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Recalibrating the Civil Justice Reform Act

Carl W. Tobias
University of Richmond, ctobias@richmond.edu

ESSAY

RECALIBRATING THE CIVIL JUSTICE REFORM ACT

CARL TOBIAS*

Civil justice reform has become increasingly controversial, with some observers touting the concept as the best hope for the federal courts, and others criticizing the idea as an empty gesture that could well increase delay and expense in civil litigation. Vice President Dan Quayle and the American Bar Association ("ABA") have battled over the issue, with the ABA President characterizing the reform as too important to leave to the government.

In 1990, Congress enacted the Civil Justice Reform Act ("CJRA"), a measure which could substantially change the nature of federal civil litigation.[1] One aspect of the CJRA that provides evidence respecting the progress of civil justice reform is the civil justice expense and delay reduction plans issued in late 1991 by the thirty-four federal district courts which the Judicial Conference of the United States designated as Early Implementation District Courts ("EIDCs").

Congress is currently attempting to assess the reforms included in these plans, which constitute the initial significant step in implementing the CJRA. By some oversight, Congress has not invited me to testify. Indeed, Congress has failed even to schedule a hearing, despite the growing controversy over civil justice reform. I, therefore, must content myself with this Essay.[2]

The Essay first briefly examines the requirements of the Civil Justice Reform Act of 1990 and then analyzes statutory implementation in the federal districts which have attained EIDC status. This evaluation finds that the early reform efforts, while

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* Professor of Law, University of Montana. B.A., Duke University, 1968; LL.B., University of Virginia Law School, 1972. I would like to thank Sally Johnson, Peggy Sanner, and Tammy Wyatt-Shaw for valuable suggestions; Cecelia Palmer and Charlotte Wilmerton for processing this piece; and the Harris Trust and the Cowley Endowment for generous, continuing support. Errors that remain are mine.

[1] *See* Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471–482 (Supp. 1989–1990)).

[2] Apologies to Professor John Hart Ely. *See* John Hart Ely, *Suppose Congress Wanted a War Powers Act that Worked*, 88 COLUM. L. REV. 1379, 1379 (1988).

promising, have also had less advisable features. The Essay concludes with suggestions that Congress should adopt to ameliorate these problems.[3]

I. THE CIVIL JUSTICE REFORM ACT

Congress passed the CJRA in response to claims of abuse in the civil litigation process, growing costs and delays associated with civil lawsuits, and decreasing access to the federal civil justice system.[4] For more than a decade and a half, many federal judges had expressed concern about a litigation explosion and increasing litigation abuse.[5] Enactment of the CJRA in 1990 marked a watershed because Congress had previously rejected "most of the judiciary's requests for substantial procedural reform in part out of apparent concern that the courts were applying procedure to undermine substantive statutes."[6]

The Act requires that all ninety-four federal district courts develop a civil justice expense and delay reduction plan by December, 1993.[7] The purpose of the plans is to facilitate the adjudication of civil lawsuits "on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes."[8] The courts are to promulgate the plans after receiving reports and recommendations that advisory groups prepare.[9]

These advisory groups, which the districts appointed ninety days after the statute's passage, were to be "balanced," includ-

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[3] Although this Essay primarily addresses Congress, much of it applies to other individuals and institutions responsible for civil justice reform, such as federal district judges and the Judicial Conference of the United States.

[4] *See* SENATE COMM. ON THE JUDICIARY, JUDICIAL IMPROVEMENTS ACT OF 1990, S. REP. NO. 416, 101st Cong., 2d Sess. 103 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6804–05; Jeffrey J. Peck, *"Users United": The Civil Justice Reform Act of 1990*, LAW & CONTEMP. PROBS., Summer 1991, at 105, 105–09.

[5] *See, e.g.*, Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting); National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 640–41, 643 (1976); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 740–41 (1975).

[6] Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. (forthcoming Feb. 1993) (manuscript at 14 n.55, on file with author) [hereinafter Tobias, *Balkanization*]. *See generally* Carl Tobias, *Judicial Discretion and the 1983 Amendments to the Federal Civil Rules*, 43 RUTGERS L. REV. 933, 961–63 (1991) [hereinafter Tobias, *Discretion*] (suggesting that courts were applying procedure to erode substance of statutes).

[7] *See* 28 U.S.C. § 471 (Supp. 1989–1990).

[8] *Id.* § 471.

[9] *See id.* § 472.

ing lawyers as well as persons representative of litigants who appear in the courts.[10] Each advisory group must thoroughly evaluate the condition of the district's criminal and civil dockets, "identify trends in case filings and in the demands being placed on the court's resources," and designate the "principal causes of cost and delay in civil litigation" that the district experiences.[11] The advisory groups, in formulating suggestions, must consider the particular needs and circumstances of the court, its parties, and their attorneys while ensuring that each contributes significantly to "reducing cost and delay and thereby facilitating access to the courts."[12]

The courts, upon receiving the groups' reports and recommendations, must consider the documents and confer with the groups and then must consider and may adopt the eleven principles, guidelines, and techniques (primarily governing case management, discovery, and alternative dispute resolution) enumerated in the statute or any other measures which could decrease expense and delay.[13] Thirty-four districts issued civil justice plans before December 31, 1991, to qualify for designation as EIDCs.[14] The Judicial Conference Committee on Court Administration and Case Management officially designated those courts as EIDCs on July 30, 1992.[15] The next section of this Essay evaluates nascent civil justice planning in these districts.

II. Early Implementation of the CJRA

A. *The Implementation Process*

Nearly all of the thirty-four EIDCs, relying on the work of, and in consultation with, their advisory groups, seem to have

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[10] *See id.* § 478(b).

