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A. Leo Levin

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BEYOND TECHNIQUES OF CASE MANAGEMENT: THE CHALLENGE OF THE CIVIL JUSTICE REFORM ACT OF 1990

A. LEO LEVIN*

The Civil Justice Reform Act of 1990¹ ("CJRA") was accompanied by a Senate Committee Report that begins with the finding that the federal courts were suffering "under the scourge of two related and worsening plagues."² One plague was excessive cost to the litigants, the other a shortage of judicial resources.³ An omnibus judgeship bill, authorizing eighty-five additional Article III judges, dealt rather directly with the latter problem.⁴ Containing the cost of litigation was a far more complex matter. The problem existed for years, sometimes prompting dire warnings from the bar.⁵ Prior attempts at alleviating the situation⁶ had been, in the

* I had the privilege of serving as Reporter to the Advisory Group of the United States District Court for the Eastern District of Pennsylvania appointed under the Civil Justice Reform Act of 1990. Robert M. Landis served as Chairman and Jennifer R. Clarke as Assistant to the Chairman. The three of us spent many hours together discussing that project, and a number of the ideas presented in this paper had their genesis in those sessions. I am very much in their debt. Some ideas had their genesis in discussions with William B. Eldridge, Director of Research, Federal Judicial Center, when we were colleagues at the Federal Judicial Center. I am grateful to him as well. I am also indebted to my colleague Stephen B. Burbank, a constant source of stimulation and helpful criticism, and to Craig Miller-Barnett and Chad Eisenberger, able research assistants. Any errors, of fact or of judgment, are to be debited to me alone.

¹ 28 U.S.C. §§ 471-482 (1992).

² S. REP. NO. 416, 101st Cong., 2d Sess. (1990). The purpose of the bill was "to provide for civil justice expense and delay reduction plans [and] to authorize judicial positions for the courts of appeals and district courts." *Id.* at 1.

³ *Id.*

⁴ See Federal Judgeship Act of 1990, Pub. L. No. 101-650, §§ 202(a), 203(a), 204(c), 104 Stat. 5098, 5098-5101 (1990). These included eleven judgeships on the courts of appeals, 61 on the district courts, and thirteen temporary judgeships. *Id.* Authorizing the judgeships is a small, but important step towards alleviating the shortage. For a discussion of judicial vacancies, see *infra* note 35.

⁵ See, e.g., Francis Kirkham et al., *Colloquy on Complex Litigation*, 1981 B.Y.U. L. REV. 741, 747 (discussing problems presented by complex litigation). "[I]f more is not done to reduce the expense of litigation, the legal profession will be destroyed. If the courts of this country cannot handle litigation at a reasonable expense, then some substitute mechanism for dispute settling will be needed." *Id.*; see also A. Leo Levin & Denise D. Colliers, *Containing the Cost of Litigation*, 37 RUTGERS L. REV. 219, 220 (1985). "Even litigators who frankly admitted that they were becoming wealthy pri-

view of the sponsors of the legislation, altogether inadequate, as the "worsening plague" demonstrated.

The authors of the CJRA determined that, if the legislation was to have any measure of success, it must deal in specifics. The tone is set in the statement of the CJRA's purposes. The CJRA seeks "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."⁷ This is to be accomplished by requiring each United States District Court to implement a "civil justice delay and expense reduction plan,"⁸ after consulting with a local advisory group representing users of the court.⁹

The scores of CJRA sections and subsections that follow are devoted to what Congress considers effective components of delay reduction programs.¹⁰ These are techniques and principles that all district courts must consider and that some are mandated to implement. In addition, there is provision for "appellate" review of the plans that are promulgated.¹¹

It is easy to take a narrow view of the CJRA, focusing exclusively on case management techniques and assessing its significance in those terms. Indeed, Professor Linda Mullenix recently complained that "almost everyone who has considered the Act has

marily because of fees attributable to discovery expressed amazement and concern about the rapid escalation of the expense of conducting and complying with discovery." *Id.* (quoting Wayne Brazil, *Views from the Frontlines: Observations by Chicago Lawyers about the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 217, 233-34).

⁶ *See, e.g.*, 85 F.R.D. 521, 522-23 (1980). Justice Powell, finding that the 1980 amendments to the Federal Rules of Civil Procedure were inadequate in dealing with the problems of discovery, dissented from an order of the Supreme Court forwarding to Congress those amendments. *Id.* at 523. "Favorable Congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs." *Id.* These amendments were followed by the 1983 amendments to the Federal Rules.

⁷ 28 U.S.C. § 471 (1992). This section of the CJRA characterizes the objectives of the plans to be implemented by each district court. *Cf.* Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105 (1991) (noting that CJRA reaches beyond individual plans).

⁸ 28 U.S.C. § 471.

⁹ *See id.* § 472(a). The advisory group will be appointed by the chief judge after consultation with other judges of the court. *Id.* It will be balanced to include attorneys and other patrons of the court who are representatives of major categories of litigants in each court. *Id.*

¹⁰ *Id.* § 473.

¹¹ *See id.* § 474.

mistakenly focused on the nuts and bolts."¹² Examining the "nuts and bolts" is not an unworthy enterprise, and it is completely reasonable that case management techniques be the focus of attention. The primary purpose of the CJRA is to guide district courts in the implementation of practices and procedures to reduce litigation expense and delay.¹³ Indeed, this is the source of much of the bitter opposition by federal judges who argue that the CJRA is far too intrusive.¹⁴ These judges have added that the positive aspects of the legislation were better left to implementation by the Judicial Conference of the United States.¹⁵

Any legislation that has ninety-four district courts busily involved in "a nationwide experiment aimed at reducing expense and delay in the civil justice system"¹⁶ is of major importance, and if the focus of the experimentation is improving access to justice, the potential impact can be enormous. Moreover, this vast program of experimentation may well yield useful conclusions which enhance our understanding of civil litigation.

Notwithstanding all of this, viewing the CJRA as legislation concerned solely with the details of the litigation process would be unduly narrow. Likewise, it would be far too narrow to read it as being concerned only with how judges process their civil caseloads. It is important not to lose sight of the other provisions of the CJRA which involve the other two branches of government and such private players as litigants, attorneys, and "independent" research organizations.¹⁷ Each is too important to be overshadowed by the "immediate-action-required" provisions of what is still popularly

¹² Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 379 (1992).

¹³ See 28 U.S.C. §§ 471, 472, 475.

¹⁴ See Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, 54 LAW & CONTEMP. PROBS. 99, 100 (1991). Judge Cohn argues that the "Act mandates an extensive revision in the manner in which federal district court judges manage cases on their dockets." *Id.* Judge Cohn also suggests that the bill is premised on invalid assumptions. *Id.* at 101.

¹⁵ *Id.* at 100. Moreover, the proposed changes in court administration do not follow recommendations of the Judicial Conference which are based on carefully considered statistics. *Id.*

¹⁶ See Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49 (1992).

¹⁷ See, e.g., 28 U.S.C. § 478(b).

known as the "Biden Bill."¹⁸ These "other" provisions are also remarkable although they have been little remarked.

Finally, we must ask whether, taken as a whole, the CJRA has larger implications for the future of federal procedure and the entire rule making process. Professor Tobias, in a thoughtful, detailed study of the CJRA and its implementation to date, notes a serious threat to the "integrity of federal civil procedure."¹⁹ Professor Mullenix further argues that "the Act has effected a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch."²⁰ These are respected scholars whose concerns command attention. Is there something in the structure of the CJRA, its unexpressed major premises, or in the cumulative impact of its detailed prescriptions that provide a basis for these views?

This Article shall briefly examine the implications of three provisions of the statute that neither prescribe nor suggest specific techniques of cost or delay reduction. The first is a legislative finding that "Congress and the executive branch share responsibility for cost and delay in civil litigation."²¹ Is this conclusion no more than a courtesy bow to the judiciary, assuring the judges that others also share in the blame, or does the legislation envision remedial steps to be taken by the other branches?

Second, we must note those provisions assigning the district courts the obligation, and the authority, to develop local plans to achieve the twin goals of the legislation, more efficient and more economical disposition of litigation.²² As already noted, these provisions are fundamental to the structure of the statute. Are they intended to empower the ninety-four district courts to deviate at

¹⁸ The Civil Justice Reform Act of 1990 is widely referred to as the "Biden Bill," in recognition of its principal sponsor Senator Joseph R. Biden, Jr., Chairman of the Senate Judiciary Committee.

¹⁹ Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1427 (1992).

²⁰ Mullenix, *supra* note 12, at 379. Professor Mullenix contends that "Congress has taken procedural rulemaking power away from the judges and their expert advisors and delegated it to local lawyers." *Id.* Literally, this appears to be a gross exaggeration, for the power to promulgate a plan rests with the judges of the district courts. They remain free to accept or reject proposals made by the advisory groups.

