ADVISORY COMMITTEE ON CRIMINAL RULES

San Diego, California

October 11-12, 1993

		1. V	**************************************	-
			Elevate.	4
		No Agentine		
			and the second s	
			No. 1	
	,		k-normal	
			d was in	
			lang or	
·				
			one-12	
			Mercal Mercal	
			haved.	
			Spare, Cal	
			et e	
			Brown L.	į.
				167
				* ·

AGENDA CRIMINAL RULES COMMITTEE MEETING

October 11-12, 1993 San Diego, California

I PRELIMINARY MATTERS

- A. Introductions and Comments by Chair
- B. Approval of Minutes of April 1993, Meeting

II. REPORT OF SUBCOMMITTEE ON COMMITTEE PROCEDURES

III CRIMINAL RULES UNDER CONSIDERATION

- A. Rules Approved by the Supreme Court and Forwarded to Congress.
 - 1. Rule 12.1, Discovery of Statements.
 - Rule 16(a), Discovery of Experts.
 - 3. Rule 26.2, Production of Statements.
 - 4. Rule 26.3, Mistrial.
 - 5. Rule 32(f), Production of Statements.
 - 6. Rule 32.1, Production of Statements.
 - 7. Rule 40, Commitment to Another District
 - 8. Rule 41, Search and Seizure.
 - 9. Rule 46, Production of Statements.
 - 10. Rule 8, Rules Governing Section 2255 Hearings.
 - 11. Technical Amendments.
- B. Rules Approved by Standing Committee at June 1993 Meeting and Forwarded to Judicial Conference
 - 1. Rule 16(a)(1)(A), Disclosure of Statements by Organizational Defendants.

- Rule 29(b), Delayed Ruling on Judgment of Acquittal.
- 3. Rule 32, Sentence and Judgment.
- 4. Rule 40(d), Conditional Release of Probationer.
- C. Rules Approved by Standing Committee at June 1993 Meeting: To Be Circulated for Public Comment (Memo)
 - 1. Rule 5(a), Initial Appearance Before the Magistrate.
 - Rule 10, Arraignment.
 - Rule 43, Presence of Defendant.
 - 4. Rule 53, Regulation of Conduct in the Court Room.
- D. Rules Under Consideration by Advisory Committee
 - Rule 6, Secrecy Provisions of Rule re Reporting Requirements (Memo).
 - Rule 16, Production of Witness Names (Memo).
 - Rule 16, Disclosure to Defense of Information Relevant to Sentencing (Memo).
 - Rule 40, Treating FAX Copies of Documents as Certified (Memo)
 - 5. Rule 41, Proposed Deletion of Requirement that Warrant be Issued by Authority Within the District (Memo).
 - Rules Governing Section 2254 Cases;
 Proposed Legislation Affecting Rules (Memo).
 - 7. Other Proposals.

- E. Rules and Projects Pending Before Standing Committee and Judicial Conference
 - 1. Rule 57, Materials Re Local Rules (Memo).
 - 2. Rule 59, Proposed Amendments Concerning Technical Amendments to Rules by Judicial Conference (Memo)
 - 3. Report on Proposal to Implement Guidelines for Filing by Facsimile.

IV. MISCELLANEOUS

V. DESIGNATION OF TIME AND PLACE OF NEXT MEETING

4 Ð

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair:

Honorable D. Lowell Jensen United States District Judge P.O. Box 36060 450 Golden Gate Avenue San Francisco, California 94102

Area Code 415 556-9222

FAX-415-556-2625

Members:

Honorable W. Eugene Davis United States Circuit Judge 556 Jefferson Street, Suite 300 Lafayette, Louisiana 70501

Area Code 318 264-6664

FAX-318-264-6685

Honorable Sam A. Crow United States District Judge 430 U.S. Courthouse 444 SE Quincy Street Topeka, Kansas 66683-3501

Area Code 913

295-2626

FAX-913-295-7615

Honorable George M. Marovich United States District Judge United States District Court 219 South Dearborn Street Chicago, Illinois 60604

Area Code 312

435-5590

FAX-312-435-7578

Honorable Joseph H. Rodriguez United States District Judge 418 United States Courthouse and Post Office 401 Market Street Camden, New Jersey 08101

Area Code 609 757-5002

FAX-609-757-5175

Honorable B. Waugh Crigler United States Magistrate Judge United States District Court 255 West Main Street, Room 328 Charlottesville, Virginia 22901

Area Code 804 296-7779

FAX-804-296-5585

Professor Stephen A. Saltzburg George Washington University National Law Center 720 20th Street, NW, Room 308 Washington, DC 20052

Area Code 202 994-7089

FAX-202-994-9446

·

ADVISORY COMMITTEE ON CRIMINAL RULES (CONTD.)

THE TOTAL TOTAL OF THE PARTY OF	(CONID.)				
John Doar, Esquire Doar, Devorkin, & Rieck 233 Broadway, 10th Floor The Woolworth Building New York, New York 10279	Area Code 212 619-3730 FAX-212-962-5037				
Tom Karas, Esquire Tom Karas, Ltd. 101 North First Avenue, Suite 2470 Phoenix, Arizona 85003	Area Code 602 271-0115 FAX-602-271-0914				
Rikki J. Klieman, Esquire Klieman, Lyons, Schindler, Gross & Pabian 21 Custom House Street	Area Code 617 737-4777				
Boston, Massachusetts 02110	FAX-617-737-4778				
Edward F. Marek, Esquire Federal Public Defender 1660 West 2nd Street, Suite 750	Area Code 216 522-4856				
Cleveland, Ohio 44113	FAX-216-522-4321				
Attorney General (ex officio) Director, Office of Legislation, Criminal Division	Area Code 202 514-3202				
Roger Pauley, Esquire 2244 U.S. Department of Justice Washington, DC 20530	FAX 202-514-4042				
Reporter:					
Professor David A. Schlueter St. Mary's University of San Antonio School of Law	Area Code 210 436-3308				
One Camino Santa Maria San Antonio, Texas 78284	FAX-210-436-3717				
Liaison Member:					
William R. Wilson, Esquire Wilson, Engstrom, Corum & Dudley 809 West Third Street	Area Code 501 375-6453				
Little Rock, Arkansas 72201 Secretary:	FAX-501-375-5914				
Peter G. McCabe					
Secretary, Committee on Rules of Practice and Procedure	Area Code 202 273-1820				
Washington, DC 20544	FAX-202-273-1826				

and the second second second . , , ,

ACENDA I - A San Diego, California October 11-12, 1993

ORAL PRESENTATION

		ena)
	,	deleter (IV)
		less //
		a.c.
		95
	,	

MINUTES

of

THE ADVISORY COMMITTEE

on

FEDERAL RULES OF CRIMINAL PROCEDURE

April 22 & 23, 1993 Washington, D.C.

The Advisory Committee on the Federal Rules of Criminal Procedure met in Washington, D.C. on April 22 and 23, 1993. These minutes reflect the actions taken at that meeting.

CALL TO ORDER

Judge Hodges, Chair of the Committee, called the meeting to order at 9:00 a.m. on Thursday, April 22, 1993 at the Federal Judiciary Building in Washington, D.C. The following persons were present for all or a part of the Committee's meeting.

Hon. Wm. Terrell Hodges, Chair

Hon. Sam A. Crow

Hon. W. Eugene Davis

Hon. John F. Keenan

Hon. George M. Marovich

Hon. Joseph H. Rodriguez

Hon. Harvey E. Schlesinger

Hon. D. Lowell Jensen

Prof. Stephen A. Saltzburg

Mr. John Doar, Esq.

Mr. Tom Karas, Esq.

Ms. Rikki J. Klieman, Esq.

Mr. Edward Marek, Esq.

Mr. Roger Pauley, Jr., designate of Mr. John Keeney, Acting Assistant Attorney General

Professor David A. Schlueter Reporter

Also present at the meeting were Judge Robert Keeton and Mr. Bill Wilson, chairman and member respectively of the Standing Committee on Rules of Practice and Procedure; Mr. Peter McCabe, Mr. David Adair, and Mr. John Rabiej of the Administrative Office of the United States Courts. Magistrate Judge Crigler was not able to attend.

I. INTRODUCTION AND COMMENTS

Judge Hodges welcomed the attendees and noted that Judges Keenan and Schlesinger were attending their last meeting and thanked them for their many years of faithful

service to the Committee. He also introduced the new members of the Committee: Judges Davis, Marovich, and Rodriguez, and Ms. Klieman.

II. HEARING ON PROPOSED AMENDMENTS

The Chair also noted that a number of Criminal Rules had been published for public comment and that originally, a hearing on those proposed amendments had been set for March 29th in San Francisco and May 6, 1993 in Washington. Due to lack of witnesses, the San Francisco hearing had been cancelled. In order to consolidate travel, the May 6th hearing had been moved forward to coincide with the Committee's meeting. The Committee heard testimony from two witnesses: Mr. Thomas W. Hillier, Jr., a Federal Public Defender from Seattle, Washington and Hon. Frederick N. Smalkin, 1 from the United States District Court in Baltimore, Maryland. Mr. Hillier addressed the proposed amendments to Rules 16 and 32 and Judge Smalkin addressed the proposed amendments to Rules 16 and 32.

III. SPECIAL ORDER OF BUSINESS

As a special order of business the Chair recognized four persons who had indicated an interest in testifying about proposed amendments to Rule 16: Hon. Donald E. O'Brien, Hon. William G. Young, Hon. John A. Jarvey, and Professor Charles W. Ehrhardt. Each presented testimony to the Committee on the need for an amendment to Rule 16 which would either require the government to identify written materials which directly name the defendant, or in the alternative, require the government to make available to the defendant any existing index or cross referencing system or program which would assist the defense in identifying materials relating to the defendant. The witnesses offered the two options in language drafted by Professor Ehrhardt. They pointed out that there is a compelling financial need to save defense counsel time in sorting through massive amounts of material in preparing for trial. In response to questions from the Committee they recognized that the government might have an interest in protecting its work product but that some system should be devised to expedite criminal discovery, where time and resources are becoming more scarce.

Judge Hodges thanked the witnesses for their insights and indicated that in the due course of discussing possible

^{1.} Due to scheduling conflicts, Judge Smalkin was not able to appear before the Committee until the afternoon session on April 22.

amendments to Rule 16, the proposal would again be considered.

IV. APPROVAL OF MINUTES

Judge Crow moved that the minutes of the Committee's October 1992 meeting in Seattle be approved. Mr. Karas seconded the motion which carried unanimously.

V. CRIMINAL RULES UNDER CONSIDERATION

A. Rules Approved by the Supreme Court and Forwarded to Congress

The Reporter informed the Committee that the Supreme Court was in the process of approving a number of proposed amendments to the Criminal Rules and forwarding them to Congress for action under the Rules Enabling Act. The Rules amended by the Court are as follows:

- 1. Rule 12.1, Production of Statements.
- 2. Rule 16(a), Discovery of Experts.
- 3. Rule 26.2, Production of Statements.
- 4. Rule 26.3, Mistrial.
- 5. Rule 32(f), Production of Statements.
- 6. Rule 32.1, Production of Statements.
- 7. Rule 40, Commitment to Another District.
- 8. Rule 41, Search and Seizure.
- 9. Rule 46, Production of Statements.
- 10. Rule 8, Rules Governing § 2255 Proceedings.
- 11. Technical Amendments to other Rules.

B. Rules Approved by the Standing Committee and Circulated for Public Comment on an Expedited Basis

The Reporter informed the Committee that at its December 1992 meeting the Standing Committee approved for public comment proposed amendments to Rules 32 and 40(d), two amendments approved by the Committee at its Seattle meeting in October 1992. In addition, the Standing Committee authorized publication and comment on two Rules it had earlier approved: Rules 16(a)(1)(discovery of experts) and Rule 29(b)(delayed rulings on motions for judgment of acquittal). All four rules were approved for expedited consideration; the comment period ended on April 15, 1993.

Rule 16(a)(1(A)), Disclosure of Statements by Organizational Defendants

Judge Hodges provided a brief background on the proposed amendment to Rule 16 which would require the government to disclose to the defense certain statements by individuals associated with organizational defendants.

Mr. Karas moved that the proposed amendment be sent forward to the Standing Committee with the recommendation that it be approved. Mr. Marek seconded the motion.

Judge Hodges noted that several written comments had been received on the proposed change and that he thought that there was merit in recognizing in the rule and the accompanying note the fact that the parties may disagree as to whether a particular person was in a position to bind the organizational defendant. Following comments by Judge Marovich concerning that problem, Judge Keeton recommended that the rule be changed slightly to require the government to disclose the statements of persons "the government contends" were in a position to bind the organizational defendant. Judge Hodges in turn suggested appropriate language for the note which would recognize that the defense would not be required to stipulate or admit that a particular individual was in a position to bind the defendant.

Judge Keenan moved that the amending language be added to the rule. Judge Rodriguez seconded the motion which carried by a vote of 10 to 0 with one abstention. The main motion to forward the amendment to the Standing Committee carried by a vote of 10 to 0 with one abstention.

2. Rule 29(b), Delayed Ruling on Judgment of Acquittal

The Reporter briefly reviewed the background of the proposed amendment to Rule 29(b) and noted that one commentator, Mr. Weinberg, had suggested that the rule or the note reflect that on appeal of a delayed ruling of a motion for judgment of acquittal the court is not free to consider any evidence submitted after the motion was made at trial. Following additional brief discussion during which several members indicated that that position was clear from the wording of the rule itself, Mr. Pauley moved that the rule be forwarded to the Standing Committee. Judge Crow seconded the motion which carried by vote of 10 to 0 with two abstentions.

3. Rule 32, Sentence and Judgment

去。由于4年1月1日的新港市1月日本市上产业1日至二十

The discussion of the amendments to Rule 32 began with Judge Hodges giving a brief overview of the amendments and listed ten issues the Committee should address in deciding what, if any, further changes should be made to Rule 32. Mr. Pauley, Mr. Marek, and the Reporter suggested several additional topics. Mr. Karas moved that the Committee discuss the amendments. Following a second by Judge Marovich, the Committee voted unanimously to discuss the proposed amendments.

Turning first to the issue of timing of sentencing, Judge Hodges noted that almost all of the approximately 30 individuals submitting written comments on the proposed amendments questioned the wisdom of imposing a 70-day deadline for sentencing. He indicated that one possible solution would be to retain the current language in Rule 32, "without unnecessary delay," but to also retain from the proposed, amended rule as published for comment specific incremental deadlines for submission of the presentence report, etc. Mr. Pauley indicated that he had informally polled United States Attorneys' offices and that some had suggested including a specific deadline of 84, 90, or 91 days. Judge Davis expressed general agreement with Judge Hodges' concerns about a specific deadline and Judge Crow questioned whether there was any need for a national rule governing the timing of sentencing proceedings. Mr. Karas ultimately moved that Rule 32(a)2 be revised to require sentencing to take place without "unnecessary delay" but that the participants would be required to comply with the internal time limits for preparation of the report, filing of objections, etc. Judge Davis seconded the motion which carried by a unanimous vote.

Turning to Rule 32(b)(4), Judge Hodges noted that several commentators had questioned the proposed language which indicated that the probation officer would "determine" the appropriate sentencing classification for the defendant. After brief discussion the Committee agreed that the Rule should require the probation officer to provide information concerning the classification which he or she "believes" to be applicable to the defendant.

Regarding Rule 32(b)(4)(E), Judge Hodges noted that several commentators had questioned whether any reference should be made in the presentence report to the availability of nonprison programs. The Committee generally agreed that

^{2.} The references are to Rule 32 as it was published for public comment.

the language should be changed and subsequently Judge Jensen recommended that the rule be amended to read: "in appropriate cases, information about the nature and extent of nonprison programs and resources available for the defendant." The proposed language was approved by a unanimous vote.

Judge Hodges indicated that a number of commentators had focused on Rule 32(b)(6)(A) which addresses disclosure and objections to the presentence report. They were split on the issue of whether the probation officer's recommendation on sentence should be disclosed. As published, the rule created a presumption that the recommendation should be disclosed, unless a local rule provided otherwise. Mr. Marek briefly reviewed the debate on this particular issue and ultimately moved that the language as published should be retained. Mr. Pauley seconded the motion which carried unanimously.

The Committee next addressed Rule 32(b) (6) (B) and the question whether the probation officer should be granted the authority to "require" counsel and the defendant to meet with him or her, Judge Hodges noted that several commentators guestioned the wisdom of granting that authority. Judge Marovich indicated that he believed the probation officer should have that authority. In response to a question from Ms. Klieman whether the Committee had considered the possibility of using some word other than require, Mr. Marek reviewed what he believed to be the role of the probation officer and that the Committee, in his view, had not intended to change drastically the role of the probation officer. Mr. Pauley expressed the view that perhaps local rules could address this point but Judge Marovich questioned whether that would accomplish the desired result of early resolution of the issues. He noted that the role of the probation officer has changed and that they have become in some cases one of the adversaries. Mr. Wilson expressed deep concern about the role of probation officers but that the rule reflects the reality of that role

Both Judges Hodges and Schlesinger indicated that the local rule in the Middle District of Florida includes language authorizing the probation officer to require meetings with the defense counsel and that it has worked well. Judge Davis indicated that the word "require" promotes the perception that the probation officer's role has expanded. Following additional comments, the Chair summarized the various options: leaving the rule as published; deleting the provision altogether, or amending the rule to provide that the probation could request counsel to meet. The Committee voted 8 to 2 to amend the rule to

read: ""the probation officer may meet with the defendant, the defendant's counsel, and the attorney for the Government, to discuss those objections."

With regard to Rule 32(b)(2), which entitles defense counsel to be present at any interview between the probation officer and the defendant, Judge Hodges informed the Committee that a number of commentators expressed concern about the ability of counsel to unreasonably delay preparation of the presentence report. After a brief discussion of the options available, the Committee voted unanimously to change the language to read: "On request, the defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant by a probation officer in the course of a presentence investigation." Mr. Pauley expressed concern, however, about the definition of the word "interview" and suggested that the Committee Note indicate that the Committee did not intend for the rule to apply to every conversation between the probation officer and the defendant. Mr. Marek suggested that the issue should be left to the courts for resolution. Professor Saltzburg moved that the Note should read to the effect that the word interview extends to any communication initiated by the probation officer where he or she is seeking information to be used in the presentence investigation. He added that the burden should be on the defense counsel to respond promptly to notice of an intent to interview the defendant. Mr. Karas seconded the motion which carried by a 9 to 4 vote.

Following additional discussion about the respective roles of the probation officer, the defense counsel, and the court in insuring that counsel is given an opportunity to be present, without unduly delaying the process, Professor Saltzburg moved that the words "upon request" be deleted from the rule. Mr. Marek seconded the motion which failed by a vote of 3 to 9.

Turning to Rule 32(b)(6)(D), Judge Hodges noted that the word "presentencing" should read "sentencing."

Judge Hodges indicated that with regard to Rule 32(c)(1), at least one commentator questioned the choice of language dealing with controverted matters which would not be "taken into account or will not affect sentencing." He noted that that the phrase "will not affect" was not in the original Rule 32 and the commentator expressed concern that the new language would invite litigation. Judge Hodges explained that due to overlapping ranges in the in the sentencing guidelines, there might be situations in which a controverted matter would not alter the sentence even if the sentencing range is changed. Mr. Wilson commented that as

published, a judge's statement that the controverted matter will not be considered in any way, will avoid the litigation. Mr. Adair agreed that there might be factual disputes about a matter which would affect the classification but not the sentence imposed.

Ultimately, a minor change was made in the wording of the provision to read "the controverted matter will not be taken into account in, or will not affect, sentencing." The Chair added that the Note should include some reference to the change in wording.

Judge Hodges noted that some commentators had suggested removing language in proposed Rule 32(c)(1) which indicates that the court has discretion to consider additional evidence or testimony, language which exists in the current rule. Mr. Marek noted that one commentator had indicated that the granting of discretion may be problematic. He noted that the caselaw is still developing and ultimately moved that the Committee Note be amended to indicate that developing caselaw reflects the possibility that due process might require the court to consider additional evidence or testimony, and that it might be an abuse of discretion not to consider additional evidence. Judge Marovich seconded the motion which carried by a vote of 8 to 4 with one abstention.

Judge Keeton noted a potential ambiguity in the language which apparently distinguishes between testimony and evidence and that use of the word "testimony" could be problematic. He noted that counsel now argue that they have a right to present oral testimony. Judge Hodges observed that perhaps the Committee Note could be changed to indicate that use of the phrase "or other evidence" should indicate to the trial court that it had the discretion to determine the form of the evidence. He added that the current rule seems to have a broader sweep; under proposed (c) (1), the additional evidence would be considered to the extent that it affected unresolved objections.

The Reporter indicated that a number of the concerns raised in the discussion might be covered in the Committee Note, i.e., the fact that the Rules of Evidence do not apply, and that the trial court has the discretion to determine the form of the evidence to be received.

After some additional discussion on the point, Mr. Doar moved that the words "testimony or other" be deleted from subdivision (c) (1). Professor Saltzburg seconded the motion which carried by a unanimous vote.

With regard to Rule 32(b)(6)(B), Judge Hodges noted a suggestion raised in several written comments to the effect that the probation officer, or counsel, should provide copies of the original objections to the court. Mr. Marek moved, and Professor Saltzburg seconded, a motion to amend the Committee Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their original objections or have them included as a part of the addendum in the presentence report. The motion carried by a unanimous vote.

Mr. Marek recommended that the Committee reconsider the provisions in Rule 32(b)(5) regarding exclusion of certain information. In particular, he expressed concern that such information, although not included in the report, might nonetheless be relied upon by the court in assessing a sentence. Following some preliminary discussion of the issue, Mr. Marek moved that the language in Rule 32(c)(3)(A) be amended to require that any information excluded under (b)(5) be summarized in writing if the information will be relied upon in sentencing. Mr. Karas seconded the motion. Judge Keeton expressed opposition to the change to the extent that it would require the court to prepare a written summary and not have the option of doing so orally from the He suggested that perhaps the language in subdivision (c)(3)(A) concerning a summary of excluded information should be moved into Rule 32(6)(A). agreed, and changed his motion.

Judge Hodges suggested some language to accomplish the intent of the motion which generated additional discussion. Ms. Klieman expressed concern for even a summary of confidential information in the presentence report would be problematic. The Reporter then offered alternative language.

Professor Saltzburg expressed concern that the proposed changes would be considered a major revision to the Rule as it was published for comment and questioned whether the proposed language might encourage probation officers to err on the side of including more confidential information. Judge Keenan stated the current rule seems to work and that no changes were required. Judge Schlesinger indicated that even assuming confidential information were disclosed, it would normally not make a major difference in the sentence.

Additional discussion focused on the practical problems of transmission of the summary and appellate review of the information. Judge Jensen suggested that the real issue was whether the defense counsel would have enough time to review the summary. Mr. Marek agreed and believed that the best solution would rest in making provision for counsel to

respond to whatever confidential information was relied upon in sentencing. Mr. Marek restated his motion, with the consent of Mr. Karas, to amend (c)(3)(A) to require a written summary and to require the court to provide counsel with a reasonable opportunity to comment on the summary. That motion carried by a unanimous vote.

ing the street of the second Mr. Pauley drew the Committee's attention to Rule 32(c)(5) concerning the court's advice to the defendant regarding the right to appeal In particular he pointed out earlier language in the 1974 Advisory Committee Notes which indicated that advising a defendant of the right to appeal after he had pleaded guilty might be confusing. He moved that the rule be amended to reflect the differences which exist in the defendant's right to appeal in a contested case and in a case where the defendant has entered a guilty plea. Judge Davis seconded the motion which passed with a

unanimous vote:

Mr. Karas moved that Rule 32, as amended, be forwarded to the Standing Committee. Judge Keenan seconded the motion which passed unanimously

4. Rule 40(d), Conditional Release of Probationer

Judge Hodges informed the Committee that no written comments had been received on the proposed amendment to Rule 40(d). Mr. Karas moved that the rule be forwarded to the Standing Committee and Judge Rodriguez seconded the motion. Standing Committee and Juage Rout 1940-It passed with a unanimous vote.

C. Other Criminal Procedure Rules Under Consideration by the Committee

1. Rule 5: Proposal to Exempt UFAP Arrestees from Rule

in the grant of the second

The Chair briefed the Committee on the background of proposed amendments to Rule 5 and informed them that at the Seattle meeting in october 1993, he had appointed a subcommittee composed of Judge Jensen (Chair), Judge Schlesinger, Magistrate Judge Crigler, Mr. Karas, and Mr. Pauley to study the proposals. Judge Jensen indicated that his subcommittee had attempted to obtain as much information as possible concerning what actually happens when a person charged with the offense Unlawful Flight to Avoid Prosecution (UFAP) is acrested by federal authorities. Under Rule 5, such persons are to be presented to a magistrate even if prosecution for the offense is not contemplated.

Mr. Pauley moved that Rule 5 be amended to provide that persons arrested for violating 18 U.S.C. § 1073 (UFAP) may be turned over to appropriate state or local authorities provided that the Government promptly moves, in the district in which the warrant was issued, to dismiss the complaint. Professor Saltzburg seconded the motion.

CONTRACTOR STATEMENT OF THE STATEMENT OF

Judge Jensen indicated that he favored the motion but Mr. Karas spoke against the proposal noting that a person charged with UFAP might be placed in custody indefinitely without the benefit of appearing before a magistrate. Mr. Pauley expressed the view that the federal system should not provide a backstop for state criminal justice problems or procedures. And Mr. Marek responded that the federal system is involved if a UFAP charge has been filed. The Committee ultimately voted 11 to 2 to make the proposed changes and forward them to the Standing Committee with a recommendation to publish the amended rule for comment by the bench and bar.

2. Rules 10 and 43: In Absentia Appearances

Judge Hodges provided a brief background to the proposal to permit use of video technology to arraign defendants, not present in court. He noted that at the Committee's Seattle meeting he had appointed a subcommittee composed of Judge Keenan (Chair), Judge Crow, Mr. Doar, Mr. Marek, and Professor Saltzburg to study the issue and report back to the Committee. Judge Keenan indicated that the subcommittee had studied the issue and believed that the Rules should be amended. He then moved that Rules 10 and 43 be changed to permit use of teleconferencing technology where the defendant waives the right to be physically present in court. Mr. Doar seconded the motion.

Mr. McCabe of the Administrative Office, informed the Committee that at its Spring 1993 meeting, the Judicial Conference had approved a pilot teleconferencing program in the Eastern District of North Carolina for competency hearings where the defendant is not present in court. Judge Davis questioned whether a defendant would really be waiving the right to be present and Judge Keenan indicated that the waiver provision was a major compromise within the subcommittee's consideration of the issue.

Mr. Karas opposed the rule changes, stating that he viewed the amendments as one more step down the slippery slope. He noted that the waivers will come from those defendants with appointed counsel and that Arizona had scrapped a similar program of video arraignments. Mr. Marek

also opposed the amendments. He was concerned that there would be inevitable questions whether the defendant actually waived appearance in court, adding that defendants often do not fully grasp the significance of initial appearances. He joined Mr. Karas in questioning the wisdom of starting down the path of video teleconferencing.

Judge Marovich indicated that the amendment sends the message that arraignments are not that important and Mr. Wilson questioned the practical problems of defense counsel effectively communicating with a client who may not be present in court with counsel.

After some additional discussion the original motion was withdrawn and replaced with a motion to forward the proposed amendment without provision for waiver.

Mr. Marek expressed greater concern for the new proposal and Professor Saltzburg indicated that the proposal would squeeze the humanity out of the justice system. He noted that there was something fundamental about bringing defendants forward and putting them before a judge. Concerning the waiver provision, he stated that that issue could be addressed in the Committee Note. Additional comments by Judge Hodges, Mr. Marek, and Mr. Wilson focused on the problems of counsel being present with the defendant. Judge Crow commented that there might be a problem with the definition of arraignment, which is covered in Rule 10. But Rule 43 might not be as limited. Judge Marovich indicated that if teleconferencing were limited to only arraignments, it might not be as objectionable.

Judge Keenan indicated that perhaps the best way to proceed would be to treat Rule 10 separately and go forward with that rule alone. On a vote whether to amend Rule 10 without a waiver provision, the motion failed by a vote of 6 to 7. Judge Keenan thereafter moved that Rule 10 be amended to permit video teleconferencing if the defendant waived personal appearance. Professor Saltzburg seconded the motion which carried by a vote of 10 to 3.

Turning to Rule 43; Judge Jensen noted that the issue of waiver would also be a key point in any change to the rule. Mr. Marek expressed concern that any counsel who recommended that a defendant waive personal appearance might be guilty of ineffective assistance of counsel:

Judge Keenan moved that Rule 43 be amended to permit teleconferencing of pretrial sessions if the defendant waives personal appearance. Judge Crow seconded the motion which carried by a vote of 9 to 3 with one abstention.

3. Appointment of Subcommittee to Consider Problems Associated with Proposals to Amend Rules

治水和 配對松松鄉 沙野鄉鄉

Judge Hodges noted the problems often associated with unsuccessful proposals to amend rules. He queried what response, if any, the Committee should give to individuals or groups who request permission to appear personally before the Committee to propose rule changes or to address the Committee before it votes on a particular amendment. He appointed a subcommittee consisting of Judge Crow (Chair), Judge Jensen, Mr. Marek, Ms. Klieman, and Mr. Pauley to consider the issue and whether the Committee should adopt any policies or standard procedures for dealing with those issues. Later in the meeting, at the suggestion of Mr. Pauley, Judge Hodges asked the subcommittee to consider the issue of whether a particular proposal should be considered indefinitely tabled if it is rejected by the Committee.

4. Rule 12: Proposal to Amend Rule to Require Defense to Raise Entrapment Defense as Motion

Judge Hodges indicated that Judge M. Real had proposed that Rule 12 be amended to require defendants to raise the entrapment defense as a pretrial motion and drew the Committee's attention to materials in the agenda book supporting that proposal. No motion was made regarding the proposal.

5. Rule 16: Proposal to Require Government Disclosure of Witnesses

The Chair indicated that at its October 1992 meeting the Committee had indicated an interest in revisiting possible amendments to Rule 16 which would require the government to disclose its witnesses to the defense. Mr. Wilson and Professor Saltzburg had agreed to draft a possible amendment, and had done so. But he added that Attorney General Reno had sent a letter to the Committee asking it to defer consideration of that amendment until she had a chance to review it.

Judge Schlesinger then moved to defer consideration of the amendment. Judge Keenan seconded the motion.

Judge Keenan indicated that it would be important to respect the request of the new Attorney General and give the Department of Justice an opportunity to consider more fully the proposed amendment. Judge Hodges indicated that there has been almost continuous consideration of amendments to

Rule 16 and that the heart of that rule rested in the proposal from Mr. Wilson and Professor Saltzburg.

Mr. Wilson acknowledged the request of the Attorney General but was concerned about continued delays in addressing what is a vital issue in federal criminal discovery. Professor Saltzburg acknowledged that the issue raised political questions and that if the Committee did not defer it might be viewed as a snub to the Attorney General. He suggested a middle ground — the Committee could defer the matter but continue to pursue the amendment. Mr. Pauley indicated that after reviewing the proposal, the Attorney General might be in a position to suggest an alternative solution or amendment.

Following additional brief discussion of possible solutions, the Committee vote unanimously to defer the proposed amendment to Rule 16 until its next meeting.

There was also a brief discussion about the proposal from Judge O'Brien that Rule 16 be amended to require the government to identify the materials implicating the defendant. Several members expressed concern about the process of reconsidering proposals which had already been rejected; this proposal in particular had been considered and rejected by the Committee at is October 1993 meeting. Judge Hodges recommended that the subcommittee on procedures consider the issue. Any further action on Judge O'Brien's proposal was deferred.

6. Rule 24(b): Proposal to Reduce Number of Peremptory Challenges

The Chair pointed out a proposal from several individuals that the Committee consider amending Rule 24 to reduce or equalize peremptory challenges — in an effort to reduce court costs. He provided background information on the Committee's past attempts to amend Rule 24(b) to equalize the number of peremptory challenges and observed that perhaps Congressional interest in the matter might spur the Committee to reconsider that issue. No motion was made to amend Rule 24.

7. Rule 43: Proposal to Permit In Absentia Sentencing

The Reporter provided a brief introduction to the Department of Justice's proposal to amend Rule 43 to permit in absentia sentencing. Mr. Pauley moved that Rule 43 be so amended and Judge Davis seconded that motion.

Mr. Pauley provided additional background information and reasons for the amendment. He pointed out that caselaw recognizes that the government can be prejudiced by the absence of a defendant. Judge Hodges questioned what would happen to the right of appeal if the defendant was sentenced in absentia. Judge Marovich indicated that it is a matter of waiver. He noted that in Illinois there is considerable caselaw indicating that if the defendant leaves after being admonished about the consequences of doing so, he or she has waived whatever right they had to be present or to appeal.

ant to have more desired to the second

Professor Saltzburg opposed the motion noting that trial judges might wish to wait to hear the defendant's reasons for not being present. He added that there did not appear to be any real data or evidence suggesting that there is need for the changing the rule. Judge Hodges observed that a presentence report could be prepared even if the defendant were absent and thus preserve some of the evidence for later use. Judge Marovich stated that defendant's should not be permitted to create a gridlock on the system by not showing up for sentencing. Mr. Pauley added that there has been an increase of "fugitivity" and that it seems anomalous that the entire trial could proceed without the defendant being present but that sentencing could not take place in the same circumstances.

Judge Keeton expressed agreement with Judge Marovich's views and the problems of wasting judicial resources by having to wait for the defendant's return. Mr. Pauley indicated that amending the rule would not require the court to sentence in absentia; it would simply permit the court to do so. Professor Saltzburg questioned whether the percentage of "fugitivity" had actually decreased in light of the increase in the number of cases. Judge Keenan questioned the potential impact on Rule 35 motions. Mr. Marek stated that once sentence is imposed, there is no way to correct it and Judge Hodges indicated that if the defendant's absence was involuntary, the sentence would probably be void. He added that sentencing in absentia would permit orders of restitution for victims, a view shared by Judge Jensen.

Judge Hodges questioned whether a guilty plea would be considered part of the trial and Mr. Pauley indicated that it would be. Mr. Marek expressed concern with that view and stated that the rule should be limited to those trials where the defendant has entered a not guilty plea; he questioned the constitutionality of a rule permitting in absentia sentencing after a guilty plea. Judge Marovich suggested that perhaps the rule should include a provision requiring the defendant to be admonished of the risk of flight before

sentencing. Judge Hodges and Mr. Marek raised the question of whether the change would violate the Sixth Amendment and Mr. Pauley responded that the amendment assumed that counsel would be present. Only the defendant's presence would be waived.

Ultimately, the Committee voted in favor of the proposed amendment to Rule 43 by a margin of 7 to 5.

Later in the meeting, Mr. Pauley moved that the word "corporation" in Rule 43(c) should be changed to the word "organization" as defined in 18 U.S.C. § 18. Judge Davis seconded the motion which carried by a unanimous vote.

