

ARTICLES

CONGRESS, THE COURTS, AND THE LONG RANGE PLAN*

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TABLE OF CONTENTS

Introduction	626
I. Congress and the Judiciary's Budget	629
A. Expansive Jurisdiction and Unfunded Mandates ...	629
B. The Government Shutdown	634
C. The Line-Item Veto and the Grassley Questionnaire	635
1. The line-item veto	635
2. The Grassley questionnaire	636
D. The Effects of Continued Underfunding	637
II. Congress and Direct Reform of Procedure	639
A. Background: The Rules Enabling Act	640
B. The Civil Justice Reform Act	641
1. Origins of the Act	641
2. The Act's provisions	642
a. The role of advisory groups	642
b. Cost and delay reduction principles and techniques	643
c. The contents of the plans	644
C. The Common Sense Legal Reform Act	645
1. The Private Securities Litigation Reform Act of 1995	646

* Portions of this Article previously appeared in *The Federal Lawyer* and in the *Newsletter of the Pretrial Practice and Discovery Committee of the A.B.A. Section on Litigation*.

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2. The procedural impact of other proposed legislation	649
D. Implications of Direct Reform	651
III. Reforming the Relationship Between Congress and the Courts	653
A. The Overall Approach: Conciliation, Not Confrontation, with Congress	653
B. Resources	656
1. The creation of mandatory accounts	656
2. Coordination of resources and jurisdiction	658
a. The <i>Plan</i> : Encouraging Congress to behave .	658
b. Beyond the <i>Plan</i> : Unfunded mandate reform for the courts	658
3. User fees	661
C. Procedures	663
1. Sunset on the Civil Justice Reform Act	665
2. Referral of rule changes to Rules Enabling Act process	666
Conclusion	668

INTRODUCTION

The relationship between Congress and the federal courts is at a low ebb. Judges at all levels of the judiciary have spoken out recently about perceived threats to their independence.¹ The organized bar

1. Chief Justice Rehnquist spoke on the subject of judicial independence at a conference on the future of the federal courts at American University, Washington College of Law. See *Chief Justice Speaks on Independence*, THE THIRD BRANCH, May 1996, at 1. For a text of the Chief Justice's remarks, see Symposium, *The Future of the Federal Courts*, 46 AM. U. L. REV. 263, 267-74 (1996). Four current and former chief judges of the U.S. Court of Appeals for the Second Circuit recently criticized the vociferous public attacks (some of them from Congress) on Judge Harold Baer, Jr., who had suppressed evidence in a drug prosecution. See Henry J. Reske, *Questions of Independence*, A.B.A. J., June 1996, at 110 (detailing response written by Judges Wilfred Feinberg, J. Edward Lumbard, Jon O. Newman, and James L. Oaks to attacks on Judge Baer). Senior Judge Barefoot Sanders of the U.S. District Court for the Northern District of Texas commented on the importance of judicial independence to the credibility of the courts. See *Judge Barefoot Sanders and Committee Address Judicial Concerns*, THE THIRD BRANCH, May 1996, at 10, 11. Judges have expressed these concerns privately as well. In her capacity as Chair of the Judicial Conference Committee on the Judicial Branch, Judge Deanell Reece Tacha received numerous letters from other judges, the contents of which she described as follows:

These letters gave me increasing concern. Thoughtful jurists, none of whom falls within the category of those who simply seek additional comforts or resources beyond their needs, are echoing a growing refrain of concern about whether the independence of the federal judiciary is being gradually eroded. The letters contain a sense of sorrow and urgency, asking the judiciary itself and, implicitly, the other branches of government, to consider the importance of protecting the independence of the judiciary.

Deanell Reece Tacha, *Independence of the Judiciary for the Third Century*, 46 MERCER L. REV. 645, 647 (1995).

and the academy are devoting renewed attention to the relationship between Congress and the courts.² In addition, the division of authority between the two branches has been the subject of several recent decisions from the Supreme Court of the United States. In 1995, the Court held that Congress violated the principle of separation of powers in a 1991 statute that required courts to reopen certain final judgments.³ The Court earlier had given a very broad interpretation to the inherent power of the federal courts.⁴ These events, taken together, are evidence of a serious and ongoing conflict.

A primary source of the conflict is the judiciary's budget. The budget crises of 1995 threatened to close the courts.⁵ Twice in the last ten years the courts have had to suspend civil jury trials because Congress did not appropriate the money to pay juror fees and expenses.⁶ Congress also has imposed numerous obligations on the courts without appropriating additional money to cope effectively with them.⁷ The judicial branch perceives this insensitivity, if not hostility, to its fiscal needs as a threat to its independence. As one Circuit Judge has written, "Independent judicial action requires an appropriate level of support which allows a judge to carry out the judicial

2. The American Bar Association Committee on Federal Judicial Improvements recently appointed a task force to study concerns about separation of powers and judicial independence. See John Gibeaut, *Taking Aim*, A.B.A. J., Nov. 1996 at 50, 51. The *Mercer Law Review* recently published a symposium devoted to the issue. See *Federal Judicial Independence Symposium*, 46 *MERCER L. REV.* 637 (1995).

3. See *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1463 (1995) (striking down § 27A(b) of Securities Exchange Act of 1934 as unconstitutional because it required federal courts to reopen final judgments entered before its enactment); *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 438 (1992) (upholding subsection (b)(6)(A) of Northwest Timber Compromise despite Respondent's challenge that Congress violated Article III because Act directed particular decision in cases without repealing or amending status underlying litigation).

4. See *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-55 (1991) (detailing historical interpretation of inherent powers of federal courts and holding that district court acted within its discretion in assessing attorneys fees as sanction for bad faith conduct).

5. See *Press Release on Behalf of the Executive Committee of the Judicial Conference of the United States* (Jan. 4, 1996) <<http://www.uscourts.gov>> (on file with *The American University Law Review*) [hereinafter *Press Release*]. For a detailed discussion of how the judiciary and Congress have come into conflict recently over the judiciary's budget, see *infra* Part I and sources cited therein.

6. See Patrick E. Longan, *The Case for Jury Fees in Federal Civil Litigation*, 74 *OR. L. REV.* 909, 920-22 (1995) (stating that in both 1986 and 1993, Administrative Office of U.S. Courts sent memoranda to all district judges instructing them to halt jury trials until Congress could pass supplemental appropriations to fund civil juries).

7. Examples include: The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1994); The Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994); The Anti-Car Theft Act of 1992, 15 U.S.C. § 1901 (1994); 18 U.S.C. § 2119 (1994); and the Child Support Recovery Act of 1992, 18 U.S.C. § 228 (1994). For a detailed discussion of these statutes and others in which Congress has increased the workload of the courts without coordinating the provision of resources, see *infra* Part I.

function without relying on other entities [or] depending on someone else's assessment of the judge's needs."⁸

Another battleground is for control of procedure in the federal courts.⁹ Since 1934, most of the control has been in the hands of the judiciary. Under the Rules Enabling Act, the Supreme Court was given the power to promulgate rules of procedure for the federal courts.¹⁰ In recent years, however, Congress has inserted itself directly into making or shaping procedural rules. Congress passed the Civil Justice Reform Act in 1990 and mandated that each district at least consider the adoption of certain techniques designed to reduce the cost and duration of federal civil litigation.¹¹ Even more recently, Congress has taken upon itself the task of legislating new procedures for securities fraud cases and, as part of the Republican "Contract with America," has tried to enact numerous other procedural reforms.¹²

At this propitious time, the Judicial Conference of the United States has issued a *Long Range Plan for the Federal Courts*.¹³ The *Long Range Plan* contains a number of proposals, the purposes of which are to defuse the current situation with Congress and to structure a relationship between Congress and the courts that will preserve the independence of the judiciary.¹⁴ If these proposals are put into

8. See Tacha, *supra* note 1, at 648.

9. For a detailed discussion of how Congress and the federal courts have collided over procedure, see *infra* Part II.

10. See Rules Enabling Act of 1934, 28 U.S.C. §§ 2071-2077 (1994). For a general discussion of the background and operation of the Rules Enabling Act, see ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *THE FEDERAL RULES OF PRACTICE AND PROCEDURE: A SUMMARY FOR BENCH AND BAR* (1993). For additional information and some proposals for changes, see Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655, 1675-91 (1995). Mr. McCabe is Secretary to the Judicial Conference Standing Committee on the Rules of Practice and Procedure. See *id.* at 1655 n.*.

11. See Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482. See generally Patrick Johnston, *Civil Justice Reform: Juggling Between Politics and Perfection*, 62 FORDHAM L. REV. 833 (1994) (critiquing Civil Justice Reform Act).

12. See David C. Weiner, *Reform or Deformed Legislation*, 21 LITIG. 1, 1-2 (1995) (listing specific proposed reforms in "Contract with America"). One proposal of the "Contract with America" was that a series of court reforms entitled the "Common Sense Legal Reform Act" should be enacted. See *id.* at 1. Those reforms were embodied in H.R. 10, which the 104th Congress passed early in its first session. See *id.* at 1. For a discussion of the fate of these reforms, which eventually were divided into three separate bills, see *infra* Part II.C. For background on the origin of many of the reforms in H.R. 10, see PRESIDENT'S COUNCIL ON COMPETITIVENESS, *AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA* (1991).

13. See JUDICIAL CONFERENCE OF THE UNITED STATES, *LONG RANGE PLAN FOR THE FEDERAL COURTS* (1995) [hereinafter *LONG RANGE PLAN*]. For background on the *Long Range Plan*, see Richard B. Hoffman & William C. Lucianovic, *Long Range Planning: A Reality in the Judicial Branch*, 44 AM. U. L. REV. 1599, 1602-07 (1995).

14. See *LONG RANGE PLAN*, *supra* note 13, at 57-70, 93-108 (discussing possible areas for innovation such as Rules of Practice and Procedure, criminal sentencing, jury system, pro se litigation, cost of litigation, and need for case management). For a detailed discussion of these

effect, the confrontation may be avoided. The *Long Range Plan* a conservative document,¹⁵ however, and it may not go far enough toward protecting the courts from Congress. The purposes of this Article are to describe how the relationship between Congress and the courts has evolved in recent years, to discuss how the *Long Range Plan* proposes to solve the problems, and to propose several additional solutions. Part I details the recent battles over the budget and related issues. Part II explores how Congress and the courts have collided over regulation of federal procedure. Part III discusses the *Long Range Plan* and additional proposals that will preserve the independence of the courts and respect the proper role of Congress.

Congress and the courts should not and need not be on a collision course. Solutions that respect the appropriate role for each, such as those proposed in the *Long Range Plan* and in this Article, will help to resolve the present situation and to refocus both branches on delivery of justice rather than on the protection of prerogative.

I. CONGRESS AND THE JUDICIARY'S BUDGET

A. *Expansive Jurisdiction and Unfunded Mandates*

A superficial observer would conclude that the federal judiciary has been treated quite well in recent years. In the last fifteen years, many state court systems have been in dire condition because of underfunding.¹⁶ During that same time period, the budget of the federal judiciary has increased 170%.¹⁷ This growth rate is more than four times the growth rate of the federal budget as a whole.¹⁸ A superficial observer would miss, however, the fact that Congress has expanded the responsibilities of the federal courts even faster than it has expanded the judiciary's budget.¹⁹ Under the established numerical workload guidelines for the federal courts, recent budgets

proposals, see *infra* Part III.

15. See William W. Schwarzer, *Very Separated Powers*, THE RECORDER, Dec. 22, 1995, at 6, available in LEXIS, Cal Library, Recdr File (stating that plan proposes primarily adherence to current policies and basically is vote for status quo).

16. For a detailed description of the funding problems at the state court level, see AMERICAN BAR ASS'N SPECIAL COMM. ON FUNDING THE JUSTICE SYS.: A CALL TO ACTION (1992) [hereinafter A CALL TO ACTION].

17. See LONG RANGE PLAN, *supra* note 13, at 11 (stating that increase in funding is due primarily to growth of judiciary's staff).

18. See *id.* (stating that 170% increase in judiciary's budget is comparable to 171% increase in budget of Department of Justice).

19. See *id.* at 94. "The regrettable reality is that while recent judicial budgets have shown sizeable increases, the increases have not kept pace with the volume and costs of additional tasks that the courts have assumed under new congressional mandates. Insufficient resources are ultimately a threat to judicial branch independence." *Id.*

have fallen short of fully funding the responsibilities of the judiciary. The 1988 budget fell \$50 million short in operating funds.²⁰ The 1989 budget was almost \$100 million less than needed to maintain operations.²¹ The 1992 shortfall resulted in a hiring freeze and the suspension of substance abuse treatment programs and of plans to repair or replace the judiciary's computer systems.²² The 1993 budget was \$200 million short of what was needed to keep pace, and the 1994 budget fell \$400 million short of the amount necessary to fund fully the responsibilities that Congress had placed on the courts.²³ Thus, although it might appear to a superficial observer that Congress has been generous in the rate of growth of the judiciary's budget,²⁴ it becomes evident that Congress has been quite stingy when the budget is judged relative to the demands that Congress has made on the judiciary.²⁵

Congress repeatedly has left the courts with responsibilities but no resources to fulfill them. One example is the payment of juror fees. Litigants in most cases in federal court are entitled to a jury under the Seventh Amendment to the U.S. Constitution.²⁶ By statute, jurors are paid \$40 per day.²⁷ In 1986, and again in 1993, Congress did not appropriate sufficient funds to pay jurors the daily fees to which they are entitled by statute.²⁸ In 1986, the Administrative Office of the U.S. Courts sent a memorandum to all federal district judges that read in part:

[C]ivil jury trials will have to be suspended on June 16 through the end of the fiscal year (September 30). . . . [T]he Judicial Conference has directed that you empanel no new civil juries from June 16 forward. . . . [T]his suspension [of civil jury trials] must

20. See *Congress Cuts Judiciary's Fund Request by Five Percent, But Available Funds Greater Than in FY87*, THE THIRD BRANCH, Feb. 1988, at 1, 1.

