JUDICIAL ACCOUNTABILITY AND THE CJRA*

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I want to thank Lee Cooper and the ABA for inviting me here today. It's a great privilege for me to represent Senator Biden and the Brookings Task Force on Civil Justice Reform. It's especially meaningful for me because I was a student here at the University of Alabama in 1979 when I first met Senator Biden.

I've been involved with this effort, along with Mark Gitenstein and Jeff Peck, then of Senator Biden's staff, and Bob Litan, then and now of the Brookings Institution, since its conception almost nine years ago in Senator Biden's office. So I very much appreciate this opportunity to share my views of the RAND results and the road ahead.

I'm going to be distributing afterwards a press release by the Brookings Task Force[1] signed by myself and twenty-one of my colleagues who served on the original task force, several of whom are here. I'll address the substance of the press release in my remarks.

First, I believe the RAND Corporation deserves our thanks for an exceptional job. The chips have fallen where they may, and RAND has reported on the results with unquestioned integrity and independence.

Second, in my view it's beyond dispute that the CJRA has done more to put the future of civil justice reform on an *empirical* footing than any previous reform effort, and we should do

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* Text of speech as delivered by Jeffrey Connaughton at the American Bar Association Conference on the Civil Justice Reform Act held in Tuscaloosa, Alabama on March 21, 1997.

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1. Brookings Institute, Brookings Task Force Urges Continued Attention to Civil Justice Reform (Mar. 7, 1997) (unpublished press release, on file with the *Alabama Law Review*) [hereinafter Brookings Task Force].

our best to keep it there. I always found irony in the criticism by some that the CJRA lacked an empirical basis when its *very purpose* was to commission an *unprecedented* pilot program and this massive empirical study we're here today to discuss.

I might add that when I worked in the White House Counsel's office in 1995 and participated in formulating the Administration's position on the broad and dramatic legal reform bills that were moving through the House of Representatives at that time, I found myself thinking that, *especially* when compared to the empirical approach embodied by the CJRA, the House-passed legal reform bills were *not* a rational approach to legal reform.

In 1995, we heard a lot of anecdotes about spilled McDonald's coffee. We heard statistics thrown about wildly claiming that Americans file one million lawsuits annually. Yet the House-passed legal reform bills failed primarily because they grossly overreached the limits of any defensible empiricism, which perhaps does justify more limited federal reforms.

For similar though less dramatic reasons, I might also add that I agree with Justice Scalia's criticism of the 1993 amendments to Rule 26 on this basis. Justice Scalia wrote:

> Apparently, the advisory committee considered [the CJRA's three-year] timetable schedule too prolonged . . . preferring instead to subject the entire federal judicial system at once to an extreme, costly, and essentially untested revision of a major component of civil litigation. That seems to me unwise. Any major reform of the discovery rules should await completion of the pilot programs authorized by Congress . . . .[2]

I hope there's general agreement that legal reform should be based as much as possible on verifiable empirical results. We might all applaud the CJRA if simply for that reason.

Third, like others in the Brookings Group, I'm disappointed by the judicial reaction to the CJRA. The RAND report describes judicial implementation of the CJRA by saying that all the pilot and comparison districts created plans that complied with the loosely worded statutory language of the Act. "However, if the spirit of the [CJRA] is interpreted to mean experimentation and

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2. Order Amending the Federal Rules of Civil Procedure, Statements by the Justices, 123 L. Ed. 2d lxii, lxxii (1993) (Scalia, J., dissenting).

change . . . then the pilot districts met that spirit to varying degrees."[3]

I must say that's as artfully crafted a passage as I've ever seen. Jim Kakalik, wherever you are, you must be proud of it. We all know what you meant by it. Congress tried to give judges a new pair of Nikes. Some said, "thanks, but I've already got a pair." And others decided to stick with their old pair of Keds.

Now, there are many, many judges who work very hard every day to manage their burgeoning dockets, and they deserve our praise. Furthermore, there are many judges who enthusiastically did their best under the CJRA to make reform work, and they especially deserve our praise.

But there's no getting around the fact that an astonishing 85 percent of the judges in the pilot districts stated they managed their cases no differently after the CJRA as compared to before.[4] Is it any wonder, then, that RAND found no measurable difference in the effect of the CJRA pilot program as a package? Almost all of the pilot district judges never changed shoes.

So one issue clearly has been resolved by the CJRA: When it comes to the way judges run their courtrooms, Congress can't make them do what they don't want to do.

In spite of judicial resistance to change, however, the CJRA was not a failure. First, public accountability in the form of the reporting requirement of three-year old cases *did* have a strong effect on judges and reduced the number of those cases. And so the Brookings group, in its press release, "urges Congress to make permanent the 'three-year old' and other disclosure requirements."[5] Second, because case management varies across judges and districts, RAND was able to assess the effects of specific procedures and techniques on time to disposition and costs.[6]

RAND *did* determine whether courts run faster when wearing Nikes as compared to Keds. This explains RAND findings on the implications for a promising case management package,

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3. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, JUST, SPEEDY, AND INEXPENSIVE? AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 10 (1996).