8. Rule 53: Permitting Cameras in the Courtroom

Judge Hodges provided a brief background on the proposal to permit the broadcasting of criminal trials. Mr. McCabe informed the Committee that the Judicial Conference had approved a pilot program for civil trials; five courts had been authorized to permit cameras in the courtroom where the trial judge felt that it was appropriate to do so. The program would eventually be evaluated by the Conference.

Judge Davis noted that there seemed to be an absence of "horror stories" coming from that test program and Ms. Klieman spoke in favor of amending Rule 53 to permit broadcasting. She indicated that in her experience cameras in the courtroom tended to keep everyone honest; the media tends not to come into the courtroom because they can watch the proceedings from another location. It also serves as an asset to the administration of justice. Mr. Marek observed that the proposed amendment defers to the Judicial Conference to set the appropriate guidelines.

Mr. Pauley moved that Rule 53 be amended by deleting the reference to "radio" in the current rule. Judge Davis seconded the motion which carried by a vote of 12 to 1. Judge Schlesinger then moved that Rule 53 be amended to permit broadcasting the judicial proceedings under guidelines determined by the Judicial Conference. Professor Saltzburg seconded the motion which carried.

D. Rules and Projects Pending Before the Standing Committee and the Judicial Conference

1. Rule 57: Proposed Amendments Concerning Local Rules

The Reporter indicated, as a matter of information, that the Standing Committee was currently considering standardized language for amending the various procedural

rules concerning promulgation of local rules. In the case of the criminal rules, the amendment would be effective for Rule 57.

2. Rule 59: Proposed Amendments Concerning Technical Amendments

The Reporter also informed the Committee of pending amendments to Rule 59 which would authorize the Judicial Conference to make technical changes to the rules without the necessity of going through the entire rule-making process.

3. Admission of United States Attorneys Under Local Rules

Judge Hodges informed the Committee of a concern raised by then Attorney General Barr in a letter to Chief Justice Rehnquist concerning the question of whether the Courts of Appeals and the District Courts have the authority to require United States Attorneys to join their bars. Judge Keeton indicated that the Standing Committee was interested in hearing the views of the various advisory committees on that issue. He recognized that there is no "rule" in any of the procedural rules addressing the point; admission requirements are left to the local courts. Judge Hodges questioned whether, as Attorney General pointed out, the local admission requirements might conflict with statutory provisions governing the authority of the Attorney General to assign attorneys to represent the United States.

Judge Keeton added that it would be helpful to hear the views of the Department of Justice as to whether it believed the answer rested in promulgation of a rule, and if so, the extent of the rule. He noted that the present view is that the Judicial Conference does not have the authority to promulgate a rule governing bar admissions and he questioned who would have the authority. Mr. Pauley reminded that the Attorney General's letter noted that the problem of bar admissions existed in both the appellate and trial courts and disagreed that the best course would be to send the issue back to the Department of Justice.

Judge Hodges indicated that he would be inclined to write a letter to the Standing Committee indicating that the Committee had considered the issue and determined that the issue of bar admission did not appear in the criminal rules and that although the Committee had doubts about the appropriateness of such a rule it would be receptive to specific proposals for addressing the problem.

4. Filing by Facsimile

Mr. Rabiej informed the Committee that the Judicial Conference was considering the issue of promulgating guidelines for implementation of facsimile filing of documents. He added that issue was still pending and that there appeared to be no urgency for the Committee to address possible amendments to the Criminal Rules.

5. Renumbering and Integration of Rules

As a point of information, the Reporter pointed out that the Standing Committee had been, and would be, considering proposals to integrate all of the appellate, civil, and criminal rules of procedure rules into one unified numbering system. He noted that to date, no specific action had been taken on that proposal other than to chart out how the new system might work.

VI. RULES OF EVIDENCE UNDER CONSIDERATION

The first the state of the stat

The Reporter informed the Committee that the Chief Justice had appointed an Evidence Advisory Committee and that it would handling any amendments to Federal Rule of Evidence 412, which had been approved by the Committee at its October 1992 meeting and published for comment. He added that Professor Saltzburg had been designated as the Committee's liaison to the new Evidence Committee.

the state of the state of VII. MISCELLANEOUS AND DESIGNATION OF TIME AND PLACE OF NEXT MEETING

After a brief discussion about possible meeting dates and places, the Committee voted unanimously to hold its next meeting in San Diego, California on October 11 and 12, 1993.

The meeting adjourned at 11:15 a.m. on Friday, April

UNITED STATES DISTRICT COURT DISTRICT OF KANSAS United States Courthouse

United States Courthouse 444 S.E. Quincy Topeka, Kansas 66683-3501 AGENDA II San Diego, California October 11-12, 1993

Chambers of Sam A. Crow, Judge



913 295-2626 FAX 913 295-7615

August 17, 1993

The Honorable D. Lowell Jensen U.S. District Judge Post Office Box 36060 San Francisco, CA 94102

Mr. Edward F. Marek Federal Public Defender 1660 W 2nd Street, #750 Cleveland, OH 44113-1454 Ms. Rikki J. Klieman Counsellor at Law Klieman & Lyons 21 Custom House Street Boston, MA 02110

Mr. Roger Pauley Director, Office of Legislation U.S. Department of Justice Criminal Division, Room 2244 Washington, DC 2053

Dear Subcommittee Members:

As a result of the proposed report that I mailed each of you on July 26, I have received responses from you. I have attempted to incorporate your thinking within the enclosed revised proposed report. The text lined out is to be deleted and the bold text is to be added. I would like to hear from you at your convenience.

I wish to sincerely thank you for your comments, suggestions, etc. I shall arrange a telephone conference in the near future.

Respectfully yours,

Sam A. Crow

U.S. District Judge

SAC:bjr Enclosure

CC:

The Honorable William Terrell Hodges Chairman, Advisory Committee Criminal Rules United States Courthouse, Suite 512 311 West Monroe Street Jacksonville, Florida 32202 Subcommittee Members

Page 2

August 17, 1993

Mr. Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, D.C. 20544

Mr. John Rabiej, Chief Rules Committee Support Office Washington, D.C. 20544

PROPOSED REPORT OF SUBCOMMITTEE ON PROCEDURAL CHANGES

CHARGE1:

- I. At business meetings, as opposed to public hearings, should the Advisory Committee permit interested persons to appear and speak and, if so, under what conditions?
- II. Should the Advisory Committee impose any conditions for reconsidering a proposed rule change once it has been rejected by the Committee?

I. Oral Statements at Business Meetings

A. Assessment of Current Practice, Procedure, and Policy

On occasion, our Advisory Committee has heard oral testimony from interested persons upon their request and the Chairman's approval. To date, this has occurred so infrequently that it has not interfered with the Committee's ability to conduct its business meetings. The concern is that this opportunity to appear and speak will become more widely known and exploited. Without either the Committee setting limits or the Chairman continuing to hold tight reins over the

It is fair to say that the subcommittee considers its charge to be timely. The rulemaking procedure is the subject of current Congressional scrutiny. In June of 1993, the Subcommittee on Intellectual Property and Judicial Administration of the House Committee on the Judiciary recently conducted hearings on the rulemaking process and heard the testimony of Judges Keeton, Pointer, and Schwarzer. These oversight hearings are due in large part to the substantial public comment and criticism that the recently proposed amendments to the Federal Rules of Civil Procedure have drawn. At the hearing, Judge Keeton defended the Rules Enabling Act process as "the most thoroughly open, deliberative, and exacting process in the world for developing substantively neutral rules." It is the subcommittee's belief that any proposed change must be perceived as consistent with and in furtherance of the established process and the goals it serves.

practice, it is foreseeable that the business meetings could become "mini-public hearings" and would extract a substantial toll in the Advisory Committee's time and expense.

The Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure ("Procedures") govern the Advisory Committees' responsibilities in drafting and recommending rule changes. Nothing in the Procedures or in the Rules Enabling Act expressly allow or disallow oral statements from interested parties when an Advisory Committee meets to draft proposed rules. In the absence of an express provision, the focus is turned to whether the Procedures address the circumstances when an interested person would want to appear before the Committee at this stage.

A person may want to submit orally a proposal.

Though not expressed as any form of requirement, the

The state of the s

The Judicial Conference of the United States has the statutory duty to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331. The Judicial Conference "may authorize the appointment" of advisory committees to assist in "recommending rules." 28 U.S.C. § 2073(b). The Judicial Conference "shall authorize the appointment of a standing committee" to review advisory committees' recommendations and then "recommend to the Judicial Conference" rule changes "as may be necessary to maintain consistency and otherwise promote the interest of justice." 28 U.S.C. § 2073(b). The procedures by which the advisory committees and the standing committees are to consider proposed rules must be prescribed and published by the Judicial Conference. 28 U.S.C. § 2073(a))(1).

Procedures seem structured to deal only with "written recommendations." Part I, §§ 2, 3(b). Specifically, the Secretary of the Standing Committee must refer all written suggestions or recommendations to the appropriate Advisory Committee, and the reporter of each Advisory Committee must prepare "copies and summaries of all written recommendations and suggestions received" and forward them to the Advisory Committee. Moreover, the Advisory Committee's records must include the "written suggestions received from the public." Part I, § 6(b).

A person may want to address orally a written proposal. The Procedures contemplate that an Advisory Committee will gather or conduct business for three different reasons—drafting, public hearing, and final recommendation. Part I, §§ 3, 4, 5. At the drafting stage, the Advisory Committee is "to consider the draft proposed new rules and rules amendments, together with Committee notes, make revisions therein, and submit them for approval of publication to the Standing Committee." It is here that the Committee members discuss in detail the proposals. They work among themselves to build a consensus on whether a need exists and whether the suggested change is appropriate. They share their knowledge, experience and expertise in an effort to formulate proposed rules that are

the Procedures, the only public input appropriate at this formative stage is the initial written proposal.

Public comment comes later when the public hearings are held. After the Standing Committee approves the proposed rules for publication, notice is sent on the changes and public comment is heard. The expense and burden of notice and public debate is justified for only those rule proposals that pass the Advisory Committee and are approved by the Standing Committee for publication. Finally, the Procedures require only the Advisory Committee's review and consideration of those public comments and testimony submitted during the public hearing.

Congress, however, plainly intended to have even the drafting stage of the Advisory Committee's work open to public scrutiny. Every meeting of the Advisory Committee must be preceded by notice of time and place and must be open to the public. 28 U.S.C.

§ 2073(c)(1); Procedures Part I, § 3(a). The minutes of each Advisory Committee meeting are part of the records available for public inspection. Part I, § 6(b). This openness requirement raises questions that carry broad public policy connotations. Can a meeting have a public nature without the opportunity for public comment? Is public scrutiny effective if

it can be expressed only during the subsequent public hearing? We should be concerned that bills continue to be introduced in Congress which would allow for federal rules to be amended without going through the Rules Enabling Act process. These bills are driven in part by criticisms of slowness and insufficient opportunity for public comment. Any effort to make the process appear less responsive or open could fuel this desire for change. At the same time, the Advisory Committee is in a good position to discard any procedures which delay its operations without sacrificing meaningful opportunities for public input.

According to John Rabiej, Chief of the Rules
Committee Support Office, the other Advisory Committees
have no formal written policy concerning testimony at
business meetings. He is not aware of any other
Advisory Committee having formally considered a policy
or rule to restrict such testimony. As far as he
knows, the other Advisory Committees function much the
same as ours in leaving it to the Chairman to decide if
and when oral testimony would be heard at business
meetings.

B. <u>The Subcommittee's Recommendation and Alternatives in</u>
Order of Preference

Recommendation: The Advisory Committee should adopt the subcommittee's recommendation to require all suggestions and proposals submitted by interested persons to be in writing and to limit oral testimony or statements to public hearings only and not business

committee members from asking questions of proponents or opponents who are attending the business meeting.

Piret Alternative Recommendation: The Advisory
Committee adopt the subcommittee's first alternative
recommendation to require all suggestions and proposals
submitted by interested persons to be in writing and to
allow oral testimony at business meetings in support of
or in opposition to written proposals upon advance
written request and cause shown

Second Alternative Recommendation: The Advisory
Committee adopt the subcommittee's second alternative
recommendation to stay with the status quo but monitor
closely the current practice of oral testimony at
business meetings and reconsider the above
recommendations when circumstances further warrant it.

C. Reasons for Recommendation Proposed Alternative No. 1

An analysis in the contract of

L. C. S. C. Though the subcommittee does not perceive an immediate problem with hearing oral testimony at business meetings, it is only a matter of time before it becomes known to the interested circles that this THE REPORT OF THE PARTY OF THE additional opportunity exists for influencing the 化乙醇基酚 医原原 海關 化橡木 医胸腔 经格工员 rulemaking process in the first instance. Once the 河州 化自己分配 海绵 海绵 海绵 practice takes hold, efforts to curtail it are more likely to be seen as contrary to the public nature of 5、31、47、60、 与内翻译为[[4]、4] 6 特 the Committee's work. Allowing a proponent to speak in Stall William AND AND STREET favor of a proposal raises questions of notice to A MARINE THE TAX groups or individuals that might oppose the proposal and equal time for their requested oral presentation. Balancing these interests and deciding whether circumstances justify hearing oral testimony may not be the type of responsibilities that a Chairman should have or want. The prohibition of both oral proposals

and oral testimony at business meetings is simple to enforce, is consistent with the Judicial Conference's Procedures, permits the Committee to devote its business meetings to considering and drafting proposed rules, and does not substantially compromise the public nature of the proceedings or the ability of any interested party to present a proposal or viewpoint to the Committee at a meaningful time.

の理解をうしている はれる かかか でき はいかり

D. <u>Dissenting View</u>

"that a flat prohibition on any oral presentations would be viewed as contradictory to the powerful public policy" of the Committee's work and process being open to the public. In light of the limited history of oral testimony at business meetings and the lack of any significant interference from this practice, these members would favor leaving the matter within the Chairman's discretion and reconsidering the policy if the practice gets out of hand.

II. Reconsideration of Proposed Rule Changes

A. Current Practice, Procedure and Policy

The Advisory Committee has seen suggestions and recommendations sometimes submitted again after a prior rejection. Repeat proposals have not occurred often enough to make any judgment as to whether they are purposeful or mere coincidence. Unless the reason for renewing a proposal is to harass or burden, the subcommittee does not perceive any impropriety in asking the Advisory Committee, as presently constituted, to consider a proposal again. There is no question of propriety if the proposal is supported by new or different arguments or circumstances. As for the burden or expense to the Advisory Committee from repeat proposals, the subcommittee did not attempt to make any findings. At this point, the subcommittee assumes that there will be some burden and expense if the Advisory Committee in each instance fully studies and discusses the renewed suggestion.

The Judicial Conference's Procedures do not restrict the resubmission of rejected proposals. The mandate of the Advisory Committee is to "carry on 'a continuous study of the operation and effect of the general rules of practice and procedure.'" Part I, § 1. In other words, the Advisory Committee's work must be deliberative, thorough, and ongoing. In

addition; the Procedures specify that the Committee must consider "suggestions and recommendations received from any source." The Procedures do not limit the number or the nature of submissions from any source.

B. The Subcommittee's Recommendation in Order of Preference

· (1) (2) 有在 (1) (2) (2) (2) (2) (3)

The Advisory Committee adopt the subcommittee's recommendation that the reporter in preparing copies and summaries of all written suggestions or proposals identify those that are similar to ones that have been submitted, discussed, and rejected and, to the extent practicable, provide a summary of the reasons for the rejection appearing in Committee's minutes.

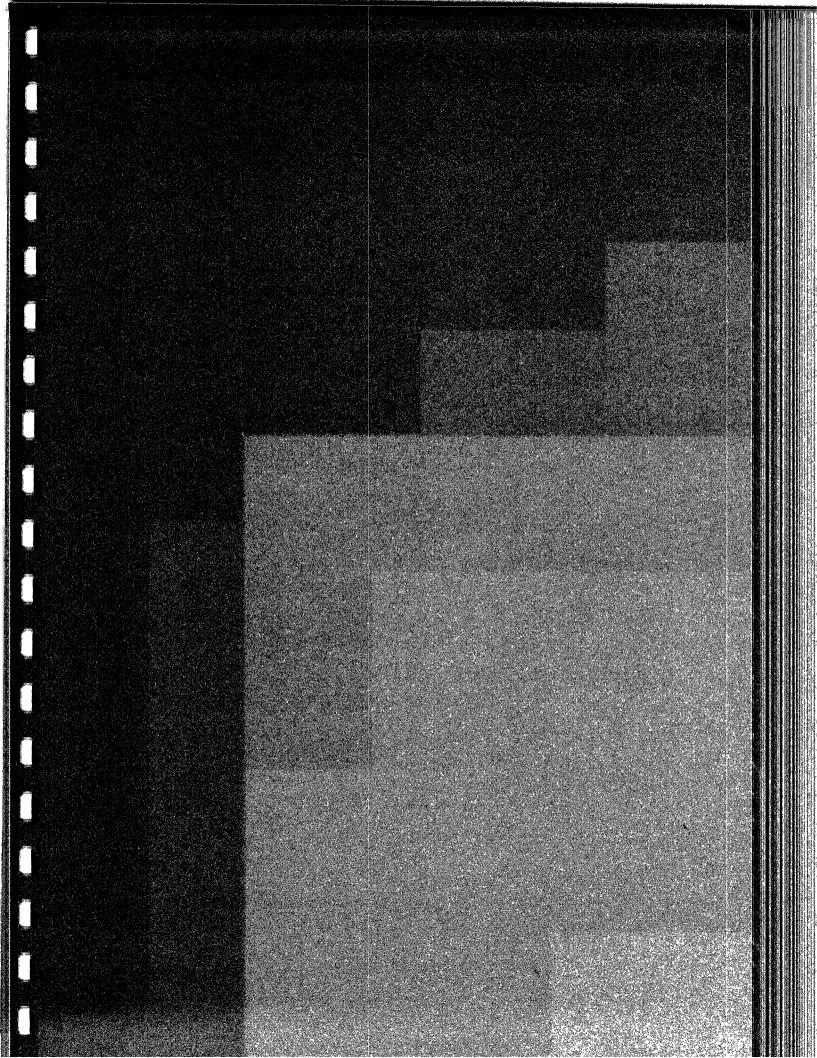
First Alternative Recemmendation: The Advisory Committee adopt the subcommittee's first alternative recommendation that the reporter in preparing copies and summaries of all written suggestions or proposals identify those that are substantially similar to ones that have been submitted, discussed, and rejected within the last year. These repeat suggestions or proposals will not be discussed or considered at the business meeting except upon a majority vote of the Committee.

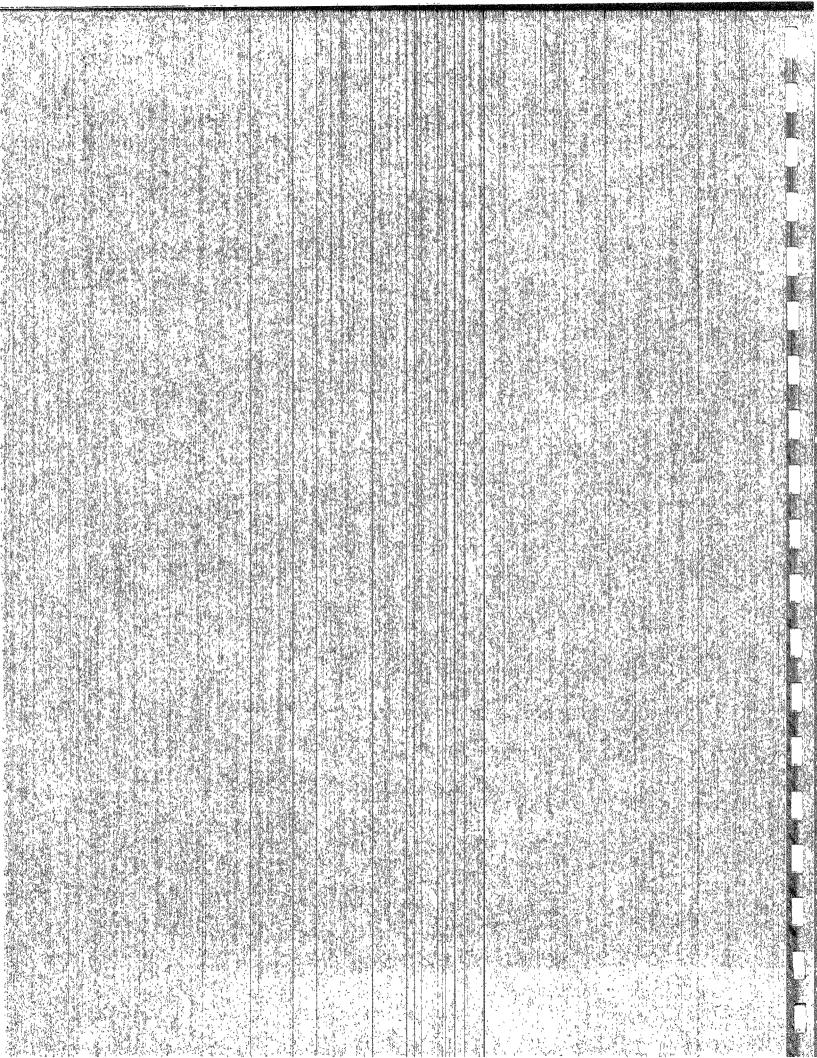
Second Alternative Recommendation: The Advisory Committee adopt the subcommittee's second alternative recommendation to stay with the status que.

C. Reasons for Recommendation for Proposed Changes

The subcommittee does not favor a policy that would bar reconsideration or resubmission for an arbitrary period of time. The subcommittee does recognize that members of the Advisory Committee extensively prepare for the business meetings and that proposed rule changes are often discussed at length at the meetings. Knowing If aware that the same or similar suggestion or proposal was earlier that the

Committee had considered and rejected a prior suggestion or proposal similar to the pending one was rejected and the reasons for that rejection, members could prepare accordingly and then decide at the meeting whother the subject was worthy of revisiting. The subcommittee believes existing practice of having a motion and second before the Committee takes up a recommendation proposal is a sufficient threshold for screening acvice repeat proposals. Assuming a repeat proposal clears the threshold, the additional information provided by the reporter will assist members in identifying and discussing the pertinent considerations. The subcommittee believes that the reporter is uniquely situated to provide such this helpful information and that the qualifier, "to the extent practicable," should prevent this additional work from becoming unduly burdensome.





COMMITTEE ON RULES OF PRACTICE AND PROCEDURE AGENDA II San Diego, Californ OF THE JUDICIAL CONFERENCE OF THE UNITED STATES October 11-12, 1993 WASHINGTON, D.C. 20544 ROBERT E. KEETON JUN 1 1993 U. S. District Judge Sam A. Crow CHAIRMEN OF ADVISORY COMMITTEES CHAIRMAN KENNETH F. RIPPLE APPELLATE RULES PETER G. McCABE SECRETARY **EDWARD LEAVY** BANKRUPTCY RULES SAM C. POINTER, JR. **CIVIL RULES**

May 26, 1993

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR. EVIDENCE RULES

Honorable Sam A. Crow
United States District Judge
430 Federal Building and
United States Courthouse
444 S.E. Quincy Street
Topeka, Kansas 66683

Dear Sam:

As promised, I have prepared the enclosed summary of the rules process for your consideration in preparing your speech.

It seems to me that others may want the same sort of brief overview information on the rules system. Accordingly, I may decide to ask the reporters of the standing committee and the advisory committee for their comments on the paper. Eventually, we might be able to use it as a handout to answer public inquiries.

If there is anything else you need, please call on me.

Sincerely

Peter G. McCabe Assistant Director

Enclosure

SUMMARY OF THE FEDERAL RULES PROCESS

Authority

The Judicial Conference of the United States is required by statute to "carry on a continuous study of the operation and effect of the general rules of practice and procedure." 28 U.S.C. § 331.

The Congress has authorized the Judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate right of the Congress to veto or defer any of the rules. The Rules Enabling Act sets forth the authority and procedures for promulgating federal rules. 28 U.S.C. §§ 2071-2077.

The Rules Committees

The Judicial Conference's responsibilities as to rules are coordinated by its Committee on Rules of Practice and Procedure, commonly referred to as the "Standing Committee." 28 U.S.C. § 2073(b). In addition, the Judicial Conference has five advisory committees, dealing respectively with the appellate, bankruptcy, civil, criminal, and evidence rules. 28 U.S.C. § 2073(a)(2). The Standing Committee reviews and coordinates the recommendations of the five advisory committees, and it recommends to the Judicial Conference proposed rules changes "as may be necessary to maintain consistency and otherwise promote the interests of justice." 28 U.S.C. § 2073(b).

The Standing Committee and the advisory committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice.

Each committee has a reporter, a prominent law professor, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and accompanying committee notes.

The secretary to the committees, the Assistant Director for Judges Programs of the Administrative Office of the United States Courts, maintains the records of the committees and coordinates the administrative aspects of the rules process. The Rules Committee Support Office of the Administrative Office provides day to day administrative and legal support to the secretary and the committees.

Open Meetings and Records

Meetings of the rules committees are open to the public and are widely announced. All records of the committees, including minutes of committee meetings, suggestions and comments from the public, prepared statements of witnesses, transcripts of public hearings, and summaries and memoranda prepared by the reporters, are public and are maintained by the secretary. Copies of the rules and proposed amendments are generally available through the Secretary and the Rules Committee Support Office.

Drafting Rules Changes

When an advisory committee decides initially that a particular change in the rules would be appropriate, it normally asks its reporter to prepare a draft amendment to the rules and an explanatory committee note. The draft amendment and committee note are discussed, and revised as appropriate, at a committee meeting. They are then voted upon by the full advisory committee.

The Standing Committee has a style subcommittee that works with the respective advisory committees in reviewing the proposed amendments to ensure that they are written in clear and consistent language. The reporters of the Standing Committee and the five advisory committees are encouraged to work together to promote clarity and consistency among the various sets of federal rules.

Publication of Proposed Amendments

Once an advisory committee votes to recommend an amendment to the rules, it must obtain the approval of the Standing Committee, or its chairman, to publish the proposed amendment. In seeking publication, the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

After publication is approved by the Standing Committee, the secretary arranges for printing and distribution of the proposed rule changes to bench and bar, to publishers, and the general public. More than 11,000 persons and organizations are on the mailing list, including federal judges and other court officers, United States attorneys and other federal officials, state chief justices, state attorneys general, law schools, bar associations, and interested lawyers, law firms, and other organizations that request distribution.

The public is normally given 6 months in which to comment in writing to the secretary on the proposed amendments. (In an emergency, a shorter time period may be authorized by the Standing Committee.)

During the 6-month comment period, the advisory committee will conduct one or more public hearings on the proposed amendments.

Consideration of the Public Comments and Final Approval by the Advisory Committee

At the conclusion of the comment period, the reporter is required to prepare a summary of the written comments received and the testimony presented at the public hearings. The advisory committee then takes a fresh look at the proposed rule changes in light of the public comments and testimony.

If the advisory committee decides to make any substantial change in its proposal, it must provide an additional period for public notice and comment.

Once the advisory committee decides to proceed with the proposed rule amendment in final form, it must submit it to the Standing Committee for approval. Each amendment proposed by the advisory committee must be accompanied by a separate report summarizing the comments received from the public and explaining any changes made by the advisory committee following the original publication. The advisory committee's report may also include minority views. Approval by the Standing Committee

The Standing Committee normally considers the final recommendations of the advisory committees for rules amendments at its June meeting. The Standing Committee may accept, reject, or modify the proposals. If a modification of the Standing Committee represents a substantial change, the proposal will be returned to the advisory committee with appropriate instructions.

If the Standing Committee approves proposed rules changes, it transmits them to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee reports and its own report explaining any changes it made.

Judicial Conference Approval

The Judicial Conference normally approves proposed amendments to the rules at its September session. Following approval by the Conference, the amendments are transmitted to the Supreme Court.

Supreme Court Approval

The Supreme Court has the authority to prescribe the federal rules, subject to a statutory waiting period. 28 U.S.C. § 2072, 2075. The Court must transmit proposed rules amendments to the Congress by May 1 of each year. 28 U.S.C. § 2074.

Congressional Review

The Congress has a statutory period of 7 months to act on any rules prescribed by the Supreme Court. If the Congress does not enact legislation to reject, modify, or defer the rules, they take effect as a matter of law on December 1. 28 U.S.C. § 2074.

In the case of the Federal Rules of Bankruptcy Procedure, the statutory waiting period is 3 months. Accordingly, absent Congressional action proposed rules changes take effect on August 1. 28 U.S.C. § 2075.

PROCEDURES FOR AMENDING THE FEDERAL RULES

The rules amendment process is time-consuming because it requires: (1) comprehensive input from judges, lawyers, academics and the public, and (2) approval by several entities.

	<u>Action</u>	<u>Date</u>
• ′	Suggestion for a change in the rules. (Submitted in writing to the secretary.)	At any time.
•	Referred by the secretary to the appropriate advisory committee.	Promptly after receipt.
•	Considered by the advisory committee and its reporter.	Normally at next advisory committee meeting.
•	If approved, the advisory committee seeks authority from the Standing Committee to circulate to bench and bar for comment.	Normally at same meeting.
•	Public comment period.	6 months.
•	Public hearings.	During the comment period.
•	Advisory committee considers the amendment afresh in light of public comments and testimony at hearings.	Usually about one month after the close of the comment period.
•	Advisory committee approves amendment in final form and transmits to the Standing Committee.	Normally at same meeting.
•	Standing Committee approves amendment, with or without revisions, and recommends approval by the Judicial Conference.	Normally at June meeting.
•	Judicial Conference approves amendment and transmits to the Supreme Court.	Normally at September meeting.
•	The Supreme Court prescribes the amendment.	By May 1.
•	Congress has statutory time period in which to enact legislation to reject, modify, or defer the amendment.	By December 1 (civil, criminal, appellate, and evidence rules). By August 1 (bankruptcy rules).
•	The amendment to the rules become law.	December 1 (August 1 for bankruptcy rules)

ta No series de la companya de la comp . 9

TEXAS TECH
LAW REVIEW

VOLUME 22

SYMPOSIUM 1991

Number 2

FIFTH CIRCUIT SURVEY

June 1989-May 1990

FOREWORDJuc	ige Thomas Gibbs Gee
Article	
AN INTRODUCTION TO FEDERAL CO PROCEDURE	URT RULEMAKINGThomas E. Baker
Survey Articles	
ADMINISTRATIVE LAW	Aichael A. Scaperlanda
ADMIRALTY LAW	Edward J. Murphy, James T. Brown and James T. Liston
ANTITRUST	Jerry L. Beane
BANKING LAW	H. DeWayne Hale
BANKRUPTCY	Gerrit M. Pronske
	Russell H. Roden
CRIMINAL LAW	Alan N. Greenspan
CRIMINAL PROCEDURE	Timothy W. Floyd
ENVIRONMENTAL LAW	Scott D. Deatherage
EVIDENCE	David A. Schlueter
FEDERAL TAXATION	Marilyn E. Phelan
LABOR AND EMPLOYMENT LAWL	
SECURITIES LAWJay	yne Elizaheth Zanglein

AN INTRODUCTION TO FEDERAL COURT RULEMAKING PROCEDURE

by Thomas E. Baker*

Toward the end of September 1990 at a closed meeting in Washington, D.C., the Judicial Conference of the United States passed on a substantial set of proposed amendments to the rules of practice and procedure of the federal courts. The new appellate rules authorized local circuit rules on electronic filing,1 required a jurisdictional statement in the appellant's brief2 and eliminated some inconsistencies in the notice rules for admiralty appeals.3 The new civil rules related to pretrial scheduling orders,4 discovery in international litigation,5 claims of privilege,6 subpoenas of nonparties,7 alternate jurors, the standard for entry of judgment as a matter of law, procedures for special masters 10 and substitution for a judge who is unable to continue.11 Most important, a completely redrafted Federal Rule of Civil Procedure 4: (1) authorized service as provided by the state in which a defendant is served, as well as the forum state; (2) permitted nationwide personal jurisdiction in federal question cases; (3) emphasized and encouraged waivers of actual service; and (4) clarified and economized service of process by and on the federal government.12 The most substantial changes occurred in bank-

^{*} Professor of Law, Texas Tech University; B.S. cum laude, Florida State University, 1974; J.D. with high honors, University of Florida, 1977. By appointment of Chief Justice William H. Rehnquist, the author serves on the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The views expressed herein are those of the author alone. A previous version of this article appeared in the Texas Lawyer. See Baker, An Invitation to Get Involved, Texas Lawyer, Sept. 3, 1990, at 22, col. 1.

^{1.} See FED. R. APP. P. 25(a).

^{2.} See FED. R. APP. P. 28(a).

^{3.} See FED. R. APP. P. 4.

^{4.} See FED. R. CIV. P. 16(b).

^{5.} See FED. R. Crv. P. 26, 44.

^{6.} See FED. R. CIV. P. 34.

^{7.} See FED. R. Civ. P. 45.

^{8.} See FED. R. CIV. P. 47, 48.

^{9.} See FED. R. Crv. P. 41, 50, 52(c).

^{10.} See FED. R. Crv. P. 53.

^{11.} See FED. R. Crv. P. 63.

^{12.} See FED. R. Crv. P. 4

kno acti stat sepa

199

equ con rega or a

fede exec Thi ing of

for

with tha rule uni Act

Rulind ind ten

193

ed. conf of p may

Cha

ruptcy procedure, where the rules have been redrafted in wholesale. These reforms were made necessary, in large part, by far-reaching recent legislation: the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986¹³ and the Retiree Benefits Bankruptcy Protection Act of 1988.¹⁴ Even the Official Bankruptcy Forms have been redrafted.

As expected, these proposed amendments to the rules were adopted by the Supreme Court and not changed by Congress. Federal practitioners are now obliged to learn a good many new appellate, bankruptcy and civil rules of procedure. But this article is not about the "substance" of these new procedures. It is too late for that discussion. What I want to explain here is the procedure by which federal rule changes, such as these, are promulgated. My hope is to demystify these procedures so that more members of the Barmight participate meaningfully in federal judicial rulemaking.

Federal practitioners are not to be criticized for not knowing how rules are begotten. I am an academic proceduralist who regularly teaches Federal Jurisdiction, and I had only a vague understanding of federal rulemaking before I was appointed to the Standing Committee on Rules and Procedures. Members of the Bar, obviously, have an important stake in changes in federal procedure and, necessarily, have a public responsibility to further the quixotic goal of Federal Rule of Civil Procedure 1: "to secure the just, speedy, and inexpensive determination of every action." 16

I. HISTORY

Modern federal judicial rulemaking dates from 1958. Nevertheless, a few paragraphs of history inform our understanding of current practice.¹⁷ The famous Judiciary Act of 1789 first authorized federal courts to fashion necessary rules of practice.¹⁸ However, a lesser

^{13.} Pub. L. No. 99-554, 100 Stat. 1089 (1986) (codified in scattered sections of 28 & 11 U.S.C.).