21. See *President Signs FY89 Judiciary Appropriation*, THE THIRD BRANCH, Nov. 1988, at 1, 1.

22. See *102d Congress Adjourns: Results Are Mixed Bag for Judiciary*, THE THIRD BRANCH, Oct. 1992, at 1, 2.

23. See Longan, *supra* note 6, at 924.

24. See LONG RANGE PLAN, *supra* note 13, at 93-94 (stating that Congress has provided judiciary with resources increasing at same rate as those allotted to Department of Justice).

25. See *id.* (stating that increases in judicial budgets have not kept pace with costs of additional tasks courts assumed under congressional mandates).

26. See U.S. CONST. amend. VII. The Supreme Court recently has made an expansive interpretation of the Seventh Amendment right to a jury trial. See *Chauffeurs Local 391 v. Terry*, 494 U.S. 558, 561 (1990) (holding that Seventh Amendment right to jury trial applies to breach of duty of fair representation by labor union); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 64 (1989) (finding that constitutional right to jury trial applies to suit by bankruptcy trustee to recover fraudulent transfer).

27. See 28 U.S.C. § 1871(b)(1) (1994).

28. See Longan, *supra* note 6, at 920-27 (discussing Congress' actions and proposing solutions to funding problems).

continue in effect until we inform you that sufficient funds have been made available²⁹

This memorandum left the federal courts with a constitutional obligation to hold jury trials but without funds to pay jurors their statutory fees.³⁰ Two courts held that the cessation of jury trials because of a lack of funds was unconstitutional.³¹ Only a supplemental appropriation late in the fiscal year averted the potential collision of the budget with the Seventh Amendment.³² In 1993, a similar episode occurred but again was staved off by a similar supplemental appropriation.³³

The same pattern emerged in 1990 when Congress passed the Civil Justice Reform Act³⁴ and imposed numerous obligations on the district courts.³⁵ Each district court had to appoint an advisory group to assess the existing docket, to identify trends in case filings, to identify the principal causes of expense and delay in the district, and 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."³⁶ Each group then had to recommend particular reforms to reduce expense and delay in light of local conditions.³⁷ Congress did not, however, include the funds necessary for carrying out these mandates in the appropriation for the Judiciary for the 1991 fiscal

29. *Armster v. United States Dist. Court*, 792 F.2d 1423, 1425 (9th Cir. 1986).

30. *See id.* at 1426-27.

31. *See id.* at 1430 (concluding specifically that Seventh Amendment is violated by suspension for significant period of time); *Hobson v. Brennan*, 637 F. Supp. 173, 174 (D.D.C. 1986) (stating that indefinite suspension of jury trials in anticipation of future shortage of funds violates Seventh Amendment).

32. *See Congress Approves Supplemental Appropriations; Funds Available for Civil Jury Trials*, THE THIRD BRANCH, Aug. 1986, at 2 (reporting that Congress had approved urgent appropriations bill that provided \$3.8 million in funding for jurors' fees thereby averting suspension of civil jury trials).

33. *See President Signs FY93 Supplemental Bill*, THE THIRD BRANCH, July 1993, at 1.

34. 28 U.S.C. §§ 471-82 (1994).

35. The hearings on that legislation and companion provisions that expanded the size of the federal judiciary also provided the occasion for some public displays of the tensions between Congress and the courts. After some accusations were made in the media that Senator Joseph Biden (D-Del.), then Chairman of the Senate Judiciary Committee, was "playing politics" with the new judgeships, Senator Biden made a searing opening statement on the last day of hearings. *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong. 308 (1990) (statement of Sen. Biden).

36. 28 U.S.C. § 472(c)(1)(A)-(D).

37. *See id.* § 472(b)(3).

year.³⁸ It took a supplemental appropriation, almost a year later, to provide the necessary funds.³⁹

The Civil Rights Act of 1991⁴⁰ and the Americans With Disabilities Act of 1990⁴¹ are two more recent examples. Since the enactment of these statutes, civil rights filings in the federal courts have risen eighty-six percent after five years of stability.⁴² Neither of these statutes, however, contained budgetary authorization to take care of this increased workload.

Congress followed a similar pattern in 1992. Among the topics of legislation passed that year with serious fiscal consequences for the judiciary were the Bankruptcy Judgeship Act of 1992,⁴³ the Child Support Recovery Act of 1992,⁴⁴ the Animal Enterprise Protection Act of 1992,⁴⁵ the Anti-Car Theft Act of 1992,⁴⁶ and the Federal Courts Administration Act of 1992.⁴⁷ These bills created initial budgetary obligations of more than \$18 million and recurring obligations of over \$26 million, yet Congress included no money for these programs in the fiscal 1993 budget.⁴⁸ A year later, some partial funding was allocated.⁴⁹

In 1994, two of the most important pieces of legislation under consideration by Congress were the crime bill⁵⁰ and various health

38. See *Funding Guidelines Approved for Civil Justice Reform Implementation*, THE THIRD BRANCH, May 1991, at 4 (stating that Judicial Conference Executive Committee directed courts to submit requests for funds necessary for implementing Civil Justice Reform Act for remainder of fiscal year 1991).

39. See *id.*

40. 42 U.S.C. § 1981 (1994).

41. *Id.* §§ 12101-12213.

42. See *Press Release of the Administrative Office of the U.S. Courts* (June 24, 1996) <<http://www.uscourts.gov>> (on file with *The American University Law Review*).

43. 28 U.S.C. §§ 1, 152 (1994).

44. 18 U.S.C. § 228 (1994).

45. *Id.* § 43.

46. 15 U.S.C. § 1901 (1994); 18 U.S.C. § 2119.

47. 28 U.S.C. §§ 1, 376, 1295, 2412.

48. See *Judiciary FY93 and FY94 Appropriations Requests on Center Stage*, THE THIRD BRANCH, Mar. 1993, at 1, 3-4. Eighth Circuit Chief Judge Richard S. Arnold testified before Congress in connection with the Judiciary's 1993 budget and reflected:

At the same time that Congress is adding to the growing workload, the Judiciary is being asked to tighten its belt and keep providing the same level and quality of justice to the citizenry with less than necessary funding. The Judiciary cannot continue to absorb growing workloads and maintain an acceptable level of service to the public. We are seeking funding to maintain that level of service to fund our most critical needs.

Id. at 3.

49. See Department of Justice and Related Agencies Appropriations Act of 1993, Pub. L. No. 103-121, 107 Stat. 1153 (appropriating funds for federal court administration for 1994 fiscal year and anti-car theft bill).

50. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified at 42 U.S.C. §§ 13701-14223).

care reform bills.⁵¹ The crime bill became law and imposed many new obligations on the federal courts.⁵² Initially, the House of Representatives did not take these obligations into account when it passed the judiciary's appropriation.⁵³ Health care legislation, which did not pass, also would have increased the workloads of the federal courts.⁵⁴ At the time that Congress passed the judiciary's appropriation for fiscal 1995, passage of health care reform appeared likely. Congress, however, did not authorize any funds to handle the anticipated larger caseload.⁵⁵

The most recent reports indicate that, far from taking steps to ensure that resources are provided to accommodate all the demands placed on the judiciary, the Republican Congress is taking an even closer—some would say hostile—look at judicial spending.⁵⁶ The Director of the Administrative Office of the U.S. Courts has written that he is pessimistic about the willingness of Congress to support the judiciary.⁵⁷ There are abundant recent examples. One rider to the judiciary's free-standing 1996 appropriations bill requires the courts to limit the cost of judicial conferences.⁵⁸ Congress has closely scrutinized courthouse construction projects in recent years and even has rescinded \$79 million in construction funds in 1995.⁵⁹ Another recent bill would have created an inspector general's position within the Administrative Office of the U.S. Courts to monitor expenditures.⁶⁰ Congress has displayed a consistent pattern in recent years

51. See, e.g., Health Security Act of 1993, S. 1757, 104th Cong. (1994); H.R. 3600, 104th Cong. (1994).

52. See *Finding Guide to Violent Crime Control and Law Enforcement Act*, 55 Crim. L. Rep. (BNA) 2429, 2431 (1994) (listing numerous new federal crimes established by Act).

53. See *Budget Passed by House Falls Short of Judiciary's FY95 Needs*, THE THIRD BRANCH, July 1994, at 1 (stating that House funding level was cause for concern because small increase in appropriations from 1994 was insufficient even to maintain Judiciary's existing services).

54. See *id.*

55. See Department of Justice and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-317, 108 Stat. 1725 (appropriating funds for fiscal year 1995).

56. See Mark Hansen, *Court Spending Under Review*, A.B.A. J., Feb. 1996, at 24, 24 (asserting that Congress recently has begun to question everything from Judiciary's spending on conferences and courthouses to its commitment to weeding out waste and abuse).

57. See L. Ralph Mecham, *Introduction to the Symposium on Federal Judicial Administration: Stewardship in a Changing Environment*, 14 MISS. C. L. REV. 193, 194 (1994).

58. See *Judiciary Secures FY96 Funding*, THE THIRD BRANCH, Jan. 1996, at 1, 10 [hereinafter *FY96 Funding*].

59. See *President Signs FY95 Supplemental Appropriations Bill*, THE THIRD BRANCH, Aug. 1995, at 3, 3.

60. See Schwarzer, *supra* note 15, at 6. Judge Schwarzer, who recently completed a term as Director of the Federal Judicial Center, described the current situation with Congress as follows:

The courts estimate that they need an increase of 10 percent just to maintain current services. But Congress appears to be turning a deaf ear to the judiciary's pleas. It is taking the position that the courts must take cuts just like everyone else, and they may receive only a fraction of what they need.

of giving the judiciary insufficient resources to meet the demands placed upon it. But this pattern, consistent as it is, is not the most dramatic evidence of tension between Congress and the courts regarding money. That evidence comes from the budget shutdowns of the fall of 1995 and winter of 1995-96.⁶¹

B. *The Government Shutdown*

When the budget impasse between President Clinton and the Republican Congress shut the government down in November 1995, the judiciary's response included cancellation of training, reduction of travel by court personnel, and furloughs for two-thirds of the staff of the Administrative Office of the U.S. Courts.⁶² On December 7, 1995, Chief Justice Rehnquist wrote to the President of the Senate and the Speaker of the House of Representatives to ask for a free-standing funding bill for the judiciary in order to take the federal courts out of the crossfire.⁶³ The Chief Justice expressed his fear that the budget impasse was jeopardizing the operation of the courts.⁶⁴

That plea yielded no immediate results. During the second government shutdown, the judiciary used revenue from filing fees to continue operating, but concerns about the continued functioning of the courts grew.⁶⁵ The Executive Committee of the Judicial Conference issued a press release on January 4, 1996, to describe the consequences of a continued funding lapse:

Our justice system will be seriously disrupted. Judges will be unable to conduct jury trials. Indictments against criminal defendants may have to be dismissed under the Speedy Trial Act. Injunctive orders

What's more, Congress has called for an improvement in the efficiency of the courts. In its report on the appropriations bill, the House committee stated that "it expects the Judicial Conference to initiate an in-depth review of ways to make the judiciary more efficient and less costly. The review shall be performed by an independent, nonpartisan, professional organization outside the judiciary, but with the complete cooperation and support of the judiciary." It looks as though this is only the beginning.

Id.

61. See *An Inside Look at the Shutdown*, THE THIRD BRANCH, Dec. 1995, at 1, 2 (stating that during government budget shutdown in December 1995, courts encountered numerous issues relating to daily operations and spent disproportionate amount of time addressing funding lapse).

62. See *id.* at 1-3 (discussing, in detail, impact of 1995 government shutdown).

63. See *Chief Justice Acts on Budget Crisis*, THE THIRD BRANCH, Dec. 1995, at 1, 1 (reprinting copy of Chief Justice Rehnquist's letter sent December 7, 1995, to Vice President Gore and Speaker Gingrich).

64. See *id.*

65. See *FY96 Funding*, *supra* note 58, at 10 (stating that Chair of Executive Committee, Chief Judge Gil Merritt, expressed concern that our system of law and order would break down because of lack of funds).

against violations of the law (for example, air and water pollution and abridgement of constitutional rights) and money judgments awarded to victims may in large measure go unenforced.

Under such circumstances, a breakdown in our system of constitutional order and law enforcement may occur. The judges, working alone in the absence of appropriated funds will do their best to maintain order, but our normal system of justice cannot be guaranteed to our citizens during this period.⁶⁶

On January 6, 1996, in response to the plea of the Chief Justice and the Judicial Conference and after enormous efforts by members of the judiciary, the Administrative Office of the U.S. Courts, and sympathetic legislators, Congress passed, and the President signed, an appropriation bill for all of fiscal year 1996.⁶⁷ That Congress would permit matters to reach the precipice of the closing of the courts, however, is dramatic evidence of the ongoing tension between the two branches.

C. *The Line-Item Veto and the Grassley Questionnaire*

1. *The line-item veto*

The recent line-item veto legislation raises another concern for the judiciary.⁶⁸ Under this bill, the President may veto particular appropriations for any funding other than the salaries of judges and certain retirement programs.⁶⁹ The Judicial Conference of the United States repeatedly has expressed concern about the line-item veto. A primary concern is that the President is the head of the executive branch, which is the most frequent litigant in federal court.⁷⁰ The fear is that the threat of a line-item veto could impair the independence of the judiciary in cases involving the executive branch. Currently, elaborate procedures are in place to insulate the judiciary's budget from control by the executive branch.⁷¹ These

66. *Press Release*, *supra* note 5.

67. *See FY96 Funding*, *supra* note 58, at 10.