4. *Id.* at 24.

5. Brookings Task Force, *supra* note 1, at 2.

6. KAKALIK ET AL., *supra* note 3, at 5.

comprised of: (1) early judicial management; (2) setting the trial schedule early; (3) reducing time to discovery cutoff (a case management technique that seemed to be effective in reducing costs as well as time to disposition); and (4) having litigants at or available on the telephone for settlement conferences.[7]

These findings are no big surprise. The challenge is still in implementing them. The Brookings press release states: "This finding strongly reaffirms the view of the original Brookings Task Force that, *where it is implemented*, active judicial management can work to alleviate congestion in the civil justice system."[8] Or, as my favorite quote from the RAND report states: "This assessment clearly shows that what judges do to manage cases *matters*."[9]

That single sentence, in my mind, cuts through a lot of talk about the other causes of federal court congestion, like the burden of the criminal docket. Yes, the criminal docket is a huge factor in all of this. Congress should take far greater care when it passes legislation that increases the workload on the already over-burdened federal courts. But granting that, RAND has found that what judges do to manage their civil cases *matters*. Not every pilot district, as some would have you believe, had already adopted the CJRA techniques. Everything else equal, why shouldn't we take these results and try to improve efficiency with regard to the civil docket?

RAND's findings on the effects of discovery cut-off in every federal courtroom are *particularly significant*. The Brookings Group and other observers of complex litigation have long suspected that discovery abuse is *the* major cause of excessive costs and delay. The RAND study found that shortening the median time to discovery cut-off appears to be a "win-win"—it reduces time to disposition and lawyer work time.

So maybe the RAND study can be summed up in one sentence: It's very difficult, if not impossible, to change the way judges approach their caseloads, but you can *write rules* that change the way lawyers and litigants behave.

And that leads to my fourth reaction: Given the silver lining

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7. *Id.* at 26.
8. Brookings Task Force, *supra* note 1, at 2 (emphasis in original).
9. KAKALIK ET AL., *supra* note 3, at 26 (emphasis added).

in RAND's results—that is, the empirically based conclusion that certain case management techniques matter, especially in the control of the discovery process, doesn't the CJRA effectively *require* the Judicial Conference to recommend their widespread implementation? Based on a plain reading of the statute, the answer to that question is yes.

The key provision of the Act reads as follows:

> If in its report the Judicial Conference does *not* recommend an expansion of the pilot program . . . the Judicial Conference *shall* identify alternative, more effective cost and delay reduction programs that should be implemented in light of the findings of the Judicial Conference in its report . . . .[10]

That is why the Brookings Group has called on "the various bodies of the federal judiciary to encourage individual judges to adopt the successful case management techniques already in use by some judges and in some districts."[11] The Judicial Conference should find in the RAND results the basis for recommending meaningful and empirically tested guidelines.

In its press release, the Brookings Group particularly wants to praise and encourage the effort being led by Judge Paul Niemeyer. Quoting from the release:

> The Brookings Group applauds the efforts by the Advisory Committee of the Federal Rules of Civil Procedure of the U.S. Judicial Conference, which is examining current discovery rules to determine if modifications could lower costs and delay throughout the federal judicial system. The Brookings Group looks forward to the Committee's recommendations for improvements in the civil court system.[12]

I. ADDRESSING CRITICISMS OF THE CJRA

I'd like to address some of the criticisms leveled at the CJRA.

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10. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 105(c)(2)(C), 104 Stat. 5089, 5098 (1990) (outlining pilot program study requirements) (in Note to 28 U.S.C. § 471 (1994)) (emphasis added).

11. Brookings Task Force, *supra* note 1, at 2.

12. *Id.*

The Brookings Group has been criticized for excluding judges.[13] I'd first remind you that the Brookings Group included four former federal district court judges, and they played an important role in developing the consensus.[14]

But in another sense, the Brookings Group did more than simply exclude judges; it excluded all those people who normally lead or participate in the judicial rules amendment process. Instead, the Brookings Group included representatives of the people who *use* the federal civil justice system. Under the auspices of bipartisan congressional leadership, it gave each of them a veto and a mandate to develop a consensus.

That strategic decision had its consequences. Senator Biden bore the full brunt of judicial input during the legislative process, and the final revisions of the Act certainly reflected the imprint of the judiciary.[15]

During that legislative process, it became apparent that many lawyers, academics and judges adamantly believe that the judiciary should play the dominant role in rule-making. That may be true, particularly so if the courts take timely and responsible steps to address systemic problems. But at the end of the 1980s, Congress perceived that the courts had not done enough. At the same time, Congress found it important to place the implementation of the Act and its follow-through in the hands of the judiciary. That's why the Brookings Group hopes that the Judicial Conference will take the lead in devising the next steps.