²¹ See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 102(2), 104 Stat. 5089, 5089 (1990). This discussion refers to the role of the executive as one of the three branches of government, not to its role as a major litigator in the federal courts. As to the latter, see Carl Tobias, *Executive Branch Civil Justice Reform*, 42 AM. U. L. REV. 1521 (1993).

²² See, e.g., 28 U.S.C. §§ 471, 472(a), 473 (1992).

will from the Federal Rules of Civil Procedure ("Federal Rules")? If so, what shall become of the Federal Rules? Are we embarking on a process of balkanization that will make a relic of the idea of a uniform national procedure?²³

Finally, the CJRA requires that the experiences of the ten pilot courts and a comparable group of ten other federal district courts be the subject of a "study conducted by an independent organization with expertise in the area of Federal court management."²⁴ This is one of a number of interrelated provisions relating to empirical studies that are to be reported to Congress.²⁵ Do they have any significance beyond the call for periodic checkups?

I. RESPONSIBILITIES OF THE EXECUTIVE BRANCH AND CONGRESS

Among the congressional findings with which the CJRA opens is the statement that "Congress and the executive branch, share responsibility" with the courts, litigants, and litigants' attorneys for "cost and delay in civil litigation and its impact on access to the courts, adjudication of cases on the merits, and the ability of the civil justice system to provide proper and timely judicial relief for aggrieved parties."²⁶ This conclusion is neither in the version of the bill introduced on January 25, 1990, nor in the version introduced on May 17, 1990. Moreover, careful examination of the findings reveals a dramatic change in tone from the earliest version to the bill as enacted. The first version condemned the civil justice system for failing to meet its most fundamental objective—fair adjudication dispensed promptly and inexpensively.²⁷ As enacted, the bill recognizes that obligations imposed by others, specifically the executive and legislative branches, may be at the root of the problem.²⁸ This external pressure is best exemplified by the assertion that "[t]he problems of cost and delay in civil litigation . . . must be addressed in the context of the full range of demands

²³ See Tobias, *supra* note 19.

²⁴ Civil Justice Reform Act § 105(c)(1).

²⁵ See, e.g., 28 U.S.C. § 479(a) (mandating that "comprehensive report on all plans received" be made by Judicial Conference); Civil Justice Reform Act § 104(c), (d) (requiring that study and report of demonstration program be made by Judicial Conference); see also Federal Judgeship Act of 1990, Pub. L. No. 101-650, § 205, 104 Stat. 5098, 5103-04 (1990) (study by Comptroller General of United States of "policies, procedures and methodologies used by the Judicial Conference" in recommending new judgeships). These are to be transmitted to Congress.

²⁶ Civil Justice Reform Act § 102(2).

²⁷ See S. 2027, 101st Cong., 2d Sess. § 2 (1990).

²⁸ *Id.*

made on the court's resources by both civil and criminal matters."²⁹

The change in tone reflected by these developments is mirrored in the Senate hearings. Early exchanges between representatives of the judiciary and sponsors of the legislation can only be described as acrimonious. Both bitter and unrestrained comments were allowed to remain in the published transcript.³⁰ Fortunately, over the course of a year, an accommodation was achieved, which resulted in the findings discussed above.

If legislative findings are no more than window dressing, mere "preliminaries" dictated by custom, we might have nothing more than a minor historical vignette. These findings, however, were carefully crafted and intended to relate to the substance of the CJRA. The operative portion of the CJRA calls upon each advisory group to identify the causes of delay in its district,³¹ and the findings make it clear that the contributions of the executive and Congress deserve inclusion where applicable.³²

The most obvious and most serious causes of delay attributable to the executive and legislative branches of government are a shortage of human resources, specifically judges, and a shortage of judgeships. The Eastern District of Pennsylvania is a district court which had nineteen authorized positions during the period in question,³³ but lost as a result of vacancies over a five-year period the equivalent of nine judges, each sitting on the bench for a full year.³⁴

The immediate reaction of most people is to compute the percentage loss on a linear basis, for example, twenty-four months of vacancies out of 240 judge-months authorized. This computation, however, substantially understates the harm. It is universally agreed that a firm trial date, if feasible, is the most potent catalyst

²⁹ CJRA § 102(1).

³⁰ See *Civil Justice Reform Act of 1990: Hearings on S. 2027 Before the Senate Judiciary Committee*, 101st Cong., 2d Sess. 349 (1990) [hereinafter *Hearings*]. "I was shocked to read some of the statements . . . some outrageous things . . . If my staff did that to me, they would either be fired . . ." *Id.* The bill was also noted as being "extraordinarily intrusive into the internal workings of the Judicial Branch Many thoughtful Federal judges are very, very uneasy . . ." *Id.* at 221.

³¹ See 28 U.S.C. § 472(c)(1)(C) (1992).

³² See CJRA § 102(3).

³³ CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR THE E. DIST. OF PA. (1991) [hereinafter *CJRA REPORT, E. DIST. OF PA.*]

³⁴ *Id.*

of settlements and, hence, one of the most important instruments of calendar control. Unfortunately, a vacancy rate of even ten percent can make trial dates exponentially less firm and unreliable when compounded by an unpredictable and increasing criminal caseload.

The Eastern District of Pennsylvania is hardly unique,³⁵ nor is the problem confined to the federal trial courts.³⁶ Particularly

³⁵ See, e.g., Judicial Conference of the United States, *Civil Justice Reform Act Report*, June 1, 1992 (covering early implementation districts and pilot courts). The report covers the following districts: Alaska, E.D. Cal., S.D. Cal., Del., S.D. Fla., Ill., Mass., E.D.N.Y., S.D.N.Y., N.D. Ohio, and S.D. Tex. *Id.* By late 1992, the Administrative Office of the U.S. Courts listed a hundred judicial vacancies, 84 in the district courts and 16 in the courts of appeals. See Diane Russell, Note, *Some Ethical Considerations of Judicial Vacancies: A Case Study of the Federal Court System in the United States Virgin Islands*, 5 GEO. J. OF LEGAL ETHICS 697 (1992) ("The Administrative Office . . . has called eleven courts 'judicial emergencies'—seats that have been empty for more than eighteen months.").

³⁶ See, e.g., A striking example at the appellate level is found in the order of Chief Judge Clark of the U.S. Court of Appeals for the Fifth Circuit which declared an emergency under 28 U.S.C. § 46(b). The order begins as follows:

This court is authorized to have 17 judges in regular active service. Today, the number of judges so serving is 13. Only one nomination has been sent to the Senate for its advice and consent. It is now pending in the Senate. The circuit is experiencing increases in appellate filings greater than those experienced in any other United States court of appeals. Because of the backlog of cases in district courts of the Fifth Circuit, this disproportionate increase in filings is expected to continue. Since the beginning of 1985, except for very brief periods in 1986 and 1990, this court has been at least two judges short of its authorized complement of judges in regular active service. Retirements, a resignation, and the failure of the President to nominate persons to fill vacancies in the court have caused the present increase in the number of vacancies.

From all indications, such executive inaction may contribute for an indefinite time in the future. Pleas for help have gone unanswered.

Lack of action to fill these vacancies, coupled with filing increases, have caused a judicial emergency in the court. The effect of the declared emergency is that cases may be heard by panels on which a majority of the judges are *not* members of that court, i.e. of the U.S. Court of Appeals for the Fifth Circuit. Obviously, this has significant impact on the precedential value of the decisions rendered as well as on litigant satisfaction.

Id. As will be discussed more fully below, acute shortage of adequate judicial resources frequently results from three related phenomena: first, the failure to fill vacancies; second, the process of creating new judgeships (typically by omnibus bills long in coming which add a substantial number of judges at one time); and finally, the high level of demonstrated need viewed as the minimum for considering new positions.

The problems are not novel. Consider the following excerpt from the final report of the Commission on Revision of the Federal Court Appellate System, often referred to as the Hruska Commission after its chairman, Senator Roman L. Hruska:

shocking is the experience of the District of the Virgin Islands.³⁷ The extended vacancy period has forced this district to sustain itself by a steady stream of visiting judges, including an acting chief judge.³⁸ The CJRA, by its terms, requires the various advisory groups to identify those vacancies that cause expense and delay in civil litigation, particularly when vacancies are the chief cause of that expense and delay.³⁹ Clearly, however, relief is not in the hands of the judiciary.