68. For general discussions of the implications of the line item veto on the separation of powers, see Robert Destro, *Whom Do You Trust?*, 44 THE FED. LAW. 26 (1997); and Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1836-39 (1996).

69. *See Line Item Veto Act of 1996*, Pub. L. No. 104-130, 110 Stat. 1200 (to be codified at 2 U.S.C. § 691) (giving President authority to veto appropriations if he determines that they will reduce federal budget deficit without impairing essential government functions or harming national interest).

70. *See Line Item Veto Legislation Raises Separation of Powers Concerns*, THE THIRD BRANCH, Apr. 1996, at 4 (stating that judiciary's concern over President's ability to exercise line item veto and to rescind funding to judiciary will seriously threaten even-handed administration of justice).

71. The current procedure is for the Director of the Administrative Office of the U.S. Courts to submit the courts' budget to the Office of Management and Budget, which then is

procedures were created in the 1930s when the funds for the judiciary came from the Department of Justice and when judges frequently complained about having to plead with the Justice Department for resources.⁷² The protections and independence that the procedures are intended to assure could disappear with the exercise of the line-item veto. By including the judiciary in this legislation, Congress has threatened further the operation, and perhaps the independence, of the judicial branch.

2. *The Grassley questionnaire*

A related development is the questionnaire sent to federal judges by Senator Charles Grassley (R-Iowa) in his capacity as chair of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts. The survey was directed to all active and senior judges on the courts of appeals and the district courts and asked questions regarding workload and outside work activities.⁷³ The Judicial Conference encouraged judges to complete the survey, but promised Senator Grassley that it also would provide an institutional response on behalf of the judiciary. The chair of the Judicial Conference's Executive Committee, Chief Judge Gilbert Merritt, indirectly expressed some trepidation about Grassley's survey when he noted that Congress in the past has directed requests for information to the Judicial Conference rather than to individual judges.⁷⁴ The judiciary has reason to fear Senator Grassley's motives in seeking the information. Senator Grassley has been an outspoken opponent to expansion of the federal judiciary and has held hearings about the possible elimination of some judgeships.⁷⁵ He may intend to use the information to justify reducing congressional support of the courts. In the context of the ongoing budgetary problems between Congress and the courts, Senator Grassley's survey is an ominous sign. It is further evidence of continuing tension between Congress and the federal courts.

supposed to submit the request to Congress without change. See 28 U.S.C. § 605 (1994); 31 U.S.C. § 1105(b) (1994). For background on this process and its origins, see Gordon Bermant & Russell R. Wheeler, *Federal Judges and the Judicial Branch: Their Independence and Accountability*, 46 MERCER L. REV. 835, 848-50 (1995).

72. See Schwarzer, *supra* note 15, at 6.

73. See *Conference Will Submit Institutional Response to Grassley Survey*, THE THIRD BRANCH, Feb. 1996, at 12.

74. See *id.*

75. See Schwarzer, *supra* note 15, at 6 (noting that Iowa Senator held hearings to determine if some judgeships are no longer needed).

D. *The Effects of Continued Underfunding*

The imbalance between the demands placed on the judiciary and the resources Congress provides must be corrected. The drafters of the *Long Range Plan* carefully studied the trends in the growth of the federal caseload to forecast what the federal courts will look like in the year 2020.⁷⁶ They studied two scenarios, the first of which assumed that Congress would not limit the growth of federal jurisdiction, but would be relatively generous with resources. That scenario, particularly the projected fourfold expansion of the number of federal judges, would bring its own problems.⁷⁷ The second scenario assumed that Congress would continue the present course and neither limit growth nor provide the funding necessary to accommodate that growth. That scenario turned out to be nightmarish.⁷⁸ Here is how the *Long Range Plan* attempts to dramatize the consequences of the current course:

It is 2020. Federal caseloads have quadrupled in the last 25 years, but the number of federal judges has leveled off at 1000. The federal budget remains in crisis, the product of continued growth in non-discretionary federal spending and the unwillingness to raise taxes. Congress is no longer willing to fund the increasing costs of new courthouses, support staff and judicial salaries necessary to address the rising tide of cases.

76. See LONG RANGE PLAN, *supra* note 13, at 17-20.

77. Limiting the growth of the federal judiciary has been a prominent and controversial topic in recent years. Compare Stephen Reinhardt, *Too Few Judges, Too Many Cases*, A.B.A. J., Jan. 1993, at 52-54 (proposing that Congress should double size of circuit courts of appeals), with Gerald Bard Tjoflat, *More Judges, Less Justice*, A.B.A. J., July 1993, at 70-73 (responding to Judge Reinhardt's article by highlighting problems inherent in increasing size of federal courts). In 1980, Judge Alvin Rubin forecast:

If we drift with the times and respond to only needs as they arise, we will by 1990 have spawned a vast judging machine. It may run smoothly. We hope so. It may be honest and capable. We hope so. But unless some basic problems are considered and solved, our judicial branch will become increasingly faceless and anonymous. The President will nominate, the Senate will consent but bureaucracy will decide.

Alvin B. Rubin, *Bureaucratization of the Federal Courts: The Tension Between Justice and Efficiency*, 55 NOTRE DAME LAW. 648, 658-59 (1980); see also REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, 101st Cong. 8 (1990) (noting unprecedented growth and change in federal courts during last half century); Richard A. Posner, *Coping with the Caseload: A Comment on Magistrates and Masters*, 137 U. PA. L. REV. 2215, 2216 (1989) (arguing that federal courts were created to be small and recently have reached their natural limits of expansion); Henry J. Reske, *Keeping a Trim Federal Judiciary*, A.B.A. J., Dec. 1993, at 26 (recounting recommendation of the Judicial Conference of the United States to control judicial growth carefully). For a recent discussion of the issue by the new Director of the Federal Judicial Center, see A. Leo Levin & Michael E. Kunz, *Thinking About Judgeships*, 44 AM. U. L. REV. 1627 (1995) (articulating suggestions for managing the federal judicial system).

78. See LONG RANGE PLAN, *supra* note 13, at 18.

Austerity is a way of life in the federal courts. The queue for civil cases lengthens to the point where federal judges rarely conduct civil trials. User fees proliferate and would be judged onerous by twentieth century standards. As a consequence, many litigants seek justice from private providers. Overworked and underpaid administrators defer maintenance on courthouses and no longer update library collections. Most vacancies on the federal bench go unfilled for long periods of time because capable lawyers, once attracted to a judicial career, are no longer willing to serve. The federal courts have by and large become criminal courts and courts for those who cannot afford private justice.⁷⁹

This is, and should be, a chilling prospect.

It also should not be viewed as science fiction. Already, the job of a federal judge may be less attractive to exceptionally qualified candidates than it once was.⁸⁰ Part of the attraction of the federal judiciary is its small size and its prestige. Another attraction is the time and resources to do excellent work and to ensure that the results reached are correct. Judge Anne C. Conway of the Middle District of Florida arrived on the district court bench to find a docket of 570 civil cases, 1070 pending motions, and a large criminal docket. She stated:

I began my tenure as a district court judge by losing sleep. In the middle of the night, I would wake up and think of something I had done—or not done—on a case. I thought of motions pending for over two years. I worried about six year old cases that had not been set for trial. I thought of all the time spent in the courtroom, either in trial or in hearings, sentencing, status conferences, or rearraignments, while motions continue to flow in.

After several of these middle of the night sessions, and a few practical suggestions given to me during daylight hours, I devised a strategy that permits me to make some headway. As often as possible, I come in at 7:00 a.m. to clear off my desk. If I am lucky, I am left alone to work on cases until 8:00 or 8:30. I am in trial from 9:00 a.m. to 4:30 p.m., with an extended break for lunch so I can go through the paperwork that has accumulated during the morning. At 4:30 p.m., I begin sentencing, rearraignments, and pretrial conferences. Members of my staff listen to the intercom to hear when I take a break, and they literally line up outside my door

79. *Id.* at 20.

80. See Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. PA. L. REV. 777, 783 (1981). See generally William H. Rehnquist, Address at the Mac Swinford Lecture at The University of Kentucky (Sept. 23, 1982) (transcript available from the Public Information Office, United States Supreme Court) (forewarning that talented individuals no longer will seek judgeships as element of prestige disappears).

to ask questions. I sometimes feel besieged, but we are making progress.⁸¹

Furthermore, the bureaucratization of the courts that the *Long Range Plan* projects also is, in many respects, already upon us. Courts rely increasingly on law clerks, staff attorneys, and masters, giving less personal attention to their work product.⁸² If it is true, as Justice Brandeis wrote, that judges are respected "because we do our own work,"⁸³ then the projection of the *Long Range Plan* already is too much a reality.

The present imbalance between demands and resources must not be allowed to continue. The *Long Range Plan* already has done a valuable service by forcing us to contemplate where the current conflict between Congress and the courts swiftly is taking us. Battles over the budget, however, are not the only battles being fought between the two branches.

II. CONGRESS AND DIRECT REFORM OF PROCEDURE

Another source of conflict between Congress and the courts is control over procedure, particularly civil procedure, in the courts.⁸⁴ To appreciate why this subject is the source of such controversy today, one must understand the history of civil rulemaking and how it has changed in recent years.⁸⁵

81. Anne C. Conway, *First Impressions*, LITIG., Winter 1993, at 3, 3; see also Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 940 (1996) (discussing the "growing preoccupation" of district judges with administration rather than adjudication).

82. See RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 102-19 (1985) (discussing prominent role of law clerks in managing case loads); Harry T. Edwards, *The Rising Workload and Perceived Bureaucracy of the Federal Courts: A Causation-Based Approach to the Search for Appropriate Remedies*, 68 IOWA L. REV. 871, 919 (1983) (discussing how increase in number of judges on court can impede collegiality and therefore reduce overall quality of court's work product); Daniel J. Meltzer, *The Judiciary's Bicentennial*, 56 U. CHI. L. REV. 423, 428 (1989) (stating that staff attorneys often draft opinions before judges see the briefs); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 765 (1989) (discussing decline in quality of judge's work product); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2132 (1974) (discussing increased use of magistrates and masters).

83. Rubin, *supra* note 77, at 656.

84. A recent example of direct congressional involvement in procedure is the statutory override of the Supreme Court's interpretation of Rule 19 in *Martin v. Wilks*, 490 U.S. 755 (1989). See *The Civil Rights Act of 1991*, 42 U.S.C.A. § 2000e-2(n)(1)(A) (1994) (overruling Supreme Court decision by disallowing collateral attacks on employment discrimination claims after those claims have been litigated). The conflict over civil procedure also was the subject of one session—entitled "Who Makes the Rules?"—of the Association of American Law Schools Conference on Civil Procedure (the first in seven years) held in Washington, D.C., in June 1995.

85. In addition to the Civil Justice Reform Act and the Common Sense Legal Reform Act, see *infra* Parts II.B and C respectively, Congress has taken other steps in recent years to regulate federal procedure directly. Congress amended Rule 4 on service of process. See Pub. L. No. 97-462, 96 Stat. 2527 (codified as amended at 28 U.S.C. § 2071 (1983)). Congress also amended

A. *Background: The Rules Enabling Act*

Since 1938 when the Federal Rules of Civil Procedure were promulgated, the judiciary has been the primary source for civil rule changes. Under the Rules Enabling Act⁸⁶ as it operates today, proposed rule changes are drafted not by Congress, but by the Advisory Committee on Civil Rules consisting of prominent judges, lawyers, and law professors.⁸⁷ This committee solicits and considers comments by the public and eventually sends its recommendations to the Judicial Conference's Committee on Rules of Practice, Procedure, and Evidence. The Committee on Rules then forwards its recommendations to the Judicial Conference, which sends recommendations to the Supreme Court of the United States.⁸⁸ The Supreme Court then has the power to promulgate the new rules, which become effective after a period during which Congress has the opportunity to consider them and to reject or modify them.⁸⁹ The role of Congress for fifty-two years after 1938 thus was reactive and, for the most part, passive. That role changed significantly with the Civil Justice Reform Act of 1990.⁹⁰ Congress became even more active when the Republican Party took control and sought to enact legislation that was part of the "Contract with America."⁹¹

Rule 35. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4401 (codified as amended at 21 U.S.C. § 1501 (1989)). Congress also attempted to reject the 1993 discovery amendments to the Federal Rules of Civil Procedure. See Paul D. Carrington, *Learning from the Rule 26 Brouhaha: Our Courts Need Real Friends*, 156 F.R.D. 295, 302-07 (1994) (outlining how different interest groups attempted to persuade Congress to reject amendments). The conflict over procedure may have even deeper roots, dating back to the controversy in the 1970s regarding the Federal Rules of Evidence, and some of its most recent manifestations also concern the evidence rules. See McCabe, *supra* note 10, at 1683-87 (discussing controversy over rulemaking process surrounding enactment of Federal Rules of Evidence).

86. 28 U.S.C. § 331, 2071-2077 (1994). For background on the passage of the Rules Enabling Act, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015 (1982) (discussing how history of Act's passage can provide guidance and insight for today's federal rulemakers); Carrington, *supra* note 85, at 297-99 (documenting history of passage of Act); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 499-515 (1986) (discussing how Act was debated and interpreted immediately prior and subsequent to its enactment).

87. See generally McCabe, *supra* note 10, at 1656-75 (providing overview of rulemaking process). For a detailed discussion of both the history and the current procedures of federal rulemaking, see *A Self Study of Federal Judicial Rulemaking—A Report from the Subcommittee on Long Range Planning to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, 168 F.R.D. 679 (1996).

88. See McCabe, *supra* note 10, at 1672-74 (detailing public comment period and Supreme Court approval components of rulemaking process as required by 1988 amendments to Rules Enabling Act).

89. See *id.*

90. 28 U.S.C. §§ 471-482 (1994).