[11] *Id.* § 472(c)(1).

[12] *Id.* § 472(c)(2)–(3).

[13] *See id.* §§ 472(a), 473(a)–(b).

[14] *See* Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (listing EIDCs).

[15] *See, e.g.*, Letter from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management, to Gene E. Brooks, Chief Judge, United States District Court for the Southern District of Indiana (July 30, 1992) (on file with the *Harvard Journal on Legislation*); Letter from Robert M. Parker, Chair, Judicial Conference of the United States Committee on Court Administration and Case Management to Paul G. Hatfield, Chief Judge, United States District Court for the District of Montana (July 30, 1992) (on file with the *Harvard Journal on Legislation*).

undertaken the type of introspection and prescribed the kind of procedures that Congress envisioned. Practically every court carefully followed the guidance in the CJRA[16] and was attentive to the statutory goals of reducing expense and delay in civil litigation.

The courts surveyed their civil and criminal dockets and apparently premised procedural provisions only on supporting data.[17] These districts considered and adopted, as indicated, the statutorily-enumerated principles, guidelines, and techniques, especially those covering case management, discovery, and alternative dispute resolution ("ADR").[18] Some courts closely consulted with their advisory groups or conferred with other districts. For instance, the Advisory Group for the Eastern District of Pennsylvania was one of the first groups to issue its report and recommendations, and those received broad distribution, apparently serving as models for other groups and districts.[19] Additional courts clearly responded to the recommen-

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[16] *See, e.g.*, United States District Court for the Southern District of Indiana, Civil Justice Expense and Delay Reduction Plan (Dec. 31, 1991) [hereinafter Southern District of Indiana Plan] (on file with the *Harvard Journal on Legislation*); United States District Court for the District of Massachusetts, Expense and Delay Reduction Plan (Nov. 18, 1991) [hereinafter Massachusetts Plan] (on file with the *Harvard Journal on Legislation*). I emphasize the plans, rather than the advisory groups' reports and recommendations on which the districts based the plans, because the plans impose procedures that affect judges, lawyers, and litigants and because the districts are not required to adopt advisory group suggestions. Moreover, nearly every advisory group seems to have followed the guidance which Congress provided in § 472 of the Act. For example, the groups promptly completed comprehensive assessments of the courts' criminal and civil dockets as § 472(c)(1) requires. *See, e.g.*, Report of the Advisory Group, United States District Court for the District of Montana 14–32 (Aug. 1991) [hereinafter Montana Report] (on file with the *Harvard Journal on Legislation*); Report of the Advisory Group of the United States District Court for the Eastern District of Pennsylvania 8–30 (Aug. 1, 1991), *reprinted in* 138 F.R.D. 167, 190–212 (1991) [hereinafter Eastern District of Pennsylvania Report]. The groups also appear to have followed the suggestions in § 472(c)(1) by identifying trends in case filings and demands imposed on the courts' resources, designating the primary causes of expense and delay in civil cases, and examining how those could be reduced with better evaluation of the impact of new legislation on courts. *See, e.g.*, Report and Proposed Plan of the Advisory Group, United States District Court for the Eastern District of Wisconsin 2–20 (Dec. 1991) (on file with the *Harvard Journal on Legislation*); Final Report from the Advisory Group to the United States District Court for the District of Delaware 11–49 (Oct. 1, 1991) (on file with the *Harvard Journal on Legislation*).

[17] *See, e.g.*, United States District Court for the District of Kansas, Civil Justice Reform Act Expense and Delay Reduction Plan 1–4 (Dec. 31, 1991) (on file with the *Harvard Journal on Legislation*); Massachusetts Plan, *supra* note 16, at 4–13.

[18] *See, e.g.*, Southern District of Indiana Plan, *supra* note 16, at 3–15; United States District Court for the District of Wyoming, Civil Justice Expense and Delay Reduction Plan 11–17 (Dec. 31, 1991).

[19] *See* Eastern District of Pennsylvania Report, *supra* note 16; Telephone Interview with Lauren K. Robel, Professor of Law, University of Indiana, Bloomington, and Advisory Group Reporter, Southern District of Indiana (Sept. 21, 1992) (noting the

dations that their advisory groups forwarded, articulating the districts' reasons for accepting or rejecting the suggestions.[20]

A smaller number of courts carefully treated numerous issues of authority that civil justice reform raises. For example, several districts rejected certain of their advisory groups' recommendations, finding that the courts lacked the requisite authority to implement the suggestions, while others refused to prescribe procedures that would conflict with the Federal Rules of Civil Procedure or that they had no clear authority to adopt.[21] Some courts similarly eschewed reliance on procedures that the Advisory Committee on the Civil Rules proposed as part of a comprehensive package of Federal Rules amendments which could not become effective until December, 1993, at the earliest.[22]

Numerous districts seemed sensitive to related questions of implementation. Most courts expressly provided that new procedures adopted in their civil justice plans would only become effective through the regular process for promulgating new, or amending presently applicable, local rules.[23] A number of dis-

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broad distribution of the Eastern District of Pennsylvania report and recommendations and its role as a model).

[20] *See, e.g.*, United States District Court for the Western District of Wisconsin, Civil Justice Expense and Delay Reduction Plan app. 2 (Dec. 31, 1991) [hereinafter Western District of Wisconsin Plan] (on file with the *Harvard Journal on Legislation*); United States District Court for the Southern District of Illinois, Civil Justice Delay and Expense Reduction Plan 14–17, 19–21 (Dec. 27, 1991) [hereinafter Southern District of Illinois Plan].