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13. *See The Civil Justice Reform Act of 1990 and the Judicial Improvements Act of 1990: Hearings on S. 2027 and on S. 2648 Before the Senate Comm. on the Judiciary*, 101st Cong. 329 (1990) ("Perhaps because no active judicial officer was asked to serve on the task force whose work informed the first version of this legislation, S. 2027 [based on task force recommendations] caught the vast majority of federal judges by surprise . . . .") (statement of Honorable Robert F. Peckham, United States District Court Judge, N.D. Cal., and member of the Judicial Conference of the United States); *see also id.* at 233 (referring to Brookings Institute Task Force as "Users United") (statement of the Honorable Richard A. Enslen, United States District Court Judge, W.D. Mich.).

14. Brookings Task Force, *supra* note 1, at 3.

15. JAMES S. KAKALIK ET AL., RAND INSTITUTE FOR CIVIL JUSTICE, IMPLEMENTATION OF THE CIVIL JUSTICE REFORM ACT IN PILOT AND COMPARISON DISTRICTS 2-3 (1996).

II. SEPARATION OF POWERS

Some of the attitudes about the CJRA are founded in a particular view of separation of powers—that Congress simply had no business initiating rule changes. I'd like to briefly address that argument.

As a preliminary point, I noted that some of these attitudes about curtailing the independence of Article III judges prompted RAND to include a commentary on implementing change. Among other things, RAND states that "change is not something [that is] 'done to' members of an organization; rather, it is something they participate in, experience, and shape."[16] There may be truth in that statement. I would, however, remind RAND that federal judges and the Judicial Conference *did* participate in and shape the legislative outcome of the CJRA. Moreover, the Act was designed at the insistence of the judiciary to provide judges with flexibility in the implementation of the plans.

It's also worth noting that the CJRA was not a high school project, nor was it a homework assignment in a class on organizational behavior. It was an Act of Congress, signed into law by the President of the United States.[17]

Throughout our history, it's certainly true that each branch of government has performed not only its own delegated functions, but also the additional duty of resisting encroachment by the other branches upon its core prerogatives. As the Supreme Court has said: "The hydraulic pressure inherent within each of the separate [b]ranches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted."[18]

But the CJRA is not an example of Congress acting beyond or even near the outer limits of its powers. Federal court reform and rule-making plainly are within Congress' power.[19] The Supreme Court has said "Congress has undoubted power to regulate the practice and procedure of federal courts . . . ."[20]

So the CJRA is simply not analogous to a situation like, for

16. KAKALIK ET AL., *supra* note 3, at 30.
17. Civil Justice Reform Act of 1990, 28 U.S.C. §§ 471-482 (1994).
18. INS v. Chadha, 462 U.S. 919, 951 (1983).
19. Mistretta v. United States, 488 U.S. 361, 387 (1989).
20. *Id.* (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941)).

example, congressional encroachment into the President's constitutional prerogative to conduct foreign affairs. That's an area of the law that engenders true, and in a sense unresolvable, constitutional debate between the Congress and the President. In that area, the courts are mostly unavailable to break the tie due to the political question doctrine or some other limitation on their Article III powers. Consequently, in certain murky areas of the Constitution, both Congress and the Presidency share an ethic of institutional responsibility to assert their respective powers as they independently interpret them to exist.

There is no such room for argument with respect to the CJRA. The Supreme Court has never questioned Congress' rulemaking authority. Moreover, the federal courts "inferior" to the Supreme Court are a *creation* of Congress, and so have even less reason than the executive branch to resist congressional will.

The CJRA *is* analogous to, as an example, congressional oversight of the White House and federal agencies, a function of Congress that plainly falls within its powers.[21] If the executive branch were to take the same position regarding separation of powers and congressional meddling into executive branch activities, as some judges and lawyers have taken regarding the CJRA, we would soon have constitutional meltdown.

My point is that, true, each branch of government must resist the other branches when those branches exceed their powers. And the independence of the federal judiciary to render legal decisions untainted by political influences must forever remain inviolate. But each branch must also be willing to *endure* what may *feel* like intrusive oversight and meddling by the other branches when those branches act well within their powers. In our democracy, when anyone in government feels as though he or she has a monopoly on the best ideas, then something has gone wrong. Likewise, when anyone in government does *not* occasionally feel frustrated or perhaps ill-used by the intervention of the other branches, then those other branches had better get on the stick.

For, in our governmental system, whether in the White House, in Congress, or in the judiciary, it is critical that no single branch stand above the input of the other branches and

21. 16 C.J.S. *Constitutional Law* § 134 (1984).

the public. It may produce discomfort and frustration, but it is necessary for each branch to be held accountable to the people. And that, in the end, is what I think the Civil Justice Reform Act is all about.

Thank you, and I hope you enjoy your stay at the University of Alabama.