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## Extending the Civil Justice Reform Act of 1990

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## ESSAY

### EXTENDING THE CIVIL JUSTICE REFORM ACT OF 1990

*Carl Tobias\**

Several years ago, I admonished those who are responsible for maintaining a uniform, simple system of federal civil procedure to ameliorate the increasing balkanization of that regime, a problem exacerbated by the Civil Justice Reform Act (CJRA) of 1990.<sup>1</sup> More recently, I urged Congress to recalibrate the legislation.<sup>2</sup> The CJRA encouraged unprecedented introspection in all ninety-four federal district courts, leading to experimentation with procedures that were intended to reduce expense and delay in civil litigation. Despite my cogent suggestions for extending the deadline for the CJRA's implementation, Congress completely ignored that brilliant advice. By some oversight, Congress not only failed to call me as a witness, but also neglected to schedule a hearing regarding this matter.<sup>3</sup>

I was recently vindicated, however, when Congress passed the Judicial Amendments Act of 1994 and adopted concepts that were central to my recommendations. I had asserted that the CJRA's major purposes could not be achieved in the time prescribed, threatening the legislation's efficacious implementation, and thus, I proposed that Congress postpone several statutory deadlines.<sup>4</sup> Congress actually subscribed to my ideas in the Judicial Amendments Act. A significant component of the new legislation extends for one year the mid-1995 date when the RAND Corporation, which is studying ten pilot districts' experimentation with cost and delay reduction procedures, must submit its conclusions to the Judicial Conference of the United States.<sup>5</sup>

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\* Professor of Law, University of Montana. I wish to thank Peggy Sanner for valuable suggestions, Cecelia Palmer and Charlotte Wilmerton for processing this piece, and the Harris Trust for generous, continuing support. Errors that remain are mine.

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

2. Carl Tobias, *Recalibrating the Civil Justice Reform Act of 1990*, 30 HARV. J. ON LEGIS. 115, 127-33 (1993).

3. Apologies again to Professor John Hart Ely. See Tobias, *supra* note 2, at 115 n.2.

4. See Tobias, *supra* note 2, at 128-32.

5. See Judicial Amendments Act of 1994, Pub. L. No. 103-420, 108 Stat. 4345 (1994). Section two of the statute extends the authorization of the Judiciary Automation Fund for three years, while section three extends authorization for court-annexed arbitration in twenty districts until the end of 1997. See *id.* §§ 2-3.

Numerous compelling arguments supported congressional postponement of this deadline. Most importantly, the RAND Corporation can now capture much additional data, which are critical to assessing accurately the procedures' effectiveness in decreasing expense and delay, thereby increasing the value of the innovative civil justice reform effort. Particularly significant, the extension will facilitate RAND's collection, evaluation, and synthesis of considerably more information on the cohort of cases that impose the greatest cost and delay and, therefore, enhance understanding of the procedures' efficacy in expeditiously concluding that litigation which is the most difficult to resolve.

In short, the one-year extension of the statutory deadline could substantially increase the worth of this novel national experiment with expense and delay reduction procedures, even though the modification might seem relatively insignificant. The above factors mean that the section of the Judicial Amendments Act of 1994 that postpones the deadline for completing the study of the pilot districts warrants analysis. This essay undertakes that effort. The paper initially explores the developments that prompted Congress to pass legislation extending the deadline. I first examine the RAND Corporation's empirical assessment in the ten pilot districts and ascertain that the company's compliance with the mid-1995 date on which it was to have submitted the study would have precluded assembling, evaluating, and synthesizing considerable instructive material. The essay concomitantly analyzes the genesis of this problem and finds that several phenomena, such as some pilot districts' delayed implementation of civil justice reform, led to the complication but that RAND had no responsibility for, and was unable to affect, the difficulty.

I next briefly evaluate the 1994 statute's provisions. The paper then assesses whether Congress should have granted the extension by examining the advantages and disadvantages that will probably attend postponement. I ascertain that the benefits will be much greater than the detriments, most of which are comparatively unimportant or appear amenable to amelioration. The essay thus finds that the congressional decision to extend the deadline was appropriate. I conclude with several suggestions for efficaciously implementing the postponement that the 1994 Judicial Amendments Act affords.

