"USERS UNITED"*: THE CIVIL JUSTICE REFORM ACT OF 1990

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I

INTRODUCTION

Across the country, federal district courts have begun implementing the Civil Justice Reform Act of 1990 ("the CJRA" or "the Act"),[1] widely referred to as the "Biden Bill" in recognition of its principal sponsor, Senator Joseph R. Biden, Jr. (D-Delaware), chairman of the Senate Judiciary Committee. Passed in the waning moments of the 101st Congress and praised by President Bush as making "valuable suggestions for improving the management of the civil justice system,"[2] the CJRA promises to have a profound impact on the practice of civil litigation in the federal court system.[3] Its objectives are "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."[4]

The CJRA is the subject of widespread attention from lawyers, judges, and clients alike because of the substance of its underlying reforms and the process by which those reforms came about. Substantively, the Act mandates a series of sweeping steps at the local and national levels to make federal civil litigation more affordable, more accessible, and less time consuming. The linchpin of the Act is user involvement in the establishment and promulgation of policies for the management of litigation in the federal courts. This involvement is accomplished through the creation of local advisory groups, which are responsible for assessing the civil and criminal dockets and the overall operation of their federal district courts, recommending

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* Statement of Judge Richard A. Enslen, Hearings on the Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990 before the Senate Judiciary Committee, 101st Cong, 2d Sess 227 (1990) ("Senate Hearings").

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The views expressed herein are the author's own, and do not represent the views or opinions of any member of the Senate Judiciary Committee.

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

2. Signing Statement of President Bush, Dec 1, 1990 (noted in Senator Biden's remarks on Implementing the Civil Justice Reform Act, 137 Cong Rec S1330-02 (Jan 30, 1991)).

3. Title II of the Judicial Improvements Act is particularly significant as well. It creates 85 new federal judgeships, many of which are targeted specifically at district courts with heavy drug caseloads. See Federal Judgeship Act of 1990, 28 USCA §§ 201, 202 (Supp 1991) (enacted as Title II of the Judicial Improvements Act of 1990).

4. 28 USCA § 471.

comprehensive plans to reduce costs and delays, and monitoring the application of the plans and the condition of the courts' dockets.

The process by which this legislation became the law of the land is equally significant, albeit for different reasons. Less than twelve months passed between the introduction of the Act and its enactment—a rather remarkable feat, even the critics of the Act must concede, in an area of the law in which reform has been both incremental in scope and languid in pace. Action that typically occupies several years and multiple Congresses took only one year and only one session of a single Congress. This fast pace occurred for several reasons: (1) careful and deliberate study preceded legislative action; (2) consensus was the watchword, with common opponents forging an unprecedented alliance; and (3) under Senator Biden's stewardship reasonable compromise outlasted stubborn resistance.

For the critics of the legislation in some segments of the federal judiciary, initial fear of the legislative process became, for some of the most fearful, the triumph of successful legislative achievement. For others, who are thankfully few in number, no legislation, however much the product of thoughtful compromise and reasoned debate, can appease what they still consider to be encroachment upon territory somehow reserved exclusively to the judiciary.

This comment addresses the substantive components of the CJRA as well as the process that led to its enactment. Both are integral to understanding the Act's potential for long-term, sweeping reforms of the civil justice system. First, in highlighting the key provisions of the CJRA, the value of a statutory imprimatur becomes apparent. Indeed, in a system where key participants have incentives to resist—not support—reform, change is much more likely to occur through the force of law than through the nonbinding, hortatory proposals that the Judicial Conference sought to substitute in its place. Second, analyzing the process that led to the enactment of this comprehensive legislation in record time demonstrates that coalitions can be built even among those who have repeatedly battled one another on some of the most divisive issues to come before Congress. This process, in which antagonists on product liability and McCarran-Ferguson[5] became allies on civil justice, is noteworthy as much for that which occurred before the legislation was introduced as for that which occurred after.

