ideas imposed on it."

But Biden said, "I didn't introduce this bill because I think judges are bad guys; I just think the system is ripe for change."

Biden's bill, S 2027, is based on the consensus recommendations last year of a task force of corporate general counsels, insurance industry attorneys, plaintiffs' trial lawyers and consumer activists brought together by Biden.

The bill mandates that each federal district court develop a comprehensive plan to reduce costs and delays. The plan is to include certain features, such as development of tracks or timetables for discovery based on the complexity of the case, the setting of early and firm trial dates, assignment of a single judge to a case to manage its progress, and increased use of alternative dispute resolution.

To further these aims, the bill provides $16 million in added funding for automation and clerical expenses.

Reaching a Consensus

Testifying in support of the measure, Patrick Head, general counsel of FMC Corp., said he was "surprised if not shocked" during meetings of the task force to find traditional adversaries, such as insurance company counsels and plaintiffs' lawyers, as well as some federal judges reaching a consensus on what is contained in the bill as a cure for the costs and delays that plague the federal courts' civil calendar.

He called the bill "the sleeper of the year if it can cut costs and get finality" out of the civil justice system.

Bill Wagner of Tampa, Fla., the immediate past president of the Association of Trial Lawyers of America, said the bill seeks to compress the time it takes to resolve a case without biasing any type of litigant or suit.

Stephen B. Middlebrook, general counsel to Aetna Life and Casualty, and Gene Kimmelman, legislative director for Consumer Federation of America, agreed.

The bill also received a strong endorsement at the hearing from Judge Richard A. Enslen of the Western District of Michigan, who said he employs many of the case management devices in the bill and has found them effective.

Wednesday, March 7, 1990

The Los Angeles Daily Journal

Courts and Congress Close to Agreement On Cutting Delays, Costs of Civil Cases

WASHINGTON DOCKET

By STEPHEN WERMIEL
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON—After locking horns for months, the federal judiciary and congressional leaders may be nearing an uneasy agreement on legislation aimed at reducing delay and expense in civil cases.

Aides to Sen. Joseph Biden (D., Del.), chairman of the Senate Judiciary Committee, have been negotiating with officials of the Administrative Office of the U.S. Courts over a compromise version of legislation Sen. Biden introduced in January.

The negotiations may not be quite as delicate as current efforts to initiate a budget summit, but it's close; federal judges are very sensitive about attempts to tell them how to manage their courts.

"We are in agreement on the general fundamental principles to reduce cost and delay. But it's micro-regulation by statute and mandatory requirements that concern us," says Chief Judge Robert Peckham of the federal district court in San Francisco, who is leading the judiciary's response to Sen. Biden.

As first proposed, Sen. Biden's legislation would have required each federal district court to appoint a local advisory committee and to adopt a civil-case management plan within one year. The plans were to include a procedure for placing cases on different tracks, with simple cases to be handled quickly, and complex cases more slowly. And judges would have been given 45 days after the time defendants respond to a lawsuit to set a detailed schedule for pretrial discovery, motions and the trial date.

The proposal, which was produced by a task force that studied the problems of delay and litigation cost, also would have required each court to publish periodic lists of cases that fall behind schedule.

In introducing the legislation, Sen. Biden said, "The civil justice system as we know it today is not fulfilling its basic objectives of providing the just, speedy and inexpensive resolution of disputes." The bill had support from Democratic and Republican leaders on the Senate and House Judiciary Committees.

But it wasn't long before federal judges were protesting the intrusion into their courtrooms that the legislation would represent. "Many thoughtful federal judges are very, very uneasy about the signals this bill sends of legislative incursion—albeit well-meaning—in the judicial arena and what it portends for the future," said Chief Judge Aubrey Robinson of the federal court in Washington, in Senate Judiciary Committee testimony in March.

While they were complaining, however, the judges didn't miss the message behind the legislation. On May 1, the Judicial Conference, the policy-making arm of the federal courts, adopted its own 14-point program, requiring each district court to appoint an advisory group to recommend a case-management plan. But the Judicial Conference system gives judges discretion to adopt only those recommendations that are "feasible and constructive" and says nothing about tracking or listing delayed cases.

The 27-judge Judicial Conference recommended that two model plans be developed for handling civil cases with less delay and expense, and that the plans be tested in five volunteer district courts.

Now the drama has moved into a third act: negotiations between aides to Mr. Biden and officials of the Administrative Office aimed at producing a bill that the judiciary can, at the very least, refrain from opposing, if not actually supporting.

Final details of the compromise are still being drafted and haven't been approved by a working group led by Judge Peckham. But its features will be far less mandatory, according to those familiar with the discussions. They include giving districts three years, instead of one, to develop a plan, using the tracking system initially only as a pilot program in a few districts, and setting guidelines and principles that courts may adopt for civil-case management, rather than mandatory rules. District courts that move quickly would receive as an incentive extra funds to implement their plans.

Sen. Biden, aides say, hopes to settle on a compromise and to move it quickly through Congress this year. But, says Judge Peckham, "It is difficult to say for certain that we will reach an accomodation."

Civil Justice/Civil Rights

In 1988, the last time Congress pushed successfully for major, federal court reform, some proposals had been percolating on Capitol Hill for nearly a decade. But it took only 12 months and an all-nighter for the lawmakers to enact a broad-ranging plan for reducing costs and delay in the civil justice system.

The final product represented a rather Solomonesque compromise sensitive to judicial branch concerns that the proposals stepped on the judiciary's independence and to legislative demands that court logjams be broken.

The legislation, pushed by Senate Judiciary Chairman Joseph Biden, D-Del., requires each federal district court to draft within one year and implement over the following three years a plan to cut civil litigation expenses and delays. Bowing to judicial opposition, Congress backed away from mandating the content of the plans. Instead, the bill suggests incorporating six management principles, such as setting early and firm trial dates and imposing greater controls on discovery.

Unwilling to let the judiciary completely off the hook, the bill creates a pilot program in 10 districts, five of which must include major metropolitan areas. Those courts must base their plans on the congressional management principles. In the fifth year, an independent review committee will determine which has been more efficient — mandatory or suggested measures.

If the mandatory plans produce better results, the bill requires the Judicial Conference of the United States to expand their use or propose a demonstrably more efficient alternative.

Also for the first time, the courts must publish semiannual reports of judges and magistrates who have had motions and bench trials submitted for consideration for more than six months and cases pending for more than three years.

"Congress came a long way on this and passed a piece of legislation that is a lot more palatable to the Judicial Conference," said conference spokesman David Sellers.

Attached to the civil justice reforms was the first new judgeship bill in more than six years. Congress approved 85 new seats — 11 appellate and 74 district judgeships — targeted mainly for areas with heavy drug-related caseloads. The Judicial Conference had requested 96 new judges — 20 appellate and 76 district — and 12 bankruptcy positions.

This legislation also was the vehicle for a first stab at implementing recommendations of the Federal Courts Study Committee, appointed by Chief Justice William H. Rehnquist, to investigate the long-range needs of the federal court system.

Congress approved the so-called non-controversial elements of the committee's report, including a study of the federal public-defender appointment process; a fall-back statute of limitations for federal civil actions arising under an act of Congress, unless specifically stated elsewhere; a one-year study of intercircuit conflicts by the Federal Judicial Center and a two-year study of structural alternatives for the courts of appeals; the renaming of U.S. magistrates to "magistrate judge"; an exemption from the salary cap on senior judges for earnings from teaching; and a five-year extension of the Parole Commission.

"Clearly, we were hopeful the so-called non-controversial package would have been more expansive," said William K. Slate II, the committee's executive director. "The next time out, we'll be looking at individual bills for our proposals instead of one major bill, and that makes it much harder. Judicial reform is not for the short-winded."

And finally, the civil justice reform measure includes a bill, sponsored by Rep. Robert W. Kastenmeier, D-Wis., creating a national commission on judicial impeachment and discipline. The commission is to report to Congress in one year on ways to improve the processing of complaints about judges and to make the system more accessible to the public.

Two attempts to "reform" the work product of one particular court — the U.S. Supreme Court — were unsuccessful last session. Although approved by solid margins, the proposed Civil Rights Act of 1990, intended to reverse six job discrimination rulings last year, fell victim to a presidential veto that Congress was unable to override.

That bill, along with the proposed Religious Freedom Restoration Act, will no doubt return in some form next year. The religious freedom bill, introduced at the session's end, would reverse last term's high court decision in the peyote-Native American Church case. The justices abandoned the compelling-interest test for determining when government action violates the First Amendment free-exercise clause. *Employment Division v. Smith*, 58 U.S.L.W. 4433. — *Marcia Coyle*

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U.S. Judges Blast Speed-Up Bill

Bar Leaders Agree Biden Plan Won't Work

By Henry Gottlieb

The Senate Judiciary Committee has accomplished a rare feat: Pushing U.S. District Judge Dickinson Debevoise to the brink of losing his cool.