A related phenomenon is the delay in creating judgeships. Again, the Report of the Advisory Group of the Eastern District of Pennsylvania provides a typical example. Between 1980 and 1990, there was more than an eighty percent annual increase in the number of cases commenced.⁴⁰ Only four additional judgeships were created during this period, all in December of 1990. As of August 1, 1991, the date of the Report, none had been filled.

Inevitably, this data raises a difficult and troubling question. If the courts have been able to cope, and indeed to achieve impressive records of timely dispositions, without the necessary resources, are the requested resources really necessary? If no additional judges are provided should not productivity be expected to rise again?

If judicial dispositions were widgets and courts were widget factories, the analysis might be easier. They are not. This is not to deny that docket pressures sometimes produce desirable efficiencies, for example, dispositions without elaborate, published

The heart of the Commission's proposal [concerning assuring adequate numbers of judges] is the creation of additional judgeships to meet developing needs. A newly created judgeship which is not filled provides no help; by the same token, a vacancy in an existing judgeship exacerbates the need. The Commission recommends that judicial vacancies be filled expeditiously. Such a recommendation may appear superfluous, but the fact remains that in the last five fiscal years, vacancies in the courts of appeals have caused a combined loss of twenty-eight years of judicial service. In a system with only 97 active judgeships, the effective dispensation of justice must suffer from a loss of this magnitude.

Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Proposals for Change* 63 (1975).

³⁷ See Russell, *supra* note 35, at 699.

³⁸ *Id.* at 698-99. "Since 1988, the U.S. Court of Appeals for the Third Circuit has been forced to shuttle judges to the Virgin Islands from all over the country . . . The judicial caseload has grown to monstrous proportions." *Id.* at 699.

³⁹ See 28 U.S.C. § 472(c)(1)(C).

⁴⁰ See CJRA REPORT, E. DIST. OF PA., *supra* note 33, at 195.

opinions. There are some limitations, however, which should be noted.

First, increased productivity may not be without cost. For some time, there has been a concerted effort to increase the number of settlements and reduce the incidence of trials, with impressive effects on disposition rates. This can greatly benefit litigants as well as the system. Mr. Justice Brennan, while sitting on the Supreme Court of New Jersey, observed that "a case settled is a case best disposed of, because then one of the parties certainly avoids the heartache of losing at the trial."⁴¹ If, however, settlements are achieved because parties are told that the priority of the criminal docket and the requirements of the Speedy Trial Act are likely to preclude civil trials for at least two years, productivity statistics may improve, but justice will hardly have been achieved.

Second, and perhaps more to the point, the Judicial Conference of the United States will not request an additional judgeship until the weighted caseload in the district exceeds 400 filings per year.⁴² This benchmark is hardly *de minimis*, particularly when "early and ongoing control of the pretrial process" by a judicial officer is expected to become the norm.⁴³

Apparently, the impact of a shortage of human resources may be far greater than that of the principles and techniques of litigation management.⁴⁴ Solutions, however, are hard to come by, particularly since so much of the problem is political. Moreover, with all three branches actively involved in creating judgeships, and

⁴¹ Judge William J. Brennan, Jr., *Remarks of Judge William J. Brennan, Jr.*, 1956 PROC. OF THE ATT'Y GENERAL'S CONF. ON COURT CONGESTION AND DELAY IN LITIG. 78, 87.

⁴² CJRA REPORT, E. DIST. OF PA., *supra* note 33, at 192; *see infra* note 45 (discussing weighted case loads).

⁴³ *See* 28 U.S.C. § 473(a)(2); CJRA § 102(5)(B). To gain some appreciation of the significance of the "400 filings," it is helpful to cast the figure in terms of dispositions per working day, with or without opinions, trials, or hearings. Consider further that a 250-day work year is considered normal and that many time-consuming tasks, from selection of law clerks to attendance at judicial conferences, must also be accommodated.

⁴⁴ *See* Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 165-66 (1991). After criticizing proposals for disclosure as an alternative to discovery, Mengler concludes: "[A] sounder approach, more consistent with the Federal Rules' commitment to merits resolution, is to put down the rulemaking pen and to provide the necessary resources to manage formal discovery effectively." *Id.* at 165. This, he suggests, can be done by reducing the caseload or by adding Article III and magistrate judges. *Id.*

two of those branches involved in filling vacancies, it becomes exceedingly difficult to develop constructive approaches to this long-festering problem.

It is precisely for these reasons that the Advisory Group for the Eastern District of Pennsylvania recommended that Congress hold hearings on the process of creating and filling new judgeships.⁴⁵ The court approved the recommendation, and the chief judge transmitted it to the President of the Senate and the Speaker of the House.

Congressional hearings are an appropriate forum to hear the views of all interested parties.⁴⁶ Can they do more than rehearse the thrice-told tale of litigants hurt by political inaction?⁴⁷ The

⁴⁵ Two problems in particular deserve consideration. The first is the timing of legislation providing for new judgeships. As the example in the text illustrates, long periods can pass without action, followed by an omnibus bill creating a large number of judgeships around the country. This practice may also have unfortunate side effects not directly related to case processing. There is reason to believe that creating judgeships "wholesale" may contribute to less than thorough investigation of nominees' credentials, both by the executive and by those in the Senate responsible for the confirmation process. This, in turn, may have been a factor in the substantial increase in disciplinary problems in the federal judiciary.

The second problem is the standard for measuring the need for additional judicial resources. Is the level set too high or too low? Should it be a function of other factors, such as the utilization of magistrate judges? To deal with this series of questions it is important to recognize that cases vary in complexity and in the burdens they impose on the judiciary. A case seeking recovery of a defaulted student loan is hardly the equivalent of an antitrust class action. In order to reflect these differences, the Federal Judicial Center has developed a system in which each case type is "weighted" to reflect its relative burdens on the judiciary.

Reference has already been made to the fact that Congress has asked the Comptroller General to study the "policies, procedures and methodologies" used by the Judicial Conference in determining the number of additional judgeships to request. See *supra* note 25. This hardly obviates the need for, or the utility of, Congressional hearings. On the contrary, the findings should be subject to the scrutiny of the academic community, of litigants as represented by organizations of counsel, and of the judges themselves.

⁴⁶ See *supra* note 43.

⁴⁷ See *Varied Issues Delay U.S. Nominees' Confirmation*, N.Y. TIMES, Dec. 16, 1991, at B9 [hereinafter *Varied Issues*] (focusing on delays in confirmation of federal nominees, particularly judges, due to political strategizing and bargaining). The article noted the problems of the United States District Court for the Southern District of New York: "Seven of the 27 judgeships in this district are vacant. Three of the seven vacancies have not been filled for more than 18 months and for two of these there are no nominees." *Id.*; see Robert L. Haig, *Judicial Vacancies and Procedural Reform*, N.Y. L.J., June 15, 1982, at 2.

After the Justice Thomas confirmation hearings, a Senate Task force was formed to expedite the confirmation process. *Varied Issues, supra*. The following New York Times subheading demonstrates the need for dispassionate hearings: "Senators and Bush blame each other as posts remain unfilled." *Id.*

Southern District of Florida has offered an approach that has far-reaching implications. The judges in that district are asked to give at least six months notice before taking senior status. This, of course, is intended to give the President and the Senate ample time to avoid a vacancy. Judges, as well as justices, have been giving advance notice for years, but what is significant about the Florida proposal is that it sets a standard—a judge is *expected* to give six months notice.

Similarly, standards should be created for the submissions for presidential nominations to fill vacancies. Furthermore, Senators who have the prerogative of making recommendations to the White House should be subject to time constraints. This delay is not measured in days or months, but rather in years. Political factors can help explain some of the longest periods. Indeed, perhaps they account for the insensitivity to serious ethical issues that can and do arise when delay is egregiously excessive, but they offer no solutions.

It is suggested that at some point there should be a deadline, if only to announce that someone—a Senator, the Justice Department, the White House—is in default. Moreover, as history has demonstrated, even the unwritten rules of senatorial prerogative are subject to amendment, they may be changed in the interest of the citizenry and as a result of considered and announced policy.

It would be naive to assume that congressional hearings, in and of themselves, create a universal solvent that makes difficult problems disappear. It is hoped, however, that legislators dedicated to improving access to justice will recognize that the lack of judicial resources is largely a result of the current process of creating and filling judicial positions.

The time for such hearings is precisely now, shortly after passage of an omnibus judgeship bill.

As of the date of this Article, written in the fall of 1993, the Clinton administration has been in office for the better part of a year with no significant progress on the filling of judicial vacancies. The problem is not one of two political parties at loggerheads, although such factors can exacerbate it.