## I. DEVELOPMENTS LEADING TO PASSAGE OF THE JUDICIAL AMENDMENTS ACT

### A. *CJRA Statutory Requirements*

The Civil Justice Reform Act of 1990 required the Judicial Confer-

ence to select ten pilot districts, at least five of which must encompass metropolitan areas.<sup>6</sup> The legislation mandated that, not later than December 31, 1991, the pilot districts adopt six statutorily-prescribed principles and guidelines of litigation management and cost and delay reduction; the pilot districts were to experiment with those procedures for three years.<sup>7</sup>

The Act commanded that by December 31, 1995 the Judicial Conference submit a report on the pilot program, including an analysis of how much the principles and guidelines decreased expense and delay, to the Judiciary Committees of the Senate and of the House of Representatives.<sup>8</sup> The legislation required that the Conference consider these results in light of the effect on cost and delay in ten comparable districts that had discretion to promulgate and apply the principles and guidelines enumerated in the CJRA.<sup>9</sup> This comparison was to be premised on a study performed by an "independent organization with expertise in the area of federal court management."<sup>10</sup> After soliciting proposals, the Judicial Conference selected the RAND Corporation, an entity that possesses substantial multidisciplinary experience in civil justice research, having conducted numerous evaluations of federal and state court procedures and operations.<sup>11</sup> The Judicial Conference requested that the RAND Corporation submit the results of its study by the middle of 1995, so that the Conference would have sufficient time to prepare its report for Congress.<sup>12</sup>

The CJRA provided that the Conference's report recommend "whether some or all district courts should be required to include" in their civil justice plans the prescribed six principles and guidelines.<sup>13</sup> If the Judicial Conference suggests that some or all districts adopt the procedures, the Conference must initiate Federal Rule revision to implement this recommendation.<sup>14</sup> Were the Judicial Conference to reject the pilot program's expansion, the Conference must "identify alterna-

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6. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, § 105(b)(2), 28 U.S.C. § 471 notes (1988 & Supp. V 1993).

7. See *id.* § 105(b); see also 28 U.S.C. § 473(a) (1988 & Supp. V 1993) (prescribing principles and guidelines principally governing case management, discovery and ADR).

8. See Judicial Improvements Act of 1990, § 105(c)(1).

9. See *id.*

10. *Id.*

11. See Memorandum of RAND Corporation, Terry Dunworth & James Kakalik, *Summary of Research Design for Evaluation of the Pilot Program of the Civil Justice Reform Act of 1990* ii, 29-30 (March 18, 1994) (on file with the *University of Cincinnati Law Review*) [hereinafter *Summary*].

12. See *id.* at 4; see also *supra* note 8 and accompanying text.

13. Judicial Improvements Act of 1990, § 105(c)(2)(A).

14. Judicial Improvements Act of 1990, § 105(c)(2)(B).

tive, more effective cost and delay reduction programs that should be implemented in light of its" report's findings and may commence Federal Rule amendment to effectuate the suggestion.<sup>15</sup>

The Judicial Conference delegated most of these statutorily-assigned responsibilities to the United States Judicial Conference Committee on Court Administration and Case Management. That Committee's initial chair was Robert Parker, then-Chief Judge for the Eastern District of Texas, and the Committee's present chair is Ann Claire Williams, District Judge for the Northern District of Illinois.<sup>16</sup>

Designation of the ten pilot districts was the first action taken by the Committee that is relevant to the issues treated in this essay. The only requirement that the CJRA imposed on the Conference was that at least five of the courts chosen be districts "encompassing metropolitan areas."<sup>17</sup> The Conference Committee relied on several factors—such as filing volume, caseload type, and the relative speed with which districts resolved lawsuits—in selecting the Southern District of California, the District of Delaware, the Northern District of Georgia, the Southern District of New York, the Western District of Oklahoma, the Eastern District of Pennsylvania, the Western District of Tennessee, the Southern District of Texas, the District of Utah, and the Eastern District of Wisconsin.<sup>18</sup>