Normally the model of patrician equanimity, Debevoise is fighting mad about legislation that Judiciary Committee Chairman Joseph Biden is advancing as a remedy for slow civil justice in federal trial courts. "It's an absolute monstrosity," says Debevoise. And he is not the only judge or lawyer in New Jersey who thinks so.

Chief Judge John Gerry, some of his colleagues on the bench, and leaders of the state's federal bar are so angry about some of the provisions they are declaring their willingness to step to the front ranks of any national effort to kill the bill.

Granted, they say, slow civil justice is a problem in New Jersey's federal courts. The average case that went to trial last year took 26 months to get there, the fifth-slowest pace in the nation's 94 judicial districts. But for the moment, in New Jersey, the cure proposed by Biden is causing more angst than the ailment.

Says Richard Collier, chairman of the New Jersey State Bar Association's Federal Practice and Procedure Committee: "We want to derail it before it zips through." Stephen Orlofsky, another member of the committee, says, "so far, the reaction has been uniformly and resoundingly negative." Deepening the lawyers' sinking feelings is their view that Biden's plan adopts features that remind them of New Jersey's tightly managed state court system.

What's in the Bill?

The proposal introduced on Jan. 25 by Biden, a Delaware Democrat, was co-sponsored by the committee's ranking Republican, Strom Thurmond, of South Carolina, and was based on a Brookings Institution study conducted by a 36-member task force of lawyers, judges, professors, and court professionals.

The bill pays homage to three articles of faith among court managers. The first one says that cases are disposed of most efficiently when deadlines are established for each stage of litigation. Second, speeding cases means speeding discovery, motion practice, and settlements, because 95 percent of federal filings are resolved before trial. Third, hands-on management by judges gets things done.

CONTINUED ON Page 22

PROMISES FIGHT: U.S. District Judge Dickinson Debevoise says a new bill designed to remedy slow civil justice in federal trial courts is "an absolute monstrosity."

U.S. Judges Blast Bill

CONTINUED FROM Page One

The legislation would require each district to develop separate tracking plans for easy and complex cases — a so-called differentiated case management system similar to experiments New Jersey courts are now running in Bergen and Camden counties.

Each district would be free to set its own deadlines for discovery and motions. But for all districts, a judge, not a magistrate, would be required to hold a mandatory discovery and case management conference within 45 days of the first responsive pleading in a case. At the conference, issues would be identified, discovery schedules would be set, a pretrial conference date would be set, and in simple cases, a trial date also would also be established.

If the districts fail to devise a plan within a year, one is imposed on them from Washington.

The bill also contains a provision aimed at judges who are slow to make interim rulings. Four times a year, the courts would publish a report listing each judge's list of motions unresolved for more than 30 days, and how long they have been pending.

Distaste for Micromanagement

Gerry and Debevoise have no argument with the goal of the bill or its philosophical underpinnings. They just don't like the idea of what Gerry calls "an endless string of efforts in Congress to micromanage the business of the courts." What's more, the judges say, this particular bill would make things worse, especially in New Jersey. Debevoise lists three main objections:

• The bill ignores the root cause of civil trial delays — the crushing case load of criminal cases, which take precedence under speedy trial rules for criminal matters. What's the use of setting rigid deadlines for civil cases that won't be adhered to because of the crush of criminal business?

• The bill reduces the role of magistrates in scheduling and hands it back to the judges. This would be a time-consuming step backward in New Jersey, where several magistrates have earned reputations for moving cases quickly, Debevoise and Gerry say. "We [the judges] are a sweatshop and we've got to keep sweating on productive things, not things that take more time," Debevoise says. "In New Jersey, we've been able to hold our heads above water because of the magistrates' work."

• The bill would require each judge and district clerk to devote more attention to record keeping, which is already an overly time-consuming burden, Debevoise says. Additional records are especially onerous, he says, because most of the fiats in the Biden bill have already been instituted informally in New Jersey. For example, cases in this state are already on tracks. Judicial productivity is enforced by collective discipline, he says. Early conferencing of cases is already an established tool in the district, the judges say.

Gerry, who circulated memos about the bill to the 13 other judges and nine magistrates in the district, says he has heard no dissent from his negative opinion about the bill. He says judges around the country as well are beginning to express concern about the bill, but he says he knows of no organized opposition yet.

Three leaders of the state's federal bar say they agree with the judges' analysis. The president of the Association of the Federal Bar of New Jersey, Bruce Goldstein, of Saiber, Schlesinger, Satz & Goldstein in Newark, says he is most upset about what he perceives as an attempt to gut the magistrates' work.

At the State Bar's federal section, Orlofsky, a partner with Blank, Rome, Comisky & McCauley in Cherry Hill, and Collier, of Collier, Jacob & Sweet in Somerset, say they are prepared to work with their counterparts in other states to fight the bill.

Lipscher Connection

Orlofsky says one of the things that turned him off about Biden's proposal was the incantation of Robert Lipscher's name in Biden's introductory speech on the Senate floor.

Lipscher, director of New Jersey's Administrative Office of the Courts, is considered a seer among the nation's court managers, but he has been a lightning rod for the Bar's denunciations of court administration in New Jersey. Orlofsky says Biden's use of Lipscher's comments on differentiated case management to buttress the efficacy of the legislation, "made me laugh." Lipscher declines to comment.

The judiciary committee is scheduled to hold hearings on the bill this month, and an aide to the senator says the panel is willing to make changes. "We studied it carefully, and we think it's a very good bill, but it's not the holy grail," the aide says.

He says the committee is aware that the crush of criminal cases is not adequately addressed in the legislation and that a bill to be introduced later this year — presumably legislation calling for creation of new judgeships — will deal with the problem.

'Fear of God' in Litigants

Robert Litan, a senior fellow at Brookings who was reporter for the task force study, says there was a consensus among the members of the study group that the magistrates' system has not worked because only judges can "put the fear of God into the litigants. Things get lost in the black hole of the magistrates' offices."

He also says that New Jersey judges might be overreacting to fears of central control. The key feature of the bill is its provision that each court sets its own set of deadlines, taking into account its own circumstances, Litan says. "It may be that in New Jersey you already have the best system; in that case, if it ain't broke, don't fix it," he says.

If nothing else, the fight over this bill is likely to focus additional attention among New Jersey practitioners on the record of the District Court in moving cases. In the year ending June 30, 1989, 6 percent of the cases in the district were more than three years old — about average for the nation. And the civil case load per judge, 414 cases, also was about average. At the same time, the figures show that New Jersey judges were victimized by complexity. When the degree of difficulty was factored in, the average judge in only 11 districts had as big a civil workload as each of the 14 New Jersey judges.

The addition of large, multi-defendant, mob trials that tie up judges for months has put the district deeper in the hole in the past few years, Gerry says. New Jersey also suffers from the absence of a large cadre of senior judges, who help clear cases but are not counted in the workload statistics. New Jersey has only two senior judges, Mitchell Cohen, in Camden and Clarkson Fisher, in Trenton.

U.S. Magistrate Jerome Simandle, who sits in Camden, expresses the same concerns voiced by Gerry and Debevoise, but he says the legislation will spark a necessary debate. As long as the bill serves as a "catalyst" for discussion, that's fine he says, but not if it ends up being the remedy. ■

Conference OKs Plan to Cut Court Costs, Delays

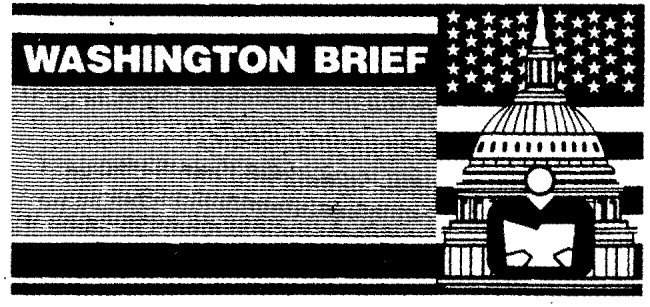
OPPOSED TO congressional proposals for improving the management of civil suits in the federal courts, the Judicial Conference of the United States recently approved its own program to cut costs and delay.

Last March, the conference — the policy-making arm of the federal judiciary — voted unanimously to oppose legislation, the so-called Civil Justice Reform Act of 1990, which embodies the recommendations of a special study committee composed of politicians, academicians, lawyers and political scientists. During the following weeks, district judges who serve as representatives on the conference came up with their own plan to tackle the trial-court caseload problems.