II. LOCAL PLANS, LOCAL RULES, AND NATIONAL UNIFORMITY

A. *Questions of Power*

A "cornerstone principle" of the CJRA is that reform must come "from the 'bottom up.'"⁴⁸ In this regard, the legislature followed the advice of the Brookings Institution Task Force on Reducing Costs and Delay in Civil Litigation,⁴⁹ advice which was echoed by distinguished leaders in the field of judicial administration, such as the late Judge Robert Peckham.⁵⁰ The CJRA requires each district court to fashion its own plan to deal with whatever problems it perceives based on its own conditions. Moreover, local advisory groups are to be comprised of users of the federal court system who can bring their own experiences to bear on the analysis of problems and the fashioning of solutions, and who will ultimately be affected by the plans.⁵¹

What freedom is bestowed on the local groups and on the district courts? Are there any constraints? May a district court ignore other acts of Congress or the Federal Rules? Upon enactment of the CJRA, these questions assumed immediate practical importance in two regards. First, while the CJRA encourages alternative dispute resolution, Congress has placed limits on the number of districts permitted to experiment with court-annexed

⁴⁸ S. JUD. COMM. REP. NO. 768, 101st Cong., 2d Sess. 14 (1990); see Peck, *supra* note 7, at 109-10.

⁴⁹ THE BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION, REPORT OF A TASK FORCE 11 (1989), reprinted in *Hearings, supra* note 30, at 421, 437 [hereinafter BROOKINGS REPORT].

[R]eform must come from the "bottom up," or from those in each district who must live with the civil justice system on a regular basis. The proper role for Congress, we believe, is to launch this process with a mix of suggestions and incentives . . . Accordingly, our core recommendations allow each federal court . . . to develop its own set of reforms . . . within some broad parameters that Congress would establish through federal legislation.

Id.

The author was a member of the Brookings Task Force. It was agreed at a meeting of the Task Force that the published report would note, either in the text or in the foreword, that not every member of the Task Force agreed with everything contained in the report, a common caveat that does not appear in the published version. *Id.*

⁵⁰ See *Hearings, supra* note 30, at 315. Judge Peckham served in the Northern District of California. He was the Chairman of the Judicial Conference, Subcommittee on the Civil Justice Reform Act of 1990. See S. REP. NO. 416, *supra* note 2, at 15 (citing Judge Peckham and stating that reform should be decentralized so that successful ideas on local level can be implemented on national scale).

⁵¹ See S. REP. NO. 416, *supra* note 2, at 14 (citing BROOKINGS REPORT, *supra* note 49, at 12, reprinted in *Hearings, supra* note 30, at 421, 438).

arbitration.⁵² Does the CJRA supersede the earlier statutory provisions? Second, the entire area of case management was rife with potential conflicts with the Federal Rules; this was particularly true of the rules governing discovery. Is the statutory requirement that local rules not be inconsistent with the Federal Rules now abrogated?⁵³ At stake was the principle of uniformity in the federal judicial system.⁵⁴

As is so often true, action could not await definitive resolution of the legal issue. As Professor Tobias reports, one court, the United States District Court for the Eastern District of Texas, "flatly proclaim[ed] that 'to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling.'"⁵⁵ Indeed, Professor Tobias continues, "in commendable candor, the plan's author states that the 'court recognizes that provisions of this plan,' including the section regarding the 'relationship between the Rules Enabling Act and the Civil Justice Reform Act,' could 'ultimately be the subject of judicial review in the Courts of Appeal.'"⁵⁶ Nor was the Eastern Dis-

⁵² See 28 U.S.C. §§ 651(a), 658 (1988) (permitting certain district courts to authorize arbitration by local rule in any civil action).

⁵³ See 28 U.S.C. § 2071(a) (1988) (requiring all rules established by courts to conform to acts of Congress and rules of practice and procedure).

⁵⁴ See Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2002-11 (1989) (describing evolution of "uniformity debate" regarding Federal Rules); see also A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) (discussing potential of Rule 83, which provides majority of judges in given district with authority to promulgate local rules as means of creating "laboratories for change").

Unhappiness with local rules, particularly the fact that so many are inconsistent with the Federal Rules, has spawned a veritable lexicon of vivid figures of speech characterizing them. Over a quarter of a century ago Charles Alan Wright described local rules "as the 'soft underbelly' of federal procedure." Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1012 n.6 (1966). Other descriptions have ranged from the prosaic to the poetic: a "gross affliction," a "computer virus of indeterminate origin," "a plague," and "Wild Flowers in the Garden." See Levin, *supra*, at 1568-69 (citations omitted).

⁵⁵ Tobias, *supra* note 16, at 51 (quoting CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. CT. FOR E. DIST. OF TEX. 9 (1991) [hereinafter CJRA REPORT, E. DIST. OF TEX.]). Professor Tobias also notes that circuit committees as well as the Judicial Conference of the United States have a role in reviewing plans promulgated by the district courts, and this review should provide a forum for resolution of these unresolved legal questions. *Id.* at 53-55.

⁵⁶ *Id.* at 51-52 (quoting CJRA REPORT, E. DIST. OF TEX., *supra* note 55).

trict of Texas alone; "[n]umerous districts" have acted as though they had the authority to disregard the Federal Rules.⁵⁷

Understandably, this view did not command unanimous approval. In a carefully-crafted opinion which received wide distribution, William R. Burchill, Jr., General Counsel of the Administrative Office of the United States Courts, stated that where there is "a clear statement of Congress' intention to provide the courts with additional tools to control expense and delay in civil litigation,"⁵⁸ as is true in the case of certain aspects of discovery, the CJRA "expands the civil rules in these discrete areas."⁵⁹ Where there is no evidence of clear congressional intent, the mere passage of the CJRA, with its emphasis on local plans, does not expand the authority of the district courts.⁶⁰

Those who argue that the CJRA permits local deviation from the Federal Rules suggest that the CJRA provides blanket authority for a revision of Rule 83 to allow for local rules inconsistent with the Federal Rules. For them, the CJRA mandate that "courts adopt local plans to reduce excessive delays and costs" provides the necessary authority.⁶¹ Phrased differently, it may be said that "[d]istrict Courts . . . are now encouraged by the Judicial Improvements Act of 1990 to find new methods of resolving disputes with dispatch and reduced costs."⁶²

This reading of the CJRA is surprising because the legislative history provides no indication that anyone contemplated this result. Furthermore, the provisions to build "from the bottom up" by promulgating local plans do not lack significant meaning even

⁵⁷ *Id.* at 51.

⁵⁸ Memorandum from William R. Burchill, Jr., General Counsel Administrative Office of the United States Courts, to Abel J. Mattos, Court Administration Division-CPB 3 (July 5, 1991).

⁵⁹ *Id.*

⁶⁰ *Id.* at 1. "While it is an important purpose of this Act to encourage creativity and innovation, it appears to me that Congress intended such approaches to be consistent with the civil rules unless it expressly said otherwise." *Id.* More specifically, "Fed. R. Civ. P. 83 would prohibit development of local rules inconsistent with the civil rules." *Id.*

⁶¹ See Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 143 (1993).

⁶² See FED. R. CIV. P. 83 advisory committee notes. The amendment to Rule 83 was forwarded to the Judicial Conference of the United States in May of 1992, but was not forwarded by the Conference to the Supreme Court. See 146 F.R.D. 515, 519 (1992). The proposed changes to Rule 83 were recommitted by the Advisory Committee on Civil Rules for further study. See *infra* notes 62-70 and accompanying text (discussing amendment in greater detail).

within the constraints of the Federal Rules. Examples are abundant: "early and ongoing control of the pretrial process through involvement of a judicial officer," "setting early firm trial dates," and "explor[ing] the parties' receptivity to . . . settlement."⁶³

More needs to be said about the amendment to Rule 83, which, it should be emphasized, was not forwarded by the Judicial Conference to the Supreme Court and, therefore, was not considered by the Court with the other amendments which became effective in December 1993. The Advisory Committee on Civil Rules proposed an amendment to Rule 83 which would have allowed local rules to conflict with the Federal Rules for a limited time, under limited conditions, and for purposes of experimentation.⁶⁴ The substance of this proposal is not objectionable. On the contrary, its objectives are commendable.⁶⁵ It allows for needed experimentation on the local level. Data collection essential for proper evaluation of experiments and approval by the Judicial Conference of the United States after screening by the Standing Committee is also mandated.⁶⁶ Indeed, the revision of Rule 83 would control what Professor Tobias has aptly termed the "Balkanization" of federal procedural law⁶⁷ and would assure that any "experiments" include data-gathering as part of the price of being freed from the constraints of the Federal Rules. It would, if coordinated with the requirements of the CJRA, provide far more information and guidance than is presently expected.⁶⁸

⁶³ See 28 U.S.C. § 473(a).

⁶⁴ See *supra* note 60.