^{14.} Pub. L. No. 100-334, 102 Stat. 610 (1988) (codified in scattered sections of 11 U.S.C.).

^{15.} See Notice to Subscribers, 111 S. Ct. no. 5, at CV (1990).

^{16.} FED. R. Crv. P. 1.

^{17.} See generally Goodman, On the Fiftieth Anniversary of the Federal Rules of Civil Procedure: What Did the Drafters Intend?, 21 SUFFOLK L. REV. 351, 353-67 (1987) (detailing the history of the Federal Rules of Civil Procedure).

^{18.} Act of Sept. 24, 1789, ch. 20, § 17, 1 Stat. 73, 83 (current version at 28 U.S.C. § 1652 (1988)).

325

ale. ing ees. efits

ptcy vere SS. 15.

new le is late e by 📲

lope. Bar

wing: larly ding omusly,

necal of and

rtherrent deral esser

8 & 11

.S.C.).

of Civil etailing

S.C. §

known statute which passed less than a week later provided that in actions at law the federal procedure should be the same as in the state courts. 19 This created a system which seems odd to us today: a separate federal procedure, independent from state procedure, for equity and admiralty and a static federal procedure for law that conformed to the procedure in each state as of September 1789, regardless of later state court changes. The system became more odd, or at least more uneven, in 1828 when Congress passed a statute that required federal courts in subsequently admitted states to conform to 1828 state procedures.20 The same statute provided that all federal courts, were to follow 1828 state procedures for writs of execution and other enforcement proceedings with some discretion.21 This unsatisfactory system prevented the federal courts from following the lead of state procedural reform such as the New York Code of 1848 which merged law and equity and simplified pleading.22

The next legislative improvement came in 1872 when Congress withdrew fulemaking authority from the federal courts and required that all actions in law conform with the corresponding state forum's rules and procedures. 3 As a practical consequence there was no uniformity in federal procedure because, as a result of the Conformity Act, there were as many different federal rules and procedures as

there were states.24
My reader can look elsewhere for the history of the Federal Rules of Civil Procedure t'told in large part in terms of dedicated individuals who worked and campaigned to bring them into existence."23 What bears emphasis in our historical world is that until 1938, that is, for the first 150 years of the 200 year history of federal

^{19.} Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (current version at 28 U.S.C. § 1652 (1988)).

^{20.} Act of May 19, 1828, ch. 68, 4 Stat. 278.

^{21.} Id.

^{22.} See Clark, The Challenge of a New Federal Judicial Procedure, 20 CORNELL L.Q. 443, 499-50 (1935).

^{23.} Act of June 1, 1872, ch. 255, 17 Stat. 197 (repealed 1934).

^{24. 4} C. Wright & A. Miller, Federal Practice and Procedure § 1002, at 14 (2d ed. 1987) ("[T]he procedural law continued to operate in an atmosphere of uncertainty and confusion, aggravated by the growing tendency of federal courts to develop their own rules of procedure under the licensing words of the 1872 Act that conformity was to be 'as near as may be."").

^{25.} Id. § 1004, at 21. See also Goodman, supra note 17, at 355 (explaining the roles of Charles E. Clark, James W. Moore and others in the original promulgation of the rules).

courts, things were the reverse of what they are today. Before 1938, the federal courts followed state procedural law and federal substantive law, even in diversity cases. Of course, the substantive law of the forum state was recognized to be controlling in the famous diversity decision of *Erie Railroad Co. v. Tompkins*, ²⁶ overruling *Swift v. Tyson*.²⁷

And in the same year, after more than two decades of effort, national rules of procedure were drafted by an ad hoc Advisory Committee appointed by the Supreme Court under the provision of the Rules Enabling Act of 1934.²⁸ The new rules—which persist today through numerous subsequent amendments—established a uniform federal procedure, abolished the distinction between law and equity, created one form of action, provided for liberal joinder of claims and parties and authorized extensive discovery.

The Supreme Court's ad hoc Advisory Committee was comprised of distinguished lawyers and law professors. While the ad hoc Committee has been deservedly lionized for drafting the rules themselves. a more subtle but equally lasting achievement was to establish the tradition of federal procedural reform.29 Two features of that nascent experience have characterized federal judicial rulemaking ever since. First, the ad hoc Committee took care to elicit the thinking and the experience of the bench and bar by distributing drafts and soliciting comments with a pronounced willingness to reconsider and redraft its recommendations. Second, "the work of the Committee was viewed as intellectual, rather than a mere exercise in counting noses."30 The ad hoc Committee demonstrated the shared sense of responsibility to recommend to the Supreme Court the best and most workable rules rather than rules that might be supported most widely or might appease special interests. Although the rulemaking mechanism has been revised over the years since, these two traditions have endured.

^{26. 304} U.S. 64 (1938).

^{27. 44} U.S. (16 Pet.) 11 (1842); see generally E. CHEMERINSKY, FEDERAL JURISDICTION § 5.3.5 (1989) (discussing "choice of law in diversity cases"); C. WRIGHT, THE LAW OF FEDERAL COURTS §§ 54-60 (4th ed. 1983) (explaining the history of the Erie Doctrine).

^{28.} Act of June 19, 1934, ch. 651, §§ 1-2, 48 Stat. 1064 (codified at 28 U.S.C. § 2072 (1988)). See Order Appointing Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774 (1934).

^{29.} See generally 4 C. WRIGHT & A. MILLER, supra note 24, § 1005 (assessing the contributions of the Advisory Committee in establishing judicial rulemaking).

^{30.} Id.

This positive early experience located rulemaking responsibility in the judicial branch, but the modern rulemaking process took a few more years to evolve. A year after the new rules went into effect, the Supreme Court called upon the ad hoc Advisory Committee to submit amendments which the Court accepted and sent to Congress and which became effective in 1941.31 The next year, the Supreme Court designated the ad noc Committee a continuing Advisory Committee which then periodically proposed amendments through the 1940s and early 1950s. 32 In 1955, the continuing Advisory Committee submitted an extensive report to the Supreme Court with numerous suggested amendments. The Court rather mysteriously took no action on the Report and instead ordered the Committee "discharged with thanks' and revoked the Committee's authority as a continuing body 33

The resulting void in rulemaking procedure was an object of concern expressed by the American Bar Association, the Judicial Conference and other groups. At the time, there was no small controversy over whether the Court should designate a new standing committee and how the members might be selected. Dissatisfaction with the rulemaking role of the Supreme Court as a veritable rubber stamp of Advisory Committee recommendations had led several Justices to dissent publicly, from time to time complaining that the proposals were not actually the work of the Court.35 Apparently, there were misgivings expressed behind the scenes about the tenure

^{31.} Order Requesting Amendments from the Advisory Committee 308 U.S. 642 (1939).

^{32.} Continuance of Advisory Committee, 314 U.S. 720 (1941); see, e.g., Order Amending the Rules of Civil Procedure, 341 U.S. 962 (1951); Order Amending the Rules of Criminal Procedure, 335 U.S. 917 (1948); see also Clark, "Clarifying" Amendments to the Federal Rules?, 14 Onio St. L.J. 241, 242 (1953) (discussing the frequency of amendments).

^{33.} Order Discharging the Advisory Committee, 352 U.S. 803 (1956).
34. See The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A. J. 42, 42 (1958) (conducting "[a] panel discussion of this important question").

^{35.} See, e.g., Order Amending the Rules of Civil Procedure, 329 U.S. 843 (1946) (noting Justice Frankfurter's reliance on the judgment of the Advisory Committee); Order Amending the Rules of Civil Procedure, 308 U.S. 643 (1939) (noting Justice Black's disapproval); Order Adopting the Rules of Procedure for the District Courts of the United States, 302 U.S. 783 (1937) (noting Justice Brandeis' disapproval of the new federal rules). Even after the changes in the rulemaking procedure outlined infra at notes 37.47 and accompanying text, there were continued dissents regarding the method of promulgation. See, e.g.. Order Amending the Rules of Civil Procedure, 374 U.S. 861 (1963) (opposing statements of Black, J. and Douglas, J.) ("[T]he rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power.") But see infra note 45 and accompanying text.

of the continuing Committee members, who served indeterminate terms until they resigned or died. All this subtle controversy took place along with the separation of powers tug-of-war between the courts and Congress over which institution should make rules, and how.

The replacement rulemaking procedures were designed by Chief Justice Earl Warren, Justice Tom C. Clark and Chief Judge John J. Parker, of the Fourth Circuit, during their cruise to attend the 1957 American Bar Association Convention. Later, Justice Clark recalled, "On our daily walks around the deck of the Queen Mary, we thrashed out the problem thoroughly, finally agreeing that the Chief Justice, as chairman of the Judicial Conference, should appoint the committees which would give them the tag of 'Chief Justice Committees." The "Queen Mary Compromise" led to a statutory amendment that assigned responsibility to the Judicial Conference for advising the Supreme Court regarding changes in the various rules—admiralty, appellate, bankruptcy, civil and criminal—which the Court had statutory authority to amend. The rulemaking process today follows the basic 1958 design.

II. RULEMAKING TODAY

The Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure³⁸ describe simple procedures that have proven to be efficient and effective. The Judicial Conference of the United States consists of the Chief Justice of the United States, Chairman, the Chief Judge of the United States Court of Appeals for the Federal Circuit, the Chief Judge of the Court of International Trade, the chief judges of the other twelve United States courts of appeals and twelve district judges chosen for a term of three years by the judges of each circuit at an annual judicial conference of the circuit. The Judicial Conference meets twice every year to consider administrative problems and policy issues

^{36.} Clark, Foreword to 4 C. WRIGHT & A. MILLER, supra note 24, at ix.

^{37.} Act of July 11, 1958, Pub. L. No. 93-12, 72 Stat. 356 (codified at 28 U.S.C. § 331 (1988)); see generally The Rule-Making Function and the Judicial Conference of the United States, 44 A.B.A. J. 42-45, 91-94 (1958) (explaining the newly proposed and subsequently enacted procedures).

^{38.} See Announcement, 50 Fed. Reg. 13,752 (1989); 110 S. Ct. no. 11, at CXXX-CXXXV (1990); see also 28 U.S.C. §§ 2071-2077 (1988).

1 1 1 1

أدرالم الأواج

4 \$ 14

1000-1806

17点: 10 10

4 425 34

affecting the federal judiciary and to make recommendations to Congress concerning legislation affecting the federal judicial system.39

The Judicial Conference created the Committee on Rules of Practice and Procedure (Standing Committee)40 and various Advisory Committees (currently one each on Appellate Rules, Bankruptcy, Civil Rules and Criminal Rules). All appointments to the committees are made by the Chief Justice of the United States for a three-year, once-renewable term. Members are federal and state judges, practicing attorneys and academics. A reporter, usually a professor of law,

is appointed to serve each committee.

Each Advisory Committee is charged to carry out a "continuous study of the operation and effect of the general rules of practice and procedure" in its particular field 1 An Advisory Committee considers suggestions and recommendations received from any source, new statutes and court decisions affecting the rules and relevant legal -Wind commentary. Copies or summations of all written recommendations and suggestions that are received are forwarded to each member. The Advisory Committees meet at the call of the chairman, and each meeting is preceded by notice of the time and place, including publication in the Federal Register, and meetings are open to the public.42 The Reporter, under the direction of the Advisory Committee or its chairman prepares the initial drafts of rules changes and "Committee Notes" explaining their purpose or intent. The Advisory Committee then meets to consider and revise these drafts and submits them, along with an Advisory Committee Report which includes any minority or separate views, to the Standing Committee.

Once the Standing Committee approves the drafts for publication, the proposed rules changes are printed and circulated to the bench and bar, and to the public generally. Every effort is made to publish the proposed rules widely. A notice is published in the Federal Register and the proposed rules are included in the advance sheets of Supreme Court Reporter, Federal Reporter and Federal Supple-

^{39.} See 28 U.S.C. § 331 (1988).

^{40.} See id. § 2073(b). The statute provides: "The Judicial Conference shall authorize the appointment of a standing committee on rules of practice, procedure, and evidence" Id. (emphasis added). The convention has been to refer to this committee as the "Standing Committee on Rules of Practice and Procedure, or simply the "Standing Committee."

^{41.} Id. 42. See, e.g., Meeting Notice, 55 Fed. Reg. 38,589 (1990) (meeting of the Advisory Committee on Appellate Rules) · 编辑的 网络拉克哈 推進 / 一位10 4篇 4次 6 16 17 19

ment.⁴³ As a matter of routine, copies are provided to various legal publishing firms and to the chief justices of each state and, as is practicable, to all individuals and organizations who request them.

Unless there is a finding that the administration of justice requires expedition, the comment period runs six months from the Federal Register notice date. The Advisory Committee usually conducts public hearings on proposed rule changes, again preceded by notice. The hearings typically are held in several geographically diverse cities to allow for regional comment. Transcripts of the hearings are generally available.

At the conclusion of the comment period, the reporter prepares a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee then may change the proposed rules in accordance with meritorious comments or suggestions. If there are substantial changes, there may be an additional period for public notice and comment. The Advisory Committee then submits the proposed rule changes and Committee Notes to the Standing Committee. Each submission is accompanied by a separate report of the comments received that explains any changes made subsequent to the original publication. The report also includes the minority views of Advisory Committee members who chose to have their separate views recorded.

The Standing Committee coordinates the work of the several Advisory Committees. Although sometimes the Standing Committee suggests proposals to be studied, its chief function is to review the proposed rule changes recommended by the Advisory Committees. Meetings of the Standing Committee are generally open to the public and are preceded by public notice in the Federal Register.44

The Chairman and Reporter of the Advisory Committee attend the meetings of the Standing Committee to present the proposed rules changes and Committee Notes. The Standing Committee may accept, reject or modify a proposal. If a modification effects a substantial change, the proposal may be returned to the Advisory Committee with appropriate instructions. Next, the Standing Committee transmits the proposed rule changes and Committee Notes approved by it, together with the Advisory Committee report, to the Judicial Conference. The Standing Committee's report to the Judicial

^{43.} See, e.g., 110 S. Ct. No. 15, at CLIX (June 1, 1990) (amendments to the Federal Rules of Criminal Procedure).

^{44.} See, e.g., Meeting Notice, 55 Fed. Reg. 25,384 (1990) (Standing Committee).

1 1

Conference includes its recommendations and explanations of any

changes it has made.

The Judicial Conference, in turn, transmits those recommendations it approves to the Supreme Court. Formally, the Supreme Court retains the ultimate responsibility for the adoption of changes in the rules which are accomplished by an Order of the Court.45 The Supreme Court has played an active part, not infrequently refusing to adopt rules proposed to it and making changes in the text of rules.46 In the contemporary reality however, as suggested by this elaboration of these procedures, the Advisory Committees and the Standing Committees are the main engines for procedural reform.47 Under the enabling statutes, amendments to the rules may be reported by the Chief Justice to the Congress at or after the beginning of a regular session of Congress but not later than May 1. The amendments become effective no earlier than December 1 of the year of transmittal if Congress takes no adverse action. 49

III SEPARATION OF POWERS

In the years since 1958, this rulemaking procedure has been followed regularly—almost biennially? for significant rule changes, 医腹部神经 點聽點點的手中地區區區區區

^{45.} See, e.g., Order Amending Federal Rules of Civil Procedure, 108 S. Ct. 211 (1988). 46. The Court did make changes in the original adoption of the civil and criminal rules.

See 1 C. WRIGHT & A. MILER, PEDERAL PRACTICE AND PROCEDURE \$\$ 2 m.8, 1004 n.18 (2d ed. 1982). See generally Clark The Role of the Supreme Court in Federal Rule-Making, 46 JUDICATURE 250, 258 (1963) ("The strength of the Federal Rules of Procedure is based not wholly or perhaps even largely upon their undoubted worth, but upon the fact of their authorization and promulgation by the Supreme Court of the United States."). The Court continues to do so. See Order, 129 F.R.D. 559 (May 1, 1990) (noting that a portion of Criminal Rule 41(a), recommended by the Judicial (Conference, was not being adopted). But see supra note 29.

^{47.} Between the Advisory Committees and the Standing Committee, the latter may be obliged to assume a more proactive role in future rulemaking, for example, by conceiving rule initiatives and by taking the lead on systemic issues. Some issues of national proportion require the attention of the Standing Committee. The Local Rules Project provides an example of such an issue. The ongoing project has studied the local rules from all of the district courts and provided a series of recommendations aimed at reducing conflicts between local and national rules of procedure, providing model local rules and a uniform numbering system for local rules based on the national rules. See Local Rules Study Indicates Rule Proliferation, Lack of Uniformity, 3 INSIDE LITIGATION 15, 15-19 (1989). The local rules and internal operating procedures of the various courts of appeals are currently under study.

^{48. 28} U.S.C. 65 2071 2077 (1988). 49. See, e.g., Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (current version at 28 U.S.C. § 2074 (1988)) (providing that the proposed Rules of Evidence should have no effect until expressly approved by Act of Congress).

^{50.} See, e.g., Order Amending the Rules of Civil Procedure, 480 U.S. 955 (1987); Order

主要使你把到此時心臟一瞬時中華 不知 是对人工工工

but not without occasional differences over separation of powers. The enabling statute declares that the judicial rulemaking may affect "practice and procedure" but may not "abridge, enlarge or modify any substantive rights." This distinction is not always easy to discern.⁵²

Indeed, a separation of powers showdown occurred over the Federal Rules of Evidence. An Advisory Committee on Rules of Evidence was created in 1965, and the rulemaking procedures described above were followed. Following extensive study, the Committee promulgated a set of proposed rules of evidence in 1972, but there was such political furor over the rules, particularly the rules having to do with evidentiary privileges, that Congress mandated that the rules would not take effect until expressly approved by statute. Congress then made many substantial revisions before making the Federal Rules of Evidence effective in 1975.⁵³

More recently, Congress amended the enabling act specifically to require notice and commentary periods and open meeting procedures in judicial rulemaking. The legislative veto provision that attached to all rules of evidence after the 1972 controversy was discarded, but section 2074(b) still provides that any revision of the rules governing evidentiary privileges shall have no force unless approved by Congress. Efforts that year in the House of Representatives (supported by the Department of Justice and Judicial Conference) to repeal the so-called "suppression clause" in federal rulemaking failed to garner Senate agreement. The clause purports to provide that rules promulgated by the Supreme Court may trump existing acts of Congress which "shall be of no further force or

Amending the Rules of Civil Procedure, 471 U.S. 1155 (1985); Order Amending the Rules of Civil Procedure, 461 U.S. 1097 (1983); Order Amending the Rules of Civil Procedure, 456 U.S. 1015 (1982).

^{51. 28} U.S.C. § 2072 (a)-(b) (1988).

^{52.} See, e.g., Sibbach v. Wilson & Co., 312 U.S. 1 (1941). See generally J. Weinstein, Reform of Court Rulemaking Procedures (1977) (providing a series of recommendations for judicial rulemaking).

^{53.} Act of January 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 28 U.S.C. app.). See S. Saltzsung & K. Redden, Federal Rules of Evidence Manual 3-5 (3d ed. 1982). See generally Cleary, Preliminary Notes on Reading the Rules of Evidence, 57 Neb. L. Rev. 908 (1978) (detailing Congress' role in the rulemaking process).

^{54.} Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) (to be codified in scattered sections of 28 U.S.C. & 5 U.S.C.).

^{55. 28} U.S.C. § 2074(b) (1988). But cf. Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983) (legislative veto held unconstitutional).

effect after such rules have taken effect." Read against the principle of separation of powers, this obscure clause is unwise and most likely unconstitutional. It has resulted in little mischief over the years principally because of prudent self-restraint on the part of judicial rulemakers. Perhaps this explains the Senate's recent mysterious obstinacy in refusing to repeal the provision.

Although previously passive, during the last two decades Congress has taken a more active role to change proposed rules and to preempt altogether the judicial rulemaking procedure. The increased Congressional involvement makes for a more persistent separation of powers threat from the Congressional direction. This happens when Congress passes a statute to effect a rule change and thus execute a kind of 'end run' around the established regular judicial rulemaking procedures. The congress passes are statuted to effect a rule change and thus execute a kind of 'end run' around the established regular judicial rulemaking procedures.

IV. THE FUTURE

1988 marked the fiftieth anniversary of the federal rules of civil procedure. Anniversaries are worthwhile for providing an occasion for retrospection and evaluation. As a novice rulemaker, I lack the vision to see very far into the crystal ball, but I have two preliminary observations, one about the rules and the other about the rulemaking process. First, consider what the rules have become. There is an

^{56. 28} U.S.C. § 2072(b) (1988).

^{57.} See C. Waight, supra note 27, § 4, at 15-17. Professor Wright argued that, in light of the controversy surrounding the adoption of the Federal Rules of Evidence and increased Congressional involvement in the rulemaking process, proposals for reform in the process should be forthcoming from the legal profession, especially the Standing Committee and the Judicial Conference. See Wright, Book Review, 9 St. Mary's L.J. 652, 653-38 (1978) (reviewing J. Weinstein, Reform of Court Rule Making Procedures (1977)).

^{58.} One best recent example—a worst example might not be imaginable by the judges—was Senator Joseph Biden's bill which would have required each district court to adopt an elaborate case processing procedure. See S. 2648, 101st Cong., 2d Sess., 136 Cong. Rec. S16220, S16269 (daily ed. Oct. 27, 1990) (proposing an amendment to the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089).

Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089).

59. See generally Subrin, Fireworks on the 50th Anniversary of the Federal Rules of Civil Procedure, 73 JUDICATURE 4 (1989); The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988, 137 U. PA. L. Rev. 1873 (1989) (symposium); The Future of Federal Litigation, 50 U. PITT. L. Rev. 701 (1989) (symposium); The Fiftieth Anniversary of the Federal Rules of Civil Procedure, 63 Notre Dame L. Rev. 597 (1988) (symposium); The Fiftieth Anniversary of the Federal Rules of Civil Procedure, 62 St. John's L. Rev. 399 (1988) (symposium); Weinstein, The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie, 54 Brooklyn L. Rev. 1 (1988).

· 在一个年期 · 中国

irony to be found between Rule 1's exhortation that the rules "secure the just, speedy, and inexpensive determination of every action"60 and Rule 84's whistling hope that the forms will implement the "simplicity and brevity" of the rules. Noting what the rules have become, John P. Frank, a distinguished practitioner and legal historian has responded to these claims succinctly and phonetically: "Phui!"62 In fifty years, the rules have grown and multiplied to belie such naivete. For example, the Wright, Miller and Cooper treatise contains forty-six volumes of text devoted to the rules of federal procedure.63 And has not everyone noticed that the remarkable growth of Alternative Dispute Resolution, the nouveaux procedure, denies Rule 2's edict that there be "one form of action?" Some of the rule changes over the years since 1958 have been fribbling—changes of nuance and obfuscation which have contributed needlessly to the complexity and undue uncertainty of the rules. My unwillingness to cite an example of this concern may be attributed to my sense of collegiality as a new member of the Standing Committee. I do believe, however, that every federal practitioner can point to a fribbling rule change. Stated affirmatively, and more constructively, the fundamental tenet of rulemaking should be that no rules be changed unless there is good reason and substantial need.

Second, with rare exceptions, rule changes seldom have been based on empirical research. Instead, the rulemaking process primarily relies on research by the reporters and on the informed intuition of the members of the Advisory Committees and the Standing Committee. Over the years, the members have brought their impressive intellects and varied elite professional experiences to bear on the issues facing the Committee. Reactive commentary from the legal community supplements these sources; indeed, there has been

^{60.} FED. R. Crv. P. 1.

^{61.} FED. R. Crv. P. 84.

^{62.} Frank, The Rules of Civil Procedure—Agency for Reform, 137 U. PA. L. REV. 1883, 1885 (1989).

^{63.} See C. Wright & A. Miller, Federal Practice and Procedure (1987).

^{64.} FED. R. CIV. P. 2. See generally Rosenberg, Resolving Disputes Differently: Adieu to Adversary Justice?, 21 CREIGHTON L. REV. 801 (1988); Edwards, Alternative Dispute Resolution: Panacea or Anathema?, 99 HARV. L. REV. 668 (1986). The debate regarding alternative methods of resolving disputes has been vigorous. Compare Fiss, Out of Eden, 94 YALE L.J. 1669 (1985) and Fiss, Against Settlement, 93 YALE L.J. 1073 (1984) (lambasting McThenia's model for dispute resolution) with McThenia & Shaffer, For Reconciliation, 94 YALE L.J. 1660 (1985) (disputing Fiss' model for dispute resolution).

no dearth of public and professional commentary, at least on controversial proposals. Deborah R. Hensler, Research Director of the Rand Corporation's Institute of Civil Justice has observed, "Over the last decade there has been a burgeoning of empirical research on civil justice issues. Much of this work has focused on issues of docket growth and delay, but there are few pioneering efforts at empirical research on the operation of specific rules. Studies of Rule 11 may be the proving exception to my observation. Judges have no time and lawyers have no economic incentive for empirical research. The law professoriate, as a whole, lacks the necessary training for empirical research and too often demonstrates something of an ennui toward the actual practice of law. Of course, we procedure teachers take part in the procedure debate over rule changes, legislation and case decisions. But our contributions are as anecdotal and normative as contributions of the judges and practitioners. Admittedly, some important work has been undertaken by a few entities such as the Rand Corporation and the Federal Judicial Center. My point simply is that more should be done to encourage and to utilize empirical work in judicial rulemaking.

I cannot help but agree with Judge Harry T. Edwards, a former law professor who sits on the United States Court of Appeals for the District of Columbia Circuit, who identified the research challenge

of the law schools:

Legal scholars have an important role to play in helping to determine who, in the future, goes to court and who goes to some other forum; what kinds of cases will be decided by a judge, by someone else, or without any involvement of a 'neutral'; which cases will be appealed, and on what time track; and what kinds of issues will not be resolved by social institutions at all.⁵⁷

Until now this challenge to the academy has gone largely unmet. In the Final Report of the Federal Courts Study Committee, the group

^{65.} Hensier, Researching Civil Justice: Problems and Pitfalls, 51 Law & CONTEMP. PROBS.

<sup>55, 55 (1988).
66.</sup> See, e.g., T. WILIGING, THE RULE 11 SANCTIONING PROCESS (1988). This is not to say that empirical work has not been used in the past, when available. See e.g., W. GLAZER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 41-44 (1968); M. ROSENBERG, THE PRETRIAL CONFERENCE AND EFFECTIVE JUSTICE 93-105 (1964). It played an important role in the 1970 amendments to the appellate rules. See 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE 427-28 (2d ed. 1987).

^{67.} Edwards, The Role of Legal Education and Shaping the Profession, 38 J. LEGAL EDUC. 285, 292 (1988).

application of the same of the same

created by Congress and appointed by the Chief Justice to plan for the future of the federal judiciary, there are about a dozen calls for various empirical studies. There needs to be a similar call for empirical work in judicial rulemaking, and law schools need to respond.

The Standing Committee has been criticized for a tendency to assume that the sole objective of rulemaking is to work out better solutions for specific problems under the present rules. At the same time, other participants and observers of federal rulemaking view the role and function of the Committee to be just that—to evaluate and to recommend fine-tuning adjustments in the existing rules mechanism. Recent indications from at least some members of the Standing Committee suggest that they are no longer content to function merely in a reactive mode. We will have to wait and see if a new attitude develops for the members of the Committee to view procedural issues more broadly, with an explicit orientation to consider whether federal court practices and procedures serve larger societal goals. If this attitude grows, we might expect the Standing Committee and the various Advisory Committees to contemplate the general framework of existing rules systemically towards a more basic reexamination of rules of practice and procedure. Such efforts may more resemble the approach of the original ad hoc Committee that designed the 1938 system of rules, rather than the approach of the last half-century which has resulted in modifications and amendments to add layer upon layer of rulemaking gloss.

Indeed, returning to the 1938 design principle of "just, speedy and inexpensive" procedures which are characterized by "simplicity and brevity" could engender reforms as dramatic as the 1938 rules. Anyone who reads legal periodicals and law reviews is familiar with the tenor of the current debate among members of the profession over the problems of cost and delay and the central concern for access to justice. Admittedly, there seems to be more of a consensus about the problems than about their solutions. One thing is certain: there is a great deal at stake and, therefore, this is an exciting time to be involved in federal rulemaking.

^{68.} See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 185 (1990); see also Mengler, Burbank & Rowe, Recent Federal Court Legislation Made Some Noteworthy Changes, Nat'l L.J., Dec. 31, 1990, at 20 (detailing which recommendations of the Federal Courts Study Committee were enacted into law during 1990).

V. AN INVITATION

My last entreaty addressed to my lawyer-reader is to become involved in the rulemaking procedure. My principal reason for writing this article is to demystify the procedure so that attorneys will accept this invitation. Suggestions and recommendations on any of the federal rules may be sent to:

Mr. James E. Macklin, Jr.

Secretary
Committee on Rules of Practice and Procedure Administrative Office of the United States Courts
Washington, D.C. 20544 Washington, D.C. 20544

The standard procedure is to acknowledge in writing such suggestions and recommendations and to refer them to the appropriate Advisory Committee.

Lawyers should take the time to read, study and respond to the proposed rules during the commentary period. Urge the appropriate committee of your bar associations or take it upon yourself to appear and testify at the public hearings. Members of the bar, obviously, have an important stake in changes in federal procedure and, necessarily, bear a public responsibility to contribute their expertise.

In closing, I cannot improve on the exhortation of a young, somewhat hyperbolic procedure professor, who in 1954 was just beginning his own involvement in rulemaking: "If the careful work of the Committee is followed by real participation and informed comment from the bar, the amendments finally adopted should ensure that the Federal Rules of Civil Procedure will continue to be the outstanding system of procedure in the world. THE RESERVE OF LINE ASSESSMENT OF THE REAL PROPERTY OF THE PARTY OF TH

The state of the s

^{69.} Wright, Amendments to the Federal Rules: The Function of a Continuing Rules Committee, 7 VAND L. REV. 521, 555 (1954).

COPIES AVAILABLE AT THE MEETING

Supreme Court of the Anited States Washington, B. C. 20543

CHAMBERS OF THE CHIEF JUSTICE April 22, 1993

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Criminal Procedure and an amendment to Rule 8 of the Rules Governing Section 2255 Proceedings that have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code. While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely.

William Helongwisk

Honorable Thomas S. Foley Speaker of the House of Representatives Washington, D.C. 20515

(III)

Mark to

SUPREME COURT OF THE UNITED STATES

THURSDAY, APRIL 22, 1993

ORDERED:

1. That the Federal Rules of Criminal Procedure for the United States District Courts be, and they hereby are, amended by including therein amendments to Criminal Rules 1, 3, 4, 5, 5.1, 6, 9, 12, 16, 17, 26.2, 32, 32.1, 40, 41, 44, 46, 49, 50, 54, 55, 57, and 58, and new Rule 26.3, and an amendment to Rule 8 of the Rules Governing Section 2255 Proceedings.

[See infra., pp. ______.

- 2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 1993, and shall govern all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings in criminal cases then pending.
- 3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

á

Ronneable from Speaker of the Rechingrophy D.

ábireuu 3

Agenda F-19 Rules September 1993

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

Your Committee on Rules of Practice and Procedure met in Washington, D.C. on June 17-19, 1993. All members of the Committee attended the meeting. Philip B. Heymann, Deputy Attorney General, attended part of the meeting, with Messrs. Roger Pauley and Dennis G. Linder representing him in his absence. The Reporter to your Committee, Dean Daniel R. Coquillette and the Secretary to the Committee, Peter G. McCabe, also participated in the meeting.

Also present were Judge Kenneth F. Ripple, Chair, and Professor Carol Ann Mooney, Reporter, of the Advisory Committee on Appellate Rules; Judge Edward Leavy, Chair, and Professor Alan N. Resnick, Reporter, of the Advisory Committee on Bankruptcy Rules; Chief Judge Sam C. Pointer, Jr., Chair, and Dean Edward Cooper, of the Advisory Committee on Civil Rules; Judge William Terrell Hodges, Chair, and Professor David A. Schlueter, Reporter, of the Advisory Committee on Criminal Rules; and Judge Ralph K. Winter, Jr., Chair, and Dean Margaret A. Berger, Reporter, of the Advisory Committee on Evidence Rules.

NOTICE

NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF.

en so

All Marcon of
Name of the Control o
T T T T T T T T T T T T T T T T T T T
escali

III. Amendments to the Federal Rules of Bankruptcy Procedure.

The Advisory Committee on Bankruptcy Rules submitted proposed amendments to Bankruptcy Rules 8002 and 8006 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated to the bench and bar for comment in December 1992. The scheduled public hearing on the amendments was canceled because no one requested to testify.

The proposed amendments to Rules 8002 and 8006, along with conforming changes to the Appellate and Civil Rules, are intended to designate a single event that initiates tolling periods in the Appellate, Bankruptcy, and Civil Rules for certain post-trial motions. Your Committee voted to make several stylistic changes to the proposed amendments. An excerpt from the Advisory Committee report and the proposed amendments, as amended, are set forth in Appendix B.

Recommendation: That the Judicial Conference approve the proposed amendments to Bankruptcy Rules 8002 and 8006 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

III. Amendments to the Federal Rules of Criminal Procedure.

The Advisory Committee on Criminal Rules submitted to your Committee proposed amendments to Criminal Rules 16, 29, 32, and 40 together with Committee Notes explaining their purpose and intent. The proposed amendments were circulated for public comment in late December 1992 on an expedited four-month timetable to coincide with the timetable for amendments to Evidence Rule 412. A public

hearing on the proposed amendments was held in Washington, D.C. on April 22, 1993.

The Advisory Committee received a substantial number of proposed amendments to Criminal Rule 32, the particularly from probation officers who were concerned about the time deadlines imposed on the completion of presentence reports. In light of these concerns, the Advisory Committee eliminated the reference to the specific time set for the completion of a presentence report and substituted the existing provision, which requires the report to be completed before the sentence is imposed "without unreasonable delay." Specific time periods regulating other stages of the sentencing process, however, were retained in the proposed amendments. The Advisory Committee also retained the proposed amendment's presumption that a probation officer's sentencing recommendation be disclosed to the parties, despite the recommendation of the Committee on Criminal Law to retain the current rule's presumption against disclosure.

The Advisory Committee made several other changes to the original draft regarding the responsibilities and authority of probation officers during the sentencing process. Among other things, the changes would provide defendant's counsel with a reasonable opportunity, instead of an entitlement, to attend any interview with a probation officer, and they would authorize a probation officer to arrange, rather than to require, meetings with defendant's counsel. In addition, your Committee made stylistic changes to the proposed amendments.

Your Committee agreed with the Advisory Committee's conclusion that a victim allocution provision in Rule 32 was unnecessary because a court now has the discretion to permit a victim to speak at sentencing. Mandating victim allocution might lead to greater victim frustration because of the sentencing quidelines restrictions, which limit the impact of a victim's statement. Your Committee, however, eliminated as unnecessary several sections of the Committee Note, which would have explained in detail these and other reasons for not including the victim allocution provision in the Rule.

