

# EXECUTIVE BRANCH CIVIL JUSTICE REFORM

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## TABLE OF CONTENTS

Introduction .....	1522
I. The Origins and Development of Civil Justice Reform ..	1524
A. Civil Justice Reform Under the Civil Justice Reform	
Act of 1990 .....	1524
1. The 1990 statute .....	1524
2. Early implementation .....	1526
B. Executive Branch Civil Justice Reform Under the	
Bush Administration .....	1529
1. Executive branch experimentation .....	1529
a. Executive order and Department of Justice	
guidance .....	1529
i. Background .....	1529
ii. Description .....	1530
b. Implementation .....	1537
2. Legislative proposal .....	1540
II. Critical Analysis of Executive Branch Civil Justice	
Reform .....	1541
A. A Word About Assessment .....	1541
B. Specific Procedures .....	1544
1. Discovery .....	1544
2. Sanctions .....	1547
3. Expert witnesses .....	1548
4. Settlement .....	1549
5. Case management .....	1551
C. General Assessment .....	1552
1. Inadvisable and less advisable aspects .....	1552
2. Advisable aspects .....	1553

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D. Transition by Way of Resolution.....	1558
III. Suggestions .....	1558
Conclusion .....	1566

## INTRODUCTION

The authors of several papers in this Symposium have justifiably criticized the essay that former Vice President Dan Quayle published in Volume 41 of *The American University Law Review*.<sup>1</sup> Many knowledgeable observers of the civil justice system have leveled equally legitimate criticism at civil justice reform initiatives that the Bush administration instituted.<sup>2</sup> Questionable data, arguable policy, or overheated political rhetoric supported certain aspects of the Vice President's paper, as well as most of the proposals developed by the Competitiveness Council that the Vice President chaired<sup>3</sup> and numerous efforts of the Republican administration in the area of civil justice reform.<sup>4</sup>

One endeavor, involving executive branch civil justice reform in the field of federal civil procedure, apparently was less problematic. That effort, which aimed to "facilitate the just and efficient resolution of civil claims" involving the United States Government, imposed a number of requirements on government attorneys who participate in civil litigation.<sup>5</sup> This is a Bush administration initiative that Vice President Quayle mentioned in his essay and that the

1. See Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559, 559-69 (1992) (proposing civil justice reform, including specific proposals in areas such as voluntary dispute resolution; discovery, punitive damages, expert witnesses, and attorney's fees).

2. See, e.g., Robert C. Clark, *Why So Many Lawyers? Are They Good or Bad?*, 61 FORDHAM L. REV. 275, 277-87 (1992) (asserting that former Vice President Quayle's suggestion that there are too many lawyers and his analogizing litigation to cancerous growth are shallow and without substantive analysis). See generally Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 384-408 (1992) (suggesting that Civil Justice Reform Act will transform civil procedure into arcane science); Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound: It Should Not Be Amended*, 138 F.R.D. 631, 631-36 (1991) (arguing that proposed amendments to expert testimony rules would exclude probative evidence).

3. See Dan Quayle, *Proposed Civil Justice Reform Legislation: Proposed Legislation: Agenda for Civil Justice Reform in America*, 60 U. CIN. L. REV. 979, 985-86 (1992) [hereinafter Quayle, *Proposed Legislation*] (describing composition of Federal Civil Justice Reform working group, under authority of Council on Competitiveness, in memorandum to President Bush outlining Council's recommendations).

4. See Carl Tobias, *The Clinton Administration and Civil Justice Reform*, 144 F.R.D. 437, 443-45 (1993) [hereinafter Tobias, *Clinton Administration*] (describing Bush administration's efforts to implement civil justice reform).

5. See Exec. Order No. 12,778, pmb., 3 C.F.R. 359, 359-60 (1991), reprinted in 28 U.S.C. § 519 (Supp. III 1991) (stating that purpose of order is to facilitate just and efficient resolution of civil claims involving U.S. Government, to encourage filing of only meritorious civil claims, to improve legislative and regulatory drafting, to reduce needless litigation, to promote fair and prompt adjudication before administrative tribunals, and to provide model for similar reforms of litigation practices in private sector and states).

Clinton administration must rigorously analyze.<sup>6</sup>

The Bush administration briefly experimented with civil justice reform in the executive branch. President Bush promulgated Executive Order 12,778 on October 23, 1991, and the order became effective in January 1992.<sup>7</sup> That same month, the United States Department of Justice issued preliminary guidance that was intended to assist federal agencies and government lawyers in effectuating the Executive order.<sup>8</sup> Nonetheless, the Department only finalized those guidelines in the waning days of the Bush administration.<sup>9</sup> Although the Republican administration did not fully implement executive branch civil justice reform, the Executive order and the accompanying guidance seemed well considered and prescribed some procedures that apparently would be efficacious in reducing expense and delay, the ostensible purpose of civil justice reform.<sup>10</sup> Moreover, the order and the guidelines will be in effect until President Clinton modifies them,<sup>11</sup> so that his administration must decide how to treat this nascent reform.

The factors above mean that civil justice reform in the executive

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6. See Quayle, *Civil Justice Reform*, *supra* note 1, at 560 (noting that Executive Order 12,778 is preliminary step in process of reforming dispute resolution methodology); see also Tobias, *Clinton Administration*, *supra* note 4, at 441-45 (describing procedural reforms inherited by Clinton administration and explaining need for close analysis of initiatives).

7. See Exec. Order No. 12,778, § 10, 3 C.F.R. 359, 367 (1991), *reprinted in* 28 U.S.C. § 519 (Supp. III 1991) (stating that order is effective 90 days after signing).

8. See Memorandum of Preliminary Guidance on Implementation of the Litigation Reforms of Executive Order No. 12,778, 57 Fed. Reg. 3640 (1992) [hereinafter Preliminary Memorandum].

9. See Memorandum of Guidance on Implementation of the Reforms of Executive Order No. 12,778, 58 Fed. Reg. 6015 (1993) [hereinafter Memorandum]. This memorandum was not issued by the Department of Justice until January 25, 1993, five days after the inauguration of William Jefferson Clinton as the forty-second President of the United States. *Id.* at 6015; see Thomas L. Friedman, *Clinton Takes Oath as 42nd President, Urging Sacrifice To "Renew America,"* N.Y. TIMES, Jan. 21, 1993, at A5 (describing inauguration of President Clinton).

10. See Exec. Order No. 12,778, pmbl., 3 C.F.R. at 359-60, *reprinted in* 28 U.S.C. § 519 (listing reduction of expense and delay of litigation, among other considerations, as purpose of civil justice reform); Memorandum, *supra* note 9, at 6016 (noting that Memorandum "provides guidance for applying Order's provisions" with eye toward order's explicit purpose of "facilitat[ing] the just and efficient resolution of civil claims involving the United States").

11. See Tobias, *Clinton Administration*, *supra* note 4, at 437-38 (noting that President Clinton has opportunity to address numerous issues concerning federal courts and suggesting that he carefully analyze executive branch civil justice reform begun by Bush administration). President Clinton's power to modify the order, as stated in the order itself, derives from "the authority vested in . . . [the] President by the Constitution and the laws of the United States of America, including chapter 31 of title 28, United States Code, and section 301 of title 3, United States Code." Exec. Order No. 12,778, pmbl., 3 C.F.R. at 360, *reprinted in* 28 U.S.C. § 519; see also 28 U.S.C. §§ 501-530 (1988 & Supp. II 1990) (describing Department of Justice as executive department and describing nature and responsibilities of Attorney General); 3 U.S.C. § 301 (1988 & Supp. III 1991) (authorizing presidential power to delegate authority to agency officials). See generally Cass Sunstein, *Cost Benefit Analysis and the Separation of Powers*, 23 ARIZ. L. REV. 1267, 1268-69 (1981) (describing increasing use of Executive orders to regulate agency actions).

branch warrants systematic assessment to ascertain whether the Clinton administration should continue experimenting with the concept and, if so, how the administration can most effectively implement the reform. This Article undertakes that effort. The Article first traces the origins and development of civil justice reform in the area of federal civil procedure, emphasizing the Bush administration's attempts to institute executive branch reform. The Article then critically evaluates the Bush administration initiative and finds it sufficiently promising to warrant additional effectuation and ongoing experimentation, particularly if the endeavor is vigorously implemented, rigorously evaluated, and recalibrated. The third Part of this Article affords numerous suggestions that the Clinton administration should follow to effectuate, and to continue experimenting with, civil justice reform in the executive branch.

## I. THE ORIGINS AND DEVELOPMENT OF CIVIL JUSTICE REFORM

### A. *Civil Justice Reform Under the Civil Justice Reform Act of 1990*

#### 1. *The 1990 statute*

The statutory background of civil justice reform in the field of federal civil procedure requires only brief treatment here because others have thoroughly examined the topic.<sup>12</sup> Congress enacted the Civil Justice Reform Act (CJRA or Act)<sup>13</sup> in 1990 out of concern about growing abuse in civil litigation, especially during the discovery process, and in response to the increasing expense entailed in resolving civil cases and shrinking access to federal courts for resolving civil lawsuits.<sup>14</sup> Since the mid-1970s, numerous federal judges had been asserting that a litigation explosion was taking place in the federal courts, resulting in increased discovery and litigation abuse.<sup>15</sup>

12. See, e.g., Mullenix, *supra* note 2, at 384-406 (analyzing civil justice reform of 1980s and arguing that Civil Justice Reform Act of 1990 is noble but ill-advised piece of legislation that will only complicate civil procedure); Jeffrey J. Peck, "Users United": *The Civil Justice Reform Act of 1990*, LAW & CONTEMP. PROBS., Summer 1991, at 105, 105-09 (addressing background and substantive components of Civil Justice Reform Act); Carl Tobias, *Civil Justice Reform Roadmap*, 142 F.R.D. 507, 507-09 (1992) (charting recent developments in civil justice reform efforts among legislative, judicial, and executive branches of Federal Government).

13. Civil Justice Reform Act of 1990, §§ 101-650, 28 U.S.C. §§ 471-482 (Supp. 1992).

14. See SENATE COMM. ON THE JUDICIARY, JUDICIAL IMPROVEMENTS ACT OF 1990, S. REP. NO. 101-416, 101st Cong., 2d Sess. 103 (1990), reprinted in 1990 U.S.C.A.N. 6802, 6804-05 (stating that legislation is response to increasing cost of civil litigation and problems created by lack of adequate judicial resources); see also Peck, *supra* note 12, at 105-06 (discussing attitudes of litigators and federal trial judges concerning nature and extent of litigation costs and delays).

15. See, e.g., National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976) (upholding district court's dismissal of antitrust action due to party's failure to obey discovery order and noting that extreme sanction of dismissal is appropriate where party

The CJRA requires that each of the federal trial courts develop a civil justice expense and delay reduction plan by December 1993.<sup>16</sup> The purposes of the plans are "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy and inexpensive resolutions of civil disputes."<sup>17</sup> Under the CJRA, every federal district court must adopt a plan once it has examined a report compiled by an advisory group for the district.<sup>18</sup>

The advisory groups, which the courts named within ninety days of the statute's enactment, were to be "balanced," including attorneys and individuals who are representative of litigants involved in the districts' civil cases.<sup>19</sup> The Act mandates that the groups comprehensively analyze the courts' civil and criminal dockets and identify the major sources of expense and delay, as well as trends involving case filings and demands placed on the districts' resources.<sup>20</sup> In formulating recommendations, the groups must consider the needs and circumstances of the courts, litigants, and litigants' lawyers and must ensure that all three contribute significantly to decreasing expense and delay, thus facilitating access to the civil justice system.<sup>21</sup> After districts receive the advisory groups' reports and recommendations, the courts are to review them and confer with the groups.<sup>22</sup> The districts then must consider, and may adopt, the eleven principles, guidelines, and techniques listed in the legislation and any other procedures deemed appropriate for reducing expense or delay.<sup>23</sup>

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shows flagrant bad faith and callous disregard of responsibilities); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 740-41 (1975) (noting that discovery provisions of Federal Rules of Civil Procedure are liberal with potential for abuse); Dissent from Order Amending the Federal Rules of Civil Procedure, 446 U.S. 997, 1000 (1980) (Powell, J., dissenting) (dissenting from adoption of amendments because amendments do not go far enough to rectify intolerable abuse of discovery process where party with greater resources prevails through threat of delay and expense, thereby denying justice to poorer opponents); see also RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 1-130 (1985) (describing federal courts as in state of crisis due to explosion in caseload, lack of judicial resources, and need for more coherent, practicable judicial philosophy).

16. 28 U.S.C. § 471 (Supp. 1992).

17. *Id.*

18. *Id.* § 472.

19. *Id.* § 478(b).

20. *Id.* § 472(c)(1).

21. *Id.* § 472(c)(2)-(3).

22. *Id.* § 472(a).

23. See *id.* § 473(a)-(b). The legislation proposes the following specific principles and guidelines: (1) systematic, differential treatment of civil cases tailored to accommodate each specific case's complexity and length of time; (2) early and ongoing control of pretrial process by judicial officer; (3) careful, deliberate monitoring of discovery by judicial officer through a discovery management conference where complexity of case so demands; (4) encouragement of cost-effective exchange of information through cooperative discovery devices; (5) requiring that all discovery motions be accompanied by certification of moving party that a reasonable

## 2. *Early implementation*

Thirty-five groups presented reports and suggestions to their courts before December 31, 1991, and thirty-four districts issued plans by that date to qualify for the status of Early Implementation District Courts (EIDCs).<sup>24</sup> The Committee on Court Administration and Case Management of the Judicial Conference of the United States officially designated the thirty-four courts as EIDCs on July 30, 1992.<sup>25</sup> The remaining advisory groups and courts are proceeding with civil justice planning, although only two districts promulgated civil justice plans in 1992,<sup>26</sup> and a small number of courts will probably adopt plans before the deadline of December 1993.<sup>27</sup>

Thoroughgoing assessment of the civil justice expense and delay reduction plans that the EIDCs developed is relatively unimportant to understanding the most significant issues that executive branch reform implicates. Nonetheless, the assessment below affords a general examination and specific examples of those aspects of early civil justice planning under the 1990 legislation that are most pertinent to civil justice reform efforts in the executive branch.

Nearly all EIDCs, relying on the reports and recommendations of their advisory groups, apparently engaged in the kind of introspection and prescribed the types of procedures that Congress envi-

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effort has been made to reach agreement with the opposing party; (6) use of alternative dispute resolution where appropriate; (7) requiring each party to submit a discovery management plan at the initial pretrial conference; (8) requiring that at each pretrial conference each party be represented by an attorney who has the authority to bind the party regarding all matters previously identified by the court; (9) requiring that all requests for extension of discovery deadline or postponement of trial be signed by both attorney and party making the request; (10) setting up a neutral, nonbinding evaluation program where a neutral court officer considers the legal and factual basis of the case; and (11) requiring that, upon court notice, an attorney with the power to bind each party be present or available by telephone during any settlement conference. *Id.*

24. See Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 56 (1992) [hereinafter Tobias, *Judicial Oversight*] (listing 34 Early Implementation District Courts (EIDCs)).

25. See, e.g., Letter from Robert M. Parker, Chair, Judicial Conference of the U.S. Committee on Court Administration and Case Management, to Gene E. Brooks, Chief Judge, U.S. District Court for the Southern District of Indiana 1 (July 30, 1992) (on file with *The American University Law Review*) (approving Southern District of Indiana as EIDC and recognizing that each district has own peculiar problems); Letter from Robert M. Parker, Chair, Judicial Conference of the U.S. Committee on Court Administration and Case Management, to Paul G. Hatfield, Chief Judge, U.S. District Court for the District of Montana 1 (July 30, 1992) (on file with *The American University Law Review*) (approving District of Montana as EIDC).

26. U.S. DIST. COURT FOR THE W. DIST. OF MO., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Apr. 30, 1992) [hereinafter WESTERN DISTRICT OF MISSOURI PLAN]; U.S. DIST. COURT FOR THE W. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN (Nov. 30, 1992).

