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Is the Recent Frenzy of Civil Justice Reform a Cure-All or a Placebo? An Examination of the Plans of Two Pilot Districts

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I. Introduction

There has been much hoopla in the last decade about the increased delay and expense of civil litigation.[1] Many federal judges place the blame on their ever-growing dockets.[2] Other

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1. TASK FORCE ON CIVIL JUSTICE REFORM, THE BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 1 (1989) [hereinafter BROOKINGS REPORT].

2. *See, e.g.*, Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274,

reformers believe that better case management by the judge will prevent the wasted time and money often caused by overzealous or dilatory lawyers.[3] Consequently, there have been calls for "procedural reform, more active case management by judges, and better efforts by attorneys and their clients to control cost and delay."[4]

The clamorings of these concerned jurists have finally been heard by all three branches of the federal government, causing a frenzy of reform activity in the last few years. Although there has been some limitation on the number of cases filed in federal court,[5]

274-75 (1982); William H. Rehnquist, *A Plea for Help: Solutions to Serious Problems Currently Experienced by the Federal Judicial System*, 28 ST. LOUIS U. L.J. 1, 7 (1984); William W. Schwarzer, *Managing Civil Litigation: The Trial Judge's Role*, 61 JUDICATURE 400, 401 (1978). Actually, Chief Justice Burger raised this concern over two decades ago. Almost ten years ago, after 14 years of calling for reform, he likened himself to the boy who cried wolf because he had complained about the increasing federal docket so often. Warren E. Burger, *Annual Report on the State of the Judiciary*, 69 A.B.A. J. 442, 442 (1983).

This perception of the state of the federal docket is not shared by the entire federal judiciary, however. Witness, for example, the remarks of Judge Jack Weinstein of the Eastern District of New York who said: "Concern over excess litigation in the federal courts is . . . typically exaggeration. Sober attention to the statistical evidence indicates that we are no more overwhelmed now than at many times in the past." Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901, 1907-08 (1989).

3. *E.g.*, Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 770-71, 783 (1981); Schwarzer, *supra* note 2, at 402, 408. Not everyone agrees that "managerial judges" are the answer. A number of federal judges see a decline in the quality of federal opinions with the increase in managerial duties. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985); Robert H. Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 232-34 (1976); Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME L. REV. 648 (1980). Perhaps the most outspoken critic of the case management movement, Professor Judith Resnik, agrees that "judicial management may be teaching judges to value their statistics . . . more than they value the quality of their dispositions." Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 380 (1982). Moreover, she maintains that "because managerial judging is less visible and usually unreviewable, it gives trial courts more authority and at the same time provides litigants with fewer procedural safeguards to protect them from abuse of that authority." *Id.*

4. BROOKINGS REPORT, *supra* note 1, at 3.

5. For example, Congress has limited diversity jurisdiction by increasing the

the primary focus of reform has been on the course of already-filed litigation. Federal trial judges have been encouraged and, more recently, commanded to take a more active role in case management.[6] Thus, in a departure from traditional practice,[7] federal judges have become much more active in the pretrial phase of litigation.[8]

Not surprisingly, the judiciary has led the way in attempting to solve the problems caused by its increased docket. Since January 1980, the Supreme Court has amended the Federal Rules of Civil Procedure twice to increase sanctions for pleading and discovery abuses,[9] limit the use of discovery,[10] and expand the role of the judge generally in the pretrial stage.[11] Even now, the Advisory Committee on the Civil Rules is considering revolutionary changes that would reduce discovery disputes and facilitate settlements.[12]

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jurisdictional amount, Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 201, 102 Stat. 4642, 4646 (1988) (codified as amended at 28 U.S.C. § 1332(a) (1988)); removing diversity status from resident aliens, *id.* § 203, 102 Stat. at 4646; and reducing the number of removable suits, Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 312, 104 Stat. 5089, 5114 (to be codified as amended at 28 U.S.C. § 1441(c)). In addition, the Supreme Court has given "teeth" to FED. R. CIV. P. 11—regarding certified pleadings—to discourage frivolous filings. *See* FED. R. CIV. P. 11 advisory committee's notes to 1983 amendments.

6. *See infra* notes 9-13, 31-38 and accompanying text.

7. "Until quite recently the trial judge played virtually no role in a case until counsel for at least one side certified that it was ready for trial." Peckham, *supra* note 3, at 770.

8. *Id.* at 770-71; Phillip W. Tone, *The Role of the Judge in the Settlement Process*, *in* SEMINARS FOR NEWLY APPOINTED UNITED STATES DISTRICT JUDGES 57 (1975).

9. FED. R. CIV. P. 11 advisory committee's notes to 1983 amendments; FED. R. CIV. P. 26 advisory committee's notes to 1980 amendments of subsection (f) and 1983 amendments of subsection (g); FED. R. CIV. P. 37(b)(2) & (g) advisory committee's notes to 1980 amendments.

10. FED. R. CIV. P. 26 advisory committee's notes to 1983 amendments of subsections (a) & (b).

11. FED. R. CIV. P. 16 advisory committee's notes to 1983 amendments.

12. The proposed amendments to Rule 26 of the Federal Rules of Civil Procedure would make a number of changes allowing the court to restrict abusive discovery. The most revolutionary change is the proposed amendment "impos[ing] on parties a duty to disclose, without awaiting discovery requests, certain basic information that is needed in most cases to prepare for trial or make an informed decision about settlement." FED. R. CIV. P. 26(a) advisory committee's note to proposed amendments (Aug. 1991).

Moreover, the Supreme Court, through its opinions, has encouraged the district judges to be more aggressive in controlling their dockets.[13] Accordingly, many federal judges have embraced the case management movement enthusiastically.[14]

Despite the judiciary's efforts, many judges and lawyers contended that the problems of cost and delay remained.[15] Thus, within the last three years, the other two branches of government have joined the effort to reduce the problems in the judicial branch. First, after considerable study,[16] Congress passed the Civil Justice Reform Act of 1990[17] ("the Act"), which requires each federal district court to develop and implement a "civil justice expense and delay reduction plan."[18] Then, just as the Act went into effect, the executive branch, under the leadership of Vice President Dan Quayle, began its own study of cost and delay in civil litigation.[19]

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13. *See, e.g.*, Celotex Corp. v. Catrett, 477 U.S. 317 (1986) (encouraging the grant of summary judgment motions); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) (same); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (same); *see also* National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) (encouraging the use of dismissal as a sanction).

14. Perhaps the two best-known examples of enthusiastic case managers are Judges William W. Schwarzer and Robert F. Peckham, both formerly of the U.S. District Court for the Northern District of California. *See, e.g.*, WILLIAM W. SCHWARZER, MANAGING ANTITRUST AND OTHER COMPLEX LITIGATION (1982); Robert F. Peckham, *The Federal Judge as Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770 (1981); *see also* Tone, *supra* note 8, at 59-60 (noting federal judges now advocate active intervention in the settlement process). Not all federal judges have become "managerial judges," however. *See, e.g.*, McCargo v. Hedrick, 545 F.2d 393, 396-402 (4th Cir. 1976) (maintaining that excessive pretrial requirements are burdensome on the judicial process and that pretrial practice should be simple); *see also* John F. Grady, *The Unsteady Triumvirate*, 63 NOTRE DAME L. REV. 830, 834 (1988) (elaborate pretrial orders require "enormous expense . . . with no perceptible benefit to the clients").

15. BROOKINGS REPORT, *supra* note 1, at 8.

16. *See* S. REP. NO. 416, 101st Cong., 2d Sess. 13-14 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6816.

17. Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. I, §§ 101-106, 104 Stat. 5089, 5089-98 [hereinafter Civil Justice Reform Act of 1990]. Title I of the Act is referred to simply as the Civil Justice Reform Act of 1990. *Id.* § 101, 104 Stat. at 5089.

18. *Id.* § 103, 104 Stat. at 5090.

19. In January 1991, the Federal Civil Justice Reform Working Group of the President's Council on Competitiveness began "conducting a sweeping study of ways

The result of that study was an executive order, signed by President George Bush on October 23, 1991,[20] containing "guidelines to promote just and efficient [federal] government civil litigation."[21]

Since this Article is part of a special issue on the Southern District of Texas's cost and delay reduction plan, the focus is necessarily on the congressional reform effort. But to analyze this effort intelligently, one must be aware of the background of reform activity. This Article compares the plan of the Southern District of Texas with that of the District of Delaware. In so doing, it raises some questions about the efficacy of the Act. Part II provides a brief description of the Act, noting its radical departure from uniform federal procedure. Part III describes the District of Delaware and the Southern District of Texas, highlighting the need to develop different solutions to meet very different needs. Part IV compares and contrasts the respective plans of the two districts, neither of which actually solves the problems that the Act was enacted to address. Consequently, in Part V, the Article concludes by addressing the efficacy and wisdom of the current efforts to reform the judiciary.

II. The Civil Justice Reform Act of 1990

For the first century and a half of our Republic, the rules of civil procedure for federal law suits varied from district to district.[22] Not quite sixty years ago, after many years of study and

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to accelerate the resolution of civil litigation and to make the legal system 'more efficient.'" *Administration Examines Reforms To Limit Discovery, Allow Fee Awards for Defendants*, U.S.L.W. (daily ed.), Feb. 28, 1991, at 1. Vice President Quayle unveiled the working group's recommendations in August 1991 at the ABA annual meeting. *ABA Rejects Ancillary Business, Inroads on Client Confidences*, 60 U.S.L.W. 2121, 2121 (1991).

20. Executive Order No. 12,778, 56 Fed. Reg. 55,195 (1991); *see Government Lawyers Ordered To Streamline Litigation*, 60 U.S.L.W. 2282 (1991).

21. 56 Fed. Reg. at 55,195. For example, federal government litigators are required to explore settlement and alternative dispute resolution possibilities. *Id.* at 55,195-96. In addition, federal litigation counsel "shall make every reasonable effort to streamline and expedite discovery." *Id.* at 55,196.

22. Congress passed a series of process acts, which tied federal procedure in common-law actions to the procedure of the state in which the district court sat at the time of admission to the Union. The Process Acts were as follows: Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93, 93; Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276; Act of May 19, 1828, ch. 68, §§ 1, 3, 4 Stat. 278, 278-81; Act of Aug. 1, 1842, ch.

debate, Congress accepted the conclusion of the American Bar Association (ABA) that this system did not work effectively.[23] The ABA had found that not only were lawyers who practiced in more than one state confused,[24] but that "a federal practitioner 'even in his own state, f[elt] no more certainty as to the proper procedure than if he were before a tribunal of a foreign country.'"[25] Therefore, the ABA urged adoption of a uniform procedure for federal courts. Congress responded by enacting the Rules Enabling Act of 1934,[26] which delegated to the Supreme Court the power to draft uniform procedural rules. The result was the Federal Rules of Civil Procedure.