The proposed changes to Rules 16, 29, and 40 are relatively minor. The proposed change to Rule 16 would explicitly extend the discovery and disclosure requirements of the rule to organizational defendants. The changes to Rule 29 would permit the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all the evidence. Changes to Rule 40 would clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction.

The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, appear in <u>Appendix C</u> together with an excerpt from the Advisory Committee report.

Recommendation: That the Judicial Conference approve proposed amendments to Criminal Rules 16, 29, 32, and 40 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress pursuant to law.

The Advisory Committee also submitted proposed amendments to Criminal Rules 5, 10, 43, and 53, and recommended that they be published for public comment. The proposed amendment to Rule 5 would exempt from the Rule's requirements prosecutions initiated under the Unlawful Flight to Avoid Prosecution (UFAP) statute, because a United States attorney rarely prosecutes defendants under 4 - 1 - 1 /4 / the statute. UFAP is used primarily to assist state law enforcement officers in apprehending and holding alleged state law offenders. Rules 10 and 43 would be amended to allow video teleconferencing of certain pretrial proceedings with the approval of the court. The proposed changes to Rule 43 would also allow the court to sentence a defendant in absentia who flees after the trial has begun. Finally, the proposed amendment to Rule 53 would permit broadcasting of proceedings under guidelines to be adopted by the Judicial Conference. Α Conference approved pilot program permitting broadcasts of proceedings in civil cases is presently underway.

Your Committee made stylistic changes and voted to circulate the proposed amendments to the bench and bar for comment. In order to establish an orderly time for publication, your Committee also authorized the Advisory Committee to consult with the other advisory committees and determine the time to distribute the proposed amendments for public comment.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

Agenda F-19 (Appendix C) Rules September 1993

ROBERT E. KEETON CHAIRMAN

PETER G. McCABE SECRETARY CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY BANKRUPTCY RULES

SAM C. POINTER, JR. CMIL RULES

WILLIAM TERRELL HODGES CRIMINAL RULES

RALPH K. WINTER, JR. EVIDENCE RULES

TO:

Hon. Robert E. Keeton, Chairman

Standing Committee on Rules of Practice

and Procedure

FROM:

Hon. Wm. Terrell Hodges, Chairman

Advisory Committee on Federal Rules of Criminal

Procedure

SUBJECT

Report on Proposed and Pending Rules of Criminal

Procedure and Rules of Evidence

DATE:

May 14, 1993

I. INTRODUCTION

At its meeting in April 1993, the Advisory Committee on the Rules of Criminal Procedure acted upon proposed or pending amendments to a number of Rules of Criminal Procedure. This report addresses those proposals and the recommendations to the Standing Committee. A GAP Report and copies of the Rules and the accompanying Committee Notes are attached along with a copy of the minutes of the Committee's April 1993 meeting.

II. RULES OF CRIMINAL PROCEDURE PUBLISHED FOR PUBLIC COMMENT.

A. In General

In July 1992, the Standing Committee approved amendments to Rules 16 and 29 but directed publication for public comment be deferred pending a relocation of the Rules Committee Support Office. In December 1992, the Standing Committee approved amendments to Rules 32 and 40 and directed that all four rules (16, 29, 32, and 40) be published on an expedited basis with the comment period to end on April 15, 1993. Comments were received on the proposed amendments and were carefully considered by the

Advisory Committee at its April 1993 meeting in Washington, D.C. In addition, the Committee received the testimony of two witnesses at that same meeting.

The GAP Report provides a more detailed discussion of the changes made to the Rules since their publication. The following discussion briefly notes any significant changes and the Committee's recommended action:

B. Rule 16(a)(1)(A). Production of Statements by Organizational Defendants.

The Committee made a minor change to the rule. The Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, whom the government contends, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

The Committee recommends that Rule 16(a)(1)(A), as amended be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

C. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

Although the Committee made no changes to the rule, it did make a minor change to the Committee Note to reflect that on appeal of a delayed ruling on a motion for judgment of acquittal, the appellate court would also be limited to consideration of the evidence presented before the motion was made.

The Advisory Committee recommends that the Standing Committee approve Rule 29 and forward it to the Judicial Conference for its approval.

D. Rule 32. Sentence and Judgment.

The Advisory Committee has made several changes to the rule and the Committee Note. They are as follows:

1. Time Limits:

The Committee changed Rule 32(a) to retain the current language that sentencing should take place "without unnecessary delay." The rule continues to

provide, however, that the internal time limits in Rule 32(b)(6) will be followed unless the court advances or shortens them.

2. Presence of Counsel:

The Committee changed subdivision (b)(2) to provide that the defendant's counsel is "entitled to notice and a reasonable opportunity" to attend any interview. The Note was also changed to indicate that the burden should be on counsel, once notice is given, to respond. The Note was also modified to indicate that the Committee believed that the term "interview" should extend only to communications initiated by the probation officer for the purpose of obtaining information to be used in the presentence report.

3. Probation Officer's Determination of Applicable Sentencing Classification:

As published, subdivision (b)(4)(B) required the probation officer to include in the presentence report the classification of the offense which the probation officer "determines" to apply. In response to comments on the proposal, the Committee replaced the word "determines" with the word "believes."

4. Availability of Nonprison Programs

A minor change was made in Rule 32(b)(4)(E) to clarify that the presentence report need not include information about nonprison programs and resources except in appropriate cases.

5. Filing of Original Objections:

The Committee added a comment in the Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their objections with the court or have them included in full as a part of the addendum to the presentence report. See Rule 32(b)(6)(B).

Probation Officer's Authority to Require Meeting:

In response to comments that Rule 32(b)(6)(B) might create incorrect perceptions about the probation officer's role in sentencing by authorizing the probation officer to "require" the parties to meet, the Committee modified the language to state that the

probation officer "may meet" with the parties to discuss their objections.

7. Additional Evidence at Sentencing Hearing:

In Rule 32(c)(1) the Committee modified the language addressing the court's discretion to permit the parties to present additional information at the sentencing hearing. The words "to introduce testimony or other evidence on the objections," were changed to read, "to introduce evidence." The modification gives the court the discretion to decide if the offered evidence, in whatever form, should be admitted. The Committee Note was expanded to recognize that in appropriate cases, due process might require the court to hear the offered evidence.

14

8. Disclosure of Information Not Included in the Presentence Report:

Rule 32(c)(3)(A) was changed to provide that if the court had received information which has been excluded from the presentence report under (b)(5) because it is confidential, etc., the court must create a written summary of that information and provide it to the parties — if the court intends to rely on the information in sentencing. As published, the court had the option of summarizing that information orally or in writing. The language was also modified slightly to require the court to give the defense a reasonable opportunity to comment on the information. The Committee Note was amended to recognize that the reasonable opportunity requirement might necessitate a continuance.

9. Notification of Right to Appeal:

Rule 32(c)(5) was changed to reflect the differences in the right to appeal, depending on whether the defendant has entered a guilty or not guilty plea.

The Advisory Committee recommends that Rule 32, as amended, be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

E. Rule 40(d). Conditional Release of Probationer.

The Committee received no comments on, and made no changes in, the proposed language of Rule 40(d) or the

Committee Note.

The Advisory Committee recommends that Rule 40(d) be approved by the Standing Committee and forwarded to the Judicial Conference for its approval.

III. PROPOSED AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE.

A. In General.

The Advisory Committee at its April 1993 meeting in Washington, D.C. considered proposed amendments to several Rules. It recommends that the following amendments be approved for publication and comment from the bench and bar. Copies of the proposed amendments and the proposed Advisory Committee Notes are attached.

B. Rule 5. Exemption of Persons Arrested for Unlawful Flight to Avoid Prosecution.

At the Advisory Committee's October 1992 meeting in Seattle, a subcommittee was tasked with studying possible problems resulting from the requirement that persons arrested for violating 18 U.S.C. § 1073, Unlawful Flight to Avoid Prosecution (UFAP) appear before a magistrate under Rule 5. The subcommittee reported at the April 1993 meeting that its study indicated that several scenarios are possible where state officials may or may not be involved in the arrest of a UFAP defendant and that the Rule 5 requirement of prompt appearance may not be essential where the U.S. attorney has no intent to prosecute. The Committee therefore recommended that Rule 5 be amended to exempt UFAP defendants from Rule 5 where the United States does not intend to prosecute. The proposed Rule and Committee Note are attached. The Advisory Committee recommends that the amendment be published for public comment.

C. Rule 10. In Absentia Arraignments; Use of Video Teleconferencing.

Pursuant to a proposal from the Bureau of Prisons, the Committee considered a proposal to amend Rules 10 and 43 to permit video arraignments at its October 1992 meeting. A subcommittee was appointed and recommended to the Committee at its April 1993 meeting that Rule 10 be amended to provide for video arraignments, where the defendant waives the right to be present in court. Its recommendation was based, in part, on the Judicial Conference's recent approval of a

pilot program in the Eastern District of North Carolina. That program permits use of video conferencing technology to conduct competency hearings between the court and a corrections facility. The Committee contemplates that the Rule will simply permit the court, in its discretion, to use such technology.

The Advisory Committee recommends that the proposed amendment, which is attached, be approved for publication and comment.

D. Rule 43. In Absentia Pretrial Sessions; Use of Video Teleconferencing; In Absentia Sentencing.

The Advisory Committee considered two different amendments to Rule 43. The first focused on use of video teleconferencing for pretrial sessions and the second focused on in absentia sentencing for defendants who become fugitives after their trial has begun.

1. Video Teleconferencing for Pretrial Sessions:

In conjunction with its consideration of an amendment to Rule 10 regarding video arraignments, supra, the Committee also addressed an amendment to Rule 43 which would permit use of video teleconferencing technology for other pretrial sessions, where the defendant waives the right to be present in court. Both rules generated extensive discussion and as with the amendment to Rule 10, the amendment to Rule 43 grants the count the discretion to use video teleconferencing. It does not mandate such use.

The Advisory Committee recommends that this proposed amendment to Rule 43 be approved for publication and public comment.

2. In Absentia Sentencing

The Department of Justice has proposed that Rule 43 be amended to permit in absentia sentencing for defendants who flee after their trial has begun. Currently, Rule 43 permits the trial itself to continue, but makes no specific reference to the ability of the court to continue with sentencing. As the Department of Justice explained, this can create a gridlock on the system. The amendment would make it clear that once the trial has begun, the defendant may not only waive the right to be present at trial but also the right to be present at sentencing.

The Committee recommends that the the Standing

Committee approve this amendment for publication and public comment.

E. Rule 53. Permitting Cameras in Courtroom; Broadcasting of Proceedings.

Pursuant to a request from the American Society of Newspaper Editors and others, the Advisory Committee considered an amendment to Rule 53 which would permit photographs and broadcasting of judicial proceedings, under guidelines adopted by the Judicial Conference. The Committee's discussion focused on the pending report on a three-year pilot program for cameras and audio coverage of civil proceedings, which was approved by the Judicial Conference in 1990. The Committee, following an extended discussion of this proposal, believed that it was appropriate to propose an amendment to Criminal Rule 53 and seek public comment. In making that decision, the Committee considered both the absence of horror stories in those courts which permit photographs and broadcasting and the positive features of such coverage.

Attachments:

GAP Report
Proposed Amendments
Minutes of April 1993 Meeting

TO: Hon. Robert E. Keeton, Chairman

Standing Committee on Rules of Practice and

Procedure

FROM: Hon. Wm Terrell Hodges, Chairman

Advisory Committee on Rules of Criminal Procedure

SUBJECT: GAP Report: Explanation of Changes Made Subsequent

to the Circulation for Public Comment of Rules

DATE: May 15, 1993

At its July 1992 meeting the Standing Committee approved the circulation for public comment of proposed amendments to Rules 16 and 29 and at its meeting in December 1992 approved the circulation for public comment of proposed amendments to Rules 32 and 40.

All four rules were published on an expedited basis in January 1993 with a deadline of April 15, 1993 for any comments. At its meeting on April 22, 1993 in Washington, D.C., two witnesses presented testimony to the Committee on the proposed amendments. The Advisory Committee has considered the written submissions of members of the public as well as the two witnesses. Summaries of any comments on each Rule, the Rules, and the accompanying Committee Notes are attached.

The Advisory Committee's actions on the amendments subsequent to the circulation for public comment are as follows:

1. Rule 16(a)(1)(A). Production of Statements by Organizational Defendants.

The Committee made a minor change to the rule. As originally published, and as reflected in the original Committee Note, the rule did not address the question of what showing the defense would have to make to demonstrate that the requested statements were made by a person associated with an organizational defendant. After additional discussion on that point, the Committee changed the rule to reflect that the defense is entitled to discover the statements of persons, whom the government contends, were in a position to bind an organizational defendant. The Note was also changed to indicate that the rule does not require the defense to stipulate or admit that a particular person was in a position to bind the organization.

2. Rule 29(b). Delayed Ruling on Judgment of Acquittal.

冰蝶船陪於褐脊雕作性锦颈静心融水,

Advisory Committee on Criminal Rules
GAP REPORT
May 1993

The Committee made no changes to the rule. But it did make a minor change to the Committee Note to reflect that on appeal of a delayed ruling on a motion for judgment of acquittal, the appellate court would also be limited to consideration of the evidence presented before the motion was made.

3. Rule 32. Sentence and Judgment.

In response to public comments on the published version of Rule 32, the Advisory Committee has made several changes to the rule and the Committee Note. The changes, other than minor clarifying changes in wording, are as follows:

Time Limits: In response to a significant number of commentators who expressed concern about codifying a specific time limit for sentencing, the Committee changed Rule 32(a) to retain the current language that sentencing should take place "without unnecessary delay." The rule continues to provide, however, that the internal time limits in Rule 32(b)(6) will be followed unless the court advances or shortens them.

Presence of Counsel: Although most commentators agreed that the defense counsel should be entitled to attend the probation officer's interviews of the defendant, there was concern that providing that right might unnecessarily delay the sentencing process. The Committee agreed and changed subdivision (b) (2) to provide that the defendant's counsel is "entitled to notice and a reasonable opportunity" to attend any interview. In the Note, the Committee indicated that the burden should be on counsel, once notice is given, to respond. The Note was further changed to indicate that the Committee believed that the term "interview" should extend only to communications initiated by the probation officer for the purpose of obtaining information to be used in the presentence report.

Probation Officer's Determination of Applicable Sentencing Classification: A number of commentators expressed concern about language in subdivision (b) (4) (B) which required that the presentence report should contain the sentencing classification which the probation officer "determines" is applicable. Some commentators indicated that that language perpetuates the view that the probation officer determines that appropriate sentence. In

response to that concern the Committee changed the word "determines" to "believes."

Availability of Nonprison Programs: In response to the suggestion of at least one commentator, Rule 32(b)(4)(E) was modified slightly to clarify that information about nonprison programs and resources need not be included in the presentence report except in appropriate cases.

Filing of Original Objections: Several commentators raised the question of whether the court would ever see counsel's original objections to the presentence report, as noted in subdivision (b) (6) (B). Although the Committee made no change in the rule, it did add a comment in the Note to indicate that nothing in the rule prohibits the court from requiring the parties to file their objections with the court or have them included in full as a part of the addendum to the presentence report.

Probation Officer's Authority to Require Meeting:
As published, subdivision (b)(6)(B) authorized the probation officer to require the parties to meet and discuss their objections to the presentence report. In response to comments that that provision might create incorrect perceptions about the probation officer's role in sentencing, the Committee modified the language to indicate that the probation officer may meet with the parties to discuss their objections.

Additional Evidence at Sentencing Hearing: In subdivision (c)(1) the Committee modified the language addressing the court's discretion to permit the parties to present additional information at the sentencing hearing; in lieu of the words "to introduce testimony or other evidence on the objections," the Committee changed the rule to read, "to introduce evidence," thus leaving it to the court to decide in its discretion if the offered evidence, in whatever form, should be admitted. The Committee Note was expanded slightly to recognize that in appropriate cases, due process might require the court to hear the offered evidence.

Disclosure of Information Not Included in the Presentence Report: The Committee modified subdivision (c)(3)(A) to provide that if the court had received information which has been excluded from the presentence report under (b)(5) because it is confidential, etc., the court must prepare a written summary of that information and provide it to the

とも場合の対象の影響はいいないである

Advisory Committee on Criminal Rules GAP REPORT May 1993

parties -- if the court intends to rely on the information in sentencing. As originally published (and as it exists currently in Rule 32) the court had the option of summarizing that information orally or in writing. The language was also modified slightly to require the court to give the defense a reasonable opportunity to comment on the information. The Committee Note was amended to indicate that the reasonable opportunity requirement might necessitate a continuance.

Notification of Right to Appeal: The language in subdivision (c)(5) was changed to reflect the differences in the right to appeal, depending on whether the defendant has entered a guilty or not guilty plea.

4. Rule 40(d). Conditional Release of Probationer.

The Committee received no written comments addressing the proposed change to Rule 40(d) and has made no changes in the proposed language of the rule or the Committee Note.

Attachments:

Rules and Committee Notes Summaries of Comments and Testimony Lists of Commentators



Rule 16. Discovery and Inspection

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

- (a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.
 - (1) Information Subject to Disclosure.
 - (A) STATEMENT OF DEFENDANT. Upon request of a defendant the government <u>must shall</u> disclose to the defendant and make available for inspection, copying, or photographing: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. government <u>must</u> shall also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial. Upon request of a Where the defendant which is an

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

organization such as a corporation, partnership, association or labor union, the government must disclose to the defendant any of the foregoing statements made by a person the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who the government contends (1) was, at the time of making the statement that testimony, so situated as a an director, officer, or employee, or agent as to have been able legally to bind the defendant in respect to the subject of the statement conduct constituting the effense, or (2) was, at the time of offense, personally involved in the alleged conduct constituting the offense and so situated as a an director, officer, or employee, or agent as to have been able legally to bind the defendant in respect to that alleged conduct in which the witness person was involved.

COMMITTEE NOTE

The amendment is intended to clarify that the discovery and disclosure requirements of the rule apply equally to individual and organizational defendants. See In re United States, 918 F.2d 138 (11th Cir. 1990) (rejecting distinction between individual and organizational defendants). Because an organizational defendant may not know what its officers or agents have said or done in regard to a charged offense, it is important that it have access to statements made by persons whose statements or actions could be binding on the defendant. See also United States v. Hughes, 413 F.2d 1244, 1251-52 (5th Cir. 1969), vacated as moot, 397 U.S. 93 (1970) (prosecution of corporations "often resembles the most

complex civil cases, necessitating a vigorous probing of the mass of detailed facts to seek out the truth").

The amendment defines defendant in a broad, nonexclusive, fashion. See also 18 U.S.C. § 18 (the term "organization" includes a person other than an individual). And the amendment recognizes that an organizational defendant could be bound by an agent's statement, see, e.g., Federal Rule of Evidence 801(d)(2), or be vicariously liable for an agent's actions. The amendment contemplates that, upon request of the defendant, the Government will disclose any statements within the purview of the rule and made by persons whom the government contends to be among the classes of persons described in the rule. There is no requirement that the defense stipulate or admit that such persons were in a position to bind the defendant.

Rule 29. Motion for Judgment of Acquittal

* * * * *

(b) RESERVATION OF DECISION ON MOTION. If a motion for judgment of acquittal is made at the close of all the evidence, t The court may reserve decision on the a motion for judgment of acquittal, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

COMMITTEE NOTE

The amendment permits the reservation of a motion for a judgment of acquittal made at the close of the government's case in the same manner as the rule now permits for motions made at the close of all of the evidence. Although the rule as written did not permit the court to reserve such motions made at the end of the government's case, trial courts on occasion have nonetheless reserved ruling. See, e.g., United States v. Bruno, 873 F.2d 555 (2d Cir.), cert. denied, 110 S.Ct. 125 (1989);

United States v. Reifsteck, 841 F.2d 701 (6th Cir. 1988). While the amendment will not affect a large number of cases, it should remove the dilemma in those close cases in which the court would feel pressured into making an immediate, and possibly erroneous, decision or violating the rule as presently written by reserving its ruling on the motion.

The amendment also permits the trial court to balance the defendant's interest in an immediate resolution of the motion against the interest of the government in proceeding to a verdict thereby preserving its right to appeal in the event a verdict of guilty is returned but is then set aside by the granting of a judgment of acquittal. Under the double jeopardy clause the government may appeal the granting of a motion for judgment of acquittal only if there would be no necessity for another trial, i.e., only where the jury has returned a verdict of guilty. United States v. Martin Linen Supply Co., 430 U.S. 564 (1977). Thus, the government's right to appeal a rule 29 motion is only preserved where the ruling is reserved until after the verdict.

In addressing the issue of preserving the government's right to appeal and at the same time recognizing double jeopardy concerns, the Supreme Court observed:

> We should point out that it is entirely possible for a trial court to reconcile the public interest in the Government's right to appeal from an erroneous conclusion of law with the defendant's interest in avoiding a second prosecution. In United States v. Wilson, 420 U.S. 332 (1975), the court permitted the case to go to the jury, which returned a verdict of guilty, but it subsequently dismissed the indictment for preindictment delay on the basis of evidence adduced at trial. Most recently in United States v. Ceccolini, 435 U.S. 168 (1978), we described similar action with approval: 'The District Court had sensibly made its finding on the factual question of guilt or innocence, and then ruled on the motion to suppress; a reversal of these rulings would require no further proceeding in the District Court, but merely a reinstatement of the finding of guilt.' Id. at 271.

United States v. Scott, 437 U.S. 82, 100 n. 13 (1978). By analogy, reserving a ruling on a motion for judgment of acquittal strikes the same balance as that reflected by the Supreme Court in Scott.

Reserving a ruling on a motion made at the end of the government's case does pose problems, however, where the defense decides to present evidence and run the risk that such evidence will support the government's case. To address that problem, the amendment provides that the trial court is to consider only the evidence submitted at the time of the motion in making its

FEDERAL RULES OF CRIMINAL PROCEDURE ruling, whenever made. And in reviewing a trial court's ruling, the appellate court would be similarly limited. [Rule 32 is deleted and replaced with the following] Rule 32. Sentence and Judgment 1 2 (a) IN GENERAL; TIME FOR SENTENCING. When a presentence investigation and report are made 3 under subdivision (b)(1), sentence should be imposed 4 without unnecessary delay following completion of the 5 process prescribed by subdivision (b)(6). The time 6 7 limits prescribed in subdivision (b)(6) may be either 8 shortened or lengthened for good cause. 9 (b) PRESENTENCE INVESTIGATION AND REPORT. 10 (1) When Made. The probation officer must 11 make a presentence investigation and submit a 12 report to the court before the sentence is 13 imposed, unless: 14 (A) the court finds that the information 15 in the record enables it to exercise its 16 sentencing authority meaningfully under 18 17 U.S.C. \$ 3553; and 18 (B) the court explains this finding on 19 the record. 20 (2) Presence of Counsel. On request, the 21 defendant's counsel is entitled to notice and a

reasonable opportunity to attend any interview of the

defendant by a probation officer in the course of a

presentence investigation.

22

23

	6	FEDERAL RULES OF CRIMINAL PROCEDURE
25		(3) Nondisclosure. The report must not be
26		submitted to the court or its contents disclosed to
27		anyone unless the defendant has consented in writing,
28		has pleaded guilty or nolo contendere, or has been
29		found quilty.
30		(4) Contents of the Presentence Report. The
31		presentence report must contain
32		(A) information about the defendant's
33		history and characteristics, including any
34		prior criminal record, financial condition,
35		and any circumstances that, because they
36		affect the defendant's behavior, may be
37		helpful in imposing sentence or in
38		correctional treatment;
39		(B) the classification of the offense
40		and of the defendant under the categories
41		established by the Sentencing Commission
12	•	under 28 U.S.C. § 994(a), as the probation
13		officer believes to be applicable to the
14		defendant's case; the kinds of sentence and
15		the sentencing range suggested for such a
16		category of offense committed by such a
17		category of defendant as set forth in the
18		guidelines issued by the Sentencing
19		Commission under 28 U.S.C. § 994(a)(1); and
50		the probation officer's explanation of any
51		factors that may suggest a different

Name of Street, or other Persons		
accord .	52	sentence within or without the applicable
	53	guideline that would be more appropriate,
at country of the cou	54	given all the circumstances;
	55	(C) a reference to any pertinent policy
Econol.	56	statement issued by the Sentencing Commission
	57	under 28 U.S.C. § 994(a)(2);
	58	(D) verified information, stated in a
	59	nonargumentative style, containing an
	60	assessment of the financial, social,
Spiriture .	61	psychological, and medical impact on any
-	62	individual against whom the offense has been
	63	committed;
	64	(E) in appropriate cases, information
1	65	about the nature and extent of nonprison
Search .	66	programs and resources available for the
and the second	67	defendant;
	68	(F) any report and recommendation
Making	69	resulting from a study ordered by the court
	70	under 18 U.S.C. § 3552(b); and
GENERAL STREET	71	(G) any other information required by
and the same of th	72	the court.
	73	(5) Exclusions. The presentence report
Mensor	74	must exclude:
	75	(A) any diagnostic opinions that, if
diam's	76	disclosed, might seriously disrupt a program
	77	of rehabilitation;

	8	FEDERAL RULES OF CRIMINAL PROCEDURE
78		(B) sources of information obtained upon
79	•	a promise of confidentiality; or
80		(C) any other information that, if
81		disclosed, might result in harm, physical or
82	1	otherwise, to the defendant or other persons.
83		Disclosure and Objections.
84		(A) Not less than 35 days before the
85		sentencing hearing unless the defendant
86		waives this minimum period the probation
87		officer must furnish the presentence report
88		to the defendant, the defendant's counsel,
89		and the attorney for the Government. The
90		court may, by local rule or in individual
91		cases, direct that the probation officer not
92		disclose the probation officer's
93		recommendation, if any, on the sentence.
94		(B) Within 14 days after receiving the
95		presentence report, the parties shall
96		communicate in writing to the probation
97		officer, and to each other, any objections to
98		any material information, sentencing
99		classifications, sentencing guideline ranges,
100		and policy statements contained in or omitted
101		from the presentence report. After receiving
102	•	objections, the probation officer may meet
103		with the defendant, the defendant's counsel,
104	-	and the attorney for the Government to

105	discuss those objections. The probation
106	officer may also conduct a further
107	investigation and revise the presentence
108	report as appropriate.
109	(C) Not later than 7 days before the
110	sentencing hearing, the probation officer
111	must submit the presentence report to the
112	court, together with an addendum setting
113	forth any unresolved objections, the grounds
114	for those objections, and the probation
115	officer's comments on the objections. At the
116	same time, the probation officer must furnish
117	the revisions of the presentence report and
118	the addendum to the defendant, the
119	defendant's counsel, and the attorney for the
120	Government.
121	(D) Except for any unresolved objection
122	under subdivision (b)(6)(B), the court may,
123	at the hearing, accept the presentence report
124	as its findings of fact. For good cause
125	shown, the court may allow a new objection to
126	be raised at any time before imposing
127	sentence.
128	(c) SENTENCE
129	(1) Sentencing Hearing. At the sentencing
130	hearing, the court must afford counsel for the
131	defendant and for the Government an opportunity to

132	comment on the probation officer's determinations
133	and on other matters relating to the appropriate
134	sentence, and must rule on any unresolved
135	"我们就是我们的时候,我们就是一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个一个
136	objections to the presentence report. The court
137	may, in its discretion, permit the parties to
	introduce testimony or other evidence on the
138	objections. For each matter controverted, the
139	court must make either a finding on the allegation
140	or a determination that no finding is necessary
141	because the controverted matter will not be taken
142	To the Company of September 1997
143	into account in, or will not affect, sentencing.
144	A written record of these findings and
145	determinations must be appended to any copy of the
	presentence report made available to the Bureau of
146	Prisons.
147	(2) Production of Statements at Sentencing
148	Hearing. Rule 26.2(a)-(d), (f) applies at a
149	sentencing hearing under this rule. If a party
150	elects not to comply with an order under Rule
151	26.2(a) to deliver a statement to the movant, the
152	court may not consider the affidavit or testimony
153	of the witness whose statement is withheld.
154	(3) Imposition of Sentence. Before imposing
155	sentence, the court must:
156	(A) verify that the defendant and
157	defendant's counsel have read and discussed
158	the presentence report made available under

-	159	subdivision (b)(6)(A). If the court has
y 	160	received information excluded from the
and .	161	presentence report under subdivision (b)(5)
5 10	162	the court in lieu of making that
en j	163	information available must summarize it in
أفست	164	writing, if the information will be relied on
ess)	165	in determining sentence. The court must also
ected*	166	give the defendant and the defendant's
	167	counsel a reasonable opportunity to comment
, m	168	on that information;
, nod ^y	169	(B) afford defendant's counsel an
-	170	opportunity to speak on behalf of the
zed	171	<pre>defendant;</pre>
,	172	(C) address the defendant personally and
en e	173	determine whether the defendant wishes to
and and	174	make a statement and to present any
	175	information in mitigation of the sentence;
e e e e e e e e e e e e e e e e e e e	176	and
COLUMN TO THE PROPERTY OF THE	177	(D) afford the attorney for the
anced	178	Government an equivalent opportunity to speak
issaid.	179	to the court.
	180	(4) In Camera Proceedings. The court's
and a	181	summary of information under subdivision (c)(3)(A)
	182	may be in camera. Upon joint motion by the
. W	183	defendant and by the attorney for the Government,
·	184	the court may hear in camera the statements
and	185	made under subdivision $(c)(3)(B)$, (C) , and (D)

186	by the defendant, the defendant's counsel, or the
187	attorney for the Government.
188	(5) Notification of Right to Appeal. After
189	imposing sentence in a case which has gone to
190	trial on a plea of not quilty, the court must
191	advise the defendant of the right to appeal.
192	After imposing sentence in any case, the court
193	must advise the defendant of any right to appeal
194	the sentence, and of the right of a person who is
195	unable to pay the cost of an appeal to apply for
196	leave to appeal in forma pauperis. If the
197	defendant so requests, the clerk of the court must
198	immediately prepare and file a notice of appeal or
199	behalf of the defendant.
200	(d) JUDGMENT.
201	(1) In General. A judgment of conviction
202	must set forth the plea, the verdict or findings,
203	the adjudication, and the sentence. If the
204	defendant is found not guilty or for any other
205	reason is entitled to be discharged, judgment must
206	be entered accordingly. The judgment must be
207	signed by the judge and entered by the clerk.
208	(2) Criminal Forfeiture. When a verdict
209	contains a finding of criminal forfeiture, the
210	judgment must authorize the Attorney General to
211	seize the interest or property subject to

212	forfeiture on terms that the court considers
213	proper.
214	(e) PLEA WITHDRAWAL. If a motion to withdraw a
215	plea of quilty or nolo contendere is made before
216	sentence is imposed, the court may permit the plea to
217	be withdrawn if the defendant shows any fair and just
218	reason. At any later time, a plea may be set aside
219	only on direct appeal or by motion under 28 U.S.C.
220	§ 2255.

COMMITTEE NOTE

The amendments to Rule 32 are intended to accomplish two primary objectives. First, the amendments incorporate elements of a "Model Local Rule for Guideline Sentencing" which was proposed by the Judicial Conference Committee on Probation Administration in 1987. That model rule and the accompanying report were prepared to assist trial judges in implementing guideline sentencing mandated by the Sentencing Reform Act of 1984. See Committee on the Admin. of the Probation Sys., Judicial Conference of the U.S., Recommended Procedures for Guideline Sentencing and Commentary: Model Local Rule for Guideline Sentencing, Reprinted in T. Hutchinson & D. Yellen, Federal Sentencing Law and Practice, app. 8, at 431 (1989). It was anticipated that sentencing hearings would become more complex due to the new fact finding requirements imposed by guideline sentencing methodology. See U.S.S.G. § 6A1.2. Accordingly, the model rule focused on preparation of the presentence report as a means of identifying and narrowing the issues to be decided at the sentencing hearing.

Second, in the process of effecting those amendments, the rule was reorganized. Over time, numerous amendments to the rule had created a sort of hodge podge; the reorganization represents an attempt to reflect an appropriate sequential order in the sentencing procedures.

Subdivision (a). Subdivision (a) retains the general mandate that sentence be imposed without unnecessary delay thereby permitting the court to regulate the time to be allowed for the probation officer to complete the presentence investigation and submit the report. The only requirement is that sufficient time be allowed for completion of the process prescribed by subdivision (b)(6)

unless the time periods established in the subdivision are shortened or lengthened by the court for good cause. Such limits are not intended to create any new substantive right for the defendant or the Government which would entitle either to relief if a time limit prescribed in the rule is not kept.

The remainder of subdivision (a), which addressed the sentencing hearing, is now located in subdivision (c)

Subdivision (b). Subdivision (b) (formerly subdivision (c)), which addresses the presentence investigation, has been modified in several respects.

First, subdivision (b)(2) is a new provision which provides that, on request, defense counsel is entitled to notice and a reasonable opportunity to be present at any interview of the defendant conducted by the probation officer. Although the courts have not held that presentence interviews are a critical stage of the trial for purposes of the Sixth Amendment right to counsel, the amendment reflects case law which has indicated that requests for counsel to be present should be honored. See, e.g., United States v. Herrera-Figureroa, 918 F.2d 1430, 1437 (9th Cir. 1990) (court relied on its supervisory power to hold that probation officers must honor request for counsel's presence); United States v., Tisdale, 952 F.2d 934, 940 (6th Cir. 1992) (court agreed with rule requiring probation officers to honor defendant's request for attorney or request from attorney not to interview defendant in absence of counsel). The Committee believes that permitting counsel to be present during such interviews may avoid unnecessary misunderstandings between the probation officer and the defendant. The rule does not further define the term "interview." The Committee intended for the provision to apply to any communication initiated by the probation officer where he or she is asking the defendant to provide information which will be used in preparation of the presentence investigation. Spontaneous or unplanned encounters between the defendant and the probation officer would normally not fall within the purview of the rule. Committee also believed that the burden should rest on defense counsel, having received notice, to respond as promptly as possible to enable timely completion of the presentence report.

Subdivision (b)(6), formerly (c)(3), includes several changes which recognize the key role the presentence report is playing under guideline sentencing. The major thrust of these changes is to address the problem of resolving objections by the parties to the probation officer's presentence report. Subdivision (b)(6)(A) now provides that the probation officer must present the presentence report to the parties not later than 35 days before the sentencing

hearing (rather than 10 days before imposition of the sentence) in order to provide some additional time to the parties and the probation officer to attempt to resolve objections to the report. There has been a slight change in the practice of deleting from the copy of the report given to the parties certain information specified in (b)(6)(A). Under that new provision (changing former subdivision (c)(3)(A)), the court has the discretion (in an individual case or in accordance with a local rule) to direct the probation officer to withhold any final recommendation concerning the sentence. Otherwise, the recommendation, if any, is subject to disclosure. The prior practice of not disclosing confidential information, or other information which might result in harm to the defendant or other persons, is retained in (b)(5).