27. A number of advisory groups issued reports in 1992. These include advisory group reports from the Southern District of Iowa, the Eastern District of Louisiana, the District of New Mexico, the Middle District of North Carolina, the Middle District of Pennsylvania, the District of South Dakota, the Eastern District of Tennessee, the Northern District of Texas, the Western District of Texas, and the Western District of Washington.

sioned.<sup>28</sup> The courts apparently attended to the legislative objectives of decreasing expense and delay in civil lawsuits, carefully evaluated their civil and criminal dockets, and considered and adopted the eleven statutorily prescribed principles, guidelines, and techniques for facilitating litigation.<sup>29</sup>

A number of procedures with which the EIDCs are experimenting closely resemble those that are significant components of executive branch civil justice reform. Practically all of the districts have employed measures that are intended to encourage settlement.<sup>30</sup> An important means by which courts promote settlement is through the use of various forms of alternative dispute resolution (ADR).<sup>31</sup> A few courts even impose onerous requirements covering participation in ADR.<sup>32</sup> For instance, the Western District of Missouri randomly and automatically assigns one-third of its civil cases to an

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28. See, e.g., U.S. DIST. COURT FOR THE E. DIST. OF CAL., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 1-2 (Dec. 3, 1991) [hereinafter EASTERN DISTRICT OF CALIFORNIA PLAN] (stating that plan was result of diligent efforts of advisory group to identify instances in which civil case management could be enhanced); U.S. DIST. COURT FOR THE N. DIST. OF GA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 26-54 (Dec. 17, 1991) [hereinafter NORTHERN DISTRICT OF GEORGIA PLAN] (reviewing local rules of practice as amended pursuant to CJRA); U.S. DIST. COURT FOR THE E. DIST. OF TEX., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN PURSUANT TO THE CIVIL JUSTICE REFORM ACT OF 1990 1 (Dec. 20, 1991) [hereinafter EASTERN DISTRICT OF TEXAS PLAN] (noting that court is "presented with the challenge of bringing costs under control so that our society may enjoy the benefits of a civil justice system that is affordable, timely, and fair").

29. See, e.g., U.S. DIST. COURT FOR THE S. DIST. OF IND., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 1-2 (Dec. 30, 1991) [hereinafter SOUTHERN DISTRICT OF INDIANA PLAN] (stating that court, pursuant to its obligations as early implementation district, has considered recommendations of its advisory committee); U.S. DIST. COURT FOR THE DIST. OF MASS., EXPENSE AND DELAY REDUCTION PLAN 2 (Nov. 18, 1991) [hereinafter DISTRICT OF MASSACHUSETTS PLAN] (noting that advisory group has made detailed, thorough, ongoing assessment of court's civil and criminal docket pursuant to CJRA); U.S. DIST. COURT FOR THE W. DIST. OF MICH., DIFFERENTIATED CASE MANAGEMENT PLAN 1-9 (finding that while court is generally meeting its responsibility to litigants to provide "just, speedy, and inexpensive determination of every [civil] action" as required by CJRA, 17 specific proposals require implementation to further this goal).

30. See, e.g., EASTERN DISTRICT OF CALIFORNIA PLAN, *supra* note 28, at 7 (requiring all judges to offer to conduct early settlement conferences); NORTHERN DISTRICT OF GEORGIA PLAN, *supra* note 28, at 7 (requiring two mandatory settlement conferences and continued judicial involvement); U.S. DIST. COURT FOR THE N. DIST. OF W. VA., PLAN FOR CIVIL JUSTICE DELAY AND EXPENSE REDUCTION 79-80 (Dec. 18, 1991) (requiring mandatory pretrial conferences in complex cases to develop case management plans and encourage settlement).

31. See U.S. DEP'T OF JUSTICE, GUIDANCE ON THE USE OF ALTERNATIVE DISPUTE RESOLUTION FOR LITIGATION IN THE FEDERAL COURTS 3-9 (Aug. 1992) [hereinafter ADR GUIDANCE] (describing alternative dispute resolution techniques and procedures, including arbitration, mediation, early neutral evaluation, factfinding, and minitrials).

32. See, e.g., U.S. DIST. COURT FOR THE E. DIST. OF N.Y., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 15-18 (Dec. 17, 1991) [hereinafter EASTERN DISTRICT OF NEW YORK PLAN] (requiring that all claims for \$100,000 or less be sent to arbitration); EASTERN DISTRICT OF TEXAS PLAN, *supra* note 28, at 5-9 (noting that judicial officer may refer cases to various ADR programs where appropriate); U.S. DIST. COURT FOR THE DIST. OF UTAH, CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 9-10 (Dec. 30, 1991) (noting that resort to litigation process is last resort and that court will experiment with court-supervised mediation, arbitration, minitrials, and summary jury trials).

ADR program and subjects to sanctions litigants who do not participate in good faith.<sup>33</sup>

Sanctions are another procedure included in the plans of numerous EIDCs that are an important feature of civil justice reform in the executive branch.<sup>34</sup> A number of EIDCs authorize judges to impose sanctions on litigants and lawyers for failing to comply with various provisions in their civil justice plans.<sup>35</sup> Indeed, the Massachusetts Plan provides that negligent violations are punishable with sanctions.<sup>36</sup>

Discovery is an additional, significant area in which many EIDCs have adopted procedures that resemble those central to executive branch reform. For example, a majority of the EIDCs have prescribed some form of mandatory prediscovery disclosure that is premised on a controversial 1991 proposal to revise the Federal Rules, which has now been superseded.<sup>37</sup> A number of EIDCs have also

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33. See WESTERN DISTRICT OF MISSOURI PLAN, *supra* note 26, at 1; cf. U.S. DIST. COURT FOR THE S. DIST. OF W. VA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 81-84 (Dec. 30, 1991) [hereinafter SOUTHERN DISTRICT OF WEST VIRGINIA PLAN] (describing scope of mandatory mediation program as potentially including all civil cases within district, with final determination made by court). The West Virginia plan refers to ten categories of cases as typical for inclusion in the mediation program: commercial and other contract cases, personal injury matters, civil rights employment cases, ERISA cases, tax matters, debt collection cases, asbestos claims, FELA matters, labor management employment cases, and miscellaneous civil actions. SOUTHERN DISTRICT OF WEST VIRGINIA PLAN, *supra*, at 81-84. The plan specifically excludes from mediation cases involving administrative agency appeals, habeas corpus and other prisoner petitions, forfeitures of seized property, and bankruptcy appeals. *Id.*

34. Cf. Exec. Order No. 12,778, § 1(f), 3 C.F.R. 359, 362 (1991), *reprinted in* 28 U.S.C. § 519 (Supp. III 1991) (stating that litigation counsel shall take steps to seek sanctions against opposing parties where appropriate).

35. See SOUTHERN DISTRICT OF INDIANA PLAN, *supra* note 29, at 9 (noting that counsel has responsibility to prepare case management agenda and present agenda to court at pretrial conference or face possible imposition of sanctions); U.S. DIST. COURT FOR THE V.I. REPORT AND PLAN OF THE ADVISORY GROUP 35 (Dec. 23, 1991) (stating that any breach or failure to perform under agreement reached at pretrial conference is basis for imposition of sanctions, including costs, attorney fees, entry of judgment or agreement, or other appropriate remedies).

36. See DISTRICT OF MASSACHUSETTS PLAN, *supra* note 29, at 67 (observing that district court has broad discretion to impose sanctions).

37. See, e.g., U.S. DIST. AND BANKRUPTCY COURT FOR THE DIST. OF IDAHO, THE CIVIL JUSTICE REFORM ACT OF 1990 EXPENSE AND DELAY REDUCTION PLAN 10-11 (Dec. 19, 1991) [hereinafter DISTRICT OF IDAHO PLAN] (requiring parties, within 30 days of service of complaint, to make initial disclosure, including list of persons with relevant knowledge, list of witnesses, copy or description of all relevant records, and existence of any relevant insurance agreement). After initial disclosure, the parties must also disclose the substance of any expert testimony and adhere to limits on document production requests, interrogatories, and depositions. *Id.*; see also COMMITTEE ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 16, 26, *reprinted in* 137 F.R.D. 53, 83-84, 87-88 (1991) [hereinafter JUDICIAL CONFERENCE PROPOSAL] (proposing discovery requirements, including disclosure of persons with relevant knowledge, witnesses, relevant documents, insurance agreements, and expert testimony); NORTHERN DISTRICT OF GEORGIA PLAN, *supra* note 28, at 14 (noting that court may develop mandatory interrogatories to be answered by each party); EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 32, at 4-5 (listing discovery limita-



required parties to certify that they have attempted to resolve discovery disputes with their opponents before submitting discovery motions to the courts.<sup>38</sup>

*B. Executive Branch Civil Justice Reform Under the Bush Administration*

*1. Executive branch experimentation*

*a. Executive order and Department of Justice guidance*

*i. Background*

On October 23, 1991, President George Bush issued Executive Order 12,778, which was intended to facilitate the efficient and fair resolution of civil disputes in which the United States Government is involved.<sup>39</sup> On January 30, 1992, the Department of Justice published a memorandum that provided preliminary guidance to federal administrative agencies and government attorneys on the order's prescriptions.<sup>40</sup> The major dimensions of the order modify the ways that government counsel "conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases."<sup>41</sup>

The Department of Justice requested that federal agencies and government attorneys submit comments recounting their experiences with the order by July 20, 1992, and announced that it intended to review the information tendered, rely on that material in

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tions and other pretrial requirements, including initial disclosure and limits on interrogatories and depositions). The Civil Rules Committee dramatically reversed course twice in two months on this issue. See Randall Samborn, *U.S. Civil Procedure Revisited*, NAT'L L.J., May 4, 1992, at 1, 12 (reporting that Advisory Committee on Civil Rules, after reversing course twice, proposed reform of discovery process in order to keep pace with legislative and executive branch civil litigation reform and thus preserve independence of judiciary). In September 1992, the Judicial Conference sent a proposal for mandatory prediscovery disclosure to the Supreme Court. COMMITTEE ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE 26 (Sept. 1992) [hereinafter 1992 PROPOSED AMENDMENTS]. On April 22, 1993, the Court transmitted that proposal to Congress. See 61 U.S.L.W. 4365, 4372-76 (U.S. Apr. 27, 1993) (suggesting that amendments to Federal Rules of Civil Procedure be adopted and take effect on December 1, 1993).

38. See, e.g., U.S. DIST. COURT FOR THE E. DIST. OF PA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 15 (Dec. 31, 1991) (stating that no motion shall be entered without certification by counsel that reasonable effort to resolve dispute has been made); U.S. DIST. COURT FOR THE S. DIST. OF ILL., CIVIL JUSTICE DELAY AND EXPENSE REDUCTION PLAN 14 (Dec. 27, 1991) (requiring statement that good faith effort to resolve dispute was made at discovery conference and requiring statement to recite date, time, and all persons participating in conference); U.S. DIST. COURT FOR THE DIST. OF WYO., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 13 (Dec. 1991) (stating that parties must make reasonable, good faith effort to resolve discovery disputes and must certify in writing efforts undertaken to resolve disputes).

39. See Exec. Order No. 12,778, pmbl., 3 C.F.R. 359, 359 (1991), reprinted in 28 U.S.C. § 519 (Supp. III 1991) (stating that order is response to growth in civil litigation and current litigation practices that have imposed high cost on American individuals, businesses, industry, professionals, and all levels of government).

40. Preliminary Memorandum, *supra* note 8.

41. Preliminary Memorandum, *supra* note 8, at 3640-41.

determining how the final guidance could best refine the order's operation, and issue those final guidelines.<sup>42</sup> In the summer of 1992, the Department also sought the perspectives of its own lawyers, federal agency counsel, and United States Attorneys on implementation of the guidelines.<sup>43</sup>

After a Justice Department ad hoc committee received the submissions from government counsel, it evaluated the comments and revised the preliminary guidance in light of them.<sup>44</sup> The committee met numerous times after July 20, 1992, and drafted several iterations of the final guidelines.<sup>45</sup> The committee completed its work in December 1992, and one of the final official acts of William Barr, the Bush administration Attorney General, was signing the guidance on January 15, 1993.<sup>46</sup>

Because the final guidelines that the Department of Justice issued in January 1993 made comparatively few substantive changes in, and indeed principally clarified, the preliminary guidance, the final guidelines will be examined in the text of this Article only when they elaborate or modify the preliminary guidance. Moreover, the final guidelines are primarily described in this Part, while they are critically analyzed in the second Part of this Article.<sup>47</sup>

## ii. Description

Section 1(a) of Executive Order 12,778 mandates that counsel for the United States undertake reasonable efforts to notify persons whom the Government is considering suing of government intent to file suit and to afford the individuals an opportunity to settle the controversy.<sup>48</sup> The content and timing of reasonable attempts depend on the particular circumstances of each case, and government attorneys need not provide notice in unusual situations, such as cases where notice would strategically disadvantage the United

42. Preliminary Memorandum, *supra* note 8, at 3640-41.

43. Telephone Interview with Timothy Naccarato, Special Counsel to the Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C. (Jan. 29, 1993).

44. Telephone Interview with Janice Calabresi, Special Counsel to the Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C. (Jan. 19, 1993).

45. *Id.*

46. See Memorandum, *supra* note 9, at 6015 (noting that §§ 4(a), 4(b), and 7(d) of order require Attorney General to coordinate efforts by federal agencies to implement reform, issue guidelines, and define scope of order).

47. The description follows the requirements essentially as provided in the order, but the critical analysis combines certain aspects of the requirements.

48. See Exec. Order No. 12,778, § 1(a), 3 C.F.R. 359, 360 (1991), *reprinted in* 28 U.S.C. § 519 (Supp. III 1991) (declaring that no complaint initiating civil litigation shall be filed before reasonable effort is made by government counsel to notify persons and attempt to settle); see also Preliminary Memorandum, *supra* note 8, at 3641 (stating that notice may be provided either by agency or litigating counsel for purpose of settling dispute).

States.<sup>49</sup>

Section 1(b) commands government lawyers to analyze the prospects for settlement whenever they secure adequate information.<sup>50</sup> Counsel thereafter have an ongoing responsibility to evaluate the possibility of settlement and when appropriate must offer to participate in settlement conferences.<sup>51</sup> Section 1(c) is intended to encourage settlement by requiring that government lawyers participate in ADR programs, if this activity will foster prompt, fair, and efficient resolution of civil cases.<sup>52</sup>

Section 1(d) of the Executive order covers discovery.<sup>53</sup> Section 1(d)(1) pertains to the disclosure of core information.<sup>54</sup> This subsection states that, early in civil actions, government attorneys must

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49. See Preliminary Memorandum, *supra* note 8, at 3641 (stating that notice is not needed where it would defeat purpose of litigation); see also Memorandum, *supra* note 9, at 6016 (noting that agency efforts to resolve disputes prior to litigation can afford requisite notice and stating that government counsel need not repeat notice unless additional notice would be productive).

50. See Exec. Order No. 12,778, § 1(b), 3 C.F.R. at 360, *reprinted* in 28 U.S.C. § 519 (requiring litigation counsel to make reasonable efforts toward settlement both before and during trial); see also Preliminary Memorandum, *supra* note 8, at 3641 (suggesting that litigation counsel meet with supervising attorney and affected agency to discuss acceptable terms of settlement before settlement conference); Memorandum, *supra* note 9, at 6016 (stating that litigation counsel should evaluate possibility of settlement throughout trial but that no unreasonable concession or offer should be extended nor any agency policy evaded for sake of litigation position); *infra* notes 66-68 and accompanying text (discussing § 1(g) of Executive order, which encourages early filing of motions that could resolve litigation, and observing that when government attorneys do file early, they should not seek to participate in settlement conferences until dispositive motions are resolved).

51. See Preliminary Memorandum, *supra* note 8, at 3641 (stating that litigation counsel are to "move the court for such a conference" when reasonable).

52. See Exec. Order No. 12,778, § 1(c), 3 C.F.R. at 360-61, *reprinted* in 28 U.S.C. § 519 (stating that, when feasible, claims should be resolved through informal negotiations, discussions, and settlements before utilization of formal, structured ADR process or court proceeding, but that ADR process should be used where litigation counsel determines it is warranted in context of particular claim and will materially contribute to prompt, fair, and efficient resolution of dispute); see also Preliminary Memorandum, *supra* note 8, at 3641 (suggesting that litigation counsel meet with affected agency concerning desirability of ADR procedure when such procedures have likelihood of success). In making this decision, government counsel "should consider the amount and allocation of the cost of employing ADR." Preliminary Memorandum, *supra* note 8, at 3641; see also Memorandum, *supra* note 9, at 6017 (stating that each agency, when determining whether or not to use ADR, should utilize skill and training of litigation counsel to ensure that use of such procedures in particular case will not result in binding determination as to Government without exercise of agency's discretion; that manner or terms of resolution will not compromise interest of United States; and that cost of using ADR will not be exorbitant).