91. See H.R. 10, 104th Cong. (1995) (proposing vast changes in federal and state civil justice systems in accordance with "Contract with America").

B. *The Civil Justice Reform Act*

1. *Origins of the Act*

The Civil Justice Reform Act ("CJRA")⁹² marked a radical departure from the Rules Enabling Act. Unlike most procedural changes, the initiative for the CJRA came from Congress rather than from the committees established by the Rules Enabling Act.⁹³

The legislation passed over the objections of the judiciary. Senator Joseph Biden (D-Del.), then chairman of the Senate Judiciary Committee, was the driving force behind the CJRA, which was dubbed the "Biden Bill."⁹⁴ He began by assembling a task force co-sponsored by the Foundation for Change and the Brookings Institute to study and make recommendations concerning the civil justice system.⁹⁵ Senator Biden wrote that the purpose of the task force was to bring together a diversified group to study the problems of expense and delay in federal civil cases.⁹⁶ Significantly, no sitting federal judge was a member of the task force, although two former judges participated.⁹⁷ The task force recommended mandating that each district adopt certain techniques and reforms and a plan describing how the reforms would be implemented.⁹⁸ The individual district plans, however, were to be merely details of the implementation of the task force's uniform design.

The initial legislation closely tracked the recommendations of the task force.⁹⁹ The bill, however, encountered immediate vociferous

92. 28 U.S.C. §§ 471-482.

93. See Deanell Reece Tacha, *Judges and Legislators: Enhancing the Relationship*, 44 AM. U. L. REV. 1537, 1548 (1995). For general background on the evolution of the CJRA, see S. REP. NO. 101-416 (1990), reprinted in 1990 U.S.C.C.A.N. 6802.

94. See Deanell Reece Tacha, *Judges and Legislators: Renewing the Relationship*, 52 OHIO ST. L.J. 279, 279 (1991).

95. For an excellent discussion of the background of the CJRA, see Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1303-06 (1994) (discussing perceived problems with civil justice system and government proposals for reform preceding passage of CJRA).

96. See Joseph R. Biden, Jr., *Introduction to Symposium on the Civil Justice Reform Act*, 67 ST. JOHN'S L. REV., at i, i (1993).

97. See BROOKINGS INST., JUSTICE FOR ALL: REDUCING COSTS AND DELAY IN CIVIL LITIGATION 1 (1989) (listing Shirley Hufstедler, former federal judge for the Ninth Circuit, and Norman Krivosha, former Chief Justice of the Nebraska Supreme Court, as members of task force).

98. See *id.*

99. See *id.* at 2-3 (recommending that Congress direct each federal district court to develop formal plans to reform civil justice system); see also Rand Institute for Civil Justice, *Evaluating the Civil Justice Reform Act of 1990* (visited Oct. 20, 1996) <<http://www.rand.org/publications/RB/RB9022/RB9022.html>> [hereinafter *Rand CJRA Report*] (stating that recommendations of Sen. Biden's Task Force on Civil Justice Reform ultimately were incorporated into legislation).

opposition from the judiciary,¹⁰⁰ especially the Judicial Conference of the United States, which accused Congress of attempting to "micromanage" the federal courts' business. The position of the Judicial Conference was summed up by the late Judge Robert Peckham in hearings before the Senate Judiciary Committee:

I come to bring you the position of the executive committee of the Conference and tell you why we can't endorse the bill. First, we have told you about the 14-point program of the Judicial Conference [an alternative reform proposal], and we feel that will have the same effective impact that the legislation will have.

But, second, the executive committee fears that the statute would circumvent the procedures established and recently reendorsed by Congress in the Rules Enabling Act, and set a precedent for unwise departures from the rulemaking process.

We feel there is a great balance in the provisions of the Rules Enabling Act, that it took ten years in gestation from 1924 to 1934. And as I indicated, it has been revisited and recently reendorsed. It allows a deliberative process at the beginning. It allows comment from judges and scholars and lawyers.¹⁰¹

Despite the intensity of the opposition, Congress passed the CJRA and the President signed it into law less than one year after it had been introduced. By the time it passed, however, the legislation had changed fundamentally. It did not mandate particular reforms, but rather local study and response to the perceived problems of excessive cost and delay in civil litigation.¹⁰² Nevertheless, the CJRA was a radical departure from the Rules Enabling Act¹⁰³ and involved Congress much more directly in dictating procedure in the federal courts.

2. *The Act's provisions*

a. *The role of advisory groups*

The first step under the CJRA was the creation of Advisory Groups for each district.¹⁰⁴ The judges in each district were to decide who

100. See Tacha, *supra* note 93, at 1541 ("The Judicial Improvements Act [of which the CJRA was one component], as introduced, contained numerous provisions relating to civil case management and provoked significant concerns among members of judiciary. The debate during the development of that bill often put the two branches in juxtaposed positions, even though they shared common goals.").

101. *The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong. 316-17 (1990).

102. See 28 U.S.C. § 478 (1994).

103. *Id.* § 2072.

104. See *id.* § 478.

would be members, subject to the restriction in the CJRA that each Advisory Group contain representatives of the primary types of litigants in each district.¹⁰⁵ The greatest percentage of Advisory Group members, by far, are attorneys who practice in the district.¹⁰⁶ The Advisory Groups' duties were to report, recommend, and explain. The reporting function includes: (1) assessment of the district's civil and criminal dockets, trends in case filings, and other demands on the courts' resources; (2) identification of the principal causes of cost and delay in the district; and (3) examination of how to reduce cost and delay by better assessment of the impact of new legislation on the courts.¹⁰⁷ The core of the Advisory Groups' job has been to recommend particular reforms to be adopted in each district to reduce cost and delay in light of local conditions.¹⁰⁸ The Advisory Groups thus appeared to decentralize the power previously concentrated under the Rules Enabling Act.

b. Cost and delay reduction principles and techniques

Despite the appearance of local autonomy, Congress gave quite detailed instructions in § 473 of the CJRA and required the Advisory Groups to explain how their plans complied with the Act.¹⁰⁹ Most of § 473 is taken up with inventories of "principles and guidelines of litigation management and cost and delay reduction."¹¹⁰ Every CJRA Advisory Group must consider these principles and techniques, although only "pilot courts" are required to adopt them.¹¹¹ The pilot courts are located in districts that were selected as sites for an extensive study of the effectiveness of the CJRA's principles and techniques for reducing cost and delay.

The CJRA requires that every district court must approach its plan for cost and delay reduction with six principles in mind: (1) systematic, differential treatment of cases of differing complexity (also known as "tracking" cases); (2) early and ongoing judicial involvement in planning the progress of a case—such as by imposing limits on the amount or time for discovery, setting an early, firm trial date, and setting deadlines for the filing and disposition of motions; (3) close

105. *Id.* § 478(b).

106. See Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L. REV. 879, 891 (1993) (stating that most advisory groups consist of attorneys).

107. See 28 U.S.C. § 472(c)(1)(A)-(D).

108. See *id.* § 472(b)(3).

109. See *id.* § 473.

110. *Id.* § 473(a).

111. See *id.* § 473(a), (b).

monitoring of complex cases, with particular attention to the possibility of bifurcating issues for trial and conducting discovery in stages or "phases"; (4) encouragement of cost-effective discovery "through the use of cooperative discovery devices"; (5) prohibition of filing motions without a certification that the parties have attempted to resolve the dispute informally; and (6) authorization to refer cases to alternative dispute resolution programs such as mediation, minitrial, summary jury trial, or other programs authorized by the district (such as court-annexed arbitration).¹¹²

In addition to the principles that each Advisory Group must consider, there are six "litigation management and cost and delay reduction techniques" that must be considered and may be included. These techniques are: (1) a joint discovery-case management plan to be submitted early in the case; (2) a requirement that attorneys attend pretrial conferences with authority to bind their clients on designated issues for discussion (which could include a mandatory settlement conference); (3) a requirement that the attorney and the client sign all requests for extension of time for discovery or continuance of a trial date; (4) an evaluation program in which a neutral court representative meets with the parties early in a case to assess the possibilities of settlement, discovery planning, or both; (5) a requirement that parties or representatives of parties with authority to make settlement decisions be present or available by telephone during a settlement conference; and (6) such other techniques as appear to be appropriate in light of the assessments made of the district's needs.¹¹³

c. The contents of the plans

After the Advisory Groups completed their work, each district court was to promulgate its delay and expense reduction plan.¹¹⁴ Every district court now has done so.¹¹⁵ Some districts chose to have their plans in place by December 1993 and thereby qualify for additional financial assistance in connection with their plans.¹¹⁶ These "early implementation district" plans displayed enormous variety.¹¹⁷ For

112. See *id.* § 473(a).

113. See *id.* § 473(b).

114. See *id.* § 472(a), (d).

115. See Rand Institute for Civil Justice, *Just, Speedy, and Inexpensive? An Evaluation of Judicial Case Management Under the Civil Justice Reform Act* (visited Mar. 9, 1997) <<http://www.rand.org/publications/MR/MR800/MR800.html>>.

116. See 28 U.S.C. § 471 note.

117. See AMERICAN BAR ASS'N, REPORT OF THE TASK FORCE ON THE CIVIL JUSTICE REFORM ACT 2 (1992) [hereinafter ABA TASK FORCE REPORT]; see also *Rand CJRA Report*, *supra* note 99

example, the CJRA required each district to consider the establishment of different "tracks" of cases, each to receive a different amount of management from the court.¹¹⁸ In the early implementation and pilot districts alone (a total of thirty-four districts), nine districts rejected the idea altogether.¹¹⁹ Three established two tracks, seven established three tracks, and the rest established between four and seven tracks of cases.¹²⁰ In some districts, tracking is entrusted to judicial discretion, and in others either it is rule-based or the attorneys select the track.¹²¹ If one purpose of the CJRA was to engender ninety-four "experiments," then the variety evident in the CJRA plans indicates that the statute has been a success in this regard. The overriding point is that the experiments are being conducted according to a protocol dictated by Congress.¹²² The CJRA thus bypassed the Rules Enabling Act and commanded reform by direct legislation.¹²³ The CJRA, however, was not the last of such legislation.

C. *The Common Sense Legal Reform Act*

The "Contract with America," the platform upon which the Republican Party ran and obtained control of both Houses of Congress in 1994, promised further reform of the civil justice system.¹²⁴ These reforms originally were part of one bill, H.R. 10, that was introduced early in the first session of the 104th Congress.¹²⁵ With this legislation, Congress took the next significant step toward a confrontation with the judicial branch over control of procedure in the federal courts.

("Variation in how districts approach case management is great and has increased since the pilot district programs went into effect. . . . These large differences between districts in case management policies give us the opportunity to evaluate very different policies, even if the districts that use them did not change significantly as a result of the CJRA.")

118. See 28 U.S.C. 473(a)(1).

119. See ABA TASK FORCE REPORT, *supra* note 117, at App. A-2.

120. See *id.*

121. See *Rand CJRA Report*, *supra* note 99 (discussing variations in how CJRA has been implemented).

122. See *id.* (stating that all pilot districts adopted plans that included six principles required by Act and that plans met CJRA requirements).

123. See 28 U.S.C. §§ 471-482 (dictating reform of civil justice system without altering Federal Rules).

124. For background on the "Contract with America" and how it became embodied in various items of legislation, see Philip D. Bostwick, *Civil Justice Reform Through Federal Legislation: Watching the House, the Senate, and the President Make Sausage*, in CIV. PRAC. & LITIG. TECH. IN THE FED. CTS., at 321 (ALI-ABA Course Study Materials, Dec. 14-16, 1995).

125. See Weiner, *supra* note 12, at 1 (noting that bill was introduced on January 4, 1995). For a general discussion and critique of the proposals in H.R. 10, see Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699 (1995).

1. *The Private Securities Litigation Reform Act of 1995*

The various procedural reforms that were part of the original legislation implementing the "Contract with America" were incorporated into several bills for separate consideration. Only the Private Securities Litigation Reform Act of 1995¹²⁶ has become law. This Act contains a number of procedural changes applicable to the pretrial phase of securities fraud cases.¹²⁷

The Act contains a heightened pleading standard beyond the requirement under Rule 9(b)¹²⁸ that fraud be alleged "with particularity."¹²⁹ For all cases in which the plaintiff alleges that the defendant made a misleading statement or a material omission, the plaintiff must specify each statement that was misleading, why it was misleading, and, as to any such allegation made on information and belief, a statement with particularity of all facts upon which the plaintiff's belief is formed.¹³⁰ Also, the plaintiff can recover only upon stating with particularity facts giving rise to a strong inference that the defendant acted with a particular state of mind.¹³¹

The Act requires the court to stay all discovery during the pendency of a motion to dismiss unless a party can demonstrate undue prejudice or unless particularized discovery is necessary to preserve evidence.¹³² During such a stay, however, all parties must preserve relevant evidence as if it has been requested under Rule 34.¹³³ Those who willfully disobey this obligation are subject to "appropriate sanctions."¹³⁴ In addition, the Act exempts defendants from liability for certain "forward-looking statements" and stays discovery, other than discovery relating to the applicability of the exemption, during the pendency of any motion for summary judgment based on the exemption.¹³⁵

126. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C.A. §§ 77a to 78u-5 (West Supp. 1996)).

127. See generally Mary S. Deimer, *Reforms Change Landscape of Securities Litigation*, LITIG. NEWS, Mar. 1996, at 1, 4 (summarizing and discussing potential effects of Act).

128. FED. R. CIV. P. 9(b) (requiring that all averments of fraud or mistake state with particularity the circumstances constituting fraud or mistake).

129. 15 U.S.C.A. § 78u-4(b)(1) (West Supp. 1996).

130. See *id.* § 78u-4(b)(1).

131. See *id.* § 78u-4(b)(2).

132. See *id.* § 78u-4(b)(3)(B). For a discussion of how the courts are interpreting this section, see *Questions About Discovery Stay Surface with Private Securities Litigation Reform Act*, FED. DISCOVERY NEWS, May 1996, at 2.