Just a half-century later, Congress listened again to the advice of a broad spectrum of the American bar with respect to solving the problems of civil litigation,[27] but this time the advice was different. A task force of "experts and participants in the civil justice system," convened at the instigation of Senator Joseph Biden of Delaware, chair of the Senate Judiciary Committee,[28] specifically did "not advocate the adoption of a uniform set of reform suggestions to be

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109, 5 Stat. 499. For the procedure applied to states admitted to the Union between 1842 and 1872, see Charles Warren, *Federal Process and State Legislation* (pt. 1), 16 VA. L. REV. 421, 445 (1930). In 1872, Congress passed the Conformity Act, which required the district courts to use the current state procedure in common-law actions. Act of June 1, 1872, ch. 255, §§ 5, 6, 17 Stat. 196, 197.

23. As one commentator has noted,

> It was common knowledge at the time the Rules Enabling Act was passed [in 1934] that it represented the conclusion of a campaign, conducted for more than twenty years by the American Bar Association, for a uniform federal procedure bill authorizing the Supreme Court to promulgate rules of procedure in civil actions at law.

Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1023-24 (1982).

24. *Id.* at 1042.

25. *Id.* at 1041 (quoting 19 A.B.A. REP. 411, 420 (1896)).

26. Rules Enabling Act of 1934, Pub. L. No. 73-415, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1988)).

27. Congress relied primarily on the report of a task force convened by the Brookings Institution and the Foundation for Change. S. REP. NO. 416, *supra* note 16, at 13, 1990 U.S.C.C.A.N. at 6816.

28. BROOKINGS REPORT, *supra* note 1, at 2.

applied by all district courts throughout the nation."[29] Rather, the task force found, "reform must come from the 'bottom up,' or from those in each district who must live with the civil justice system on a regular basis."[30] Accordingly, Congress decreed that each federal district court must appoint an advisory group to analyze the causes of expense and delay for litigants in the district.[31] Each court must then consider the findings and recommendations of the advisory group and devise a solution to the district's problems.[32]

While requiring districts to generate local solutions, Congress nonetheless provided some general guidance for all districts. The Act contains several guidelines and techniques of litigation management for the courts and their advisory groups to consider based on the recommendations of the task force.[33] The task force found that "the most important cause of high litigation costs or delays is abuse by attorneys of the discovery process, which leads to 'overdiscovery' of cases."[34] In addition, the task force reported that "the 'failure of judges to control the discovery process' is another important cause of high litigation costs."[35] Consequently, the Act's guidelines require that the districts consider, among other things, ways to control the extent and duration of discovery and the number of discovery disputes.[36] The Act also encourages "early and ongoing control of the pretrial process through involvement of a judicial officer";[37] in particular, the Act envisions that judges will

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29. *Id.* at 11.

30. *Id.*

31. Civil Justice Reform Act of 1990 § 103(a), 104 Stat. at 5094 (to be codified at 28 U.S.C. § 478).

32. *Id.*, 104 Stat. at 5090-91 (to be codified at 28 U.S.C. § 472).

33. *Id.*, 104 Stat. at 5091-93 (to be codified at 28 U.S.C. § 473(a)-(b)).

34. BROOKINGS REPORT, *supra* note 1, at 6.

35. *Id.* at 7.

36. *See* Civil Justice Reform Act of 1990 § 103(a), 104 Stat. at 5091-92 (to be codified at 28 U.S.C. § 473(a)). The suggestions include such measures as tailoring discovery to the complexity of the case, setting firm time limits for the completion of discovery, and requiring counsel to certify that they have attempted to resolve discovery disputes before bringing the matter to a judge. *Id.*

37. *Id.*, 104 Stat. at 5091 (to be codified at 28 U.S.C. § 473(a)(2)). "[T]he term 'judicial officer' means a United States district court judge or a United States magistrate." *Id.*, 104 Stat. at 5096 (to be codified at 28 U.S.C. § 482).

set and enforce firm deadlines, with trial within eighteen months of the filing of a complaint.[38]

While most districts have three years from December 1, 1990—the effective date of the Act—to draft their plans,[39] ten pilot districts, including the Southern District of Texas and the District of Delaware,[40] had to implement their plans by December 31, 1991.[41] Moreover, although all other districts must consider, but need not follow, the Act's guidelines,[42] the pilot districts' plans *must include* these congressional suggestions for litigation management.[43] Despite this mandatory content, the Delaware and Texas plans are dramatically different from each other. These differences are best understood in light of the nature of the districts themselves. The contrasts between the districts will shed light on why Congress rejected fifty years of legal wisdom favoring uniform procedure in favor of diverse local procedures.

III. A Tale of Two Districts: The District of Delaware and the Southern District of Texas

While the Southern District of Texas is a vast slice of the even vaster State of Texas,[44] the District of Delaware is the only district in the State of Delaware,[45] the second smallest state in the

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38. *Id.*, 104 Stat. at 5091-92 (to be codified at 28 U.S.C. § 473(a)(2), (3)).

39. *Id.* § 103(b), 104 Stat. at 5096.

40. The other eight pilot districts are the Southern District of California, 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 District of Utah, and the Eastern District of Wisconsin. *Judicial Conference Seeks Reform of Asbestos Litigation*, THE THIRD BRANCH, Apr. 1991, at 1, 2.

41. Civil Justice Reform Act of 1990 § 105(b), 104 Stat. at 5097-98. In addition, there are a number of "early implementation districts," which volunteered to formulate their plans by December 31, 1991, as well. *See id.* § 103(c), 104 Stat. at 5096.

42. *Id.* § 103(a), 104 Stat. at 5091 (to be codified at 28 U.S.C. § 473(a)).

43. *Id.* § 105(b)(1), 104 Stat. at 5097.

44. The Southern District of Texas covers a land area of slightly less than one-fifth of the state of Texas, which is 262,017 square miles in size. CIVIL JUSTICE REFORM ACT ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE S. DIST. OF TEX., REPORT 7 (Oct. 18, 1991), *reprinted in* 11 REV. LITIG. 203, 214 (1992) [hereinafter TEXAS REPORT]; THE WORLD ALMANAC AND BOOK OF FACTS 123 (1992) [hereinafter WORLD ALMANAC].

45. 28 U.S.C. § 87 (1988).

Union.[46] Not surprisingly, the populations of the two districts vary greatly in size. The population of the entire state of Delaware is 666,168,[47] whereas Houston, the headquarters of the Southern District of Texas,[48] is home to over 1.6 million people.[49] Those numbers, however, do not tell the whole Delaware story. Although Delaware's population is small, it is among the densest in the country. The majority of the population lives in the northern part of the state, within fifteen miles of Wilmington,[50] the seat of the district court.[51] Moreover, Wilmington is just outside of Philadelphia,[52] a city the size of Houston,[53] and is only sixty-five miles from Baltimore.[54] Furthermore, Wilmington is the midway point along the 200-mile corridor between Washington, D.C., and New York City.[55] Thus, Delaware is part of "a major metropolitan area

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46. 3 NEW ENCYCLOPAEDIA BRITANNICA 970 (15th ed. 1991). The area of Delaware is 2,045 square miles. *Id.* at 971. Only Rhode Island, with an area of 1,212 square miles, is smaller. 10 *id.* at 24.

47. This figure is as of the 1990 census. WORLD ALMANAC, *supra* note 44, at 74-75.

48. TEXAS REPORT, *supra* note 44, at 7, 11 REV. LITIG. at 214.

49. The population of Houston as of the 1990 Census was 1,630,553. WORLD ALMANAC, *supra* note 44, at 105.

50. 3 NEW ENCYCLOPAEDIA BRITANNICA, *supra* note 46, at 970. The State of Delaware is almost two states, divided by the Chesapeake and Delaware Canal. The southern part is sparsely populated and mainly agricultural. *Id.*

51. ADVISORY GROUP APPOINTED PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. COURT FOR THE DIST. OF DEL., FINAL REPORT 6 (Oct. 1, 1991) (unpublished report, on file with the clerk of the court) [hereinafter DELAWARE REPORT].

52. Wilmington is 25 miles from Philadelphia. GARY L. FITZPATRICK & MARILYN J. MODLIN, DIRECT-LINE DISTANCES 244 (U.S. ed. 1986). Moreover, Philadelphia International Airport is less than 20 miles from Wilmington, AMERICAN AUTO. ASS'N, AAA ROAD ATLAS 105 (1991), closer to Wilmingtonians than to many Philadelphians.

53. As of the 1990 census, Philadelphia, with a population of 1,585,577, is approximately the size of Houston. THE WORLD ALMANAC, *supra* note 44, at 103; *cf. id.* at 73 (noting that Houston and Philadelphia, with 1.6 million people each, trail only New York, Los Angeles, and Chicago).

54. FITZPATRICK & MODLIN, *supra* note 52, at 40. Baltimore has a population of 692,134. WORLD ALMANAC, *supra* note 44, at 116.

55. Wilmington is 99 miles from Washington D.C., FITZPATRICK & MODLIN, *supra* note 52, at 273, and 105 miles from New York City, *id.* at 233. Both Interstate Highway 95 and Amtrak pass through Wilmington on the route between New York and the District of Columbia.

with significant domestic and commercial activity,"[56] not unlike the Houston region.

Accordingly, there are some marked similarities in the types of cases handled by the District of Delaware and the Houston-area divisions of the Southern District of Texas.[57] In both the Houston region and Delaware, about 90% of total filings are civil cases.[58] Moreover, the District of Delaware and the Houston-area divisions see comparable civil cases. For example, "Houston is the base of operations for the international energy industry . . . . [Thus,] the Houston division sustains a heavy civil docket of complex corporate and commercial litigation."[59] Likewise, Delaware is home to such companies as Dupont and Hercules, giving the state a resulting dominant role in the chemical industry.[60] Furthermore, Delaware's famous corporation code[61] has led to Delaware's renown as "the state of incorporation of many companies which conduct business nationwide and internationally."[62] Not surprisingly, therefore, "[c]ases traditionally considered to be 'complex' comprise an unusually high proportion of the civil docket";[63] a major portion of

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56. TEXAS REPORT, *supra* note 44, at 9, 11 REV. LITIG. at 216 (describing the Houston region).

57. These divisions are Houston, Galveston, and Victoria. *Id.* at 12, 11 REV. LITIG. at 220.

58. "In the Houston region, civil filings constitute 92% of each judge's docket . . . ." *Id.* at 13, 11 REV. LITIG. at 220. In Delaware, "[i]n 1990, civil case filings comprised 87.5 percent of total case filings." DELAWARE REPORT, *supra* note 51, at 26.

59. TEXAS REPORT, *supra* note 44, at 8-9, 11 REV. LITIG. at 216.

60. 3 ENCYCLOPAEDIA BRITANNICA, *supra* note 46, at 970.