The Conference principally depended on workload per judge, district size, the quantity of civil and criminal filings, and the disposition time in civil litigation, as elements for comparing pilot and comparison districts. Furthermore, the Conference consulted recommendations made by RAND in choosing the ten comparison districts.<sup>19</sup> These are the District of Arizona, the Central District of California, the Northern District of Florida, the Northern District of Illinois, the Northern District of Indiana, the Eastern District of Kentucky, the Western District of Kentucky, the District of Maryland, the Eastern District of New York, and the Middle District of Pennsylvania.<sup>20</sup>

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15. Judicial Improvements Act of 1990, § 105(c)(2)(C).

16. President Clinton recently appointed Judge Parker to the United States Court of Appeals for the Fifth Circuit. See *Judicial Milestones*, THE THIRD BRANCH, (Admin. Office of the U.S. Courts, Wash., D.C.) Aug. 1994, at 8. Judge Williams became chair of the Committee in October 1993. See *Chief Justice Names Judicial Conference Committee Chairs*, THE THIRD BRANCH (Admin. Office of the U.S. Courts, Wash., D.C.) Aug. 1993, at 4-5.

17. See Judicial Improvements Act of 1990, § 105(b)(2).

18. See Memorandum from the RAND Institute for Civil Justice to the Judicial Conference of the United States, Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990* 5 (June, 1994) (on file with the *University of Cincinnati Law Review*) [hereinafter *Preliminary Observations*].

19. See *id.*; see also *Summary*, *supra* note 11, at 9-12.

20. See *Preliminary Observations*, *supra* note 18, at 5.

### B. The RAND Corporation's Efforts

The RAND Corporation expeditiously and systematically undertook its study of the pilot program.<sup>21</sup> RAND commenced research in September 1991, and the company concentrated on refining its particular research design and on assisting the Judicial Conference in designating the comparison districts during the initial half-year.<sup>22</sup> RAND refined the survey questionnaires that it planned to send judges, lawyers, and litigants and prepared to field test the questionnaires throughout this six-month period and thereafter.<sup>23</sup> RAND researchers also met with judicial officers and court personnel in each of the twenty pilot and comparison districts to explain the project and to solicit their cooperation.<sup>24</sup>

Detailed collection of data began in 1992 and was scheduled to continue until December 1994.<sup>25</sup> RAND first chose a stratified random sample of 250 cases from lawsuits that terminated in each of the twenty districts in 1991. RAND then selected a similar sample of cases to which courts applied civil justice reform procedures, beginning with litigation filed during 1992 and 1993.

RAND explained that it was unable to commence this component of the study earlier because a number of pilot districts had not completely implemented procedures in civil justice expense and delay reduction plans until "well into" 1992, even though all of these courts did satisfy the December 31, 1991 statutory deadline for adopting plans.<sup>26</sup> RAND proffered several reasons for delayed effectuation, and my work and the research of other observers confirm RAND's explanations.

Numerous districts decided to include civil justice reform requirements in their local rules, which was an advisable practice because it

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21. I rely substantially in this subsection on *Preliminary Observations*, *supra* note 18; Memorandum of RAND Corporation, Terry Dunworth & James Kakalik, *Supplemental Detailed Evaluation of Selected ADR Programs in Selected CJRA Pilot and Comparison Districts, Summary of Research Design* (October 16, 1992) (on file with the *University of Cincinnati Law Review*) [hereinafter *Supplemental*], and interviews with RAND and its personnel, employees of the Administrative Office of the U.S. Courts, and others familiar with the RAND effort.

22. See *Supplemental*, *supra* note 21, at 4.

23. See *id.*; see also *Preliminary Observations*, *supra* note 18, at 19-20 (discussing questionnaires).

24. See *Summary*, *supra* note 11, at 14-15.

25. I rely substantially in this paragraph on *Preliminary Observations*, *supra* note 18, at 19-21; *Supplemental*, *supra* note 21, at 4.