New subdivisions (b)(6)(B), (C), and (D) now provide explicit deadlines and guidance on resolving disputes about the contents of the presentence report. The amendments are intended to provide early resolution of such disputes by (1) requiring the parties to provide the probation officer with a written list of objections to the report within 14 days of receiving the report; (2) permitting the probation officer to meet with the defendant, the defendant's counsel, and the attorney for the Government to discuss objections to the report, conduct an additional investigation, and to make revisions to the report as deemed appropriate; (3) requiring the probation officer to submit the report to the court and the parties not later than 7 days before the sentencing hearing, noting any unresolved disputes; and (4) permitting the court to treat the report as its findings of fact, except for the parties' unresolved objections. Although the rule does not explicitly address the question of whether counsel's objections to the report are to be filed with the court, there is nothing in the rule which would prohibit a court from requiring the parties to file their original objections or have them included as an addendum to the presentence report.

This procedure, which generally mirrors the approach in the Model Local Rule for Guideline Sentencing, supra, is intended to maximize judicial economy by providing for more orderly sentencing hearings while also providing fair opportunity for both parties to review, object to, and comment upon, the probation officer's report in advance of the sentencing hearing. Under the amendment, the parties would still be free at the sentencing hearing to comment on the presentence report, and in the discretion of the court, report.

Subdivision (c). Subdivision (c) addresses the imposition of sentence and makes no major changes in current practice. The provision consists largely of material

formerly located in subdivision (a). Language formerly in (a)(1) referring to the court's disclosure to the parties of the probation officer's determination of the sentencing classifications and sentencing guideline range is now located in subdivisions (b)(4)(B) and (c)(1). Likewise, the brief reference in former (a)(1) to the ability of the parties to comment on the probation officer's determination of sentencing classifications and sentencing guideline range is now located in (c)(1) and (c)(3).

Subdivision (c)(1) is not intended to require that resolution of objections and imposition of the sentence occur at the same time or during the same hearing. It requires only that the court rule on any objections before sentence is imposed in considering objections during the sentencing hearing, the court may in its discretion, permit the parties to introduce evidence. The rule speaks in terms of the court's discretion, but the Sentencing Guidelines specifically provide that the court must provide the parties with a reasonable opportunity to offer information concerning a sentencing factor reasonably in dispute. See U.S.S.G. 5 6Al. 3(a). Thus, it may be an abuse of discretion not to permit the introduction of additional evidence. Although the rules of evidence do not apply to sentencing proceedings, see Fed. R. Evid. 1101(d)(3), the court clearly has discretion in determining the mode, timing, and extent of the evidence offered. See, e.g., United States V. Zuleta-Alvarez, 922 F.2d 33, 36 (1st Cir. 1990) (trial court did not err in denying defendant's late request to introduce rebuttal evidence by way of cross-examination). in. Pamer Mb

Subdivision (c)(1) (formerly subdivision (c)(3)(D)) indicates that the court need not resolve controverted matters which will "not be taken into account in, or will not affect, sentencing." The words "will not affect" did not exist in the former provision but were added in the revision in recognition that there might be situations, due to overlaps in the sentencing ranges, where a controverted matter would not alter the sentence even if the sentencing range were changed.

The provision for disclosure of a witness' statements, which was recently proposed as an amendment to Rule 32 as new subdivision (e), is now located in subdivision (c)(2).

Subdivision (c)(3) includes minor changes. First, if the court intends to rely on information otherwise excluded from the presentence report under subdivision (b)(5), that information is to be summarized in writing and submitted to the defendant and the defendant's counsel. Under the former provision in (c)(3)(A), such information could be summarized orally. Once the information is presented, the defendant and the defendant's counsel are to be given a reasonable

· 你也 她就你你你可以是我们就被你就

opportunity to comment; in appropriate cases, that may require a continuance of the sentencing proceedings.

Subdivision (c)(5), concerning notification of the right to appeal, was formerly included in subdivision (a)(2). Although the provision has been rewritten, the Committee intends no substantive change in practice. That is, the court may, but is not required to, advise a defendant who has entered a guilty plea, nolo contendere plea or a conditional guilty plea of any right to appeal (such as an appeal challenging jurisdiction). However, the duty to advise the defendant in such cases extends only to advice on the right to appeal any sentence imposed.

Subdivision (d). Subdivision (d), dealing with entry of the court's judgment, is former subdivision (b).

Subdivision (e). Subdivision (e), which addresses the topic of withdrawing pleas, was formerly subdivision (d). Both provisions remain the same except for minor stylistic changes.

Under present practice, the court may permit, but is not required to hear, victim allocution before imposing sentence. The Committee considered, but rejected, a provision which would have required the court to permit victim allocution at sentencing.

Rule 40. Commitment to Another District

2 * * * * *

- 3 . (d) ARREST OF PROBATIONER OR SUPERVISED RELEASEE. If a
- 4 person is arrested for a violation of probation or
- 5 supervised release in a district other than the district
- 6 having jurisdiction, such person shall be taken without
- 7 unnecessary delay before the nearest available federal
- 8 magistrate judge. The person may be released under Rule
- 9 46(c). The federal magistrate judge shall:
- 10 (1) Proceed under Rule 32.1 if jurisdiction over the person
- 11 is transferred to that district;

13

14

15

16

17

18

19

20

21

22

(2) Hold a prompt preliminary hearing if the	
alleged violation occurred in that district, and eit	her
(i) hold the person to answer in the district court	of
the district having jurisdiction or (ii) dismiss the	
proceedings and so notify that court; or	

(3) Otherwise order the person held to answer in the district court of the district having jurisdiction upon production of certified copies of the judgment, the warrant, and the application for the warrant, and upon a finding that the person before the magistrate is the person named in the warrant.

23

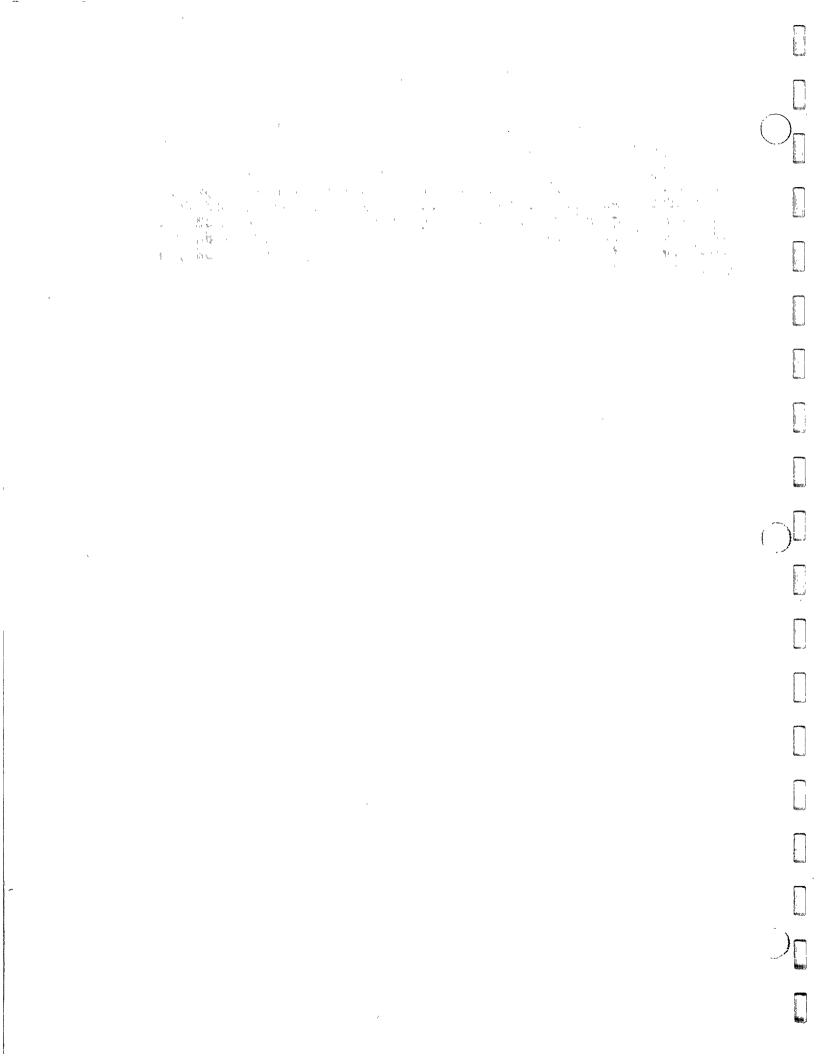
COMMITTEE NOTE

The amendment to subdivision (d) is intended to clarify the authority of a magistrate judge to set conditions of release in those cases where a probationer or supervised releasee is arrested in a district other than the district having jurisdiction. As written, there appeared to be a gap in Rule 40, especially under (d)(1) where the alleged violation occurs in a jurisdiction other than the district having jurisdiction.

A number of rules contain references to pretrial, trial, and post-trial release or detention of defendants, probationers and supervised releasees. Rule 46, for example, addresses the topic of release from custody. Although Rule 46(c) addresses custody pending sentencing and notice of appeal, the rule makes no explicit provision for detaining or releasing probationers or supervised releasees who are later arrested for violating terms of their probation or release. Rule 32.1 provides quidance on proceedings involving revocation of probation or supervised release. In particular, Rule 32.1 (a)(1) recognizes that when a person is held in custody on the ground that the person violated a condition of probation or supervised release, the judge or United States magistrate judge may release the person under Rule 46(c), pending the revocation proceeding. But no other explicit reference is made in Rule 32.1 to the authority of a judge or magistrate judge to determine conditions of release for a probationer or supervised releasee who is arrested in a district other than the district having jurisdiction.

The amendment recognizes that a judge or magistrate judge considering the case of a probationer or supervised releasee under Rule 40(d) has the same authority vis a vis decisions regarding custody as a judge or magistrate proceeding under Rule 32.1(a)(1). Thus, regardless of the ultimate disposition of an arrested probationer or supervised releasee under Rule 40(d), a judge or magistrate judge acting under that rule may rely upon Rule 46(c) in determining whether custody should be continued and if not, what conditions, if any, should be placed upon the person.

多輪衛子



Advisory Committee on Criminal Rules Rule 5 Fall 1993

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance Before the Magistrate

(a) IN GENERAL. Except as otherwise provided in this rule, an officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall must take the arrested person without unnecessary delay before the nearest federal magistrate judge or, in-the-event-that if a federal magistrate judge is not reasonably available, before a state or local judicial officer authorized by 18 U.S.C. § 3041. If a person arrested without a warrant is brought before a magistrate judge, a complaint, satisfying the probable cause requirements of Rule 4(a), must be promptly filed shall-be filed-forthwith-which-shall-comply-with-the-requirements-of Rule-4(a)-with-respect-to-the-show-of-probable-cause. When a person, arrested with or without a warrant or given a summons, appears initially before the magistrate judge, the magistrate judge shall must proceed in accordance with the applicable subdivisions of this rule. An officer making an arrest under a warrant issued upon a complaint charging solely a violation of 18 U.S.C. § 1073 need not comply with this rule if the person arrested is transferred without unnecessary delay to the custody of appropriate state or local authorities in the district of arrest and an attorney

FEDERAL RULES OF CRIMINAL PROCEDURE

- 23 for the government moves promptly, in the district in which
- the warrant was issued, to dismiss the complaint.

COMMITTEE NOTE

The amendment to Rule 5 is intended to address the interplay between the requirements for a prompt appearance before a magistrate judge and the processing of persons arrested for the offense of unlawfully fleeing to avoid prosecution under 18 U.S.C. § 1073, when no federal prosecution is intended. Title 18 U.S.C. § 1073 provides in part:

"Whoever moves or travels in interstate or foreign commerce with intent...to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees...shall be fined not more than \$5000 or imprisoned for not more than five years, or both.

* * * * *

Violations of this article may be prosecuted...only upon formal approval in writing by the Attorney General, the Deputy Attorney General, the Associate Attorney General, or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."

In enacting § 1073, Congress apparently intended to provide assistance to state criminal justice authorities in an effort to apprehend and prosecute state offenders. It also appears that by requiring permission of high ranking officials, Congress intended that prosecutions be limited in number. In fact, prosecutions under this section have been rare. The purpose of the statute is fulfilled when the person is apprehended and turned over to state or local authorities. In such cases the requirement of Rule 5 that any person arrested under a federal warrant must be brought before a federal magistrate judge becomes a largely meaningless exercise and a needless demand upon federal judicial resources.

e i gran garangan

FEDERAL RULES OF CRIMINAL PROCEDURE

In addressing this problem, one of several options are commonly used by federal authorities when no federal prosecution is intended to ensue after the arrest. once federal authorities locate a fugitive, they may contact local law enforcement officials who make the arrest based upon the underlying out-of-state warrant. In that instance, Rule 5 is not implicated and the United States Attorney in the district issuing the § 1073 complaint and warrant can take action to dismiss both. In a second scenario, the fugitive is arrested by federal authorities who, in compliance with Rule 5, bring the person before a federal magistrate judge. If local law enforcement officers are present, they can take custody, once the United States Attorney informs the magistrate that there will be no prosecution under § 1073. Depending on the availability of state or local officers, there may be some delay in the Rule 5 proceedings; any delays following release to local officials, however, would not be a function of Rule 5. third situation, federal authorities arrest the fugitive but local law enforcement authorities are not present at the Rule 5 appearance. Depending on a variety of practices, the magistrate may calendar a removal hearing under Rule 40, or order that the person be held in federal custody pending further action by the local authorities.

Under the amendment, officers arresting a fugitive charged only with violating § 1073 need not bring the person before a magistrate judge under Rule 5(a) if there is no intent to actually prosecute the person under that charge. Two requirements, however, must be met. First, the arrested fugitive must be transferred without unnecessary delay to the custody of state officials. Second, steps must be taken in the appropriate district to dismiss the complaint alleging a violation of § 1073. The rule continues to contemplate that persons arrested by federal officials are entitled to prompt handling of federal charges, if prosecution is intended, and prompt transfer to state custody if federal prosecution is not contemplated.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 10. Arraignment

1

4

5

6

7

8

10

11

12

13

Arraignment, which must shall be conducted in open

court, and shall-consists of:

(a) reading the indictment or information to the defendant or stating to the defendant the substance of the charge; and

(b) calling on the defendant to plead to the indictment or information therete.

The defendant <u>must</u> shall be given a copy of the indictment or information before being called upon to <u>enter a plea</u>

plead. <u>Video teleconferencing may be used to arraign a</u>

defendant not physically present in court, if the defendant waives the right to be arraigned in open court.

COMMITTEE NOTE

Read together, Rules 10 and 43 require the defendant to be present in court for the arraignment. See, e.g., Valenzuela-Gonzales v. United States, 915 F.2d 1276, 1280 (9th Cir. 1990) (Rules 10 and 43 are broader in protection than the Constitution). The amendment to Rule 10, in addition to several stylistic changes, creates an exception to that rule and provides that the court may permit arraignments through video teleconferencing if the defendant waives the right to be present in court. Similar amendments have also been made to Rule 43 to cover other pretrial sessions.

In amending the rule, and Rule 43, the Committee was very much aware of the argument that permitting video arraignments could be viewed as an erosion of an important element of the judicial process. First, it may be important for a defendant to see, and experience first-hand the formal

Advisory Committee on Criminal Rules 2 Rule 10 Fall 1993

FEDERAL RULES OF CRIMINAL PROCEDURE

impact of the reading of the charge. Second, it may be necessary for the court to personally see and speak with the defendant at the arraignment, especially where there is a real question whether the defendant really understands the gravity of the proceedings. And third, there may be difficulties in providing the defendant with effective and confidential assistance of counsel if the two are in separate locations, connected only by audio and video linkages.

The Committee nonetheless believed that in appropriate circumstances the court, and the defendant, should have the option of conducting the arraignment where the defendant is in visual and aural contact with the court, but in a different location. Use of video technology might be particularly appropriate, for example, where an arraignment will be pro forma but the time and expense of transporting the defendant to the court are great. In some districts, defendants have to be transported long distances, under armed quard, to an arraignment which may take only minutes to complete.

A critical element to the amendment is that no matter how convenient or cost effective a video arraignment might be, the defendant's right be present in court stands unless he or she waives that right. As with other rules including an element of waiver, whether a defendant voluntarily waived the right to be present in court during an arraignment will be measured by the same standards. An effective means of meeting that requirement in Rule 10 would be for the court to obtain the defendant's views during the arraignment itself or require the defendant to execute the waiver in writing.

FEDERAL RULES OF CRIMINAL PROCEDURE

1	Rule	43.	Presei	nce of	Def	end	ant.
			1.00		" as a	,	State of
2) gr	1 1 2	,	5 1	2 h

(a) Presence Required. The defendant shall must be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

- (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict, and the imposition of sentence, will shall not be prevented and the defendant will shall be considered to have waived the right to be present whenever a defendant, initially present at trial,
 - (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), er
 - (2) in a noncapital case, is voluntarily absent at the imposition of sentence, or

(2)(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

FEDERAL RULES OF CRIMINAL PROCEDURE

(c) Presence Not Required.	A defendant ne	ed not be
present in-the-following-situation	ens:	*

- (1) A-corporation-may-appear-by-counsel-for-all purposes when represented by counsel and the defendant is an organization, as defined in 18 U.S.C. § 18;
- (2) In-prosecution-for-offenses when the offense is punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence:
- (3) At when the proceeding involves only a conference or argument hearing upon a question of law-;
- (4) when the proceeding is a pretrial session in which the defendant can participate through video teleconferencing and waives the right to be present in court; or
- (4)(5) At when the proceeding involves a correction reduction of sentence under Rule 35.

COMMITTEE NOTE

The revisions to Rule 43 focus on three areas and reflect in part similar changes in Rule 10, which governs arraignments. First, the amendments make clear that a defendant who, initially present at trial but who voluntarily flees before sentencing, may nonetheless be sentenced in absentia. Second, the court may use video

FEDERAL RULES OF CRIMINAL PROCEDURE

technology to conduct pretrial sessions with the defendant absent from the courtroom, where the defendant waives the right to be present. Third, the rule is amended to extend to organizational defendants. In addition, some stylistic changes have been made.

Subdivision (a). The changes to subdivision (a) are stylistic in nature and the Committee intends no substantive change in the operation of that provision.

Subdivision (b). The changes in subdivision (b) are intended to remedy the situation where a defendant voluntarily flees before sentence is imposed. Without the amendment, it is doubtful that a court could sentence a defendant who had been present during the entire trial but flees before sentencing. Delay in conducting the sentencing hearing under such circumstances may result in difficulty later in gathering and presenting the evidence necessary to formulation of a guideline sentence.

The right to be present at court, although important, is not absolute. The caselaw, and practice in many jurisdictions, supports the proposition that the right to be present at trial may be waived through, inter alia, the act of fleeing. See generally Crosby v. United States, 113 S.Ct. 748, U.S. (1993). The amendment extends only to noncapital cases and applies only where the defendant is voluntarily absent after the trial has commenced. The Committee envisions that defense counsel will continue to represent the interests of the defendant at sentencing.

The words "at trial" have been added at the end of the first sentence to make clear that the trial of an absent defendant is possible only if the defendant was previously present at the trial. See Crosby v. United States, supra.

Subdivision (c). There are two changes to subdivision (c). The first is technical in nature and replaces the word "corporation" with a reference to "organization," as that term is defined in 18 U.S.C. § 18 to include entities other than corporations.

The second change to subdivision (c) is more significant. New subdivision (c)(4), which parallels a similiar amendment in Rule 10, provides that the court may use video teleconferencing technology to conduct pretrial sessions with the defendant at another location -- if the

Advisory Committee on Criminal Rules
Rule 43
Fall 1993

FEDERAL RULES OF CRIMINAL PROCEDURE

一戶時期被御務軍軍衛衛的在

defendant waives the right to be personally present in court. The Committee balanced the concern that this might dehumanize the judicial process against the fact that some pretrial sessions can be very brief, pro forma, proceedings. As noted above, the right to be present in court is not an absolute right, and may be voluntarily waived by the defendant. It is important to note that the amendment does not require the court to use such technology; the rule simply recognizes that the court may, under appropriate conditions, and in full respect of the defendant's rights, use such technology.

Although the Committee did not attempt to further define the term pretrial sessions, the rule could logically extend to sessions such as Rule 5 proceedings, arraignments (as specifically provided for in the amendment to Rule 10), preliminary examinations under Rule 5.1, competency hearings, pretrial conferences, and motions hearings not already within the purview of subdivision (c)(3). The Committee does not contemplate that the amendment would extend to guilty plea inquiries under Rule 11(c).

P

FEDERAL RULES OF CRIMINAL PROCEDURE*

The first of the first of the second

Rule 53. Regulation of Conduct in the Court Room

The taking of photographs in the court room during the 2

progress of judicial proceedings or radio broadcasting of 3 ng nang menghalikan menggalangkan sengan yang diban menghalikan diban di

judicial proceedings from the court room shall must not be permitted by the court except as such activities may be

authorized under guidelines promulgated by the Judicial

Conference of the United States. committee note

1

4

5

6

7

The amendment to Rule 53 marks a shift in the federal courts' regulation of cameras in the court room and the broadcasting of judicial proceedings. The change does not require the courts to permit such activities in criminal cases. Instead, the rule authorizes the Judicial Conference to do so under whatever guidelines it deems appropriate.

The debate over cameras in the court room has subsided due to several developments in the last decade. First, the Supreme Court's decision in Chandler v. Florida, 448 U.S. 560 (1981) made clear that it is not a denial of due process to permit cameras at criminal trials. Second, a large majority of the state courts now permit photographic and broadcasting coverage of criminal trials, without significant interruption in the proceedings or adverse impact on the participants. Third, developments in video and audio technology have enabled coverage of judicial proceedings to be accomplished with little or no interruption; some courts have adopted rules requiring pooling of coverage, which seems to even further reduce the liklihood of disruption.

In 1990 the Judicial Conference approved a three-year pilot program with audio coverage and photographic coverage of civil proceedings in selected trial and appellate courts. The Conference declined to apply the program to criminal proceedings -- because of the absolute ban of such activities in Rule 53.

Advisory Committee on Criminal Rules Rule 53 Fall 1993 2

FEDERAL RULES OF CRIMINAL PROCEDURE*

In adopting the amendment the Committee was persuaded, in part, by the fact that despite the wide, and almost common, presence of cameras in court rooms there has not been a long list of complaints or a parade of horrible experiences. To the contrary, the Committee believed that judicial decorum might be enhanced if the media is able to observe, and record, the proceedings from a location outside the court room. The Committee also recognized that the criminal justice system might be better understood, and appreciated, if criminal proceedings are made readily available to the public at large. See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 573 (1980)(vital role of print and electronic media as surrogates for the public supports opening of courts to audio and camera coverage).

 $\mathcal{M}_{\mathcal{A}} = \{ (x,y) \mid x \in \mathcal{A} \mid x \in \mathcal{A} \mid x \in \mathcal{A} \}$

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Clarification of Rule 6: Proposed Revision of

Statistical Reporting of Indictments

DATE: September 2, 1993

Attached are memos prepared by Mr. Peter McCabe and Mr. David Cook (Chief of the Statistics Division) concerning the issue of whether a proposed change in statistical reporting of indictments might violate the secrecy provisions of Rule 6.

As noted in Mr. McCabe's memo of April 7, 1993, the Criminal Rules Committee normally does not provide advisory opinions. But in its role it may decide whether any amendments to a particular rule are appropriate.

At this point, there is no specific suggestion that Rule 6 be amended.

		Numerical States
		Western Company
		Minal
	•	
		land of
		The state of the s
		Reserved to the second
		E.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES WASHINGTON, D.C. 20544

ROBERT E. KEETON CHAIRMAN CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE APPELLATE RULES

EDWARD LEAVY BANKRUPTCY RULES

SAM C. POINTER, JR. CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

RALPH K. WINTER, JR.

PETER G. McCABE

April 7, 1993

MEMORANDUM TO DAVID L. COOK

SUBJECT: Clarification of Criminal Rule 6

I received your memorandum of March 23, 1993, that requests clarification of Rule 6 of the Federal Rules of Criminal Procedure regarding the statistical reporting of sealed indictments. Although I believe that your proposal to report sealed indictments as "generic" cases is not inconsistent with the provisions of the present rule, I am sending a copy of your memorandum to the chairman and reporter of the Advisory Committee on Criminal Rules for consideration.

As you know, the committee does not render "advisory opinions" on the interpretation of a particular rule.

Nonetheless, because the committee is responsible to carry on "a continuous study of the operation and effect of the general rules of practice and procedure" and since your proposal may require amendment of the rule, I have referred your memorandum to the committee's chairman for whatever action, if any, he determines appropriate.

Peter G. McCabe Secretary

cc: Honorable Robert E. Keeton Honorable William Terrell Hodges William R. Wilson, Esq.

Professor David A. Schlueter

 $\| f_{\mathbf{k}}(\mathbf{z}) - f_{\mathbf{k}}(\mathbf{z}) \|_{2} \leq \frac{1}{\kappa_{\mathbf{k}}} \frac{\mathbf{p}_{\mathbf{k}}^{\mathbf{z}}}{\mathbf{p}_{\mathbf{k}}^{\mathbf{z}}} + \frac{1}{\kappa_{\mathbf{k}}} \frac{\mathbf{p}_{\mathbf{k}}^{\mathbf{z}}}{\mathbf{p}_{\mathbf{k}}^{\mathbf{z}}$

L. RALPH MECHAM DIRECTOR

JAMES E. MACKLIN, JR. DEPUTY DIRECTOR

A STATE OF THE STA

96,5

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

DAVID L. COOK CHIEF. STATISTICS DIVISION 202 273 2240

March 23, 1993

MEMORANDUM TO PETER MCCABE

SUBJECT: Clarification of Rule 6, Federal Rules of Criminal Procedure

Historically, statistical reports of sealed indictments filed in district court have not been submitted to the Administrative Office until the time the indictments were unsealed; this procedure was implemented primarily because of the secrecy requirements imposed by Rule 6 of the Federal Rules of Criminal Procedure. These actions have been counted as "filings" for workload purposes during the month they were unsealed along with other indictments actually filed during that month.

When courts were maintaining manual dockets and submitting manual statistical reports, it was a fairly simple process for them to withhold the report until the indictment was unsealed. With the implementation of ICMS, where statistical reports are generated automatically from docket entries, it is much more difficult to follow separate procedures for sealed indictments. Special system events must be created by clerks to allow for docketing of the indictment in the court database while preventing the automatic submission of a filing report. When the indictment is unsealed, additional special events must be created to generate the filing report, including some information from the original docketing of the case.

To ease the reporting burden on the courts, we would like to revise the reporting requirements to have all indictments (whether sealed or not) reported at the time of actual filing using one standard set of procedures. Procedures could be developed in ICMS to replace the defendant name with the word "Sealed" in the statistical record of sealed indictments maintained in Washington. In the summary reports published by the Administrative Office, sealed indictments would not be reflected separately, but would be included in the grand total for defendants commenced on indictment.

The remaining question is whether implementing this proposed procedure would put us in violation of Rule 6, F.R.Cr.P. We feel that in your capacity as Secretary to the Rules Committee of the Judicial Conference, you are the most appropriate individual to make such a determination or to provide us guidance on how to get a "green light" for making this change.

Please advise us whether the reporting of a "generic" case opening without including the defendant's name is inconsistent with Criminal Rule 6.

David L. Cook

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Rule 16: Proposal To Amend Rule to Require

Government Disclosure of Witnesses

DATE: September 3, 1993

At its April 1993 meeting in Washington, D.C., the Committee briefly considered a proposed amendment to Rule 16, drafted by Mr. Wilson and Professor Saltzburg. The amendment addressed the issue of government disclosure of its witnesses to the defense. During the meeting a letter from Attorney General Reno was hand delivered to the Committee; she requested that the Committee delay consideration of the proposed amendment until she had had an opportunity to study the issue. Following discussion, the Committee voted unanimously to table the matter until its Fall 1993 meeting.

On August 4, 1993, the Attorney General wrote to Judge Hodges, indicating that she could *not* support the proposed amendment. In support of her position she attached a lengthy memo prepared by Mr. Roger Pauley.

Attached to this memo are:

- -- The Wilson/Saltzburg draft amendment (I have retyped the proposal and included line numbers, etc.)
- -- Attorney General Reno's letter and a memo from Roger Pauley;
- -- Materials showing the Advisory Committee's proposed amendment to Rule 16 in 1974; and
- -- An alternative draft amendment.

I have taken the liberty of drafting another, shorter, version of a possible amendment to Rule 16 which does not include a requirement to disclose the government witnesses' statements. This version includes elements of the 1974 proposal along with some elements of the Wilson/Saltzburg proposal. Note that additional language is in brackets; this language parallels similar language in the 1974 version concerning the government's ability to depose one of its witnesses if it is required to disclose that witness' name, etc.

The issue before the Committee is whether it should proceed to recommend an amendment to Rule 16. If the Committee is interested in moving forward with an amendment, then the following issues may be addressed:

- -- Whether the disclosure should be triggered by a defense request.
- -- Timing requirements (For requesting and/or disclosing the names, etc.)
- -- Whether the disclosure requirements should extend to "statements" by the government witness.
- -- Whether a reciprocity disclosure provision should be included.
- -- The procedures, if any, for determing whether the government may avoid making the disclosure
- -- Whether some provision should be made for deposing the government witness under Rule 15 as provided in the 1974 amendment.

FEDERAL RULES OF CRIMINAL PROCEDURE

exist.		
500b	1	Rule 16. Discovery and Inspection
suto ^l	2	(a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.
essa)	3	(1) Information Subject to Disclosure.
ness!	4	* * * * *
i persed	5	(F) NAMES AND ADDRESSES OF WITNESSES. Upon
tanal		
- M	6	request of the defendant, the government must
mad .	7	disclose to the defendant, not later than seven
and the	8	days before trial, the names and addresses of the
tar*	9	witnesses the government intends to call in the
70)	10	presentation of its case in chief. If the
Willey Columb	11	government has a good faith belief that pretrial
scort.	12	disclosure of some or all of this information will
was of	13	either pose a threat to the safety of a person or
sund	14	obstruct justice, it may seek protective or
men,	15	modifying orders from the Court in accordance with
900a	16	subdivision (d).
العم	17	[When a request for discovery of the names
anci	18	and addresses of witnesses has been made by a
and or	19	defendant, the government must be allowed to
ATTENÇ	20	perpetuate the testimony of such witnesses in
interior and the second	21	accordance with Rule 15]
essud	22	* * * *
ia a	23	(2) Information Not Subject to Disclosure. Except
state#	24	as provided in paragraphs (A), (B), (D), and (E)+,

26

27

28

29

30 -

31

FEDERAL RULES OF CRIMINAL PROCEDURE

and (F) of subdivision (a)(1), this rule does not
authorize the discovery of inspection of reports,
memoranda, or other internal government documents
made by the attorney for the government or other
government agents in connection with the
investigation or prosecution of the case.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 16. Discovery and Inspection

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

- (a) DISCLOSURE OF EVIDENCE BY THE GOVERNMENT.
 - (1) Information Subject to Disclosure.

* * * * *

STATEMENTS OF WITNESSES. Upon request of the defendant, made no later than four (4) weeks prior to trial, the government, no later than one (1) week before trial, (i) must disclose to the defendant the names of prospective government witnesses and make available for copying any statements of these witnesses as defined in Rule 26.2 (f), and (ii) with respect to any statements which the government intends to offer pursuant to Fed. R. Evid. 801 (d)(2)(E), must disclose to the defendant and make available for copying statements as defined by Rule 26.2 and a summary of the substance of any other such statements, provided that the information covered by this subdivision is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government. In the event, however, that the government has a good faith belief that

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

45

46

47

48

FEDERAL RULES OF CRIMINAL PROCEDURE

pretrial disclosure of some or all of this information will pose a threat to the safety of witnesses or of obstruction of justice, the attorney for the government may submit to the Court ex parte and under seal all names, statements and summaries covered by this subdivision with a statement setting forth the reasons why the government believes in good faith to fine the contract that the evidence cannot be safely disclosed prior Mile to the The to trial. The Court must keep any ex parte submission by the government under seal until the conclusion of the trial at which time the Court must make the portions of the submission that are relevant to the testimony of any government witness or to statements admitted pursuant to Fed. R. Evid. 801 (d)(2)(E) a part of the public The Court may review whether the government failed to comply with this subdivision by failing either to disclose names, statements or summaries to the defendant or to submit them to the Court ex parte and under seal, but the Court may not review the sufficiency of the reasons provided in an ex parte submission by the government under seal.

FEDERAL RULES OF CRIMINAL PROCEDURE

49 * * * *

50

51

52

53

55

60

61

(2) Information Not Subject to Disclosure. Except as provided in paragraphs (A), (B), [and] (D), and (E) of subdivision (a)(1), this rule does not authorize the discovery of inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case[,]. [or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. [3500.]

Committee's Note

No subject has engendered more controversy in the Advisory Committee over many years than discovery. In 1974, the Supreme Court approved an amendment to Rule 16 that would have provided a defendant with names of witnesses, subject to the government's right to seek a protective order. But, Congress refused to approve the rule in the face of massive opposition by United States Attorneys throughout the country. In recent years, proposals have been made to the Advisory Committee to reconsider the rule approved by the Supreme Court. The opposition of the Department of Justice has remained constant, however, as it argued to the Committee that the threats of harm to witnesses and obstruction of justice have increased over the years as the penalties have risen for narcotics offenses, continuing criminal enterprises and other crimes.

FEDERAL RULES OF CRIMINAL PROCEDURE

The Advisory Committee shares this concern for the safety of witnesses. It also is concerned, however, with the practical hardships defendants face in attempting to prepare for trial without adequate discover. The Committee notes that the Federal Rules of Criminal Procedure already recognize the importance of discovery in situations in which the government might be unfairly surprised or disadvantaged without it - e.g., Rule 12.1, Notice of Alibi; Rule 12.2, Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition; and Rule 12.3, Notice of Defense Based Upon Public Authority. The arguments against similar discovery for defendants are unpersuasive and ignore the fact that the defendant is presumed innocent and therefore is presumptively as much in need of information adequate to avoid surprise as is the government. The fact that the government bears the burden of proving all elements beyond a reasonable doubt is not an argument for denying a defendant adequate means for responding to government evidence in order to show that a reasonable doubt exists.

The Advisory Committee considered several different approaches to discovery on behalf of a defendant. In the end, it adopted a middle ground between complete disclosure and the existing Rule 16. Essentially, the Committee proposes that the government must disclose names of witnesses and their statements as well as recorded statements or a summary in lieu thereof statements by alleged coconspirators unless the government submits, exparte and under seal, to the Court written reasons why some or all of this evidence cannot safely be disclosed. This approach adopts an approach of presumptive disclosure that is used in a number of United States Attorneys offices. It recognizes the importance of discovery in all cases, but protects witnesses and evidence when the government has a good faith basis for fearing for the safety of either.