53. Exec. Order No. 12,778, § 1(d), 3 C.F.R. at 361, *reprinted* in 28 U.S.C. § 519.

54. See *id.* § 1(d)(1), 3 C.F.R. at 361, *reprinted* in 28 U.S.C. § 519 (noting that "core information" includes names and addresses of people having relevant information and location of relevant documents); see also Preliminary Memorandum, *supra* note 8, at 3641-42 (discussing § 1(d)(1) of order, which requires government counsel to make reasonable efforts to reach agreement with opposing parties regarding exchange of information); *supra* note 37 and accompanying text (noting that majority of EIDCs have adopted some form of mandatory prediscovery disclosure and citing Civil Rules Committee's attempt to amend Federal Rules of Civil Procedure).

offer to participate in the mutual exchange of certain important material.<sup>55</sup> Counsel can only make such offers when no dispositive motions are pending, when other parties consent to exchange analogous information, and when the court will enter that agreement as a stipulated order.<sup>56</sup>

Section 1(d)(2) governs the review of proposed document requests.<sup>57</sup> Government lawyers can pursue the discovery of documents only after complying with requirements intended to ensure that proposed discovery is reasonable in light of the circumstances of the case.<sup>58</sup> The attorneys must base the reasonableness decision on enumerated considerations that are similar to those present in rule 26 of the Federal Rules of Civil Procedure. The considerations include: (1) whether the requests are duplicative, unduly burdensome, or expensive, given the requirements of the suit; (2) the amount in controversy; (3) the importance of the questions at issue; and (4) whether a more convenient way to secure the documents exists.<sup>59</sup> Section 1(d)(3) mandates that government lawyers attempt to resolve disagreements over discovery, including those involving sanctions, with opposing counsel or pro se litigants before asking the court to resolve the dispute.<sup>60</sup>

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55. Exec. Order No. 12,778, § 1(d)(1), 3 C.F.R. at 361, *reprinted in* 28 U.S.C. § 519; *see* Preliminary Memorandum, *supra* note 8, at 3641-42 (discussing requirement that government attorneys must offer to exchange certain information at early stage of litigation).

56. Preliminary Memorandum, *supra* note 8, at 3641-42; *see also* Memorandum, *supra* note 9, at 6017 (suggesting that agreement between parties, unless local practice warrants otherwise, should be by consent order to guarantee court enforcement). In ascertaining the practicability of compliance, counsel must consider factors such as the "utility of early issue-narrowing motions and devices, the scope and complexity of the disclosure that will be required[, and] the time available to comply with the requirement." Preliminary Memorandum, *supra* note 8, at 3642.

57. *See* Exec. Order No. 12,778, § 1(d)(2), 3 C.F.R. at 361, *reprinted in* 28 U.S.C. § 519 (requiring each agency within executive branch to establish coordinated procedure for conduct and review of document discovery, including but not limited to review by senior lawyer prior to service of request to ensure that request is not cumulative, unreasonable, oppressive, or unduly burdensome or expensive given relative importance of issues involved in litigation); *see also* Preliminary Memorandum, *supra* note 8, at 3642 (discussing § 1(d)(2) governing review of proposed document request).

58. Exec. Order No. 12,778, § 1(d)(2), 3 C.F.R. at 361, *reprinted in* 28 U.S.C. § 519; *see also* Preliminary Memorandum, *supra* note 8, at 3642 (noting that document discovery may be pursued only after compliance with review procedures).

59. Exec. Order No. 12,778, § 1(d)(2), 3 C.F.R. at 361, *reprinted in* 28 U.S.C. § 519. *Compare id. with* FED. R. Civ. P. 26(g) (requiring attorney signature on every discovery request as certification that request is consistent with rules of civil procedure, is warranted by existing law or good faith argument for extension, modification, or reversal of existing law, and is not unreasonable or unduly burdensome or expensive given needs of case, previous discovery, amount in controversy, and importance of issues at stake).

60. *See* Exec. Order No. 12,778, § 1(d)(3), 3 C.F.R. at 361, *reprinted in* 28 U.S.C. § 519 (requiring both attempt to resolve dispute before petitioning court and that any discovery motion concerning dispute be accompanied by representation that attempt at resolution was either unsuccessful or impracticable under circumstances); *see also* Preliminary Memorandum, *supra* note 8, at 3642 (stating that litigation counsel must try to resolve dispute with opposing

Section 1(e) of the Executive order commands government attorneys to introduce only reliable expert testimony.<sup>61</sup> The lawyers must rely on experts who possess specialized knowledge, have conducted research, or have other expertise in the applicable area and who base their determinations on explanatory theories that are accepted by at least a substantial minority of experts in the field.<sup>62</sup>

Section 1(f) of the order covers motions for sanctions.<sup>63</sup> Government attorneys are to seek sanctions against opposing counsel and parties when "appropriate," although government lawyers normally must attempt to resolve controversies with the other side before filing sanctions motions.<sup>64</sup> All federal agencies are to designate "sanctions officers" who must review proposals of government attorneys to request sanctions and motions that litigants file against the United States.<sup>65</sup>

Section 1(g) informs government lawyers that they must use efficient case management techniques and undertake reasonable attempts to expedite the resolution of civil lawsuits.<sup>66</sup> When proper,

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party, but only if terms of compromise are reasonable). This requirement parallels the fifth guideline of the CJRA. *See* 28 U.S.C. § 473(a)(5) (Supp. 1992) (listing, among other principles that district courts may adopt, requirement that discovery motions be accompanied by certification that moving party has made reasonable, good faith effort to reach agreement with opposing counsel).

61. Exec. Order No. 12,778, § 1(e), 3 C.F.R. at 361-62, *reprinted in* 28 U.S.C. § 519; *see also* Preliminary Memorandum, *supra* note 8, at 3642-43 (noting that existing widely used practice among government attorneys to use only reliable experts enhances Government's position in litigation). A reliable expert is one with substantial knowledge, background, research, or other expertise in a widely accepted field. Preliminary Memorandum, *supra* note 8, at 3642. The requirement of reliable experts is more an evidentiary than a procedural requirement. *See* PAUL R. RICE, EVIDENCE: COMMON LAW AND FEDERAL RULES OF EVIDENCE 922-1028 (2d ed. 1990) (discussing general rules and principles applicable to courtroom use of expert testimony and scientific evidence).

62. *See* Exec. Order No. 12,778, § 1(e), 3 C.F.R. at 361-62, *reprinted in* 28 U.S.C. § 519 (describing proper use of expert testimony, defining reliable expert testimony, and requiring litigation counsel to engage in mutual disclosure of expert witness information to extent other party agrees to comparable disclosure); *see also* Preliminary Memorandum, *supra* note 8, at 3642-43 (delineating elements of reliable expert testimony).

63. Exec. Order No. 12,778, § 1(f), 3 C.F.R. at 362, *reprinted in* 28 U.S.C. § 519; *see also* Preliminary Memorandum, *supra* note 8, at 3643 (discussing § 1(f)).

64. *See* Preliminary Memorandum, *supra* note 8, at 3643 (stating that government attorneys should pursue sanctions against opposing parties only when there is well-founded basis for such action). The order does not define "appropriate" but advises counsel to evaluate their opponents' filings and to seek sanctions against "those responsible for abusive practices." Exec. Order No. 12,778, § 1(f), 3 C.F.R. at 362, *reprinted in* 28 U.S.C. § 519.

65. *See* Exec. Order No. 12,778, § 1(f), 3 C.F.R. at 362, *reprinted in* 28 U.S.C. § 519 (requiring submission of motion for sanctions to sanctions officer and requiring that sanctions officer be senior supervising attorney within agency who is licensed to practice law before state court, courts of District of Columbia, or other territories of United States); *see also* Preliminary Memorandum, *supra* note 8, at 3643 (noting that sanctions officer should be attorney with substantial litigation experience and supervisory authority).

66. *See* Exec. Order No. 12,778, § 1(g), 3 C.F.R. at 362, *reprinted in* 28 U.S.C. § 519 (stating that these efforts should include, but are not limited to: (1) making reasonable efforts to negotiate; (2) narrowing issues by revising pleadings where appropriate; (3) requesting early

government counsel are to seek summary judgment to terminate a case or narrow the issues to be tried.<sup>67</sup> Government attorneys should also attempt to stipulate undisputed facts and seek early trial dates when appropriate.<sup>68</sup>

Section 1(h) instructs government lawyers that they must offer to enter agreements providing for two-way fee shifting with their opposition "to the extent permissible by law."<sup>69</sup> Review of relevant authority by the Attorney General indicated that no legislation specifically provided for such agreements.<sup>70</sup> Accordingly, the Justice Department informed government attorneys that they may not offer to enter the agreements until Congress passes authorizing legislation or the Attorney General provides the requisite authority.<sup>71</sup>

In addition to section 1 of the order, which is titled "Guidelines To Promote Just and Efficient Government Civil Litigation,"<sup>72</sup> there are nine sections that provide other types of information, most of which is less relevant to the issues treated in this Article. Several sections are technical. Section 4 provides for Justice Department coordination of agency efforts to implement the order's first and third sections and empowers the Attorney General to promulgate

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trial date; and (4) moving for summary judgment when motion is likely to prevail); *see also* Preliminary Memorandum, *supra* note 8, at 3643 (discussing § 1(g) of order and suggesting that litigation counsel employ case management techniques in accord with order).

67. Exec. Order No. 12,778, § 1(g), 3 C.F.R. at 362, *reprinted in* 28 U.S.C. § 519; *see also* Preliminary Memorandum, *supra* note 8, at 3643 (noting that government attorneys should not, in pursuit of expedient case management, concede facts or issues that are reasonably in dispute, uncertain, or without corroboration).

68. Exec. Order No. 12,778, § 1(g), 3 C.F.R. at 362, *reprinted in* 28 U.S.C. § 519; Preliminary Memorandum, *supra* note 8, at 3643.

69. *See* Exec. Order No. 12,778, § 1(h), 3 C.F.R. at 362-63, *reprinted in* 28 U.S.C. § 519 (requiring that in civil litigation involving disputes over federal contracts pursuant to 41 U.S.C. §§ 601-613 or in any civil litigation initiated by United States, litigation counsel shall offer to enter agreement whereby losing party pays prevailing party's legal fees and costs); *see also* Preliminary Memorandum, *supra* note 8, at 3643 (noting that order directs Attorney General to review legal basis for fee-shifting agreements).

70. *See* Preliminary Memorandum, *supra* note 8, at 3643 (observing absence of legislative authority for fee-shifting agreements).

71. Preliminary Memorandum, *supra* note 8, at 3643. The Department properly resolved this issue. The Supreme Court recently proclaimed that the "allocation of the costs accruing from litigation is a matter for the legislature, not the courts." *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990). Moreover, Congress has explicitly rejected two-way fee shifting while enacting more than 100 statutes prescribing one-way fee shifting. *See* *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (appendix to opinion of Brennan, J., dissenting) (listing fee-shifting statutes enacted by Congress and separating statutes into three categories). Justice Brennan found 69 statutes where attorney's fees are "part of cost"; 49 statutes where attorney's fees are not "costs"; and 7 statutes allowing "cost and expenses including attorney's fees." *Id.*; *see also infra* notes 83-85 and accompanying text (discussing agencies' duty to review proposed legislation or regulations prescribing certain types of fee-shifting provisions).

72. Exec. Order No. 12,778, § 1, 3 C.F.R. at 360, *reprinted in* 28 U.S.C. § 519.

guidelines.<sup>73</sup> Section 5 defines "agency" and "litigation counsel;"<sup>74</sup> section 6 proclaims that the order creates no private rights that are enforceable;<sup>75</sup> section 7 offers guidance as to the order's scope;<sup>76</sup> section 9 states that the order neither compels nor authorizes the disclosure of privileged information;<sup>77</sup> and section 10 made the order effective ninety days after October 23, 1991.<sup>78</sup>

Section 2 prescribes principles that are intended to foster the passage of legislation and the promulgation of administrative regulations that do not unduly burden the federal judicial system.<sup>79</sup> The section imposes general duties on agencies that are issuing or revising regulations, developing legislative proposals relating to regula-

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73. See Exec. Order No. 12,778, § 4, 3 C.F.R. at 365, *reprinted in* 28 U.S.C. § 519 (instructing that guidelines promulgated by Attorney General shall serve as models for internal guidelines issued by agencies pursuant to order); see also *infra* notes 86-88 and accompanying text (describing § 3 of order, which directs administrative agencies, to extent possible, to implement recommendations of Administrative Conference of United States, as set forth in *Case Management as a Tool for Improving Agency Adjudication*, 1 C.F.R. §§ 305.86-87 (1991)).

74. See Exec. Order No. 12,778, § 5, 3 C.F.R. at 365, *reprinted in* 28 U.S.C. § 519 (defining "agency" according to definition in 28 U.S.C. § 451, which excludes departments in legislative and judicial branches and defining "litigation counsel" as trial counsel in U.S. Attorney's offices, Special Assistant U.S. Attorneys, litigation division in Department of Justice, attorneys in agencies authorized to represent themselves, and any private counsel hired to represent agency). The final guidance asserts that the definition of "agency" requires "independent" agencies to comply with the order because the "President clearly has the authority to supervise and guide the exercise of core executive functions such as litigation by government agencies." Memorandum, *supra* note 9, at 6019. This claim is debatable and may implicate the Reagan administration's view that the President should have substantial control over the independent agencies. See Christopher C. Demuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075 (1986); Alan B. Morrison, *OMB Interference with Agency Rulemaking: The Wrong Way To Write a Regulation*, 99 HARV. L. REV. 1059 (1986); Steve Nelson, *OMB Should Steer Clear of Independent Agencies*, LEGAL TIMES, May 13, 1985, at 2.

75. See Exec. Order No. 12,778, § 6, 3 C.F.R. at 365-66, *reprinted in* 28 U.S.C. § 519 (proclaiming that order does not create any right or benefit, either substantive or procedural, that may be enforced by party against United States and proclaiming that order does not obligate United States to accept particular settlement or alter standards for accepting settlements).

76. See *id.* § 7, 3 C.F.R. at 366, *reprinted in* 28 U.S.C. § 519 (indicating that order does not apply to criminal matters or proceedings in courts outside United States). Moreover, notice is not required in numerous specific situations, principally when it would defeat the litigation's purpose. See *id.* (stating that notice is not required in any action regarding assets subject to forfeiture, or any action to seize property; in any bankruptcy, insolvency, conservatorship, receivership, or liquidation proceedings; when assets in question are subject to flight, dissipation, or destruction; when defendant is subject to flight; or when otherwise impracticable). Furthermore, the provisions on ADR and core disclosure do not apply to actions "to seize or forfeit assets subject to forfeiture" or to debt collection cases involving less than \$100 million. *Id.*

77. See Exec. Order No. 12,778, § 9, 3 C.F.R. at 366, *reprinted in* 28 U.S.C. § 519 (noting that privileged data includes "sensitive law enforcement information [and] information affecting national security").

78. Exec. Order No. 12,778, § 10, 3 C.F.R. at 367, *reprinted in* 28 U.S.C. § 519.

79. Exec. Order No. 12,778, § 2, 3 C.F.R. at 363-65, *reprinted in* 28 U.S.C. § 519. Sections 2, 3 and 8 are less technical and have greater relevance to the issues addressed in this article and therefore will be treated more thoroughly. Because the notions are not sufficiently relevant to warrant extensive examination in the second Part of the Article, some commentary on them appears in the following footnotes.

tions, or drafting new legislation.<sup>80</sup> The section charges the agencies to review such proposals for drafting mistakes and unnecessary ambiguity, to write them in ways that minimize needless litigation, and to draft proposals that prescribe clear and certain legal standards for affected behavior and foster simplification and burden reduction.<sup>81</sup>

Section 2 enumerates many specific issues that agencies are to consider in discharging these general responsibilities. For instance, agencies drafting proposed legislation and regulations must make all reasonable efforts to guarantee that proposals clearly specify their preemptive effect, if any, clearly specify their effect on current federal law, if any, clearly specify their retroactive effect, if any, define their important terms, and provide clear and certain legal standards for affected conduct.<sup>82</sup> The section also requires agencies to review and perform cost-benefit analyses of any proposed legislation or regulations that permit attorney's fee awards in favor of one class of litigants.<sup>83</sup> Agencies must recommend against the adoption of fee-shifting provisions when the costs of the provisions significantly outweigh any benefits, or when the prescriptions fail to detail when awards of costs and fees are proper or to limit such awards.<sup>84</sup> Whenever agencies submit draft proposals to the Office of Management and Budget, the agencies must certify that they have complied with the above requirements and justify any departures therefrom.<sup>85</sup>

Section 3 prescribes principles that are intended to foster fair and efficient resolution of administrative adjudications.<sup>86</sup> The section instructs agencies that are adjudicating administrative claims to implement, insofar as is reasonable and practicable, certain recommendations covering case management that the Administrative

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80. *Id.*

81. *Id.*

82. *See id.*, (stating that legislation should specify or address applicable statutes of limitation, whether private arbitration is appropriate, whether provisions are constitutionally severable, whether legislation applies to Federal Government, standards for governing assertion of personal jurisdiction, and other issues affecting clarity and general drafting standards). These general and specific duties may improve the quality of agency drafting efforts, although agencies already have significant incentives to draft the clearest possible proposals. *See* Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1988) (attempting to bring clarity, definition, and predictability to agency activities by requiring, among other things, that certain information be made available to public, open meetings, notices of rulemakings, and procedures for implementing proposed rules).