133. See 15 U.S.C.A. § 78u-4.

134. *Id.* § 78u-4(b)(3)(C)(ii).

135. See *id.* § 78u-5(f).

The Act requires the court in every securities fraud case to make specific findings regarding whether the parties and attorneys have complied with Rule 11(b) with respect to every complaint, responsive pleading, and dispositive motion.¹³⁶ Federal Rule of Civil Procedure 11(b) requires attorneys to make a reasonable inquiry before signing a pleading and provides that a signature is a certification that the pleading is not being presented for an improper purpose.¹³⁷ The signature also certifies that the legal contentions are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law, and that the factual contentions have evidentiary support or are likely to have evidentiary support after additional time for investigation and discovery.¹³⁸ If the court finds that Rule 11(b) has been violated, it must impose sanctions.¹³⁹ Those sanctions are presumed, for a complaint that violates the rule, to be the expenses and attorneys' fees incurred in the action.¹⁴⁰ For a responsive pleading or dispositive motion, those sanctions are presumed to be fees and expenses incurred as a direct result of the violation.¹⁴¹ The presumption can be rebutted by evidence that the violation was de minimis (such as one count from a multi-count complaint) or that the award of fees would be an unjust and unreasonable burden.¹⁴² If the presumption is rebutted, the court is to impose "appropriate" sanctions.¹⁴³

In a securities fraud class action, the lead plaintiff must certify that: (1) he or she reviewed and authorized the filing of the complaint; (2) the plaintiff did not purchase the securities at the direction of counsel or in order to participate in a suit; and (3) the plaintiff is willing to serve as lead plaintiff for the class.¹⁴⁴ Also, the lead plaintiff has twenty days after filing the complaint to provide notice to members of the class in a widely circulated business publication to invite them to volunteer to serve as lead plaintiff.¹⁴⁵ The Act requires the court to appoint the "most adequate plaintiff" and to presume that the member of the class who has sought to represent the class and who has the largest financial stake is the most adequate plaintiff.¹⁴⁶ The

136. See *id.* § 78u-4(c)(1).

137. See FED. R. CIV. P. 11(b).

138. See *id.*

139. See 15 U.S.C.A. § 78u-4(c).

140. See *id.* § 78u-4(c)(3)(A)(ii).

141. See *id.* § 78u-4(c)(3)(A)(i).

142. See *id.* § 78u-4(c)(3)(B)(i)-(ii).

143. See *id.* § 78u-4(c)(3)(C).

144. See *id.* § 77z-1(a)(2)(A)(i)-(iii).

145. See *id.* § 77z-1(a)(3)(A)(i)(I)-(II).

146. See *id.* § 77z-1(a)(3)(B).

presumption that the largest stakeholder will be the most adequate plaintiff may be rebutted by a showing that the plaintiff will not represent the class fairly and adequately or is subject to unique defenses.¹⁴⁷ The lead plaintiff, as appointed by the court, will choose lead counsel, subject to the court's review as necessary to protect other members of the class.¹⁴⁸

With certain narrow exceptions, a plaintiff may recover from each defendant only the proportion of the damage caused by that defendant, unless that defendant committed a knowing violation of the securities laws.¹⁴⁹ With the elimination of joint and several liability in such cases comes an important provision to encourage settlement: claims for contribution against a settling defendant are barred.¹⁵⁰ In addition, settlement notices for class actions must contain specific information.¹⁵¹ The notice must disclose the aggregate amount to be paid to the class and the amount calculated on an average per share basis.¹⁵² The notice also must contain a joint statement, if agreement can be reached, of the amount per share that the plaintiff will recover if the plaintiff prevails on each claim.¹⁵³ If the parties cannot agree, the notice must contain a statement regarding the areas of disagreement.¹⁵⁴ The notice also must contain an explanation of why the parties are proposing to settle the case and a statement and explanation of any fees that are to be paid from the common fund.¹⁵⁵

These examples, which are not intended to be exhaustive, illustrate the pervasive procedural impact that this legislation will have. In effect, Congress has rewritten Federal Rules of Civil Procedure 9, 11, 23, and 26 without following the more circuitous procedures of the Rules Enabling Act. The movement that began with the CJRA has accelerated from congressionally imposed local experimentation to uniform statutory procedures.

147. *See id.* § 77z-1(a)(3)(B)(iii)(II)(aa)-(bb). The plaintiff may conduct discovery to discern who the most adequate plaintiff is only if the plaintiff first demonstrates a reasonable basis for finding that the party with the largest financial stake is incapable of being an adequate representative. *See id.* § 77z-2(a)(3)(B)(iv). One purpose of this provision is to increase the role of institutional investors in directing securities litigation. *See* H.R. CONF. REP. NO. 104-369, at 30 (1995), *reprinted in* 1996 U.S.C.A.N. 730, 747.

148. *See* 15 U.S.C.A. § 77z-1(a)(3)(B)(v).

149. *See id.* § 78u-4(g)(2).

150. *See id.* § 78u-4(g)(7)(A).

151. *See id.* § 77z-1(a)(7).

152. *See id.* § 77z-1(a)(7)(A).

153. *See id.* § 77z-1(a)(7)(B)(i).

154. *See id.* § 77z-1(a)(7)(B)(ii).

155. *See id.* § 77z-1(a)(7)(C), (E).

2. *The procedural impact of other proposed legislation*

Although the Private Securities Litigation Reform Act of 1995 is the only aspect of "Common Sense Legal Reform" that has become law, the Republican majority in the 104th Congress attempted to make a number of other procedural changes by direct legislation. In particular, the Attorney Accountability Act (which passed in the House but on which the Senate took no action) would have enacted three procedural reforms.¹⁵⁶

The Attorney Accountability Act would have amended 28 U.S.C. § 1332 (and bypassed Federal Rule of Civil Procedure 68)¹⁵⁷ to provide for written offers of settlement not less than ten days before trial of a diversity case.¹⁵⁸ If the offeree rejected the offer but failed to obtain a better result by going to trial, the offeree would have been obliged to pay the reasonable attorneys' fees and expenses incurred after the offer was rejected, unless the court found that requiring this payment would be "manifestly unjust."¹⁵⁹ For example, a plaintiff whose offer to settle for \$250,000 was rejected would have been able to recover the post-offer fees and expenses if the final judgment exceeded that offer. The defendant in that case who made an offer of \$100,000 would have recovered post-offer fees and expenses if the final judgment was less than \$100,000. Any final judgment between these figures would have resulted in each party bearing its own costs and fees, absent another basis for shifting the costs and fees to the other party.¹⁶⁰

The Attorney Accountability Act also would have amended Federal Rule of Civil Procedure 11.¹⁶¹ The Act would have made Rule 11 applicable to discovery and would have made the imposition of sanctions for a violation of the rule mandatory.¹⁶² It would have eliminated the "safe harbor" provision added in 1993 that requires a Rule 11 motion to be served but not filed and gives the offending

156. See Attorney Accountability Act of 1995, H.R. 988, 104th Cong.

157. Rule 68 is entitled "Offer of Judgment" and provides for payment of costs if an offer is rejected and the judgment obtained is not more favorable than the offer. See FED. R. CIV. P. 68.

158. See H.R. 988 (proposing amendment to 28 U.S.C. § 1332(e)(1)); H.R. REP. NO. 104-62, at 1 (1995).

159. See H.R. REP. NO. 104-62, at 2 (1995).

160. See Bostwick, *supra* note 124, at 4-5 (discussing allocation of attorney's fees and expenses between parties).

161. For a critique of this provision, see Carl Tobias, *Why Congress Should Reject Revision of Rule 11*, 160 F.R.D. 275 (1995) (arguing that revision would reinstate satellite litigation and chilling effects, problems that Rule 11 was intended to cure).

162. See H.R. REP. NO. 104-62, at 18 (proposing amendment to Federal Rule of Civil Procedure 11).

party twenty-one days to withdraw the offending pleading before the motion can be filed and sanctions can be imposed.¹⁶³ Finally, the amended Rule 11 would have resulted in more frequent shifting of fees because it would have required the sanction imposed to be sufficient not only to deter violations but also to compensate those who had been victims of such violations.¹⁶⁴

A final pretrial change in the Attorney Accountability Act would have involved an amendment to the Federal Rules of Evidence rather than the Federal Rules of Civil Procedure.¹⁶⁵ Under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,¹⁶⁶ the trial judge must undertake to decide whether scientific testimony is scientifically valid and whether it will assist the trier of fact in the particular case.¹⁶⁷ Even if the evidence meets these criteria, the trial judge remains free to rule that it is inadmissible if its probative value is outweighed substantially by dangers of confusing the issues or misleading the jury.¹⁶⁸ Such decisions often are made at a pretrial stage when, for example, a motion for summary judgment must be granted if the plaintiff's scientific evidence on a crucial element of the case is inadmissible.¹⁶⁹ The legislation would have required the exclusion of scientific evidence unless it was found to be scientifically valid and reliable and to have a valid connection to the fact that it is offered to prove.¹⁷⁰ Perhaps most significantly, the bill would have required the probative value of the evidence to outweigh the dangers of misleading the jury and confusing the issues, rather than the current standard that the dangers "substantially outweigh the probative value."¹⁷¹ Thus, the bill would have reversed the standard.¹⁷² Although the Attorney Accountability Act did not become law in the

163. See *id.*

164. See *id.* at 19.

165. See *id.*

166. 509 U.S. 579 (1993).

167. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592-93 (1993).

168. See *id.*

169. See *id.* In fact, this was the precise posture of the *Daubert* decision itself. On remand, the United States Court of Appeals for the Ninth Circuit held that summary judgment for the defense would be appropriate because the plaintiffs' proffered expert testimony was inadmissible. See *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (1995).

170. See H.R. REP. NO. 104-62, at 18-19.

171. *Id.* Reading Rule 702 in conjunction with Rule 403, the existing standard requires the danger of misleading the jury with scientific evidence to substantially outweigh its probative value for the evidence to be excluded. See FED. R. EVID. 702 (allowing for admission of scientific evidence if it will assist trier of fact to understand the evidence or to determine a fact at issue); FED. R. EVID. 403 (stating that relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay or waste of time).

172. See Laird C. Kirkpatrick, *Legislation—Proposed Rules Amendments*, COMMITTEE ON TRIAL EVIDENCE, Spring 1995, at 8.

104th Congress, it is another important example of Congress' attempt to regulate pretrial procedure directly. It is clear that Congress is undertaking to reform procedure directly with increasing frequency and determination. The implications of this movement, in the context of other actions by Congress related to the federal courts, are particularly disturbing.

D. *Implications of Direct Reform*

Increased direct congressional regulation of procedure is making practice in the federal courts more complex. The Federal Rules of Civil Procedure were intended to be uniform throughout the United States.¹⁷³ Geographic uniformity is gone, however, in part due to the CJRA.¹⁷⁴ With that Act, Congress required the district courts to adopt procedures that were tailored to the individual district. The result has been the "balkanization" of procedure.¹⁷⁵ The careful practitioner now must check the Federal Rules of Civil Procedure, the local Civil Justice Expense and Delay Reduction Plan, the local rules of court, and the standing orders of the individual judge to whom the case is assigned.¹⁷⁶ This complexity is not without its costs.

The proliferation of local differences creates what Professor Paul Carrington has called "legal clutter":

Legal clutter is the enemy of simplicity; the more such material is placed in the hands of parties and lawyers, the more billable hours will be expended, but the less well-read and well-understood the real rules will be, and the more likely that litigation will digress from the merits to satellite controversies.¹⁷⁷

173. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 672-73 (stating that the fundamental element of original Rules was to promulgate uniform means for local courts to exercise control).

174. See generally Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1447, 1448 (1994) (bemoaning Act's effects on uniformity and simplicity of Federal practice under national procedure rules); Carl Tobias, *Civil Justice Reform and the Balkanization of Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1393 (1992) (cautioning against "balkanization" of federal procedural system).

175. See Tobias, *supra* note 174, at 1393; see also Carrington, *supra* note 85, at 304 (noting that there is "some risk that the CJRA will indeed result in the complete unraveling of national procedural standards as we have known them for the last half century").

176. For an analysis of some of the issues raised by these overlapping and sometimes contradictory sources of authority, see Edwin J. Weseley, *The Civil Justice Reform Act; The Rules Enabling Act; The Amended Federal Rules of Civil Procedure; CJRA Plans; Rule 83—What Trumps What?*, 154 F.R.D. 563, 577-78 (1994).

177. Carrington, *supra* note 81, at 947-48 (citing JOHN P. FRANK, *AMERICAN LAW: THE CASE FOR RADICAL REFORM* 86-90 (1969)); see also Standing Committee on Rules of Practice and Procedure, Minutes of the Meeting 3 (June 23-24, 1994), available in 1994 WL 880354 ("Several of the members stated that the Civil Justice Reform Act had caused procedural uncertainty and confusion in the district courts. The bar was expressing concern that it is difficult to determine precisely what procedures are in effect in a given district in light of the CJRA experimentation

If Congress passes general legislation like the Attorney Accountability Act,¹⁷⁸ practitioners will have to consult additional provisions of title 28 of the U.S. Code as well.¹⁷⁹

With the Private Securities Litigation Reform Act of 1995,¹⁸⁰ Congress introduced a new type of complexity: different procedural rules for different types of cases. The Federal Rules of Civil Procedure were intended not only to be geographically uniform but also "trans-substantive" (the same rules apply to all civil actions).¹⁸¹ Now, however, Rule 11 means one thing for securities cases and something else for other cases. Likewise, Rule 23 means one thing for securities cases and something else for other types of class actions. The standard for pleading a securities case no longer can be found in Rules 8 or 9, but rather is embodied in a separate statute.¹⁸² The Federal Rules govern only sometimes. If this Act is the first of many of its type, a Congress that began with the intent of simplifying legal processes may have made them exponentially more complex.