The requirement that the defendant request discovery under this subdivision at least four weeks prior to trial assures that the government will have sufficient time to respond to a defense request for discovery and that last minute discovery requests; which can serve to delay trials or disrupt the government's preparation for trial, will be foreclosed. The provision that the government need not provide the discovery required by the amendment until one week before trial should eliminate some concern about the safety of witnesses and some fears about possible obstruction of justice. But, this provision effectively makes reciprocal discovery impossible. A defendant cannot

Proposed Amendment to Rule 16 Wilson/Saltzburg Summer 1993

FEDERAL RULES OF CRIMINAL PROCEDURE

reasonably be expected to provide names of witnesses or statements until the defense has an opportunity to examine the names of witnesses, their statements and the summaries of coconspirator statements which the government will Since the government need not disclose until one week before trial, the defense will need the week to prepare for the government's case and cannot reasonably be expected to announce the names of witnesses or to disclose their statements before the trial begins Although the absence of reciprocity may appear at first blush to lack symmetry, the Advisory Committee believes that the amendment in fact will promote symmetry in the rules. The government already receives notification pursuant to Rules 12.1, 12.2 and 12.3 with respect to the defenses that would otherwise pose a risk of surprise, and the government has the exclusive right to offer statements under Fed. R. Evid. 801 (d)(2)(E). In providing for enhanced discovery for the defense, the Advisory Committee believes that the danger of unfair surprise to the defense will be reduced in many cases and that trials in these cases will be fairer.

The Advisory Committee regards this amendment to Rule 16 as a reasonable step forward and as a rule which must be carefully monitored. The Advisory Committee does not preclude a further amendment to Rule 16 to deal with problems that might arise or to recognize the invalidity of one or more of the four assumptions upon which the amendment The four assumptions are the following: (1) the government will act in good faith, and there will be cases in which the government will have a good faith belief as to danger without "hard" evidence to prove the actual existence of danger; (2) in many cases judges will not be in a better position than the government to gauge potential danger to witnesses; (3) post-trial litigation as to the sufficiency of government reasons in every case of an ex parte submission under seal would result in an unacceptable drain on judicial resources; and (4) post-trial disclosure of the relevant portions of the government's submission will permit defense lawyers and the judiciary to assess the extent to which the government is avoiding discovery and the legitimacy of the reasons proffered by the government.

In requiring that relevant portions of an <u>ex parte</u> submission by the government be kept under seal only until a trial ends and then made public, the Advisory Committee intends to provide a mechanism for scrutiny by the judiciary, defendants and their counsel, and the public of the number and type of instances in which the government

THE RESERVE TO SERVE THE RESERVE TO SERVE THE RESERVE THE RESERVE

FEDERAL RULES OF CRIMINAL PROCEDURE

professes to be concerned for the safety of witnesses or evidence. The Advisory Committee provides in its amended rule that the Court may not review the sufficiency of the reasons provided by the government in any given case; it may only review whether the government either provided the defendant with the required discovery or made the required submission. The Committee's intent is to assure that in camera submissions under seal do not become a subject of satellite litigation in every case in which they are made. It is true that the amendment provides an opportunity for the government to keep secret the information covered by subdivision (E) even though it lacks a good reason for doing so in an individual case. The Advisory Committee recognizes this possibility but is not prepared to believe that government bad faith is certain to be a problem. The Committee is certain, however, that it would require an investment of vast judicial resources to permit post-trial review of all submissions. Thus, the amendment provides for no review of government submissions in individual cases. No defendant will be worse off under the amended rule than under the current version of Rule 16, since the current version of Rule 16 allows the government to keep secret the information covered by the amended rule whether or not it has a good faith reason for doing so in any individual case. Moreover, this Note establishes that the Advisory Committee has not precluded a further amendment to Rule 16 to deal with future problems.

The state of the s



U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

August 5, 1993

Honorable William Terrell Hodges Chairman Advisory Committee on Criminal Rules P.O. Box 1620 Jacksonville, Florida 32201-1620

Dear Judge Hodges:

I am advised that the Attorney General's Office yesterday sent you a copy of a letter signed by her relating to the Rule 16 proposals to be considered at the upcoming meeting of the Advisory Committee in San Diego.

In order to assist the Committee in its deliberations and to show (as the Attorney General's letter asserts) that the Department did not reach its position on the Wilson/Saltzburg proposal "lightly or without careful consideration of both the pending proposal and other possible alternatives", I am enclosing a truncated version of a comprehensive memorandum I prepared for the use of the Department's highest level officials in formulating a view on this issue. 1

I look forward to seeing you in October.

Sincerely,

Roger A. Pauley, Director Office of Legislation

Criminal Division

Enclosure

cc: Honorable D. Lowell Jensen Professor David A. Schlueter

¹ The memorandum omits as confidential the "Recommendations" section, included in the original memorandum, but otherwise is complete.



Office of the Attorney General Washington, A. C. 20530

August 4, 1993

Honorable William Terrell Hodges Chairman Advisory Committee on Criminal Rules P.O. Box 1620 Jacksonville, Florida 32201-1620

Dear Judge Hodges:

This is in response to your letter of April 26, 1993, requesting the Department of Justice's views on two proposals to amend Rule 16 of the Federal Rules of Criminal Procedure to broaden defendant's pretrial discovery rights. The first and more significant proposal would require the government upon request (subject to a rather complicated process whereby a prosecutor could exempt certain information from disclosure) to disclose the identities and prior statements of its prospective witnesses as well as any statements of coconspirators which the government had in its possession. The second proposal would require the government, as to any documents required to be disclosed under Rule 16, also to turn over to the defense any method of indexing or organizing the documents in order to facilitate their examination.

Pretrial discovery in criminal cases, particularly insofar as it involves disclosure of witness identity, is as you know a subject that has been widely debated and that frequently engenders great controversy. State practices vary tremendously, and there is no consensus on whether broader discovery produces fairer or more efficient justice or the reverse, or whether such discovery (even assuming some benefits therefrom) may be accomplished without an unacceptable diminution in witness safety, privacy, and willingness to cooperate which is so essential to the effective enforcement of our criminal laws.

I am not persuaded that a change in the current federal system which would require pretrial disclosure of witnesses' names and statements and the statements of co-conspirators in all cases best serves the interests of justice and is appropriate at this time. Although the proposal is drafted to address the issues of obstruction and witness intimidation once an indictment is handed down, it could nevertheless discourage witnesses from coming forward in the first instance.

Although there are federal cases where obstruction and witness intimidation are not legitimate concerns, the proposal is too broad in its application. Accordingly, the Department cannot support it. This conclusion, which was not reached lightly or without careful consideration of both the pending proposal and other possible alternatives, is in accord with the unanimous recommendation of my senior advisors, including many with firsthand experience litigating criminal cases in the federal district courts. However, in an effort to serve justice, balancing the interests of fairness and efficiency in its determination with the need to assure that those witnesses who assist in its determination are free of intimidation, the Department will consider revising instructions to federal prosecutors on pretrial disclosure of witness identity in the United States Attorney's Manual.

We must object as well to the second proposal, which I understand was briefly considered and rejected by your Committee last October. The proposal is motivated by the laudable desire to save public monies in the form of hourly fees paid to appointed counsel when those counsel have to pore over hundreds or thousands of documents in a complex, multi-defendant case, searching for any materials relevant to their particular client. However, requiring the government to turn over an index or other organizational system it may have devised for the documents would set an unwise precedent with respect to the work product of federal investigative agencies and prosecutors. It could also in many cases unfairly reveal the government's theory of the case. Moreover, it may be doubted whether any competent counsel would deem it appropriate to rely on a government-provided index to a set of materials or rather would feel compelled to examine all the documents independently to determine their relevance to his client's defense. requirement that the government provide an index or organizational system would almost certainly lead to additional litigation, where counsel alleged that the government's index was inaccurate or misleading. The cost of such litigation would reduce or eliminate any savings contemplated by the amendment.

The Department's response to proposals to increase discovery in criminal cases has traditionally not been inflexible but rather has been based on an issue by issue examination. For example, it is my understanding that the Department, while not without its concerns, in recent years worked constructively with the Committee to fashion the pending amendments (due to take effect later this year) to expand Rule 16 to provide for reciprocal pretrial discovery of expert witness testimony, and to extend Rule 26.2 (relating to the provision of witness statements after direct examination) to various pretrial and post-trial hearings.

I intend that the Department continue its policy of constructive dialogue with the Committee. Although we cannot support the pending proposals, I look forward to working with you and the other Committee members on many important matters to enhance the fairness and efficiency of the justice process.

Sincerely,

Julification

Janet Reno

The control of the co



U. S. Department of Justice

Criminal Division

Washington, D.C. 20530

MEMORANDUM

JUN 2 1993

TO:

Philip B. Heymann

Deputy Attorney General

FROM:

Roger A. Pauley, Director

Office of Legislation K

Criminal Division

SUBJECT:

Pretrial Discovery Relating to Government Witnesses; Policy Options for Addressing a Pending Proposal to Amend

Rule 16, F.R.Crim.P.

At your request the following provides background, a discussion of policy options, and recommendations for the Department in responding to a pending proposal to amend Rule 16 of the Federal Rules of Criminal Procedure to provide greater discovery of government witnesses and their statements.

A. BACKGROUND

1. Current Law and Practice.

Except in capital cases, there has never been a requirement that the government in a federal criminal case disclose the names and addresses of its prospective witnesses or their statements. In capital cases, 18 U.S.C. 3432, which dates from 1790, provides that the government must furnish the defendant, at least three days prior to trial, with a "list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment". This statute (which does not require any witness statements to be revealed) has been interpreted to require only the disclosure of the government's case-in-chief, not witnesses in Goldsby v. United States, 160 U.S. 70 (1895). Its witnesses. purpose is to assist in preparing the defense by allowing an opportunity to interview the government's witnesses. E.g. Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966) (holding that the prosecutor's advice to prosecutive witnesses that they not talk to defense counsel unless the prosecutor was present denied the defendant a fair trial); but see United States v. Black, 767 F.2d

1334 (9th Cir. 1985) (prosecutor's letter to prospective witnesses merely advising them of right to decline to be interviewed by defense counsel did not deny defense fair access to witnesses). Section 3432 contains no exception, even when there is evidence that providing a witness list pretrial could endanger a witness' safety or lead to efforts to obstruct justice. For this reason, the Department of Justice last year sought an amendment of the law to create such an exception, since fear for witnesses' safety had caused at least one United States Attorney to opt against seeking the death penalty. At our request, Congressman Schumer offered and Congress adopted a provision in last year's conference crime bill that would dispense with the need to supply a list of veniremen or witnesses if the court finds that to do so "may jeopardize the life or safety of any person" (§ 3070 of H.R. 3371).

In non-capital cases, disclosure of witness lists and statements is governed by the so-called Jencks Act, 18 U.S.C. 3500. This statute was enacted in 1957, after the Supreme Court decision of the same year in Jencks v. United States, 353 U.S. 657. Court in Jencks held, in the exercise of its supervisory power, that the defense was entitled to obtain, for impeachment purposes, statements which had been made to government agents by government witnesses, and that the prosecutor was required, upon demand, to turn over such statements to the defense at the time of crossexamination. Defendants, however, began almost immediately to cite Jencks in support of far more sweeping discovery requests, which in many instances were acceded to by trial judges. These events led the Department of Justice promptly to submit legislation to clarify and limit the reach of Jencks which legislation a few months later was adopted as 18 U.S.C. 3500 See Palermo V. United States, 360 U.S. 343 (1959). That law states that, in any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." It has been uniformly held that implicit in the Jencks Act (and in the lack of any statute applicable to non-capital cases that is comparable to 18 U.S.C. 3432) is the principle that the government is under no legal duty to disclose prior to trial the names and/or addresses of its witnesses. 2 And indeed, the government has been successful in THE COURSE OF THE PROPERTY OF

¹ The Department had sought language that would provide an exception also for cases in which we showed that providing the list would likely lead to attempts to obstruct justice; but this aspect of our proposal was not adopted.

² Nor does the constitutional doctrine of <u>Brady v. Maryland</u>, 373 U.S. 83 (1963), discussed subsequently, require such disclosure. <u>Weatherford</u> v. <u>Bursey</u>, 429 U.S. 545 (1977).

securing a writ of mandamus when district judges have, from time to time, attempted to compel such disclosure. E.g. <u>United States</u> v. <u>Algie</u>, 667 F.2d 569 (6th Cir. 1982); see also <u>In re United States</u>, 834 F.2d 283 (2d Cir. 1987).

Currently, the Jencks Act is substantially embodied also in Rule 26.2 of the Federal Rules of Criminal Procedure. That Rule, adopted in 1979, differs from the Jencks Act in that, following another Supreme Court decision (United States v. Nobles, 422 U.S. 225 (1975)) holding that it is permissible to impose discovery obligations on defendants in criminal cases, the Rule provides for reciprocal discovery of witness statements following direct examination. In addition to this Rules expansion of the Jencks Act to encompass defense witnesses, the Supreme Court earlier this year transmitted to Congress amendments that would extend Rule 26.2 also to certain pretrial and post-trial proceedings where live witness testimony may be offered, including detention hearings, sentencing hearings, hearings to revoke probation or supervised release, and hearings on collateral attack motions under 28 U.S.C. Also transmitted to Congress was an amendment of Rule 16, F.R.Crim., to require the parties to provide reciprocal discovery with respect to prospective expert witnesses, in the form of a written summary of their anticipated testimony, the bases therefor, and the witnesses' qualifications. These amendments, unless modified or disapproved by Congress, will take effect on December 1, 1993. The Department, in the main, did not oppose these Rules changes. 5

Notwithstanding Congress' 1957 rebuff, in the Jencks Act, of judicial attempts to enlarge the government's pretrial discovery obligations, the Judicial Conference in 1974 launched a major effort to require the government to disclose pretrial the names and addresses of its witnesses. In 1974, the Supreme Court transmitted to Congress the Conference's proposal to amend Rule 16, F.R. Crim.P., to require the government, upon request, at any time after indictment, to divulge the names and addresses and criminal

³ It should be noted that Rules take precedence over previously enacted statutes with which they are in conflict, by virtue of the so-called "supersession" language in 28 U.S.C. 2072(b). Thus, a Rule to require pretrial disclosure of witness statements would effectively overrule the Jencks Act.

⁴ In 1983, an amendment along similar lines to Rule 12 was adopted, applying Rule 26.2 to suppression hearings.

⁵ The Department sought and obtained language permitting the court in pretrial detention hearings to dispense with the Rule 26.2 requirements "for good cause shown". The reason for this is the practical concern that a witness' prior statements, at so early a stage in the criminal proceeding, might not be readily available.

records of all prospective witnesses to be called in its case-in-Disclosure of witness statements, however, would continue to be governed by the Jencks Act; and the government would have the right to depose any witness whose pretrial identity was revealed. Under the proposed amendment, furthermore, the government would have an identical opportunity to obtain the names and addresses of defense witnesses.

The Department steadfastly but unsuccessfully opposed the proposal throughout the Rules-writing process. When the Rule reached Congress, the Department, greatly concerned about the proposal's potential for endangering witnesses and facilitating obstruction of justice, mounted a massive campaign to defeat the amendment. Mobilizing the Attorney General's Advisory Committee of United States Attorneys, the Department submitted to the House and Senate Judiciary Committees a document detailing over 700 instances of recent witness abuse; and its representatives instances of recent witness abuse; and its representatives testified in hearings strongly urging Congress to reject the proposed Rule 16 changes. 7 The defense bar, however, supported the Rule 16 amendments, as did the judiciary. After a protracted struggle, the Department's position prevailed, and legislation was enacted (P.L. 94-64) rejecting the Rule 16 witness list provision. In the House, the Department was initially only partially successful. The House Judiciary Committee limited the Judicial Conference's proposal, by requiring that the disclosure need only be made, as in capital cases, three days before trial. An effort re trial. An effort Department deemed proposal, which the this reject unsatisfactory, was narrowly defeated on the House Floor. Thereafter, however, the Senate voted to delete altogether the Court's proposed Rule 16 amendment and the Senate's position was adopted in conference. The conference report stated: "A majority of the Conferees believe it is not in the interest of the effective administration of criminal justice to require that the government or the defendant be forced to reveal the names and addresses of its witnesses before trial. Discouragement of witnesses and improper contact directed at influencing their testimony were deemed of this policy." concerns in the formulation paramount H. Rep. No. 94-414, 94th Cong., 1st Sess. (1975). The state of the s

1.1. 4.2. X 2000年 2015年 2015年

Ja Harrison

⁶ Departmental attacks in Congress upon Rules amendments are extremely rare, in deference to the Rules Enabling Act process which the Department has traditionally supported. In short, the Department has not wished to involve Congress in the process of amending the various Rules of procedure and accordingly normally shies away from invoking Congressional power to disapprove a Rule.

A copy of the statement of then Acting Assistant Attorney John C. Keeney before the House Subcommittee on Criminal Justice is appended hereto.

In the years since 1975, there have been sporadic attempts by the defense bar and some judges to revive the issue. House Subcommittee hearings were held in 1986 on legislation to require the pretrial provision of witness lists and statements by both parties in criminal cases, but the bill went no farther after the Department testified in opposition. Likewise, a proposal to consider a Rules amendment like the one promulgated in 1974 was brought before the Judicial Conference's Advisory Committee on Criminal Rules in 1989 but was rejected after the Committee was advised of the Department's continuing opposition.

Formal Department of Justice policy with respect to the pretrial disclosure of witness identity is set forth in § 9-6.200 of the United States Attorneys Manual.8 After noting that prosecutors are under no legal obligation to reveal witness: identities pretrial and that insuring the cooperativeness of witnesses and safeguarding the judicial process from undue influence are among the Department's highest priorities, the Manual states that it is therefore "the Department's position that pretrial disclosure of a witness' identity should not be made if there is, in the judgment of the prosecutor, any reason to believe that such disclosure would endanger the safety of the witness or any other person, or lead to efforts to obstruct justice. The Manual goes on to indicate factors that are relevant to the possibility of witness intimidation or obstruction, and provides further that pretrial disclosure of a witness identity "should not ordinarily be made against the known wishes of any witness. Lastly, however, the Manual points out the advantages of pretrial disclosure (absent any indication of untoward consequences of the kind previously mentioned), including an enhancement of the prospects that the defendant will plead guilty or will institute plea negotiations, and that disclosure may obviate the need for a continuance in the event of trial. The Manual concludes: "In sum, whether or not to disclose the identity of a witness prior to trial is committed to the discretion of the federal prosecutor, and that discretion should be exercised on a case-by-case, and witness-bywitness basis. Considerations of witness safety and willingness to cooperate, and the integrity of the judicial process, are paramount." paramount." 文化 人名英格兰人姓氏格兰人名

In fact, practice varies widely among United States Attorneys Offices, and even within the same Office among individual Assistants, as is apparent from the comments received on the pending proposal (discussed below) from federal prosecutors. A few follow a virtual "open file" policy of revealing to defense counsel at an early stage almost everything about the government's case, including witness identity and prior statements. Others go to the

⁸ It appears, however, that there is no written Department policy with respect to the provision of Jencks Act statements from witnesses whose identity is known.

opposite extreme and invoke the Jencks Act routinely to withhold such information; while still others are in the middle, adjusting their practice more to the facts of each case (as the Manual suggests is proper).

No. Sept. 18 The Pending Proposal, was a second to the se

THE PROPERTY OF

THE THE PROPERTY OF THE PROPER The Advisory Committee on Criminal Rules of the Judicial Conference typically meets twice each year. Like other Advisory Committees, it has assigned to it a liaison member from the Standing Committee on Rules of Practice and Procedure (on which the Department is represented by the Deputy Attorney General). The liaison member for the Advisory Committee on Criminal Rules is William R. Wilson, a prominent defense attorney from Little Rock, 10 At the October 1992 meeting of the Advisory Committee Mr. Wilson announced that he would like to place on the agenda for the committee's next meeting in April a proposal to amend Rule 16, F.R. Crim. P., that would broaden a defendant's discovery rights regarding government witnesses and statements. Mr. Wilson stated that he found it anomalous and indefensible that in federal civil cases discovery was expansive and increasing and thought to promote truth-finding and to aid in the efficient resolution of cases, whereas in criminal cases involving even more important stakes for the parties and society, discovery was narrow. Professor Stephen Saltzburg, a member of the Advisory Committee, offered to help Mr. Wilson draft a specific proposal for presentation at the May meeting and indicated that he would try to fashion a proposal that would both broaden a defendant's discovery rights while protecting witness safety. THE RESERVE THE PROPERTY OF TH

Prior to the April meeting, Professor Saltzburg circulated to all Advisory Committee members the proposal at issue, a copy of which is appended. In essence, the proposal would amend Rule 16, F.R. Crim P., to require the government, upon request made no later than four weeks before trial, to disclose no later than one week before trial the names of all prospective government witnesses and their statements (as defined in Rule 26.2) as well as any statements which the government intends to offer into evidence under the coconspirator evidence rule and a summary of any other such statements. The proposal would apparently require the government as well to use due diligence (as to both witness and coconspirator statements) to acquire such statements within the

As previously noted, the Manual does not specifically address Jencks Act practice as distinguished from the disclosure of witness identity. However, as a practical matter, most or all United States Attorneys and other federal prosecutors treat both issues in the same manner.

10 Not surprisingly, Mr. Wilson and Webb Hubbell are known to

and apparently share a high regard for one another.

time period addressed by the Rule. The obligation would not be reciprocal because (as explained in the draft Advisory Committee Note) the government need not disclose until one week before trial and the defense will need that week to prepare for trial and cannot be expected to disclose its witnesses. The draft Note further justifies the lack of reciprocity by pointing to Rules requiring the defendant to give prior notice before raising certain defenses such as alibi and argues that only the government can introduce coconspirator statements. In an effort to protect witness safety and the integrity of the judicial process, the proposal also embodies a unique procedure. The proposal would allow a federal prosecutor who has a good faith belief that pretrial production of any witness' name, statement, or summary would pose a threat to witness safety or of obstruction of justice to file a statement of reasons under seal why any such information could not be disclosed. The court could not review the sufficiency of the reasons. However, at the conclusion of the trial the court must make public the portion of the statement of reasons that is relevant to the testimony of any witness or coconspirator statement that was admitted in evidence.

Upon receiving this proposal in February 1993, I caused it to be sent 11 for comment to every United States Attorney's Office and Section within the Criminal Division. Every response expressed strong opposition. Nevertheless, in the end, the Attorney General on the day of the meeting did sign a letter to the Chairman (which I hand-delivered at the meeting) asking that the matter be postponed until the Committee's next meeting (scheduled for mid-October). After the letter was circulated and the issue discussed among the Committee, the Committee voted unanimously to grant the Attorney General's request. However, some members voiced dismay at the delay and the committee voted to instruct the Chairman to write a letter to the Attorney General seeking the Department's written response to the proposal or any alternative suggestions by August 1 (as well as our views on an unrelated Rule 16 proposal also due to be considered at the same meeting). That letter (copy appended) was dispatched by the Chairman on April 26, 1993.

B. GENERAL CONSIDERATIONS

Before focusing on specific options, such as the Wilson/Saltzburg amendment, for dealing with witness discovery, it is appropriate to enunciate some generally applicable facts and principles which form the framework for consideration of particular proposals. In this regard, a discussion of the asserted general benefits and disadvantages on both sides seems in order.

¹¹ The proposal came to me in my capacity as the Department's designated representative on the Advisory Committee, a position I have occupied for approximately the past twenty years.

1. A critical examination of claimed benefits from amending Rule 16 in the manner proposed.

The proponents of Rule 16 amendments to require pretrial government disclosure of witness identities and statements claim what the advocates of broadened discovery traditionally claim will result therefrom: namely, increased fairness and improved efficiency. On the fairness side, while advocates of wider federal discovery cannot colorably assert that federal criminal trials are unfair in a constitutional sense, they maintain that earlier access to government witness lists and statements promotes fairness and accurate factfinding by allowing more time for legitimate preparation of the defendant's case. For example, they would argue, if a defendant does not learn, until the time of his or her testimony, of the identity of a government witness who allegedly saw the defendant commit the crime, the defense has no reasonable opportunity to delve into that witness! background, not only to test such obvious things as the quality of the person's vision, but also to investigate whether the person is in some indirect way related to and biased against the defendant or has ever suffered from medical or mental problems that might increase the risk of a mis-identification. While a continuance may be sought, its grant is a matter of discretion and in any event the length of any continuance, with a jury having been selected, is likely to be far less than the time afforded the defendant by a pretrial disclosure. On the other hand, it should be noted that the proponents claim of enhanced fairness and factfinding resulting from earlier access to government witnesses and prior statements is not unchallenged. The Department of Justice has consistently testified regarding its fear that unscrupulous defendants and/or their counsel will misuse the earlier access to government withesses and statements to tailor or manipulate their strategy to avoid conviction. As stated in the 1975 Congressional testimony of them and currently Acting Assistant Attorney General Keeney (appended hereto; p.17):

Fairness requires giving defendants advance notice of the facts the government intends to prove, and fairness and the practicalities of the situation justify giving defendants advance opportunity to examine documentary and physical evidence ... as currently provided for in rule 16. But fairness is due the government, too. Fairness is not safeguarding defendants from tripping themselves up. Fairness is not affording defendants time at their leisure to shape their tactics and defenses to fit every configuration of the government's case; or, to forego defenses, and ponder the opportunities of cultivating reasonable doubt.

These concerns were echoed recently in several of the comments received from United States Attorneys' Offices when the Wilson/Saltzburg proposal was circulated. 12

Also on the benefit side, the claim is that pretrial access to government witness lists and statements will bring about greater efficiency in the disposition of criminal cases, by facilitating guilty pleas and, in the event of trial, by eliminating the need in many instances for a continuance. While it seems undeniable that in cases that go to trial adoption of broader Rule 16 discovery along the lines proposed will obviate the need for continuances based on the government's presentation of a "surprise" witness, the fact is that only a small percent of federal criminal cases go to trial; 13 and for those that do not, the claimed increase in and for those that do not, the claimed increase in efficiency from wider Rule 16 discovery of government witnesses and statements is highly questionable. Far from leading to more and quicker guilty pleas, adoption of such a proposal might actually delay the entry of such pleas at least where the proposal (as is the case with the Wilson/Saltzburg amendment) calls for disclosure a fixed number of days before the scheduled trial date. unusual circumstances, no defense counsel operating under such a Rule would opt to have his or her client plead guilty until seeing the government's witness list and being provided with their prior statements. Accordingly, most plea negotiations could not be finalized, or even begun in some situations, until shortly before the trial was due to start. Moreover and ironically, the shorter the time period before trial in which the discovery must take place (a feature included in many Rule 16 proposals as one method of reducing the risk of harm to prospective government witnesses), 14 the worse the impact on efficiency from the standpoint of plea entry and negotiation.

Wholly apart from the effect on the timeliness of pleas, adoption of Rule 16 changes of the sought proposed will inevitably lead to increased litigation thus diminishing or eliminating whatever efficiency gains are achieved at the trial from a reduced need for continuances. One need only look at the civil side of the

The Department's concern does not rest primarily on the possibility that witness statement disclosure pretrial may facilitate perjury by the defendant, although that is certainly also a debatable proposition.

¹³ United States Sentencing Commission, 1992 Annual Report, p.54.

¹⁴ See, e.g. the three-days before trial period adopted by the House of Representatives in 1975 during consideration of the Judicial Conference proposal.

docket to see the dramatic litigation explosion inherent in liberal discovery. While it is true that no one is talking, in terms of the present proposals, about such civil discovery devices as interrogatories and depositions of witnesses, even the pending proposals have a significant potential for increased litigation and delay. For example, litigation will inevitably ensue when the government seeks to put on a witness whose name was not disclosed pretrial to the defendant. This can be expected to occur with some frequency because many witnesses are only debriefed by busy prosecutors a few days before trial, and such debriefings may cause new witnesses to become known to the prosecutor only shortly before trial (or even, in a lengthy trial, after the trial has commenced). Nevertheless, the defendant will contend that the government either acted in bad faith or failed to exercise due diligence in learning of the witness sufficiently before trial to comply with the Rule. Also, the government may occasionally inadvertently fail to list a witness. Litigation will then take place as to the remedy for this witness. Litigation will then take place as to the remedy for this "violation", with the defendant inevitably arguing for preclusion of the witness' testimony and/or on appeal for a new trial if the testimony is allowed. The reach fruit reser with a get our

Lastly, from the proponents' perspective, the contention must be examined that -- as Mr. Wilson eloquently expounded before the Advisory Committee -- in the federal justice system it is anomalous that criminal discovery is so much narrower than that in civil cases. Is there an anomaly? The argument "for" proceeds from various assumptions. In essence, these are that broad discovery is good because it promotes fairness and efficiency (claims just examined, <u>ante</u>); that these benefits (of pretrial access to the identities and prior statements of prospective witnesses), as well as many others in the discovery arena, are available to the parties in civil cases, which involve mostly disputes about property; that criminal cases, which involve liberty interests, are even more important yet these self-same discovery benefits are not available to the person whose liberty is at stake; and "therefore" that the lack of such benefits to criminal defendants is unjustified. One may agree, as a general proposition, that criminal cases are more significant than civil cases without, however, accepting the conclusion. As discussed above, the premise that broader discovery in the form of increased pretrial access to government witness lists and statements is to be associated with increased fairness and efficiency is open to serious dispute. Moreover, there are substantial differences in criminal cases that undermine the claim of "anomaly". First, while it is often said that the basic goal of a trial is to ascertain "the truth", the guest therefor in criminal cases is largely one-sided. It is the government, representing the people, that seeks the truth. The defendant seeks only to be acquitted, and the Constitution aids him in this effort through certain doctrines and provisions that are in derogation of the search for truth and that have no application in civil litigation. The Fifth Amendment privilege against self-incrimination and the Fourth Amendment exclusionary rule (to mention only two) are in

this category. Thus, it is somewhat misleading to argue that the defendant in a criminal case deserves greater discovery opportunities because to do so will further the search for truth, when most defendants have no interest in the truth being found by the trier of fact. Second, the danger of witness intimidation or reprisal, or of obstruction of justice, is far less in civil cases than in criminal. Precisely because the stakes are higher for the criminal defendant, the risks of affording him or her earlier access to witness identities are heightened. The asserted "anomaly" of disparate degrees of discovery between civil and criminal cases is therefore unfounded or at best unproven.

2. A critical examination of claimed disadvantages from amending Rule 16 in the manner proposed.

Witness Safety Concerns.

Leaving aside the Wilson/Saltzburg proposal, the principal concern expressed by those opposed to past proposals to amend Rule 16 to require pretrial disclosure of witness' identities was fear that such a change would result in physical harm to witness and others and efforts to obstruct justice. ¹⁵ Is this a valid If so, it would appear to be an extremely powerful concern? argument against requiring such disclosures, since it is difficult at best to make the case that some increase in the fairness of (admittedly constitutionally fair) trials and in their efficiency, even if assumed arguendo to result from the disclosure, is worth a higher cost in human life and limb to witnesses and other innocent Those who argue that proposals like the Judicial Conference's 1974 amendment to require the disclosure of government witness lists will cost lives essentially contend that prosecutors must be able to rely on unarticulable hunches or modicums of facts, which a court might not recognize as sufficient to meet a legal standard, for denying pretrial discovery. The legal backdrop for this contention is Rule 16(d). That Rule contains a mechanism, asserted by proponents of witness list and statement discovery as sufficient to safeguard prosecutors' legitimate concerns for witness safety and obstruction of justice, that permits a court -as to any discovery required by the Rule -- at any time upon "a sufficient showing" to issue a protective "order that the discovery ... be denied, restricted, or deferred". The court may allow for protective orders to be submitted <u>ex parte</u>. motions Prosecutors maintain, however, that this is not adequate to safequard witnesses because "sufficient showing" is too elastic a

¹⁵ As previously described, the Wilson/Saltzburg proposal responds to this concern by the unique device of having the prosecutor file an unreviewable statement of reasons for not including a particular witness' name or statement. Whether or not this mechanism succeeds in its goal or is otherwise problematic will be addressed later in the options part of this memorandum.

standard and gives courts wide discretion to deny an exemption. Some judges, although acting in perfect good faith, would if a Rule 16 amendment were adopted to mandate the provision of government witnesses lists and statements, make judgments under Rule 16(d) that are mistaken, with tragic consequences. Moreover, there will be instances in which the prosecutor has little more than a hunch, based on the type of offense and offender, that a witness life may be in jeopardy if his identity were prematurely revealed. In such a case, Rule 16(d)'s "sufficient showing" standard, however interpreted, could not be met. In this situation, it is argued, if the prosecutor is wrong and discovery is improperly denied, all that is lost is (arguably) a small measure of fairness and efficiency; but if the prosecutor is right, yet is compelled to make the disclosure, what is lost is the witness (or another person's such as the witness' spouse's or child's) <u>life</u>.

Therefore, prosecutors assert, paramount concerns for witness safety are unavoidably compromised if the decision whether or not to disclose their identities pretrial is transferred from prosecutors to the courts. Against this, advocates of witness list discovery have relied on three things -- one in the nature of a demurrer based on allegedly contrary State experience, and two consisting of additional procedural protections available under the proposal.

For their first point, discovery proponents assert that many States such as Florida have operated for years under laws that require the government to disclose pretrial the names and statements of its prospective witnesses, without an undue incidence of witness tampering or violence. Witnesses from such States have testified to this effect in hearings before Congress A Report of the Congress of the Congr

The first the special of the contract of the c

¹⁶ In 1974, the Note accompanying the proposed Rule 16 change to require disclosure of witness lists (but not statements) enumerated 22 States that had such requirements. Preliminary research has revealed no more recent compilation of such States, and time has not permitted me to conduct a survey of all 50 States to ascertain whether that number has increased or decreased since 1974. Likewise information is not readily available as to how many States require disclosure also of witness statements, but logic and intuition suggest that the number is smaller. For instance, Alaska and Kansas, which require witness list disclosure, have statutes like the Jencks Act which bar any requirement to provide witness statements until after direct examination.

The relevance of State experience, however, is questionable because States typically do not try the same kinds of cases. ¹⁷ A local grocery store robbery, for example, is not likely to involve the kind of defendant who would threaten or kill witnesses or seek to bribe a witness or juror. Federal criminal cases more frequently involve defendants who are liable to engage in such conduct. Moreover, the alleged State "experience" is not based on hard data, or at least none has been cited. The impressions of a few practitioners are not a substitute for a properly conducted study which would examine the comparative rates of witness intimidation between States which have witness list discovery and States which do not, or between the former and the Federal Government.

Second, proponents of Rule 16 change have asserted that witness safety concerns are largely satisfied by a provision in Rule 15, F.R. Crim. P., permitting the government to depose a prospective witness before trial. This, it is said, will remove the incentive to kill the witness since the deposition could then be admitted as former testimony. The threefold response is that (1) former testimony is not nearly as effective in most cases as live testimony; (2) deposing the witness does not prevent attempts to alter a witness' testimony through threats or violence; and (3) the "opportunity" to have the fearful witness appear for another proceeding — the deposition — in which the witness must confront the defendant is not an attractive one in many cases.