83. Exec. Order No. 12,778, § 2(d), 3 C.F.R. at 365, *reprinted* in 28 U.S.C. § 519.

84. *Id.* These requirements could directly affect the expense of litigation. *Cf. supra* note 71 (describing congressional opposition to fee shifting); *infra* notes 219-21 and accompanying text (emphasizing importance of measures aimed directly at cost).

85. Exec. Order No. 12,778, § 2(c), 3 C.F.R. at 364-65, *reprinted* in 28 U.S.C. § 519.

86. *Id.* § 3, 3 C.F.R. at 365, *reprinted* in 28 U.S.C. § 519.



Conference has promulgated.<sup>87</sup> The Justice Department's final guidance elaborates by encouraging agencies to extend the application of relevant components of the order's first section to counsel in administrative adjudications.<sup>88</sup>

Section 8 of the order provides that government attorneys are not to interpret the order's constituent requirements in ways that conflict with the federal civil rules, federal or state law, additional applicable rules of procedure or practice, or court orders.<sup>89</sup> The final guidance states that government lawyers must comply with both the order's provisions and the requirements of "applicable local rules or court orders" when they overlap.<sup>90</sup>

*b. Implementation*

Since January 1992, all counsel who litigate civil cases on behalf of the United States Government, including lawyers in federal agencies, the Department of Justice, and the ninety-four local United States Attorneys offices, are supposed to have implemented Executive Order 12,778 and the Justice Department guidance experimenting with executive branch reform.<sup>91</sup> Several factors complicate the effort to ascertain exactly how the United States has effectuated the Executive order and the guidelines, however.

First, government lawyers initially had less than six months to experiment with the order and the preliminary guidance and to submit comments on their experiences, and many government attorneys may have been uncertain as to how they were to proceed while the Justice Department was finalizing the guidelines. Second, there are thousands of government counsel with differing responsibilities for litigating civil lawsuits. For example, attorneys in applicable divisions of the Justice Department or in the legal offices of numerous

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87. *Id.*; see also Case Management as a Tool for Improving Agency Adjudication, 1 C.F.R. § 305.86-7 (1992) (recommending that agencies, in both formal and informal adjudications, should consider applying case management methods, including personnel management devices, step-by-step time goals, expedited options, case-file systems, two-stage resolution approaches, mediation, certain questioning techniques, time extension practices, joint consideration of cases with common issues, telephone conferences and hearings, intra-agency review, and training).

88. See Memorandum, *supra* note 9, at 6019 (noting that although order does not require application of § 1 to agency proceedings, application of relevant sections of order to such proceedings is statutorily permissible); see also *supra* notes 48-71 and accompanying text (addressing application of § 1 of order to administrative adjudications).

89. Exec. Order No. 12,778, § 8, 3 C.F.R. at 366, reprinted in 28 U.S.C. § 519.

90. Memorandum, *supra* note 9, at 6019. Unfortunately, neither the order nor the guidance treats the more difficult issue of how government lawyers are to resolve conflicts between the order and other applicable law. Cf. *infra* notes 177-78, 192-96 and accompanying text (detailing ways in which order overlaps with other law and explaining administrative effort needed to disseminate order's requirements to government attorneys).

91. Preliminary Memorandum, *supra* note 8, at 3640.

agencies may have considerably more responsibility than the local United States Attorneys offices for litigating many civil cases on behalf of the Government.<sup>92</sup> Third, it is very difficult to trace how the contents of the order and the guidelines were communicated to all government lawyers, how the attorneys understood and implemented them, and what counsel reported to the Justice Department regarding their experimentation experiences. Nonetheless, some highly generalized information can be derived from the Federal Register notice that accompanied and explained issuance of the final guidance.<sup>93</sup> Additional information can be obtained from interviews with Justice Department personnel responsible for finalizing the guidance, from interviews with government counsel responsible for implementing executive branch reform, and from individuals knowledgeable about civil justice reform.

These sources indicate that government attorneys have undertaken minimal implementation of the Executive order and the Justice Department guidance. Moreover, the efforts to date have been sporadic. Attorneys in federal agencies, the Department of Justice, and United States Attorneys Offices have varied significantly in terms of the rigor and seriousness with which they implemented executive branch reform. There has been greater compliance within the Justice Department than among federal agencies and United States Attorneys Offices, as might be expected.<sup>94</sup> For example, although a few United States Attorneys Offices have fully effectuated the reform, some have only begun to implement it, and a number have taken initial steps, such as instituting training sessions, toward implementation.<sup>95</sup>

Experimentation with the different aspects of the reform has also varied considerably. For instance, government counsel implemented more broadly and quickly the components of the order that

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92. For instance, the Environment and Natural Resources Division of the Justice Department assumes responsibility for much civil litigation involving public lands. *E.g.*, Federal Land Policy & Management Act, 43 U.S.C. §§ 1701-1784 (1988 & Supp. II 1990). The U.S. Army Corps of Engineers has similar responsibility for certain condemnation proceedings. Federal Water Pollution Control Act, § 404(d), 33 U.S.C. § 1344(d) (1988).

93. Memorandum, *supra* note 9, at 6015-19.

94. Telephone Interview with Jeffrey Axelrad, Director of Torts Branch, Civil Division, U.S. Department of Justice, Washington, D.C. (Jan. 29, 1993).

95. Telephone Interview with Timothy Naccarato, *supra* note 43. On November 25, 1991, the Justice Department sponsored a civil justice reform seminar for federal litigators. *See* U.S. DEP'T OF JUSTICE, CIVIL JUSTICE REFORM IMPLEMENTATION OF EXECUTIVE ORDER 12778 1-89 (Nov. 25, 1991) (setting forth agenda of November 25, 1991 seminar and containing information concerning civil justice reform, including history and purpose of Executive Order 12,778). On February 27, 1992, the Department's Executive Office for U.S. Attorneys sponsored "national broadcast training" on civil justice reform. *See* U.S. DEP'T OF JUSTICE, CIVIL JUSTICE REFORM IMPLEMENTATION OF EXECUTIVE ORDER 12778 37-47 (Feb. 27, 1992) (on file with author) (presenting helpful overview of Order's practical aspects).

resemble federal procedural rules.<sup>96</sup> Government lawyers concomitantly effectuated ADR less widely and promptly because of lingering concern about how best to implement the alternatives.<sup>97</sup> When the Justice Department learned of this problem from responses to its requests for comments, the Department circulated guidance on ADR to government counsel in federal agencies and United States Attorneys Offices, who now appear to be more comfortable with the concept.<sup>98</sup> The above factors suggest that it is too early to ascertain the effects, if any, on expense or delay of the reform's implementation.<sup>99</sup>

The future of executive branch reform remains very much in flux because the Clinton administration has not decided whether it will retain the reform or, if retained, how the reform will be implemented. President Clinton has left in effect the Executive order that President Bush promulgated, but has made no affirmative determination regarding the reform.<sup>100</sup> This inaction has correspondingly led to uncertainty about the reform among government lawyers. The former Acting Attorney General, Stuart Gerson, and many Justice Department personnel considered themselves caretakers and, therefore, made little policy in the area of executive branch reform.<sup>101</sup> The major exception to this was in the area of generic procedures, such as those prescribing ADR, which seemed sufficiently efficacious and apolitical that the Justice Department has continued to promote their application.<sup>102</sup>

It is too early to ascertain how Janet Reno, the new Attorney Gen-

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96. Telephone Interview with Timothy Naccarato, *supra* note 43; *see also supra* notes 54-60 and accompanying text (analyzing Executive order components resembling federal procedural rules).

97. Telephone Interview with Jeffrey Axelrad, *supra* note 94; *see also supra* note 52 and accompanying text (indicating that Executive order § 1(c) encourages settlement through ADR).

98. Telephone Interview with Timothy Naccarato, *supra* note 43; *see also* ADR GUIDANCE, *supra* note 31, at 12-14 (setting forth, *inter alia*, characteristics of cases suitable for ADR and procedures for selection of cases for ADR); *supra* notes 42-46 and accompanying text (describing government requests for comments on reforms and government's resulting revision of preliminary guidance).

99. Telephone Interview with Jeffrey Axelrad, *supra* note 94; Telephone Interview with Janice Calabresi, Special Counsel to the Assistant Attorney General, Civil Division, U.S. Department of Justice, Washington, D.C. (June 29, 1992); Telephone Interview with Timothy Naccarato, *supra* note 43.

100. Telephone Interview with Janice Calabresi, *supra* note 99; Telephone Interview with Timothy Naccarato, *supra* note 43; *cf.* Carl Tobias, *Litigating with Justice: A Civil Agenda*, *LEGAL TIMES*, Dec. 28, 1992, at 22 [hereinafter Tobias, *Litigating with Justice*] (suggesting that Clinton administration vigorously implement executive branch reform).

101. Telephone Interview with Janice Calabresi, *supra* note 99; Telephone Interview with Timothy Naccarato, *supra* note 43.

102. *See* ADR GUIDANCE, *supra* note 31, at 14 (setting forth procedures for selection of cases for ADR).

eral, will treat executive branch civil justice reform. In an address at an April national conference on civil justice reform, Ms. Reno characterized the commitment to the area of civil justice reform as one of the most significant that the Justice Department could undertake and outlined her approach to the field:

I want to approach it in a nonpartisan, careful, thoughtful way, through the creation in the Department of Justice of something akin to the old Office of Justice Improvement, an office where we can focus on the issues of civil justice reform without buzz words, without labels, and without political debate, looking at what is best for the system, looking at issues of alternative dispute resolution, of case management, of what to do about punitive damages, of product liability reforms, of prefiling requirements, and of early settlement provisions.<sup>103</sup>

## 2. *Legislative proposal*

The Bush administration also proposed legislation covering civil justice reform. It based the proposal on the suggestions of the Council on Competitiveness Working Group on Civil Justice Reform, found in the entity's August 1991 report.<sup>104</sup> On February 4, 1992, Senator Charles Grassley and Representative Hamilton Fish introduced the administration's civil justice reform legislation in Congress.<sup>105</sup>

The measure consists principally of procedural requirements resembling those prescribed in or implemented pursuant to the CJRA or included in Executive Order 12,778. For instance, one section of the bill mandates that a district in every circuit institute a multidoor courthouse program for three years.<sup>106</sup> Under this section, the courts would have to implement ADR plans that permit parties to choose specific techniques for resolving cases without litigation, such as arbitration, mediation, early neutral evaluation, and summary jury trials.<sup>107</sup> This prescription, therefore, could essentially replicate efforts that numerous EIDCs have already instituted, that many of the remaining districts may initiate, and that government counsel are currently implementing.<sup>108</sup> Another section of the pro-

103. U.S. Attorney General Janet Reno, Address Before the National Conference on Civil Justice Reform (Apr. 21, 1993), available in LEXIS, Nexis Library, Federal News Service File.

104. See PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 15-27 (Aug. 1991) (providing civil justice reform recommendations).

105. See S. 2180, 102d Cong., 2d Sess. (1992) (stating bill's purpose as providing "greater access to civil justice by reducing cost and delay"); H.R. 4155, 102d Cong., 2d Sess. (1992) (same).

106. S. 2180, *supra* note 105, § 7; H.R. 4155, *supra* note 105, § 7.

107. S. 2180, *supra* note 105, § 7; H.R. 4155, *supra* note 105, § 7.

108. See, e.g., *supra* notes 30-33 and accompanying text (describing EIDCs' civil justice

posed legislation mandates that plaintiffs afford potential defendants written notice of their claims and actual damages sought prior to filing actions.<sup>109</sup> This stricture mirrors a requirement that the Executive order imposes.<sup>110</sup>

Additional facets of the legislative proposal, such as the provision for fee shifting in diversity cases, are very controversial.<sup>111</sup> In fact, the bill is unlikely to pass in 1993, because the proposal includes these controversial measures and replicates the CJRA and its implementation considerably more than the Executive order.<sup>112</sup> The defeat of the Bush administration and the Clinton administration's probable opposition to the bill also suggest that its passage in 1993 is doubtful.<sup>113</sup>

## II. CRITICAL ANALYSIS OF EXECUTIVE BRANCH CIVIL JUSTICE REFORM

### A. *A Word About Assessment*

Several difficulties complicate evaluation of the executive branch civil justice reform instituted by the Bush administration. First, government attorneys have undertaken only skeletal implementation of the Executive order and the Justice Department guidance.<sup>114</sup> Effectuation has generally been sporadic and has varied significantly

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reform efforts); *supra* notes 52, 97 and accompanying text (noting government implementation of Executive Order 12,778).

109. S. 2180, *supra* note 105, § 5; H.R. 4155, *supra* note 105, § 5.

110. See *supra* notes 48-49 and accompanying text (describing similar requirements in § 1(a) of Executive order).

111. See Preliminary Memorandum, *supra* note 8, at 3643 (supporting assertion that fee-shifting provisions are controversial because legislation did not explicitly require such provisions). See generally *supra* notes 69-71, 84 and accompanying text (explaining government restrictions on implementation of fee-shifting provision).

112. Compare S. 2180, *supra* note 105, § 3 (stating that prevailing party is entitled to recover attorneys' fees "only to the extent that such party prevails on any position or claim advanced during the action") with Civil Justice Reform Act of 1990, 28 U.S.C. § 473 (Supp. 1992) (promulgating provisions replicated in S. 2180 but without mention of fee-shifting provisions) and Exec. Order No. 12,778, § 1(h), 3 C.F.R. at 362-63, *reprinted in* 28 U.S.C. § 519 (instructing government attorneys to enter into fee-shifting agreements "to the extent permissible by law").

113. See Tobias, *Clinton Administration*, *supra* note 4, at 443 (describing bill provisions that are likely to prevent timely passage). Indeed, Congress failed to schedule a hearing on the proposal during 1992. *Id.* Near the end of Congress' last session, Senator DeConcini introduced a bill to establish a National Commission on Civil Justice Reform. See S. 3333, 102d Cong., 2d Sess. (1992) (proposing national civil justice reform commission to examine and develop solutions to civil justice problems). He intended the proposal to "address the inability of the current administration and Congress to develop a comprehensive legislative proposal for civil justice reform." 138 CONG. REC. S 16,994 (daily ed. Oct. 5, 1992) (statement of Sen. DeConcini). Senator DeConcini has cosponsored the Civil Justice Reform Act of 1993. See S. 585, 103d Cong., 1st Sess. (1993).

114. See *supra* notes 91-99 and accompanying text (discussing incomplete implementation of Executive order).

among the Justice Department, the federal agencies, and the ninety-four United States Attorneys Offices, as well as within the entities' different components.<sup>115</sup> These factors indicate that there has been virtually no assessment of the efficacy of the procedures by, for example, establishing baselines and attempting to ascertain whether and how substantially the procedures have reduced litigation expense and delay.<sup>116</sup>

Even had experimentation been more systematic and uniform, and had measures been instituted to evaluate efficacy, those efforts would have left untreated the procedures' detrimental side effects, namely the potential for less accurate dispute resolution, and significant process values, such as fairness and justice, that the CJRA and the Executive order expressly mandate be considered.<sup>117</sup> For instance, if resource-poor litigants who were participating in mandatory ADR felt compelled, by monetary restraints or by pressure from adversaries or judicial officers, to settle for less than their cases were actually worth, the parties' opponents and the courts would save money and time, but such savings would be at the litigants' expense in terms of compensation and fairness.<sup>118</sup>

In short, it is problematic to define cost and delay and to analyze

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115. See Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 WASH. & LEE L. REV. 89, 110 (1993) (noting that relatively few U.S. Attorneys offices in Fourth Circuit have effectuated executive branch reform); Telephone Interview with Jeffrey Axelrad, *supra* note 94 (noting that Torts Branch of Department of Justice Civil Division is fully implementing reforms set forth in Executive order); see also *supra* notes 94-99 and accompanying text (indicating that government attorneys generally have been slow to implement reform).

116. See *supra* note 99 and accompanying text (noting that because consistent implementation of reform did not occur, it is too early to conduct meaningful evaluation of reform's effects); see also Carl Tobias, *Recalibrating the Civil Justice Reform Act*, 30 HARV. J. ON LEGIS. 115, 124 (1993) [hereinafter Tobias, *Recalibrating the CJRA*] (asserting that few districts have established expense and delay baselines necessary to measure progress).

117. See, e.g., 28 U.S.C. § 471 (Supp. 1992) (stating that civil justice plans' purposes are to "ensure just, speedy, and inexpensive resolutions"); Exec. Order No., 12,778, 56 Fed. Reg. 55,195, 55,195 (1991) (propounding order's purpose to "promote fair and prompt adjudication"); see also Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1466-71 (1987) (discussing process values); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076-78 (1984) (discussing process values and criticizing imbalance of power between parties as justification for ADR).