⁶⁵ See Levin, *supra* note 54.

⁶⁶ FED. R. CIV. P. 83 advisory committee notes.

⁶⁷ See Tobias, *supra* note 19.

⁶⁸ See 28 U.S.C. §§ 471-482. The amendment to Rule 83 limited the effective period to a maximum of five years, which is hardly *de minimis*. It would be imprudent to provide for a shorter maximum. There must be time for cases to be terminated, for data to be gathered and evaluated and, where the innovations point to the desirability of change on a national scale, for that change to be effected.

Individual district courts are provided some limited discretion to experiment with local rules confined to a discrete problem or procedure. For example, Federal Rule 26(b)(2) allows a district court, by local rule, to limit the number of depositions or interrogatories, and Federal Rule 26(a), governing the duty of disclosure without request by the opponent, is subject to "override" by local rule.

Specific provisions of the CJRA concerning the duration and the cost of discovery and the desirability of voluntary and cooperative disclosure support these proposals. But surely the authority to delegate discretion to the district courts goes beyond that. See, e.g., FED. R. CIV. P. 16(b) (allowing local rules to exempt categories of cases from requirement of scheduling order).

Notwithstanding the above, there is a question of authority and power, and it is suggested that, absent amendment of the Rules Enabling Act, such a revision of Rule 83 is beyond the authority presently bestowed on the Supreme Court.⁶⁹ With commendable candor, the Advisory Committee and the Standing Committee have recognized the problem and explicitly referred to it.⁷⁰ Under the proposal, a provision of the Federal Rules could be rendered null and void in a particular district for a period of five years without prior approval of either the Supreme Court or Congress.⁷¹ Of particular concern is the relationship between the Supreme Court and Congress in the area of procedural innovations since the history of that relationship has not been altogether free of tension in recent years, as the legislation on court-annexed arbitration attests.⁷²

⁶⁹ See Levin, *supra* note 54, at 1585-86 (arguing that any experimentation of local rules should be authorized by Congressional legislation); see also REPORT OF THE FEDERAL COURT STUDY COMMITTEE 81, 83, 85-86 (1990); *Sweeping Changes in Federal Judiciary Urged by Federal Courts Study Committee*, 58 U.S.L.W. 2599 (Apr. 17, 1990) (urging Congress to extend statutory authorization for local rules pertaining to alternative dispute resolution).

⁷⁰ FED. R. CIV. P. 83 special note.

Mindful of the constraints of the Rules Enabling Act, the Committee calls the attention of the Supreme Court and Congress to new subdivision (b) [experimental rules]. Should this limited authorization for adoption of rules inconsistent with national rules without Supreme Court and Congressional approval be rejected, [the Committee recommends approval of other changes to Rule 83].

Id.

⁷¹ See FED. R. CIV. P. 83.

⁷² See 28 U.S.C. §§ 651-658 (1992). Court-annexed arbitration was introduced in the federal judicial system on the initiative of Attorney General Griffin Bell early in the Carter administration. It began operation in the Eastern District of Pennsylvania, for example, in February 1978, on an experimental basis. The legislation authorizing court-annexed arbitration was signed into law on November 19, 1988, a little more than a decade later. *Id.*

In the interim, when it became necessary to obtain funding for the program, the judicial branch went directly to the appropriations committees, rather than to the judiciary committee, which had "substantive" jurisdiction over the area. The program as enacted in 1988 was still experimental, with a five-year sunset provision and a requirement of an evaluation. The legislation also introduced a substantial number of limitations, specifying, for example, the types of cases that could be sent to arbitration, the courts authorized to experiment with the program, and the limits on sanctions that could be imposed by arbitrators. The legislation was processed through the judiciary committees.

The sunset provision expired on November 19, 1993 without Congressional action. However, S. 1732, extending the sunset date to December 31, 1994 was sent to the President for signature before the end of November 1993.

A threshold question deserves consideration: If every proposed amendment must be presented to Congress and is subject to its veto, then if Congress allows an amendment to the rules to take effect, is there not, automatically and inevitably, congressional consent? The short answer is no; acquiescence does not constitute consent. The failure of Congress to override a proposed amendment does not repeal a duly-enacted legislative limitation on the rulemaking power.⁷³

Policy considerations reinforce the conclusion dictated by technicalities. It is useful to begin by considering a range of underlying attitudes concerning local rules, for this may aid in explicating the Rules Enabling Act. It is no secret that many lawyers with national practices are deeply disturbed by the proliferation of local rules.⁷⁴ Such attorneys vary both in the intensity of their feelings and in precisely what they find objectionable with the present state of local rules.⁷⁵ There is reason to believe, however, that they are most unhappy with local rules that ignore the Federal Rules.⁷⁶

Posit that one such practitioner or member of Congress states:

I can live with local rules that are inconsistent with other local rules, but I draw the line at local rules that are inconsistent with the Federal Rules. The latter are binding on all of us, judges no less than practitioners. I am entitled to rely on specific provisions of the Federal Rules. If local rules are designed to fill in the interstices, let them do so, but they have no right to veto the Federal Rules.

This is precisely the position that has been adopted by Congress. Section 2071(a)⁷⁷ states unambiguously that local rules "shall be consistent with Acts of Congress *and* rules of practice

⁷³ See Stephen B. Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions about Power*, 11 HOFSTRA L. REV. 997, 1011 (1983); Levin, *supra* note 54, at 1583 n.59, 1585 n.68.

⁷⁴ See Levin, *supra* note 54, at 1568-69.

⁷⁵ See Levin, *supra* note 54, at 1568-69.

⁷⁶ See Subrin, *supra* note 54, at 2016-17. Such local rules were already singled out for criticism in what is commonly known as the Knox Committee Report. REPORT TO THE JUDICIAL CONFERENCE OF THE COMMITTEE ON LOCAL DISTRICT COURT RULES III (1940), *cited in* Subrin, *supra* note 54, at 2016-17. The Knox Committee Report noted that local rules have been unnecessarily repetitious of the Federal Rules, have laid down detailed provisions in areas which were intentionally left unregulated by the Federal Rules, and have, in some instances, been contrary to provisions of the Federal Rules. *Id.*

⁷⁷ 28 U.S.C. § 2071(a) (1992).

and procedure prescribed under section 2072."⁷⁸ When this statute was presented to the President, it was the President's decision to accept or reject the statute, including the limitation.

Nothing short of a statutory change can provide the President with the opportunity to exercise his prerogative to sign or veto, weighing the absence of the consistency limitation as he chooses. It follows that amendment of the Rules Enabling Act, or the creation of legislation which specifically creates exceptions, as the General Counsel to the Administrative Office has advised, is required to allow for local rules that are inconsistent with the Federal Rules, even for purposes of experimentation.

There is more involved than a "mere technicality," even assuming that it is ever appropriate to so characterize lack of authority. As already noted, there is substantial disagreement about the importance of uniformity in federal civil procedure.⁷⁹ Encouraging experimentation in the interest of "perfecting federal civil rules,"⁸⁰ even with the resulting lack of uniformity, is highly desirable under specified conditions. The legislative process, through appropriate hearings, can serve to inform not only the drafters of the statute, but also those charged with applying it, of the factors which should be considered in implementing it.⁸¹ We have a need for smooth-functioning laboratories for change; this process is intended to provide the best possible design.⁸²

B. *Reforming the Rulemaking Process*

The phrases "working from the bottom up" and "responding to local conditions" have a nice ring to them. On reflection, however, it must be clear that this is hardly the way to maintain uniformity in a national system of courts. Even if the CJRA is read as requir-

⁷⁸ *Id.* (emphasis added).

⁷⁹ See, e.g., Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507 (1992).

⁸⁰ See Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP. PROBS. 67 (1988) (suggesting use of controlled experiments either on unrestricted national scale or in small number of federal district courts).

⁸¹ See *id.* For example, the choice of districts in which to allow a particular experiment to proceed in order to maximize the potential benefit and minimize disruption should be a factor for consideration. See *id.* This does not minimize the substantial contribution made by the Advisory Committee in the careful crafting of the conditions included in rule 83(b).

⁸² See Steven Flanders, *Local Rules in Federal District Courts: Usurpation, Legislation, or Information?*, 14 LOY. L.A. L. REV. 213, 219 n.35 (1981). Judge Jack B. Weinstein, a preeminent authority in the field of rulemaking, is credited with popularizing the term in this context. *Id.*; Levin, *supra* note 54, at 1581.

ing local rules to be consistent with the Federal Rules, there is far more to the CJRA than a mere invitation to district courts to “fill in the interstices” of the Federal Rules. The very passage of the CJRA, and the formation of ninety-four advisory groups, creates pressure on the national committees to invite local variations. The “balkanization” against which Professor Tobias warns is in fact here.⁸³

How did all this come about? The shrinking of the country and the proliferation of national practice might have been thought to enhance rather than to denigrate the value of uniformity of practice in the federal system. The simple fact is that the structure of the CJRA partially results from disenchantment with the rulemaking process as it operates today.