Lastly, advocates of Rule 16 witness list discovery have asserted that the insertion of a short time period before the scheduled start of trial will further reduce the risks to witnesses, since violence prone defendants will have only a brief opportunity to execute their plans and the government can take steps to protect a witness deemed vulnerable during this interval. Both the Wilson/Saltzburg amendment and the House-passed Rule 16 amendment in 1974 adopted this device. The twofold response is that (1) while limiting the time of disclosure to shortly before trial is of some help, it does not take long for a defendant minded to engage in threatening or violent behavior against a witness to implement this objective; and (2) scheduled trial dates often are extended for a variety of reasons; if this occurs after a witness

¹⁷ Abraham Laeser, Chief Assistant State Attorney for the area in Florida of which the present Attorney General was then the State Attorney, so testified in 1986 before the House Subcommittee on Criminal Justice. Mr. Laeser opined that Florida probably came closest to the Federal Government in dealing with numbers of violence prone defendants, but acknowledged that even that State's defendants as a whole were of a different ilk from those more dangerous individuals frequently prosecuted in the courts of the United States.

identity has been revealed, the witness will be in extended jeopardy.

Witness Privacy Concerns and Cooperativeness.

Even if concerns for the safety of witnesses and other persons, and for obstructive conduct, are wholly discounted or (as in the Wilson/Saltzburg proposal) sought to be accommodated in the proposal itself by preserving the current ability of prosecutors not to comply with the discovery rule when in their judgment to do so would endanger those interests, creation of a rule calling for pretrial disclosure of witness lists and statements inevitably undermines witness privacy and cooperativeness. The privacy concern is based on the belief that large numbers of people are unwilling witnesses. They would strongly prefer not to testify but, out of civic duty, will do so if necessary. Since more than 80% of indicted federal cases now do not go to trial but rather result in guilty pleas, 18 most of these prospective witnesses at present need not be identified to the defendant. They often do not fear physical harm, but fear adverse social consequences in their communities from testifying, or from being identified as having been willing to testify. They also may not wish to be approached by defense counsel seeking to interview them, and certainly would not be pleased at the opportunity such early identification will afford for the defense to investigate many aspects of their lives, such as credit ratings, employment, criminal background, medical records, etc., in an effort to develop impeaching material. If Rule 16, F.R. Crim. P. is changed to require their names to be divulged to the derense pretrial, not only will these legitimate privacy interests be infringed, the general willingness of persons to come forward and cooperate with law enforcement in criminal cases—already a severe problem in many communities—will be further eroded.

The only response to this concern is that such privacy and cooperativeness effects are a necessary cost of a fair and efficient criminal justice system. The benefits of witness list discovery, proponents would argue, outweigh these admittedly unpleasant aspects of allegedly being a person with information relevant to a criminal case.

3. <u>Differences between witness list only and witness list</u> plus witness statement discovery proposals; and the impact of Brady v. Maryland.

Heretofore, this part of the memorandum has set forth general considerations that pertain both to pretrial discovery proposals, like that of Judicial conference in 1974, that seek solely

THE PARTY OF THE P

¹⁸ A small but growing percentage also are not tried because the defendant becomes a fugitive.

disclosure by the government of a list of its prospective witnesses, and proposals like the pending Wilson/Saltzburg amendment, that seek not only that list but also discovery of the prior statements of such witnesses (in effect overruling the Jencks Act).

The case <u>for</u> the broader type of proposal is necessarily weaker than the case for witness list disclosure alone since, assuming the existence of witness list discovery, many of the arguments based on eliminating unfair surprise are no longer available, either at all or to the same degree, to support the extension of pretrial discovery to cover prior statements. At the same time, the case <u>against</u> requiring witness statement disclosure before trial is necessarily weaker since, on the same assumption of the existence of pretrial witness list discovery, many of the arguments based on concerns for witness safety and privacy, obstruction of justice, trial delay, and litigation (discussed <u>ante</u>) are no longer available, either at all or to the same degree, to oppose extension of discovery to encompass statements.

Nevertheless, important policy considerations for distinguishing the two types of proposals exist, considerations which, as previously noted, 19 have caused some States to accept the concept of witness list discovery but to balk at the notion of requiring early disclosure of witness statements (in effect endorsing the concept of the Jencks Act).

Before sketching these considerations, it is necessary to engage in a brief explanation of the doctrine of Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, since this subject has relevance to the government's provision to the defense of prior witness statements. Brady held that the suppression by the government of evidence favorable to an accused, after a defense request, violates due process irrespective of the prosecutor's good faith. In Giglio v. United States, 405 U.S. 150 (1972), the Court made clear that Brady applies to impeachment evidence if the reliability of the witness was material to the issue of guilt. The Brady doctrine, therefore, covers many prior witness statements and thus, as to its scope, occupies much the same ground as the Jencks Act. Although Brady has significant implications for discovery, it creates no discovery rule. 20 The essential difference revolves

¹⁹ See note 16, infra.

²⁰ Brady has been construed authoritatively not to mandate the pretrial disclosure by the government of the identities of its witnesses. Weatherford v. Bursey, 429 U.S. 545, 559-560 (1977) (upholding the use by the government of an undercover agent whom the prosecutor decided to have testify one day before trial after his undercover status was compromised, notwithstanding the agent's prior representation to the defendant that he would not be a

around the timing of disclosure. Brady, a doctrine of constitutional dimension, requires only that disclosure of potentially favorable evidence (e.g. a prior statement of a government witness containing some inconsistencies that could be used for impeachment) occur in sufficient time to permit its effective use by the defendant. While this may vary with the type of evidence, and some courts have required disclosure of Brady material pretrial, many courts have held that Brady is satisfied if disclosure occurs at trial. See Wright, Federal Practice & Procedure, § 254 (1982).

With this general background, we can now explore the policy considerations pertaining to the broader versus narrower types of pretrial discovery proposals. In essence, the arguments in favor of witness statement discovery embody the same sorts of perceived benefits and disadvantages as are advanced with respect to witness list discovery. Proponents of overturning the Jencks Act by a Rule 16 amendment maintain that to do so (even assuming the existence of witness list discovery) will enhance the fairness and efficiency of the criminal justice process. Fairness will be aided, the argument runs, because merely providing the identity of a government witness will not serve in all cases to alert the defendant to what he or she can expect from the witness at trial. For example, the witness may be someone who was a friend of the defendant and who the defense anticipates will be a reluctant or hostile witness for the prosecution. If, however, the witness has been cooperating with the government unbeknownst to the defendant and has given prior statements implicating him in the crime, such testimony could come as a considerable surprise, without a sufficient opportunity to explore -- except through spontaneous cross-examination -- possible explore — except through spontaneous cross—examination — possible motives (e.g. promises of immunity or to convey the witness cooperation to a probation officer, potential employer, etc.) that might detract from credibility, or to examine the prior statements thoroughly for any inconsistencies with known facts from the defendant's perspective. The same is true with regard to efficiency. Providing in Rule 16 for the pretrial disclosure of witness statements will, it is argued, improve efficiency by obviating the need for trial continuances and expediting plea negotiations. negotiations.

On the other hand, opponents will argue that (even assuming the existence of witness list discovery) mandating the government to reveal those witnesses' prior statements will, unless the prosecution is permitted in its sole discretion to exempt any statement from the general application of the rule, endanger witness safety. Although the defendant may know of a witness identity, the defendant may not be aware of the fact that the witness is prepared to give far more damaging testimony than anticipated. The example above is one such illustration; another

could involve a drug prosecution in which the defendant knows the government plans to call a witness because of certain general conversations that the defendant had with the witness relating to the defendant's alleged access to drugs. However, the defendant may not also know that the witness secretly observed the defendant actually sell drugs. In these types of cases, assuming prior statements have been given to federal agents outlining the full scope of the witness' prospective testimony, providing those statements to the defense before trial could furnish substantially greater incentive for the defendant to intimidate or harm the witness before trial. The same is true regarding the potential for subjecting prospective witnesses to privacy intrusions. If the witness was thought to be of minor importance, defense counsel may not bother to try to interview him or to delve into his background in an effort to unearth impeaching material. When made aware of the witness' real significance, however, those steps will likely be taken. Yet, if the defendant ultimately pleads guilty or becomes a fugitive before the witness testifies, the witness' privacy may have been compromised unnecessarily. to efficiency, opponents will point out that witness statement disclosure inevitably generates far more litigation than mere witness list disclosure, since there will be frequent occasions in which statements are inadvertently not disclosed.

C. OPTIONS

This portion of the memorandum explores some choices for the Department in responding to Chairman Hodges' letter to the Attorney General seeking our position on the Wilson/Saltzburg proposal or other alternatives. The discussion begins with options calling for acceptance of this proposal or others with similar objectives, and ends with a discussion of countervailing options in favor of outright opposition. Several intermediate options are also addressed. In each instance, the discussion is divided into "Arguments For" and "Arguments Against".

In order to keep the memorandum within reasonable boundaries, the "Arguments For" and "Arguments Against" will not reiterate the competing contentions that were discussed in the preceding part and that are generally applicable to the various options under consideration. Rather, the pros and cons set forth here will focus only upon option/specific considerations that have not previously been mentioned.

I. Accept the Wilson/Saltzburg amendment (or something similar thereto).

Arguments For

The principal argument for this proposal is that it is the only such proposal ever to have been offered that recognizes the legitimacy of the government's concerns for the safety of

witnesses and for the possibility of obstructionate conduct and accepts the principle that in order to satisfy those concerns the prosecutor must retain sole, unreviewable discretion not to reveal the identity or statement of a particular prospective witness.

Arguments Against (**) - 100 -

Despite its bow to witness safety and related concerns, this proposal cannot be seriously considered as it is replete with problems. Another option, to be discussed later, could expand discovery yet achieve the same goal of deference to prosecutorial discretion without the problems inherent in the Wilson/Saltzburg amendment. Among these problems are the following:

- 翻譯在海海上的時間與此中國主義 人名斯特斯特尔里 內部 人名英罗马特 经产工工厂 被重发人 计程序结片 电变电子 计算中华 1. The proposal s inclusion of a requirement that the government disclose coconspirator statements is unjustified and unrelated to the witness list and statement issue. The coconspirator statement provision is not predicated on considerations of reducing surprise since defendants can hardly be surprised to learn who their coconspirators are. Unless a coconspirator actually testifies for the government, in which event Rule 801(d)(2)(E) of the Federal Rules of Evidence is not implicated, his statements, in terms of pretrial discovery principles, are no different from other damaging evidence the government may have in its possession; and the proposal suggests no viable rationale why they should be provided pretrial to the defense. See In re United States, 834 F.2d 283 (2d Cir. 1987). In addition, this aspect of the proposal calls on the government to provide a "summary" of any such Rule 801(d)(e)(E) statements which the government does <u>not</u> intend to introduce. This requirement -- that a busy prosecutor create a document for the defendant -- is burdensome without cause. There is no reason to provide such a summary, assuming the statements are not potentially helpful to the defense. 21 The state of the s
- 2. The proposal fails in its apparent objective to eliminate altogether concerns for safety stemming from disclosure. For one thing, the proposal as drafted only allows the prosecutor to file a sealed statement of reasons for exempting a particular witness identity or statement when there is a good faith belief that "pretrial disclosure of some or all of [the required] information will pose a threat to the safety of witnesses" (emphasis supplied). Not uncommonly, however, the threat is not to the witness but to a member of his family or a loved one. Moreover, the proposal's requirement for unsealing and making public the statement of reasons at the conclusion of trial may occasionally present safety

²¹ If they are helpful, <u>Brady v. Maryland</u>, 373 U.S. 83 (1963), already requires their disclosure, although such disclosure could (as previously discussed) take place later than the seven days before trial required by the Wilson/Saltzburg proposal.

problems. For example, suppose there is an undercover agent in the case, whose testimony is not crucial but might be needed. Suppose further that, at the time discovery is required (seven days before trial), the government has made a decision to at least preserve the option of calling the agent as a witness, and therefore the prosecutor files a sealed statement identifying the agent and citing his undercover role as a reason for not disclosing his identity pretrial. During trial, the prosecutor determines that it is not necessary to call the witness, a decision influenced by the desire of the investigating agencies involved to continue to use his undercover capacity to pursue agent in In such a case, requiring that the prosecutor's investigations. statement of reasons become public at the conclusion of the trial could seriously endanger the undercover agent or at the least end his usefulness. While a Rule 16(d) protective order could be sought to postpone the unsealing of the reasons, such motions come with no quarantee that they will be granted.

- 3. The proposal will lead to litigation above and beyond that generally associated with witness list discovery. Specifically, the proposal does not foreclose litigation, which therefore can be anticipated, on the use by the government of the exception. Such a claim will doubtless be based on the allegation that a United States Attorney's Office is engaged in a pattern of non-compliance with the Rule. This allegation could be founded on no more than a superficial comparison with other Offices as to the frequency with which the exception is invoked. Responding to such allegations, even though unfounded, would be quite burdensome.
- 4. The proposal's lack of reciprocal discovery is unjustified. Prior proposals contained a reciprocity feature. The rationale provided in the draft explanatory Note to the proposal in this regard is unpersuasive. There is no reason why the defense could not simultaneously, or a few days later, be required to furnish a list of its prospective witnesses to the government.
- The proposal's effect on capital cases, specifically on 18 U.S.C. 3432 which (as discussed earlier) requires the government to furnish a list of its witnesses three days before trial, is problematic. By virtue of the supersession language in 28 U.S.C. 2072(b), a Rule such as the Wilson/Saltzburg amendment takes precedence over any earlier enacted, inconsistent statute. Thus, courts would have to determine whether the Rule 16 amendments embodied in the proposal were inconsistent with 18 U.S.C. 3432. The Note contains no basis for assuming awareness of or intention to supersede the statute. However, the Rule does not except capital cases and in some ways is more protective of the defendant than the statute in that it provides for seven-day rather than three-day notice of witness lists and for disclosure of witness It would be anomalous, according to this line of statements. argument, to have a less protective statute remain applicable in capital cases. On the other hand, the proposed Rule contains the

feature allowing the prosecutor to exempt any witness' name from the disclosure obligation. The statute, by contrast, allows for no exceptions. There is therefore substantial doubt whether the Rule is really more protective than the statute and whether it can be deemed to supersede it. In sum, the answer to the inconsistency/supersession issue is not clear and would generate considerable confusion and litigation.

- The proposal's timing is flawed. Making the defendant request discovery four weeks before trial is unrealistic, since often less then four weeks notice of a trial date is given. Likewise, requiring the government to make disclosure seven days before trial seems too long and would unduly expose witnesses to unanticipated harm. As just observed, Congress has determined in capital cases that three days before trial is sufficient, and this period was also adopted by the House of Representatives in 1975.
- The proposal does not insure that witness discovery will increase. Once it becomes known that the prosecutor may file a statement of reasons exempting any witness from having his or her identity be revealed to the defense pretrial, many prospective witnesses will allege fear and pressure the prosecutor to file a statement of reasons in their behalf. Since prosecutors are dependent on the goodwill of their witnesses, such importuning will be difficult to resist even when the prosecutor does not personally believe that the witness' safety (or that of any other person) is in Tachardy THE RESERVE OF THE RESERVE OF THE PROPERTY OF person) is in jeopardy.
- Lastly, the proposal is simply unwieldy. It reminds one of a Rube Goldbergian construct -- i.e., a needlessly convoluted mechanism to achieve a simple goal. The device of having the prosecutor file a sealed statement of reasons, which then becomes unsealed at the end of trial but whose contents cannot be reviewed, all in order to preserve prosecutorial control over the process while still putting pressure on the prosecutor to disclose witness identities and statements, is simply too cumbersome and burdensome. not only on prosecutors but on courts and court personnel responsible for the sealing and unsealing:
- Accept an amendment along the lines of that promulgated by the II. Judicial conference in 1974 and endorsed by the House of Representatives in 1975 to provide for pretrial disclosure of government witness lists (and possibly statements).

The state of the s

Arguments For

The arguments for such a proposal have been set forth in part
B of this memorandum.

in garaparanah militara Kalangaran garapa ing Kalangaran da kalangaran kanangan berangan berangan berangan ber

可以有效**,**最终,黑魔,使人,只是自然的解放射,因此是一个地震,这种一个人,一个人,是是一个人都是一个地方,只是一个人

Arguments Against

The arguments against this type of proposal have been mostly set forth in part B of this memorandum. In addition, consideration should be given to the political and institutional ramifications of endorsing this kind of proposal. Adoption of such a proposal would reverse one of the Department's most strongly and consistently asserted policy positions spanning many Administrations, both Republican and Democratic. The proposal was highly controversial in 1974 and remains so today. Indeed, with the rising incidence of federal prosecution of violence prone defendants facing lengthy jail sentences, concerns for the safety of potential government witnesses and their families, and for obstructionate conduct aimed at subverting the judicial process, are if anything greater now than they were a generation ago. Even if, therefore, the Department were not, as in 1974, to lead the battle against adoption of this proposal, it is very probable that its circulation to the bench and bar for comment 22 and its ultimate submission to Congress, if approved by the Judicial Conference and the Supreme Court, would ignite a fierce struggle to enact legislation to prevent the proposal from taking effect.

III. Support an amendment to require pretrial disclosure of witness lists (and possibly statements), but with a major exception for cases in which the defendant (or any of them in a multidefendant case) is charged with a kind of felony deemed to pose the greatest risk of obstructionate or violent conduct directed at prospective witnesses; or in the alternative, support an amendment to require pretrial discovery of witness lists (and possibly statements) only for defendants charged with enumerated, non-violent offenses.

Proposals along these lines could be devised in almost endless variations. One would be to exempt cases in which a defendant was charged with a "drug trafficking crime" or a "crime of violence" as those terms are defined in 18 U.S.C. 924(c). 23 Another would be to assume that a significant incentive for witness intimidation or endeavors to obstruct justice stems from the seriousness of the offense, and therefore to broaden the exemption to reach any case which includes a charge of a Class A or B felony, in addition to the preceding classes of offenses of drug trafficking and violent

1.30

25

²² By statute, all proposals for amending the Federal Rules of Criminal Procedure must follow a process involving their public dissemination for comment prior to a final meeting and vote being taken to send the proposal forward with a recommendation for adoption.

²³ Both definitions reach only felonies.

Still another alternative would be to enumerate only those offenses to which the discovery requirements would apply, such as non-violent offenses with no mandatory minimum prison sentence and a maximum sentence of five years or less.

Arguments For The principal argument for this type of proposal is that it strikes a proper balance between the interests served by pretrial witness list and statement discovery and the legitimate concerns for witness safety and obstruction of justice. The overwhelming majority of cases in which there is substantial fear of these activities occur in prosecutions in which the defendant is charged with a drug, violent, or other very serious felony. Accordingly, drawing the line in this way preserves the current state of the law, leaving it within the prosecutor's sole discretion whether to provide such pretrial discovery in these cases, while mandating such discovery (which would nevertheless be reciprocal and subject such discovery (which would nevertheless be reciprocal and subject to the possibility of a protective order under Rule 16(d)) in all other cases. Moreover the line drawn (wherever specifically chosen in terms of classes of offenses to which the Rule would apply) would be clear and easy to apply.

Arguments Against

While such a proposal would substantially curtail the concerns for witness safety and obstruction of justice, it would not eliminate them. There will always remain the class of prosecutions exemplified by the 1930s income tax case against Al Capone in which, due to the nature of the defendant, a significant risk to witnesses and the integrity of the judicial process exists. In those cases, the government would be forced to rely on the discretion of judges to grant protective orders, which many witnesses would not find satisfactory.

In addition, such a proposal could have an unwholesome effect on the Department's charging practices. Many prosecutors would be motivated to include a charge in the indictment that triggered the discovery exemption as a means of retaining control over the discovery process, as well as to satisfy the demands of prospective witnesses that (whether out of concern for safety or for privacy intrusions of the kind previously discussed) their names be kept from the defendant for as long as possible. Such a proposal would therefore require a high degree of supervision,

²⁴ class A felonies carry up to life imprisonment; Class B felonies carry twenty-five years or more in prison. 18 U.S.C. 3559(a) such felonies would include such non-violent, non-drug crimes as espionage, bank fraud, and engaging in a sexual act with a child.

which may not be practicable, over individual prosecutors' charging determinations.

IV. Accept a broad discovery amendment along the lines of that described in Option II, but with a provision allowing the prosecutor (or a supervisory level prosecutor) to overcome the rule by filing a non-litigable written declaration that to comply in a particular case would endanger witnesses or others or threaten the integrity of the trial (in the alternative, such a declaration would not have to exempt disclosure of every witness in the case but could be limited to a statement that there are some witnesses whose identities are not being disclosed for these reasons).

Arguments For

This proposal would preserve the prosecutor's control over the decision whether to provide witness list and statement discovery (as under present law) and would do so in a manner that is both simpler yet more complete than that provided in the Wilson/Saltzburg amendment.

Arguments Against

As with the Wilson/Saltzburg proposal, there is no assurance that such a Rule would lead to greater discovery, since witnesses would urge the prosecutor to file a declaration on their behalf. In the event no greater discovery resulted, the Rule would merely inflict on the system yet another burdensome document — the prosecutor's declaration. Such a system would be worse than the current Rule in which the prosecutor can achieve the same result, but without having to encumber the record with a written averral.

Moreover, the filing of such a declaration could prejudice the court (or create the appearance of prejudice) in the case. At present, the court at most knows only that the prosecutor has opted not to provide pretrial discovery. Under the proposed amendment, the court would be presented with a declaration indicating, in effect, that the government regards the defendant as a threat to witnesses or the integrity of the court's processes. While the same types of allegations occur when the government seeks pretrial detention on grounds of dangerousness, such motions are typically handled by magistrates and the court will be aware only that the defendant is detained or not detained.

v. <u>support a demonstration project in which one of the foregoing options is implemented in a very few districts for a limited period.</u>

Arguments For

A demonstration project would permit valuable experience to be gained, without risking permanent change in the Rules. Both the defense and prosecutorial sides are skeptical of many of each other's assumptions as to the benefits and harms that would result from adoption of witness list and statement discovery in the federal system. A demonstration project would test whether the various concerns, e.g. for witness safety, and tendency to tailor defenses, are real or not.

Arguments Against

Depending upon which option was selected for "demonstration", such a project could still subject many prospective witnesses to the dangers flowing from premature revelation of their identities to the defense, including intrusions on privacy and risk of life or bodily harm.

2000 A 100 A 100

Moreover applying one Rule in one district and a different Rule in another district is inherently unfair. The Rule would also be difficult to administer in view of the fact that often there is a wide choice of venues available to prosecute an offense. Prosecutors might be motivated in such cases to choose a venue that was not participating in the "demonstration", leading to defense claims of unfairness.

Finally, there is no mechanism under the Rules for instituting a demonstration project involving experimentation with a Rule that is at odds with the existing Rules. Such a proposal, therefore, would require promulgation of a new Rule (e.g. a "temporary" Rule 16A) or a statute. The former would be unprecedented and (in my judgment) unlikely to be adopted by the Judicial Conference, while the latter course of seeking legislation would likely not satisfy the proponents, who wish to keep control of the issue within the Rules Enabling Act process.

The Conference might well fear that allowing a demonstration project in one area would lead to a plethora of requests in other areas, e.g., for television in the courtroom, arraignments by video transmission, equalization or elimination of peremptory challenges, etc. — which could ultimately produce a crazy-quilt of differing procedures being applicable in different districts.

VI. Support an amendment to the United States Attorneys'
Manual stating a policy favoring witness list (and
possibly statement) disclosure in various types of nonviolent cases.

As with option III, the possible variations here are legion, but the central idea underlying this option is not to alter the Rules, which create legally enforceable rights, but to encourage more discovery through changes in the Department's internal policy.

Arguments For

This approach retains prosecutorial discretion over the disclosure decision while at the same time virtually assuring an increase in discovery by the government as desired by proponents.

Moreover, since Manual policies do not give rise to judicially enforceable rights, the proposal would not lead to burdensome litigation in those instances, e.g., in which a witness' name was inadvertently left off the list.

Arguments Against

Even assuming the new policy would be honored by prosecutors in the present Administration, Departmental policies are subject to change far more easily than Rules, and this one could be modified or reversed in a few years with the advent of a new Administration or even a new Attorney General in the same Administration.

Since the Manual creates no legal rights, there is no remedy to the defendant for failure to comply.

From the opposite perspective of discovery opponents, this option is objectionable because current Manual policy properly sets forth the competing interests. A change in that policy to encourage or require disclosure in certain classes of cases would be in derogation of the appropriate focus of the present policy on the paramount concern for the safety and privacy of witnesses.

VII. Oppose on the merits any alteration of Rule 16 to provide for witness list and statement discovery.

Arguments For

The arguments for this option are the arguments against options I through V and are not repeated here. This option is the only one consistent with longstanding Departmental views.

Arguments Against

The arguments against are the same as those in support of any of options I through V and are not repeated here.

VIII. Oppose any alteration of Rule 16 to provide for witness list and statement discovery as a misuse of the Rules Enabling Act process.

Arguments For

that, because of its The argument here is controversiality and importance to the federal justice system, an amendment of Rule 16, F.R. Crim.P., to require the government to furnish pretrial a list of its prospective witnesses (and possibly their statements) violates the spirit of the Rules Enabling Act. The Rules Enabling Act is presently codified in chapter 131 of title 28 (28 U.S.C. 2071 et seq.). The Act dates from the 1930s and delegates to the Supreme Court, acting through the Judicial Conferences and committees thereof, the authority to develop rules of practice and procedure for the federal courts. Once transmitted to Congress by the Supreme Court, a proposed new Rule or amendment takes effect after six months unless Congress enacts a statute extending the time or modifying or disapproving the proposed change.

Past opponents of witness list discovery, including the Department, have argued that especially in the aftermath of the 1974-1975 experience with such a proposal, the Rules Enabling Act process should not be utilized to seek this result; rather the effort should be pursued in Congress directly through legislation. Central to this position is the belief that the Rules Enabling Act was designed to provide a mechanism for development (and evolutionary modification) of detailed rules governing day to day litigation in the federal courts, with which Congress -- because of its focus on matters of great public importance -- would likely not have the institutional will or the expertise to address. Under this theory, however, Congress did not intend for the Supreme Court to use the Enabling Act process to promulgate rules that, although procedural in nature, implicate important and highly controversial justice issues. The importance and controversiality of this issue having been demonstrated in 1974 and 1975, the argument continues, it would be a misuse of the process for proponents once again to transmit an amendment which they know will likely cause Congress to have to respond with hearings and, possibly, with legislation rejecting or mod fying the amendment. In short, the argument concludes, congress is aware of this issue and yet has chosen in recent years not to adopt any proposal to require pretrial disclosure by the government of its prospective witnesses. It is inappropriate, therefore, in effect to force Congress to reconsider the matter through a Rules amendment, and to use the Enabling Act

process to gain an advantage whereby opponents will have to muster a Congressional majority to overturn the proposal.

Arguments Against

Nothing in the Rules Enabling Act indicates that it was intended only for Rules of a humdrum nature. A similar argument was rejected by the Supreme Court in <u>Sibbach</u> v. <u>Wilson & Co.</u>, 312 U.S. 1 (1941), as to the original Act. Moreover, the Act was most recently overhauled in 1988, after the 1974-1975 experience with the witness list discovery issue, and shortly after 1986 hearings on the same subject. Yet Congress made no changes in the statute to curtail its application. Thus, using the Enabling Act process to promote this or any other controversial proposal violates neither the letter nor the spirit of the law.

²⁶ In fact, Congress repealed a provision in the then existing Enabling Act relating to rules of procedure after verdict that prohibited the Court from promulgating a rule to abridge the power of an accused to apply for withdrawal of a plea of guilty in certain circumstances. See former 18 U.S.C. 3772.

Subdivision (e) also makes clear that the deposition can be used as affirmative evidence whenever the witness is available but gives testimony inconsistent with that given in the deposition. A California statute which contained a similar provision was held constitutional in California v. Green, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). This is also consistent with section 801(d)(1) of the Rules of Evidence for United States Courts and Magistrates (Nov. 1971).

Subdivision (f) is intended to insure that a record of objections and the grounds for the objections is made at the time the deposition is taken when the witness is available so that the wifness can be examined further, if necessary, on the point of the objection so that there will be an adequate record for the court's later ruling upon the objection.

Subdivision (g) uses the "unavailability" definition of the Rules of Evidence for the United States Courts and Magistrates 804(a) (Nov

Subdivision (ii) is intended to make clear that the court always has authority to order the taking of a deposition, or to allow the use of a deposition, where there is an agreement of the parties to the taking or to the use.

Rule 16.

DISCOVERY AND INSPECTION

- (a) Disclosure of evidence by the government.
- (1) Information subject to disclosure.
- (A) Statement of defendant. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph: any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. Where the defendant is a corporation, partnership, association, or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a grand jury who was, at the time either of the charged acts or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind the defendant in respect to the activities involved in the charges.

Cite as 62 F.R.D. 271

- (B) Defendant's prior record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is then available to the attorney for the government.
- (C) Documents and tangible objects. Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant.
- (D) Reports of examinations and tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government.
- (E) Government witnesses. Upon request of the defendant the government shall furnish to the defendant a written list of the names and addresses of all government witnesses which the attorney for the government intends to call in the presentation of the case in chief together with any record of prior felony convictions of any such witness which is within the knowledge of the attorney for the government. When a request for discovery of the names and addresses of witnesses has been made by a defendant, the government shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.
- (2) Information not subject to disclosure. Except as provided in paragraphs (A), (B), and (D) of subdivision (a) (1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.
- (3) Grand jury transcripts. Except as provided in Rule 6 and subdivision (a) (1) (A) of this rule, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.

- (4) Failure to call witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call the witness.
 - (b) Disclosure of evidence by the defendant.
 - (1) Information subject to disclosure.
- (A) Documents and tangible objects. Upon request of the government, the defendant shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.
- (B) Reports of examinations and tests. Upon request of the government, the defendant shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to his testimony.
- (C) Defense witnesses. Upon request of the government, the defendant shall furnish the government a list of the names and addresses of the witnesses he intends to call in the presentation of the case in chief. When a request for discovery of the names and addresses of witnesses has been made by the government, the defendant shall be allowed to perpetuate the testimony of such witnesses in accordance with the provisions of Rule 15.
- (2) Information not subject to disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, his agents or attorneys.
- (3) Failure to call witness. The fact that a witness' name is on a list furnished under this rule shall not be grounds for comment upon a failure to call a witness.
- (c) Continuing duty to disclose. If, prior to or during trial, a party discovers additional evidence or material previously re-

Cite as 62 F.R D. 271

quested or ordered, which is subject to discovery or inspection under this rule, or the identity of an additional witness or witnesses, he shall promptly notify the other party or his attorney or the court of the existence of the additional material or witness.

(d) Regulation of discovery.

- (1) Protective orders. Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon request by a party the court shall permit the party to make such showing, in whole or in part, in the form of a written statement to be inspected by the judge alone. If the court enters an order granting relief following such a showing, the entire text of the party's statement shall be sealed and preserved in the records of the court to be made available to the appellate court in the event of an appeal.
- (2) Failure to comply with a request. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances. The court may specify the time, place and manner of making the discovery and inspection and may prescribe such terms and conditions as are just.
- (e) Alibi witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

Advisory Committee Note

Rule 16 is revised to give greater discovery to both the prosecution and the defense. Subdivision (a) deals with disclosure of evidence by the government. Subdivision (b) deals with disclosure of evidence by the defendant. The majority of the Advisory Committee is of the view that the two—prosecution and defense discovery—are related and that the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution.

The draft provides for a right of prosecution discovery independent of any prior request for discovery by the defendant. The Advisory Committee is of the view that this is the most desirable approach to prosecution discovery. See American Bar Association, Standards Relating to Discovery and Procedure Before Trial, pp. 7, 43–46 (Approved Draft, 1970).

The language of the rule is recast from "the court may order" or "the court shall order" to "the government shall permit" or "the

Limiting the rule to situations in which the defendant can show that the evidence is material seems unwise. It may be difficult for a defendant to make this showing if he does not know what the evidence is. For this reason subdivision (a)(1)(C) also contains language to compel disclosure if the government intends to use the property as evidence at the trial or if the property was obtained from or belongs to the defendant. See ABA Standards Relating to Discovery and Procedure Before Trial \$ 2.1(a)(v) and Commentary pp. 68-69 (Approved Draft, 1970). This is probably the result under old rule 16 since the fact that the government intends to use the physical evidence at the trial is probably sufficient proof of "materiality." C. Wright, Federal Practice and Procedure: Criminal \$ 254 especially n. 70 at p. 513 (1969, Supp.1971). But it seems desirable to make this explicit in the rule itself.

Requiring disclosure of documents and tangible objects which "were obtained from or belong to the defendant" probably is also making explicit in the rule what would otherwise be the interpretation of "materiality." See C. Wright, Federal Practice and Procedure: Criminal \$ 254 at p. 510 especially n. 58 (1969, Supp.1971).

Subdivision (a)(1)(C) is also amended to add the word "photographs" to the objects previously listed. See ABA Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(v) (Approved Draft, 1970).

Subdivision (a)(1)(D) makes disclosure of the reports of examinations and tests mandatory. This is the recommendation of the ABA Standards Relating to Discovery and Procedure Before Trial § 2.1 (a)(iv) and Commentary pp. 66-68 (Approved Draft, 1970). The obligation of disclosure applies only to scientific tests or experiments "made in connection with the particular case." So limited, mandatory disclosure seems justified because: (1) it is difficult to fest expert testimony at trial without advance notice and preparation; (2) it is not likely that such evidence will be distorted or misused if disclosed prior to trial; and (3) to the extent that a test may be favorable to the defense, its disclosure is mandated under the rule of Brady v. Maryland, supra.

Subdivision (a)(1)(E) is new. It provides for discovery of the names of witnesses to be called by the government and of the prior criminal record of those witnesses. Many states have statutes or rules which require that the accused be notified prior to trial of the witnesses to be called against him. See, e^-g_{st} Alaska R.Crim.Proc. 7(e); Ariz.R. CrimProc. 153, 17 A.R.S. (1956); Ark.Stat.Ann. § 43:1001 (1947); Cal.Pen.Code § 995(a) (West 1957); Colo.Rev.Stat.Ann. §§ 39-3-6, 39-4-2 (1963): Fla.Stat.Ann. \$ 906.29 (1944); Idaho Code Ann. \$ 19-1404 (1948); III.Rev.Stat. ch. 38, § 114-9 (1970); Ind.Ann.Stat. § 9-903 (1956), IC 1971, 35-1-16-3; Iowa Code Ann. § 772.3 (1950); Kan.Stat. Ann. \$ 62-931 (1964); Ky.R.Crim.Proc. 6.08 (1962); Mich.Stat.Ann. \$ 28.980, M.C.L.A. \$ 767.40 (Supp.1971); Minn.Stat.Ann. \$ 628.08 (1947); Mo.Ann.Stat § 545.070 (1953); Mont.Rev.Codes Ann. § 95-1503 (Supp. 1969); Neb.Rev.Stat. § 29-1602 (1964); Nev.Rev.Stat. § 173.015 (1967); Okl.Stat. fit. 22, § 384 (1951); Ore.Rev.Stat. § 132.580 (1969); Tenn. Code Ann. § 40-1708 (1955); Utah Code Ann. § 77-20-3 (1953). For examples of the ways in which these requirements are implemented, see State v. Mitchell, 181 Kan. 193, 310 P.2d 1003 (1957); State v.