118. This example also implicates the difficult questions of defining and measuring costs and determining who bears those expenses. See Tobias, *Recalibrating the CJRA*, *supra* note 116, at 124 (noting that few districts have determined how costs should be defined and allocated among parties); cf. John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677-84 (1986) (arguing that poorer litigants involved in class actions tend to have little control over their own cases); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 495-98 (1988-1989) [hereinafter Tobias, *Civil Rights*] (analyzing difficulties that resource-poor litigants confront despite congressional passage of numerous statutes suggesting that federal courts should be solicitous of litigants' needs). But cf. Carl Tobias, *Updating Civil Justice Reform in Montana*, 54 MONT. L. REV. 89, 95 (1993) [hereinafter Tobias, *Updating Civil Justice Reform*] (providing evidence suggesting that certain repeat players, namely insurers, choose state forum out of concern about pressures in settlement conferences).

accurately expense and delay reduction. It is even more difficult, however, to articulate, measure, and value certain side effects and concerns significant to the civil litigation process. Even more complicated is attempting to balance meaningfully all of the considerations that are relevant in determining whether executive branch civil justice reform should proceed and, if so, under what circumstances.

Notwithstanding these problems, it is possible to offer a preliminary assessment of the Executive order, the Justice Department guidance, and their nascent implementation. This can be achieved principally by examining the procedures that are being applied in the executive branch effort in light of prior or ongoing experimentation with the same or analogous procedures. For instance, many years before the CJRA's passage, a number of federal judges, particularly in the Northern District of California, had been experimenting with various case management techniques.<sup>119</sup> Similarly, numerous courts had been experimenting with certain forms of ADR, such as summary jury trials,<sup>120</sup> and judges across the nation had been experimenting with court-annexed arbitration.<sup>121</sup>

Indeed, Congress relied substantially on this earlier experimentation when prescribing the eleven principles, guidelines, and techniques in the CJRA, mechanisms that most EIDCs are presently implementing.<sup>122</sup> One measure of the executive branch procedures' efficacy, therefore, could be whether Congress deemed the procedures sufficiently effective to warrant prescription in the 1990 Act. This yardstick is somewhat unrefined because the efficacy of certain principles, guidelines, and techniques remains controversial<sup>123</sup> and because Congress did not consider the enumerated factors to be all-

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119. See Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CAL. L. REV. 770, 779-89 (1981) (evaluating pretrial case management techniques used in Northern District of California); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 386-91 (1982) (describing various models of judicial case management).

120. See, e.g., Thomas D. Lambros, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution*, 103 F.R.D. 461, 474-75 (1984) (noting courts' use of summary jury trial as cost-saving device). See generally Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366, 385-89 (1986) (criticizing summary jury trials as not having positive impact on settlement rates).

121. See BARBARA S. MEIERHOEFER, COURT-ANNEXED ARBITRATION IN TEN DISTRICT COURTS 13-18 (1990) (discussing ways in which courts have experimented with arbitration programs). Congress stamped its imprimatur on this experimentation in the 1988 Judicial Improvements Act. See 28 U.S.C. §§ 651-658 (1988) (providing arbitration system for federal courts).

122. See *supra* note 29 and accompanying text (indicating EIDC implementation of 11 principles prescribed by Congress).

123. Some procedures used earlier were and remain controversial. See, e.g., Posner, *supra* note 120, at 385-89 (criticizing summary jury trials). Moreover, a few observers have asserted that Congress based the CJRA's procedures substantially on political factors. See Avern Cohn, *A Judge's View of Congressional Action Affecting the Courts*, LAW & CONTEMP. PROBS., Summer 1991,

inclusive.<sup>124</sup> The mere statutory prescription of procedures or prior experimentation with those procedures or other measures does not necessarily insure that the procedures will reduce expense or delay or that they will be free from deleterious side effects or will honor important process values.

In sum, a preliminary assessment of the executive branch procedures can be provided primarily by considering them in light of identical or similar mechanisms with which courts have experimented prior to the CJRA's enactment or pursuant to that legislation. The procedures' efficacy can be evaluated in terms of reducing expense, delay, and the detrimental side effects and significant process values that the provisions' application implicates. Analysis of how specific procedures could prove problematic or effective precedes a summary by way of general examination.

### B. *Specific Procedures*

#### 1. *Discovery*

The United States Department of Justice touted the discovery provisions as one of the reform's principal components.<sup>125</sup> Many attorneys believe that difficulties with discovery, particularly its abuse, cause much expense and delay in civil litigation.<sup>126</sup> Chief Judge Robert Parker, the Chair of the Judicial Conference Committee on Court Administration and Case Management, has characterized excessive discovery as the "single greatest factor that contributes to unacceptable cost."<sup>127</sup>

The requirements pertaining to the disclosure of core information are problematic in several respects.<sup>128</sup> Most important, they

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at 99, 103 (concluding that CJRA was "driven by special interests"); see also Mullenix, *supra* note 2, at 396-407 (describing political process from which CJRA evolved).

124. See 28 U.S.C. § 473(b)(6) (Supp. 1992) (instructing, in sixth open-ended technique, that each court should include in civil justice plan "such other features as the district court considers appropriate" after considering its advisory group's recommendations).

125. See Memorandum, *supra* note 9, at 6018 (describing reform's discovery component).

126. See Wayne D. Brazil, *Views from the Front Lines: Observations by Chicago Lawyers About the System of Civil Discovery*, 1980 AM. B. FOUND. RES. J. 219, 229-35 (describing attorney criticisms of discovery process in large cases); William W. Schwarzer, *The Federal Rules, the Adversary Process, and Discovery Reform*, 50 U. PITT. L. REV. 703, 703 (1989) (stating that "discovery now tends to dominate . . . litigation and inflict disproportionate costs and burdens"). But see Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 161 n.33 (1991) (citing authorities in support of proposition that discovery abuse is not rampant).

127. Memorandum on Civil Justice Reform Act Implementation from Robert M. Parker, Chair, Judicial Conference of the U.S. Committee on Court Administration and Case Management, to Chief Judges, U.S. Courts of Appeals, Chief Judges, U.S. District Courts, and Chairs, Advisory Groups (Oct. 22, 1992) (on file with *The American University Law Review*).

128. See *supra* notes 54-56 and accompanying text (describing discovery provisions of Executive order).



are less stringent, in terms of what must be divulged and the disclosure's timing, than the strictures that the Federal Rules proposal would impose and that numerous EIDCs have implemented pursuant to the CJRA.<sup>129</sup> For instance, the executive branch reform requires that parties voluntarily divulge some helpful material, such as the names and addresses of potential witnesses and the location of relevant documents, during discovery.<sup>130</sup> In contrast, the Federal Rules proposal, and a number of courts under the CJRA, call for the automatic disclosure of that information, as well as considerably more information such as data compilations, damages computations, and relevant insurance agreements, within thirty days of the service of defendant's answer.<sup>131</sup>

Even if the executive branch disclosure requirements were more demanding, the proviso that they are inapplicable while a dispositive motion is pending<sup>132</sup> severely undercuts the strictures' effectiveness. The United States frequently files questionable motions to dismiss that courts do not resolve promptly, often triggering governmental requests for discovery stays.<sup>133</sup> These developments would suspend governmental responsibility to comply while consequently halting the progress of cases.

The above difficulties, principally implicating the efficacy of the executive branch disclosure requirements, are compounded by the uncertainty surrounding the Federal Rules proposals on which many EIDCs premised their prediscovery disclosure procedures. Most of the EIDCs relied on the notion that material "bear significantly on any claim or defense," which appeared in a 1991 draft,<sup>134</sup> the rule revisors, however, subsequently replaced that concept with the idea of "discoverable information relevant to disputed facts al-

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129. See *supra* note 37 and accompanying text (noting prediscovery provisions prescribed by EIDCs).

130. See *supra* notes 54-56 and accompanying text (discussing discovery section of Executive order); see also Don J. DeBenedictis, *Panel Raps Bush's Order*, 78 A.B.A. J., Oct. 1992, at 40 (suggesting that requiring Government to disclose potential witness information is already "typical litigation practice" and thus is not substantive reform).

131. See JUDICIAL CONFERENCE PROPOSAL, *supra* note 37, at 3-5, reprinted in 137 F.R.D. at 66-68 (noting information required to be disclosed under proposal). The proposal also imposes a continuing duty to update disclosures. *Id.*

132. Exec. Order No. 12,778, § 1(d)(1), 3 C.F.R. 359, 361 (1991), reprinted in 28 U.S.C. § 519 (Supp. III 1991).

133. See Letter from John W. Toothman, Esq., Shulman, Rogers, Gandal, Pordy & Ecker, Alexandria, Va., to Carl Tobias, Professor of Law, University of Montana (Dec. 31, 1992) (on file with *The American University Law Review*) (asserting that order's discovery provision is ineffective due to slow resolution of preliminary motions).

134. See JUDICIAL CONFERENCE PROPOSAL, *supra* note 37, at 14, 137 F.R.D. at 87-88 (requiring under rule 26(a)(1)(B) that litigants supply information "concerning documents, data compilations, and tangible things . . . likely to bear significantly on any claim or defense").

leged with particularity in the pleadings."<sup>135</sup> Even though the Supreme Court recently approved this formulation, Congress may well alter it.<sup>136</sup>

The two other subparts of the Executive order's discovery section promise to have no more impact than provision for the disclosure of core information. The requirements covering review of proposed document requests essentially import discovery strictures that are present in current federal rule 26,<sup>137</sup> prescriptions with which government attorneys should already be complying. The order's procedures relating to discovery motions, which require that government lawyers make reasonable efforts to resolve discovery disputes with adversaries before filing motions and to so state in those papers, effectively replicate a measure prescribed in the CJRA<sup>138</sup> that numerous EIDCs have instituted.<sup>139</sup> When these provisions do not resolve discovery controversies, the requirements that counsel participate in more activities will increase litigation expenses.<sup>140</sup>

Notwithstanding the above problems, the discovery commands could effect some savings of money and time. Insofar as government attorneys comply with the strictures regarding disclosure of core information to divulge relevant material early in a case, this

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135. 1992 PROPOSED AMENDMENTS, *supra* note 37, at 72; see also *supra* note 37 and accompanying text (describing EIDC discovery provisions).

136. See 61 U.S.L.W. 4365, 4372-76 (U.S. Apr. 27, 1993) (proposing amendments to Federal Rules of Civil Procedure). Numerous elements of the organized bar opposed the 1991 draft, but many constituents believe the new iteration to be an improvement. See Samborn, *supra* note 37, at 12-13 (noting attorney satisfaction with final draft). Nonetheless, some critics may ask Congress to change the proposal. See *infra* notes 233-34 and accompanying text (noting author's belief that pressure to modify proposals may be exerted). See generally Linda S. Mullenix, *Hope over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 801 (1991) (predicting that formulation of new discovery rules will be affected by political pressures); Carl Tobias, *Collision Course in Federal Civil Discovery*, 145 F.R.D. 139, 139 (1993) (stating that "procedural reform efforts are on a collision course" due to inaction of federal judiciary).

137. See FED. R. CIV. P. 26(b), (g) (providing federal discovery rules for civil cases); see also *supra* notes 57-60 and accompanying text (comparing pertinent federal civil procedure rules with proposed Executive order provisions governing discovery).

138. See 28 U.S.C. § 473(a)(5) (1988 & Supp. 1992) (requiring that party moving for discovery motion first make "reasonable and good faith effort" to reach agreement with opposing party); see also *supra* note 60 and accompanying text (noting implementation by EIDCs of provision requiring efforts to reach agreement between parties before discovery motions will be heard).

139. See, e.g., U.S. DIST. COURT FOR THE DIST. OF MONT., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 17 (Dec. 1991) [hereinafter DISTRICT OF MONTANA PLAN] (establishing new discovery procedures for court); *supra* note 38 and accompanying text (noting other courts' adoption of similar approaches).

140. See Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393, 1415 (1993) [hereinafter Tobias, *Balkanization of Federal Civil Procedure*] (arguing that expediting discovery process may actually increase litigation expenses and cause problems for litigants with limited resources).

activity may expedite and streamline discovery.<sup>141</sup> To the extent that these lawyers implement the requirements regarding document requests, compliance could both decrease the number of government requests and make them more routine and, thus, contribute to cost and temporal savings.<sup>142</sup> When the strictures on discovery motions lead to the resolution of discovery disputes, the resources of parties and courts will be conserved through a reduction in the number of filings.<sup>143</sup>

## 2. Sanctions

Much of what is included in the Executive order's provision for sanctions<sup>144</sup> seems unwarranted. Requiring government counsel to scrutinize their opponents' papers for deficiencies and seek sanctions when appropriate could unduly emphasize technical niceties in pleadings,<sup>145</sup> foster unnecessary satellite litigation,<sup>146</sup> and promote incivility among attorneys.<sup>147</sup> These detrimental impacts will increase expense and delay, particularly disadvantaging resource-poor litigants.<sup>148</sup> Moreover, the Justice Department had previously fol-

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141. I recognize that this is a significant caveat. See *supra* notes 54-56, 133 and accompanying text (presenting and criticizing Executive order's discovery provision).

142. See *supra* notes 57-60, 137 and accompanying text (describing Executive order provisions governing review of proposed document requests and comparing provisions with Federal Rules of Civil Procedure).

143. See *supra* note 60 and accompanying text (discussing Executive order provision requiring attempt by parties to resolve discovery disputes); see also *supra* notes 138-40 and accompanying text (criticizing aforementioned Executive order provision).

144. See *supra* notes 63-65 and accompanying text (describing Executive order's sanctions provision).

145. See *supra* notes 63-65 and accompanying text (presenting Executive order § 1(f) requirements, which may lead to unnecessary emphasis on technical wording of legal motions). Such scrutiny and the resulting conflicts over opponents' documents would contravene the drafters' intent in adopting original rule 8 that pleading be liberal and flexible. See *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 113 S. Ct. 1160, 1163 (1993) (holding that federal courts may not employ heightened standard of pleading beyond "liberal system of 'notice pleading' set up by the Federal Rules"); FED. R. CIV. P. 8(e)(1) (stating that "no technical forms of pleadings or motions are required"); see also Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434-40 (1986) (describing liberal intent of rule 8 drafters). See generally Carl Tobias, *Public Law Litigation and the Federal Rules of Civil Procedure*, 74 CORNELL L. REV. 270, 296-301 (1989) (explaining rule 8 pleading standards).

146. See, e.g., *Eastway Constr. Corp. v. City of New York*, 821 F.2d 121, 122-24 (2d Cir.) (illustrating how attorney's fee sanctions can lead to satellite litigation), *cert. denied*, 484 U.S. 918 (1987); see also Stephen B. Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11*, 137 U. PA. L. REV. 1925, 1930 (1989) (citing conflicts among circuit courts on "practically every important question of interpretation and policy" relating to rule 11 sanctions); Tobias, *Civil Rights*, *supra* note 118, at 514 (noting how rule 11 has "exacerbated," rather than cured, litigation abuse).

147. See Tobias, *Civil Rights*, *supra* note 118, at 515 (emphasizing ways in which federal sanction rules have caused conflicts among attorneys).

148. See Melissa L. Nelken, *Sanctions Under Amended Federal Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313, 1327, 1340 (1986) (stating that attorneys may be reluctant to bring civil rights suits for fear of being

lowed a properly measured informal policy of pursuing sanctions only in cases of egregious litigation abuse.<sup>149</sup>

The Executive order's requirements covering sanctions could be less problematic than they appear, depending on how the provisions are interpreted and implemented. For instance, government counsel may only request that judges sanction "those responsible for abusive practices."<sup>150</sup> Although abuse is not defined, the abuse idea seems inconsistent with the requirement that papers be scrutinized for technical flaws.<sup>151</sup> Courts have experienced difficulty applying the abuse concept in the context of sanctions disputes, and use of the notion could impose a relatively high threshold and make this aspect of the reform resemble the prior Justice Department policy on sanctions.<sup>152</sup>

If the Government were to pursue sanctions vigorously in appropriate circumstances, parties and lawyers could be deterred from filing frivolous claims against the United States.<sup>153</sup> The strictures on sanctions should also serve to make governmental sanctions practices more consistent and routine.<sup>154</sup> Insofar as government counsel might file unwarranted motions seeking sanctions, the procedures provide the safeguard of mandating that attorneys secure approval from specifically designated sanctions officers, thereby limiting the potential for "arbitrariness and caprice" which might attend government requests for sanctions.<sup>155</sup>

### 3. *Expert witnesses*

Certain provisions pertaining to expert witnesses are essentially

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sanctioned if suits are deemed frivolous); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189, 200-02 (1988) (confirming commentators' views that fear of sanctions may lead to fewer suits on behalf of poor plaintiffs).