5. The McCarran-Ferguson Act, 15 USC § 1012 (1988), reserves to the states the power to regulate the business of insurance, and thereby grants to the insurance industry an exemption from the antitrust laws. Proposals to repeal the exemption, or at least substantially dilute it, have been made for several years and, historically, have been quite controversial.

II

THE CONSENSUS IN SUPPORT OF CIVIL JUSTICE REFORM

A. Laying the Foundation for Reform—The Harris Survey and the Brookings Conferences on Civil Justice

Two major projects preceded the introduction of the CJRA on January 25, 1990.[6] First, Louis Harris and Associates, Inc., conducted an in-depth survey of 250 plaintiff attorneys, 250 defense attorneys, 100 public interest attorneys[7] who actively litigate cases in federal courts, 300 corporate general counsel of companies selected from the 5,000 largest American corporations (based on annual sales revenue), and 147 federal trial court judges.[8] Second, at Senator Biden's request, the Brookings Institution convened a series of conferences with a task force of national experts in civil litigation. Both the Harris survey and the Brookings task force were integral to identifying reform proposals and developing consensus.

The Harris survey examined, for the first time ever, the attitudes and opinions of litigators and federal trial judges on the nature and extent of the problems of litigation costs and delays. While many had speculated about the impact of discovery on high costs and the potential of reforms to address this and other problems, never before had the opinions and attitudes of the users of the civil justice system been scientifically and expertly probed. The survey provided concrete evidence of the nature of the problem and a firm basis to believe that the users could unite behind a series of comprehensive, effective reforms.[9]

A substantial majority of the litigators and federal trial judges concluded that the high cost of litigation unreasonably impedes the ordinary citizen's access to the courts.[10] The survey found that the most important perceived cause for the high cost of litigation is the abuse of the discovery process.[11] The most frequently cited types of lawyer abuse leading to high transaction costs are lawyers who "over-discover" cases rather than focusing on controlling issues, and lawyers and litigants who use discovery as an

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6. See Statements on Introduced Bills and Joint Resolutions, 136 Cong Rec S414 (daily ed Jan 25, 1990).

7. "Public interest attorneys" included attorneys working for the government, as well as those working for private, non-profit organizations.

8. *Procedural Reform of the Civil Justice System* (Louis Harris & Assoc, Inc, 1989)("Harris Survey"), reprinted in Senate Hearings at 91 (cited in note *). The survey was conducted for the Foundation for Change, Inc.

9. When asked whether "it would be possible to introduce procedural improvements and reforms that would significantly reduce transaction costs," 82% of the private litigators, 83% of the public interest litigators, 90% of the corporate litigators, and 88% of the federal judges surveyed answered affirmatively. See id at 180 (cited in note 8).

10. Sixty-nine percent of the corporate counsel, 85% of the public interest litigators, 63% of the plaintiffs' litigators, 52% of the defense litigators, and 56% of the federal trial judges surveyed agreed that transaction costs of federal litigation unreasonably impede the use of the civil justice system by the ordinary citizen. Id at 122.

11. Sixty-two percent of the plaintiffs' and defense litigators, 63% of the public interest litigators, 80% of the corporate counsel, and 71% of the judges surveyed said that discovery abuse was the most important cause for the high cost of litigation. Id at 128.

adversarial tool to raise the stakes for their opponents.[12] With respect to reform proposals, the survey showed broad and widespread support for increasing the role of federal judges as active case managers.[13]

Probing attitudes and opinions and gathering evidence of consensus is one thing; actually developing consensus in support of specific and detailed reform proposals is quite another. With the results of the Harris survey in hand, Senator Biden turned to the complicated task of building consensus and energizing the movement toward enactment of comprehensive legislation.