26. See *Preliminary Observations*, *supra* note 18, at 21 (providing RAND's explanation); see also Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) (listing all pilot districts' satisfaction of the deadline); *supra* note 7 and accompanying text.

facilitated the access of lawyers and litigants to applicable procedures.<sup>27</sup> Such inclusion meant that the courts had to publish the proposed procedural changes, solicit and consider public input on the proposals, modify them as indicated, formally promulgate the new or amended local rules, and notify the bar and the public that the procedures had become effective.<sup>28</sup>

A number of districts encountered complications in implementing new procedural requirements. Illustrative is the "difficulty involved in instituting a formally structured [Alternative Dispute Resolution] ADR plan, which requires developing detailed procedures and forms, selecting and certifying ADR providers and informing and educating members of the bar about the new program."<sup>29</sup> Even some courts that did not experience these types of problems discovered that elaborating and effectuating the specifics of new procedures and policies consumed considerably more time than Congress or the federal bench had contemplated.<sup>30</sup>

RAND planned to track the 5,000 cases being treated with CJRA procedures through final disposition or for as long as the statutorily-imposed deadlines permitted.<sup>31</sup> RAND acknowledged that the median time for resolving private civil lawsuits has been approximately nine months, although courts require much longer to dispose of numerous cases.<sup>32</sup> RAND's assertions that civil justice reform procedures may substantially reduce cost and delay in those lawsuits that presently consume the greatest time to process and that probably are most expensive led it to oversample this group of cases and to state that it must

27. See Carl Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1587, 1623 (1994). See generally David S. Day & Margo R. Tschetter, *The Local Rule Revision Project: The South Dakota Experience*, 38 S.D. L. REV. 500 (1993) (examining the Uniform Local Rule Revision process in the District of South Dakota as an example of beneficial experimentation).

28. See 28 U.S.C. §§ 2071, 2077 (1988 & Supp. V 1993); see also *Preliminary Observations*, supra note 18, at 28. For example, compliance with these procedural requirements meant that the Montana District's civil justice expense and delay reduction plan only became effective on April 1, 1992. See Carl Tobias, *Civil Justice Planning in the Montana Federal District*, 53 MONT. L. REV. 239, 239 n.2, 243-244 (1992).

29. See *Preliminary Observations*, supra note 18, at 28. For example, institution of an ambitious ADR program in the Western District of Missouri consumed considerable time. See Carl Tobias, *Civil Justice Reform in the Western District of Missouri*, 58 MO. L. REV. 335, 341-42 (1993).

30. Quite a few districts also had to expend time employing and training new personnel to adopt, implement, and evaluate the reform procedures. Indeed, as late as June 1994, RAND found that there were "even a few circumstances under which some plan provisions have still not yet been implemented." *Preliminary Observations*, supra note 18, at 28.

31. *Preliminary Observations*, supra note 18, at 21.

32. *Preliminary Observations*, supra note 18, at 21; *Supplemental*, supra note 21, at 4.

collect data for three years.<sup>33</sup> RAND admonished that a "significant and troublesome proportion of the CJRA case sample will still be open when, under the present timetable, data collection must end at the close of 1994."<sup>34</sup>

The RAND Corporation's early prognostication proved to be correct. By 1994, it became clear that an important percentage of the cases that RAND was tracking would not be completed in time to permit their inclusion in the RAND study. The Administrative Office of the United States Courts, one research and data collection component of the federal courts that has significant responsibility for helping to implement and evaluate the CJRA, requested that RAND compile a report thoroughly explaining this problem.<sup>35</sup>

RAND relied upon the districts' histories of resolving litigation over the last two decades and projected into the future by case types.<sup>36</sup> Were it to maintain the original schedule, RAND found that the average percentage of lawsuits which would remain unresolved when its study was scheduled to end would be twenty percent, a number of districts would have greater than thirty percent, and the loss of some specific categories of litigation would exceed forty percent.<sup>37</sup> The above percentages were not uniformly distributed either across districts or case types.<sup>38</sup> It is important to emphasize that many of these suits are the very ones that require the greatest time and resources to conclude and on which civil justice reform procedures could have the most profound effects.