[21] *E.g.*, Western District of Wisconsin Plan, *supra* note 20, app. 2, at 2, 6; *see also* United States District Court for the Northern District of Georgia, Civil Justice Expense and Delay Reduction Plan 18 (Dec. 17, 1991) (questioning whether specific authority is needed to institute mandatory non-binding court-annexed arbitration) (on file with the *Harvard Journal on Legislation*); United States District Court of the Southern District of Florida, Civil Justice Expense and Delay Reduction Plan 95 (Nov. 1991) (recognizing that court lacked "power to redress the primary factors which cause unreasonable cost and delay in" district) (on file with the *Harvard Journal on Legislation*).

[22] *See, e.g.*, Western District of Wisconsin Plan, *supra* note 20, app. 2, at 2; *cf.* United States District Court for the District of Alaska, Civil Justice Expense and Delay Reduction Plan 4 (Dec. 16, 1991) (favoring some form of automatic, mandatory prediscovery disclosure and expecting to experiment with mandatory disclosure, but considering counterproductive an attempt to predict changes involving discovery in Federal Rules or in local rules) (on file with the *Harvard Journal on Legislation*). For the comprehensive package of Federal Rules amendments, see Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Preliminary Draft of Proposed Amendments of Federal Rule of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53 (1991) [hereinafter Proposed Amendments 1991]. *See also* Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1, 12 (describing package proposed at April, 1992 meeting of the Advisory Committee on the Civil Rules).

[23] *See, e.g.*, United States District Court for the Southern District of West Virginia, Civil Justice Expense and Delay Reduction Plan 74 (Dec. 30, 1991) (on file with the

tricts apparently attempted to keep their local rules committees apprised of, and involved during, the entire planning process, and quite a few courts appointed members of these committees to their advisory groups. Indeed, the local rules committee for the Southern District of Indiana simply served as the advisory group.[24] Other courts instituted measures to guarantee, insofar as possible, that federal court practitioners would have notice that new procedural provisions were effective.[25]

B. *Specific Reforms Implemented*

One primary goal of the CJRA is to reduce expense and delay in the civil justice system.[26] Several districts, accordingly, adopted procedures that were expressly intended to address these goals, such as placing numerical limitations on interrogatories, depositions, and the length of briefs.[27] Moreover, the Eastern District of Texas, one of the few courts which attempted to attack directly the growing expense in civil litigation,[28] imposed a "maximum fee schedule for contingency fee cases . . .

Harvard Journal on Legislation); Civil Justice Expense and Delay Reduction Plan for Implementation of the Civil Justice Reform Act of 1990 in the District of New Jersey 17–25 (Dec. 19, 1991) (on file with the *Harvard Journal on Legislation*).

[24] *See* Southern District of Indiana, Report of the Civil Justice Reform Advisory Group i (Dec. 1991) (on file with the *Harvard Journal on Legislation*); Lauren K. Robel, Remarks at the Roundtable on Civil Justice Reform, Law & Society Ass'n Annual Meeting (May 30, 1992).

[25] *See, e.g.*, Southern District of West Virginia, Plan for Implementation of the Civil Justice Expense and Delay Reduction Plan 72–73 (Dec. 30, 1991) (on file with the *Harvard Journal on Legislation*); *Notice: Proposed Amendments to the Rules of Procedure of the U.S. District Court for Montana*, MONT. LAW., Feb. 1992, at 13; *see also* United States District Court for the District of Montana, Civil Justice Expense and Delay Reduction Plan 26–38 (Dec. 1991) [hereinafter Montana Plan] (providing proposed rule amendments) (on file with the *Harvard Journal on Legislation*). Of course, notice to members of the bar within the district may not reach non-members who practice in the district.

[26] *See supra* notes 4, 8 and accompanying text.

[27] *See, e.g.*, Southern District of Illinois Plan, *supra* note 20, at 18 (setting a 20-page limit on the length of briefs); United States District Court for the Eastern District of New York, Civil Justice Expense and Delay Reduction Plan 7 (Dec. 17, 1991) (limiting the number of interrogatories and depositions) (on file with the *Harvard Journal on Legislation*).

[28] *See* United States District Court for the Eastern District of Texas, Civil Justice Expense and Delay Reduction Plan (Dec. 20, 1991) [hereinafter Eastern District of Texas Plan] (on file with the *Harvard Journal on Legislation*). A major purpose for passage of the CJRA was to reduce expense. *See supra* note 8 and accompanying text. Moreover, the Act specifically instructs advisory groups to insure that the court, litigants, and their counsel contribute significantly to reducing expense. 28 U.S.C. § 472(c)(3); *see also supra* note 12 and accompanying text.

of 33% of the total award or settlement," which the court can modify in exceptional circumstances.[29]

Other districts have adopted less direct, but creative, approaches to limiting cost and delay. The Montana District, for instance, is employing peer review committees comprised of federal court practitioners who will review possible discovery and litigation abuse at the instigation of judicial officers to determine whether abuse has occurred.[30] The committees could reduce the prevalence of discovery disputes and abusive litigation practices, thereby saving resources of judges, lawyers, and litigants.[31]

Some districts are also implementing innovative approaches to alternative dispute resolution, which could decrease cost and delay. For example, the Western District of Missouri is randomly assigning one-third of its civil caseload automatically to a compulsory non-binding ADR program.[32] A few courts, including the Idaho District and the Northern District of West Virginia, are instituting "settlement weeks" in which volunteer attorneys trained as mediators or neutrals attempt to settle civil cases.[33]

The advisory group for the Eastern District of California, in response to concerns expressed by local attorneys,[34] is experi-

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[29] Eastern District of Texas Plan, *supra* note 28, at 7–8. "In cases where statutory attorneys' fees are recoverable, such as civil rights cases, the court shall approve a reasonable fee." *Id.* at 8.

