U. S. Department of Justice

Civil Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

February 13, 2004

03-CV-011

Peter G. McCabe
Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Dear Mr. McCabe:

The United States Department of Justice appreciates this opportunity to comment on Proposed (New) Federal Rule of Civil Procedure ("FRCP") 5.1 and the proposed amendments to FRCP 6(e). As the nation's principal litigator in the Federal courts, the Department has a strong and long-standing interest in participating in the rules amendment process. The Department takes particular interest in Proposed FRCP 5.1 as it seeks to implement the unique role of the Attorney General to defend Acts of Congress from constitutional challenge. The Department was directly involved in the drafting and shaping of the proposal from the outset, and we welcome this opportunity to express our strong support for the final proposal.

Proposed FRCP 5.1

Proposed FRCP 5.1 requires a party challenging the constitutionality of a statute in a non-government case to file a notice of constitutional challenge and serve a copy of the notice on the Attorney General.[1] The proposal implements the provisions of 28 U.S.C. § 2403, which provide that courts shall certify constitutional challenges to Acts of Congress to the Attorney General and permit the United States to intervene in the actions. Presently, the third sentence of FRCP 24 implements the certification requirement of § 2403, but there have been many instances in which the Attorney General has not been provided with notice of constitutional challenges or has received informal notice at a late stage of a proceeding. Thus, the Department's primary purpose in supporting this proposal has been to increase the prospect that the Attorney General will receive notice in a timely manner. Each provision of the proposal is meant to serve this end.

[1] Proposed FRCP 5.1 also requires parties to notice the relevant State Attorney General when the constitutionality of state statutes are drawn into question. Although the Department has framed its comments around the rule's provisions that apply to constitutional challenges to Acts of Congress, our comments apply equally to the state statute provisions.

Proposed FRCP 5.1 does not alter the courts' statutory duty to certify a constitutional challenge under § 2403. Nonetheless, it is the Department's position that requiring notice from both the party challenging the statute and from the court will ensure that the Attorney General is made aware of constitutional challenges in a timely manner.[2] In response to any concern that the dual notice requirement creates an additional burden on the challenging party, it should be noted that FRCP 24(c) already imposes a duty on the challenging party to "call the attention of the court to its consequential duty" to certify the constitutional challenge. In addition, many district courts have imposed similar duties on challenging parties through local court rules.[3] To the extent that the proposal imposes the actual notice requirement directly on the party raising the challenge, it thereby reduces the initial burden on the courts and the clerks to identify cases in which certification under § 2403 is appropriate.

Cases in Which the New Rule Would Apply. Proposed FRCP 5.1 would apply in any case in which no party is the United States, a federal agency, or an officer or employee of the United States sued in an official capacity. Thus, it would apply even when one of the parties is a federal official sued in an individual capacity for acts and omissions occurring in connection with the performance of duties on behalf of the United States. Although the Department represents some officials sued in their individual capacities, these officials are sometimes represented by private counsel. Therefore, the Department supports the requirement of filing and serving notices in this subset of cases involving federal officials sued in their individual capacities.

Proposed FRCP 5.1 also provides that notice should be made when a party challenges an "Act of Congress." This term mirrors the term used in § 2403. The Department understands "Act of Congress" to encompass, at the least, all federal statutes, including joint resolutions. Moreover, although FRCP 24(c) applies when an Act of Congress that affects the public interest is challenged, the Rule would apply when any Act of Congress is challenged. It is the Department's belief that the Attorney General is in the best position to determine in the first instance whether an Act affects the public interest. A reviewing court can always disagree.

Time for Intervention/Stay of Proceedings Pending Appearance of the Attorney General. Proposed FRCP 5.1 requires that a court set a time to intervene for the Attorney General of not less than 60 days from the date of certification. The Department proposed that the Attorney General have at least a 60-day window to intervene in recognition of the Department's internal administrative

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[2] In instances in which a court sua sponte raises a constitutional challenge, the certification requirement of § 2403 will remain the only vehicle for notice to the Attorney General.