When Judge Williams read the report that the Administrative Office asked RAND to compile, she found that an extension was clearly warranted and desirable. In the spring of 1994, Judge Williams wrote Senator Joseph Biden, Chair of the Senate Judiciary Committee and the CJRA's principal proponent, suggesting the propriety of postponement.<sup>39</sup> This correspondence, however, elicited no written response,

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33. *Preliminary Observations*, *supra* note 18, at 21; *Supplemental*, *supra* note 21, at 4. RAND asserted that, over the three-year time, experience will probably lead districts to improve and modify policies and that it would be important to reflect those improvements in the report to Congress. *Supplemental*, *supra* note 21, at 4.

34. *Preliminary Observations*, *supra* note 18, at 21.

35. This assertion is premised on conversations with RAND personnel, Administrative Office employees, and other individuals who are knowledgeable about civil justice reform.

36. Telephone Interview with Terence Dunworth, Principal Researcher, RAND Corporation (July 11, 1994) [hereinafter Telephone Interview].

37. *Id.*

38. For instance, the Eastern District of Pennsylvania, which quickly instituted its reform effort, is projected to have only a three percent loss. Telephone Interview, *supra* note 36.

39. Letter from Ann Claire Williams, U.S. District Judge, Northern District of Illinois, to Senator Joseph Biden, Chair, Senate Judiciary Committee (Apr. 13, 1994).

even though the Senator's staff began working on possible solutions.<sup>40</sup> When the Case Management Committee met on June 21, 1994, it officially considered the issue for the first time and unanimously voted to request that Congress extend the relevant deadlines.<sup>41</sup>

The Committee asked Judge Williams to write another letter informing Senator Biden of the Committee's action and requesting him to sponsor legislation that would extend those deadlines.<sup>42</sup> The necessity for that correspondence was obviated, however, when it became clear that several prominent members of the Senate Judiciary Committee, including Senator Biden, intended to introduce a bill that would address this matter during the summer of 1994.<sup>43</sup>

## II. GENESIS OF THE PROBLEM

Several factors apparently explain why so many cases would have remained unresolved when RAND was scheduled to complete its study. One important consideration is that the statute initially provided insufficient time for the litigation in which CJRA procedures were being applied to conclude and for RAND to assemble, analyze, and synthesize all of the relevant data.<sup>44</sup> Earlier experimentation with similar reforms in states, such as California and New Jersey, suggested that the time prescribed in the 1990 legislation for experimentation with procedures and for assessment would probably prove inadequate.<sup>45</sup> This was particularly true of the complex suits, which require the greatest money and time to resolve and for which RAND oversampled, even though these cases are critical to the most accurate evaluation of the efficacy of civil justice reform procedures.

Another significant factor was numerous pilot districts' delay in fully instituting expense and delay reduction procedures for reasons recounted above, such as the need to promulgate new local rules.<sup>46</sup> Some-

40. Telephone Interview with Sean Moylan, Counsel, United States Senate Judiciary Committee (July 11, 1994).

41. This is premised on telephone interviews with several individuals who are familiar with that meeting.

42. This is premised on telephone interviews with several individuals who are familiar with that meeting.

43. See S. 2407, 103d Cong., 2d Sess. (1994); see also *infra* notes 48-51 and accompanying text.

44. Telephone interview, *supra* note 36; see also TERENCE DUNWORTH & NICHOLAS M. PACE, RAND CORPORATION, STATISTICAL OVERVIEW OF CIVIL LITIGATION IN THE FEDERAL COURTS (1990); *supra* notes 7-8 and accompanying text.

45. This assertion is premised on telephone interviews with numerous individuals who are knowledgeable about federal and state civil justice reform efforts.

46. See *supra* notes 26-27 and accompanying text.

what slow implementation meant that districts failed to apply procedures immediately upon the adoption of civil justice plans, that RAND could not begin selecting all relevant suits for tracking on January 1, 1992, that a number of suits designated were filed throughout 1992, and that some of the litigation chosen was instituted as late as 1993.<sup>47</sup> Delayed effectuation also explains why so many lawsuits would have terminated after the study's scheduled completion date.