[30] *See* Montana Plan, *supra* note 25, at 17; Carl Tobias, *Federal Court Procedural Reform in Montana*, 52 MONT. L. REV. 433, 449 (1991).

[31] The judges and some lawyers in the Montana District apparently hold these views. I am less sanguine and believe that use of the committees may raise due process concerns. *See* Carl Tobias, *The Montana Federal Civil Justice Plan*, 53 MONT. L. REV. 91, 97–98 (1992).

[32] *See* United States District Court for the Western District of Missouri, Early Assessment Program Early Implementation Project 1 (Oct. 31, 1991) [hereinafter Western District of Missouri Early Implementation Project] (on file with the *Harvard Journal on Legislation*). Jerome T. Wolf, chair of the advisory group, claims that the cost of delay makes the experiment "worth it whether it proves out or not." Randall Samborn, *The Battle Escalates on Reform*, NAT'L L.J., Mar. 2, 1992, at 1, 29. *See generally* Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 947–57 (1991) (discussing judicial authority to require participation in ADR); Tobias, *supra* note 14, at 49.

[33] *See* United States District and Bankruptcy Court for the District of Idaho, Expense and Delay Reduction Plan 12–13 (Dec. 1, 1991) [hereinafter Idaho Plan] (on file with the *Harvard Journal on Legislation*); Report of the Advisory Group to the United States District Court for the Northern District of West Virginia 46–47 (Dec. 1991) (discussing use of "settlement weeks" since 1987) (on file with the *Harvard Journal on Legislation*). I believe that some of the procedures discussed above are problematic as a matter of authority or policy. *Compare supra* note 28 and accompanying text *with infra* note 47 and accompanying text. *See generally* Tobias, *supra* note 14.

[34] *See* Report of the Civil Justice Reform Act Advisory Group of the United States

menting with pre-argument notification to counsel by the court of the issues to be argued during hearings and with time-tailored scheduling of motions.[35] The district thereby hopes to reduce the amount of time lawyers spend waiting in the courthouse to argue motions.

In addition to the various reforms introduced to reduce expense and delay, early civil justice planning seems to have afforded numerous salutary, and perhaps unanticipated, side effects.[36] The Act instituted an unprecedented nationwide experiment which is the first detailed national examination of how all ninety-four federal trial courts function. The advisory groups and the districts have collected, analyzed, and synthesized a wealth of invaluable data on the courts' day-to-day operations. Furthermore, civil justice planning has fostered healthy dialogue between the bench and bar and the advisory groups in specific districts as well as among advisory groups and judges in the ninety-four districts. Planning correspondingly appears to have promoted beneficial interaction, especially involving techniques for expeditiously resolving cases, among the judges in particular districts. It even seems to have led judicial officers in a number of districts to consider how the district qua district might improve civil case disposition.[37]

In short, almost every advisory group and federal district faithfully followed congressional guidance in the CJRA. They closely followed statutory instructions, and they exchanged instructive ideas on the Act's implementation and specific procedures with each other and with additional groups and districts.

District Court for the Eastern District of California 81, 95, 97 (Nov. 21, 1991) (on file with the *Harvard Journal on Legislation*).

[35] *See* United States District Court for the Eastern District of California, Civil Justice Expense and Delay Reduction Plan 5–6 (Dec. 31, 1991) (on file with the *Harvard Journal on Legislation*). The Advisory Group's Reporter believes that this example illustrates the value of a local district's undertaking self-examination. John B. Oakley, Remarks at Roundtable on Civil Justice Reform, Law & Society Ass'n Annual Meeting (May 30, 1992).

[36] The observations in this paragraph are premised on conversations with numerous participants in civil justice reform efforts. *See generally* Don J. DeBenedictis, *An Experiment in Reform*, 78 A.B.A. J., Aug. 1992, at 16 (discussing salutary side effects). Of course, once comprehensive data on civil justice reform are systematically gathered, assessed, and synthesized, many additional insights will be clear.

[37] I am indebted to Donna Stienstra, Research Division, Federal Judicial Center, and John Oakley, Advisory Group Reporter, Eastern District of California, for this idea. Professor Oakley believes that the calendaring approach in the federal system, whereby individual judges manage cases from filing to disposition, may have artificially isolated judges. John Oakley, *supra* note 35. *See generally* Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981) (discussing judicial case management).

Moreover, the courts adopted numerous procedures that will help achieve the statute's goals of reducing expense and delay, while the EIDCs thus far seem to be relatively efficacious laboratories of experimentation.[38]

C. *Problems in Implementation*

Although many of the above proposals may prove beneficial, several problems have arisen with nascent implementation. Some entities involved in civil justice reform have communicated less effectively than they might have. Most districts neglected to establish necessary baselines for measuring the success of the reform proposals. Moreover, numerous districts apparently did not recognize, or ignored, important problems concerning their authority to implement the various reforms. Furthermore, because each district was assigned the task of suggesting reforms tailored to its own particular needs, the proposals developed have led to considerable interdistrict disuniformity.

1. Communications Between Courts and Advisory Groups

Some courts seem to have relied minimally on the work of, or consulted little with, their advisory groups. For example, there apparently was rather limited interaction between the judges and the advisory group in the Montana District, and virtually no interchange between the federal judges or the advisory group and the local rules committee. Indeed, the judges ultimately assumed complete responsibility for drafting the proposed changes in local rules that accompanied the civil justice plan.[39] Moreover, the permanent law clerk for the Chief Judge served as the advisory group reporter.[40] A number of other courts employed similar models by relying substantially on in-

[38] Of course, it is too early to ascertain precisely how effective the districts ultimately will be. This must await actual application of the procedures prescribed and their systematic evaluation. *See, e.g.*, 28 U.S.C. § 475. *See generally* A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) (suggesting that experimentation by district courts with inconsistent local rules be allowed, employed, and evaluated).