Under the program approved by the conference, each district court will appoint an advisory committee of lawyers and representative clients to help the court assess the criminal and civil dockets, identify major sources of cost and delay in civil litigation and recommend steps to reduce costs and improve the delivery of case management services.

The conference also committed itself to adding substantial new training programs for judicial officers and court staff in case management techniques.

The attempt to solve the cost and delay problems will not be a one-shot effort, according to a conference spokesman. Every three years, each district court will be required to reconvene its advisory group to reassess conditions in the court and to recommend additional changes.



- **Federal wiretaps increase in drug cases.**
- **More heat over sentencing guidelines.**
- **Jury clears defendant in CIA trial.**

BIG EARS. When dopers talk, Uncle Sam listens — more often, at least, than he used to.

Like all law enforcement efforts, electronic surveillance is focusing more and more on drug cases. Ten years ago, 45 percent of taps were directed toward narcotics violations; today, the figure has reached 62 percent and continues to climb. Gambling investigations, though declining in number, constitute the second-largest group, followed by racketeering, which has increased from 24 taps in 1979 to 89 taps last year.

In its annual report on state and federal wiretaps, issued this month, the Administrative Office of the U.S. Courts notes that, overall, the number of federal taps in 1989 increased by 6 percent over the previous year, reaching a total of 310.

There has been a much more dramatic change, however, in the duration of the taps. While the number of taps has increased 37 percent during the past 10 years, the amount of time police are tuned in is up 146 percent. Experts say this reflects the growing complexity of the probes. One sign: the number of arrests by federal authorities increased from 88 1988 to 1,312 last year, just as the average number persons intercepted rose from 129 to 178.

But there is — besides the need for a warrant inhibiting factor to the taps' use: cost. The average price of a tap in 1979 ran about $16,000. Today $53,000.

THE NATIONAL LAW JOURNAL Monday, July 2, 1990

Lightening the Load

ONE NEED LOOK NO further than Vermont, where there is a moratorium on state civil jury trials, to know that the system is in crisis. The overwhelming cost and demands of criminal — especially drug — trials has caused huge dislocations in the nation's courthouses.

But not only are courts staggering under the sheer quantity of suits before them, the cost of litigation is leading many cases to trial solely in hopes of recouping litigation costs, trial preparation fees and the like, according to U.S. District Chief Judge Sherman G. Finesilver of Colorado.

Judge Finesilver has a number of noteworthy recommendations to ease the crunch and encourage settlements. Although some are not startlingly new, they bear reiterating:

- Judges need to become more aggressive in their pursuit of settlements, moving the process to the period shortly after a case's filing rather than "on the courthouse steps on the eve of the trial."
- Law firms should have experienced negotiators in the firms who could serve as resource people for the firms' trial lawyers. Impartial, nonemotional evaluation of cases by colleagues will promote more realistic parameters for the settlement of cases.

These steps probably will stem some of the abuses and reduce expenditures in cost and time. But perhaps what is really needed are innovations in trials themselves, and even a strong dose of good old-fashioned common sense.

During the 9th U.S. Circuit Court of Appeals' Judicial Conference in mid-June, discussions were held on such high-tech trial techniques as computer graphics and long-distance testimony by satellite. While there are initial expenses to starting up such systems, they may end up saving in the long run by making evidence immediately understandable to the jury that ultimately must decide the case.

As for common sense: Some suits should never make it into a clerk's office. We offer as an illustration the recently filed state court suit of one Hugh Craig Jr. of Indianapolis, who asks $1.99 quadrillion from the hamburger chain Wendy's for a scratch on his car. For the record, Mr. Craig also complains that the chain indulges in false advertising because there's no ham in hamburgers.

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U.S. Judges Blast Speed-Up Bill

Bar Leaders Agree Biden Plan Won't Work

By Henry Gottlieb

The Senate Judiciary Committee has accomplished a rare feat: Pushing U.S. District Judge Dickinson Debevoise to the brink of losing his cool.

Normally the model of patrician equanimity, Debevoise is fighting mad about legislation that Judiciary Committee Chairman Joseph Biden is advancing as a remedy for slow civil justice in federal trial courts. "It's an absolute monstrosity," says Debevoise. And he is not the only judge or lawyer in New Jersey who thinks so.

Chief Judge John Gerry, some of his colleagues on the bench, and leaders of the state's federal bar are so angry about some of the provisions they are declaring their willingness to step to the front ranks of any national effort to kill the bill.

Granted, they say, slow civil justice is a problem in New Jersey's federal courts. The average case that went to trial last year took 26 months to get there, the fifth-slowest pace in the nation's 94 judicial districts. But for the moment, in New Jersey, the cure proposed by Biden is causing more angst than the ailment.

Says Richard Collier, chairman of the New Jersey State Bar Association's Federal Practice and Procedure Committee: "We want to derail it before it zips through." Stephen Orlofsky, another member of the committee, says, "so far, the reaction has been uniformly and resoundingly negative." Deepening the lawyers' sinking feelings is their view that Biden's plan adopts features that remind them of New Jersey's tightly managed state court system.

What's in the Bill?

The proposal introduced on Jan. 25 by Biden, a Delaware Democrat, was co-sponsored by the committee's ranking Republican, Strom Thurmond, of South Carolina, and was based on a Brookings Institution study conducted by a 36-member task force of lawyers, judges, professors, and court professionals.

The bill pays homage to three articles of faith among court managers. The first one says that cases are disposed of most efficiently when deadlines are established for each stage of litigation. Second, speeding cases means speeding discovery, motion practice, and settlements, because 95 percent of federal filings are resolved before trial. Third, hands-on management by judges gets things done.

CONTINUED ON Page 22

PROMISES FIGHT: U.S. District Judge Dickinson Debevoise says a new bill designed to remedy slow civil justice in federal trial courts is "an absolute monstrosity."

U.S. Judges Blast Bill

CONTINUED FROM Page One

The legislation would require each district to develop separate tracking plans for easy and complex cases — a so-called differentiated case management system similar to experiments New Jersey courts are now running in Bergen and Camden counties.

Each district would be free to set its own deadlines for discovery and motions. But for all districts, a judge, not a magistrate, would be required to hold a mandatory discovery and case management conference within 45 days of the first responsive pleading in a case. At the conference, issues would be identified, discovery schedules would be set, a pretrial conference date would be set, and in simple cases, a trial date also would also be established.

If the districts fail to devise a plan within a year, one is imposed on them from Washington.

The bill also contains a provision aimed at judges who are slow to make interim rulings. Four times a year, the courts would publish a report listing each judge's list of motions unresolved for more than 30 days, and how long they have been pending.

Distaste for Micromanagement

Gerry and Debevoise have no argument with the goal of the bill or its philosophical underpinnings. They just don't like the idea of what Gerry calls "an endless string of efforts in Congress to micromanage the business of the courts." What's more, the judges say, this particular bill would make things worse, especially in New Jersey. Debevoise lists three main objections:

• The bill ignores the root cause of civil trial delays — the crushing case load of criminal cases, which take precedence under speedy trial rules for criminal matters. What's the use of setting rigid deadlines for civil cases that won't be adhered to because of the crush of criminal business?

• The bill reduces the role of magistrates in scheduling and hands it back to the judges. This would be a time-consuming step backward in New Jersey, where several magistrates have earned reputations for moving cases quickly, Debevoise and Gerry say. "We [the judges] are a sweatshop and we've got to keep sweating on productive things, not things that take more time," Debevoise says. "In New Jersey, we've been able to hold our heads above water because of the magistrates' work."

• The bill would require each judge and district clerk to devote more attention to record keeping, which is already an overly time-consuming burden, Debevoise says. Additional records are especially onerous, he says, because most of the fiats in the Biden bill have already been instituted informally in New Jersey. For example, cases in this state are already on tracks. Judicial productivity is enforced by collective discipline, he says. Early conferencing of cases is already an established tool in the district, the judges say.

Gerry, who circulated memos about the bill to the 13 other judges and nine magistrates in the district, says he has heard no dissent from his negative opinion about the bill. He says judges around the country as well are beginning to express concern about the bill, but he says he knows of no organized opposition yet.

Three leaders of the state's federal bar say they agree with the judges' analysis. The president of the Association of the Federal Bar of New Jersey, Bruce Goldstein, of Saiber, Schlesinger, Satz & Goldstein in Newark, says he is most upset about what he perceives as an attempt to gut the magistrates' work.

At the State Bar's federal section, Orlofsky, a partner with Blank, Rome, Comisky & McCauley in Cherry Hill, and Collier, of Collier, Jacob & Sweet in Somerset, say they are prepared to work with their counterparts in other states to fight the bill.

Lipscher Connection

Orlofsky says one of the things that turned him off about Biden's proposal was the incantation of Robert Lipscher's name in Biden's introductory speech on the Senate floor.