149. See Carl Tobias, *Environmental Litigation and Rule 11*, 33 WM. & MARY L. REV. 429, 460 (1992) [hereinafter Tobias, *Environmental Litigation*] (explaining that government attorneys only pursue sanctions when opposing party has "seriously abused the litigation process").

150. Preliminary Memorandum, *supra* note 8, at 3643.

151. See *supra* note 64 (discussing recommendation in Executive Order 12,778 that attorneys evaluate opposing counsels' filings).

152. See *supra* note 149 and accompanying text (describing government policy to pursue sanctions only in circumstances of extreme abuse); see also William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1015-17 (1988) (citing judicial difficulty of defining and applying abuse standard uniformly).

153. See Tobias, *Litigating with Justice*, *supra* note 100, at 22 (arguing that Government should adopt Executive order provisions, including standards specifying situations in which Government should pursue sanctions); see also Schwarzer, *supra* note 152, at 1017-18 (noting that deterrence of frivolous claims was principal purpose of rule 11's 1983 amendment).

154. Cf. *supra* note 65 and accompanying text (discussing appointment of "sanctions officers" to monitor Government's motions for sanctions).

155. See DeBenedictis, *supra* note 130, at 40 (reporting comments of former Solicitor General Kenneth W. Starr); see also *supra* note 65 and accompanying text (discussing appointment of government officers to review sanctions motions).

required, are controversial, or could prejudice the United States case.<sup>156</sup> For example, the Federal Rules of Evidence effectively allow expert testimony only from individuals who possess expertise in relevant areas.<sup>157</sup> The mandate that government attorneys present in court only reliable expert testimony implicates the heated, unresolved debate in the scientific and legal communities over "junk science."<sup>158</sup> Limiting government counsel in this way may also strategically disadvantage the United States in cases involving significant issues of science, technology, public health, and the environment. For instance, when the Government seeks to impose responsibility for environmental degradation on industry defendants in suits that raise close, complex questions of causation, the defendants might be able to call witnesses whom the United States could not. The application of these requirements, however, might help to resolve some of the controversy that currently surrounds the employment of experts and may serve as a model for private litigants and lawyers. For example, restricting government witnesses to reliance on widely accepted theories while proscribing contingent fees may be instructive experiments that will improve prevailing practices in the expert testimony area.<sup>159</sup>

#### 4. *Settlement*

The requirements pertaining to settlement in three subsections of the Executive order essentially embody good litigation practice or correspondingly mandate procedures that government counsel already follow in most civil cases.<sup>160</sup> The command that government lawyers attempt to settle controversies before filing complaints al-

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156. See *supra* notes 61-62 and accompanying text (explaining Executive order provision restricting Government's offering of expert testimony).

157. See FED. R. EVID. 702 (placing restrictions on admissibility of expert testimony); cf. Weinstein, *supra* note 2, at 636-39 (discussing proposed amendments that would strengthen rule 702, which governs expert testimony).

158. See PETER W. HUBER, GALILEO'S REVENGE 2-6 (1991) (describing "junk science" as "speculative theory that expects lawyers, judges, and juries to search for causes at the fringes of science and beyond"); see also Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 320 (1992) (granting certiorari to resolve issues relating to offering of scientific expert testimony).

159. See *supra* notes 61-62 and accompanying text (describing Executive order's restrictions on government use of expert witnesses). The application of certain requirements to public interest litigants such as injured individuals or environmental plaintiffs could seriously disadvantage them. See John W. Toothman, Agenda to Nowhere: The President's Civil Justice Reforms 6 (1992) (unpublished manuscript on file with *The American University Law Review*) (arguing that proposed reform is "designed to increase the risks to those with limited resources"); see also Tobias, *Civil Rights*, *supra* note 118, at 495-98 (arguing that narrow application of procedural rules has significant impact on civil rights plaintiffs).

160. See *supra* notes 48-52 and accompanying text (describing Executive order provisions already largely followed by government attorneys).

ready occurs in many circumstances.<sup>161</sup> The notice requirement could also prejudice the United States in the smaller number of situations where potential defendants behave improperly by, for instance, fleeing or destroying relevant documents.<sup>162</sup>

The order's prescriptions on government participation in settlement conferences and concomitantly ADR<sup>163</sup> will be minimally more effective than the notice concept discussed in the previous paragraph. For instance, the Government now actively participates in these forms of dispute resolution.<sup>164</sup> Involvement in settlement conferences and ADR can disadvantage resource-poor litigants, which may include the Government when it is aligned against certain regulated interests, such as the petroleum industry.<sup>165</sup> Judges and parties in settlement conferences may unduly pressure litigants with limited funding who might believe that resistance will prejudice their cases or lead to sanctions.<sup>166</sup> Participation in these conferences and various forms of ADR can correspondingly deplete parties' scarce resources without moving cases closer to resolution on the merits.<sup>167</sup>

The prescriptions covering settlement could effect significant expense and delay reductions for the Government, for lawyers and litigants whom the Government opposes, and for the judiciary.<sup>168</sup>

161. See Toothman, *supra* note 159, at 4 (noting that government lawyers generally attempt settlement before filing of suit); see also DeBenedictis, *supra* note 130, at 40 (arguing that reform is unhelpful because it requires actions that already occur).

162. See Toothman, *supra* note 159, at 4 (suggesting that "every practicing lawyer" has had client who fled or shredded documents prior to suit). But see *supra* notes 49, 76 and accompanying text (discussing Executive order provision for situations where notice is not required, thus alleviating concerns about defendants who might flee or shred documents).

163. See *supra* notes 50-52 and accompanying text (describing Executive order provisions requiring use of settlement conferences and ADR techniques).

164. See *supra* notes 48-52 and accompanying text (describing ADR methods already largely followed by government attorneys).

165. See Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1375-83, 1400-04 (describing potential prejudices in ADR system and concluding that ADR should be used only when parties are of equal economic strength). See generally Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 914-28 (1991) (providing critical analysis of ADR); Tobias, *Civil Rights*, *supra* note 118, at 495-98 (describing ways in which inherent characteristics of civil rights cases cause such cases to be adversely affected by forms of ADR).

166. See *supra* note 118 and accompanying text (discussing unique burdens ADR places on resource-poor litigants); see also Tobias, *Environmental Litigation*, *supra* note 149, at 455-56 (noting that government attorneys as repeat players may be reluctant to jeopardize ongoing relations with judges); *supra* note 33 and accompanying text (describing court-imposed sanctions for litigants who are perceived to have not participated in good faith).

167. Cf. Tobias, *Civil Rights*, *supra* note 118, at 495-98 (explaining special challenges faced by civil rights litigants).

168. Cf. *supra* note 21 and accompanying text (citing Judicial Improvements Act's mandate that federal district court advisory groups' recommendations must consider impact of expense and delay on judicial system); *infra* note 205 and accompanying text (suggesting that Executive order's prescriptions reducing expense and delay may cause government attorneys to be more receptive to ADR).

Requiring that the United States provide notice and attempt to settle cases before filing, as well as increased participation of the Government in settlement conferences and ADR, may foster earlier resolution of a greater number of civil cases, particularly before trial. Insofar as these measures' invocation results in more lawsuits being terminated sooner in the litigation process, and even outside the traditional courtroom procedures, parties, attorneys, and judges will realize savings.

### 5. Case management

The Executive order's instructions requesting the employment of efficient case management mechanisms and reasonable efforts to expedite the resolution of civil suits can be criticized for reasons similar to those regarding settlement and ADR.<sup>169</sup> For example, the requirements that government counsel negotiate with other litigants and stipulate to undisputed facts, seek early trial settings, and move for summary judgment when appropriate are typical litigation practices.<sup>170</sup> Numerous courts have effectively imposed, under federal rule 11, the order's command that government lawyers review and revise pleadings to reflect information derived from discovery,<sup>171</sup> although this activity can be expensive and unnecessary.<sup>172</sup>

The Executive order's provision for using efficient techniques of case management and making reasonable attempts to expedite civil cases could reduce expense and delay.<sup>173</sup> For instance, undertaking reasonable efforts to agree on facts that are not in dispute, request-

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169. See *supra* notes 66-68 and accompanying text (explaining § 1(g) of order, which commands government lawyers to seek expeditious resolution of civil lawsuits); see also *supra* text accompanying notes 165-67 (suggesting that settlements and ADR may unfairly pressure resource-poor litigants to avoid pursuit of meritorious cases).

170. Cf. *supra* notes 67-68 and accompanying text (restating elements of order that instruct government attorneys to expedite civil lawsuits); cf. also Toothman, *supra* note 159, at 7 (noting ineffectiveness of warning government attorneys to seek early trial dates and narrow issues in pleadings, as attorneys often deliberately impede pretrial process).

171. See Tobias, *Civil Rights*, *supra* note 118, at 489-501 (documenting judicial enforcement of rule 11 requirements); see also Exec. Order No. 12,778, § 1(g)(2), 3 C.F.R. 359, 362 (1991), reprinted in 28 U.S.C. § 519 (Supp. III 1991) (ordering counsel to review and revise papers to guarantee their accuracy and ensure that they reflect narrowing of issues resulting from discovery).

172. See Carl Tobias, *Reconsidering Rule 11*, 46 U. MIAMI L. REV. 855, 868-69 (1992) [hereinafter Tobias, *Reconsidering Rule 11*] (arguing that proposed rule 11 duty to revise pleadings would burden attorneys and parties, add unwarranted expense to litigation, and generally complicate lawsuits); see also *supra* note 145 and accompanying text (suggesting that requiring attorneys to inspect their opponents' papers could promote unnecessary emphasis on technical aspects of pleadings).

173. See Tobias, *Clinton Administration*, *supra* note 4, at 444 (suggesting that while ultimate effectiveness of executive branch civil justice reform remains unclear, certain procedures such as mediation, ADR, and participation in settlement conferences could expedite resolution of civil litigation).

ing early trial dates, and moving for summary judgment to narrow the issues may decrease delay and thereby save some expense.<sup>174</sup>

The subsections of the Executive order that were not discussed or were treated minimally in the text above warrant little additional examination here.<sup>175</sup> Most of these elements are good litigation practice, introduce no new requirements, or seem ineffective, and impose on government attorneys duties with which they now can, or must, comply under the CJRA, federal or local rules, or other procedural requirements.

### C. General Assessment

#### 1. Inadvisable and less advisable aspects

One significant problem with executive branch reform is that it institutes few procedures that promise to reduce expense or delay that judges, lawyers, or litigants could not already invoke, especially pursuant to the CJRA, or that are not now good litigation practice for most attorneys and parties, particularly the United States and its counsel. A side-by-side comparison of the Executive order's requirements and the CJRA's eleven principles, guidelines, and techniques reveals that practically all of the executive branch procedures are identical or similar to those listed in the Act, which the ninety-four districts must consider and may adopt.<sup>176</sup> For instance, the order's provisions for settlement, ADR, and discovery replicate or resemble the statutorily prescribed principles, guidelines, and techniques.<sup>177</sup>

Another important difficulty is the significant administrative effort that the reform's proper implementation will necessitate. The thousands of government lawyers who work in the Justice Department, federal agencies, and United States Attorneys Offices must

174. See *infra* notes 215, 217-18 and accompanying text (documenting attempts by EIDCs to reduce delay and thereby reduce cost of civil litigation). But see *infra* notes 182-84 and accompanying text (noting Justice Department practice of relitigating same substantive legal issue in different jurisdictions, thus depleting time and resources of parties).

175. See *supra* notes 73-90 and accompanying text (providing brief explanation of Executive order sections that address technical aspects of reform).

176. Compare Exec. Order No. 12,778, 3 C.F.R. 359, 359-67 (1991), reprinted in 28 U.S.C. § 519 (Supp. III 1991) (containing executive branch civil justice reform prescription) with 28 U.S.C. § 473 (Supp. II 1990) (setting forth statutory plan for reduction of civil litigation expense and delay).

177. Compare Exec. Order No. 12,778, §§ 1(a)-(d), 3 C.F.R. at 360-61, reprinted in 28 U.S.C. § 519 (explaining cost-saving prescriptions of Executive order) with 28 U.S.C. § 473(a)(3)-(6) (Supp. II 1990) (establishing guidelines for cost reduction and expedition of civil litigation). Congress or the rule revisors have rejected several other provisions, such as those governing fee shifting and sanctions. See *supra* note 71 and accompanying text (noting congressional and Justice Department rejection of two-way fee shifting); *infra* text accompanying notes 236-37 (noting Judicial Conference's intention to limit applicability of rule 11 sanctions).



become aware of, understand, comply with, and consistently effectuate the executive branch procedures. This is particularly difficult because government counsel, their opponents, and judges will have to integrate the strictures with other applicable procedures.

Those procedures include the requirements appearing in the civil justice plans that every district must promulgate by December 1993, the existing Federal Rules and Federal Rule proposals (such as those governing mandatory prediscovery disclosure) that are scheduled to become effective the same month,<sup>178</sup> and the disuniform local rules currently applicable in each of the ninety-four districts.<sup>179</sup> Understanding and reconciling these procedures will be especially burdensome for Justice Department and agency counsel and their adversaries, who typically participate in civil litigation in multiple districts.

## 2. *Advisable aspects*

The executive branch reform would at least require that all government attorneys comply with procedures that could reduce expense and delay.<sup>180</sup> In many situations, government lawyers have few incentives to expedite civil suits. The United States is a defendant in a number of these cases, and adverse decisions will require that the Government pay damages, initiate appeals or institute additional actions with which it disagrees. Delayed resolution can also save the United States the money and time that must otherwise be expended on pretrial discovery and trying suits. Delay correspondingly affords the Government tactical benefits against parties with limited resources who could be dissuaded from vigorously pursuing litigation.

The substantive policies and political perspectives of the presidential administration that is in power can also lead government counsel to delay in civil cases. In the administration of President Ronald Reagan, for example, government attorneys often raised du-

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178. See *supra* note 37 and accompanying text (discussing Judicial Conference proposal for mandatory prediscovery disclosure submitted to Supreme Court in September 1992 and forwarded by Court to Congress in April 1993).

179. See COMMITTEE ON RULES OF PRACTICE & PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE LOCAL RULES PROJECT: LOCAL RULES ON CIVIL PRACTICE (1989) (examining local rules of 94 district courts, identifying inconsistencies among rules, and reviewing underlying policies of rules); see also Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence and Emerging Procedural Patterns*, 137 U. PA. L. REV. 1999, 2020-26 (1989) (reporting findings on proliferation and diversity of local rules).

180. See Tobias, *Litigating with Justice*, *supra* note 100, at 22 (suggesting methods Justice Department may implement to realize cost-saving and delay-reducing goals of civil justice reform); cf. Toothman, *supra* note 159, at 6-7 (condemning suggestions proposed by executive branch designed to expedite civil litigation and reduce expense in civil litigation).

bious threshold arguments and invoked procedural technicalities to stall civil actions or avoid reaching the merits.<sup>181</sup> A notorious and very controversial example was the Reagan administration's reliance on the questionable idea of nonacquiescence.<sup>182</sup> Even after one, or numerous, appeals courts had ruled against the United States on a substantive legal issue, the Justice Department would persist in relitigating that question in other circuits.<sup>183</sup> The Government only infrequently persuaded these courts, thus wasting valuable time and resources of the parties, the Government, and the courts.<sup>184</sup>

In numerous civil cases, the United States has found reasons not to expedite the disposition of suits and has had substantial incentives to delay resolution.<sup>185</sup> Justice delayed can be justice denied in a very real sense, especially for resource-poor litigants such as injured individuals.<sup>186</sup> The executive branch reform may positively affect some of the incentives that motivate government counsel and could encourage them to reduce cost and delay.

Although the executive branch reform implements very few procedures that are not already available,<sup>187</sup> the reform would affirmatively require all government lawyers to satisfy certain strictures intended to decrease expense and delay. The procedures' nationwide scope means that they would apply to government attorneys in each of the ninety-four districts,<sup>188</sup> many of which include courts

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181. See Tobias, *Litigating with Justice*, *supra* note 100, at 22 (noting delaying tactics of President Reagan's Civil Division, including invocation of dubious standing challenges and automatic, questionable motions to dismiss); see also Toothman, *supra* note 159, at 7 (maintaining that government attorneys often delay pretrial process through excessive filing of motions and answers).

182. Nonacquiescence refers to the refusal of federal agencies to conform their decisions to adverse rulings of the courts of appeals. *E.g.*, Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 692-713 (1989) (examining agencies' practice of selectively refusing to apply judicial precedent); see, *e.g.*, Borton, Inc. v. Occupational Safety and Health Review Comm'n, 734 F.2d 508, 510 (10th Cir. 1984) (noting OSHRC's challenge to meaning of statutory language that was declared unambiguous in previous litigation); Yellow Taxi Co. of Minneapolis v. NLRB, 721 F.2d 366, 382-83 (D.C. Cir. 1983) (admonishing NLRB for intentional defiance of established judicial precedent); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 966 (3d Cir. 1979) (reviewing NLRB order that conceded applicability of established precedent but refused to follow it).