[39] The observations in this sentence and the one above are based on conversations with several individuals involved in civil justice planning in Montana and several members of the local rules committee. *See also* Montana Plan, *supra* note 25, at 26–38.

[40] *See* Montana Report, *supra* note 16.

ternal court personnel.[41] Such an approach may have restricted the exchange between the bench and the bar that Congress in the CJRA intended and perhaps compromised the independence of some groups.

2. Establishing Baselines

Another significant problem with early civil justice planning is that only a minuscule number of districts seem to have created appropriate baselines relating to expense and delay against which to measure progress. A comparatively crude example of baselines is the provision in one district for randomly sending one-third of its civil cases to a mandatory non-binding ADR program. Any expense or delay reduction in those cases could then be compared with cost and delay in cases not so assigned.[42]

Without specific baselines, it is exceedingly difficult to ascertain accurately what civil justice planning has achieved. The lack of appropriate baselines will also make it difficult for the districts to discharge their statutory responsibilities for assessing "annually the condition of the court's civil and criminal dockets with a view of determining appropriate additional actions that may be taken by the court to reduce cost and delay in civil litigation and to improve the litigation management practices of the court."[43] Moreover, virtually no districts seem to have solved the exceedingly difficult problem of establishing expense baselines that would answer such problematic questions as the meaning of costs and who would bear those costs.

3. Authority to Implement Reforms

One of the most difficult and important issues involved in civil justice reform is judicial authority to implement procedures

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[41] *See, e.g.*, Report of the Western District of Wisconsin Advisory Group, title page (Nov. 15, 1991) (on file with the *Harvard Journal on Legislation*); District of Wyoming Advisory Group, Report and Recommended Plan (Nov. 1991) (on file with the *Harvard Journal on Legislation*). The other major model was to employ a law professor as advisory group reporter. *See, e.g.*, United States District Court for the Northern District of Indiana, Report of the Advisory Group on the Reduction of Cost and Delay in Civil Cases (Oct. 1991) (on file with the *Harvard Journal on Legislation*); Advisory Group for the Eastern District of Virginia, Report of the Civil Justice Reform Act, title page (Sept. 19, 1991) (on file with the *Harvard Journal on Legislation*).

[42] *See* Western District of Missouri Early Implementation Project, *supra* note 32, at 1–14. It is relatively easy to establish baselines based on the procedures that existed in districts at the time civil justice reform commenced.

[43] *See* 28 U.S.C. § 475.

which are meant to reduce expense or delay. Some districts have claimed that they possess very broad authority under the CJRA to prescribe procedures which deviate from the Federal Rules and the United States Code. A few have even asserted that the CJRA provides them carte blanche to adopt any procedures which will reduce cost or delay, regardless of whether they contravene federal requirements. Indeed, the plan for the Eastern District of Texas expressly states that "to the extent that the Federal Rules of Civil Procedure are inconsistent with this Plan, the Plan has precedence and is controlling."[44] That district promulgated an offer of judgment provision which conflicts with both the time limitations of Federal Rule 68 and the Rule's requirements governing discrepancies between offers made and judgments ultimately secured.[45] The court's civil justice plan also imposed limits on contingency fees[46] which may interfere with congressional prerogatives to allocate litigation costs.[47]

Other courts have prescribed procedures that seem inconsistent with the Federal Rules or the United States Code, although these districts have been less explicit than the Eastern District of Texas. Perhaps the most troubling example has been the provision for mandatory pre-discovery disclosure. Twenty EIDCs have adopted varying disclosure requirements that resemble suggestions to amend the Federal Rules which the Civil Rules Committee proposed in 1991.[48] Those recommendations, which were vociferously attacked by nearly all segments of the bar,[49] would dramatically change traditional ideas of, and present rules governing, discovery.[50] The Committee substantially reversed its position twice last spring and eventually prescribed proposals similar to the ones initially recommended.[51] Lawyers

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[44] Eastern District of Texas Plan, *supra* note 28, at 9.

[45] *See* Tobias, *Balkanization*, *supra* note 6 (manuscript at 31). *Compare* Eastern District of Texas Plan, *supra* note 28, at 10 *with* FED. R. CIV. P. 68.

[46] Eastern District of Texas Plan, *supra* note 28, at 7–8.

[47] *See* Kaiser Aluminum & Chem. Corp. v. Bonjourno, 494 U.S. 827, 835 (1990) (explaining congressional prerogatives to allocate costs).

[48] *See, e.g.*, United States District Court for the District of Delaware, Civil Justice Expense and Delay Reduction Plan 2–3 (Dec. 23, 1991) (on file with the *Harvard Journal on Legislation*); Report and Plan of the Advisory Group of the District Court of the Virgin Islands 36–37 (Dec. 23, 1991) (on file with the *Harvard Journal on Legislation*); *see also* WINTHROP, STIMSON, PUTNAM & ROBERTS, NATIONAL OVERVIEW OF PLAN PROVISIONS FOR AUTOMATIC DISCLOSURE 1 (1992).

[49] *See* Samborn, *supra* note 22, at 1, 12.

[50] *See* Proposed Amendments 1991, *supra* note 22, 137 F.R.D. at 83–84, 87–88.

