# COMMENT

# A JUDGE'S VIEW OF CONGRESSIONAL ACTION AFFECTING THE COURTS

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## I

Professor Kramer's article[1] suggests an addition to the mechanisms of congressional review of proposed legislation that impacts the work of federal courts. Certainly Congress can do a better job in its consideration of such legislation, and Congress certainly should be informed of the events taking place in the federal court system, as well as in the executive branch, that affect the ability of the federal courts to do their work. It is questionable, however, whether congressional knowledge can best be improved, as Professor Kramer proposes, through the creation of a new agency in Congress similar to the Office of Technology Assessment.

To answer the question, we would need to know how good a job the Office of Technology Assessment presently does for Congress. Is its product well reasoned and of a high quality? Does Congress pay attention to its reports and recommendations? Is its work free of political influence? Because Congress has final say over procedural and evidentiary rules, control over jurisdiction, and the ability to create new causes of action, there can be no doubt that the federal judiciary would favor anything that would assist Congress in doing a better job when it enacts laws affecting the federal courts.

From my limited experience as an observer of Congress, I have grave doubts that an apolitical, technically proficient group of advisers can have any real impact on the work of Congress. Professor Kramer described how "interest groups with narrow, focused demands can often overcome more diffuse support for broad reform."[2] He also suggested that an extensive review of potential legislation need not be undertaken until a congressional committee or subcommittee has indicated real interest in that legislation.[3] By that time, however, it would likely be too late for any objective report on the impact of the proposed legislation on the courts to have any real effect. By then, special interest groups will have too much invested in the proposed



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1. Larry Kramer, *"The One-Eyed Are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 L & Contemp Probs 73 (Summer 1991).

2. Id at 77.

3. Id at 96-97.

legislation for an apolitical analysis and recommendation to influence congressional action.

The Civil Justice Reform Act of 1990, commonly called the Biden Bill in recognition of its chief sponsor,[4] serves as a classic example of the point I am making. The act mandates an extensive revision in the manner in which federal district judges manage cases on their dockets. Its introduction, however, completely bypassed the congressionally created Judicial Conference of the United States. The bill was introduced three months before the scheduled release date of a related report of the Federal Courts Study Committee,[5] an apolitical, technically proficient group of the type Professor Kramer suggests should be created. Senator Biden and the bill's co-sponsors apparently could not wait for the Study Committee's report. Thus, instead of debating the committee's recommendations, Congress considered and enacted a proposal generated through the traditional political process.

I suggest Senator Biden's timing was quite deliberate and was a successful effort at agenda control. Judith Resnik's article describes the politics of procedural lawmaking, particularly the rivalry between Congress and the Judicial Conference in this area.[6] This conflict was manifested in the timing and promotion of the Biden Bill.

## II

A federal judge has some difficulty in talking candidly about the Biden Bill. It has been packaged with Title II,[7] which increases the number of federal judges, a greatly desired objective of my colleagues. However, here too, Congress appears to want to go its own way. The proposed increases do not follow the Judicial Conference recommendations, which are based on carefully considered workload statistics. Indeed, Title II calls for increases that lack justification in the most liberal of standards for determining the number of judges for some districts.

The major flaws in the Biden Bill itself, in my view, are its emphasis on fast track procedures (which most often are of greater benefit to better financed parties); its assumption that civil cases in all federal districts are going unattended; its underestimation of the costs of implementing its requirements ($10 million is authorized); and the obvious need for significant bureaucratic programs and procedures to implement its requirements. The good aspects of the bill could easily be implemented by the Judicial Conference as the managing head of the federal court system.

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4. Civil Justice Reform Act, 28 USCA §§ 471-482 (Supp 1991) (enacted as Title 1 of the Judicial Improvements Act of 1990, Pub L No 101-650, 104 Stat 5089 (1990)).

5. Judicial Conference of the United States, Report of the Federal Courts Study Committee (April 2, 1990).

6. Judith Resnik, *From "Cases" to "Litigation,"* 54 L & Contemp Probs 5 (Summer 1991).

7. Federal Judgeship Act of 1990, 28 USCA §§ 201, 202 (Supp 1991) (enacted as Title II of the Judicial Improvements Act of 1990).

The bill, I suggest, is premised on a number of invalid assumptions, or assumptions for which proof is lacking. We have no empirical data on how long a case "should" take from filing to disposition. We do not know how increasing the pace of a case affects the quality of decisionmaking. The bill assumes that all ninety-four federal judicial districts suffer from delay and that the cause of that delay is systemic. It ignores the likely effect on the progress of a case of the individual differences in judges, the policies of U.S. attorneys, and the impact of the local legal culture. To my knowledge, there has been no study of the judicial districts that do well and those that do poorly in moving cases, or of why such a variation exists. For example, no one has described how the judges in the Eastern District of Virginia manage their cases and have acquired the reputation of having a "rocket docket."[8] We do not know why in the Eastern District of New York, the Southern District of West Virginia, the Districts of North Dakota, Arizona, and Alaska, and the Northern and Southern Districts of Florida, criminal trial hours in 1989 constituted more than 60 percent of total trial hours.