183. See Tobias, *Litigating with Justice*, *supra* note 100, at 22 (noting Government's practice of relitigating legal issues in jurisdictions that had not resolved those issues).

184. See Tobias, *Litigating with Justice*, *supra* note 100, at 22 (noting that practice was especially pernicious in litigation involving public entitlements, such as social security disability payments).

185. Tobias, *Litigating with Justice*, *supra* note 100, at 22.

186. See Tobias, *Civil Rights*, *supra* note 118, at 495-98 (recognizing disparity in litigation resources between poor, uneducated plaintiffs and well-financed and fully staffed Government); cf. H. Lee Sarokin, *Justice Rushed Is Justice Ruined*, 38 RUTGERS L. REV. 431, 431-34 (1986) (recognizing abuse of case expedition methods at expense of injured litigants).

187. See *supra* note 177 and accompanying text (observing similarities between executive branch civil justice reform proposals and methods adopted by CJRA).

188. This would be important because numerous government lawyers have not always

that may not incorporate all of these requirements in their civil justice plans.<sup>189</sup> Moreover, mandating that every government counsel comply with the strictures imposes affirmative obligations on the lawyers, rather than demanding that other attorneys, litigants, or federal judges activate the procedures.<sup>190</sup>

Even though implementation of the executive branch reform will be a significant administrative undertaking,<sup>191</sup> it is less substantial than many similar duties routinely discharged by the Government. An apt example is the annual need to communicate to all government lawyers applicable changes in the Federal Rules of Evidence and Civil, Criminal, and Appellate Procedure.<sup>192</sup> Moreover, a small expenditure of resources today that reduces expense and delay in the long term may be a worthwhile investment.

Insofar as implementation of executive branch reform entails reconciliation of increasingly inconsistent federal civil procedures, the Executive order contributes only minimally to conflicts and provides relevant guidance for resolving some anticipated difficulties.<sup>193</sup> Indeed, the fact that numerous executive branch procedures resemble present procedural requirements actually affords certain benefits.<sup>194</sup> The procedural similarities reduce inconsistency and facilitate compliance because many lawyers, litigants, and judges are already familiar with existing strictures. Furthermore, primary responsibility for treating these complications either belongs with other entities, such as the individual districts,<sup>195</sup> or has been assigned to additional instrumentalities, such as Circuit Judicial Councils.<sup>196</sup>

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litigated civil cases in ways that reduce expense and delay. See *supra* text accompanying notes 180-86 (discussing delaying practices employed by government attorneys).

189. Even the popular mandatory prediscovery disclosure procedure was adopted by only a slight majority of the EIDCs. See *supra* note 37 and accompanying text (noting EIDCs that employed mandatory prediscovery disclosure rules). See generally Tobias, *Judicial Oversight*, *supra* note 24, at 51 (observing that district courts have employed different procedures governing mandatory discovery disclosure).

190. It is important to impose affirmative obligations, such as moving for settlement conferences, on government lawyers because of their past litigation practices. See *supra* text accompanying notes 180-86 (documenting methods used by government attorneys to delay civil actions).

191. See *supra* text accompanying notes 176-79 (discussing anticipated difficulties in administration of civil justice reform).

192. See 28 U.S.C. § 2074 (1988) (prescribing procedures governing rules' adoption).

193. See *supra* text accompanying note 176 (noting order's minimal contribution to existing prescriptions); see also Memorandum, *supra* note 9, at 6019 (providing guidance for resolving problems of overlapping procedures).

194. See *supra* text accompanying notes 176-77 (observing similarity between existing procedures and executive branch guidelines).

195. See 28 U.S.C. § 2071(a) (1988) (ordering districts not to adopt local rules that conflict with Federal Rules or provisions of U.S. Code).

196. See 28 U.S.C. § 332(d)(4) (1988) (providing that councils may modify or abrogate inconsistent local rules).

The Executive order would also increase consistency in the way that the thousands of government lawyers handle civil litigation. For instance, requiring senior government attorneys to review requests for document discovery and sanctioning activity in civil cases involving the United States should help to regularize governmental practices in these areas.<sup>197</sup>

It is important to remember that executive branch reform is a nascent effort to decrease expense and delay in civil suits and that reform efforts can be improved in accordance with the suggestions offered in the third Part of this Article.<sup>198</sup> For example, government lawyers may interpret and implement the entire reform and specific procedures in ways that enhance their ability to reduce expense or delay.<sup>199</sup> When certain measures prove to be less effective, the problems that they pose could be amenable to amelioration. In short, the Government might treat the reform's effectuation as an ongoing experiment in which the general approach and particular procedures can constantly be evaluated and calibrated as experience accumulates.

The executive branch reform, therefore, may enable government civil litigation to serve as a laboratory for experimentation with new procedures or with mechanisms that are not being broadly used.<sup>200</sup> For instance, the implementation and employment of requirements relating to settlement, ADR, and efficient case management might illustrate ways of saving money or time that warrant widespread application, while ongoing experimentation may even lead to the invention of innovative techniques.<sup>201</sup> The reform could also realize former President Bush's expressly declared goal of having the

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197. See *supra* text accompanying notes 57-60, 63-65 (discussing §§ 1(d)(2)-(3) and 1(f) of order, which provide guidelines for discovery and sanctions).

198. See *infra* text accompanying notes 210-44 (urging Clinton administration to implement vigorously executive branch guidance and suggesting strategies for employing civil justice reform).

199. The lawyers could generously read and apply the procedures covering core disclosure. See *infra* text accompanying note 210 (suggesting that voluntary mutual exchange of relevant information would expedite discovery). They might also pursue a cautious sanctions policy. See Tobias, *Environmental Litigation*, *supra* note 149, at 460 (relating Justice Department policy of pursuing sanctions only in cases of severe abuse of litigation process); *infra* text accompanying note 211 (urging executive branch to pursue reasoned and moderate sanctions policy).

200. See generally A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1579-94 (1991) (suggesting that inconsistent local rules of civil procedure provide opportunity to test various methodologies in pursuit of most efficacious procedural framework); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67, 75-84 (suggesting adoption of national and geographically restricted field experiments to evaluate effectiveness of Federal Rules of Civil Procedure).

201. When specific procedures prove particularly efficacious, they probably should be embodied in the Federal Rules and applied nationwide. See Tobias, *Recalibrating the CJRA*, *supra*

United States set "an example for private litigation by adhering to higher standards" than those required by current procedural rules.<sup>202</sup> Former Solicitor General Kenneth W. Starr characterized the endeavor as an "effort to change the culture of federal litigation at the behest of the federal government,"<sup>203</sup> perhaps intimating that modifications in attitudes might effect real change.<sup>204</sup> For example, the reform may make government attorneys, many of whom understandably assumed their present posts because they wished to try cases, more receptive to ADR.<sup>205</sup>

Finally, it is especially important at this peculiar moment in the history of the federal courts to initiate efforts that could reduce expense and delay in civil litigation. The federal judiciary is in serious financial straits, attempting to operate effectively with a budget that is \$370 million less than was requested.<sup>206</sup> Additional support for experimentation that might decrease cost and delay appears in the purported reasons for the CJRA's passage, namely, the increasing expense of resolving civil disputes, the shrinking access to federal courts, and growing litigation abuse.<sup>207</sup>

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note 116, at 130 n.75 (suggesting systemwide application of civil justice reform procedures that have proven most effective subsequent to EIDC experimentation).

202. Exec. Order No. 12,778, pmb., 3 C.F.R. 359, 359-60 (1991), *reprinted in* 28 U.S.C. § 519 (Supp. III 1991).

203. DeBenedictis, *supra* note 130, at 40.

204. See DeBenedictis, *supra* note 130, at 40 (reporting opinions, provided at annual meeting of ABA, on former President Bush's Executive order commanding government lawyers to reduce civil litigation and delay). These public officials' views are considerably more sanguine than those of numerous other observers who see the reform as a modest effort. *Id.*; see also Mullenix, *supra* note 2, at 387-88 (noting that executive branch contributes few novel ideas to civil justice reform movement); Cohn, *supra* note 123, at 100 (expressing doubt about efficacy of procedures prescribed in CJRA).

205. This is premised on conversations with Justice Department personnel responsible for coordinating executive branch reform and with other individuals familiar with civil justice reform.

206. See Don J. DeBenedictis, *Tight Budget Squeezes Courts*, A.B.A. J., Dec. 1992, at 22, 22-24 (reporting judiciary budget cuts for fiscal year beginning October 1, 1992); Eva M. Rodriguez, *Federal Courts Face Year of Living Frugally*, LEGAL TIMES, Oct. 5, 1992, at 1 (reporting that federal judiciary faces unprecedented systemwide budget cuts in 1993); see also Judiciary Appropriations Act, Pub. L. No. 102-395, 106 Stat. 1828, 1856-59 (1993) (allocating salary, fee, and expense funds to federal judiciary).

207. See 28 U.S.C. § 471 (Supp. II 1990) (stating that purposes of statutorily required civil justice expense and delay reduction plans are "to facilitate deliberate adjudication of civil cases on the merits, monitor discovery, improve litigation management, and ensure just, speedy, and inexpensive resolutions of civil disputes"). I recognize that these ideas and, indeed, the CJRA's passage are controversial. See, e.g., Mullenix, *supra* note 2, at 379 (describing CJRA as "a revolutionary redistribution of the procedural rulemaking power from the federal judicial branch to the legislative branch"); Cohn, *supra* note 123, at 99-103 (criticizing CJRA); see also Lauren K. Robel, *The Politics of Crisis in the Federal Courts*, 7 OHIO ST. J. ON DISP. RESOL. 115, 115 (1991) (characterizing dispute over CJRA as intense and acrimonious).

*D. Transition by Way of Resolution*

In sum, the Executive order and the Justice Department guidance provide comparatively few procedures that judges or parties cannot presently invoke, principally under the CJRA. A small number of the requirements promise to reduce expense or delay significantly,<sup>208</sup> and some strictures apparently will be ineffective, costly, or difficult to implement.<sup>209</sup> Nonetheless, the executive branch reform imposes on all government attorneys who litigate civil cases certain requirements that could decrease expense or delay. Moreover, the serious fiscal and other restraints that the federal judiciary increasingly confronts and the rising cost of civil litigation for many parties and lawyers emphasize the need to institute efforts that might reduce expense and delay. On balance, therefore, the general approach embodied in the order and the guidelines and the specific procedures included therein appear promising enough to warrant vigorous implementation, continued experimentation, rigorous assessment, and exploration of how the reform might be improved through refinement or elaboration.

## III. SUGGESTIONS

The Clinton administration should treat executive branch reform as a nonpartisan effort that could benefit all parties and lawyers who participate in federal litigation and the federal judiciary. It should vigorously effectuate the Executive order and Justice Department guidance that the Bush administration promulgated while rigorously analyzing the executive branch experimentation that occurs.

Vigorous implementation should proceed pursuant to certain ideas included in the second Part of this Article. For instance, the Government ought to interpret generously the requirements governing disclosure of core information and promote the voluntary mutual exchange of the maximum relevant information as early in the litigation as practicable.<sup>210</sup> The United States should also seek

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208. See, e.g., *supra* text accompanying notes 141-43 (commenting that discovery provisions may save time and money); *supra* text accompanying notes 153-55 (suggesting that sanctions guidelines, if properly applied, could deter frivolous claims and make sanctions practices more consistent and routine); *supra* text accompanying note 168 (noting that settlement procedures could reduce expense and delay by encouraging early resolution of lawsuits).

209. See, e.g., *supra* text accompanying notes 125-40 (suggesting that discovery disclosure rules could increase expense of litigation); *supra* text accompanying notes 144-49 (noting that sanctions provisions could increase cost and delay and promote incivility among litigators); *supra* text accompanying notes 163-67 (commenting that rules urging settlement of disputes might eliminate meritorious claims).

210. See *supra* text accompanying note 141 (suggesting that compliance with procedures regarding disclosure of core information will expedite discovery).

to foster widespread use of experimentation with settlement conferences and ADR while pursuing an appropriately balanced sanctions policy.<sup>211</sup> Rigorous assessment would entail the establishment of baselines to permit the accurate measurement of any expense and delay reduction that the employment of certain procedures effects and the careful collection, analysis, and synthesis of empirical data showing such decreases.<sup>212</sup>

Vigorous implementation and rigorous evaluation do not necessarily mean that all of the procedures must be fully effectuated in every federal district and be subjected to searching scrutiny. Indeed, such an approach could be expensive and difficult to administer, inhibit careful experimentation and assessment, and even prove counterproductive. The preferable course of action, therefore, would be a narrower approach. The Clinton administration should implement and evaluate a sufficient number of procedures in enough districts with adequate rigor to afford representativeness, some statistical validity, and a sense of efficacy. The administration may want to designate certain districts in which it would vigorously effectuate and rigorously analyze specific procedures. For instance, the administration might emphasize the use of ADR in the three courts that the CJRA designates as demonstration districts: the Northern District of California, the Northern District of West Virginia, and the Western District of Missouri.<sup>213</sup> These courts are to experiment with various expense and delay reduction techniques, including ADR, and the Judicial Conference is to study this implementation and submit a report to Congress.<sup>214</sup>

The Clinton administration should undertake a systematic effort to identify the most efficacious procedures for decreasing cost and delay. In addition to evaluating rigorously executive branch reform, the administration should consult numerous other sources. The administration ought to monitor closely activity under the CJRA. It should scrutinize the civil justice plans developed in the thirty-four EIDCs for procedures that appear promising, such as the reliance of several courts on the setting of early, firm trial dates<sup>215</sup> and on co-

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211. See *supra* notes 149, 152 and accompanying text (lauding government sanctions policy as reasonable and suggesting that proper implementation of Executive order requirements would perpetuate appropriate utilization of sanctions); *supra* text accompanying note 168 (contending that increased government participation in settlement conferences and ADR will promote expeditious resolution of civil suits).

212. See *supra* text accompanying note 116 (noting absence of measure for determining efficacy of civil justice reform prescriptions).

213. 28 U.S.C. § 471 note (Supp. II 1990).

214. *Id.*

215. See, e.g., DISTRICT OF IDAHO PLAN, *supra* note 37, at 3 (stating that firm trial dates are necessary to promote economic efficiency, and requiring that cases be set for trial at "earliest

equal assignment of civil cases to Article III judges and magistrate judges.<sup>216</sup> The administration should also examine the annual assessments that the EIDCs have prepared or are compiling, such as the evaluation of the ADR program instituted in the Western District of Missouri,<sup>217</sup> and the civil justice plans that the remaining districts must adopt by December 1993.<sup>218</sup>

One important focus should be mechanisms that frontally attack the costs of litigation. Most EIDCs have primarily attempted to reduce delay and thus indirectly limit expense.<sup>219</sup> The Eastern District of Texas is one court that implemented measures aimed directly at cost, such as imposing ceilings on contingent fees and establishing innovative requirements governing settlement offers.<sup>220</sup> The extent of discovery is another difficulty that needs special attention because it contributes significantly to unacceptable expense. A number of EIDCs have imposed strict temporal or numerical limits on discovery.<sup>221</sup> These restrictions may afford insufficient flexibility

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practicable time"); DISTRICT OF MONTANA PLAN, *supra* note 139, at 14 (requiring establishment of firm, certain trial dates and expedited trial docket); U.S. DIST. COURT FOR THE DIST. OF OR., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 4 (Dec. 30, 1991) [hereinafter DISTRICT OF OREGON PLAN] (promoting establishment of firm trial dates).

216. See, e.g., DISTRICT OF MONTANA PLAN, *supra* note 139, at 3-4 (providing guidelines for assigning cases to judicial officers); DISTRICT OF OREGON PLAN, *supra* note 215, at 20 (providing that civil cases will be assigned to full-time magistrates and district judges on co-equal basis); see also U.S. DIST. COURT FOR THE E. DIST. OF ARK., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 3 (Dec. 30, 1991) (providing that civil cases will be randomly assigned to district judges and magistrate judges on experimental basis); Tobias, *Balkanization of Federal Civil Procedure*, *supra* note 140, at 1421-22 (reporting additional procedures developed by EIDCs, including ongoing judicial management programs and requirements that persons with binding authority attend settlement conferences).