It is clear, however, that RAND had no responsibility for, and could have done little to affect, the problems that arose. The Judicial Conference selected RAND to conduct the study many months after Congress passed the CJRA, so that RAND obviously did not participate in the decisionmaking that established the statutory deadlines. RAND was similarly uninvolved in, and unable to influence, the delays that pilot districts experienced when implementing civil justice reform.

The RAND Corporation apparently did all that it could to comply with the legislative deadline. As soon as the Judicial Conference chose RAND to perform the assessment, the company promptly and effectively instituted the study. Since the evaluation's initiation, RAND seems to have done all possible to conduct the analysis expeditiously and effectively.

### III. THE JUDICIAL AMENDMENTS ACT

The specific statutory section that provides the extension warrants relatively limited treatment here because the provision is rather terse and straightforward and its passage was relatively uncontroversial. Five members of the Senate Judiciary Committee introduced the Judicial Amendments Act of 1994 on August 18, while Congress was battling over the crime bill, health care reform, and rushing toward its Labor Day recess.<sup>48</sup> Senator Joseph Biden (D-Del.), Committee Chair, Senator Howell Heflin (D-Ala.), Courts Subcommittee Chair, and Senators Charles Grassley (R-Iowa), Orrin Hatch (R-Utah) and Arlen Specter (R-Pa.), ranking minority members of the Committee, sponsored the legislation which passed that day and was sent to the House of Representatives.<sup>49</sup>

On October 7, the House enacted the bill as received following political machinations in which prominent members of the House Judiciary Committee attempted to insert provisions, governing topics such as au-

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47. Telephone interview, *supra* note 36.

48. See S. 2407, 103d Cong., 2d Sess. (1994); see also 140 CONG. REC. S12104 (1994).

49. See 140 CONG. REC. S12104, S12106 (1994) (statement of Senator Grassley); Judicial Amendments Act of 1994, 140 CONG. REC. H11,295-96 (1994).

thorization to build additional federal courthouses, that they favored.<sup>50</sup> At the eleventh hour, common sense apparently prevailed, and Congress passed this measure extending three programs that are important to the operations of the federal courts.<sup>51</sup>

The legislation simply postpones for one year the date on which the Judicial Conference must report to Congress. This means that RAND has an additional year in which to complete its study and tender the results to the Conference. The ten pilot and ten comparison districts, therefore, must retain and continue applying the six principles and guidelines for another year, while lawyers and parties litigating in those courts must continue complying with those requirements. The twenty districts must also continue working with RAND to facilitate its evaluation of these procedures.

#### IV. BENEFITS AND DISADVANTAGES OF EXTENDING THE STATUTORY DEADLINE

##### A. *Benefits*

Many important advantages will accrue from extension of the statutory deadline. Most significant will be the ability to capture considerably more data, which leads to more accurate determinations about precisely how much specific procedures reduce expense or delay and provides better information on which to base policy decisions regarding the mechanisms' application. These factors are especially true of the cases that are most protracted and expensive and of the procedures that ostensibly have the largest potential to save money or time in those lawsuits.

Postponing the deadline is apparently preferable for nearly all individuals, interests, and institutions—including Congress and federal court judges, lawyers, and litigants who have participated in the civil justice reform enterprise to date and who will be involved in future efforts to improve federal civil litigation. Practically everyone, including proponents and critics of the Act and its implementation, will profit from having the maximum available valid data on the principles and guidelines and their ability to decrease cost and delay.

It would also be wasteful, having devoted such substantial energy,

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50. See 140 CONG. REC. H11,295, 11,296 (daily ed. Oct. 7, 1994). This information is premised on conversations with individuals who are familiar with the developments that transpired.