61. DEL. CODE ANN. tit. 8 (1991). The Delaware corporation code was first enacted in 1899. Its attraction is the wide latitude it gives to majority shareholders and corporate managers for keeping control of their corporation. CAROL E. HOFFECKER, FEDERAL JUSTICE IN THE FIRST STATE: A HISTORY OF THE UNITED STATES DISTRICT COURT FOR DELAWARE 88-89 (1992).

62. DELAWARE REPORT, *supra* note 51, at 6. As of 1989, approximately 276 of the "Fortune 500" companies were incorporated in Delaware. Telephone Interview with Delaware Development Office (Feb. 24, 1992).

63. DELAWARE REPORT, *supra* note 51, at 12.

the Delaware court's time is taken up by patent,[64] antitrust,[65] and securities[66] cases.

Still, there are several basic differences in the dockets of the Houston region and the District of Delaware. For example, while the federal courts in both Delaware and the Houston region have a high volume of prisoner civil-rights cases,[67] they are a much more important part of the Delaware caseload, constituting 38% of that court's civil docket in 1990.[68] Additionally, Houston is a deep-water port, ranking "third among U.S. ports in total tonnage and

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64. Delaware judges devoted more time—over 15%—to copyright, patent, and trademark cases than to any other type of case. Administrative Office of the U.S. Courts, Federal Judicial Center, Guidance to Advisory Groups Appointed Under the Civil Justice Reform Act of 1990: SY91 Statistics Supplement 13 (Del. ed. Oct. 1991) (on file with *The Review of Litigation*) [hereinafter Delaware Statistics Supplement]; *see also* DELAWARE REPORT, *supra* note 51, at 32 & app. F at F-3, fig. 5. This tradition of numerous patent cases dates from the 1920s. District of Delaware Judge Hugh M. Morris's

> careful analysis [in Dubilier Condenser Corp. v. Radio Corp. of America, 34 F.2d 450 (1929), *rev'd in part*, 59 F.2d 305 (3d Cir.), *cert. denied*, 287 U.S. 648 (1932), *and* 59 F.2d 309 (3d Cir.), *cert. denied*, 287 U.S. 650 (1932)] of the technology employed in the plaintiffs' patent and his statement of the principle of equity in this and similar cases sent a clear message to patent holders. The result was a remarkable increase in patent work that came before the court.

HOFFECKER, *supra* note 61, at 111.

65. "In 1990, the [Delaware] Court's percentage of [patent/copyright/trademark/antitrust] cases (6.3 percent) was the highest of any four-judge court by a significant margin." DELAWARE REPORT, *supra* note 51, at 32; *accord id.*, app. F at F-3, fig. 5.

66. The District of Delaware judges spend over 6% of their time on securities and commodities cases. Delaware Statistics Supplement, *supra* note 64, at 13. This tradition is also fairly old. For example, "[a] survey completed in 1947 showed that of the more than thirty reorganization plans submitted under the terms of the Public Utility Holding Company Act, [15 U.S.C. §§ 79 to 79z-6 (1988),] all but three came to the Delaware [District] Court for Judge Leahy's review." HOFFECKER, *supra* note 61, at 131.

67. DELAWARE REPORT, *supra* note 51, at 12; TEXAS REPORT, *supra* note 44, at 9, 11 REV. LITIG. at 216.

68. DELAWARE REPORT, *supra* note 51, at 32. In contrast, prisoner cases comprised only 17% of the Houston Division's civil docket in 1990, TEXAS REPORT, *supra* note 44, app. C at D-6, 23% of the Galveston Division's civil docket, *id.* at D-5, and 10% of the Victoria Division's civil docket, *id.* at D-8. [EDITOR'S NOTE: Because of space considerations, Appendix C to the Texas Report was not reprinted in this issue of *The Review of Litigation*.]

second in foreign tonnage."[69] Hence, the division "has a large number of admiralty, longshoremen, personal injury, and cargo damage cases."[70]

The more striking differences, however, are between the District of Delaware and the Houston-area divisions on the one hand and the "border divisions" of the Southern District of Texas[71] on the other. The Southern District of Texas abuts the Gulf of Mexico and shares 250 miles of border with Mexico.[72] The Texas advisory group found that "[t]his geography plays a significant role in criminal activity within this district";[73] to wit, the district is "disproportionately affected" by illegal drug and immigration cases.[74] Consequently, in the border divisions, civil filings constitute only 24% of the total docket.[75] Indeed, during the past three years, "criminal matters consumed 90% of judicial time" in the border divisions,[76] with the majority of these criminal matters being drug and immigration cases.[77]

Notwithstanding the similarities between the dockets of the Delaware and Houston region courts, the vast difference in size, both population and area, of the two districts must be considered for a true picture of the cost and expense of civil litigation in each.

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69. TEXAS REPORT, *supra* note 44, at 8, 11 REV. LITIG. at 216.

70. *Id.* at 7, 11 REV. LITIG. at 214. Galveston is also a deep-water port, and its division has a large number of admiralty cases. *Id.*

71. The "border divisions" of the Southern District of Texas are those along the Texas-Mexico border—Laredo, Brownsville, and McAllen. TEXAS REPORT, *supra* note 44, at 7, 11 REV. LITIG. at 214. Although Corpus Christi is not on the Mexican border, it receives similar business due to U.S. border patrol checkpoints in the area. *Id.* at 7-8, 11 REV. LITIG. at 215.

72. *Id.* at 7, 11 REV. LITIG. at 214.

73. *Id.* at 24, 11 REV. LITIG. at 232.

74. *Id.*

75. *Id.* at 13, 11 REV. LITIG. at 220. In the Corpus Christi division, civil filings are slightly higher, comprising 46% of the docket. *Id.*

76. *Id.* at 12, 11 REV. LITIG. at 219-20. These percentages may be reduced somewhat in the future given the current U.S. Attorney's policy to focus on crimes with substantial federal issues. *See id.* at 20-21, 11 REV. LITIG. at 228-29.

77. In the border divisions, "74% of criminal filings are felonies. Of felony offenses, 42% are drug cases, [and] 33% are immigration cases . . . ." *Id.* at 12, 11 REV. LITIG. at 220. In the Corpus Christi division, "89% [of the criminal cases on the docket] are felonies. Drug cases account for 86% of felony cases in this division." *Id.* at 13, 11 REV. LITIG. at 220-21.

First, there is a dramatic disparity in the size of their respective dockets. In statistical year 1990,[78] there were 778 civil cases filed in the District of Delaware.[79] During the same period, there were 5983 civil cases filed in the Southern District of Texas.[80] And while there were over 4000 criminal defendant filings in the Southern District of Texas in 1990,[81] there were fewer than 180 criminal defendant filings in the District of Delaware.[82] The Southern District of Texas "placed fifth [highest] among the ninety-four district courts in terms of cases pending";[83] the District of Delaware placed fifth lowest.[84] Second, the area of the districts affects the state of the dockets. The Delaware judges sit exclusively in Wilmington,[85] whereas the judges of the Southern District of Texas sit in six divisional seats in addition to Houston.[86] As the Texas advisory group stated, "the sheer distance to the six divisional offices requires complex management of clerical, judicial, attorney, and litigant time."[87]

Finally, in light of the relative sizes of the two districts, each is allocated a different number of judges. The Southern District of Texas currently has thirteen active Article III judges, with an additional five authorized by Congress.[88] The Biennial Judgeship Survey for 1990 found that the district actually needed twenty

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78. The courts' statistical years run from July 1 to the following June 30. DELAWARE REPORT, *supra* note 51, at 20 n.48; *see* TEXAS REPORT, *supra* note 44, at 21 & n.31, 11 REV. LITIG. at 229 & n.31.

79. Delaware Statistics Supplement, *supra* note 64, at 12.

80. TEXAS REPORT, *supra* note 44, at 26, 11 REV. LITIG. at 234.

81. *Id.*, app. D, ex. B. [EDITOR'S NOTE: Because of space considerations, Appendix D to the Texas Report was not reproduced in this issue of *The Review of Litigation*.]

82. Delaware Statistics Supplement, *supra* note 64, at 18.

83. TEXAS REPORT, *supra* note 44, at 26, 11 REV. LITIG. at 234.

84. The District of Delaware is busier than the Districts of Maine, Rhode Island, New Hampshire, and Vermont. HOFFECKER, *supra* note 61, at 210; *see* DELAWARE REPORT, *supra* note 51, app. F at F-1, fig. 1 (Delaware has fewest pending cases of any four-judge district court).

85. DELAWARE REPORT, *supra* note 51, at 6.

86. TEXAS REPORT, *supra* note 44, at 7, 11 REV. LITIG. at 214.

87. *Id.*, 11 REV. LITIG. at 214. "The mileage from Houston to each divisional office is indicated in parentheses: Brownsville (375); Corpus Christi (250); Galveston (58); Laredo (320); McAllen (350); and Victoria (120)." *Id.* at 7 n.14, 11 REV. LITIG. at 214 n.14.

88. *Id.* at 9-10, 11 REV. LITIG. at 217.

judges.[89] In contrast, until March 30, 1992, there had been a total of only twenty district judges in Delaware since the district's founding in 1789.[90] At present, there are four active judges in the District of Delaware.[91]

Unfortunately, both districts have suffered from a persistent shortage of judicial personnel. Over the past seven years, the Delaware federal court has averaged six vacant judgeship months per year.[92] In short, "the Court has been without one of its four authorized judges for fifty percent of the time."[93] The Southern District of Texas has suffered an average of 15.2 vacant judgeship months per year for the past five years.[94] In other words, the court has been effectively short 1.27 judges per year.

Given the chronic understaffing in both districts, the increased delay in civil litigation is hardly surprising. In 1985, cases over three years old comprised only about 6% of the civil docket in both districts.[95] By 1990, 8.6% of the District of Delaware's civil docket was more than three years old.[96] The problem is even worse in the Southern District of Texas where 13.2% of the civil

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89. *Id.* at 10, 11 REV. LITIG. at 217.

90. The first 19 are listed in HOFFECKER, *supra* note 61, at x. "On December 16, 1991, the Honorable Sue L. Robinson was sworn in as the twentieth United States District Judge for the District of Delaware." *Former Magistrate Becomes District Judge*, IN RE, Jan. 1992, at 12, 12. "Roderick R. McKelvie was sworn in as a judge of the United States District Court for the District of Delaware on March 30, 1992." Announcement from the law firm of Ashby, McKelvie & Geddes (Mar. 30, 1992).

91. The District of Delaware is a four-judge court. 28 U.S.C. § 133 (1988). Delaware has been authorized to have four judges only since 1985. HOFFECKER, *supra* note 61, at 204. In fact, the District of Delaware was a one-judge court until 1946 when Congress authorized a second judge. *Id.* at 139. The third judge was authorized in 1954. *Id.* at 148. The current active judges are Chief Judge Joseph J. Longobardi and Judges Joseph J. Farnan, Jr., Sue L. Robinson, and Roderick R. McKelvie.