The Brookings Institution became the scene of that consensus building effort. As noted above, Brookings convened a task force of authorities from throughout the United States that included leading litigators from the plaintiff and defense bars, civil and women's rights lawyers, attorneys representing consumer and environmental organizations, former trial and appellate court judges, representatives of the insurance industry, general counsel of major corporations, and law professors. As Senator Strom Thurmond described it, the Brookings task force "was composed of a vast array of individuals representing competing interests within our civil justice system."[14]

The task force report[15] was the origin for many of the provisions in the Act.[16] The report, with its comprehensive recommendations, was forged by consensus, despite the divergent interests represented by the task force members. Judge Richard A. Enslen of the U.S. District Court for the Western District of Michigan aptly described the task force as "Users United,"[17] noting that it represented the "heavy-weight thinking in every spectrum of our judicial system."[18] He added that "to read that task force report and not to be impressed as a Federal district judge is to miss, I think, the whole game."[19] Judge Enslen concluded that "[t]he report's analytical and thought-provoking thesis offer [sic] compelling argument to often illusive solutions to reducing delay and cost."[20]

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12. Seventy-eight percent of the judges, 86% of the corporate counsel, 59% of the public interest litigators, 75% of the defense litigators, and 68% of the plaintiffs' litigators surveyed said that lawyers who "over-discover" cases are a major cause of high costs. Seventy-one percent of the judges, 77% of the corporate counsel, 71% of the public interest litigators, 65% of the defense litigators, and 64% of the plaintiffs' litigators surveyed said that the use of discovery as an adversarial tool is a major cause of high costs. Id at 132.

13. This concept was supported by 84% of the federal trial judges surveyed, as well as by 83% of the plaintiffs' lawyers, 80% of the defense lawyers, 89% of the public interest lawyers, and 92% of the corporate counsel. Id at 161.

14. Senate Hearings at 3 (cited in note *) (Sen. Thurmond is the ranking minority member of the Senate Judiciary Committee).

15. Brookings Institution Task Force, *Justice For All: Reducing Costs and Delays in Civil Litigation* (Brookings Inst, 1989).

16. Senate Hearings at 421 (cited in note *).

17. Id at 227 (testimony of Judge Richard A. Enslen).

18. Id.

19. Id.

20. Id at 233 (written statement of Judge Richard A. Enslen).

B. Introduction and Enactment of the CJRA

Thus, when Congress convened in January 1990, the foundation for a legislative proposal was in place. The cornerstones for a broad-based coalition had been laid, and the substantive framework had been built.

Between the introduction of the CJRA and its enactment, however, the legislation underwent a variety of substantive changes. During the course of the year, Senators Biden and Thurmond received thoughtful and critically important input from individual judges, clients, lawyers, and bar associations throughout the country. As the Senate Judiciary Committee report states: "It is a testament to the wisdom and experience of judges, clients, and lawyers alike, and it reinforces the policy judgment reflected in the legislation that reform must proceed from the 'bottom up'—with . . . [the] users of the Federal court system playing a principal role in the formulation [of reform]."[21]

The Senate Judiciary Committee held two hearings on the legislation, and the House Judiciary Committee held one. Representatives of the Judicial Conference of the United States testified at all three hearings—the only witnesses to do so. Indeed, the Conference designated a special task force[22] on the civil justice legislation to work specifically with the committees. More than any other group or organization, the task force was intimately involved in discussions and negotiations concerning proposed revisions to the legislation. After a year of such debate, the legislation was passed by both houses of Congress on October 27, 1990.

III

LEGISLATION VERSUS SUGGESTION: THE FORCE OF LAW AND THE IMPORTANCE OF A STATUTORY IMPRIMATUR

A. What the Law Requires

With the enactment of the CJRA, five "first principles" of litigation management and cost and delay reduction—all recommended by the Brookings Task Force—now have the force of law. Aimed, in Senator Biden's words, at "bring[ing] about a civil justice system that is less expensive, more efficient, and more accessible for all Americans,"[23] these "first principles" are (1) reform from the "bottom up"; (2) mandatory case management guidelines; (3) enhanced judicial accountability; (4) continuous renewal; and (5) expanded information dissemination. Each will be discussed in turn.

1. *Reform from the "Bottom Up."* As Senator Biden said when the original civil justice legislation was introduced, the CJRA is "based on the principle

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21. The Judicial Improvements Act of 1990, Report of the Committee on the Judiciary of the United States Senate, S Rep No 101-650, 101st Cong, 2d Sess 4 (1990).