An especially troubling aspect of direct reform of procedure—such as the Private Securities Litigation Reform Act of 1995—is the politicization of the rulemaking process. The primary proponents of the legislation intended not just to improve securities litigation but to bury it, or at least to limit it.¹⁸³ The underlying concerns were not procedural at all, but rather substantive and political: what should the standards of liability for securities fraud be and who should enforce them? To the extent that this statute foretells the piecemeal politicization of procedural rulemaking, it bodes ill for a national, uniform system of procedure.¹⁸⁴

Congress and the courts are battling for control of procedure in federal courts. In recent years, Congress has asserted a more direct role in establishing that procedure, which has led to increased

....").

178. H.R. 988, 104th Cong. (1995).

179. Presumably, future statutory changes to federal procedure would be codified in title 28 of the U.S. Code.

180. Pub. L. No. 104-67, 109 Stat. 737 (codified as amended at 15 U.S.C.A. §§ 77a to 78u-5 (West Supp. 1996)).

181. See Paul D. Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2078 (1989); see also FED. R. CIV. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature . . .").

182. See 15 U.S.C.A. §§ 77a to 78u-5 (requiring that securities pleadings contain even greater specificity than is required under Federal Rules of Civil Procedure).

183. For example, Title I of the Act is entitled "Reduction of Abusive Litigation." See Pub. L. No. 104-67, 109 Stat. 737.

184. See Carrington, *supra* note 85, at 310 ("If the Civil Rules are to become the plaything of factional politics of the sort ordinarily prevailing on the Hill, the quality of our adjective [sic] law must diminish as one group after another gains a special advantage for itself.").

complexity and disuniformity. Considered in conjunction with the budgetary disputes already described, these procedural battles are significant, further illustrations of the deteriorating relationship between Congress and the courts.

III. REFORMING THE RELATIONSHIP BETWEEN CONGRESS AND THE COURTS

The present relationship between Congress and the courts has had ill effects on the federal court system and must be reformed. The *Long Range Plan* rejects confrontation with Congress and instead contains numerous proposals that require congressional action or forbearance.¹⁸⁵ It does not go far enough, however, toward solving the problems of recurrent budget battles or conflicts over procedure. Part III sets forth how the *Long Range Plan* proposes to address these issues and suggests some further steps.

A. *The Overall Approach: Conciliation, Not Confrontation, with Congress*

Before discussing how the *Plan* addresses the questions of resources and procedural reform, and before any critique of the particulars of the *Plan* is undertaken, it bears noting that the *Plan* rejects confronting Congress with an assertion of inherent judicial power over these issues.¹⁸⁶ There is precedent for such an assertion with respect to both resources and procedure, but the approach of the *Plan* to seek accommodation with Congress was the prudent course.¹⁸⁷

Numerous state courts have confronted legislative bodies and sought to compel adequate funding of judicial operations. For example, in 1970, the judges of the Court of Common Pleas in Philadelphia filed suit to force the mayor and the City Council of Philadelphia to appropriate additional money.¹⁸⁸ The Supreme Court of Pennsylvania held:

[T]he judiciary must possess the inherent power to determine and compel payment of those sums of money which are reasonable and

185. See Sarah Evans Barker, *Federal Court Long Range Planning: Fine Lines and Tightropes*, 71 IND. L.J. 859, 864 (1996) ("Many, if not most, of the important recommendations throughout the *Plan*, in order to become general public policy, will require either positive legislation or forbearance from legislation that already has been or soon could be offered as a bill in Congress."); see also Editorial, *A New Approach to Long-Range Planning for the Federal Courts*, 79 JUDICATURE 4, 4-5 (1995) (criticizing the *Plan's* concentration on legislative matters).

186. See LONG RANGE PLAN, *supra* note 13, at 2 ("Congress sets the courts' budgets and the scope of federal jurisdiction . . .").

187. See *Commonwealth v. Tate*, 274 A.2d 193, 197 (Pa. 1971) (holding that as co-equal branch of government, courts must be funded adequately to avoid "any impairment").

188. See *id.*

necessary to carry out its mandated responsibilities, and its powers and duties to administer justice, if it is to be in reality a co-equal, independent branch of our government.¹⁸⁹

With only a few exceptions, courts that have faced the issue have held that the courts do possess inherent power to compel legislatures to fund the judiciary adequately.¹⁹⁰ In a recent example, the former Chief Judge of the New York Court of Appeals, Sol Wachtler, sued Governor Mario Cuomo on behalf of the judiciary.¹⁹¹ The legal grounds for a confrontation with Congress over its refusal to appropriate the funds made necessary by its jurisdictional legislation are present, if the federal courts choose to assert them. The *Long Range Plan* pointedly notes the existence of the legal precedent but just as clearly disclaims any interest in using it:

Separation of powers principles require that no branch of government deprive another of either the power or the resources it needs to perform its core functions. Discharge of the judicial function as an independent branch requires resources sufficient for the judiciary to perform all its constitutional and statutory mandates. Unlike several state judiciaries, which have asserted an inherent right to compel funding beyond the regular appropriations for judicial functions, federal courts depend upon the Congress to provide them with sufficient resources. Chronic failure to provide adequate resources puts federal judges in the unfortunate position of supplicants, constantly begging the Congress for funds.¹⁹²

The judiciary has chosen, for now, not to confront Congress over the budget, but rather to convince Congress to balance the demands it places on the courts with the resources it provides.

Inherent power also is a potential source of authority for the courts to resist the direct imposition by Congress of procedural reforms such as the CJRA and the Private Securities Litigation Reform Act.¹⁹³ Professor Linda Mullenix has argued forcefully that the CJRA is unconstitutional precisely because it interferes with the inherent power of the courts over procedure.¹⁹⁴ The argument that Congress

189. *Id.*

190. See generally Note, *The Courts' Inherent Power to Compel Legislative Funding of Judicial Functions*, 81 MICH. L. REV. 1687, 1688 n.8 (1983) (citing cases that have found that courts have inherent authority to compel appropriations).

191. See generally Howard B. Glaser, *Wachtler v. Cuomo: The Limits of Inherent Power*, 14 PAGE L. REV. 111 (1994); Walter E. Swearingen, Note, *Wachtler v. Cuomo: Does New York's Judiciary Have an Inherent Right of Self-Preservation?*, 14 PAGE L. REV. 153 (1994).

192. LONG RANGE PLAN, *supra* note 13, at 94.

193. See *supra* Part II.

194. See Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1293 (1993) (articulating that federal courts are not

violates the separation of powers when it directly legislates procedure is an old one.¹⁹⁵ Most recent scholars have concluded, however, that Congress has the constitutional authority to regulate procedure in the federal courts.¹⁹⁶ Although there is no question that the courts have some inherent power to control some procedures,¹⁹⁷ the *Long Range Plan* nowhere supports its use to resist direct reform of procedure. Its implicit assumption is that direct reform by Congress of procedural rules is unwise but not unconstitutional.¹⁹⁸

bound to follow another branch's interpretation of constitution).

195. See John H. Wigmore, *All Legislative Rules for Judicial Procedure Are Void Constitutionally*, 23 U. ILL. L. REV. 276, 277-79 (1928) (arguing that courts must determine own procedural rules and stating that when legislative bodies determine judicial procedures, such rules are void constitutionally).

196. See, e.g., S. REP. NO. 101-46, at 9-12 (1990); Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, 54 LAW & CONTEMP. PROBS. 105, 114 (1991); Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 699 (1995).

197. See *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 561 (3d Cir. 1985) ("Inherent power has been frequently invoked by the courts to regulate the conduct of the members of the bar as well as to provide tools for docket management."); Felix F. Stumpf, *INHERENT POWERS OF THE COURTS I* (1994) ("The judiciary's inherent powers have been often exercised in a wide variety of situations, such as regulating members of the bar, utilizing contempt powers, enforcing decrees, promulgating court rules, and mandating increased expenditure for courts. Despite its extensive exercise, learned writers have described the concept as 'shadowy' and 'nebulous.'"); Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 TEX. L. REV. 1805, 1806 (1995) ("Inherent authority is well established and widely accepted in the state and federal judiciaries . . .").

For a discussion of particular inherent procedural powers, see Hugh Macy Favor, Jr., Note, *Federal Courts Sanctioning Represented Parties Using Rule 11 and Their Inherent Power: You Can Run But You Cannot Hide*, 21 CAP. U. L. REV. 225, 226-27 (1992). For cases discussing these powers, see *Kohkonen v. Guardian Life Insurance Co.*, 114 S. Ct. 1673, 1676-77 (1994) (defining authority to enforce settlement agreements); *Chambers v. NASCO*, 501 U.S. 32, 44 (1991) (giving courts power to sanction bad faith conduct in litigation); *Roadway Express v. Piper*, 447 U.S. 752, 757-68 (1980) (discussing assessment of attorneys' fees); *Link v. Wabash Railroad Co.*, 370 U.S. 626, 632-33 (1962) (allowing courts to exercise their power to dismiss for want of prosecution); *Gulf Oil v. Gilbert*, 330 U.S. 501, 509-12 (1947) (dismissing for forum non conveniens); *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (finding that court has inherent power, if public interest is great enough, to stay one case while awaiting outcome of other case or cases); *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266-69 (10th Cir. 1995) (imposing sanctions to promote efficiency, to regulate the docket, and to deter frivolous filings); *In re Air Crash Disaster at Florida Everglades*, 549 F.2d 1006, 1020 (5th Cir. 1977) (awarding lead counsel fees); and *Carroll v. Jaques*, 926 F. Supp. 1282, 1286-87 (E.D. Tex. 1996) (sanctioning attorney for misconduct at deposition, including calling opposing attorney an "idiot" and a "slimy son-of-a-bitch"). For additional materials on this issue, see MANUAL FOR COMPLEX LITIGATION THIRD § 21.5 (1995) (describing inherent power to appoint experts to assist court, such as "technical advisors"); John Gibeau, *Mood-Altering Verdict: Judge Suspects Prozac Settlement Though Case Went to Jury*, A.B.A. J., Aug. 1996, at 18, 18 (granting power to conduct investigation to determine whether parties secretly had settled case before it was sent to jury); Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLIAMETTE L. REV. 743, 753 (1989) ("Implicit in this discussion is the suggestion that a judge cannot occupy both the role of mediator and the role of judge—as a matter of structure.").

198. See LONG RANGE PLAN, *supra* note 13, at 58-59 (arguing that although Congress may have constitutional power to enact procedural rules for courts, this power may be unwise to use because it creates numerous extra burdens for judiciary in adjudicating disputes). 5

Inherent power, whatever its contours, thus, was rejected by the drafters of the *Long Range Plan* as a solution for the federal courts for its current problems with Congress. With respect to funding, it is evident why the better part of valor is not to "compel" additional funds: the courts have no divisions upon which to call if Congress refuses.¹⁹⁹ The courts could summon appropriations, so could anyone, but would they come?²⁰⁰ Almost certainly not. Similarly, the courts could refuse to enforce procedural changes from Congress if they want to assert the inherent power to do so. But if the judiciary chose to precipitate a constitutional crisis with Congress, the judiciary would antagonize the institution that has the power of the purse. The judiciary's budget probably would suffer even more severe shortfalls as a result than it does already. Inherent judicial power is a fascinating academic concept, but perhaps it is best that its outer limits remain unknown.²⁰¹ Conciliation is the better part of valor, and the *Long Range Plan* wisely chooses this course. The only question is precisely what form this conciliation should take.

B. Resources

The *Long Range Plan* contains a chapter devoted to providing sufficient resources for the federal court system.²⁰² That chapter begins with the obvious proposition that the courts should receive the resources they need to do their job well.²⁰³ The *Plan* contains three specific proposals of immediate relevance: (1) making some budget items non-discretionary; (2) coordinating funding with jurisdictional changes; and (3) future reliance primarily on general appropriations rather than user fees.²⁰⁴

1. The creation of mandatory accounts

The *Long Range Plan* recommends that Congress include appropriations for the courts to discharge their constitutionally mandated

199. See Carrington, *supra* note 85, at 310 ("[T]he Article III judiciary has no more divisions than the Pope to engage in battle on Capitol Hill.").

200. See WILLIAM SHAKESPEARE, *THE FIRST PART OF KING HENRY THE FOURTH* act 3, sc. 1 ("Glendower: I can call spirits from the vasty deep. Hotspur: Why, so can I, or so can any man; But will they come when you do call for them?").

201. Professor Paul Carrington, after an extensive analysis of the roles of Congress and the courts with respect to procedure, recently wrote: "We do not know whether there is a fixed limit to the power of Congress over the federal courts, and we ought hope never to find out." Carrington, *supra* note 81, at 971.

202. See *LONG RANGE PLAN*, *supra* note 13, at 93-110.

203. See *id.* at 93.

204. See *id.* at 94-95.

functions as part of the "non-discretionary" federal budget.²⁰⁵ Technically, this proposal is to make payment of such expenses a "mandatory account" under the revised Budget Act,²⁰⁶ that is, one that must be funded fully. This proposal arises primarily from the recent problems with funds for juror fees and public defender services.²⁰⁷ Payment of juror fees already are, in effect, non-discretionary because litigants have a constitutional right to a jury trial, and by statute, jurors must be paid.²⁰⁸ Congress can and should designate these accounts as mandatory accounts and thereby remove them from the yearly budget debates. Efforts to include juror fees in the list of mandatory accounts, however, have failed thus far.²⁰⁹

Another approach to this problem would be to exempt expenditures such as juror fees from the Antideficiency Act.²¹⁰ The Act provides that an officer or employee of the United States may not "make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."²¹¹ An exemption could be fashioned for expenditures related to the provision of judicial services that are mandated by the Constitution, such as jurors in cases covered by the Seventh Amendment or the costs of defenders for criminal defendants under the Sixth Amendment.²¹² Although these proposals, either for the creation of additional mandatory accounts under the Budget Enforcement Act²¹³ or for amendments to the Antideficiency Act, appear to be technical, they could be significant in light of recent

205. See *id.* at 95.

206. See *Hollings Discusses Appropriations Work*, THE THIRD BRANCH, Feb. 1994, at 1, 10 (predicting possibility of shifting juror fee accounts, compensation of court appointed lawyers' accounts, and salary accounts of U.S. Court of Federal Claims, bankruptcy and magistrate judges to mandatory status).