92. *See* DELAWARE REPORT, *supra* note 51, at 36.

93. *Id.*

94. *See* TEXAS REPORT, *supra* note 44, at 13, 11 REV. LITIG. at 221.

95. In the Southern District of Texas, "9,483 civil actions [were] pending, of which only 5.5% had been pending over three years." *Id.* at 26, 11 REV. LITIG. at 235. In the District of Delaware, only 6.6% of pending civil cases were over three years old. DELAWARE REPORT, *supra* note 51, at 35.

96. DELAWARE REPORT, *supra* note 51, at 35. This figure is down from a high of 12.2% in 1988. *Id.*

cases have attained that age.[97] Naturally, when asked to determine the causes of cost and delay in civil litigation in their districts, both courts pointed to the failure of the political branches to fill judicial vacancies in a timely manner.[98]

Furthermore, both districts predictably concluded that delay resulted from such practices as discovery overuse and frequent requests for continuances.[99] Perhaps more significantly, however, delay in the two districts was a function of the types of cases filed in each. As noted above, Delaware has a high percentage of patent and prisoner civil-rights cases,[100] and these are especially time-consuming.[101] Not surprisingly, therefore, these cases constitute almost half of the Delaware cases that are over three years old.[102] Likewise, the Southern District of Texas has had a tremendous growth in the number of necessarily time-consuming criminal filings.[103] The report of the Texas advisory group is replete with allusions to the heavy backlog of criminal cases as one of the principal causes of delay on the civil side.[104]

In sum, both districts share a number of causes of delay and cost. It is clear, however, that given the differences between the two courts, they will need different measures to solve the problems that exist. Hence it is understandable why Congress chose to let each district develop its own solutions to the problems of cost and

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97. TEXAS REPORT, *supra* note 44, at 26, 11 REV. LITIG. at 235.

98. DELAWARE REPORT, *supra* note 51, at 47; TEXAS REPORT, *supra* note 44, at 40, 47, 11 REV. LITIG. at 250, 258.

99. DELAWARE REPORT, *supra* note 51, at 46, 47; TEXAS REPORT, *supra* note 44, at 43, 48, 11 REV. LITIG. at 254, 259.

100. *See supra* notes 64, 67-68 and accompanying text.

101. The median case age for all civil cases is 329 days. Prisoner cases require, by far, the longest processing time with a median of 463 days. Excluding Prisoner cases, the median case age for all other cases is 275 days. Contract/Tort cases and PEAT [Patent/Environmental/Antitrust] cases have relatively equal case processing times of 314 days and 304 days, respectively.

DELAWARE REPORT, *supra* note 51, at 21.

102. "[A]s of June 30, 1990, Prisoner petitions constituted 24 percent of the cases pending that were older than three years. Patent cases accounted for 21 percent of the cases older than three years." *Id.* at 21 n.50.

103. TEXAS REPORT, *supra* note 44, at 11, 11 REV. LITIG. at 219.

104. *Id.* at 35, 37, 38, 39, 47, 11 REV. LITIG. at 244, 246, 248, 249, 257.

delay. In fact, one might even conclude that Congress's guidelines actually require too much uniformity to be effective. For example, as will be discussed later,[105] the District of Delaware does not need to implement all of the procedures required by Congress. Moreover, as one Texas judge stated, "[I]n view of regional differences, it was important that the [U.S. District Court for the Southern District of Texas] not impose 'a Laredo solution to a Houston problem, or a Houston solution to a Laredo problem.'"[106]

IV. Their Plans

As anticipated, the plans adopted by the two districts are completely different. While the giant Southern District of Texas adopted what may be considered a detailed, maximalist approach, the much smaller District of Delaware took a minimalist approach.

A. The District of Delaware

Members of the Delaware advisory group described the "overwhelming" view of the group as, "if it's not broken, don't fix it."[107] After studying the condition of the district court's docket, the group concluded that there was no excessive delay in Delaware compared to other districts.[108] In fact, the Delaware median processing time for civil cases, 329 days,[109] is well within the congressionally mandated eighteen months.[110] The group did find, however, that there were some costs and delays that could be considered "excessive" because they could be "reduced without

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105. *See infra* Part IV(A)(2) of this Article and notes 107, 172-76 and accompanying text.

106. TEXAS REPORT, *supra* note 44, at 39, 11 REV. LITIG. at 249 (quoting an unnamed judge).

107. Mary Pat Trostle & Victor F. Battaglia, Joint Remarks at the National Business Institute's "Civil Trial Procedures in Delaware" Seminar (Feb. 11, 1992). Ms. Trostle was the Vice Chair of the advisory group. She has recently been nominated to fill the position of magistrate judge for the District of Delaware, left open when Sue L. Robinson was confirmed as an Article III judge in December. *See supra* note 90.

108. DELAWARE REPORT, *supra* note 51, at 38.

109. *Id.* at 21.

110. *See* Civil Justice Reform Act of 1990 § 103(a), 104 Stat. at 5091 (to be codified at 28 U.S.C. § 473(a)(2)(B)).

affecting adversely the fair administration of justice."[111] The group therefore addressed those problems in its proposed plan. But since the group found very little that was "broken,"[112] it made relatively few recommendations for change. In turn, the plan adopted by the judges of the district court made even fewer changes. A discussion of the most important changes adopted in the Delaware Plan follows.[113]

1. Prisoner Civil-Rights Cases.—Because prisoner civil-rights cases make up about one-third of the district's docket[114] and "require, by far, the longest processing time" of all civil cases,[115] the Delaware advisory group studied these cases closely. The group found that both the volume and the current method of processing these cases leads to excessive cost and delay.[116] Substantially all prisoner civil-rights cases are referred to the magistrate judge[117] but, as the group noted, "[i]n light of the magistrate judge's other responsibilities, the volume of these cases makes the standard processing procedure overwhelming for the one magistrate judge authorized for the District of Delaware."[118] In addition, defen-

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111. DELAWARE REPORT, *supra* note 51, at 38.

112. Given the relatively good state of the docket, one wonders why the District of Delaware was selected to be a pilot district. It is commonly believed that Delaware is a pilot district because it is the home of Senator Joseph Biden, who conceived the Act. Trostle & Battaglia, *supra* note 107; *see also supra* text accompanying note 28.

113. The changes not discussed in the text are as follows: the court will amend Local Rule 3.1.C to require that briefs in support of motions be filed with the motion, U.S. Dist. Court for the Dist. of Del., Civil Administrative Order, *in re*: Adoption of a Cost and Delay Reduction Plan, at 7 (Dec. 23, 1991) (on file with the clerk of the court) [hereinafter Delaware Plan]; the court will change its internal operating procedures to train the courtroom clerks to send out routine notices, *id.* at 8; and the court will initiate efforts to develop model jury instructions, *id.* at 9, study the feasibility of an electronic courtroom, *id.*, conduct continuing legal education programs about the court's procedures, *id.* at 10, and seek authorization for a third law clerk for the chief judge, *id.*, and an additional "floater" secretary, *id.*

114. *See supra* note 68 and accompanying text.

115. DELAWARE REPORT, *supra* note 51, at 21; *see also supra* note 101.

116. DELAWARE REPORT, *supra* note 51, at 40-42.

117. The authorized functions of a U.S. magistrate judge are detailed at 28 U.S.C. § 636 (1988).

118. DELAWARE REPORT, *supra* note 51, at 40. Currently, the problem is particularly acute since the position of magistrate judge has been vacant since December 1991. *See supra* notes 90, 107.

dants typically make motions to dismiss or for summary judgment, but "[t]he magistrate judge does not frequently grant such motions, and the effect is to delay a disposition on the merits,"[119] since the denial is not reviewed by an Article III judge until after discovery or, in some cases, after an evidentiary hearing.[120] Finally, because most of these cases are brought *pro se*, the pleadings are often unclear and the factual record developed through discovery by the prisoners is frequently not understandable.[121] Thus, the magistrate judge requires more time than usual simply to develop a clear factual record.

To solve these problems, the court adopted several changes in the current processing of prisoner civil-rights cases that the group recommended.[122] To help with the sheer volume of the work, the court agreed that the Article III judges should accept more responsibility for such cases.[123] The court will also "[s]eek authorization for an additional law clerk to assist the Magistrate-Judge with respect to *pro se* prisoner section 1983 petitions."[124] To expedite the

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119. DELAWARE REPORT, *supra* note 51, at 41. The report is referring to motions made pursuant to FED. R. CIV. P. 12(b)(6). The magistrate judge would merely be recommending a denial of other dispositive motions, such as a motion for summary judgment. *See* 28 U.S.C. § 636(b)(1)(A) (1988). Whether the magistrate judge denies a Rule 12(b)(6) motion or recommends the denial of a summary judgment motion, the effect is the same: he or she retains the case for further proceedings prior to review by an Article III judge.

120. Moreover, because the evidentiary findings of a magistrate judge are reviewed *de novo*, "the reviewing judges may duplicate substantial portions of the magistrate judge's activity." DELAWARE REPORT, *supra* note 51, at 41.

121. *Id.* at 41, 42.

122. *Id.* at 57-58.

123. > The Judges of the Court should retain responsibility for all habeas corpus petitions and social security cases currently referred to the Magistrate-Judge. If the Court cannot implement this recommendation, then the Court should not continue to refer all prisoner section 1983 cases and habeas corpus petitions to the Magistrate-Judge. Rather, the Court should divide some of the prisoner section 1983 cases and habeas corpus petitions among the Article III Judges and the Magistrate-Judge.

Delaware Plan, *supra* note 113, at 8.

124. *Id.* at 11. The clerk is to assist "in identifying the specific issues addressed by the complaint, summarizing the evidence applicable to these issues and providing such other assistance as the Court may request in processing any action." *Id.*

disposition of prisoner civil-rights cases, the court will adopt a master scheduling order that will require the defendants to develop a clear factual record and present their motions early in prisoner section 1983 cases.[125] Moreover, the management of a case will be returned to the assigned judge if the magistrate judge recommends denial of a dispositive motion.[126] To aid in the development of a clear record, "[t]he Court should consider establishing a panel of lawyers to serve as appointed counsel to *in forma pauperis* petitions in both prisoner section 1983 and habeas corpus proceedings."[127]

2. *Scheduling Procedure.*—Studies show that one of the most effective methods for managing cases is to set firm deadlines.[128] To that end, the Delaware judges currently issue scheduling orders after conferring with parties pursuant to Rule 16 of the Federal Rules of Civil Procedure. However, "[t]he judges of the Court do not employ uniform scheduling procedures or a uniform scheduling order."[129] Despite a finding that "the procedures and orders utilized [by the Delaware judges] seem to be effective in moving cases toward prompt completions,"[130] the advisory group included

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125. Part 2 of the plan provides as follows:

> The Court shall adopt, with due consideration of the need for drafting, public notice and formal approval, a master scheduling order for the processing of prisoner section 1983 cases and habeas corpus petitions which would (a) require defendants to file a responsive pleading, if necessary, within forty-five (45) days of service of the complaint; (b) require defendants to accompany their response to the complaint with a production of all relevant documents and an affidavit establishing that defendant has conducted a thorough search for relevant documents and that the documents produced are the only documents in defendant's custody pertinent to the action; (c) require that briefs in support of any motion accompany the filing of the motion; (d) require affidavits of fact, if appropriate, to be submitted with motions; and (e) require notice to parties that if reference is made to any matter outside the pleadings the dispositive motion may be considered one for summary judgment.