22. The task force was chaired by Judge Robert F. Peckham. Judges John Nangle, Aubrey Robinson, and Sarah Barker were the other members.

23. Senate Hearings at 309 (cited in note *).

that reform must come from the 'bottom up'—that is, from those who must live with the civil justice system on a regular basis."[24] Accordingly, each of the ninety-four federal district courts must take a series of steps to fulfill the paramount obligation imposed by the Act: the development and implementation of a "civil justice expense and delay reduction plan."[25] Briefly, each district court must convene an advisory group[26] comprising "attorneys and other persons who are representative of major categories of litigants" in the district.[27] Each advisory group must assess the state of the court's civil and criminal docket, identify trends in case filings and in demands being placed on the court's resources, and identify the principal causes of cost and delay in the district's civil litigation.[28] Once this assessment is completed, the advisory group must then develop a set of comprehensive recommendations regarding the content of the district's civil justice expense and delay reduction plan. In developing the plan, the advisory group and the court must consider, and may include, certain basic principles of litigation management set forth in the statute.[29] As Judge William W. Schwarzer, director of the Federal Judicial Center, has written, "the plan should serve as a practical document that will—by incorporating principles, guidelines, and techniques suitable for each court's circumstances—focus the contributions of the entire legal community on the improvement of the civil litigation process."[30]

In mandating the development of a plan in each district court, Congress did not intend to straightjacket courts in the management of civil litigation. Each plan is best viewed as a partnership among the members of the court, the bar, and the community that the court serves. Congress has identified the objectives of the plan and provided specific guidance, while at the same time leaving the district courts with substantial discretion as to how to achieve those objectives.

2. *Mandatory Case Management Principles.* The statute directs that ten district courts—five of which must encompass major metropolitan areas—participate in a pilot program in which six fundamental principles of litigation management are made a part of the civil justice expense and delay reduction plan.[31] The six principles that must be included in the plans are:

(1) systematic, differential treatment of complex and simple cases, so that the level of individualized and case-specific management is

24. 136 Cong Rec S416 (cited in note 6).
25. 28 USCA § 471.
26. Id § 472(a).
27. Id § 478(b).
28. Id § 472(c)(1).
29. Id § 473.
30. William W. Schwarzer, Implementation of the Civil Justice Reform Act of 1990, 2 (Jan 16, 1991) (memorandum to all chief judges of the U.S. district courts) ("Implementation Memorandum").
31. Historical & Statutory Notes § (b)(1), 28 USCA § 471. The plans developed by these ten courts must be implemented no later than December 31, 1991. Id.

tailored to such criteria as case complexity and the amount of time and judicial and other resources required and available for the preparation and disposition of the case;
(2) early and ongoing control of the pretrial process by the court, through setting early, firm trial dates, controlling the extent of discovery, and setting deadlines for the filing of motions and a time framework for their disposition;
(3) careful and deliberate monitoring of complex cases;
(4) encouragement of cost-effective discovery through the voluntary exchange of information among litigants and their attorneys and other cooperative discovery devices;
(5) conservation of judicial resources by prohibiting the consideration of discovery motions unless accompanied by a certification that the moving party has made a reasonable and good faith effort to reach agreement with opposing counsel; and
(6) authorization to refer appropriate cases to available alternative dispute resolution programs.[32]

At the end of the three-year test period, an "independent organization with expertise in the area of federal court management"[33]—that is, independent of the Judicial Conference and the Federal Judicial Center—will study the degree to which costs and delays have been reduced in these districts, and compare the results to ten similar districts in which the principles were discretionary.[34] The Judicial Conference must then expand the number of district courts in which the principles are mandatory or propose an alternate, more cost-effective program.[35]

3. *Enhanced Judicial Accountability.* For the first time ever, statistics on the pace at which judges and magistrates make decisions will be made public. The statute requires the Judicial Conference to prepare semi-annual public reports, showing for every district court judge (and, where applicable, for every magistrate): (1) the number of motions pending for more than six months; (2) the number of bench trials submitted for more than six months; and (3) the number of cases that have not been terminated within three years of filing.[36] While such information has been collected previously, it has never before been made public.