Lipscher, director of New Jersey's Administrative Office of the Courts, is considered a seer among the nation's court managers, but he has been a lightning rod for the Bar's denunciations of court administration in New Jersey. Orlofsky says Biden's use of Lipscher's comments on differentiated case management to buttress the efficacy of the legislation, "made me laugh." Lipscher declines to comment.

The judiciary committee is scheduled to hold hearings on the bill this month, and an aide to the senator says the panel is willing to make changes. "We studied it carefully, and we think it's a very good bill, but it's not the holy grail," the aide says.

He says the committee is aware that the crush of criminal cases is not adequately addressed in the legislation and that a bill to be introduced later this year — presumably legislation calling for creation of new judgeships — will deal with the problem.

'Fear of God' in Litigants

Robert Litan, a senior fellow at Brookings who was reporter for the task force study, says there was a consensus among the members of the study group that the magistrates' system has not worked because only judges can "put the fear of God into the litigants. Things get lost in the black hole of the magistrates' offices."

He also says that New Jersey judges might be overreacting to fears of central control. The key feature of the bill is its provision that each court sets its own set of deadlines, taking into account its own circumstances, Litan says. "It may be that in New Jersey you already have the best system; in that case, if it ain't broke, don't fix it," he says.

If nothing else, the fight over this bill is likely to focus additional attention among New Jersey practitioners on the record of the District Court in moving cases. In the year ending June 30, 1989, 6 percent of the cases in the district were more than three years old — about average for the nation. And the civil case load per judge, 414 cases, also was about average. At the same time, the figures show that New Jersey judges were victimized by complexity. When the degree of difficulty was factored in, the average judge in only 11 districts had as big a civil workload as each of the 14 New Jersey judges.

The addition of large, multi-defendant, mob trials that tie up judges for months has put the district deeper in the hole in the past few years, Gerry says. New Jersey also suffers from the absence of a large cadre of senior judges, who help clear cases but are not counted in the workload statistics. New Jersey has only two senior judges, Mitchell Cohen, in Camden and Clarkson Fisher, in Trenton.

U.S. Magistrate Jerome Simandle, who sits in Camden, expresses the same concerns voiced by Gerry and Debevoise, but he says the legislation will spark a necessary debate. As long as the bill serves as a "catalyst" for discussion, that's fine he says, but not if it ends up being the remedy. ■

Shall vs. May

Judges Rebel Over One Word in Civil Reform Bill

BY ANN PELHAM

Judges are usually careful about words, but the federal judiciary is setting a new standard for particularity. A single word is the basis for the third branch's support of a House bill on civil justice reform—and its opposition to the Senate version.

The House legislation says efforts to improve management of civil cases "may" include six specific steps. The Senate bill says those six components, such as setting early trial dates, "shall" be part of every court's plan for reducing delay.

Congress is running out of time this session, though the judicial legislation could still be considered by a House-Senate conference committee this week. (As of Oct. 12, Senate approval of its version was expected under a "unanimous consent" agreement.)

Both the House and Senate have an incentive to settle up on civil reform: New federal judgeships are likely to be part of the package. The House has approved 61 additional district and circuit court judgeships, while the Senate bill provides for 77.

The current judges, through their Judicial Conference and the staff at the Administrative Office of the U.S. Courts, convinced the House Judiciary Committee to make a few key changes in the civil reform bill, which was originally drafted by Senate Judiciary Chairman Joseph Biden Jr. (D-Del.). Taking *shall* out was the most important alteration.

As Rep. Robert Kastenmeier (D-Wis.) told the House Sept. 27, "In the judges' view, such a requirement would constitute micromanagement, and they urged that the components of the expense and delay reduction plans be made discretionary." Kastenmeier chairs the House Judiciary Subcommittee on Courts, Intellectual Property, and the Administration of Justice.

PHILIPPE JENNEY

Sen. Joseph Biden Jr. has sparred for months with the judges.

But Biden, who already watered down his first version of the bill after protests from judges, is sticking with *shall*. He and the federal judiciary have sparred for months over the legislation and other matters. *(See "Biden Takes Judiciary to Task,"* Legal Times, *July 2, 1990, Page 7.)*

The judiciary also favors the House wording in another section. Both bills would institute a twice-a-year reporting system for each judge that would make public the number of motions and completed bench trials pending for more than six months. The list would also include cases more than three years old.

The House describes this measure as "Enhancement of judicial information dissemination." The judges prefer that to the Senate's heading: "Enhancement of judicial accountability through information dissemination." They balk at use of the word *accountability*.

As for the lists of new judgeships, the difference is greatest for the state of Texas, which gains 11 additional district judges in the House bill and only five in the Senate version. House Judiciary Chairman Jack Brooks is a Texas Democrat.

Although most new district judgeships are in areas with heavy drug caseloads, some jurisdictions with no major case increases are slated to get new judges, usually for political reasons. These slots, in places like Maine, Wyoming, and Utah, will likely be the first to go in conference.

The House judiciary panel had originally approved 59 new judgeships, but the bill was modified before floor consideration to include two additional district slots. The two judgeships, which also appear in the Senate bill, are in Washington and Illinois, states that also happen to be home to House Speaker Thomas Foley (D-Wash.) and House Minority Leader Robert Michel (R-Ill.).

Rep. Robert Kastenmeier went to bat for the federal judges.

Neil E. Bogan

Letter From THE PRESIDENT

CIVIL JUSTICE REFORM ACT OF 1990 A TOPIC FOR REVIEW

There is presently pending in both Houses of Congress proposed legislation which may have a substantial impact upon the trial of civil cases in the Federal Courts. These bills are virtually identical in nature and are being referred to as the Civil Justice Reform Act of 1990. The expressed purpose of the Act is to reduce costs of litigation, enhance the speedy resolution of civil disputes, explore alternative means of dispute resolution and avoid over lawyering. In the United States Senate, the Act is embodied in Senate Bill 2027 and in the House of Representatives Bill 3898.

Apparently, this proposed legislation is progressing quite rapidly through the Judiciary Committee of the U.S. Senate. Some of the highlights of the Bill include the following:

- Each federal district court developing a case management plan within one year. (Failure to do so would subject the district to a proposed model plan.)
- Each plan to include a system for tracking cases, with three or more tracks separating simple cases from complex ones.
- Initial track assignments to be handled by the Clerk of the Court or a designated staff person.
- For each track, the plan is to set time limits for completion of discovery.
- Judges will be required to set early, firm trial dates.
- An initial conference presided over by a judge, not a magistrate, to be held within 45 days of the first responsive hearing for establishing a discovery schedule, dates for filing and hearings on pretrial motions and, except for complex cases, the specific trial date.

Concern has been raised from several sectors relative to the impact of the proposed legislation. We are in the process of creating a coalition of OBA Committees and representatives of the Oklahoma Trial Lawyers Association and Association of Defense Counsel to undertake an indepth review of the Act and report its findings and conclusions. Some of the early concerns expressed are that the proposed legislation:

1. Denies the Court and legal counsel flexibility in the handling and scheduling of cases.
2. Substantially hinders the ability of opposing counsel, who are most knowledgeable about a case, assisting in determining the time table within which to schedule discovery and trial.
3. Removes the magistrate from participation in the discovery process which may lead to gridlock depending on each court's case load.
4. Fails to take into consideration the increase in criminal cases nationally.
5. Does not address the priority of criminal cases over civil cases pursuant to the Speedy Trial Act and the inability to ascertain the nature and volume of these cases and the effect they might have on setting firm dates for hearings

and trials in civil cases.

6 Does not consider the inherent limitation on the number of cases which may be scheduled in a given calendar year and the effect that settlement prior to trial might have on the court's docket.

7. May effectively prevent the sole practioner and medium size law firms from handling and maintianing any substantial federal practice.

It has been suggested that rather than imposing national legislation, the perceived problems might be better addressed through the Federal Judicial Conference. In the alternative the issue could be addressed by implementation of pilot programs in jurisdictions in which there have been problems in getting civil cases brought to trial to ascertain how the proposed legislation would actually function and otherwise impact both the bench and the bar.

For those attorneys practicing in the federal courts, the proposed legislation should be of special interest and perhaps concern. If you would like a copy of the proposed Senate Bill, then I would urge you to contact Marvin Emerson, Executive Director of the OBA. After review of the proposed leglislation, I would also encourage you to make your opinions known to our Oklahoma Congressional Delegation in order that they might be allowed the opportunity to make a truly informed decision based upon input from individuals most directly impacted by these proposals.