One need only look to the literature praising judicial rulemaking as compared to legislative codes of procedure to see how far we have come from what was originally envisioned. The affirmative goals of federal reform sixty and seventy years ago included national uniformity,⁸⁴ simplicity to assure that procedure would be the handmaiden of substantive law and subservient to the merits,⁸⁵ and, of paramount significance, responsibility for assuring fairness and efficiency of judges who understood the workings of the system and who could provide a rapid response by way of amendment when there was a perceived need for change.⁸⁶ These were some of the positive goals, but there was also a clear desire to avoid the politics of legislative log-rolling with procedural doctrine as one of the logs.⁸⁷

There is widespread agreement that all is not well with rulemaking in the federal system.⁸⁸ One can hardly speak of

⁸³ See Tobias, *supra* note 19.

⁸⁴ See Stephen Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1042 (1982) (noting ABA's concern with lack of uniformity over one hundred years ago).

⁸⁵ See Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 274 (1989) and authorities cited.

⁸⁶ See A. Leo Levin & Anthony G. Amsterdam, *Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1, 11 (1958).

⁸⁷ *Id.* at 10.

⁸⁸ See, e.g., Benjamin Kaplan, *A Toast*, 137 U. PA. L. REV. 1879, 1880-81 (1989) (noting attacks on uniformity and “fears of arbitrary and unequal decisions”); see also KEETON, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, A LOOK AT RULEMAKING IN THE FEDERAL JUDICIARY, THE THIRD BRANCH 10, 11 (1993) (identifying concerns with current process, including bills introduced in Congress to “amend federal rules directly by statute”); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455 (1993).

rapid response to a perceived need for change. Amendments take years to process, engendering frustration and the search for alternative mechanisms. To a great extent this delay is due to the many changes in the system, each made with good reason. We recognize the value of an open process, ample opportunity for interested parties to comment, and public hearings at which suggestions and objections become common knowledge while there is still time to comment and respond. We also recognize the need for Congress to have adequate time to evaluate proposals for change. The cumulative effect, however, of these and other refinements has been to alter the nature of the process. Response time and flexibility are not the only problems. A former reporter to the Civil Rules Advisory Committee ("Advisory Committee") wisely recognized the need to create lobbying forces to counter the special interest lobbies and "to provide a constituency for the Supreme Court in the exercise of its authority under the Rules Enabling Act."⁸⁹

It is doubtful that the Supreme Court either needs or wants such a constituency. On the contrary, it has recently taken steps to distance itself from the controversies surrounding proposed amendments. Indeed, on reflection it seems clear that the rallying cry is hardly in support of the Supreme Court, but rather in support of the rulemakers, and that the terms are not synonymous. Of course, it is true that, pursuant to statute,⁹⁰ the Supreme Court receives proposed amendments from the Judicial Conference of the United States and, in all but the rarest case, forwards them to Congress, but it has long been assumed that the role of the Court is a very limited one.

This became altogether clear in April of 1993 when the Court transmitted a veritable cornucopia of proposed amendments to Congress. Speaking on behalf of the Court, the Chief Justice wrote in his transmittal letter: "While the Court is satisfied that the required procedures have been observed, this transmittal does

⁸⁹ Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 166 (1991). Professor Carrington, then serving as Reporter for the Advisory Committee on Civil Rules of the Judicial Conference of the United States, was commenting on Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

⁹⁰ 28 U.S.C. § 2072 (1992).

not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.⁹¹

In a separate statement, Justice White described his conception of the very limited role of the Court in the rulemaking process. For him, the Court's role "is to transmit the Judicial Conference's recommendations *without change and without careful study*, as long as there is no suggestion that the committee system has not operated with integrity."⁹² He set forth Justice Douglas' view that "the Court should be taken out of the rulemaking process entirely,"⁹³ and it is not too much to suggest that, at least implicitly, he endorsed that view.

Three Justices dissented from the amendments to the rules governing discovery. Justice Scalia filed a dissenting statement, and on this point he was joined by Justice Souter and Justice Thomas.⁹⁴ What is relevant for our purpose is the standard governing review of proposals before the Court. Eschewing any attempt to improve the proposals or veto them because of "matters of expert detail," the dissenters found objections "ris[ing] to the level of principle and purpose."⁹⁵ Based on the views of these five members of the Court, it is hard to find in the involvement of the Supreme Court any basis for concluding that the process is indeed satisfactory.

If we pause to examine the discovery amendments themselves, some of the reasons for dissatisfaction with the current process of rulemaking become clearer. We have spoken of the desire to achieve national uniformity and simplicity. The provision for what is termed "mandatory early pre-discovery disclosures"⁹⁶ that is required by amended Rule 26(a)(1) is completely subject to local rule.⁹⁷ Whether there shall be any requirement of pre-discovery disclosure in a particular case, and if so, what shall be required, may vary from court to court.⁹⁸ In theory, ninety-four

⁹¹ H.R. Doc. No. 74, 103d Cong., 1st Sess. (1993) (communication from Chief Justice of United States transmitting amendments to Federal Rules).

⁹² *Id.* at 102 (emphasis added).

⁹³ *Id.*

⁹⁴ *Id.* at 104.

⁹⁵ *Id.* at 110. Justice Scalia stated that it required no expertise to realize that where revisions are so "breathtakingly novel" as those concerning discovery practice, they should not be adopted nationally without prior testing. *Id.*

⁹⁶ FED. R. CIV. P. 26(a)(1) advisory committee notes (amended 1993).

⁹⁷ *See id.* It is also subject to being overridden by stipulation or by order of the court in an individual case. *Id.*

⁹⁸ *See id.*; H.R. Doc. No. 74, *supra* note 91, at 124.

models are possible. As to simplicity, it suffices to say that the text of those subsections in the discovery rules that were added or changed spans over forty pages; when deletions are shown and advisory committee notes are added the number of pages is more than doubled.⁹⁹

The time it takes to process amendments has been a matter of concern. The Advisory Committee argued against postponing the provisions governing disclosure pending evaluation of local rules under the CJRA on the ground that it "would effectively postpone the effective date of any national standards until December 1998."¹⁰⁰ While a major component of this period involves the studies referred to, the fact is that ordinary amendments typically take over two years from the time of public hearings, in addition to the time necessary to develop and prepare them for public consideration. Moreover, there is nothing wrong with a proposal that has been described as "breathtakingly novel,"¹⁰¹ taking several years to develop. Nor does that fly in the face of the judgment that "[c]onstant reform of the federal rules to correct emerging problems is essential."¹⁰² There are amendments and there are amendments, and nothing in the nature of things requires that the processes appropriate for some be applied to all.

What is slowly emerging is the recognition that we may need a multi-track system. There are many possibilities. At one end of the spectrum is non-trans-substantive procedure, procedure that would vary from one type of claim to another.¹⁰³ It has been hotly debated with little likelihood of across-the-board acceptance.¹⁰⁴ It is, however, possible to have differentiated procedure with respect to certain aspects of litigation, not based on the substantive nature of the claim, but on other factors such as complexity. The *Manual for Complex Litigation* certainly is a prime example of the recognition that certain types of cases need specialized treat-

⁹⁹ See H.R. Doc. No. 74, *supra* note 91, at 28-70, 203-89.

¹⁰⁰ H.R. Doc. No. 74, *supra* note 91, at 124.

¹⁰¹ H.R. Doc. No. 74, *supra* note 91, at 110 (containing Justice Scalia's dissent).

¹⁰² H.R. Doc. No. 74, *supra* note 91, at 109-10.

¹⁰³ See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-trans-substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989) (responding to Robert Cover, *For James Wm. Moore: Some Reflections on a Reading of the Rules*, 84 YALE L.J. 718 (1975)).

¹⁰⁴ *Id.* at 2068. "[This article] concludes that judicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future." *Id.*

ment.¹⁰⁵ The CJRA invites—and with respect to pilot districts requires—separate management tracks for different types of cases, with the district courts free to define the tracks in whatever way they choose.¹⁰⁶

There are other ways of differentiating proposed rules. The United States Supreme Court has asked that proposals transmitted by the Judicial Conference distinguish between amendments that are controversial and those that are not. The latter might well be accorded a different timetable with respect to certain steps in the process. The prestigious chair of the Standing Committee on Practice and Procedure, Judge Robert E. Keeton, has also suggested that differentiated processes of rulemaking may be appropriate in certain circumstances.¹⁰⁷

Revision of the process is itself time-consuming and should not be hurried. Some adjustments are relatively simple, such as the recent re-creation of an Advisory Committee for the Federal Rules of Evidence.¹⁰⁸ Others, however, are more complex. The CJRA's grant of authority to district courts to ignore some Federal Rules, albeit quite limited, represents a significant change, one made over the objection of the judiciary. It represents the legislative judgment that reform by the rulemaking process could not be relied upon. At the very least, the CJRA provides a compelling reason for reassessment of the rulemaking process.