Additionally, in introducing the bill in May 1990, Senator Biden said that it was designed in part to provide greater court access to middle-class Americans who are being priced out of the litigation market.[9] The Senator fails to recognize, however, that most litigation involving middle-class Americans occurs in state courts. In commenting on the bill, Chief Judge Cook of the Eastern District of Michigan noted that "[f]ast track legal procedures generally harm those who need to schedule their time and attendance around substantially competing business and personal interests."[10] This is a polite way of saying that the fast track procedures envisioned by the Biden Bill will likely impact the plaintiffs' bar significantly more than the defendants' bar, since it is the plaintiffs' bar that most middle-class Americans look to for representation.

## III

Questions about the Biden Bill abound. Where did it come from? Why was it introduced at the time it was? Who drafted it? Who briefed Senator Biden as to its purposes so that in introducing it he deprecated the work of magistrates? Actually, if one searches, partial answers to these questions can be found.

The bill did not grow like Topsy. In 1988, the Foundation for Change, a non-profit group of which Senator Biden is the honorary chairperson, commissioned Louis Harris and Associates to poll attitudes about the courts and causes of delay and expense. The Harris report, entitled *Procedural Reform of the Civil Justice System*,[11] identified discovery abuse and inadequate case

8. Paul M. Barrett, *"Rocket Docket": Federal Courts in Virginia Dispense Speedy Justice*, Wall Street J 33 (Dec 3, 1987).

9. 136 Cong Rec S6466-03 (May 17, 1990).

10. Letter from Judge Julian Abele Cook to Judge Robert F. Peckham, March 9, 1990.

11. *Procedural Reform of the Civil Justice System* 5 (Louis Harris & Assoc., March 1989).

management as the culprits causing increased transaction costs and delay in the resolution of cases in court. The report recommended closer judicial control over the discovery process and better judicial management of cases as the solutions to the vices it described. The Harris report did not confine itself to the sins of the federal courts but rather applied, as I read it, to all courts, federal and state.

Following the Harris report, the Foundation for Change, in cooperation with the Brookings Institution, established a task force to study ways of reducing cost and delay in the movement of cases in federal courts. As with the first study, I do not know the details of who financed the study and who selected the members of the task force. It appears that the study was financed in part by Aetna Life and Casualty Foundation, the Association of Trial Lawyers of America, and Whittaker Corporation. The report, entitled *Justice for All: Reducing Costs and Delays in Civil Litigation*,[12] made a variety of procedural recommendations for all federal district courts. The principal recommendation was that each district court develop and implement a "Civil Justice Reform Plan" within twelve months. The report proposed that the plan include several elements:

- a system of case tracking or differentiated case management that (a) set early, firm trial dates at the outset of all non-complex cases and (b) set time guidelines for the completion of discovery;
- a policy of permitting only narrowly drawn "good cause" exceptions for delaying trials or discovery deadlines;
- procedures for resolving motions necessary to meet trial dates and the discovery deadlines;
- a requirement that authorized representatives of the parties with decisionmaking authority be present or available during any settlement conference;
- regular publication of reports on pending undecided motions and caseload progress;
- a provision that magistrates do not perform tasks best performed by judges; and
- mechanisms for reducing backlogs in the district courts with significant backlogs.[13]

The report also suffers from various weaknesses. First, it makes no mention of the effect of the criminal caseload on the progress of civil cases in federal courts and seriously denigrates the single most valuable tool available for aggressive case management, the magistrate system. Additionally, no federal judge served on the task force; two federal judges are listed as advisers. Ironically, one of the advisers subsequently became chair of the special Judicial Conference Committee responsible for working with the

12. *Justice for All: Reducing Costs and Delays in Civil Litigation* (Brookings Inst, 1989). The Brookings Institution has disavowed responsibility for the report, notwithstanding the use of the Institution's imprimatur to promote its validity. Id at vii.

13. Id at 12-29.

Senate Judiciary Committee and Senator Biden in an effort to reshape the bill in a form acceptable to federal judges. In my view, the task force relies on the ability of federal judges to solve the problem of how to put a square peg into a round hole.

## IV

Professor Kramer recommends establishing a new office in Congress to assist in the congressional consideration of proposed legislation that would affect federal courts. As he noted, and as I mentioned at the beginning of this comment, interests with narrow, focused demands always will defeat broad reform. The need for broad reform in case management procedures in federal courts has not been made out. When all is said and done, it appears that, given the financing of *Justice for All*, the precursor of the Biden Bill, the bill is being driven by special interests. And it is these same kinds of interests that will defeat Professor Kramer's recommendation—or inhibit its utility—unless these special interest groups find some personal value in it.