Very truly yours,

Neil E. Bogan

Neil E. Bogan, President

OFFICIAL ROSTER CHANGES MUST BE COMMUNICATED IN WRITING

All official membership roster address changes must be communicated in writing by the attorney for whom the request is being made. No official membership roster address changes will be accepted by telephone or from third parties. Offical membership roster address changes are needed so we may have a current address for mailing your DUES STATEMENTS, BAR JOURNAL and other correspondence. Return this form along with your address label from the back cover to: **Oklahoma Bar Association, Computer Department, P.O. Box 53036, Oklahoma City, OK 73152.**

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Judicial Conference plan clashes with Biden bill

By JANAN HANNA
Law Bulletin staff writer

When the U.S. Senate Judiciary Committee held its first public hearing on a proposed bill aimed at reforming the civil justice system, the Judicial Conference of the United States criticized the legislation as "extraordinarily intrusive into the internal workings of the Judicial Branch."

Three months later, the conference has adopted its own plan to reduce costs and delays of civil litigation, focusing on preserving the autonomy of each federal court district.

The conference drafted its 14-point plan, which calls on each district court to form an advisory group to study and recommend improvements in case management, after gathering the views of trial judges from throughout the country — most of whom have been outspoken critics of the pending Civil Justice Reform Act of 1990 proposed by Sen. Joseph Biden, D-Del.

The conference plan, a vague set of criteria seemingly aimed at heading off congressional intrusion of the judiciary, does not impose specific guidelines on federal judges.

Rather, each district is required to study its own case management system by "assessing" current docket conditions, identifying sources of increased costs and delays in civil litigation, "recommending" measures to reduce any problems, fielding proposed solutions to the Judicial Conference, and implementing them.

While basically playing a peripheral role, the Judicial Conference will advise the districts on ways to improve case management.

Chief U.S. District Judge John Grady of the Northern District of Illinois said he hadn't yet studied the conference's program, but he emphasized that judges should be free to manage their dockets without dictates from a court committee or Congress.

"We're open to any suggestions [on case management] from any body," Grady said. "I think each judge of the court has a definite case managment plan in place.

"I have no objection to studying the problem on a court-wide basis, but I would be opposed to telling each judge to adopt a plan. Our best ideas evolve from individual experimentation. To impose some district-wide system implies we have

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PLAN

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Plan

Continued from page 1

the final answer, and we don't. Case management is something that is going to continue evolving. The more people we have experimenting, the better."

The Biden bill, still pending in committee, calls upon a planning committee in each federal district to develop a case management system.

Cases would be divided into three tracks — expedited, complex and standard — and disposed of in a certain period of time. While the court planning committee would monitor the disposition of all cases, judges, too would be required to develop a case management plan.

Further, all judges would be required to hold a discovery case management conference in all cases and set firm trial dates.

The Conference's program was adopted as a reaction to the Biden bill, Conference spokesman David Sellers said. The Conference program is more flexible than pending legislation, recognizing that different districts and different judges have different needs, Sellers added.

Judges Bristle at Biden's Civil Reform Plan

Package Ignores Criminal Caseload, Jurists Charge

BY ANN PELHAM

The lawsuit against New York Air was filed in December 1985, just two months after the airline refused to let a disgruntled passenger off a plane that had been sitting on the runway at National Airport for more than three hours. By June 1987, after extensive discovery, both sides had moved for summary judgment.

But not until Jan. 31, 1989, more than a year and a half later—and three years after the lawsuit was filed—did U.S. District Judge John Garrett Penn issue his opinion siding with defendant New York Air—which by then had gone out of business.

Such a long delay, now usually known only to frustrated litigants afraid to speak out, would be made public as part of a civil judicial reform package now on a fast track through the Senate.

Sponsor Joseph Biden Jr.(D-Del.), chairman of the Senate Judiciary Committee, has already lined up support from key legislators as well as almost every interest group that would be affected, from insurance companies to plaintiffs lawyers to civil-rights activists.

They all agree that civil litigation takes too long and costs too much—and that judges must take tighter control of their cases.

"We're saying to the judges that they've got to be managers—and they can use any tool that they can get everybody [in the district] to agree on," says Bill Wagner of Tampa, Fla.'s Wagner, Cunningham, Vaughan & McLaughlin and the former president of the Association of

SEE CIVIL, PAGE 18

Bill Wagner: Judges must learn to manage caseloads efficiently.

Judges Greet Court Reform Proposal With Dismay, Anger

CIVIL FROM PAGE 1

Trial Lawyers of America (ATLA).

But the powerful push for the proposal has left the federal judges reeling. With many districts swamped under a heavy criminal caseload because of tougher drug laws and stepped-up drug prosecutions, a drive for civil reform seems to many judges poorly timed, at best.

"They're out of touch with the real world," says one judge bitterly. "We were never consulted at all."

Late List

Under Biden's proposal, each district would have to develop its own plan to limit discovery and set firm trial dates, with simple cases on a faster track than complex ones. Four times a year, the courts would publish a list of motions pending for more than 30 days—with the names of the tardy judges alongside. *(See the accompanying box, "Highlights of S. 2027.")*

"There's got to be some order to this system," says Mark Gitenstein of the D.C. office of Chicago's Mayer, Brown & Platt, a former Judiciary staff director for Biden who headed a task force that studied the problem at the senator's behest. "Right now the lawyers are running [the system], not the judges."

But judges point out that districts particularly hard hit by drug cases, like those along the southern border and in large urban areas, have been forced to put civil cases at the back of the line, with a wait of three years for a simple case not uncommon.

"If I don't get more judges in the next two to three years [to help with drug cases], we'll just have to say adios to civil

RUSS CURTIS

Judge Robert Peckham supports some case-management concepts.

cases," predicts Chief Judge Lucius Bunton of the U.S. District Court for the Western District of Texas.

The increase in prosecutions has left few areas untouched. Diana Murphy, a federal district judge in Minnesota and president of the Federal Judges Association, says she had to recess a civil jury trial in November to handle a criminal case.

"Since then, it's been one criminal trial after the next, and the lawyers and parties in the civil case are still out there dangling," says Murphy, who is polling the association's executive committee about whether to take a position on the bill. Personally, she was upset by the proposal.

"I didn't know whether to laugh or cry—I was so depressed when I read it," says Murphy. "Senator Biden is obviously an experienced, able senator, but this indicates such a lack of understanding of what life is like in the federal courts today."

Judicial Concern

Even judges less affected by drug prosecutions are concerned about the Biden approach. They say Congress is once again impinging on the judiciary's independence and trying to micro-manage the courts.

"We have no problem with the concept of case management," says Chief Judge Robert Peckham of the U.S. District Court for the Northern District of California and an advocate of case-tracking and other tools to advance the docket. "The problem is with the detail of the bill."

Judges must already comply with the deadlines for criminal trials set by the Speedy Trial Act, which took effect in 1979, and with the Federal Sentencing Guidelines, which the Supreme Court upheld in early 1989. Congress has also included mandatory minimum sentences in many recently passed drug provisions.

Adding to the judges' consternation is Biden's rush to move civil reform. The first committee hearing is set for March 6, a full week before the mid-March meeting of the Judicial Conference, the governing body of the judiciary and usually the voice of that branch on legislation.

The importance of the bill, though, prompted the group's leaders to pick a witness to represent judges at the hearing—even though there hasn't been time to agree on an official position. Chief Judge Aubrey Robinson Jr. of the U.S. District Court for the District of Columbia will testify March 6.

Whatever Robinson says, it will be clear from the outset that the judges are not speaking with one voice on this issue. Judge Richard Enslen of the Western District of Michigan is flying in from Kalamazoo to testify in favor of the legislation.

Some judges contend that the quickly scheduled hearing snubs a group set up by Congress to recommend court reforms. The Federal Courts Study Committee, a panel of legislators, judges, and others, is due to make its final report April 2.

SEE CIVIL, PAGE 19

Judge Diana Murphy: Biden's bill reveals "lack of understanding."

CIVIL FROM PAGE 18

But the realists among the judges swallow their pride, frustration—and even anger—in hopes of winning a seat at the negotiating table.

"It is a very detailed bill that affects quite a number of procedures," says Chief Judge Charles Clark of the U.S. Court of Appeals for the 5th Circuit and chairman of the Judicial Conference's Executive Committee. In order to craft a quick response, Clark appointed the conference's first ad hoc committee, headed by Judge Peckham. "We hope the judiciary can make some constructive comments."

The judges, though, start out at a disadvantage. Biden has been working for two years to get diverse interests to back civil reform.

In 1988, he set up, under the auspices of the Brookings Institution and his own Foundation for Change, a 36-person task force that met six times and issued a report, "Justice for All," in late 1989. Most of that proposal is now incorporated in the legislation, which has the enthusiastic support of Sen. Strom Thurmond (R-S.C.), ranking minority member of the Judiciary panel.