51. See Judicial Amendments Act of 1994, Pub. L. No. 103-420, 108 Stat. 4345 (1994); see also *supra* note 5.

time, and resources to experimentation thus far, to not capture a significantly greater quantity of, and more accurate, information. Indeed, one important reason why so much controversy attended the CJRA's passage was that no one possessed sufficient data on specific procedures and their effectiveness in limiting expense or delay to justify national application. The failure to continue experimentation with, and evaluation of, the principles and guidelines for another year risks reverting to the earlier situation in which inadequate information was available about the efficacy of particular measures to warrant reliance on them.

Extension of the deadline seems evenhanded in numerous other ways. It now appears that postponement will simply yield greater data and more accurate assessments of the specific principles and guidelines. Insofar as projections can be made, an extension will not prejudice in any meaningful way the evaluation of procedural efficacy. Moreover, postponement seems unlikely to have much positive or negative impact as between Congress and the federal judiciary, as well as on advocates and opponents of the 1990 legislation and federal court judges, lawyers, and litigants.

Extension will not require that the budget-conscious Congress appropriate additional resources. The only increased cost of RAND's efforts will be a four percent inflationary factor, which the Administrative Office is prepared to absorb out of previously allocated CJRA funds.<sup>52</sup> Postponing the deadline concomitantly effects few changes in the scope of the requirements that the statute imposes on federal districts or the work that the courts agreed to do with RAND. Furthermore, extension jeopardizes no congressional prerogatives regarding civil justice reform. The 1997 date on which the Act is scheduled to sunset means that the postponement will actually afford Congress greater time to plan for the receipt of, and to respond in ways that it deems appropriate to, the RAND study results and the Judicial Conference Report and recommendation.<sup>53</sup>

Extension will also provide some ancillary benefits. For example, it should enable judges, attorneys, and parties to experiment for a longer period with ostensibly effective procedures. Postponement will correspondingly accord the Judicial Conference an opportunity to become even better informed about the reform and to prepare for receipt of the RAND study so that the Conference can tender the most helpful report to Congress. Congress should similarly be able to capitalize on this additional time to increase legislative appreciation of civil justice

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52. Telephone interview, *supra* note 36.

53. See Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, § 103(b)(2), 28 U.S.C. § 471 notes (1988 & Supp. V 1993).

reform experimentation and its evaluation and to plan for the RAND analysis and the Judicial Conference report. These congressional endeavors will concomitantly facilitate expeditious, careful consideration of the RAND study and of the Conference report, which assumes peculiar significance in light of the imminent 1997 date on which Congress must decide whether the CJRA will sunset.<sup>54</sup>

### B. Disadvantages

The disadvantages that the extension will impose are relatively few in number and rather inconsequential. Furthermore, most are amenable to amelioration. Some pilot and comparison districts may be inconvenienced by postponement or may even wish to cease experimentation. For another year, judges in these twenty districts must continue enforcing the principles and guidelines, while lawyers and litigants will have to find, understand, and comply with the requirements.<sup>55</sup> Because most of these procedures apply comparatively early in the pretrial process, they could have somewhat limited relevance to that cohort of cases awaiting resolution and evaluation by RAND. Moreover, the extension will effectively preclude the Judicial Conference from recommending experimentation with principles and guidelines in additional federal districts because the one-year postponement affords insufficient time to implement the procedures unless Congress extends the date on which the CJRA sunsets.<sup>56</sup>

### C. Resolution

Both the quantity and quality of benefits that will apparently result from postponement outweigh the disadvantages, most of which can be remedied or ameliorated. For example, the extension will enhance the validity of the study's methodology, the evaluation's integrity, the thoroughness of the information gleaned, and the conclusions derived from those data. Furthermore, the extension will lead to more well-informed procedural decisionmaking in the future. Congressional passage of the legislation that postponed the deadline for a year, therefore, was advisable.

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54. The extension contracts to less than a year the time that Congress has to decide whether the CJRA will sunset. See *supra* note 53.

55. Because procedures adopted in some of the districts are difficult to locate, comprehend, and reconcile with the Federal Rules, they can complicate practice, especially for attorneys and parties who litigate in multiple districts and who may prefer the uniform Federal Rules. See Tobias, *supra* note 1, at 1422-27.