Id. at 7.

126. *Id.*

127. *Id.* at 11.

128. *See, e.g.*, S. REP. NO. 416, supra note 16, at 19-20, 1990 U.S.C.C.A.N. at 6822-23; BROOKINGS REPORT, *supra* note 1, at 18; DELAWARE REPORT, *supra* note 51, at 42-43.

129. DELAWARE REPORT, *supra* note 51, at 42.

130. *Id.*

Recommendation 5 in its report, which suggests that "the Court adopt *uniform* scheduling procedures and orders for use at conferences held pursuant to Federal Rule of Civil Procedure 16(b)."[131] Similarly, section 3(a) of the group's proposed plan provides for *uniform* scheduling orders.[132] In recommending uniform procedures, the group noted that 70% of Delaware lawyers surveyed "thought that the Court should adopt a uniform scheduling order 'with variations between standard, complex and expedited cases'."[133]

The court accepted the finding that "establishing a firm pretrial schedule and trial date is an effective method of reducing excessive cost and delay."[134] The district court, therefore, will promulgate a new local rule incorporating Rule 16 scheduling procedure and providing for a scheduling order. The new rule will identify the matters to be discussed at the pretrial conference, such as briefing practices and settlement prospects.[135] The new scheduling order will provide a standardized time frame for litigation, including such matters as a discovery cutoff date and the trial date.[136] The judge,

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131. *Id.* at 51 (emphasis added). The court could make exceptions if circumstances warranted. *Id.* at 52.

132. *Id.* at 65. These orders could be modified by the assigned judge. *Id.*

133. *Id.* at 42.

134. *Id.* at 42-43; *cf.* Delaware Plan, *supra* note 113, at 6 (implementing the advisory group's recommendation).

135. The Rule shall also identify the matters that would be discussed at the conference including: (i) the possibility of settlement; (ii) whether the matter could be resolved by voluntary mediation or binding arbitration; (iii) the briefing practices to be employed in the case, including what matters are or are not to be briefed and the length of briefs; and (iv) the date by which the case is to be tried.

Delaware Plan, *supra* note 113, at 6.

136. This Rule shall also provide for a scheduling order which will include the following standard items among its provisions: (1) a date for termination of discovery; (2) dates for filing various motions, such as motions to join other parties, motions to amend pleadings, case dispositive motions; (3) a date for a pretrial conference, if appropriate; and (4) a date for trial if appropriate.

Id. at 5.

of course, may make exceptions to the set time limits when the circumstances warrant.[137]

What is interesting, however, is to what the court did *not* agree. Although the judges adopted the bulk of the group's recommendations concerning the scheduling conference and order, they did not adopt Recommendation 5.[138] Moreover, while the court's plan tracks the proposed plan fairly closely, it conspicuously fails to adopt section 3(a) of the proposed plan.[139] In other words, the court did not accept the recommendation that there be a *uniform* scheduling procedure and order. One is left to wonder, what will be the practice under the new rule? Have the judges agreed that the new "rule" will be merely hortatory? The issue is not one of grave concern, given the group's finding that the court's current procedures are effective. The better question might be, why should the court be compelled to "fix" something that is not "broken"?

3. Case Tracking.—The Act requires that the pilot districts include in their plans

> systematic, differential treatment of civil cases that tailors the level of individualized and case specific management to such criteria as case complexity, the amount of time reasonably needed

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137. *Id.* One committee member, however, suggested that to get a continuance, an attorney would have to get a "dispensation from the Pope." Trostle & Battaglia, *supra* note 107 (remark of Victor F. Battaglia). The court plans to promulgate another local rule that will

> (i) require the applicant [for an extension of time] to identify each prior request for an extension of a deadline in the particular case; (ii) require the applicant to explain the reasons for the request; (iii) require any other information or certification requested by the presiding judge; and (iv) require that the request be signed by counsel and supported by a client's affidavit or that the request be accompanied by a certification that counsel has sent a copy of the request to the client.

Delaware Plan, *supra* note 113, at 6; *cf.* Civil Justice Reform Act of 1990 § 103(a), 104 Stat. at 5093 (to be codified at 28 U.S.C. § 473(b)(3)) (suggesting requirement of client's signature on requests for extension of time); DELAWARE REPORT, *supra* note 51, at 63 (noting that this requirement was the only § 473(b) technique adopted).

138. "This Rule . . . adopts Recommendations 11 [briefing practices], 12 [certification of settlement discussion] and 14 [early trial dates] . . . ." Delaware Plan, *supra* note 113, at 6.

139. "This Rule . . . adopts Section IV.A.3.(b) and (c) of the Proposed Plan." *Id.*

> to prepare the case for trial, and the judicial and other resources required and available for the preparation and disposition of the case.[140]

The Delaware court, therefore, plans to "provide guidelines for determining whether a given case is complex,"[141] taking into consideration such factors as the number of parties, the technical complexity of the factual issues, and the volume of discovery.[142] Under the new system, a party who wishes that its case be treated as "complex" will have to file a "notice of intent" with the initial pleading, along with the basis for the request. All other parties will then have fifteen days to respond.[143] The judge will make the determination as to complexity at the Rule 16 scheduling conference.[144]

The District of Delaware will also draft a rule providing "guidelines for the use of case management techniques in cases

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140. Civil Justice Reform Act of 1990 § 103(a), 104 Stat. at 5091 (to be codified at 28 U.S.C. § 473(a)(1)). The Act requires all districts to consider differential case management. *Id.* However, this principle of litigation management must be implemented in the pilot districts. *Id.* § 105(b)(1), 104 Stat. at 5097. With this requirement, Congress has officially turned its back on the principle of transubstantive rules embodied in the Federal Rules of Civil Procedure. *See* BROOKINGS REPORT, *supra* note 1, at 14 (stating that the "time has come for all federal district courts to channel litigation").

141. Delaware Plan, *supra* note 113, at 3.

142. > In making its determination of complexity, the Court may consider the following: (i) the type of action; (ii) the number of parties and their capacities; (iii) the factual and legal issues raised by the pleadings; (iv) the technical complexity of the factual issues; (v) the retroactivity of the circumstances giving rise to the claims and defenses; (vi) the volume and nature of documents subject to discovery; (vii) the amount of third-party and foreign discovery necessary; (viii) the number of deposition witnesses and their locations; (ix) the need for expert testimony; and (x) the nature of the issues to be determined pretrial.

Id. at 4.

143. *Id.* This deadline may be particularly difficult for a defendant to meet. Although a defendant has 20 days to frame an answer to the complaint according to FED. R. CIV. P. 12(a), he or she must determine the nature of the case and respond to plaintiff's request for "complex" status within 15 days.

144. Delaware Plan, *supra* note 113, at 4; *cf.* BROOKINGS REPORT, *supra* note 1, at 15 (recommending the timing and procedure for case tracking).

determined to be complex."[145] The court's list of suggested techniques, however, is merely a compilation of currently available case management devices: (1) the court may set time limits on the pleading stage of a complex case;[146] (2) the court may regulate discovery by limiting it[147] and making use of the magistrate judge to "monitor discovery and resolve disputes";[148] (3) the parties will be required to file status reports and the court may schedule periodic conferences to oversee the progress of the case;[149] and (4) the court may control the course of the trial by ordering separate trials if appropriate[150] or limiting the evidence to be admitted.[151]

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145. Delaware Plan, *supra* note 113, at 4.

146. "Under this Rule the Court may: . . . (ii) set an early date for joinder of parties and amendments to the pleadings; . . . ." *Id.*; *cf.* FED. R. CIV. P. 14(a) (requiring the defendant to obtain leave of court to file third-party complaint later than 10 days after serving answer); FED. R. CIV. P. 15(a) (requiring the party to obtain leave to amend pleading after responsive pleading is served or, if no responsive pleading is served, after 20 days of service of pleading to be amended); FED. R. CIV. P. 24 (requiring that a motion to intervene be made in timely manner).

147. The court may "(iv) limit discovery (*e.g.*, the number of depositions or the sequence of discovery) without court order; and (v) set the schedule of expert discovery; . . . ." Delaware Plan, *supra* note 113, at 4-5; *cf.* FED. R. CIV. P. 26(b)(1), (c), (d), (f) (allowing the court to limit frequency, extent, and sequence of discovery); FED. R. CIV. P. 26(b)(4) (describing limits on expert discovery).

148. Delaware Plan, *supra* note 113, at 4; *cf.* 28 U.S.C. § 636(b) (1988) (designating powers of magistrates over pretrial matters).

149. This Rule shall also provide the following procedures: (i) the parties shall file reports concerning the status of discovery and any motions or other procedural matters which are pending or anticipated as required by the presiding judge; and (ii) conferences shall be scheduled, as appropriate, by the presiding judge to discuss the issues in contention, monitor the progress of discovery, determine or schedule pending matters, and explore settlement.

Delaware Plan, *supra* note 113, at 5; *cf.* FED. R. CIV. P. 16 (granting trial judge broad discretion in holding pretrial conferences and issuing pretrial orders).

150. Delaware Plan, *supra* note 113, at 4; *cf.* FED. R. CIV. P. 20(b), 42(b) (granting trial judge authority to hold separate trials).

151. The rule will provide that the judge may "(vi) limit or restrict the use of expert testimony; (vii) limit the length of time for presentation of evidence or the number of witnesses or documents that may be presented at trial; and (viii) use a state-of-the-art courtroom." Delaware Plan, *supra* note 113, at 5; *cf.* Chapman v. Pacific Tel. & Tel. Co., 613 F.2d 193, 197 (9th Cir. 1979) (lauding trial court's creative efforts to save trial time by limiting the type of admissible evidence).