Even the judiciary's complaints were anticipated; Biden included on the task force four former federal judges now in the private sector.

"I'm sure it's causing some consternation among my former colleagues," offers task force member Frank McFadden, a former chief federal judge in Alabama and now general counsel of Blount Inc. "Federal judges don't like to be told what to do by anybody."

And that can include colleagues who offer advice. Confidential tallies are already kept of which judges have had motions pending for more than 60 days, so chief judges know which members of their districts are slow.

But most chief judges are reluctant to chastise a fellow judge either for slow decision-making or for a poorly organized docket.

If they do nag a colleague, the criticism can be ignored. Federal judges are appointed for life, and a chief judge has no power over other judges—other than to withhold new assignments from a judge with a serious backlog. This "sanction" simply means more work for other judges who have managed to keep their dockets current.

But reluctance on the part of judges to police each other has left an opening for Congress—and Biden is rushing to fill it.

Head Start

Key House members appear to be more cautious, and traditionally the judges have received a sympathetic reception from Rep. Robert Kastenmeier (D-Wis.), who chairs the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice. But Kastenmeier, Judiciary Committee Chairman Jack Brooks (D-Texas), ranking minority member Hamilton Fish Jr. (R-N.Y.), and others have introduced the Biden bill in the House.

As for the Senate Judiciary panel, staff members insist that senators are open to suggestions from the judges and plan a second hearing if necessary.

"No one's interested in ramrodding it through," says one staff member.

But the bill has a head start because well-placed members of the task force stand ready to endorse what is essentially their product.

"It is important to retain access to the courts—we need the judiciary so badly to hear the kinds of cases we bring," says Marcia Greenberger, a member of the task force and executive director of the National Women's Law Center, which focuses primarily on discrimination cases. "People we represent don't have any other remedy or forum."

Another member of the task force, Jamie Gorelick of D.C.'s Miller, Cassidy, Larroca & Lewin, says that having a case that doesn't move forward is "demoralizing and distorting to the process." She adds, "If you don't have a trial date on the schedule, there's nothing lighting a fire under the parties to encourage settlement."

Supporters emphasize that the legislation gives each district a chance to develop its own approach. Only if a district does not come up with a management plan is a "backup" plan imposed.

"This does not say you shall try every case in *X* number of days," says Gitenstein, the former Biden aide. "If we had given them much more flexibility, the proposal would have been mealy-mouthed." Many in the group wanted more specificity, with set limits on the length of discovery applied nationwide, says Gitenstein.

Many federal districts already have in place time limits and other case-management concepts suggested in the Biden bill. In the Middle District of Georgia, for example, local rules limit discovery to four months, notes Judge Robert Hall.

But court administrators in Washington have traditionally done little central record-keeping of these local management rules, which makes it harder for judges to use that as evidence to fight the proposal.

Statistics kept by the Administrative Office of the U.S. Courts show 14 months as the median time for a case to get to trial once a response is filed. When settlements and other dispositions are also included, the median drops to nine months.

But those reasonably positive statistics mask the problem, according to many on the task force.

"For some complex cases, involving toxics or airline crashes, 14 months is not enough," says Wagner, the former ATLA president. "Yet when I have a personal-injury case involving two cars, I ought to be able to get to trial in six months."

Stephen Middlebrook, vice president of Aetna Life and Casualty, points to "huge backlogs and tremendous delays," which cause his industry to spend more money on litigation than it does on actual claims—once medical-malpractice cases are excluded. "The process is not tightly controlled, and it has run amok."

Some judges agree with Middlebrook and are ready to accept the Biden bill without protest.

"We have made it horribly expensive to litigate," says U.S. District Judge Carl Rubin of the Southern District of Ohio. Although he gripes about additional paperwork, Rubin concludes, "What the hell, let's try it. If it doesn't work, it can be changed."

Supporters for the bill are likely to share Rubin's philosophy favoring a current docket. "It's not hard to keep things moving if you get tough," Rubin says. "The lawyers may not like you, but in 19 years, I'd say I've not granted 25 continuances."

Among the "rocket docket" set is Chief Judge Bunton, in Western Texas. He even offered to take over lagging civil cases from slower colleagues—and got 45 or 50. "I got rid of them," says Bunton, who recently finished a contract dispute trial in three days—by going until 10 p.m. one night and till midnight another.

"You shorten trials if you have longer days," says Bunton. "I've never had a case go into the third week in 10 years on the bench."

But for every judge who keeps a rocket docket, there seems to be a colleague at the other end of the spectrum. Judge Penn's 18-month review of relatively simple summary-judgment motions in the New York Air case was but one of many times he was slow to make a decision.

This time, the delay did not go unnoticed upstairs in the courthouse, where a panel of the U.S. Court of Appeals for the D.C. Circuit last month heard oral argument in the appeal by the passenger, James Abourezk, a former Democratic senator from South Dakota. He claimed false imprisonment and sought damages, a novel argument never before raised in the District in an airline dispute.

The appeals court upheld Penn's ruling against Abourezk. But the three judges acted at what amounted to breakneck speed, issuing the opinion in properly printed form just two weeks after the Feb. 2 oral argument. (A more typical lag time between argument and opinion is two months.)

The near record turnaround seemed intentional—and designed to underscore Penn's tardiness. □

Highlights of S. 2027, Proposed Federal Civil Reforms

- Each District Court would have to develop a case-management plan within a year. The chief judge would appoint a committee to draft the plan, with representatives from the bench, the bar, and the public. The plan would become part of the local rules.
- If a district failed to enact a plan, a model plan, to be developed by the Judicial Conference and the Federal Judicial Center, would be imposed.
- Each plan would have to include a system for tracking cases, with three or more tracks separating simple cases from complex ones. Designation would be based on number of parties, number of claims and defenses raised, difficulty of legal issues, and complexity of subject matter.
- Initial track assignment would be handled by the clerk of the court or a designated staffer. Lawyers for parties could suggest a different track; disputes would be resolved by the judge within 30 days.
- For each track, the plan would suggest presumptive time limits for completion of discovery. Judges would also be required to set early, firm trial dates.
- An initial conference, presided over by a judge, not a magistrate, would be required within 45 days of the first responsive pleading. At that time, the judge would set a discovery schedule, dates for filing of and hearings on pretrial motions, and, except for complex cases, the trial date (for a specific day, week, or month). The judge would also have to determine then whether to involve a magistrate in the case and, if so, the magistrate's tasks.
- Each District Court would have to offer litigants alternative dispute resolution, including mediation, arbitration, a mini-jury trial or a summary jury trial, and early neutral evaluation.
- Each District Court would also be required to take an inventory of its case backlog and to develop a plan for reducing the backlog.
- Each District Court would be required to issue a quarterly report on each judge's caseload. The report would list all motions pending before each judge for more than 30 days, with the age of motions marked in 30-day increments. The report would also list, for each judge, the number of written opinions issued, the number of bench trials, and the number of jury trials.

Last-Minute Judgeships

Congress Shoves Civil Reform on Federal Courts

BY ANN PELHAM

Legislation to reform how federal courts handle civil litigation—a proposal that initially sent the federal judiciary into a monstrous snit—was approved in the final hours of the 101st Congress.

A compromise on language mollified the judges, who had objected to earlier versions that sounded like congressional directives on how to run the courts.

Left intact, however, was a new requirement aimed at exposing judges who are slow to make decisions. Each federal judge will have to list publicly, twice a year, the motions and other matters that have been pending before the judge for more than six months.

The bill also included a major sweetener: 85 new federal judgeships. (*See accompanying list.*)

The fate of the civil reform bill was in doubt until the end. Although House and Senate negotiators had worked out a compromise measure by Oct. 24, Senate Judiciary Chairman Joseph Biden Jr. (D-Del.) had trouble getting a Senate floor vote. Sen. Howard Metzenbaum (D-Ohio) put a hold on the bill to gain leverage in his long-running dispute with Sen. Strom Thurmond (R-S.C.) on an unrelated antitrust issue.

That tug of war went on for days, finally ceasing Oct. 26 with a written promise to Metzenbaum that the judiciary panel would vote next year on his resale price maintenance bill, an antitrust measure designed to protect discount retailers from unfair pricing practices.

PHILIPPE JENNEY

Sen. Joseph Biden Jr. led the fight for civil litigation reforms.

In the meantime, with few other legislative vehicles left, senators lined up to add new titles to the judicial bill. By the end, provisions on subjects like curbing television violence and protecting the rights of sculptors had been slipped into the legislation.

The Senate voted in the early evening of Saturday, Oct. 27. The House gave its approval by voice vote just after midnight on Oct. 28.

Splitting the Mandate

In the House-Senate negotiations several days before, the haggling had been over a one-word difference between the two versions of civil reform.