[3] See, e.g., S.D. Cal. 24.1; E.D. Cal. 24-133; N.D. Cal. 3-8; N.D. Ind. 24.1; S.D. Ind. 24.1; N.D. Iowa 24.1; S.D. Iowa 24.1; D. Kan. 24.1; M.D.N.C. 83.7; N.D. Okla. 24.1; D. Ore. 10.5; E.D. Wash. 24.1.

procedures that must be followed upon receipt of a notice.[4] These procedures include securing the Solicitor General's approval for intervention under 28 C.F.R. § 0.21. The Department nonetheless believes that the Rule does nothing to restrict the ability of the Attorney General to intervene under § 2403 in an action at any time. To clarify this important point, we suggest the inclusion of the following text in the Advisory Committee's Note:

> Nothing in this Rule shall be interpreted as restricting the ability of the Attorney General or his designee to intervene in an action more than 60 days after service of the notice or, in the event that there is noncompliance with this Rule, after a final order or judgment issues.

The proposed Committee Note does indicate that a court need not stay a case pending a response from the Attorney General. It suggests, however, that the court not make a final (as opposed to preliminary) determination sustaining a constitutional challenge before the 60 days (or whatever longer period is set by the court) for intervention has elapsed. The Note also reminds courts that a stay of proceedings might avoid a second round of briefing or a second hearing on the constitutional challenge should the Attorney General decide to intervene. The proposal, however, does not restrict a court's ability to reject a constitutional challenge at any time, even before notice and certification to the Attorney General. It is foreseeable that a district court will want the discretion to dismiss frivolous challenges to Acts of Congress without providing notice. The Department believes that providing the Attorney General with at least 60 days to intervene while leaving to the court the decision of whether to stay the proceedings or dismiss the challenge outright achieves the proper balance between ensuring that the Attorney General has an opportunity to intervene and avoiding any unnecessary delay.

Manner of Serving the Notice. Proposed FRCP 5.1 would require service of the notice on the Attorney General in the manner provided by FRCP 4(i)(1)(B), which is by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia. The Department has considered various other methods for service, but has determined that service in the same manner that it receives complaints will best ensure timely and proper processing of notices.

The proposal also requires that the notice to the Attorney General include a copy of the pleading, motion, or paper raising the constitutional challenge. The Department believes strongly that because of the short time frame for the Attorney General to respond to 5.1 notices, it is important that the Department receive the paper raising the challenge as early as possible in order to analyze the challenge and decide whether to intervene. Requiring its inclusion with the notice will eliminate the added time necessary to obtain a copy of the relevant pleading and thus will serve to prevent any

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[4] The 60-day period mirrors the federal government's time to respond to complaints under FRCP 12(a)(3) and the federal government's time to file notices of appeal in Federal Rule of Appellate Procedure 4(a)(1)(B).

unnecessary delay in the court proceedings.

No Forfeiture. Proposed FRCP 5.1 carries forward similar text from FRCP 24(c) that the failure to file and send a notice does not forfeit a constitutional right.

Comparison with Parallel Appellate Rule 44. Proposed FRCP 5.1 is a departure from Federal Rule of Appellate Procedure 44. The Department deems such a departure justified due to the importance of the government's presence as a party in district court, where the factual record is made and constitutional arguments are developed. It also has been our experience that notification to the Attorney General under Appellate Rule 44 functions more smoothly given the nature of the appeals process and the centralized circuit court structure.

The Department strongly supports the enactment of Proposed FRCP 5.1 in its present form with one addition, as mentioned above, to the Advisory Committee's Note.

FRCP 6(e)

The Department supports the Committee's proposal to clarify FRCP 6(e). Our one suggestion is to change "3 days are added after the period" to "3 calendar days are added after the period." We believe this addition will make absolutely clear the Committee's intention that parties include weekends and holidays when counting the three extra days.

We thank the Committee for this opportunity to share our views. If you have any further questions or if there is anything the Department can do to assist the Committee in its important work, please do not hesitate to contact me.

Sincerely,

Peter D. Keisler
Assistant Attorney General
Civil Division