4. Discovery Changes.—Congress determined that discovery abuse is a significant cause of delay and expense in civil litigation.[152] Therefore, the Act requires that pilot districts encourage "cost-effective discovery through voluntary exchange of information among litigants and their attorneys and through the use of cooperative discovery devices."[153] The Delaware advisory group agreed that "requiring the early disclosure of basic information routinely sought can reduce excessive cost and delay in some cases."[154] The group, therefore, recommended that in personal-injury cases, the court should require parties to include certain information with the initial pleading.[155] The court adopted the recommendation, expanding it to include not only personal-injury, but also medical-malpractice and employment-discrimination cases, as well as civil actions under the Racketeer Influenced and Corrupt Organizations Act.[156] Under the new rule, parties will have to identify, for example, all people with knowledge of the facts of the case and provide a general description of the relevant documents under the parties' control.[157] While this new rule may seem to be

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152. S. REP. NO. 416, *supra* note 16, at 20-22, 1990 U.S.C.C.A.N. at 6823-25.

153. Civil Justice Reform Act of 1990 § 103(a), 104 Stat. at 5092 (to be codified at 28 U.S.C. § 473(a)(4)); *id.* § 105(b), 104 Stat. at 5097.

154. DELAWARE REPORT, *supra* note 51, at 44.

155. *Id.* at 50-51.

156. 18 U.S.C. §§ 1961-1968 (1988).

157. Under this Rule, a party must include the following information with its initial pleading: (i) the names, addresses and telephone numbers of each person with knowledge of facts relating to the litigation; (ii) the names, addresses and telephone numbers of all persons interviewed in connection with the litigation; (iii) the names, addresses and telephone numbers of each person who conducted any interview; (iv) a general description of documents in the possession, custody or control of the party which are reasonably likely to bear significantly on the claims or defenses asserted; (v) an identification of all expert witnesses presently retained by the party or whom the party expects to retain, together with the dates of any written opinions proposed by the experts; and (vi) a brief description of any insurance coverage applicable to the litigation. This Rule would require disclosure of such information without a formal discovery request from an opposing party.

Delaware Plan, *supra* note 113, at 3.

a drastic change in federal discovery procedure, it merely anticipates the changes recently proposed by the Advisory Committee on the Civil Rules.[158]

B. *Compared with the Southern District of Texas*

Since this issue of *The Review of Litigation* includes the full text of the cost and delay reduction plan for the Southern District of Texas,[159] as well as extensive commentary on that plan,[160] this Article will not duplicate what has been done elsewhere in this issue. Rather, this Article will compare the Texas Plan with the Delaware Plan, thereby demonstrating the different approaches to civil justice reform taken by the two districts, but also revealing some striking similarities.

1. The Differences.—The Delaware and Texas Plans vary greatly in their approach to cost and delay reduction. A comparison of just one Delaware provision with the corresponding Texas provision highlights the difference between the plans.[161] The Act requires the pilot districts to include in their plans "authorization to refer appropriate cases to alternative dispute resolution programs that (A) have been designated for use in a district court; or (B) the court may make available, including mediation, minitrial, and summary jury trial."[162] The Southern District of Texas and the District of

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158. *See* FED. R. CIV. P. 26(a) advisory committee's note to proposed amendments (Aug. 1991) (requiring disclosure of similar items in all civil cases unless exempted by local rule); *see also supra* note 12 and accompanying text.

159. U.S. Dist. Court for the S. Dist. of Tex., General Order No. 91-24, *re*: Adoption of Civil Justice Reform Act Cost and Delay Reduction Plan (Oct. 24, 1991), *reprinted in* 11 REV. LITIG. 315 (1992) [hereinafter Texas Plan].

160. *See* Linda S. Mullenix, *Civil Justice Reform Comes to the Southern District of Texas: Creating and Implementing a Cost and Delay Reduction Plan Under the Civil Justice Reform Act of 1990*, 11 REV. LITIG. 165 (1992).

161. There are numerous differences between the Delaware and Texas Plans. Another example that highlights their differing approaches is their respective treatment of case tracking. Delaware will henceforward distinguish between cases that are complex and not complex. *See supra* Part IV(A)(3) of this Article. The Southern District of Texas, in contrast, has adopted a very detailed case-tracking plan incorporating current differential case management practices for such cases as asbestos and student loan cases and expanding differential treatment to include numerous other types of cases. *See* Texas Plan, *supra* note 159, at 1-2.

162. Civil Justice Reform Act of 1990 § 103(a), 104 Stat. at 5092 (to be codified

Delaware provisions for alternative dispute resolution (ADR) have little in common.

The Southern District of Texas adopted an extensive rule governing ADR procedures. To implement the new procedures, the district asks Congress for additional resources to hire two ADR clerks.[163] The rule requires that attorneys discuss the possibility of ADR even before the first pretrial conference.[164] In addition, the court is given the authority to refer a case to ADR on its own motion.[165] To aid this process, "[t]he court shall have a standing panel on ADR providers. . . . The panel will review applications from providers and annually prepare a list of those qualified under the criteria contained in this rule."[166] The rule also contains detailed provisions regarding such things as fees, attendance, and confidentiality.[167] Finally, for any violation of the new ADR rule,[168] the court gives teeth to the rule by incorporating the sanctions of Rule 16(f) of the Federal Rules of Civil Procedure.[169]

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at 28 U.S.C. § 473(a)(6)). While ADR provisions are not required generally, *id.*, 104 Stat. at 5091, this principle of litigation management must be implemented in the pilot districts, *id.* § 105(b)(1), 104 Stat. at 5097.

163. Texas Plan, *supra* note 159, at 11, 11 REV LITIG. at 326.

164. *Id.* at 6, 11 REV. LITIG. at 320.

165. *Id.*, 11 REV. LITIG. at 321.

166. *Id.* at 7, 11 REV. LITIG. at 321.

167. *Id.* at 8-9, 11 REV. LITIG. at 323-24.

168. *Id.* at 9, 11 REV. LITIG. at 325.

169. FED. R. CIV. P. 16(f) provides that

> the judge, upon motion or the judge's own initiative, may make such orders with regard [to a violation] as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

The orders provided in Rule 37(b)(2) are the following:

> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against

The Delaware Plan's provisions regarding ADR furnish a sharp contrast to the Texas rule. First, the Delaware court intends to adopt a rule that will "require counsel to certify to the Court that they have conferred prior to the Rule 16 conference to discuss settlement."[170] Second, this new rule will identify as a topic for discussion at the conference "whether the matter could be resolved by voluntary mediation or binding arbitration."[171] That is the total Delaware scheme for ADR.

Currently, ADR is relatively unused in the District of Delaware.[172] A survey of Delaware litigators indicated that attorneys suggest participation in ADR to their federal clients 58% of the time, but those clients participate in ADR only 18% of the time.[173] The survey also indicated that judges in the District of Delaware refer cases to ADR only 1% of the time.[174] When asked if the court should expand the use of ADR, only 15% of the attorneys surveyed answered yes.[175] The sentiments of the federal bench and bar in Delaware were articulated by the Delaware advisory group, which opined that although

> ADR may reduce excessive cost and delay in certain instances, it also may add another layer of proceedings to a particular case

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> the disobedient party;
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> (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination . . . .

170. Delaware Plan, *supra* note 113, at 6. The Delaware advisory group explained as follows:

> Section 473(a)(6) of the Act requires a Pilot District's plan to include authorization to refer appropriate cases to alternative dispute resolution programs that have been designated for use in the Court or that the Court may make available. (Recommendation 12), which requires parties to conduct settlement discussions, provides a program of alternative dispute resolution.

DELAWARE REPORT, *supra* note 51, at 62-63. The Delaware court expressly adopted Recommendation 12. Delaware Plan, *supra* note 113, at 6.

171. Delaware Plan, *supra* note 113, at 6.

172. That is not true of Delaware state courts. The Delaware Superior Court Civil Rules contain detailed provisions for ADR. *See* DEL. SUPER. CT. CIV. R. 16.1, 16.2.

173. DELAWARE REPORT, *supra* note 51, app. E at E-17, fig. 5.

174. *Id.*, app. E at E-12, fig. 1.

175. *Id.*, app. E at E-13, fig. 2.

> and thereby increase costs and processing times. Accordingly, given the Court's current record of prompt dispositions, it should be careful not to compromise existing procedures which effectively control excessive cost and delay.[176]

Thus, one should not look for a significant increase in the use of ADR in the District of Delaware.

The divergent approaches of the two districts demonstrate an appropriate response to the somewhat frenzied commands of Congress. The Act, after all, envisioned local solutions to the problems of cost and delay.[177] Each district studied the conditions in its respective court, solicited the comments of those who use each court, and devised an approach that was tailored to the needs of the district.[178] The Southern District of Texas concluded that the ADR principle required by Congress would be helpful in solving its problems and therefore adopted a substantial ADR plan. Delaware, in contrast, concluded that this principle of case management would not address the relatively few problems in the district and therefore rejected any comprehensive ADR program.

Unfortunately, not all districts were as bold as Delaware in resisting congressional suggestions. For example, the District of Utah opined that "the most efficient method to arrive at resolution is the method found in traditional court processes . . . [and] that a supermarket of services available at the courthouse has a tendency to weaken rather than strengthen the litigation process."[179]

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176. *Id.* at 45.

177. "The district courts are given the discretion to mold the principles and guidelines to their local conditions." S. REP. NO. 416, *supra* note 16, at 30, 1990 U.S.C.C.A.N. at 6833.

178. The efforts of the Delaware advisory group are detailed *supra* notes 173-76 and accompanying text. For the efforts of the Texas advisory group, see TEXAS REPORT, *supra* note 44, at 70-71, 74-76, 11 REV. LITIG. at 284-85, 288-90. The other pilot districts also devised unique ADR programs. For example, the Northern District of Georgia simply adopted nonbinding, mandatory court-annexed arbitration or, with the consent of the parties, mediation. U.S. Dist. Court for the N. Dist. of Ga., Order, at 16-17 (Dec. 17, 1991). The Southern District of California, meanwhile, has authorized nonbinding mini-trials or summary jury trials in cases worth under $250,000. The court will also experiment with nonbinding "arbitration/mediation" in certain cases worth under $100,000 and trademark and copyright cases. U.S. Dist. Court for the S. Dist. of Cal., Resolution, at 2-3 (Oct. 7, 1991).

179. U.S. Dist. Court for the Dist. of Utah, Order, In the Matter of: The Civil

Nonetheless, the court reluctantly agreed to "experiment with court-supervised mediation, arbitration, minitrials or summary jury trials."[180] Meanwhile, the advisory group for the District of Montana[181] enthusiastically accepted congressional suggestions for case management.[182] Montana, however, is a district with very few problems of expense and delay. As one commentator on the Montana report observed, "the recommendations for Montana, if implemented as proposed, could well have the ironic effect of increasing expense and delay."[183] These examples raise the question of whether the Act's measures will solve the problems in the court system. The answer to this question is one matter on which the Texas and Delaware courts agree.