207. See generally 28 U.S.C. § 1871 (1994) (paying jurors only \$40-per-day); Longan *supra* note 6, at 915 (arguing that not enough money is provided to pay jurors); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 431 n.481 (1995) (arguing that not enough money is provided to defend indigent clients resulting in overwhelming "economic disincentives for the lawyer to invest the time and the resources necessary to develop the client's case").

208. See 28 U.S.C. § 1871 (providing for \$40-per-day payment of juror fees).

209. See S. REP. NO. 103-19, at 34-35 (1993) (proposing to make juror fees mandatory account).

210. 31 U.S.C. § 1341 (1994). See generally Levin H. Campbell, *Memorandum to Judge William G. Young Re: Budget Committee Recommendations for the Federal Courts Study Committee*, 2 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990) (arguing that certain costs associated with federal court operations including juror fees, should be exempt from Antideficiency Act when constitutional mandate must be met).

211. 31 U.S.C. § 1341(a)(1)(A).

212. See Campbell, *supra* note 210, at 3 (raising question of whether "user fees" should be assessed from those able to afford such costs).

213. 2 U.S.C.A. § 900-904 (West Supp. 1996).

history with Congress. The *Long Range Plan* provides an important service by giving the issue the visibility it deserves. There are, however, larger issues with respect to which the *Plan* falls short or is misdirected.

2. *Coordination of resources and jurisdiction*

a. *The Plan: Encouraging Congress to behave*

As already shown, the primary resource problem for the federal courts has been that Congress has not coordinated federal jurisdiction with appropriations.²¹⁴ Recommendation 55 of the *Long Range Plan* provides that Congress should appropriate the money necessary to handle the consequences of new legislation.²¹⁵ The Federal Courts Study Committee recommended six years ago that an agency be established to advise Congress of the fiscal impact of proposed legislation.²¹⁶ In response, the Administrative Office of the U.S. Courts created the Judicial Impact Office.²¹⁷ There is at least one indication that Congress may be better able and willing now to coordinate its demands with its support. The final version of the 1994 crime bill,²¹⁸ unlike some of the earlier versions, contained authorization for an appropriation of \$200 million over five years to help the courts manage their expanded workloads.²¹⁹ The *Long Range Plan* encourages Congress to appropriate funds to pay for new legislation.²²⁰ Such coordination must become the rule, rather than the exception, if the courts are to operate smoothly. But there is a more definite solution.

b. *Beyond the Plan: Unfunded mandate reform for the courts*

If the fundamental problem with the judiciary's budget has been the failure to coordinate the demands placed on the judiciary with

214. See LONG RANGE PLAN, *supra* note 13, at 94 ("Congress should be urged to reduce the Judiciary's existing obligations sufficiently to offset the impact of any new legislation with a quantifiable judicial impact.").

215. See *id.*

216. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, 101st Cong. 89-90 (1990). This idea dates to as early as 1980. See Rubin, *supra* note 77, at 658-59.

217. See *Judicial Impact Office Takes Message to Congress*, THE THIRD BRANCH, May 1991, at 1. For an example of the work of the Judicial Impact Office, see JUDICIAL IMPACT OFFICE, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL IMPACT STATEMENT, VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1994 (1995).

218. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1795 (codified in scattered sections of U.S.C.).

219. One provision, for example, provides the judiciary with extra funding to handle cases involving violence against women. See 42 U.S.C.A. § 14002 (West Supp. 1996).

220. See LONG RANGE PLAN, *supra* note 13, at 94.

the resources provided, then the proposals of the *Long Range Plan* do not go far enough. It also would be helpful to exhort Congress not to impose unfunded mandates on the federal courts. Tracking the judicial impact of proposed legislation and reporting that impact to Congress would constitute another positive approach. A further step, one that has been discussed in connection with the work of the Federal Courts' Study Committee, would be to create law review commissions with the task of identifying legislation that is having or will have fiscal consequences and recommending corrective action.²²¹ Better than any of these steps, however, would be to seek legislation that would bind Congress not to expand the jurisdiction of the federal courts without simultaneously authorizing the necessary resources or reducing the jurisdiction of the courts in other respects. In the spirit of the Rules Enabling Act,²²² Congress can and should respect the independence of the judicial branch and should commit itself to coordination of demands and resources.

Congress is familiar with the problem of unfunded mandates. Part of the "Contract with America" was a commitment to pass legislation to stop the common practice of imposing expensive requirements on states and local governments without providing any resources to help these governments comply with them.²²³ Even before the "Contract with America," state and local officials descended on Washington and declared October 27, 1993, to be "National Unfunded Mandates Day."²²⁴ Some of these officials testified at congressional hearings about the effects federal mandates were having on their ability to fund other needs of their citizens and their ability to keep taxes at a reasonable level.²²⁵ The refrain has a familiar ring to those who decry the imposition of additional jurisdiction on the federal courts without additional resources: It is politically expedient but ultimately

221. See Campbell, *supra* note 210, at 2 (arguing that because legislation is being passed without assessing economic impact on judiciary, commission may need to be established that could recommend need for corrective action when costs have become or will become overly burdensome to functions of judiciary).

222. 28 U.S.C. § 2071 (1994).

223. See Unfunded Mandates Reform Act of 1995, 2 U.S.C.A. § 1501 (West Supp. 1996). For a general but politicized discussion of the background of the issue, see NEWT GINGRICH, TO RENEW AMERICA 128, 229-33 (1995) (articulating view that many states and localities resent federal laws that require states to pay for what was required federally without providing any economic assistance).

224. See S. REP. NO. 104-1, at 2 (1995).

225. See *id.* at 2-3. For example, Mayor Rendell of Philadelphia testified: "[W]hen you pass a mandate down to us and we have to pay for it, the police force goes down, the firefighting force goes down. Recreation departments are in disrepair. Our rec centers are in disrepair because our capital budget is being sopped up by federal mandates, by the need to pay for federal mandates." *Id.* at 3.

irresponsible for Congress to require other governments (or branches) to fulfill obligations without providing the resources to meet them.

Congress responded to these complaints by passing the Unfunded Mandates Reform Act of 1995.²²⁶ This Act requires the Congressional Budget Office to prepare and distribute reports to accompany any legislation that imposes federal mandates.²²⁷ Most importantly, the Act provides that a point of order lies against any legislation that imposes federal mandates above a certain amount (and with some exceptions), yet does not provide the funds to pay for the mandates.²²⁸ In effect, when Congress passed the Act it constrained itself either to fund its mandates or to accept that its mandates will be ineffective.²²⁹ The Act thus requires Congress to coordinate the demands it places on other governments (or branches) with resources to fulfill them.²³⁰

Similar legislation could protect the federal courts from the unfunded jurisdictional mandates that have created so much trouble in recent years. The Administrative Office of the U.S. Courts already prepares estimates of the costs of legislation affecting the courts.²³¹ It is but another step, albeit a huge one, for Congress to bind itself not to impose unfunded mandates on the courts. Any new obligations on the judicial branch would require either additional appropriations or commensurate steps to reduce the existing demands on the courts.²³² Congress either could appropriate the money to pay for these obligations, or it could totally or partially offset the costs by, for example, raising the jurisdictional amount for diversity cases.²³³ The

226. Pub. L. No. 104-4, 109 Stat. 48.

227. See 2 U.S.C.A. § 658c.

228. See *id.* § 658d. A point of order is a parliamentary objection that the matter would violate the rules of the assembly. See THE SCOTT, FORESMAN ROBERT'S RULES OF ORDER 212-15 (1981).

229. See S. REP. NO. 104-1, at 30-31. Senators Levin and Lieberman represented the minority view on funding of Congress and mandates: "S. 1, however, takes a CBO estimate of the cost of legislation to state, local and tribal governments (an estimate that CBO states may be impossible to obtain in a number of cases) and says that if we don't appropriate money at the level of the CBO estimate then the legislation that we passed requiring radon abatement or an increase in the minimum wage or tougher sewage treatment standards or reductions in dioxin, will be ineffective." *Id.*

230. See 2 U.S.C.A. § 1501(2).

231. See, e.g., *Cuba Legislation Impacts Federal Courts*, THE THIRD BRANCH, Mar. 1996, at 9 (discussing costs courts may incur associated with newly-passed Cuban Liberty and Democratic Solidarity Act).

232. Opening the federal courts for claims against companies that sell property confiscated by Cuba, for example, will impose new burdens on the courts. See *id.* (discussing effects of Cuban Liberty and Democratic Solidarity Act on courts in terms of new costs that will have to be incurred).

233. See *New Courts Improvement Bill Introduced in Senate*, THE THIRD BRANCH, July 1996, at 3 (discussing S. 1887, the Federal Courts Improvement Act of 1996, which raised the jurisdictional amount for diversity cases to \$75,000).

Long Range Plan calls on Congress not to impose unfunded mandates.²³⁴ A response to that call, in the form of legislation, however, would be more comforting.

3. *User fees*

With respect to coordination of demands and resources, therefore, the *Long Range Plan* does not go far enough. In another respect, the *Plan* takes the wrong direction. The *Long Range Plan* recommends that the federal courts should rely primarily on general appropriations rather than raise the money in the form of "user fees" from litigants.²³⁵ The reasons given for this recommendation are: (1) the unpredictability of court fees from year to year; (2) the necessity of changing fees from time to time; and (3) the fear that low and moderate income litigants will be barred from federal courts.²³⁶ The *Plan* also recognizes that litigants create valuable precedent for guidance of other potential litigants and thus create external benefits.²³⁷ The *Long Range Plan*, however, does not seek the elimination of all fees. Instead, it adopts the position that filing fees that are "reasonable," and from which indigent litigants are exempted, are appropriate.²³⁸ The *Plan* also supports other fees for "services above a basic level"—as long as: (1) the amount is adjusted periodically to account for inflation; (2) the administrative burden of the fees does not outweigh its benefit; and (3) the judiciary may keep the money.²³⁹

The *Plan's* recommendation not to encourage more user fees is noble but ultimately misguided. This point has both a practical and a theoretical justification. The practical point is that Congress systematically has underfunded the courts, and the judiciary should be aggressive in promoting sources of revenue outside the yearly control of Congress. For similar reasons, many states rely to some extent on user fees.²⁴⁰ The recent budget battles alone provide sufficient reason to look beyond the budget process for sources of revenue.²⁴¹ Fee income is, after all, what kept the federal courts

234. See LONG RANGE PLAN, *supra* note 13, at 94.

235. See *id.* at 95.

236. See *id.* at 96.

237. See *id.* at 116-17.

238. See *id.* at 117.

239. See *id.* at 117-18.

240. See generally A CALL TO ACTION, *supra* note 16 (discussing how states have coped with underfunding of judiciary from general appropriations).

241. See generally Morton M. Kondracke, *Dole's New Task: Rally Hill GOP, Outfox Clinton*, ROLL CALL, Mar. 14, 1996, at 8 ("[H]ill Republicans feel whipped by President Clinton in 1995 budget wars.").

operating during the second budget impasse.²⁴² Brutal practicality should lead the judiciary to support appropriate user fees.

A theoretical justification for increased use of fees exists, as well. Private litigants who use the federal courts to resolve their disputes are using public resources that their filing fees do not cover. The tendency is to use too much of a good that is priced below its real cost.²⁴³ An artificially low price for a good in a free market would cause the price to rise (thereby eliminating some demand) and the supply to increase (thereby satisfying some demand). This process would continue until the market cleared. When prices cannot clear the market, something else will. For example, those who demand the good will have to spend extra time looking for, or awaiting delivery of, the scarce good, or they will have to find substitutes.²⁴⁴ Federal court caseloads are at an all-time high.²⁴⁵ The delays that result have caused some litigants to choose private judging, at a higher out-of-pocket cost, rather than wait in line for less expensive public justice.²⁴⁶ Demand for federal judicial services thus has a least two characteristics of an underpriced good: the search for substitutes and delay in delivery. To be sure, the point must not be overstated. Without question, the government should subsidize litigation to some extent because private litigants create precedent that enables other litigants to resolve or avoid disputes; thus, that precedent has public value.²⁴⁷ Furthermore, indigent litigants should not be, and constitutionally could not be, denied access to the courts because of their inability to pay filing or other fees.²⁴⁸ But to say that some subsidy is appropriate is not to say that the nominal filing fees required today

242. See, e.g., *Fees Fuel Courts; Administrative Office of the U.S. Courts*, NAT'L L. J., Jan. 8, 1996, at A12 (describing how Judicial Conference of United States decided to operate on fee income during second budgetary impasse); John Flynn Rooney, *Fees for Federal Filings Increased \$30, Jurisdictional Limit Raised*, CHI. DAILY L. BULL., Oct. 25, 1996, at 1 (discussing importance of fee income in maintaining operations of U.S. courts).

243. For a discussion of pricing of judicial services and the effect of a lower than "market" price, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 455-56 (2d ed. 1977).

244. For a more thorough discussion of economic theory and the supply and demand of judicial services, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 578-82 (4th ed. 1992).