¹⁰⁵ MANUAL FOR COMPLEX LITIGATION, SECOND (3d ed. 1985) (originating from *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351 (1960)).

¹⁰⁶ 28 U.S.C. § 473(a)(1) (1992). Some tracks may be defined by subject matter, such as asbestos cases or social security cases, while other tracks in the same plan may be categorized by process, such as cases assigned to court-annexed arbitration, or more generally as "standard track."

Section 473(a) states that district courts "shall consider and may include" a provision for differentiated case management. *Id.* The ten districts, however, must include differentiated case management in their respective plans. Civil Justice Reform Act § 105(b).

¹⁰⁷ See KEETON, *supra* note 88, at 10-11. "Acceleration of the process [of rulemaking], in particular instances, may be both feasible and appropriate." *Id.* This comment was made in the context of Congressional by-passing of the rulemaking process and may thus be limited in scope.

Judge Keeton also notes that certain proposed amendments which were ripe for public comment on April 15, 1993, would, "if approved . . . without delay" at every point in the remaining process, become effective in December 1994. *Id.*

¹⁰⁸ See Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years—The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992).

Clearly, the Standing Committee, the Administrative Office of the United States Courts, which provides the secretariat to the rulemaking committees, and the Federal Judicial Center would be essential components of this enterprise. Congress, too, has become increasingly involved in rulemaking and should participate in any process of evaluation and reform. Lawyers and litigants, as well as the executive branch, are interested parties whose contributions must be acknowledged. What emerges is the classic model of a commission, appropriately staffed and charged with developing proposals for legislative consideration, as has been urged by Stephen Burbank.¹⁰⁹ If the CJRA stimulates this process, it will have made a major contribution.

III. CAUSE AND EFFECT: SEARCHING FOR DATA

A. *How and What to Study*

The CJRA requires a substantial number of reports to be made to Congress and imposes additional obligations on the Judicial Conference, the Director of the Administrative Office of the United States Courts, and the Director of the Federal Judicial Center.¹¹⁰ Perhaps the most interesting of these reports is the one designed to apprise Congress of the results of the CJRA's pilot program. This program requires ten district courts, each selected by the Judicial Conference of the United States, to implement six "principles and guidelines of litigation management and cost and delay reduction."¹¹¹ These principles include: (1) differential case management, (2) early and ongoing involvement of a judicial officer in the pretrial process, (3) careful monitoring of complex cases, (4) voluntary exchange of information by the litigants and

¹⁰⁹ See Stephen B. Burbank, *Ignorance and Procedural Law Reform: A Call for a Moratorium*, — BROOK. L. REV. (forthcoming 1993). Professor Burbank suggests a moratorium on amendments to the Federal Rules pending the report of such a commission. There is much to support this view, particularly when knowledgeable participants in the process find a need for political lobbying in support of pending proposals. Whether or not *all* proposals for amendment should be put on hold, clearly an unhurried study of the process deserves the highest priority. A moratorium could be expected to contribute to the quality of the study of the process.

¹¹⁰ See, e.g., 28 U.S.C. §§ 474, 476-477, 479-481; CJRA §§ 104-105.

¹¹¹ CJRA § 105(c). The statute also provides for a demonstration program, *id.* § 104, and for early implementation courts. 28 U.S.C. § 482(c). All district courts participating in the pilot program or the demonstration program are automatically designated early implementation courts. CJRA §§ 104(a)(2), 105(a)(2). District courts which are not involved in either of these two programs may also opt for early implementation and thus be eligible for additional financial resources.

the use of cooperative discovery devices, (5) good faith efforts of the parties to resolve discovery disputes without judicial intervention, and (6) an alternative dispute resolution program.¹¹²

Congress seeks "an assessment of the extent to which costs and delays were reduced *as a result of the program*" from the report in question.¹¹³ Moreover, this assessment is to be based on empirical data gathered and analyzed by "an independent organization with expertise in the area of Federal Court management."¹¹⁴ Thereafter, the conclusions arrived at, whether they support or tend to disprove the original assumptions, are to be reflected in amendments to the Federal Rules of Civil Procedure, thereby applying the lessons learned to all district courts. In short, the CJRA introduces a three-year experiment in the pilot courts.¹¹⁵ The resultant data are to be collected and analyzed, and the Judicial Conference is to draw conclusions from the data and apply them for the benefit of litigants throughout the system.¹¹⁶

The effort to apply an empirical approach to innovations in case processing must be applauded.¹¹⁷ So, too, must the decision

¹¹² 28 U.S.C. § 473(a).

¹¹³ CJRA § 105(c)(1) (emphasis added).

¹¹⁴ *Id.* The Rand Corporation has been designated as the independent organization. It is already engaged in designing appropriate studies for collection and analysis of the required data. Presumably, the requirement of an independent organization was to avoid the risk of bias or predisposition on the part of any individuals within the federal judicial system. While the CJRA does not refer explicitly to empirical data, the context makes it clear that more than impressionistic conclusions or subjective reactions are required.

¹¹⁵ *Id.* § 105(b)(3).

The expense and delay reduction plans implemented by the Pilot Districts shall remain in effect for a period of 3 years. At the end of that 3-year period, the Pilot Districts shall no longer be required to include, in their expense and delay reduction plans, the 6 principles and guidelines of litigation management and cost and delay reduction described in paragraph (1).

Id.

¹¹⁶ *Id.* § 105(c)(2).

¹¹⁷ See Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 367 (1986).

I am unconvinced by anecdotes, glowing testimonials, confident assertions, appeals to intuition. Lawyers, including judges and law professors, have been lazy about subjecting their hunches—which in honesty we should admit are little better than prejudices—to systematic empirical testing. . . . If we are to experiment with alternatives to trials, let us really experiment; let us propose testable hypotheses, and test them.

Id. (citations omitted); A. Leo Levin, *Research in Judicial Administration: The Federal Experience*, 26 N.Y.L. SCH. L. REV. 237, 241 (1981) (underscoring effectiveness of research and evaluation, as distinguished from "rhetoric, exhortations, and advocacy")

of Congress that, once the data has been collected, it shall be for the Judicial Conference, utilizing the normal processes of rulemaking, to implement whatever conclusions have been reached.¹¹⁸

It should be recognized at the outset that the data may prove inconclusive. Comparisons among programs and among courts may not yield results which have the clarity of a litmus test experiment in a laboratory. Assessing causation can be a particularly daunting task. Conducting a study with a similar group is a familiar and recognized technique. The CJRA specifically calls for comparison with "comparable judicial districts for which the application of section 473(a) . . . had been discretionary."¹¹⁹ Given only the words of the CJRA, however, the comparison may be between two districts utilizing the same techniques, since a district which is not subject to the mandatory requirement imposed on the pilot courts may nonetheless choose to utilize most or even all of the listed principles of case management. More significantly, the impact of the omnibus judgeship bill on any given district will vary; for example, change in any single district will, at least in part, be a function of the extent to which the lack of judicial resources affected the particular district in the past and the quantity of resources (district judgeships and magistrate judgeships) now provided.¹²⁰

The difficulties, however, are not insurmountable. Moreover, they are relevant at this juncture only to emphasize that expectations should not be raised to unreasonably high levels. What is important is that the enterprise is going forward. The major premise, that policy decisions should be informed by data, is the crucial point. Whether we learn enough from the effort already underway or will need to take another step involving random experiments¹²¹ is of lesser moment.

in "improving judicial administration"); Walker, *supra* note 80 (calling for information gathering before changes in Federal Rules are given effect). See generally EXPERIMENTATION IN THE LAW: REPORT OF THE FEDERAL JUDICIAL CENTER ADVISORY COMMITTEE ON EXPERIMENTATION IN THE LAW (1981) (discussing effectiveness of "program experiments" in altering operation of justice system); Levin, *supra* note 54, at 1584 (advocating detailed "examin[ation of] the conditions under which local experimentation inconsistent with the national rules should be allowed").

¹¹⁸ See CJRA § 105(c)(2)(B).

¹¹⁹ *Id.* § 105(c)(1).

¹²⁰ See Federal Judgeship Act of 1990, Pub. L. No. 101-650, 104 Stat. 5098 (1990).