4. *Continuous Renewal.* The mechanisms set in place by the CJRA are anything but a "one-shot deal." Quite to the contrary, the statute ensures a process of continuous renewal by requiring each district court, once its plan is

32. 28 USCA § 473(a). Judge Schwarzer's memorandum provides excellent background and commentary on each of the six principles. It should be reviewed carefully by every district court and every advisory group in connection with the preparation of the plan. See generally Implementation Memorandum (cited in note 30).
33. See Historical & Statutory Notes § (c)(1), 28 USCA § 471.
34. Id.
35. See id § (c)(2)(A).
36. 28 USCA § 476.

developed and in consultation with the advisory group, to "assess annually the condition of the court's civil and criminal dockets with a view to determining appropriate additional actions that may be taken by the court to reduce cost and delay and to improve the litigation management practices of the court."[37] Thus, the statute is aimed at improving the health of the civil justice system in the long term by mandating that docket conditions are continually reviewed; new problems are continually identified; existing rules and procedures are continually examined and revised; and new rules and procedures are continually proposed.

5. *Expanded Information Dissemination.* A principal objective of the CJRA is the dissemination of information on a comprehensive, national scale. The Judicial Conference is directed to transmit copies to each of the ninety-four district courts of all the plans prepared by the district courts and all the reports compiled by the advisory groups.[38] In addition, the Conference must, on a continuing basis, "study ways to improve litigation management and dispute resolution services in the district courts";[39] prepare, periodically revise, and distribute to the district courts a manual for litigation management and cost and delay reduction that will contain a description and analysis of the principles and techniques considered most effective in reducing costs and delays;[40] and develop and conduct comprehensive education and training programs for all court officers.[41]

B. The Importance of a Statutory Imprimatur

In response to the introduction of the CJRA, the Judicial Conference adopted a "14 Point Program."[42] The Conference testified that it "hop[ed] that adoption of this ambitious, unprecedented undertaking would persuade the sponsors of [the Act] that legislation in this area was unnecessary."[43] Both the tangible and intangible advantages of the statutory approach demonstrate the dramatic and important differences between the Act and the Conference's 14 Points.

Most obviously, the Civil Justice Reform Act has the force of law. Among other things, every district court is now statutorily required to create an advisory group; develop and implement a civil justice expense and delay reduction plan; consider for inclusion in the plan or actually include certain basic case management principles and guidelines; make available to the public information on the pace of decisionmaking; and continually evaluate conditions. In contrast, the 14 Points are merely hortatory; the Judicial Conference has no enforcement authority to ensure that any of the points are

37. Id § 475.
38. Id § 479(a).
39. Id § 479(b)(1).
40. Id § 479(c).
41. Id § 480.
42. See Senate Hearings at 325 (cited in note *) (testimony of Judge Robert F. Peckham).
43. Id at 331 (written statement of the Judicial Conference of the United States).

followed by any district court. This distinction between the mandatory and discretionary approaches has several implications.

As one corollary, the CJRA establishes a national, cohesive structure and promulgates a national framework for addressing the problems of litigation costs and delays. Assessing the state of the court's docket and developing a plan to reduce costs and delays are not optional; *every* district court must comply with the law. In contrast, under the 14 Points, district courts would be free to decide whether or not to undertake any or all of these responsibilities. Furthermore, even for those courts that chose to participate in the 14 Point program, the degree of participation would have undoubtedly varied from court to court. Thus, while the CJRA links all federal district courts uniformly, the 14 Points might well have produced only a patchwork of compliance. In fact, absent a statute, there is no existing means for addressing litigation management and cost containment on a national scale. Quite simply, a void exists in the federal court administrative structure in terms of identifying and implementing a national strategy and framework for attacking the cost and delay problems. The statute fills that void; the 14 Points, lacking the force of law, could not.