2. The Similarities.—Despite the differences in the reform strategies of the District of Delaware and the Southern District of Texas,[184] there is one tactic that is common to both: both courts request that Congress accept its share of responsibility for the expense and delay in federal civil litigation. The advisory groups for both districts found that the legislative branch actually bears more of the blame for the current state of federal civil litigation than the judicial branch. The Texas advisory group declared that "the court has performed exceptionally,"[185] citing "the herculean efforts of the active judges to dispose of cases as manifested in their exemplary case terminations per judge."[186] Similarly, the Delaware advisory group found that "the Court has managed its dockets effectively."[187] These excellent performances were

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Justice Expense and Delay Plan, at 9 (Dec. 30, 1991).

180. *Id.* at 10.

181. The District of Montana is an "early implementation district." *See supra* note 41.

182. "The [Montana advisory group's] report is replete with innovative and exciting techniques for reducing expense and delay." Carl Tobias, *A Discouraging Word on Civil Justice Reform*, N.J. L.J., Dec. 5, 1991, Op-Ed, at 15.

183. *Id.*

184. For differences other than the approach to ADR, see *supra* note 161.

185. TEXAS REPORT, *supra* note 44, at 30, 11 REV. LITIG. at 239.

186. *Id.* at 31, 11 REV. LITIG. at 240 (quoting Report of the Clerk on the Status of the Docket for the U.S. District Court, Southern District of Texas, *id.*, app. C at 5).

187. DELAWARE REPORT, *supra* note 51, at 13.

rendered despite the woeful understaffing of the district courts.[188] Instead, the groups found that "the lag between judicial vacancies and judicial confirmations has contributed more than its share to cost and delay in the district[s]."[189]

Accordingly, the two districts—in the words of the Southern District of Texas—ask Congress to "honor its commitment [to just, speedy, and less expensive resolution of civil litigation] by providing the resources necessary to achieve its stated goals."[190] These resources include not only personnel, but also money and a reasonable caseload. The Southern District of Texas "implor[es]"[191] Congress to provide the money necessary to implement the plan. The judges note that they have long been aware of the solutions to the problems of expense and delay, but because Congress has not provided them with enough resources, they have been unable to solve the problems.[192] The District of Delaware also asks for the resources necessary to implement its plan.[193] Moreover, the court urges Congress to remember this obligation with each new piece of legislation and "provide additional resources to those courts [whose caseloads will be increased by such legislation] to accommodate that increase."[194]

This last request was actually a result of congressional prompting. In the face of judicial vacancies, tighter budgets, and growing backlogs, Congress has continually enacted new legislation requiring the use of Article III courts.[195] Aware of this problem,

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188. *See supra* notes 88-94 and accompanying text.

189. Texas Plan, *supra* note 159, at 11, 11 REV. LITIG. at 327. The very first recommendation of the Delaware advisory group was that "the Court employ appropriate means to encourage Congress and the Executive Branch to fill vacant judgeships in the Court." DELAWARE REPORT, *supra* note 51, at 49.

190. Texas Plan, *supra* note 159, at 12, 11 REV. LITIG. at 328.

191. *Id.*

192. *Id.* at 11-12, 11 REV. LITIG. at 327-28.

193. *See* Delaware Plan, *supra* note 113, at 10-11; *see also supra* note 124 and accompanying text.

194. Delaware Plan, *supra* note 113, at 9.

195. "[T]he Federal Courts Study Committee counted 195 statutes enacted by the Congress in the course of the past four decades that have affected the workload of the federal courts." ADVISORY GROUP OF THE U.S. DIST. COURT FOR THE E. DIST. OF PA. APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, REPORT 31, *reprinted in* 138 F.R.D. 167, 213 (1991) [hereinafter PENNSYLVANIA REPORT].

Congress invited the courts to "examine the extent to which costs and delays could be reduced by a better assessment of the impact of new legislation on the courts."[196] The District of Delaware concluded that Congress should "evaluate the impact upon the Judicial Branch of new or amended legislation."[197] The Southern District of Texas heartily agreed: "In gazing out over the ocean of federal legislation and being asked to assess the impact of new federal legislation on the civil docket, the Advisory Group was reminded of the fisherman's prayer: 'Oh Lord, thy sea is so vast and my boat is so small.'"[198] The Texas advisory group recommended that in assessing the impact of new legislation, Congress should have the advice of the judiciary.[199]

These sentiments are not unique to the District of Delaware and the Southern District of Texas. All of the pilot districts expressed, in one way or another, the belief that Congress must accept some blame for civil justice delay and expense. Perhaps the Western District of Tennessee was the most adamant, including the executive branch in its criticism. The Tennessee advisory group found that it has a "very able bench" whose jurisprudence is characterized by "care, deliberation, professionalism, and high quality";[200] docket problems exist despite, not because of, this bench. Hence, the advisory group concluded, the changes in district procedure made as a result of the Act

> are "mere tinkering" that will relieve some of the pressure temporarily. After carefully examining the inadequate resources being devoted to the district in terms of judges and courtroom facilities, and more importantly, after appreciating fully the current trend of the Executive and Legislative branches to initiate

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196. Civil Justice Reform Act of 1990 § 103(a), 104 Stat. at 5091 (to be codified at 28 U.S.C. § 472(c)(1)(D)).

197. Delaware Plan, *supra* note 113, at 9. In addition, the district court "[e]ncourage[s] the Congress to specify with respect to regulatory legislation it enacts whether it is or is not intended to afford a private remedy." *Id.*; *cf.* FEDERAL COURTS STUDY COMM., REPORT 91 (Apr. 2, 1990) (recommending checklist for legislative staff).

198. TEXAS REPORT, *supra* note 44, at 31, 11 REV. LITIG. at 240.

199. *Id.* at 32, 11 REV. LITIG. at 240-41.

200. CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. COURT FOR THE W. DIST. OF TENN., REPORT 10 (Sept. 26, 1991) (unpublished report, on file with the clerk of the court).

> new criminal laws which must be enforced in the federal courts, we believe that we are swimming against a flood that cannot be stopped without a major re-evaluation of the overall problem by the President and Congress.[201]

The other districts concurred.[202]

V. Commentary

So, what is the prognosis for the federal civil justice system? One commentator has observed: "The civil justice reform bandwagon is steamrolling along and the three branches of government are vying to steer its course. . . . [Unfortunately], the converging efforts could result in an overprescription of remedies that will have little real impact."[203] All of this frenzied activity reminds one of the children's story of Chicken Little, who, when hit on the head with an acorn, ran to everyone claiming the sky was falling. Congress, of course, would reject that analogy; ostensibly the advice of a "broad spectrum" of the American bar, not an "acorn," led to the Act.[204] A closer look at that spectrum, however, reveals that it was not very broad. Fourteen of the seventeen practitioners—those who were not corporate counsel or

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201. *Id.* at 2-3.

202. Some of the districts were not shy about pointing the finger at the political branches. *See* ADVISORY COMM., U.S. DIST. COURT FOR THE S. DIST. OF CAL., REPORT 2, 4, 5 (Sept. 19, 1991) (unpublished report, on file with the clerk of the court) [hereinafter CALIFORNIA REPORT]; PENNSYLVANIA REPORT, *supra* note 195, at 31-35, 49-52, 138 F.R.D. at 213-17, 231-34; CIVIL JUSTICE REFORM ACT ADVISORY COMM., U.S. DIST. COURT FOR THE DIST. OF UTAH, REPORT 71-78 (Dec. 1991) (unpublished report, on file with the clerk of the court) [hereinafter UTAH REPORT]. The others merely stated, without recriminations, that additional legislation and judicial vacancies had an adverse impact on their dockets. ADVISORY GROUP APPOINTED UNDER THE CIVIL JUSTICE REFORM ACT OF 1990, U.S. DIST. COURT FOR THE N. DIST. OF GA., REPORT 39-43 (Sept. 30, 1991) (unpublished report, on file with the clerk of the court); CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. COURT FOR THE S. DIST. OF N.Y., REPORT AND RECOMMENDATIONS 20-21, 25-26 (Nov. 1, 1991) (unpublished report, on file with the clerk of the court); CIVIL JUSTICE REFORM ACT ADVISORY GROUP, U.S. DIST. COURT FOR THE E. DIST. OF WIS., REPORT AND PROPOSED PLAN 16-18, 19-20, 29 (Dec. 1991).

203. Randall Samborn, *The Battle Escalates on Reform*, NAT'L L.J., Mar. 2, 1992, at 1.

204. *See supra* notes 27-28 and accompanying text.

academics—on that task force were from Washington, D.C., New York City, Chicago, or Los Angeles. The remainder of the panel was mostly comprised of corporate counsel and members of the insurance industry.[205] It is no wonder Congress ended up believing that the sky was falling.

Congress's response was too extreme for some districts and too hasty for others. Contrary to the gloomy state Congress depicted, several of the pilot districts found there was very little delay in their courts.[206] Those who did find that there was a potential problem of increased delay in their courts called for more study of the problem. The Texas advisory group stated it best:

> The Group felt repeatedly hampered by lack of data, time, and resources, or in understanding the true nature and scope of alleged problems such as discovery abuse. While it was easy to speculate anecdotally about problems of civil justice delivery, there are, in fact, few methodologically sound empirical studies documenting either litigation problems or the sources of litigation problems. Wholesale procedural reform in the absence of concrete data about causes and effects is at best a very risky exercise.[207]

The first step to solving what ails our federal court system, therefore, must be a thorough study of that system. We must determine where the problems exist and what the causes are. Since the pilot districts found that both the size of the bench and the jurisdictional grants have contributed to delay, those issues must be examined as well as case management techniques. To do that, we must engage in national debate as to the role of the federal courts and the direction they should take. But who should conduct that study and debate? And, perhaps more importantly, who should draw the conclusions and draft the solutions?

It is generally accepted that a large measure of control over the business of the federal courts lies with the political branches, which

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205. *See* BROOKINGS REPORT, *supra* note 1, at 45-49. There were also five academics on the task force.

206. *See* DELAWARE REPORT, *supra* note 51, at 38; UTAH REPORT, *supra* note 202, at 75.

207. TEXAS REPORT, *supra* note 44, at 77, 11 REV. LITIG. at 291; *accord* CALIFORNIA REPORT, *supra* note 202, at 3; PENNSYLVANIA REPORT, *supra* note 195, at 53, 138 F.R.D. at 235.

determine who sits on the bench as well as what cases the judges hear.[208] Moreover, Congress asserted when it passed the Act that it "has undoubted power to enact rules for the courts."[209] Since Congress has the power to make changes in the size of the bench, the size of the docket, and the procedure used to manage the cases, Congress seems a logical choice to be the problem-solver. Hence, Congress attempted to fill that role through the Act. Congress's solution, however, limited the federal courts to relatively minor changes, a mere tinkering with the system.[210] The Act did not address the more important questions concerning the mission of the federal courts.