¹²¹ See Walker, *supra* note 80.

From a historical perspective, the provisions of the CJRA requiring an empirical approach to improving the civil justice system may prove to be one of its most important contributions.

B. Expanding the Inquiry: The Relationship between Cost and Delay

It is commonly assumed, and probably with justification, that delay increases the cost of litigation. We begin the analysis by considering opportunity costs, that is, the time required to deal with litigation, whether in responding to discovery or in making decisions concerning the course of a case.¹²² These costs probably increase as elapsed time increases,¹²³ and opportunity costs can prove to be the highest cost of all. Moreover, the longer a matter remains undetermined, with liability in doubt, the more likely it is that a party's freedom of choice in the conduct of personal or business affairs remains curtailed.¹²⁴

More commonly, when people speak of the costs of litigation, the reference is to transaction costs such as attorneys' fees. The corollary, that expediting disposition will reduce transaction costs to the litigant, is often assumed to be equally true, but it is far from self-evident. Certainly, if a lawyer bills by the hour, long delays by the judge in deciding dispositive motions can result in substantial time spent by the lawyer refamiliarizing herself with the file, thereby increasing total fees. Similarly, extended discovery, multiple hearings, and frequent in-person conferences make for substantially larger fees.¹²⁵ If these are avoided, the transaction costs are likely to be reduced.

¹²² See Joy A. Chapper & Roger A. Hanson, *The Attorney Time Savings/Litigation Cost-Savings Hypothesis: Does Time Equal Money?*, 8 JUST. SYS. J. 258 (1983) (suggesting areas where time is wasted in litigation). Long delays between different stages of litigation (e.g. filing appeals and oral arguments) cause much time to be wasted by attorneys reviewing the case. *Id.* at 260. This is compounded by frequent continuances or the need for expert testimony. *Id.* The absence of limitations on the amount of discovery conducted or the length of briefs submitted often results in "effort that may have marginal utility." *Id.* at 261. Finally, time spent traveling to and from the courthouse, and then having to wait once there wastes much time that could be better spent. *Id.* at 262-63.

¹²³ Much will depend, of course, on what happens during the additional period; for example, whether the litigation is simply dormant, or whether the time is needed for additional discovery.

¹²⁴ *Id.* at 260-62.

¹²⁵ See Peck, *supra* note 7, at 105. The Harris Survey, which was conducted prior to the CJRA, found that the "high cost of litigation unreasonably impedes the ordinary citizen's access to the courts." *Id.* at 107 (citation omitted). This was especially so

Similarly, if a telephone conference call eliminates the need for travel, the time savings may be translated into money savings.¹²⁶ This is true, however, only if the method of billing does not change. If the lawyer continues to bill by the hour, but with fixed rate minima for certain activities, then such savings may not be realized.¹²⁷

When a lawyer is retained on a contingency fee basis, however, none of this applies. Extended hours do not increase the client's costs, and curtailing the time spent on a matter, generally, will not reduce the fee.¹²⁸ Nevertheless, even contingent fees are responsive to market pressures. Typically, the percentage charged will vary substantially, for example, between airplane injury cases and personal injury litigation involving motor vehicles.¹²⁹ It is impossible, however, to predict at what point expedited disposition will affect market rates.¹³⁰

The CJRA recognizes that the cost of litigation does not depend solely on the courts, and that significant contributions must ultimately be made by "the litigants [and] the litigants' attorneys" if costs are to be reduced.¹³¹ The central problem is that we have little data on what the courts can or should do to deal with the cost of litigation.

in the discovery phase of the lawsuit. "The most frequently cited types of lawyer abuse leading to high transaction costs are lawyers who 'over-discover' . . . and lawyers and litigants who use discovery as an adversarial tool to raise the stakes for their opponents." *Id.* at 107-08 (citation omitted); see Chapper & Hanson, *supra* note 122, at 260-62 (discussing time wasted in litigation).

¹²⁶ See Chapper & Hanson, *supra* note 122, at 262-63 (suggesting telephone conferences could replace in-court hearing of pretrial motions).

¹²⁷ See MICHAEL D. PLANET, REDUCING CASE DELAY AND THE COSTS OF CIVIL LITIGATION: THE KENTUCKY ECONOMICAL LITIGATION PROJECT 19 (A.B.A. 1984), reprinted in *ATTACKING LITIGATION COSTS AND DELAY* 278 (A.B.A. 1984). This was an empirical study conducted on the relationship between cost and delay, a study of experimental case management rules and procedures in two Kentucky circuit courts. *Id.* See generally Chapper & Hanson, *supra* note 122, at 258 (discussing how delay increases litigation costs).

¹²⁸ See Chapper & Hanson, *supra* note 122, at 262-63.

¹²⁹ See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 109 (1989). Over the past 25 years, contingent fees in aviation accident cases have dropped "from the one-third level to an average of fifteen to twenty percent . . . with rates as low as ten percent noted." *Id.*

¹³⁰ See Chapper & Hanson, *supra* note 122, at 262-63. "[T]he percentage of the amount recovered varies by attorney [and] geographic region . . . [and] depend[s] on the stage at which the case is resolved . . . Moreover, the amount against which the percentage fee is calculated varies, e.g., gross or net." *Id.*

¹³¹ CJRA § 102(3).

It is doubtful that the research contemplated by the CJRA, focused as it is on the effects of particular techniques and strategies, will yield information adequate to guide the development of policy.¹³² A broader compass is necessary. Moreover, these are sensitive areas of inquiry, and study on a national rather than a local basis is necessary. It would be appropriate for the Judicial Conference, acting through its Committee on Court Administration, to take the initiative to assure informed decisionmaking.¹³³

The CJRA has pointed to the necessity of judicial examination of the problem of the relationship between cost and delay. More fundamentally, the relationship between the cost of litigation and access to justice is implicated. These are sufficient reasons for attempting to learn more about the dynamics that drive the cost of litigation.

CONCLUSION

Students of our system of civil litigation, and *a fortiori* those who would improve it, cannot avoid continuing involvement with a veritable mass of technicalities—the fine points of process and procedure. They must, however, also be concerned with larger, often more difficult questions, such as the relationship between the cost of litigation and access to justice.

Are the tools we have fashioned to facilitate the discovery of truth being used as tactical weapons in a war of attrition?¹³⁴ Have we created an environment in which relative economic staying power too often becomes the crucial determinant in settlement? As a whole, is access to justice being facilitated or deterred?

As the CJRA recognizes, to achieve progress we must confront both types of issues. As the CJRA also recognizes, it is literally impossible for the judges of a single district court to do so in splendid isolation. There are too many players in remote arenas,

¹³² Certainly, some data will be generated, if only opinions of lawyers and litigants. However, we need to learn a great deal more concerning the dynamics of attorney fees.

There were some of the opinion that the CJRA empowered district courts to control contingent fees, for example, by putting caps on them. Such a grant of authority would have to be statutory, and it is difficult to read such a grant into the CJRA.

¹³³ See CJRA § 102(6). “[I]t is unnecessary to create an effective administrative structure to ensure ongoing consultation and communication regarding effective litigation management and cost and delay reduction principles and techniques.” *Id.*

¹³⁴ See, e.g., *Chambers v. Nasco, Inc.*, 111 S. Ct. 2123 (1991).

including members of Congress and of the executive branch, whose actions impact directly upon virtually every facet of the federal civil justice system.¹³⁵

There is every indication that the judges of the United States District Courts and the lawyers who practice before them have accepted the challenge put before them by Congress and are, in the preparation of advisory group reports and district court plans, complying with both the letter of the legislation and the spirit that motivated it. It remains to be seen whether there will be a similar response from the other two branches of government concerning the delivery of civil justice in this country.

If they, too, rise to the challenge, if a more rational system of assessing and providing needed human resources is implemented, if a new and more significant role for genuine experimentation emerges, and if all these developments supplement the essential ingredient of a judiciary that continues to seek improved ways of assuring access to justice, then the scope and sweep of the Civil Justice Reform Act of 1990 will indeed be both remarkable and remarked. More significantly, its contribution may be of historic dimensions.

¹³⁵ This Article is not intended to be an exhaustive illustration of the sweep and scope of the CJRA as it involves other activities of Congress and participants in the litigation process. It has not addressed, for example, the obligation imposed on each advisory group to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts," 28 U.S.C. § 472(c)(1)(D) (1992), a complex subject which involves the willingness of Congress to listen as well as to speak. Nor has it addressed the obligation imposed on each advisory group to "ensure that its recommended actions . . . include significant contributions" toward reducing cost and delay; such contributions are to be made by litigants as well as their attorneys. *See id.* § 472(c)(3).