245. See *Record-setting Workloads Confront Federal Courts*, THE THIRD BRANCH, July 1996, at 2.

246. See generally Helen I. Bendix & Richard Chernick, *Renting the Judge*, 21 LITIG. 33, 33 (1994) ("Some litigants submit their disputes to private judges to evade our congested court dockets and escalating costs of litigation. Others want confidentiality, more flexible discovery rules or what some have labeled 'designer justice'; tailored to fit the complexities of a specific case.").

247. For a discussion of the public benefits of private adjudication, see Patrick E. Longan, *The Shot Clock Comes to Trial: Time Limits for Federal Civil Trials*, 35 ARIZ. L. REV. 663, 689-691 (1993).

248. See *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971) (finding that filing fees for divorce actions violated Due Process Clause).

are optimal.²⁴⁹ Indigent litigants already have the right to petition for waiver of fees.²⁵⁰ Increased use of filing fees thus is justified not only by practical necessity but also by economic theory.²⁵¹

I have written in more detail elsewhere regarding one example of such a new user fee: a fee for demanding a jury in a civil case.²⁵² Many states already impose such a fee, in amounts that range from ten to five hundred dollars. A jury demand places significant direct burdens on the judicial branch by requiring the payment of jurors and adds indirect costs such as the extended length of time necessary to conduct a jury trial.²⁵³ Civil jury trials take, on average, twice as long as bench trials. Parties who demand a jury presently bear none of these costs. If the fee is assessed at the time of the jury demand and is non-refundable, it could be set low enough (perhaps around \$500) to fund at least the direct costs of jury trials. As long as the fee is waived for indigent litigants and is not exorbitant, it would be constitutional and would provide at least some assistance with the budget. It is simply a regrettable but necessary fact that Congress and the judiciary should consider this and other user fees as part of the plan for a solvent future.

The *Long Range Plan* thus addresses the question of resources in a helpful but ultimately timid manner. In particular, legislation that would preclude Congress from imposing unfunded mandates on the courts and that would enable the courts to raise significant additional revenue from filing or other fees would improve significantly the prospects for a better balance between the demands placed on the federal courts and the resources that will be available.

C. Procedures

The *Long Range Plan* has a simpler approach to the issue of direct congressional reform of procedure: it should not happen. Implementation Strategy 28(a) states that all proposed rule changes should follow the procedures of the Rules Enabling Act.²⁵⁴ The *Plan* proposes to co-opt some of the players who have turned to the legislature for relief by proposing that the rulemaking process reach

249. Under new legislation, filing fees would increase, but only by \$30. See S. 1887, 104th Cong. (1996).

250. See 28 U.S.C. § 1915(a) (1994).

251. See Longan, *supra* note 6, at 912 (arguing that jury fees "will solve the problem of funding juries without imposing an undue burden on the right to a jury trial").

252. See *id.* at 920-22 (arguing that jury fees should be assessed to raise capital for judiciary).

253. See 28 U.S.C. § 171 (providing for juror fees in federal litigation).

254. See LONG RANGE PLAN, *supra* note 13, at 58.

out to the public, the bar, and the state and federal benches.²⁵⁵ Among the particular proposals are ones to increase the membership of lawyers on rules committees, to expand the distribution of publications relating to the rules, and to appoint coordinators from state bar associations to rule committees.²⁵⁶ The *Long Range Plan* thus makes a persuasive case for Congress to stop meddling directly with procedural rules. It proposes nothing other than this persuasion, however, to accomplish this goal.

If the purpose of this implementation strategy is to show how sensitive the rulemaking process can be to the exigencies of congressional politics, the courts need only have pointed to recent history. Repeatedly, the minutes of the Standing Committee on Rules of Practice and Procedure reflect discussion of, and action based upon, the expected actions of Congress.²⁵⁷ In another example of political sensitivity, the courts responded to the initial push for the CJRA with a plan of their own.²⁵⁸ The CJRA²⁵⁹ and later portions of the Common Sense Legal Reform Act²⁶⁰ nevertheless were imposed upon the courts. Sensitivity alone will not suffice. It is dangerous for the *Plan* to rely solely on persuading Congress to follow the Rules Enabling Act. What is needed is to induce Congress to take legislative steps to minimize the harm it has caused by its efforts to reform civil procedure directly. In particular, Congress should amend the CJRA to include a more meaningful "sunset" provision,²⁶¹ and it should

255. See *id.*

256. See *id.* at 59.

257. See generally Committee on Rules of Practice and Procedure, Minutes of the Meeting (Dec. 17-19, 1992), available in 1992 WL 739926. "Judge Pointer stated that the primary impetus for amending evidence rule 412 was essentially to forestall action by the Congress and to avoid a bypass of the Rules Enabling Act process." *Id.* at 7. "Judge Keeton observed that the rules process had become more 'political' than in the past, as more individuals and organizations had become interested in the outcome of rules amendments. Accordingly, the rules committees needed to be more alert to the political process." *Id.* at 16; see also Committee on Rules of Practice and Procedure, Minutes of the Meeting 5 (Jan. 11-15, 1995), available in 1995 WL 811896 ("The Advisory Committee on Civil Rules was looking at the legislation [implementing the 'Contract with America'], but only with regard to their impact on procedural issues."); Committee on Rules of Practice and Procedure, *supra* note 177, at 26 ("Judge Higginbotham reported that legislative consideration of Rule 26(c) and protective order was continuing."); Committee on Rules of Practice and Procedure, Minutes of the Meeting 8 (Jan. 12-14, 1994), available in 1994 WL 880350 ("Dean Cooper stated his concern that the Congress at times bypasses the rulemaking process and enacts rules by statute. He argued that the committees must be able to respond to political needs and prepare quality amendments to the rules in a reasonably prompt fashion.").

258. For a discussion of the judiciary's "14-point plan," see S. REP. NO. 101-650, at 30-32 (1990).

259. 28 U.S.C. § 471-482 (1994).

260. H.R. 10, 104th Cong. (1995).

261. See 28 U.S.C. §§ 471-478; *infra* note 268 (discussing purpose behind § 103(b)(2) of the Judicial Improvements Act of 1990 and legislative history describing sunset provision's purpose

bind itself for future legislation at least to refer proposed rule changes to some or all of the Rules Enabling Act process.

1. *Sunset on the Civil Justice Reform Act*

The CJRA has complicated federal practice by forcing each district to adopt its own plan for reduction of expense and delay.²⁶² Those complications, which are costly, may have some value as experiments to see what innovations may be appropriate for inclusion in amendments to the national rules. The CJRA envisions such a role for the plans. The statute requires the Judicial Conference to report to Congress on the effectiveness of the case management techniques and guidelines implemented under the Act.²⁶³ The report of the Judicial Conference also is required to recommend whether the six techniques and guidelines should be mandated for some or all district courts²⁶⁴ and, if so, to initiate proceedings to amend the rules under the Rules Enabling Act.²⁶⁵ If the report recommends against adoption of the techniques and guidelines, the Conference is required to identify alternatives and is permitted to submit them to the Rules Enabling Act process.²⁶⁶ The district courts eventually are permitted to cease operating under their CJRA plans.²⁶⁷

The deleterious effects of the CJRA thus wither away, and the Act even may leave a legacy of desirable, national rule changes. But the "sunset" provision of the CJRA is not strong enough. It merely *permits* each district to cease operating under its plan.²⁶⁸ It should be amended to *require* the cessation of local, "balkanizing" experiments when the time for experimentation is over. Local judges and lawyers who drafted the plans may have substantial stakes in their continued operation. Yet to permit so many flowers to continue to bloom will mar what should be the uniform landscape of federal civil procedure.

as contained within § 471-78 of the Civil Justice Reform Act).

262. See 28 U.S.C. §§ 471-478 (describing seven year "sunset" provision that courts must follow).

263. See Judicial Improvements Act of 1990 § 105(c)(1), 28 U.S.C. § 471 note.

264. See *id.* § 105(c)(2)(A).

265. See *id.* § 105(c)(2)(B).

266. See *id.* § 105(c)(2)(C).

267. See *id.* § 103(b)(2). The report of the Senate Judiciary Committee explains the purpose of this section:

Subsection (b)(2) subjects section 471 through 478 of the Civil Justice Reform Act to a seven-year sunset provision so that those sections can be thoroughly tested. Upon the expiration of the seven-year period following enactment, Federal district courts are no longer required to operate pursuant to the civil justice expense and delay reduction plans mandated by Title I. Congress and the courts then will have a chance to evaluate those provisions and, if warranted, reauthorize them.

S. REP. NO. 101-46, at 63 (1990).

268. See 28 U.S.C. § 471.

Congress should require each district to cease using its individualized plan once the national implications of the experiments are clear.

2. *Referral of rule changes to Rules Enabling Act process*

Legislation to require one or more of the committees established under the Rules Enabling Act to review any proposed rule change before they can be put into effect by direct legislation also would be helpful.²⁶⁹ This proposal would be particularly beneficial with respect to legislation such as the Private Securities Litigation Reform Act, in which Congress responded to political pressure of repeat litigants who sought tactical advantages by changing the applicable procedural rules.²⁷⁰ Unlike those who lobbied for the 1995 reforms, the judges who serve on the advisory committees are insulated from politics.²⁷¹ Congress, of course, would retain the right to override the result of the Rules Enabling Act process, but at least when it did so, Congress would have the benefit of the process. Further time may have purified the politicized air that drove the reforms initially.

The Unfunded Mandates Reform Act of 1995²⁷² provides a model for such legislation. Under that statute, legislation that imposes federal mandates is subject to a point of order until the Congressional Budget Office has analyzed and commented on the expenses that it will impose.²⁷³ More effective legislation would subject any bill that effects changes in rules of procedure (or presumably rules of evidence) to a point of order unless accompanied by commentary from the Judicial Conference or a designated rules committee. Regardless of the details, information and time should work to the advantage of the process. In the best case, the Rules Enabling Act process would allow time to respond and to generate an appropriate rule change within the process, rather than through the independent legislation that precipitated the review.

There is precedent for this hope. Legislation to change Rule 26(c) was introduced in response to concerns that protective orders, particularly in products liability cases, were suppressing information

269. The idea for this legislation comes from David C. Weiner, recently the Chair of the Section of Litigation of the American Bar Association. See Weiner, *supra* note 12, at 68 ("Such a review would enable Congress to obtain the views of the impartial Rules Committee members, who have the ongoing job of considering the rules and obtaining evidence as to how they work in practice.").

270. See Private Securities Litigation Reform Act of 1995, 15 U.S.C.A. §§ 77a to 78u-5 (West Supp. 1996).

271. See Carrington, *supra* note 81, at 964.

272. Pub. L. No. 104-4, 109 Stat. 48. For a discussion of the purposes behind the Act, see *supra* notes 226-30 and accompanying text.

273. See 2 U.S.C.A. § 658d (West Supp. 1996).

about dangerous products and thereby endangering the public.²⁷⁴ The legislation would have required judges in every case in which a protective order was sought—even those where no one claimed public access was desirable—to make a finding that the protective order would not affect public safety.²⁷⁵ The political appeal of such a measure is obvious: Who can be against public safety? The problem, however—one to which legislators were unlikely to be sensitive—was that the measure needlessly would have increased the work required of federal judges by mandating intensive up-front review of every stipulated protective order.²⁷⁶ The Standing Rules Committee, however, sought and obtained a delay in the markup of the bill and drafted an alternative proposal that provides a mechanism for the dissolution of stipulated protective orders on the petition of one bound by the order or by someone who has been permitted to intervene to seek dissolution of the order.²⁷⁷ That proposal still is under consideration, but the amendment to legislate the matter directly was defeated.²⁷⁸ If this episode is any indication, intervention of the procedural rule making process in the legislative process may slow and improve the ultimate outcome.

The *Long Range Plan* recognizes the problem of direct congressional reform of procedure but does too little to solve it. The call for the exclusive use of the Rules Enabling Act process is wise but, standing alone, too timid. It does not address the existing “balkanization” of procedure under the CJRA, and it relies too much on persuading legislators who, if the Private Securities Litigation Reform Act of 1995 is any indication, have little interest in the integrity of the federal rules when political points are to be made. Legislation to place a sunset of the plans adopted under the CJRA and to require the input of the Judicial Conference on rule changes would have beneficial effects.

274. See S. 374, 104th Cong. § 2(a)(1) (1995). For background on this controversy, see Richard L. Marcus, *Symposium in Honor of Edward W. Cleary: Evidence and Procedure for the Future: The Discovery Confidentiality Controversy*, 1991 ILL. L. REV. 457, 457-63; Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 478-82 (1991); and Panel Discussion, *Confidential Settlements and Sealed Court Records: Necessary Safeguards or Unwarranted Secrecy?*, 78 JUDICATURE 304, 305 (1995).

275. See S. 374 § 2(a)(1).

276. See *Interview with Judge Patrick E. Higginbotham: Rules Changes Under Review*, THE THIRD BRANCH, Feb. 1995, at 11.

277. See *id.* For the text of the amended rule, see 150 F.R.D. 383 (1993).

278. See *House Approves Historic Measure to Revamp Product Liability Laws*, TOXICS L. DAILY (BNA), Mar. 13, 1995, at D2 (discussing defeated amendment that would have “[p]revented courts from entering protective orders sealing product liability cases involving health and safety issues, except for information containing trade secrets”).

CONCLUSION

It has taken Congress and the Courts a number of years to reach the point at which they are at odds persistently over the provision of resources and the control of procedure. It may take years for the two branches to extricate themselves from the situation. The *Long Range Plan* proposes a number of important measures that eventually might do the job. But the job is too important to wait. The federal court system is suffering from the failure of Congress to provide the funds necessary to accomplish the tasks that have been assigned to the courts and from the disruptive direct procedural reforms that have been imposed in recent years. More aggressive action, such as the measures proposed in this Article, must be taken to end that suffering and to permit the courts to return to the delivery of first-class, uniform justice.