Moreover, the statute directs an information collection and dissemination process of unprecedented proportions. Never before has every federal district court been required, in effect, to take a look inward—to collect data on its performance and to engage in a dialogue on litigation management with lawyers and clients who appear regularly in court. The information collection and dissemination structure implemented by the CJRA would simply not be effective if done on an informal, and inherently more spotty, basis. The force of law is necessary for ninety-four advisory groups in ninety-four district courts to assess their respective dockets, identify the areas in which resources may be lacking, and propose a comprehensive plan to begin to resolve the problems.

More intangibly, but no less important, the legislative process leading up to enactment of the CJRA inspired a vigorous debate on a problem of immense dimensions that, prior to introduction of the legislation, had received little attention beyond the academic journals and judicial literature. Even the harshest critics of the statute would be hard-pressed to deny that this debate was a healthy one, and that it highlighted the needs and demands of civil litigants in ways never before observed. The advisory group structure mandated by the statute will further stimulate that debate and will build upon the groundswell of attention that began last year—debate and attention that simply would not have occurred to the same degree were the structure the product of an internal Judicial Conference activity rather than the give-and-take of the legislative process.

In sum, the force of legislation was and is necessary to accomplish the bold task of setting a national agenda for litigation management and cost and delay reduction, while retaining flexibility at the local level. Because Congress expressed the users' desire for reduced costs, litigation management has been

elevated to a level of prominence that never would have been reached solely at the initiative of the Judicial Conference.

IV

THE VALUE OF THE LEGISLATIVE PROCESS

Much of the debate over the CJRA centered not on the merits of the underlying proposals, but on the appropriate source of the proposals themselves. Many within the judiciary framed the debate in this fashion: should the reform proposals encompassed within the CJRA originate in Congress, or should they—indeed, must they—originate within the judiciary by virtue of the Rules Enabling Act or, more broadly, because of the doctrine of separation of powers?[44]

Regrettably, as explored below, this battle over turf should not and need not have occurred. It *should* not have occurred because the view that court reform is somehow within the exclusive province of the courts is erroneous as a matter of law and mistaken as a matter of policy when, as here, the rule-making process had not fully responded to the range of civil litigation problems that existed. And it *need* not have occurred because the stark choice presented between Congress and the judiciary oversimplified the issue. As the debate within Congress so aptly illustrated, the legislative process allowed the judiciary to play a substantial role in shaping the final bill.

A. Congress Has Undoubted Power and Clear Responsibility to Legislate Litigation Management and Cost and Delay Reduction

Upon the introduction of the original civil justice legislation on January 25, 1990,[45] discussion proceeded on two levels. First, some challenged Congress's constitutional authority to legislate in the area of procedural reform. Second, others raised concerns about and objections to the underlying merits of certain provisions of the legislation. Throughout the year of debate, Senators Biden and Thurmond responded fully to most, if not all, of the substantive concerns and objections. What largely remained, then, was an objection to the congressional involvement in procedural reform that the bill represented. As a matter of constitutional law, this argument, which is often cloaked in separation of powers terms, is without merit.

Congress plainly has the power to enact rules of court in general and the CJRA in particular. Nearly fifty years ago, the Supreme Court said in no uncertain terms: "Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States. . . ."[46] Nearly a quarter-century

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44. Id at 329 (arguing that the CJRA intrudes into areas that are "clearly the province of the courts," and that such intrusion is inconsistent with the "congressionally mandated" Rules Enabling Act).

45. 136 Cong Rec S416 (cited in note 6).

46. *Sibbach v Wilson & Co.*, 312 US 1, 9-10 (1941).

later, Chief Justice Warren reaffirmed Congress's power in *Hannah v. Plumer*,[47] when he wrote:

> [T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts. . . . [Subsequent cases] cast no doubt on the long-recognized power of Congress to prescribe housekeeping rules for federal courts . . . .[48]

Congress has, of course, delegated some rulemaking authority to the courts. That delegation, however, does not lessen the rulemaking power conferred on Congress by the Constitution. A 1926 report of the Senate Judiciary Committee makes clear that when Congress delegated power to the courts, it never intended to surrender its constitutional role:

> [T]he bill proposed will not deprive Congress of power, if an occasion should arise, to regulate court practice, for it is not predicated upon the theory that the courts have inherent power to make rules of practice beyond the power of Congress to amend or repeal . . . . It gives to the court the power to initiate a reformed Federal procedure without the surrender of the legislative power to correct an unsatisfactory exercise of that power.[49]

Separate and apart from Congress's clear constitutional authority is its broad policymaking responsibility to regulate court practice when current rules and procedures are inadequate to deal with existing problems. Whether those rules and procedures were, in fact, adequate was a major issue within the context of the debate over the CJRA. In arguing against the need for legislative reform, the Judicial Conference suggested that the judiciary—both institutionally and individually, and particularly when it came to rulemaking—had responded fully to rising litigation costs and delays, and that, therefore, intervention by Congress was unwarranted. The response of the rulemaking process, however, had not been adequate.[50]

Reform efforts of years past had been more in the nature of limited, stopgap measures designed to address specific, narrow problems rather than broad, policy-oriented initiatives intended to achieve fundamental, systematic change. Justice Lewis Powell aptly described the state of reform efforts when, dissenting from the adoption of the 1980 amendments to the Federal Rules of Civil Procedure, he said:

> I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems . . . . The Court's adoption of these inadequate changes could postpone effective reform for another decade . . . . I do not dissent because the modest amendments recommended by the Judicial

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47. 380 US 460 (1964).

48. Id at 472-73. See also HR Rep No 422, 99th Cong, 1st Sess 5-7 (1985) ("Congressional power to regulate practice and procedure in federal courts has been acknowledged by the Supreme Court since the early days of the Republic and is now assumed without question by the courts." (citation omitted)).

49. S Rep No 1174, 69th Cong, 2d Sess 7 (1926).

50. That is not to say the adopted rules lacked merit. Some clearly did; some probably did not. The question for the purposes of this discussion is not the merits of the adopted rules but whether those rules were sufficiently responsive to the full range of problems presented by rising litigation costs and delays.

> Conference are undesirable. I simply believe that Congress's acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms.[51]

Justice Powell's admonition went unheeded in the decade that followed. While clearly important changes to the rules were adopted,[52] they did not represent the kind of broad policy initiatives reflected in the CJRA.[53] In sum, prior to introduction of the CJRA, amendments to the Federal Rules continued to be proposed and discussed; some were adopted, some discarded. "Tinkering" changes were still the norm, with the concentrated search for more systematic solutions neglected. All the while, litigation costs continued to skyrocket.

By 1990, Justice Powell's dissent had become prophetic. "Genuinely effective reform," as he put it, *had* been delayed. With increasing impatience and alarm, lawyers, judges, and community leaders emphasized the need to control litigation costs in some system-wide fashion. That view was clearly reflected in the results of the Harris survey.[54] With the introduction of the CJRA in the Senate and the House of Representatives on January 25, 1990, Congress stepped in to fill the void created by the insufficient response of the rulemaking process and reassert its inherent power to regulate court practice.

B. The Value of a Legislative Process That Is Genuinely Pluralistic and Inherently Inclusive

The legislative process that preceded enactment of the CJRA demonstrates conclusively that the debate over with whom the proposals should originate need not have occurred. The proposals to reduce costs and delays originated in Congress, but that in no way meant the exclusion of individual judges or the Judicial Conference as an institution from the legislative process itself or the substance of the legislation produced. Quite

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51. Amendments to the Federal Rules of Civil Procedure, 85 FRD 521, 522-23 (1980).

52. For example, in 1983, Rule 16 was amended in several ways to make scheduling and case management an express objective of pretrial procedures. Rule 26(b) also was amended, with the Advisory Committee notes stating that the change "contemplate[d] greater judicial involvement in the discovery process." FRCP 26(b) (notes of advisory committee on rules (1983 amendment)).