56. See *supra* notes 13-14, 53 and accompanying text.

## V. SUGGESTIONS

Recommendations for efficaciously implementing the statutory extension require relatively little examination here, because the provision for postponement is comparatively straightforward and should be rather easy to effectuate. The RAND Corporation must capitalize on the additional year that the extension affords to gather, assess, and synthesize the maximum possible relevant material on the principles and guidelines that the pilot and comparison courts are applying. RAND should continue collecting, analyzing, and synthesizing pertinent data and working with the twenty districts as conscientiously as the company apparently has to date.<sup>57</sup>

The ten pilot and comparison courts and the federal judges in these districts should keep cooperating with RAND to facilitate its effective evaluation of the procedures. The courts must also retain and continue to apply the principles and guidelines while taking advantage of the extra year to experiment with and refine promising mechanisms for reducing expense and delay. Lawyers and parties litigating in these districts should attempt to make the procedures work effectively, even as they freely criticize measures that fail to yield cost or time savings. Judges, attorneys, and parties must cooperate with RAND by, for instance, carefully answering any questionnaires regarding the CJRA that the company circulates to them.<sup>58</sup>

The Judicial Conference should employ the year to increase its understanding of reform efforts and to anticipate the submission of the RAND study, thereby enabling the Conference to compile a report for Congress that will best assist the lawmakers. For example, the Conference may want to formulate alternative procedures should the RAND analysis eventually indicate that this option is preferable to more federal districts' application of the statutorily-prescribed principles and

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57. Any effort to predict what the RAND study will ultimately show is premature and fraught with difficulty. A number of the federal districts that are not pilot courts have only been experimenting for less than two years. Moreover, the RAND Corporation is providing the only rigorous evaluation of procedures applied in the pilot districts and has reached no conclusions yet. Nevertheless, it is possible to posit very tentative predictions based upon experimentation and analysis. For instance, substantial reliance can be placed on annual assessments that numerous districts have performed. See, e.g., U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ANNUAL ASSESSMENT OF THE CONDITION OF THE COURT'S DOCKET (1993); U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, ANNUAL ASSESSMENT OF CIVIL AND CRIMINAL DOCKET (1993); see also 28 U.S.C. § 475 (1988 & Supp. V 1993). This evaluation suggests that some procedures in the broad areas of judicial case management, discovery, and ADR will probably reduce expense and delay. See Tobias, *supra* note 27, at 1623. Congress chose to delay similar evaluation of the Demonstration Program that the Federal Judicial Center is conducting. S. 464, 104th Cong., 1st Sess. (1995).

58. See *supra* note 23 and accompanying text.

guidelines.<sup>59</sup> Congress should concomitantly use the extra year to enhance its comprehension of civil justice reform. For instance, Congress could continue to monitor experimentation and evaluation in preparing for the receipt of the Judicial Conference report and in responding to it when determining whether the CJRA should sunset.<sup>60</sup>

## VI. CONCLUSION

The Civil Justice Reform Act of 1990 instituted unprecedented self-analysis in the federal district courts, which led to experimentation with procedures for decreasing cost and delay in civil litigation. Congress wisely decided to extend for a year the comprehensive assessment of that experimentation, which the RAND Corporation is conducting. The postponement should enhance the value of experimentation by facilitating the collection, evaluation, and synthesis of greater, more accurate information on these innovative efforts to save money and time.

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59. It is more difficult to predict what the Conference will do because its report and recommendation will probably be premised substantially on the results of the RAND study. See *supra* note 57. Moreover, the extension has effectively precluded prescription of experimentation with principles and guidelines in additional districts, unless Congress extends the date on which the CJRA sunsets. See *supra* note 56 and accompanying text; see also *supra* notes 13-15 and accompanying text.

60. It is even more difficult to predict what Congress will do. Completion of the RAND study and of the Judicial Conference report and recommendation to Congress premised on that study must first occur. Prediction is additionally complicated because of the political machinations that may attend congressional decisionmaking on whether the CJRA should sunset. In any event, Congress should probably exercise caution in reaching this determination. After all, Congress was substantially responsible for the need to postpone the deadline, even though it wisely decided to grant an extension.