217. See U.S. DIST. COURT FOR THE W. DIST. OF MO., ANNUAL REPORT FOR THE EARLY ASSESSMENT PROGRAM 6-12 (Jan. 26, 1993) (describing ADR program's options and procedures and requiring ongoing evaluation to determine success of program); see also *supra* notes 33, 215 and accompanying text (discussing annual assessments of demonstration districts established by CJRA); U.S. DIST. COURT FOR THE DIST. OF N.J., ANNUAL ASSESSMENT OF THE CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN FOR IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT OF 1990 38-39 (Dec. 22, 1992) (modifying procedures to use judicial resources more effectively).

218. See *supra* text accompanying note 16 (explaining CJRA requirement that federal trial courts establish expense and delay reduction programs by December 1993); see also *supra* note 27 and accompanying text (predicting that some courts will employ expense and delay reduction plans prior to statutorily imposed deadline).

219. See *supra* text accompanying notes 24-33 (discussing efforts of EIDCs to reduce delay by encouraging settlement and ADR).

220. See EASTERN DISTRICT OF TEXAS PLAN, *supra* note 28, at 7-8, 10 (limiting contingent fees in nonstatutory cases to 33.3% of total award or settlement and devising settlement procedure that requires parties who reject reasonable settlement offers to pay their opponents' litigation costs in certain circumstances).

221. See, e.g., DISTRICT OF MASSACHUSETTS PLAN, *supra* note 29, at 35 (limiting discovery practice of individual parties or groups of parties that share common interest to five depositions, 30 interrogatories, and two requests for production); EASTERN DISTRICT OF NEW YORK PLAN, *supra* note 32, at 7 (suggesting presumptive discovery limitation of 15 interrogatories and 10 depositions per side).



in complex cases or in suits where plaintiffs need considerable discovery to prove their cases.<sup>222</sup>

The Clinton administration should not confine the search for new, efficacious procedures to the CJRA and its implementation, but should broadly explore numerous possibilities. For example, the twenty districts that are currently experimenting with court-annexed arbitration pursuant to the 1988 Judicial Improvements Act could yield helpful information.<sup>223</sup> The administration should also examine and be receptive to the type of experimentation in specific courts that anticipated the CJRA,<sup>224</sup> although much of the earlier experimentation has probably been subsumed under the Act.<sup>225</sup> It might similarly consider certain case management techniques that the Eastern District of Virginia has successfully employed to maintain a current docket and early trial dates, even as the court effectively eschewed reliance on the CJRA.<sup>226</sup>

Valuable repositories of information on much of this efficacious activity are the Administrative Office of the United States Courts and the Federal Judicial Center. All of the entities that Congress charged with responsibility for oversight or study of the CJRA's implementation, such as circuit review committees, the Judicial Conference, and the RAND Corporation,<sup>227</sup> should also be helpful

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222. See Tobias, *Civil Rights*, *supra* note 118, at 495-98 (noting that inherent characteristics of civil rights cases often require extensive discovery). See generally Jay Tidmarsh, *Unattainable Justice: The Form of Complex Litigation and the Limits of Judicial Power*, 60 GEO. WASH. L. REV. 1683, 1809-11 (1992) (discussing court-imposed limitations on scope of discovery in cases entailing complex litigation).

223. See *supra* note 121 and accompanying text (discussing nationwide experimentation with court-annexed arbitration).

224. See *supra* notes 119-20 and accompanying text (noting judicial experimentation with various case management techniques and ADR).

225. The experimentation probably is proceeding pursuant to 28 U.S.C. § 473(b)(6) (Supp. II 1990). See Tobias, *Balkanization of Federal Civil Procedure*, *supra* note 140, at 1420-22 (describing nonuniform experimental procedures implemented by various districts pursuant to § 473(b)(6), which permits districts to adopt procedures not specifically authorized by CJRA subsequent to advisory group recommendation).

226. See U.S. DIST. COURT FOR THE E. DIST. OF VA., CIVIL JUSTICE EXPENSE AND DELAY REDUCTION PLAN 1-2, 9-13 (Dec. 16, 1991) (noting that court already employs, or is experimenting with, many of case management techniques recommended by CJRA, including early involvement by judicial officer, mandatory pretrial conferences, and cooperative discovery; and rejecting as unnecessary other recommendations, including requiring attendance of representatives with authority to bind party at initial pretrial conference, requiring parties to sign requests for continuances, and standardization of pretrial orders). See generally Kim Dayton, *Case Management in the Eastern District of Virginia*, 26 U.S.F. L. REV. 445, 449-87 (1992) (describing effective and efficient case management practices of Eastern District of Virginia).

227. See Tobias, *Balkanization of Federal Civil Procedure*, *supra* note 140, at 1406-11 (explaining role of circuit review committees and Judicial Conference concerning CJRA implementation and suggesting that oversight responsibilities assigned by Congress are unclear and foster complex and disuniform rules in various districts). The RAND Corporation is preparing the "program study report" on the pilot program. See 28 U.S.C. § 471 note (Supp. II 1990) (requiring that "independent organization with expertise in the area of Federal court

sources of material. The Clinton administration may want to set early 1994 as a target date by which to decide whether and, if so, how to modify the Executive order and the Justice Department guidance. The administration should be able to make well-informed determinations by that time.<sup>228</sup>

The Clinton administration, when treating the Executive order and Department of Justice guidelines, should delete any procedures that have proved unworkable, confusing, or ineffective in reducing expense and delay. The administration should also eliminate procedures whose disadvantages outweigh their benefits, especially those that impose detrimental side effects or threaten important process values. The administration could draw, for instance, on experimentation with executive branch reforms in the EIDCs, which might be documented in their annual assessments. Those requirements in the Executive order and the accompanying guidance covering notice before filing, discovery disputes, use of expert witnesses, and governmental participation in ADR may operate inefficiently, impose unnecessary costs or delays, or even strategically prejudice the United States.<sup>229</sup>

In contrast, the Clinton administration should add to the Executive order and the Justice Department guidance any techniques that clearly have decreased or promise to reduce expense or delay. The administration could rely, for example, on experience in the EIDCs, executive branch experimentation, or innovative measures included in the civil justice plans that the non-EIDCs develop or that the ad-

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management" conduct study of pilot program for report submitted by Judicial Conference to Congress).

228. There will be at least a year's worth of experience with executive branch reform that the administration can use to assess and modify civil justice reform procedures. By 1994, nearly all of the EIDCs will have completed one annual assessment, and some will have compiled a second. *See supra* note 217 and accompanying text (describing annual assessments prepared by various EIDCs). Courts that are not EIDCs will have adopted civil justice plans by December 1993, as required by the Judicial Improvements Act of 1990. *See supra* text accompanying note 218 (urging administration to examine non-EIDC civil justice plans). Federal Rules amendments, especially those governing sanctions and discovery, will also have become effective. *See infra* text accompanying notes 232-34 (discussing Federal Rules amendments that become effective in December 1993).

229. *See supra* notes 138-40 and accompanying text (recognizing that requiring counsel to engage in additional activity to resolve discovery disputes will increase litigation costs); *supra* text accompanying notes 156-59 (arguing that limiting use of expert witnesses could impede government litigation in areas of science, technology, public health, and environment); *supra* text accompanying note 162 (suggesting that notice requirements could induce defendants to flee or destroy evidence); *supra* text accompanying notes 163-67 (noting that ADR can deplete parties' resources and disadvantage resource-poor litigants). *See generally* Tobias, *Balkanization of Federal Civil Procedure*, *supra* note 140, at 1426 (suggesting that by expanding litigation responsibilities and making it more difficult to reach merits of disputes, certain aspects of civil justice reform such as ADR and managerial judging could lead to greater expense and delay in civil litigation).

ministration discovers in broadly exploring novel procedures. Certain mechanisms that some districts have employed to expedite the resolution of specific types of government litigation, such as social security appeals and student loan cases, may prove efficacious and could warrant national application.<sup>230</sup>

The Clinton administration should designate those procedures in the Executive order and Department of Justice guidelines that are not clearly efficacious or are ineffective in reducing expense and delay. For instance, it may be too early to ascertain definitively whether governmental participation in particular forms of ADR, such as mediation or summary jury trials, decreases cost or delay.<sup>231</sup> The administration should leave in effect those provisions the efficacy of which remains uncertain, ought to continue vigorously experimenting with the procedures, and should rigorously evaluate them.

The Clinton administration will also need to conform the requirements in the order and the guidance to applicable Federal Rules amendments, which will become effective in December 1993. The revisions governing mandatory prediscovery disclosure, principally under rule 26, and sanctions pursuant to rule 11 now appear most relevant<sup>232</sup> because Congress probably will resist the considerable pressure that may be exerted<sup>233</sup> to modify proposals that would amend rules recently submitted to it by the Supreme Court.<sup>234</sup>

If the requirements covering compulsory prediscovery disclosure take effect as currently drafted, they could preempt the order's pro-

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230. See, e.g., DISTRICT OF MONTANA PLAN, *supra* note 139, at 34 (mandating expedited procedures for certain cases, including federal debt-collection and forfeiture actions); DISTRICT OF OREGON PLAN, *supra* note 215, at 11 (providing special scheduling procedures for Social Security cases).

231. See *supra* notes 52, 98 and accompanying text (discussing ADR and its use by government attorneys); see also 28 U.S.C. § 473(a)(6) (Supp. II 1990) (providing CJRA's ADR prescription).

232. See *supra* notes 37, 136 and accompanying text (discussing prediscovery disclosure); *infra* text accompanying notes 236-38 (addressing issue of sanctions according to Executive order, rule 11, and Justice Department policies).

233. See *supra* note 136 and accompanying text (noting opposition to section of 1991 draft of Federal Rules concerning prediscovery disclosure); see also George Cochran, *Bench-Bar Alternative for Rule 11*, NAT'L L.J., Aug. 17, 1992, at 15-16 (discussing controversy over proposed rule 11 amendment scheduled to take effect in December 1993); Carl Tobias, *Civil Rights Plaintiffs and the Proposed Revision of Rule 11*, 77 IOWA L. REV. 1775 (1992), [hereinafter Tobias, *Proposed Revision*] (finding present rule 11 draft solicitous of civil rights plaintiffs who are disadvantaged and detrimentally affected by 1983 revision of rule).

234. See 61 U.S.L.W. 4365 (U.S. Apr. 27, 1993); see also Letter from L. Ralph Meacham, Director, Administrative Office of the U.S. Courts, to the Chief Justice of the United States and the Associate Justices of the Supreme Court 1 (Nov. 27, 1992) (on file with *The American University Law Review*) (reproducing Judicial Conference transmittal to Supreme Court of proposed amendments to Federal Rules of Civil Procedure).

visions governing disclosure of core information.<sup>235</sup> Were the revised rule 11 to become effective as presently written, the order's requirements respecting sanctions might not violate the letter, but could well contravene the spirit, of the amended rule.<sup>236</sup> For instance, the rule revisors modified rule 11 in several important ways that evince clear intent to reduce the rule's invocation significantly.<sup>237</sup> The administration could more closely align the order with this fundamental purpose by reinstituting the Justice Department's properly tempered policy of seeking sanctions only for severe litigation abuse or by at least deemphasizing the requirement that government counsel scrutinize all of their opponents' filings for evidence of sanctionable activity.<sup>238</sup>

One of the Clinton administration's most difficult tasks will be refining the retained executive branch requirements in ways that will facilitate governmental efforts to decrease expense and delay. Express and implicit suggestions for improvement appear throughout the above criticisms of the Executive order and the attendant guidance. For instance, if the Federal Rules amendment covering mandatory precovery disclosure does not preempt the order's strictures on disclosure of core information,<sup>239</sup> the administration should require that more information be divulged earlier in the litigation process. Other procedures that should be retained are the order's prescriptions for governmental participation in settlement

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235. The Rules Enabling Act, arguably, would accord Federal Rules precedence over procedures prescribed in an Executive order, especially when the Federal Rules are more stringent. See 28 U.S.C. § 2072(b) (1988) (mandating that rules of evidence, practice, and procedure prescribed by Supreme Court take precedence over any conflicting rules); *supra* note 195 and accompanying text (noting that local rules adopted by district courts must be consistent with Federal Rules or U.S. Code provisions); *supra* text accompanying notes 129-31 (indicating that Federal Rules are more rigorous than executive branch reforms).

236. See 61 U.S.L.W. 4365, 4369-70 (U.S. Apr. 27, 1993) (proposing to Congress amendments to Federal Rules of Civil Procedure); JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED AMENDMENT OF FEDERAL RULE OF CIVIL PROCEDURE 11, at 43-58 (Sept. 1992) (providing proposed revisions to rule 11 sanctioning procedures); see also *supra* notes 63-65 and accompanying text (explaining order's sanctioning provisions). See generally Tobias, *Proposed Revision*, *supra* note 233 (discussing proposed amendments to rule 11, which are designed to lessen sanctioning activity).

237. See Tobias, *Reconsidering Rule 11*, *supra* note 172, at 875-77, 880-93 (discussing provisions for "safe harbors," which provide litigants opportunity to correct improper behavior before sanctions are issued, and reduced fee shifting, which limits effect of sanctions imposed under rule 11); see also Tobias, *Proposed Revision*, *supra* note 233 (examining proposed amendments that are intended to reduce rule 11 activity by making pursuit of sanctions more burdensome). Indeed, the drafters' intent to reduce the rule's invocation apparently provoked Justice Scalia's dissent. See 61 U.S.L.W. 4365, 4369-70 (U.S. Apr. 27, 1993) (suggesting that rule 11 be amended).

238. See Exec. Order No. 12,778, § 1(f), 3 C.F.R. 359, 362 (1991), reprinted in 28 U.S.C. § 519 (Supp. III 1991) (providing executive branch position on sanctions).

239. See *supra* note 235 and accompanying text (noting probable preemption by Federal Rules of Executive order).

conferences and ADR.<sup>240</sup> It may be possible to calibrate the retained litigation requirements by delineating specific techniques that apply with greater or less efficacy in various contexts. For instance, considerable evidence suggests that some environmental disputes are comparatively amenable to resolution through the use of certain ADR mechanisms.<sup>241</sup>

The Clinton administration should undertake a concerted effort to make executive branch reform function smoothly. The administration ought to clarify any aspects of the Executive order and Justice Department guidelines that remain ambiguous.<sup>242</sup> It should do everything feasible to maximize consistency among the plethora of procedures that apply to federal civil litigation. One approach mentioned previously is to reconcile the executive branch procedures with the forthcoming Federal Rules amendments.<sup>243</sup> The administration should similarly attempt to integrate the order's provisions with measures prescribed pursuant to the CJRA in the ninety-four judicial districts. Although complete uniformity is obviously unattainable, considerable consistency can be secured, for instance, by making the order's procedures closely resemble those applicable in the largest number of districts.<sup>244</sup>

Once the Clinton administration has instituted the above suggestions, it should revise the Executive order and Justice Department guidance, as warranted, and promulgate modified requirements. The administration should guarantee that executive branch reform is vigorously implemented and rigorously evaluated. It should reexamine the effort periodically, perhaps yearly, focusing its examination on those features that are controversial or the efficacy of which is unclear. The administration should correspondingly attempt to minimize inconsistency among applicable procedures and to maximize coordination of executive branch reform. When these reviews

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240. See Exec. Order No. 12,778, §§ 1(b)-(c), 3 C.F.R. at 360-61, *reprinted in* 28 U.S.C. § 519 (containing provisions regarding settlement and ADR).

241. See, e.g., GAIL BINGHAM, *RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE* 140-47 (1986) (evaluating success of environmental dispute resolution alternatives); see also Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 133-65 (1985) (examining negotiated rulemaking procedures in EPA cases as alternative to traditional notice and comment process).

242. See *supra* text accompanying notes 144-49, 160-67, 176-77 (commenting on deficiencies of Executive order in areas of sanctions, settlement, and ADR).

243. See *supra* text accompanying notes 232-38 (addressing need for Clinton administration to reconcile Executive order with Federal Rules amendments that become effective in December 1993).

244. This may vary depending on the specific procedures at issue. For instance, if the Federal Rules proposals become effective, prediscovery disclosure and rule 11 sanctioning should be uniform. See *supra* text accompanying note 238 (suggesting method to harmonize dissimilar reform provisions). Considerable discrepancy probably will remain among judicial districts in the areas of settlement and expert testimony.

indicate ways of improving the reforms, the order and the guidelines should be modified accordingly.

#### CONCLUSION

The civil justice reform effort that the Bush administration initiated in the executive branch remains nascent. The endeavor could reduce expense and delay in the federal civil litigation to which the United States is a party, might provide instructive experimentation with efficacious procedures, and may permit the Government to serve as a model for private litigants. That potential could be realized if the Clinton administration follows the above recommendations. The administration should vigorously implement the Executive order and the Justice Department guidance, rigorously evaluate the resultant experimentation, and broadly explore additional mechanisms that will decrease cost and delay. Once the administration has collected, analyzed, and synthesized the relevant information, it should refine the executive branch procedures as indicated and continue experimentation that will reduce expense and delay in civil cases.