[51] *See* Samborn, *supra* note 22, at 1.

across the country are already invoking the discovery disclosure provisions promulgated under the CJRA, frequently for tactical advantage.[52]

Another illustration of procedures for which courts may lack sufficient authority is the Montana district's prescription for assigning civil lawsuits co-equally to Article III judges and magistrate judges.[53] The court will notify parties whose cases are assigned to magistrate judges that they may ask for reassignment, but that right is deemed waived if the requests are not filed in a timely fashion.[54] The authority for co-equal assignment is unclear, and the provision may contravene procedures for securing consent to magistrate jurisdiction in 28 U.S.C. § 636(c).[55]

The statutory language and the legislative history of the CJRA show that Congress intended for courts to have considerably narrower authority to adopt inconsistent provisions than some of the districts have asserted.[56] Indeed, the Rules Enabling Act provides that local rules are to be "consistent with Acts of Congress" and the Federal Rules of Civil Procedure.[57] Moreover, the current version of Rule 83 states that, "in all cases not provided for by rule, the district judges and magistrates may

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[52] This observation is based on conversations with numerous attorneys who practice in the federal courts.

[53] *See* Montana Plan, *supra* note 25, at 3–4; *cf.* United States District Court for the Eastern District of Arkansas, Civil Justice Expense and Delay Reduction Plan 3 (Dec. 30, 1991) (randomly assigning civil cases on experimental basis to district judges and magistrate judges) (on file with the *Harvard Journal on Legislation*); United States District Court for the District of Oregon, Civil Justice Expense and Delay Reduction Plan 20 (Dec. 30, 1991) [hereinafter Oregon Plan] (explaining that the objective of case assignment procedures is to incorporate all full-time magistrate judges into a "civil case assignment system on a co-equal basis with the district judges") (on file with the *Harvard Journal on Legislation*); *see also* Tobias, *supra* note 31, at 93 n.9 (discussing co-equal assignment of cases).

[54] *See* Montana Plan, *supra* note 25, at 4.

[55] *See* 28 U.S.C. § 636(c); Columbia Record Prods. v. Hot Wax Records, 966 F.2d 515 (9th Cir. 1992) (citing applicable case law); *In re* San Vincente Medical Partners, 865 F.2d 1128 (9th Cir. 1989) (same); Judicial Conference of the United States, Civil Justice Reform Act Report, Development and Implementation of Plans by Early Implementation Districts and Pilot Courts 5 (June 1, 1992) [hereinafter Judicial Conference Report] (Ninth Circuit Review Committee questioning validity of Montana provision for co-equal assignment); Tobias, *supra* note 31, at 93 n.9 (discussing judicial authority to so assign cases).

[56] *See* SENATE COMM. ON THE JUDICIARY, *supra* note 4, at 3–31, *reprinted in* 1990 U.S.C.C.A.N. at 6805–35 (legislative history including no indication that Congress intended to grant broad authority); Lauren K. Robel, Fractured Procedure (1992) (painstakingly analyzing legislative history and showing that Congress intended narrow ambit of authority) (unpublished manuscript on file with author).

[57] 28 U.S.C. § 2071(a) (1988). *See generally* Tobias, *Balkanization*, *supra* note 6 (manuscript at 30) (discussing Rules Enabling Act requirements).

regulate their practice in any manner not inconsistent with" the Federal Rules.[58] Therefore, a number of districts have apparently exceeded their authority.

This exercise of authority and the inconsistencies thus created can have detrimental ramifications. Most significantly, procedures adopted under the CJRA can lead to conflicts between local and federal procedural provisions, thereby implicating delicate interbranch relationships of Congress and the federal judiciary. For example, when districts adopt local procedures that contradict federal requirements, this can enhance the judiciary's power at the expense of Congress and litigants, such as civil rights plaintiffs, whose vindication of substantive rights Congress intended federal courts to facilitate.[59] More specifically, if local procedures contravene procedural provisions in substantive statutes affording employment discrimination plaintiffs certain tactical advantages[60] or make rigid what are now flexible requirements in the Federal Rules, such as several discovery rules,[61] those conflicts can erode congressional power and disadvantage parties whom Congress intended to benefit.[62]

4. Disuniformity Among Districts

Another significant problem has been each EIDCs promulgation of procedures that conflict with ones that other districts

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[58] FED. R. CIV. P. 83. The 1991 proposal to amend Rule 83 would have permitted experimentation employing inconsistent local rules for periods of less than five years with Judicial Conference approval. *See* Proposed Amendments 1991, *supra* note 22, 137 F.R.D. at 152–55. The Standing Committee, however, recently withdrew that proposal in apparent deference to the CJRA efforts. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Amendments of Federal Rules of Civil Procedure (July 1992).

[59] *See* Tobias, *Discretion*, *supra* note 6, at 961–63; *cf.* Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270 (1989) (discussing how narrow judicial application of procedure can enhance the judiciary's power). An important reason for this is that Congress does not have the opportunity to modify local procedural changes in the same way that it may alter proposed Federal Rules amendments. *See* 28 U.S.C. § 2074. *See generally* Tobias, *Balkanization*, *supra* note 6 (manuscript at 25) (discussing how local procedural changes bypass Congress).

[60] *See* Phyllis Tropper Baumann et al., *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211 (1992). Narrow judicial interpretation of such statutes in part prompted passage of the Civil Rights Act of 1991. *See* Pub. L. No. 102-166, 105 Stat. 1071 (1991). *See generally* Carl Tobias, *Civil Rights Procedural Problems*, 70 WASH. U. L.Q. 801 (1992) (discussing the Civil Rights Act of 1991).

[61] *See, e.g.*, FED. R. CIV. P. 26(a)–(b); *cf.* Tobias, *supra* note 59, at 296–301 (giving example of judicial imposition of heightened pleading requirements under Rule 8).