Given the history of congressional control of the federal courts, however, one should not be surprised at the recent failure to see the "big picture." By the very nature of the political process, most jurisdictional legislation is ad hoc and reactive, rather than thoughtful and comprehensive. First, "most of the legislation as to the Federal judicial system[] was the product of a violent attack upon the Courts . . . . It was not a carefully prepared and reasoned enactment, based on any comprehensive study of needs . . . ."[211] Second, Congress's job as a political body is to seek solutions to the ills of society. Congress often attempts to cure those ills by using the federal courts. For example, today's "war" on drugs has placed jurisdiction in the federal courts over many crimes that formerly had been routinely handled by the state courts. Such political grants of jurisdiction are not new, nor are the docket problems they cause. For example, in 1928, then-Professor Felix Frankfurter cautioned, "Almost every interest of the country is against Federal legislation in the abstract, but ready to invoke such legislation for its own protection. Every new Federal offence means a new burden upon the Federal Courts."[212] In particular, he noted, "Penal laws

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208. *See* U.S. CONST. art. I, § 8, cl. 9; *id.* art. II, § 2, ¶ 2; *id.* art. III, §§ 1, 2; *see also* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS 38 (4th ed. 1983).

209. S. REP. NO. 416, *supra* note 16, at 9, 1990 U.S.C.C.A.N. at 6811; *accord* Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941).

210. *Supra* notes 200-01 and accompanying text.

211. Burger, *Annual Report on the State of the Judiciary*, *supra* note 2, at 444.

212. Felix Frankfurter, *Distribution of Judicial Power Between the Courts of the United States and the Courts of the States*, 1928 N.J.B.A. 99, 115.

against drug addicts . . . are attempted short-cuts in the effort to prevent and punish crime."[213] Instead of trying to solve our political problems by dumping more cases into the laps of the federal courts, he urged, we should reexamine the role of those courts and in so doing make reasoned, careful choices about the cases they should hear as well as the size of the bench.[214] We are still waiting for such an examination.

Given 200 years of ad hoc procedural and jurisdictional legislation, perhaps it is reasonable to conclude that Congress is incapable of developing a consistent, thoughtful solution to the problems of the federal court system. Who then should be the one to control the debate on that issue? One might think of the judiciary themselves. After all, who better knows what will or will not work in court than the courts themselves?[215] As Roscoe Pound averred, "When rules of procedure are made by judges, they will grow out of experience, not out of the ax-grinding desires of particular lawmakers."[216] Why not use the delegation doctrine to ask the judiciary to develop its own solution to cost and delay? The obvious problem with such a solution is that while delegation of authority to the courts has been used by Congress almost since the beginning of the Nation,[217] power to determine jurisdiction has never been delegated, and perhaps could not be done so constitutionally.[218]

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213. *Id.* at 116.

214. *See id.* at 99, 115.

215. This reasoning led to the delegation of rulemaking authority to the federal courts in 1934. *See* Burbank, *supra* note 23, at 1046-48, 1052, 1067, 1085; *see also* Roscoe Pound, *The Rule-Making Power of the Courts*, 12 A.B.A. J. 599, 602 (1926) (asserting that rules drafted by courts "reflect mature experience" rather than "abstract speculations").

216. Pound, *supra* note 215, at 602.

217. From the very beginning of the Republic, Congress has delegated some rulemaking power to the judiciary. For example, the 1792 Process Act provided that in equity and admiralty suits, the courts should follow the rules of the civil law, "subject . . . to such alterations and additions as the said courts . . . deem expedient, or to such regulations as the supreme court of the United States shall think proper from time to time by rules to prescribe to any circuit or district court concerning the same." Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276. The Supreme Court approved such delegation of legislative authority in 1825. *See* Waymon v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

218. "[C]ertain congressional powers are simply not delegable—as when it is clear from the language of the Constitution that the purposes underlying certain powers would not be served if Congress delegated its responsibility." LAURENCE H.

Since a reevaluation of the jurisdiction of the courts is an integral part of any meaningful solution, the courts could develop only half a plan.

Moreover, this failure to delegate the authority to the federal courts is wise. There is a very good reason that the Framers established the government as a high-level game of rochambeau:[219] executive-legislature-judiciary. Self-study is very difficult. First, it is natural to accentuate the positive when studying oneself. Witness the reaction in the reports under consideration; both go to great lengths to pat the judiciary on the back,[220] despite some criticism from the bar.[221] Second, human beings tend to be inertial. Judges have frequently been so comfortable with the status quo that they have refused to change their ways despite clear invitations or mandates to do so.[222] Although Congress delegated rulemaking power to the Supreme Court long ago,[223] the Court has only made "tinkering" changes in the face of increasing "delay, escalating legal fees and rising court costs."[224] Finally, it is difficult to resolve conflicts of interest without a neutral check. If the judiciary is given the task of reforming itself, it may very well make self-interested decisions rather than ones sensitive to the public at large.[225]

TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-17, at 362 (2d ed. 1988).

219. The child's game of "paper-scissors-rock" in which one item always tops another; no one item is always the winner, another always checks it.

220. *See, e.g.*, DELAWARE REPORT, *supra* note 51, at 13, 35, 38, 42, 45; TEXAS REPORT, *supra* note 44, at 30-31. One should note that the majority of the Delaware advisory group were members of the bar of the court that they were assigned to critique.

221. *See, e.g.*, DELAWARE REPORT, *supra* note 51, at 42, 44, 46; TEXAS REPORT, *supra* note 44, at 35.

222. For example, the nineteenth-century Supreme Court steadfastly clung to common-law procedure, "the experience and wisdom of ages," when it could have used its rulemaking power to adopt the modern code procedure of the states. Farni v. Tesson, 66 U.S. (1 Black) 309, 315 (1862); *see* Burbank, *supra* note 23, at 1039-40. As a second example, some federal courts actually refused to allow permissive counterclaims even after the Federal Rules of Equity allowed them. Mary Brigid McManamon, *Dispelling the Myths of Pendent and Ancillary Jurisdiction—The Ramifications of a Revised History*, 46 WASH. & LEE L. REV. 863, 925 (1989).

223. *See supra* note 26 and accompanying text.

224. S. REP. NO. 416, *supra* note 16, at 8, 1990 U.S.C.C.A.N. at 6811 (quoting *Amendments to Federal Rules of Civil Procedure*, 446 U.S. 995, 998, 1000-01 (1980) (dissenting statement of Justice Powell)).

225. One example of that is Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978).

Who then should take on the task of devising a comprehensive plan for the business of the federal courts? The best solution would involve a true dialogue between the judiciary and the Congress. Such a dialogue was attempted in the drafting of the Act.[226] Unfortunately, "the cooperative relationship between Congress and the judicial branch" did not last.[227]

Additionally, there should be more participants than the federal branches of government. Litigants should also participate in the debate.[228] While they may not have the expertise to help with the details of federal jurisdiction and procedure, they should certainly have a say as to the future direction of the judicial system since they are, after all, the consumers of the courts' services. Moreover, litigant behavior may have to be changed to curb the growing cost of civil litigation, and to make such changes effective, the clients themselves ought to participate in the debate.[229]

Another dimension to the problem of cost and delay in modern litigation is the impact of federal judicial reform on the state courts. The state courts are also under pressure from overloaded dock-

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In *Will* a plurality of the Supreme Court actually said:

> No one can seriously contend that a busy federal trial judge, confronted both with competing demands on his time for matters properly within his jurisdiction and with inevitable scheduling difficulties because of the unavailability of lawyers, parties, and witnesses, is not entrusted with a wide latitude in setting his own calendar.

Id. at 665. In those circumstances, the justices maintained, abstention was proper in deference to concurrent state litigation. *Id.* at 662-65.

226. S. REP. NO. 416, *supra* note 16, at 4-5, 1990 U.S.C.C.A.N. at 6806-07. A similar dialogue was attempted in drafting another section of the law that contains the Act. Three law professors who helped to draft the supplemental jurisdiction statute, Judicial Improvements Act of 1990, Pub. L. No. 101-650, tit. III, § 310(a), 104 Stat. 5089, 5113 (to be codified at 28 U.S.C. § 1367), claim that the process was a "model of successful dialogue between the judicial and legislative branches." Thomas Mengler et al., *Congress Accepts the Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 JUDICATURE 213, 213 (1991). Unfortunately, there were not enough participants in the dialogue, leading to serious problems with the statute. *See* Richard D. Freer, *Compounding Confusion and Hampering Diversity: Life after* Finley *and the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 445 (1991).

227. S. REP. NO. 416, *supra* note 16, at 5, 1990 U.S.C.C.A.N. at 6807.

228. *See* Civil Justice Reform Act of 1990 § 103(a), 104 Stat. at 5094 (to be codified at 28 U.S.C. § 478(b)).

229. *See* BROOKINGS REPORT, *supra* note 1, at 36-39.

ets.[230] Any reduction in the business of the federal courts is bound to affect the number of cases filed in the state courts. Thus the state judiciary should have a prominent role in this debate.

One final note: we should consider the very structure of litigation in America. As long as we have the adversary system, we will have lawyers zealously litigating the rights of their clients, and thereby contributing to litigation cost and delay. One of the criticisms of the executive plan to reduce cost and delay in federal litigation[231] is that its new requirements will themselves cause more new issues to fight about.[232] In other words, we should ask ourselves about the future direction of our judicial system. Unfortunately, things have reached such a point that a quick fix is demanded. As Judge Learned Hand commented long ago while contemplating the problems of cost and delay in the federal judicial system, "[N]obody will stir until the political atmosphere becomes charged with high potential, just the time when revision ought not to take place."[233] While a bandage for the system is probably needed right now, we should take the time to determine the long-term cure for our litigation headaches.

VI. Conclusion

There is no easy cure to the problems of the cost of litigation in late twentieth-century America. Before heading pell mell into poorly considered solutions, however, we as a Nation must stop to determine our goals and our problems, along with the best way to achieve the former and rid ourselves of the latter.

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230. *See, e.g.*, THOMAS CHURCH, JR. ET AL., JUSTICE DELAYED: THE PACE OF LITIGATION IN URBAN TRIAL COURTS (1978); JOHN GOERDT ET AL., EXAMINING COURT DELAY: THE PACE OF LITIGATION IN 26 URBAN TRIAL COURTS, 1987 (1989); NATIONAL CTR. FOR STATE COURTS, ON TRIAL: THE LENGTH OF CIVIL AND CRIMINAL TRIALS (1988).

231. *See supra* notes 20-21 and accompanying text.

232. *See Government Lawyers Ordered to Streamline Litigation*, *supra* note 20, at 2282.

233. Learned Hand, Book Review, 37 YALE L.J. 130, 131 (1927).