The Senate Judiciary Committee, which drafted the bill last spring to reduce cost and delay in civil litigation, said each District Court's management plan "shall" work through certain principles, including setting early trial dates, putting cases on special tracks, tightening judicial oversight of discovery, and aggressively monitoring settlement talks. Each judicial district will devise its own plan, with input from a citizen advisory panel named by the chief judge.

The judiciary, whose views were expressed by individual federal judges and by staffers from the Administrative Office of the U.S. Courts, opposed the Senate proposal as micro-management of the courts. The House bill, passed Sept. 27 with the judges' support, said that plans for management of civil litigation "may" include the congressional guidelines.

The compromise that eventually passed artfully incorporates both the mandatory "shall" language and the voluntary "may" instruction. It directs that local advisory committees and judges "shall consider and may include" the principles.

"We find the bill more palatable than the original version," says David Sellers, spokesman for the administrative office.

Congress, however, did force part of the judiciary to implement the reforms detailed in the legislation. Senate negotiators successfully pushed for a pilot program that requires 10 districts to follow the guidelines. After three years, an independent study will compare the results of those plans to the conditions in districts not in the pilot.

By the end of 1995, the Judicial Conference will either mandate that other districts follow the guidelines—or suggest alternative cost- and delay-reduction programs.

Horse Trading

New slots on the federal bench were last added six years ago. This time, the House and Senate had different ideas about how many new judgeships to create and where they should be located. The House called for 61 new posts, while the Senate wanted 77.

Biden had apparently expected a showdown with House Judiciary Chairman Jack Brooks (D-Texas) over the judgeships. To strengthen his negotiating hand, Biden put only four new district judges for Texas in his bill, while Brooks—as well as the Judicial Conference—thought Texas needed nine new district judges to handle its growing drug caseload.

The drama fizzled when negotiators agreed to include all the judgeships in both bills, for a total of 11 appellate slots and 74 district slots, including nine in Texas.

Although 13 of the 74 positions at the District Court level are considered temporary, with their existence certain for only five years, all temporary posts created in recent years have eventually been made permanent.

The Senate was more inclined than the House to put judges in districts where a clear need had not been demonstrated, but where new judgeships seemed politically prudent. The districts of Maine, New Hampshire, Middle North Carolina, Western Tennessee, Middle Georgia, Northern Florida, Eastern Washington, Utah, and Wyoming received new judgeships even though the Judicial Conference's statistics did not show that courts there were overloaded. □

U.S. APPELLATE COURTS

3rd Circuit	2
4th Circuit	4
5th Circuit	1
6th Circuit	1
8th Circuit	1
10th Circuit	2

U.S. DISTRICT COURTS

Western Arkansas	1
Northern California	2
Central California	5
Southern California	1
Connecticut	2
Northern Florida	1
Middle Florida	2
Southern Florida	1
Middle Georgia	1
Northern Illinois	1
Southern Iowa	1
Western Louisiana	1
Maine	1
Massachusetts	1
Southern Mississippi	1
Eastern Missouri	1
New Hampshire	1
New Jersey	3
New Mexico	1
Eastern New York	3
Southern New York	1
Middle North Carolina	1
Southern Ohio	1
Northern Oklahoma	1
Western Oklahoma	1
Oregon	1
Eastern Pennsylvania	3
Middle Pennsylvania	1
South Carolina	1
Eastern Tennessee	1
Middle Tennessee	1
Western Tennessee	1
Northern Texas	2
Eastern Texas	1
Western Texas	3
Southern Texas	5
Utah	1
Eastern Washington	1
Northern West Virginia	1
Southern West Virginia	1
Wyoming	1
Temporary Judgeships	
Northern Alabama	1
Eastern California	1
Hawaii	1
Central Illinois	1
Southern Illinois	1
Kansas	1
Western Michigan	1
Eastern Missouri	1
Nebraska	1
Northern New York	1
Northern Ohio	1
Eastern Pennsylvania	1
Eastern Virginia	1

Washington Report

Attacking Court Costs and Delays

BY RHONDA McMILLION

The federal courts are poised to implement a new law requiring them to develop within one year and implement over the following three years plans to cut costs and reduce delays in civil litigation.

The ABA, which was instrumental in developing the new legislation, will monitor carefully the implementation of the sweeping reforms in the new law.

The final version of P.L. 101-650 (H.R. 5316), which was enacted Dec. 1, evolved from a much more rigid proposal, first unveiled in January 1990, by Senate Judiciary Committee Chairman Joseph R. Biden Jr., D-Del. Biden, convinced that immediate action was necessary to bring civil court costs and delay under control, introduced a measure that would have mandated the management principles in each district court's cost and delay reduction plan.

Responding to concerns raised by the Judicial Conference and the ABA Special Coordinating Committee on Civil Justice Reform, Congress compromised on the mandatory provisions. While all 94 district courts will be required to implement plans, the contents of the plans will be mandated in only 10 districts, to be designated by the Judicial Conference for participation in a four-year pilot project.

The other district courts "shall consider and may include" the new law's principles and guidelines covering areas such as systematic, differential treatment of civil cases based on such criteria as case complexity; early and ongoing control of the pretrial process through involvement of a judicial office in setting early, firm trial dates, deadlines for filing motions, and time frames and volume for discovery; and referral of appropriate cases to alternative dispute resolution.

After three years, an independent study comparing the relative efficiency of the mandatory and permissive districts will be used as a basis for Judicial Conference rules regarding possible expansion of mandatory plan components.

A first step in developing the plans required each district court by March 1 to set up an advisory group of attorneys and representatives of major categories of litigants to assess the court's civil and criminal dockets and make recommendations.

Joseph R. Biden

Courts that institute their plans between June 30 and Dec. 31 of this year will be considered Early Implementation Districts, making them eligible for additional resources from the Judicial Conference that may include technological and personnel support and information systems to help implement their plans.

The Judicial Conference also will be conducting an additional two-faceted four-year demonstration program. The Western District of Michigan and the Northern District of Ohio will experiment with systems of differentiated case management for processing cases under distinct and explicit rules, procedures and time frames. The Northern District of California, the Northern District of West Virginia and the Western District of Missouri will experiment with various alternative methods of resolving disputes selected by the courts and the Judicial Conference to reduce cost and delay in civil litigation.

Another aspect of the new law requires the director of the Administrative Office of the U.S. Courts to prepare a semi-annual report, available to the public, that discloses for each district judge the number of motions and bench trials that have been pending for more than six months and the names of each case, and the number and names of cases that have not been terminated within three years of filing.

While the civil justice reform provisions are the cornerstone of P.L. 101-650, the new law also increases judicial resources by creating 11 circuit and 74 district judgeships, and calls for a national commission on judicial impeachment to investigate the scope of problems related to appointing judges for life tenures. The impeachment study provisions, supported by the ABA, provide that the commission will consider alternatives to congressional proceedings for impeachment and report its findings and recommendations to Congress and the president within one year.

In addition, a major title of the omnibus legislation implements numerous non-controversial recommendations of the Federal Courts Study Committee, which issued its final report last April.

The provisions authorize studies on intercircuit conflicts, structural alternatives for the federal courts of appeal, and the effectiveness of the Federal Defender Program under the Criminal Justice Act of 1964.

A revised retirement system for U.S. Claims Court judges also is encompassed within the legislation as well as provisions changing the title of magistrate to U.S. magistrate judge, affecting the terms of bankruptcy judges and authorizing multicircuit bankruptcy appellate panels to determine appeals. ■

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Wednesday, October 25, 1989

The Los Angeles Daily Journal

Task Force Asks Broad Reforms In Civil Justice

Report Says System Is 'Under Attack'; Attorneys Blamed

'Excessive Cost and Delay'

By Charley Roberts
Daily Journal Staff Reporter

WASHINGTON — Responding to complaints of delay and unfairness in the nation's civil justice system, a task force of 36 legal experts — including lawyers for plaintiffs and defendants, consumer organizations and the insurance industry — has reached a consensus on broad reforms to reduce bloated court dockets and the escalating costs of litigation.

"Excessive cost and delay associated with litigating civil cases in America should no longer be tolerated and can be forcefully addressed through procedural reform, more active case management by judges, and better efforts by attorneys and their clients to control cost and delay," the task force said in a report to be released here today.

The task force was led by Robert E. Litan, senior fellow at the Brookings Institution, and Mark Gitenstein, executive director of the Foundation for Change and former chief counsel to the Senate Judiciary Committee.

Two California Members

Among its members were two Californians: former U.S. Circuit Judge Shirley Hufstedler, now a partner at Hufstedler, Miller, Kaus & Beardsley in Los Angeles; and Charles B. Renfrew, a former U.S. district judge and deputy U.S. attorney general who is now vice president for law of the Chevron Corp.