[62] *See* Tobias, *Balkanization*, *supra* note 6.

prescribed.[63] Congress structured the CJRA in ways that inexorably foster some interdistrict disuniformity because each district must take into account and may adopt the eleven principles, guidelines, and techniques listed in the statute and any other procedures which could decrease expense or delay.[64] The highly inconsistent procedures that the EIDCs have promulgated complicate the efforts of attorneys and parties, such as the Department of Justice, the Sierra Club, and General Motors, who litigate in multiple districts. All parties and lawyers, but particularly those with limited resources such as public interest litigants, have difficulty finding, mastering, and conforming to local procedures that differ substantially from district to district.[65]

III. SUGGESTIONS

When passing the CJRA, Congress pursued the laudable goals of reducing expense and delay in civil litigation through nationwide procedural experimentation. Civil justice planning has already produced an enormous quantity of illuminating data which enhances understanding of how the federal courts discharge their responsibilities. Congress apparently attempted, however, to accomplish more than could be efficaciously achieved at one time by employing too many instrumentalities and procedures. Congress may have so drafted the legislation that its implementation could undermine the Act's expressly stated purpose to reduce cost and delay.[66]

A general illustration of this statutory complication is the Act's placement of primary responsibility for implementation of the various reforms in all ninety-four federal districts, many of whose advisory groups and judges were effectively working at once.[67] Because the EIDCs labored simultaneously, few courts

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[63] For additional discussion, see *id.*

[64] *See* 28 U.S.C. § 473(a)–(b). Congress apparently attempted to maintain some uniformity by providing that all districts must consider and may adopt the eleven listed procedures.

[65] *See* Tobias, *Balkanization*, *supra* note 6 (manuscript at 38–39). *See generally* Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485 (1988–1989) (discussing difficulties that resource-deficient litigants confront).

[66] *See* 28 U.S.C. §§ 471, 472(c)(3); *supra* notes 4, 8, 12 and accompanying text.

[67] The districts had to appoint all of the advisory groups by the same date, ninety days after the Act's passage. 28 U.S.C. § 478(a). The 34 districts seeking EIDC status had to issue plans by December 31, 1991. Judicial Improvements Act of 1990 § 103(c). Some of the remaining sixty districts issued plans before the end of 1992. *See, e.g.*, Letter from Barefoot Sanders, Chief Judge, United States District Court for the North-

were able to benefit from the experimentation of other districts or to evaluate the efficacy of the reforms. Moreover, the statute instructs the courts that they must consider and could promulgate varying combinations of eleven principles, guidelines, and techniques and any additional procedures which promise to decrease expense or delay. Indeed, the thirty-four EIDCs have already adopted their plans and the remaining districts must issue plans by the statutory deadline of December, 1993.[68]

These difficulties have fostered considerable confusion among the advisory groups and the federal districts. For instance, the problems led the Advisory Group for the Eastern District of New York to request that the Standing Committee observe a "three-year moratorium on affected national rules so that each district can have a fair opportunity to assess reforms at the local level implemented through" the CJRA.[69] The difficulties have also complicated the efforts of lawyers and litigants to understand and comply with the disparate procedures applicable in various districts[70] and could frustrate the efforts of certain entities, such as government agencies and public interest groups, to monitor civil justice planning and changes in federal civil procedure.[71]

Congress must act promptly and decisively to capitalize on the civil justice reform efforts which advisory groups and districts have undertaken. Experimentation with civil justice reform to date has been sufficiently broad and diverse to permit the identification of those procedures which have the greatest promise. More expansive experimentation may yield minimal additional benefit and could even be counterproductive. Congress should evaluate the existing reform efforts and institute measures that will maximize the beneficial, and minimize the detrimental, features of nascent civil justice planning. Congress should recognize that certain elements of the CJRA, although

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ern District of Texas, to Carl Tobias (June 5, 1992) (indicating plan would issue in 1992) (on file with the *Harvard Journal on Legislation*); *cf.* Civil Justice Expense and Delay Reduction Plan for the United States District Court for the Western District of Missouri (Apr. 30, 1992) (recently issued plan) (on file with the *Harvard Journal on Legislation*).

[68] Judicial Improvements Act of 1990 § 103(b).

[69] Letter from Edwin J. Wesely, Chair, Advisory Group for the Eastern District of New York, to Robert Keeton, Chair, Committee on Rules of Practice and Procedure of the Judicial Conference of the United States 3 (Feb. 13, 1992) (on file with the *Harvard Journal on Legislation*).

[70] *See supra* notes 59–62, 64–65 and accompanying text.

[71] *See* Tobias, *Balkanization*, *supra* note 6 (manuscript at 12 n.50).

well-intentioned, may have posed very real practical problems of implementation.

An efficacious approach would be some form of mid-course correction that circumscribes the CJRA's open-ended character. For example, Congress might draw on EIDC experimentation to designate a reduced number of procedures with the greatest potential for decreasing expense or delay, such as the setting and enforcement of firm trial dates[72] or certain types of voluntary ADR,[73] and prescribe experimentation with them in relatively few districts. Congress should at least limit one of the primary parameters: the number of procedures which courts can adopt or the number of districts which participate in civil justice reform.

Regardless of how Congress chooses to restrict civil justice planning, it must ensure that evaluators assemble, assess, and synthesize information about the procedures' efficacy for enough time to ascertain which ones are preferable.[74] For instance, Congress might consider the twenty EIDCs that are currently implementing the highly controversial compulsory pre-discovery disclosure proposals an adequate number to afford a sense of the concept's efficacy. Once these courts have experimented with the technique and observers have systematically evaluated the procedure, the federal judiciary and Congress can decide if it is practicable and, if so, how widespread its use should be. Congress correspondingly ought to discourage the remaining districts from employing such discovery, pending analysis of its implementation in the EIDCs. This course of action should ultimately enable Congress to identify the most promising procedures, so that courts might apply them in a greater number of districts or even nationally, as indicated.[75]

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[72] *See, e.g.*, Oregon Plan, *supra* note 53, at 4 (stating that firm trial dates are essential to effective case management system); Idaho Plan, *supra* note 33, at 3 (same); Montana Plan, *supra* note 25, at 14 (same).