53. In contrast, following on the heels of enactment of the CJRA, the Standing Committee on Rules of Practice and Procedure of the Judicial Conference approved the Advisory Committee on Civil Rules' proposals for major changes in several of the Federal Rules of Civil Procedure. For example, a proposed change to Rule 16(c) that would expand the subjects considered at pretrial conference to include "the control and scheduling of discovery"—opposed by some members of the judiciary when proposed in the CJRA—is now one of the specific items that most courts "shall consider and may include" in their plans and that the ten pilot courts must include in their plans (see 28 USCA § 473(a) (Supp 1991)). See Proposals Approved by the Advisory Committee on Rules of Practice and Procedure, Proposed FRCP 16(c)(6). Another proposed change to Rule 16(c) would allow judges to require the attendance of parties, representatives, or insurers at settlement conferences. Id, Proposed FRCP 16(c)(16). This is also one of the elements to be considered for inclusion in the civil justice expense and delay reduction plans. 28 USCA § 473(b) (Supp 1991).

Finally, a new Rule 26 would institute a mandatory disclosure plan as proposed by Judge William Schwarzer, director of the Federal Judicial Center. Proposed FRCP 26(a). This kind of broad, ambitious initiative—even if not ultimately adopted—will surely stimulate additional needed discussion about the underlying purposes and objectives of the Federal Rules and the civil justice system in general.

54. See Part IIA.

to the contrary, the judiciary was at the center of the legislative process, with the Judicial Conference's task force playing a major role. Indeed, as noted in Part IIB, the Judicial Conference was the only witness testifying at the two Senate Judiciary Committee hearings and the one House Judiciary Committee hearing.

Thus, individual judges and the Judicial Conference as an institution were among many participants in the legislative process—and therein lies the difference between the legislative process and the 14 Point Plan that the Judicial Conference proposed in its place. The former is inclusive, while the latter is preclusive. For some, the substantial and important role played by the judiciary was not sufficient; they believe that Congress should not be involved in legislation of this kind because court reform, in their view, is the exclusive province of the judiciary. That view stems from a near-mystical reverence of the rulemaking authority exercised by the Judicial Conference.

Such a view celebrates a process that is, in the words of Rule Advisory Committee Reporter Paul Carrington, "avowedly anti-democratic."[55] After all, the 14 Point Plan was proposed by and reflects the views of a single constituency: the Judicial Conference and the judges it represents. Indeed, since the 14 Point Plan did not even contemplate the Rules Advisory Act process, it would have bypassed the notice and comment provisions—and the public involvement and public accountability inherent in such provisions—that the statute mandates.[56]

Once it was clear that the legislative process was moving ahead, there were those who then believed that all of the many suggestions made by the Judicial Conference should be adopted. Many, of course, were in fact adopted, and they improved the quality of the product that emerged. Unfortunately, there were those who believed that *every* proposed amendment should be adopted. That view, of course, distorts the legislative process. No single individual, organization, group, or constituency should dictate the terms of any legislation. In order to succeed, legislative reform must reflect the cumulative best interests of not just some, but *all* participants in the system.

A powerful case can be made that the legislative process associated with the CJRA was as inclusive as the views of those rejecting congressional involvement are exclusive. The Act represented, as the outgrowth of the Brookings conferences, the views of all the major constituents of the federal civil litigation system: plaintiff and defense lawyers, civil rights lawyers and corporate general counsel, consumer groups, insurance companies, and federal judges. Put simply, it is an Act written *by* the users of the civil justice system *for* the users of the civil justice system.

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55. Paul D. Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 Duke L J 281, 301.

56. 28 USCA § 2071(b) (Supp 1991).

V

CONCLUSION

It is far too early to assess the overall effectiveness of the CJRA. In the final analysis, the Act's success in reducing the costs and delays of federal court litigation may well depend on the commitment demonstrated by those on whose behalf the legislation was undertaken and in whose hands the civil justice system lies. The *users* of the system—clients, lawyers, and judges—can most readily determine whether the civil justice system realizes its objectives: "the just, speedy and inexpensive resolution of disputes."[57] The CJRA is a roadmap, but those who travel the road are the ones who decide whether the destination is reached.

57. FRCP 1.