Sen. Joseph Biden, D-Del., praised the work of the task force, which he proposed, and said he would make implementation of its recommendations a high priority for the Senate Judiciary Committee, which he chairs.

The report is titled "Justice for All." Published by Brookings, it says the American system of civil justice is "under attack" from clients, legislators, judges and attorneys for its inefficiency and lack of fairness.

Grumblings about the current system were quantified in a survey by Lou Harris & Associates in mid-1988. The telephone poll of more than 1,000 participants in the system found that more than half of the federal judges, corporate counsel and public-interest litigators, as well as 40 percent of private litigators, believe transaction costs in litigation are a major problem that has worsened over the past decade.

High costs "unreasonably impede access to the civil justice system by the ordinary citizen," the survey found. And the most important cause of high costs and delays is abuse by attorneys of the discovery process, the blame for which is shared by lawyers for plaintiffs and defendants.

The survey also found that a majority of lawyers, and even judges, believe judges contribute to this problem by failing to control discovery.

Applicable to States

Although the report focuses on flaws and solutions in the federal system, the task force said its findings will apply to many states and localities. Indeed, some served as models for specific recommendations, it said.

Among its findings, the task force recommended that:

• Congress require each federal district court to develop its own "civil justice reform plan," which would include provisions for assigning cases of differing degrees of complexity to different "tracks"; mandatory initial conferences

See Page 11 — REFORM

Civil Justice Reform Asked

Continued from Page 1

to schedule discovery and trial; possible alternatives for dispute resolution, and early, firm timetables for each stage of the process.

• Judges should take a more active role in managing their cases, ending the practice in some courts of delegating to magistrates functions that are better performed by judges. At the same time, the task force said the federal judiciary should be given more resources to do its job. This should include added staff, more judges and a pay raise for the judiciary.

• The bar and clients should place much greater emphasis on reducing litigation costs and delay, and take steps to accomplish this objective.

The last recommendation may prove to be the most controversial. As the task force noted, the practice of law in the United States has evolved from a profession to a business. "This change in the structure of the profession — especially the emphasis on higher billable hours — has noticeably affected the conduct of litigation, most specifically in the area of discovery."

Controlling Costs

In an effort to curb the effects of this trend, the task force recommended two broad approaches for clients: bring more litigation "in-house" and exercise greater supervision over outside counsel.

"While the data are sparse, hiring in-house counsel to conduct routine, and often highly repetitive, litigation appears to reduce costs," it said.

A recent survey by Arthur Young & Co. found that major corporations are already moving in that direction, said the report. The study found the number of corporations handling some litigation in-house climbed from 37 percent in 1983 to 75 percent by 1987.

There are limits to the cost savings to be realized from moving legal work in-house. But even where the specialized expertise of outside counsel is needed, the task force said better supervision could reduce costs.

Specifically, the report recommended increasing corporate counsel's involvement in case management, including attending trials; developing a computer-based case-tracking system that allows the corporation to follow day-to-day litigation actions; using computerized systems to develop cost data and litigation budgets; encouraging the use of more paralegals and non-lawyers to read and summarize files and documents; and appointing a corporate record supervisor to monitor and facilitate record production.

In pressing for those and other changes, the task force states that it does not advocate adoption of a uniform set of reforms to be applied by all district courts. Nor does it believe it useful to have Congress make the judgments for the district courts.

But it does urge Congress to direct, by statute, each federal district court to develop a reform plan within 12 months. Any district that fails to meet this deadline should have a model plan, developed by the judicial council in that circuit, automatically imposed on it. These backup plans should be prepared even as the individual districts are preparing their plans.

The Federal Judicial Center should be required to report progress on the plans to Congress within 18 months of enactment of this legislation, the report said.

Three-Track Approach

Each district's plan should include a system for assigning cases at the outset to one of probably three tiers or tracks, based on complexity. After that assignment, a case will be given a timetable for discovery, motions and trial date. Standards should reduce abuses and transaction costs, the report added.

Using the example of a three-track system, the task force said the "expedited" track might have a discovery guideline of 50-100 days, the "standard" track 100-200 days, and the "complex" track six to 18 months.

'[M]indful of many past efforts to accomplish the same or similar objectives, we made every effort to avoid reinventing the wheel.'

The report recommends limiting delays of trials and discovery deadlines to stringent "good-cause" exceptions. It suggests as a possible model for the districts to adopt Section 2.55 of the American Bar Association's Standards Relating to Court Delay Reduction (1984). Under this scheme, the court would cross-reference all requests for continuance and extension by the name of the lawyer, and any lawyer who persistently makes such requests may be restricted in the number of cases in which he or she may participate at a given time.

Motions to bar various lines of discovery should be promptly decided, the task force added. To push for early resolution, neutral evaluation procedures and mandatory case management conferences should be provided soon after a case is filed.

The report urged Congress to require that each district plan have a system so that authorized parties with decisionmaking power can be present or available by telephone during any settlement conference.

There is some dispute over the power of the courts currently to do this. But the task force noted that the 7th U.S. Circuit Court of Appeals recently affirmed a district court ruling assessing sanctions on a party in *G. Heilman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (1989).

The report also proposes shortening the current provision allowing 120 days for service of process to 60 days in order to accelerate scheduling of initial alternative dispute resolution and mandatory settlement conferences.

Computerized Dockets

To increase the likelihood that timetables will be followed, the task force said the Administrative Office of the U.S. Courts should direct each district to computerize its docket so that quarterly reports can be made public showing motions pending before each judge in 30-day increments.

"We believe that substantially expanding the availability of public information about caseloads by judges will encourage judges with significant backlogs in undecided motions and cases to resolve those matters and to move their cases along more quickly," stated the report.

The report also recommended that each district's plan ensure that magistrates not perform functions better left to judges and that judges using magistrates monitor their activities.

Finally, the task force said each district with a backlog should include in its plan a mechanism for reducing it.

The task force noted that it is hardly the first to address these issues: "[M]indful of many past efforts by distinguished bodies to accomplish the same or similar objectives . . . we made every effort to avoid reinventing the wheel." But it said the report is "unique in one significant respect" — a consensus by a broad spectrum of experts and participants on how to improve it.

The recommendations generally follow those presented four years ago in a study for the American Bar Association. Theodore Kolb, a senior partner in the San Francisco law firm of Sullivan, Roche & Johnson, was chairman of the ABA Task Force on Reduction of Litigation Costs and Delay that did the study.

"You start as a voice in the wilderness, and the more people validate what you say, the more other people listen," said Kolb. "This validates what we have been saying."

The Legal System as Blackmail

What makes change of this sort so difficult, he said, is that it requires changing the legal culture. "Our legal system is becoming a blackmail tool rather than a system for resolving disputes."

But change is taking place, say Kolb and U.S. District Judge Robert Peckham.

"I think the California district courts are in the forefront of the federal trial judiciary in implementing good case management and alternatives to formal litigation," said Peckham, former chief judge of the Northern District of California whose innovations helped form some recommendations.

'Our legal system is becoming a blackmail tool rather than a system for resolving disputes.'

Theodore Kolb
Sullivan, Roche & Johnson

"Some districts are doing many of these things, but we can all continue to examine our performance," he added.

The federal courts in Los Angeles and San Francisco have, for some time, assigned cases to a single judge from the time they are filed. The Northern District employs a "staged" discovery, which seeks to facilitate resolution without exhausting discovery. It also uses lawyers acting as mediators to conduct early neutral evaluations of cases.

But Peckham mildly dissents from the task force's recommendation that judges delegate less to magistrates. "Judges shouldn't delegate without assuming responsibility," he said. "But that is not the same as a judge using a magistrate. Magistrates are of enormous assistance in our district in conducting over 700 settlement conferences a year."

Praise for Lucas

As for state courts, said Peckham, "Under Chief Justice Malcolm Lucas great strides are being taken to implement case management, such as individual assignment of cases, firm trial dates and a fast track for certain cases."

Kolb, too, has praise for Lucas' efforts. "Anything done by just the courts or the bar is destined to fail. It has to be coordinated by the bench and bar. Fortunately, Chief Justice Lucas is dedicated to the program and will make sure it works."

Courts in nine California counties are experimenting with time and trial reduction techniques this year. Those proven successful may be mandated statewide next year.

Kolb noted that the courts in San Diego County, which revamped its process before the experiment began, have reduced the average time it takes cases to get to trial from four years down to two. By comparison, cases take an average of five years to reach trial in Los Angeles County.

The key to reducing costs and delay is to focus attention on cases sooner in the pipeline, he said. Nationwide, only 3 percent of the cases filed go to trial. The other 97 percent fall out of the system when they are settled or dropped. "All we're trying to do is move up the fall-out period," he said.