[73] *See supra* notes 32–33 and accompanying text.

[74] I recognize that Congress has specifically prescribed numerous studies. Each district must prepare an annual assessment. 28 U.S.C. § 475. The Judicial Conference recently completed a report to Congress on the EIDCs. *See* Judicial Conference Report, *supra* note 55. What I have in mind is a study like that which the Rand Corporation is preparing on the pilot courts program for submission in late 1995. *See* Judicial Improvements Act of 1990 § 105(c); *supra* note 43 and accompanying text (noting the difficulty of assessing efficacy without baselines).

[75] I envision Congress and the courts gradually expanding the number of procedures that are employed in a steadily growing number of districts. When a procedure proves to be very effective, system-wide adoption in the Federal Rules probably will be warranted.

Congress can rely on several sources for this broad approach. Experimentation with court-annexed arbitration, which some districts instituted in the late 1970s and which Congress approved during the 1980s and codified in the 1988 Judicial Improvements Act, is one helpful illustration.[76] Because the CJRA expressly provides for the EIDCs, however, they are most directly applicable. These courts comprise thirty-six percent of the ninety-four districts. Moreover, the EIDCs are sufficiently diverse and representative in terms, for example, of geography, local legal culture, and the procedures adopted. The EIDCs have also undertaken enough implementation to serve as effective crucibles for experimentation.

The thirty-four courts which are EIDCs nevertheless may be too numerous for efficacious experimentation and evaluation. If Congress finds that to be true, it could easily select an appropriate subset. For instance, Congress might choose a group, sufficiently small in number, yet large enough to be representative and to provide sufficiently informative insights. Existing subsets are the five demonstration[77] and ten pilot districts[78] that the Act created and the twenty "volunteer" EIDCs that satisfied the CJRA's requirements.[79] Congress might designate certain demonstration districts in terms of specific procedures with which they are experimenting.[80] Congress could base the selection of pilot districts, for example, on their statutorily mandated composition as metropolitan or rural districts.[81] Congress may premise its choice of volunteer districts, for instance, on the criteria suggested for demonstration or pilot districts.

Congress should at least extend the effective date by which the remaining districts that are not EIDCs must adopt plans, thereby enabling evaluators to analyze rigorously the effective-

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[76] *See* 28 U.S.C. §§ 651–658; BARBARA MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS (Federal Judicial Center 1990).

[77] Judicial Improvements Act of 1990 § 104.

[78] *Id.* § 105.

[79] *Id.* § 103(c); *see also supra* note 12 (listing demonstration, pilot, and volunteer EIDCs).

[80] There are only five demonstration districts. Congress instructed two to "experiment with systems of differentiated case management" and three to "experiment with various methods of reducing cost and delay in civil litigation." Judicial Improvements Act of 1990 § 104(b).

[81] "At least five of the Pilot Districts designated by the Judicial Conference shall be judicial districts encompassing metropolitan areas," and the "plans implemented by the Pilot Districts shall include the six principles and guidelines of litigation management and cost and delay reduction" in 28 U.S.C. § 473(a). Judicial Improvements Act of 1990 § 105(b)(1)–(2).

ness of the procedures which the EIDCs are applying. This would permit all districts to make more educated decisions about which procedures are most workable. If Congress does not extend the effective date, the advisory groups that are compiling reports and recommendations and the districts which are developing plans should delay their efforts as much as possible, thus facilitating consideration of the maximum information prior to finalizing their work. The groups and districts should wait as late as practicable in 1993 in order to have the benefit of two annual assessments which most of the EIDCs would have compiled by then.[82]

Finally, Congress should expeditiously clarify whether and, if so, the extent to which, districts can promulgate procedures that conflict with ones which other districts prescribe or with the Federal Rules or provisions of the United States Code. Congress should precisely delineate the breadth of the districts' authority to promulgate inconsistent procedures under the CJRA and must sharply circumscribe the power which the courts have asserted. The complications that these conflicts and expansive assertions of power create simply outweigh the value of broader experimentation. A measured approach which properly balances the needs for procedural certainty and consistency and for effective experimentation is readily available: the recently withdrawn proposal to amend Rule 83 which would have permitted districts to experiment with inconsistent procedures for appropriately limited periods subject to Judicial Conference approval.[83] Congress should concomitantly seek to reduce interdistrict disuniformity by, for example, restricting the number of procedures that districts might adopt or limiting the extent to which courts can rely on the sixth, open-ended technique which permits them to prescribe such other procedures as the districts consider appropriate in reducing cost and delay.[84]

IV. Conclusion

Civil justice reform has been highly controversial. Nonetheless, preliminary civil justice planning in the EIDCs under the

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[82] *See* 28 U.S.C. § 475. The suggestions in the last two sentences are directed more to the advisory groups and the districts than to Congress. The recommendations, however, are relevant to Congress because they are meant to improve implementation.

[83] *See supra* note 58.

[84] 28 U.S.C. § 473(b)(6). Numerous courts apparently have relied on that provision to adopt procedures that are inconsistent or questionable as a matter of authority or policy. *See* Tobias, *Balkanization*, *supra* note 6 (manuscript at 35–37).

Civil Justice Reform Act of 1990 has had considerable promise. If Congress implements the suggestions above, it can maximize the beneficial features of this reform effort. With a streamlined approach to planning, Congress should be able to realize the reform's potential and achieve the statutory goals of reducing expense and delay in federal civil litigation.