一种,是许

Cite as 62 F.R.D. 271

Parr, 129 Mont. 175, 283 P.2d 1086 (1955); Phillips v. State, 157 Neb. 419, 59 N.W.2d 598 (1953).

Witnesses' prior statements must be made available to defense counsel after the witness testifies on direct examination for possible impeachment purposes during trial; 18 U.S.C. § 3500.

The American Bar Association's Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(i) (Approved Draft, 1970) require disclosure of both the names and the statements of prosecution witnesses. Subdivision (a)(1)(E) requires only disclosure, prior to trial, of names, addresses, and prior criminal record. It does not require disclosure of the witnesses' statements although the rule does not preclude the parties from agreeing to disclose statements prior to trial. This is done, for example, in courts using the so-called "omnibus hearing."

Disclosure of the prior criminal record of witnesses places the defense in the same position as the government, which normally has knowledge of the defendant's record and the record of anticipated defense witnesses. In addition, the defendant often lacks means of procuring this information on his own. See American Bar Association Standards Relating to Discovery and Procedure Before Trial § 2.1(a)(vi) (Approved Draft, 1970).

A principal argument against disclosure of the identity of witnesses prior to trial has been the danger to the witness, his being subjected either to physical harm or to threats designed to make the witness unavailable or to influence him to change his testimony. Discovery in Criminal Cases, 44 F.R.D. 481, 499–500 (1968); Ratnoff, The New Criminal Deposition Statute in Ohio—Help or Hindrance to Justice?, 19 Case Western Reserve L.Rev. 279, 284 (1968). See, e. g., United States v. Estep, 151 F.Supp. 668, 672–673 (N.D.Tex.1957):

"Ninety per cent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have his life protected there won't be many informers hereafter."

See also the dissenting opinion of Mr. Justice Clark in Roviaro v. United States, 353 U.S. 53, 66-67, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957). Threats of market retaliation against witnesses in criminal antitrust cases are another illustration. Bergen Drug Co. v. Parke, Davis & Company, 307 F.2d 725 (3d Cir. 1962); and House of Materials, Inc. v. Simplicity Pattern Co., 298 F.2d 867 (2d Cir. 1962). The government has two alternatives when it believes disclosure will create an undue risk of harm to the witness: It can ask for a protective order under subdivision (d)(1). See ABA Standards Relating to Discovery and Procedure Before Trial § 2.5(b) (Approved Draft, 1970). It can also move the court to allow the perpetuation of a particular witness's testimony for use at trial if the witness is unavailable or later changes his testimony. The purpose of the latter alternative is to make pretrial disclosure possible and at the same time to minimize any inducement to use improper means to force the witness either to not show up or to change his testimony before a jury. See rule 15.

Subdivision (a)(2) is substantially unchanged. It limits the discovery otherwise allowed by providing that the government need not 62 FR D.—201/2

A STATE OF STATE , A tel MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Possible Amendment to Rule 16 Re Sentencing

Information

DATE: September 4, 1993

As noted in an attached memo from Mr. John Rabiej, there are pending amendments to the Commentary for § 6B1.2 of the Sentencing Guidelines (Policy Statement on Standards for the Acceptance of Plea Agreements). The Commission recommends that before the defendant enters a plea, the government should disclose information relevant to the sentencing guidelines. The commentary notes, however, that the recommendation is not intended to confer any substantive rights upon the defendant.

The change is apparently intended to "encourage plea negotiations that realistically reflect probably outcomes."

The issue before the Committee is whether it should consider amendments to Rule 16, Rule 11, or some other rule which would codify this recommendation.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

L. RALPH MECHAM DIRECTOR

JAMES E. MACKLIN, JR. DEPUTY DIRECTOR

WASHINGTON, D.C. 20544

JOHN K. RABIEJ CHIEF, RULES COMMITTEE SUPPORT OFFICE

August 9, 1993

MEMORANDUM TO PROFESSOR DAVID A. SCHLUETER

SUBJECT: Sentencing Guideline Recommendation

I am attaching a copy of a soon-to-be-released amendment to the commentary on §6B1.2 of the Sentencing Guidelines, Standards for Acceptance of Plea Agreements (Policy Statement). The amendment may be relevant to the committee's consideration of Criminal Rule 16. My understanding is that the amendment will be issued and published by the Sentencing Commission in the next few months.

My copy of the commentary is nearly illegible and is reproduced below for your convenience:

The Commission encourages the prosecuting attorney prior to the entry of a guilty plea or nolo contendere plea under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offense and offender characteristics, then known to the prosecuting attorney, that are relevant to the application of the sentencing guidelines. This recommendation, however, shall not be construed to confer upon the defendant any right not otherwise recognized in law.

John K. Robin

John K. Rabiei

Attachment

Honorable Robert E. Keeton

Honorable Alicemarie H. Stotler

Honorable William Terrell Hodges

Honorable D. Lowell Jensen

2022731826



United States Sentencing Commission May 4, 1993

Official text of the amendments submitted to Congress can be found in the May 6, 1993, edition of the <u>Federal Register</u> (Vol. 58, No. 86, Part V)

AMENDMENT 22

§6B1.2. Standards for Acceptance of Plea Agreements (Policy Statement)

Commentary

The Caminissian encourages the protecuting atomery prior to the entry of a guilty plea or noto contendere plea under Rule 11 of the Federal Rules of Criminal Procedure to disclose to the defendant the facts and circumstances of the offence and offender characteristics, then known to the proventing atomey, that are relevant to the application of the sentencing guidelines. This recommendation, however, shall not be construed to conferupon the defendant any open not otherwise recognized on law.

Reason for Amendment: This amendment adds commentary to this policy statement recommending that the prosecuting attorney disclose to the defendant the facts and circumstances of the offense and offender characteristics then known to the prosecuting attorney that are relevant to the application of the guidelines in order to encourage plea negotiations that realistically reflect probable outcomes.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Amendment to Rule 40: Use of FAX'd Certified

Copies of Warrants.

DATE: September 4, 1993

Magistrate Judge Wm. Wade Hampton from Gainesville, Florida, indicates in the attached letter that the rules currently do not provide for use of facsimile copies of indictments, warrants, etc.

In an amendment currently pending before Congress, Rule 40(a) specifically provides that "The warrant or certified copy may be produced by facsimile transmission." An amendment to Rule 41 also included reference to fasimile transmissions.

At the time of those proposal several years ago, the Committee considered the possibility of amending other rules and decided to amend only Rules 40 and 41.

		•			
	,				en chi
					tolin i uz
				,	
					€ _{sect} i
					Constitution (
		•			
					-
2					
					100-4-1200

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES WASHINGTON, D.C. 20544

ROBERT E. KEETON CHAIRMAN

PETER G. McCABE SECRETARY CHAIRMEN OF ADVISORY COMMITTEES

Lile

KENNETH F RIPPLE APPELLATE RULES

SAM C. POINTER, JR. CIVIL RULES

WILLIAM TERRELL HODGES
CRIMINAL RULES

EDWARD LEAVY BANKRUPTCY RULES

March 24, 1993

Honorable William Wade Hampton United States Magistrate Judge for the Northern District of Florida P.O. Box 355 Gainesville, Florida 32602

Re: Proposed Amendments to the Federal Rules of Criminal Procedure

Dear Judge Hampton:

Thank you for your letter of February 15, 1993, on proposing changes to the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the Chairman of the Judicial Conference Advisory Committee on Criminal Rules for consideration.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe Secretary

cc: Honorable Robert E. Keeton Honorable William Terrell Hodges William R. Wilson, Esquire Professor David A. Schlueter

WM. WADE HAMPTON UNITED STATES MAGISTRATE JUDGE FOR THE NORTHERN DISTRICT OF FLORIDA Post Office Box 355 Gainesville, Florida 32602

February 15, 1993

Mr. Peter McCabe, Secretary Committee on Rules of Practice and Procedure Judicial Conference of the United States Washington, DC 20544

Dear Peter:

Many times Magistrate Judges have to hold up a hearing or reschedule hearing awaiting Certified copies of indictments, warrants of arrest or other instruments.

We receive FAX copies showing these instruments were certified at place of issuance. However, we cannot, under present Rules, use them as Certified copies.

I suggest a possible rule change. Issuing office FAX instrument showing it is Certified (transmittal and instrument). Receiving court office re-certify and instrument be allowed for use at a hearing as certified. However, original certifying office on transmittal should show certified copies being sent by regular mail.

Sincerely.

Wade

Wm. Wade Hampton

(CR)

WWH/er

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Change to Rule 41: Deletion of Limits on

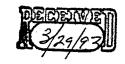
Authority to Issue Warrants Within District

DATE: September 6, 1993

Mr. J.C. Whitaker, an employee with Federal law enforcement agency, has suggested that Rule 41 be amended to delete the territorial limitations which currently appear in the rule. He notes that the rule as written creates hardships on law enforcement personnel who must often travel to another district to obtain a warrant.

In 1990, Rule 41(a) was amended to provide for warrants for property which might be moving out of one district into another. As I recall, in the process of amending the rule there was brief consideration of whether the territorial limits of the rule should be eliminated. For example, Rule 4 provides that an arrest warrant may be executed at "any place within the jurisdiction of the United States." But in the end, the amendment retained the nexus requirement; at some point, the property or person had, or would have, some connection with the district wherein the issuing authority was situated.

If the Committee is interested in considering the suggested amendment, I would draft suggested language for the Spring meeting.



227 North Bronough St. Suite 3086 Tallahassee, Fl. 32301 March 22, 1993

Honorable WILLIAM J. HODGES Chairman, Criminal Rules Advisory Committee Committee on Rules of Practice and Procedure of Judicial Conference of the U.S. Washington, D.C. 20544

Dear Mr. HODGES,

I have been employed with a Federal law enforcement agency for the past thirty five years.

The purpose of this letter is to request that you and your committee take a look at Rule 41 of the Federal Rules of Criminal Procedure. Rule 41, in part, states: "... a search warrant authorized by this rule may be issued (1) by a federal magistrate, or a state court of record within the federal district, for a search of property or for a person within the district and (2) by a federal magistrate for a search of property or for a person either within or outside the district if the property or person is within the district when the warrant is sought but might move outside the district before the warrant is executed." (emphasis added)

The requirement that a search warrant must be obtained in the district where the search is to be conducted creates hardships on Federal law enforcement. It is necessary that officers from one district, many times across country, furnish information to an officer in the district where the search is to be conducted in order that the application for search warrant be The officer requesting the search warrant and swearing to the affidavit is not familiar with the background of the case/investigation and is not in a position to answer questions raised by the Magistrate. It is not uncommon for one hundred per cent of the information in the affidavit to be third hand to the officer. The other alternative is for the officer who is familiar with the entire investigation to travel to the district where the warrant is to be obtained and executed. This officer then has to deal with the problems of preparing his affidavit to format demanded by the United States Attorney and Magistrate in that district. While there is a standard format, every district is different. In addition, each district has its own prosecutive guidelines. In this time of tight budgets and limited resources, what may be considered a significant matter in one district, may well be insignificant in another.

In addition, it is my understanding that there have been some recent cases involving obscenity and pornography where questions have been raised as to the qualifications of the magistrate to judge the community standard in another district where the crime is alleged to have occurred particularly when the area may be thousands of miles away.

What would be loss by obtaining the search warrant in the area where the offense occurred, by the officer conducting the investigation, from the court that will eventually have venue over the case when it is brought to trial?

Please take a look at Rule 41 and consider a revision that could be beneficial to all parties concerned.

Sincerely,

J. C. Whitaker

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

OF THE

JUDICIAL CONFERENCE OF THE UNITED STATES WASHINGTON, D.C. 20544

ROBERT E. KEETON CHAIRMAN

PETER G. McCABE SECRETARY CHAIRMEN OF ADVISORY COMMITTEES

KENNETH F. RIPPLE
APPELLATE RULES

EDWARD LEAVY BANKRUPTCY RULES

SAM C. POINTER, JR.
CIVIL RULES

WILLIAM TERRELL HODGES CRIMINAL RULES

March 30, 1993

RALPH K. WINTER, JR.

A STATE OF STATE OF

Mr. J. C. Whitaker 227 North Bronough Street Suite 3086 Tallahassee, Florida 32301

Re: Proposed Amendments to the Federal Rules of Criminal Procedure

Dear Mr. Whitaker:

Thank you for your letter of March 22, 1993, proposing changes to Rule 41 of the Federal Rules of Criminal Procedure. A copy of your letter will be sent to the chairman and reporter of the Judicial Conference Advisory Committee on Criminal Rules for consideration.

We welcome your comments and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe Secretary

CC: Honorable Robert E. Keeton
Honorable William Terrell Hodges
William R. Wilson, Esquire
Professor David A. Schlueter

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Possible Amendments to Rules Governing Section

2254 Cases in the United States Courts

DATE: September 7, 1993

As indicated in the attached memorandum, S. 1441 (Habeas Corpus Reform Act of 1993) would amend § 2242, et. seq. and would directly impact of the Rules governing § 2254 actions.

I understand that the Criminal Rules Committee is generally responsible for monitoring the Rules governing §§ 2254 and 2255 and that if the Act is passed, the Committee will have the task of recommending appropriate amendments to those rules.

Assuming S. 1441 is passed this Fall, amendments can be drafted and considered by the Committee at is Spring meeting.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

L. RALPH MECHAM DIRECTOR

JAMES E. MACKLIN, JR. DEPUTY DIRECTOR

WASHINGTON, D.C. 20544

JOHN K. RABIEJ CHIEF, RULES COMMITTEE SUPPORT OFFICE

August 11, 1993

MEMORANDUM TO JUDGE ROBERT E. KEETON

SUBJECT: S. 1441, Habeas Corpus Reform Act of 1993

I am attaching a copy of S. 1441, the "Habeas Corpus Reform Act of 1993" for your information. The bill was introduced on August 6, 1993, by Senator Biden. Unlike previous legislative attempts to amend the habeas corpus provisions, S. 1441 has a realistic chance of enactment. A copy of Senator Biden's remarks describing the new coalition supporting the bill is also attached.

S. 1441 would amend 28 U.S.C. § 2242 et seq. and would affect directly the Rules Governing Section 2254 Cases in the United States Courts. For example, the bill sets forth specific time deadlines for the filing of a petition and limitations on the filing of successive petitions, which are now covered under Rule 9. In addition, the bill includes provisions on amending and supplementing petitions that may affect the Rules.

The Senate returns on September 7, 1993. I will keep you apprised of developments.

John K. Rabiej

Attachment

cc: Honorable Alicemarie H. Stotler
Honorable William Terrell Hodges
Honorable Sam C. Pointer, Jr.
Honorable D. Lowell Jensen
Dean Daniel R. Coquillette
Professor David A. Schlueter
Dean Edward H. Cooper

103D CONGRESS 1ST SESSION

S. 1441

1.4、机能和原整型流流。

To reform habeas corpus.

IN THE SENATE OF THE UNITED STATES

AUGUST 6 (legislative day, June 30), 1993

Mr. Biden introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To reform habeas corpus.

- 1 Be it enacted by the Senate and House of Representa-
- 2 tives of the United States of America in Congress assembled,
- 3 SECTION 1. SHORT TITLE.
- This Act may be cited as the "Habeas Corpus Reform
- 5 Act of 1993".
- 6 SEC. 2. FILING DEADLINES.
- 7 (a) IN GENERAL.—Section 2242 of title 28, United
- 8 States Code, is amended—
- 9 (1) by amending the heading to read as follows:

1	"§ 2242. Filing of habeas corpus petition; time re-
2	quirements; tolling rules";
3	(2) by inserting "(a)(1)" before the first para-
4	graph, "(2)" before the second paragraph, "(3)" be-
5	fore the third paragraph, and "(4)" before the
6	fourth paragraph;
7	(3) by amending the third paragraph, as des-
. 8	ignated by paragraph (3), to read as follows:
9	"(3) Leave to amend or supplement the petition shall
10	be freely given, as provided in the rules of procedure appli-
11	cable to civil actions."; and
12	(4) by adding at the end the following new sub-
13	sections:
14	"(b) An application for habeas corpus relief under
15	section 2254 shall be filed in the appropriate district court
16	not later than 180 days after—
17	"(1) the last day for filing a petition for writ
18	of certiorari in the United States Supreme Court on
19	direct appeal or unitary review of the conviction and
20	sentence, if such a petition has not been filed within
21	the time limits established by law;
22	"(2) the date of the denial of a writ of certio-
23	rari, if a petition for a writ of certiorari to the high-
24	est court of the State on direct appeal or unitary re-
25	view of the conviction and sentence is filed, within

	the time limits established by law, in the United
-	States Supreme Court; or
-	"(3) the date of the issuance of the mandate of
2	•
4	for a writ of certiorari the Supreme Court grants
6	the writ and disposes of the case in a manner that
7	leaves the sentence undisturbed.
8	"(c)(1) Notwithstanding the filing deadline imposed
9	by subsection (b), if a petitioner under a sentence of death
10	has filed a petition for post-conviction review in State
11	court within 270 days of the appointment of counsel as
12	required by section 2258, the petitioner shall have 180
13	days to file a petition under this chapter upon completion
14	of the State court review.
15	"(2) The time requirements established by subsection
16	(b) shall not apply unless the State has provided notice
17	to a petitioner under sentence of death of the time require-
18	ments established by this section. Such notice shall be pro-
19	vided upon the final disposition of the initial petition for
20	State post-conviction review.
21	"(3) In a case in which a sentence of death has been
22	imposed, the time requirements established by subsection
23	(b) shall be tolled—

1	"(A) during any period in which the State has
2	failed to appoint counsel for State post-conviction re-
3	view as required in section 2258;
4	"(B) during any period in which the petitioner
5	is incompetent; and
6	"(C) during an additional period, not to exceed
7	60 days, if the petitioner makes a showing of good
8	cause.
9	"(d)(1) Notwithstanding the filing deadline imposed
10	by subsection (b), if a petitioner under a sentence other
11	than death has filed—
12	"(A) a petition for post-conviction review in
13	State court; or
14	"(B) a request for counsel for post-conviction
15	review,
16	before the expiration of the period described in subsection
17	(b), the petitioner shall have 180 days to file a petition
18	under this chapter upon completion of the State court re-
19	view.
20	"(2) The time requirements established by subsection
21	(b) shall not apply in a case in which a sentence other
22	than death has been imposed unless—
23	"(A) the State has provided notice to the peti-
24	tioner of the time requirements established by this
25	section and of the availability of counsel as described

1	in subparagraph (B); such notice shall be provided
2	
3	
4	
5	
6	
7	
8	
9	filing a request for counsel for State post-conviction
10	review; and
11	"(B)(i) the State provides counsel to the peti-
12	tioner upon the filing of a request for counsel for
13	State post-conviction review; or
14	"(ii) the State provides counsel to the peti-
15	tioner, if a request for counsel for State post-convic-
16	tion review is not filed, upon the filing of a petition
17	for post-conviction review.
18	"(3) The time requirements established by subsection
19	(b) shall be tolled in a case in which a sentence other than
20	death has been imposed—
21	"(A) during any period in which the petitioner
22	is incompetent; and
23	"(B) during an additional period, not to exceed
24	60 days, if the petitioner makes a showing of good
25	cause.

1	"(e) An application that is not filed within the time
2	requirements established by subsection (b) shall be gov-
3	erned by section 2244(b).".
4	(b) TECHNICAL AMENDMENT.—The chapter analysis
5	for chapter 153 of title 28, United States Code is amended
6	by amending the item relating to section 2242 to read as
7	follows:
	"2242. Filing of habeas corpus petition; time requirements; tolling rules.".
8	SEC. 3. STAYS OF EXECUTION IN CAPITAL CASES.
9	Section 2251 of title 28, United States Code, is
10	amended—
11	(1) by inserting "(a)(1)" before the first para-
12	graph and "(2)" before the second paragraph; and
13	(2) by adding at the end the following new sub-
14	sections:
15	"(b) In the case of a person under sentence of death,
16	a warrant or order setting an execution shall be stayed
17	upon application to any court that would have jurisdiction
18	over a habeas corpus petition under this chapter. The stay
19	shall be contingent upon the exercise of reasonable dili-
20	gence by the applicant in pursuing relief with respect to
21	the sentence and shall expire if—
22	"(1) the applicant fails to file for relief under
23	this chapter within the time requirements estab-
24	lished by section 2242;

1	"(2) upon completion of district court and court
2	of appeals review under section 2254, the application
3	is denied and—
4	"(A) the time for filing a petition for a
5	writ of certiorari expires before a petition is
6	filed;
7	"(B) a timely petition for a writ of certio-
8	rari is filed and the Supreme Court denies the
9	petition; or
10	"(C) a timely petition for certiorari is filed
11	and, upon consideration of the case, the Su-
12	preme Court disposes of it in a manner that
13	leaves the capital sentence undisturbed; or
14	"(3) before a court of competent jurisdiction, in
15	the presence of counsel, and after being advised of
16	the consequences of the decision, the applicant com-
17	petently and knowingly waives the right to pursue
18	habeas corpus relief under this chapter.
19	"(c) If any 1 of the conditions in subsection (b) has
20	occurred, no Federal court thereafter shall have the au-
21	thority to enter a stay of execution unless the applicant
22	has filed a habeas corpus petition that satisfies, on its
23	face, section 2244(b) or 2256. A stay granted pursuant
24	to this subsection shall expire if, after the grant of the

1	stay, 1 of the conditions specified in subsection (b) (2)
2	or (3) occurs.".
3	SEC. 4. LIMITS ON NEW RULES; STANDARD OF REVIEW.
4	(a) Limits on New Rules.—
5	(1) IN GENERAL.—Chapter 153 of Title 28,
6	United States Code, as amended by section 306(a),
7	is amended by adding at the end the following new
8	section:
9	"§ 2257. Law applicable
10	"(a) Except as provided in subsection (b), in a case
11	subject to this chapter, the court shall not announce or
12	apply a new rule to grant habeas corpus relief.
13	"(b) A court considering a claim under this chapter
14	shall apply a new rule when—
15	"(1) the new rule places a class of individual
16	conduct beyond the power of the criminal lawmaking
17	authority to proscribe or prohibits the imposition of
18	a certain type of punishment for a class of persons
19	because of their status or offense; or
20	"(2) the new rule constitutes a watershed rule
21	of criminal procedure implicating the fundamental
22	fairness and accuracy of the criminal proceeding.
23	"(c) As used in this section, a 'new rule' is a rule
24	that changes the constitutional or statutory standards

	9
1	that prevailed at the time the petitioner's conviction and
2	sentence became final on direct appeal.".
3	(2) TECHNICAL AMENDMENT.—The chapter
4	analysis for chapter 153 of title 28, United States
5	Code, as amended by section 306(b), is amended by
6	adding at the end the following new item:
	"2257. Law applicable.".
7	(b) STANDARD OF REVIEW.—Section 2254(a) of title
8	28, United States Code, is amended by adding at the end
9	the following: "Except as to Fourth Amendment claims
10	controlled by Stone v. Powell, 428 U.S. 465 (1976), the
11	Federal courts, in reviewing an application under this sec-
12	tion, shall review de novo the rulings of a State court on
13	matters of Federal law, including the application of Fed-
14	eral law to facts, regardless of whether the opportunity
15	for a full and fair hearing on such Federal questions has
16	been provided in the State court. In the case of a violation
17	that can be harmless, the State shall bear the burden of
18	proving harmlessness.".
19	SEC. 5. LIMITS ON SUCCESSIVE PETITIONS.
20	Section 2244(b) of title 28, United States Code, is
21	amended to read as follows:
22	"(b)(1) A claim presented in a habeas corpus petition
23	that was not timely presented in a prior petition shall be
24	dismissed unless—
25	"(A) the petitioner shows that—

1	"(i) the failure to raise the claim pre-
2 .	viously was the result of interference by State
3	officials with the presentation of the claim, in
4	violation of the Constitution or laws of the
5	United States;
6	"(ii) the claim relies on a new rule that is
7	applicable under section 2257 and was pre-
8	viously unavailable; or
9	"(iii) the factual predicate for the claim
10	could not have been discovered previously
11	through the exercise of reasonable diligence;
12	and
13	"(B) the facts underlying the claim, if proven
14	and viewed in light of the evidence as a whole, would
15	be sufficient to—
16	"(i) undermine the court's confidence in
17	the factfinder's determination of the applicant's
18	guilt of the offense or offenses for which the
19	sentence was imposed; or
20	"(ii) demonstrate that no reasonable sen-
21	tencing authority would have found an aggra-
22	vating circumstance or other condition of eligi-
23,	bility for a capital or noncapital sentence, or
24	otherwise would have imposed a sentence of
25	death.

- 1 "(2) Notwithstanding other matters pending before
- 2 the court, claims for relief under this subsection from a
- 3 case in which a sentence of death was imposed shall re-
- 4 ceive a prompt review in a manner consistent with the in-
- 5 terests of justice.".
- 6 SEC. 6. NEW EVIDENCE.
- 7 (a) IN GENERAL.—Chapter 153 of title 28, United
- 8 States Code, as amended by section 304(a)(1), is amended
- 9 by adding at the end the following new section:
- 10 "§ 2256. Capital cases; new evidence
- 11 "For purposes of this chapter, a claim arising from
- 12 a violation of the Constitution, laws, or treaties of the
- 13 United States shall include a claim by a person under sen-
- 14 tence of death that is based on factual allegations that,
- 15 if proven and viewed in light of the evidence as a whole,
- 16 would be sufficient to demonstrate that no reasonable
- 17 factfinder would have found the petitioner guilty of the
- 18 offense or that no reasonable sentencing authority would
- 19 have found an aggravating circumstance or other condi-
- 20 tion of eligibility for the sentence. Such a claim shall be
- 21 dismissed if the facts supporting the claim were actually
- 22 known to the petitioner during a prior stage of the litiga-
- 23 tion in which the claim was not raised. Notwithstanding
- 24 any other provision of this chapter, the claim shall not
- 25 be subject to section 2244(b) or the time requirements es-

- 1 tablished by section 2242. In all other respects, the claim
- 2 shall be subject to the rules applicable to claims under this
- 3 chapter.".
- 4 (b) TECHNICAL AMENDMENT.—The chapter analysis
- 5 for chapter 153 of title 28, United States Code, as amend-
- 6 ed by section 304(a)(2), is amended by adding at the end
- 7 the following new item:

"2258. Capital cases; new evidence.".

- 8 SEC. 7. CERTIFICATES OF PROBABLE CAUSE.
- 9 The third paragraph of section 2253, title 28, United
- 10 States Code, is amended by adding at the end the follow-
- 11 ing: "However, an applicant under sentence of death shall
- 12 have a right of appeal without a certificate of probable
- 13 cause, except after denial of a habeas corpus petition filed
- 14 under section 2244(b).".
- 15 SEC. 8. PROVISION OF COUNSEL.
- 16 (a) In General.—Chapter 153 of title 28, United
- 17 States Code, as amended by section 304(a)(1), is amended
- 18 by adding at the end the following new section:
- 19 "§ 2258. Counsei in capital cases; State court
- 20 "(a) COUNSEL.—(1) A State in which a sentence of
- 21 death may be imposed under State law shall provide legal
- 22 services to—
- 23 "(A) indigents charged with offenses for which
- 24 capital punishment is sought;

	1 "(B) indigents who have been sentenced to
	death and who seek appellate, post-conviction, or
-	unitary review in State court; and
4	"(C) indigents who have been sentenced to
5	
ϵ	
7	
8	
9	"(b) Counsel Certification Authority.—A
10	
11	
12	
13	
14	
15	the representation of criminal defendants in capital cases,
16	
17	
18	a statewide defender organization, a capital case resource
19	center, local public defender's offices and private attorneys
20	involved in criminal trial, appellate, post-conviction, or
21	unitary review practice. If a State fails to establish a coun-
22	sel certification authority within 180 days after the date
23	of enactment of this subsection, a private cause of action
24	may be brought in Federal district court to enforce this
25	subsection by any aggrieved party, including a defendant

1	eligible for appointed representation under this subsection
2	or a member of an organization eligible for representation
3	on the counsel certification authority. If the court finds
4	that the State has failed to establish a counsel certification
5	authority as required by this subsection, the court shall
6	grant appropriate injunctive and declaratory relief, except
7	that the court shall not grant relief that disturbs any
8	criminal conviction or sentence, obstructs the prosecution
9	of State criminal proceedings, or alters proceedings arising
10	under this chapter.
11	"(c) Duties of Authority; Certification of
12	COUNSEL.—The counsel certification authority shall—
13	"(1) establish and publish standards governing
14	qualifications of counsel, which shall include—
15	"(A) knowledge and understanding of per-
16	tinent legal authorities regarding issues in cap-
17	ital cases;
18	"(B) skills in the conduct of negotiations
19	and litigation in capital cases, the investigation
20	of capital cases and the psychiatric history and
21	current condition of capital clients, and the
22 ·	preparation and writing of legal papers in cap-
23	ital cases;
24	"(C) the minimum qualifications required
25	by subsection (d); and

1	"(D) any additional qualifications relevant
2	to the representation of capital defendants;
3	"(2) establish application and certification pro-
4	cedures for attorneys who possess the qualifications
5	established pursuant to paragraph (1);
6	"(3) establish application and certification pro-
7	cedures for attorneys who do not possess all the
8	qualifications established pursuant to paragraph (1)
9	but who possess, in addition to the minimum quali-
10	fications required by subsection (d), additional re-
11	sources (such as an affiliation with a publicly funded
12	defender organization) and experience that enable
13	them to provide quality legal representation com-
14	parable to that of an attorney possessing the quali-
15	fications established pursuant to paragraph (1);
16	"(4) establish application and certification pro-
17	cedures, to be used on a case by case basis, for at-
18	torneys who do not necessarily possess the minimum
19	qualifications required by subsection (d), but who
20	possess other extraordinary experience and resources
21	that enable them to provide quality legal representa-
22	tion comparable to that of an attorney possessing
23	the qualifications established pursuant to paragraph
24	(1);

1	"(5) publish a current roster of attorneys cer-
2	tified pursuant to paragraphs (2) and (3) to be ap-
3	pointed in capital cases;
4	"(6) establish and publish standards governing
5	the performance of counsel in capital cases, includ-
6	ing standards that proscribe abusive practices and
7	mandate sound practices in order to further the fair
8	and orderly administration of justice;
9	"(7) monitor the performance of attorneys cer-
10	tified pursuant to this subsection; and
1-1	"(8) delete from the roster the name of any at-
12	torney who fails to meet the qualification or per-
13	formance standards established pursuant to this
14	subsection.
15	"(d) MINIMUM COUNSEL STANDARDS.—All counsel
16	certified pursuant to paragraph (2) or (3) of subsection
17	(c) or appointed pursuant to subsection (f) shall possess,
13	in addition to any qualifications required by State or local
19	law, the following minimum qualifications:
20	"(1) Familiarity with the performance stand-
21	ards established by the counsel certification author-
22	ity.
23	"(2) Familiarity with the appropriate court sys-
24	tem, including the procedural rules regarding timeli-
25	ness of filings and procedural default

1	"(3) In the case of counsel appointed for the
2	trial or sentencing stages, at least 2 of the qualifica-
3	tions listed in subparagraph (A) and 1 of the quali-
4	fications listed in subparagraph (B), or 1 of the al-
5	ternative qualifications listed in subparagraph (C).
6	"(A) QUALIFYING TRIAL EXPERIENCE
7.	(MUST HAVE 2).—Prior experience within the
8	last 10 years as—
9	"(i) lead or sole counsel in 12 jury
10	trials, of which no fewer than 5 were crimi-
11	nal jury trials;
12	"(ii) lead or sole counsel in 3 criminal
13	jury trials in which the charge was murder
14	or aggravated murder;
15	"(iii) co-counsel in 5 criminal jury
16	trials in which the charge was murder or
17 ,	aggravated murder; or
18	"(iv) lead or sole counsel in no fewer
19	than 5 criminal jury trials involving crimes
20	of violence against persons, punishable by
21	imprisonment of over 1 year,
22	which were tried to a verdict or to a deadlocked
23	jury.
24	"(B) QUALIFYING CAPITAL TRIAL EXPERI-
25	ENCE (MUST HAVE 1).—

1,	"(i) lead or sole counsel within the
2	last 5 years in the trial of at least 1 capital
3	case that was tried through sentencing;
4	"(ii) co-counsel in the trial of no fewer
5.	than 2 capital cases (1 of which occurred
6	within the last 5 years) that were tried
7	through sentencing; or
8	"(iii) successful completion within the
9	preceding 2 years of a training program in
10	capital trial litigation that has been cer-
11	tified by the counsel certification authority
12	or, if the authority has not certified a pro-
13	gram, successful completion of an at least
14	12-hour training program in capital trial
15	litigation for which continuing legal edu-
16	cation (CLE) credit is available, and which
17.	the CLE authority in the State has cer-
18	tified as comporting with the objectives
19	and requirements of this section.
20	"(C) ALTERNATIVE QUALIFYING EXPERI-
21	ENCE FOR TRIAL.—Notwithstanding subpara-
22	graphs (A) and (B), an attorney shall be eligi-
23	ble for certification pursuant to paragraph (2)
24	or (3) of subsection (c) or appointment pursu-
25	ant to subsection (f) if the attorney—

1	"(i) has conducted 5 evidentiary hear-
2	ings and has been employed for more than
3	1 year by a capital resource center, a unit
4	or its equivalent that specializes in capital
5	cases within a public defender office, or a
6	public interest law office specializing in
· 7	capital litigation; or
8	"(ii) has conducted 5 evidentiary
9	hearings and has been certified by the
10	State capital litigation resource center as
11	competent to be assigned to a capital trial;
12	"(4) in the case of counsel appointed for appel-
13	late or unitary review, at least 1 of the qualifications
14	listed in subparagraph (A) and 1 of the qualifica-
15	tions listed in subparagraph (B), or 1 of the alter-
16	native qualifications listed in subparagraph (C).
17	"(A) QUALIFYING APPELLATE EXPERI-
18	ENCE (MUST HAVE 1).—Prior experience within
19	the past 5 years as—
20	"(i) lead or sole counsel in no fewer
21	than 10 appeals, of which no fewer than 5
.22	were criminal appeals;
23	"(ii) lead or sole counsel in at least 6
24	criminal felony appeals: or

1	"(iii) lead or sole counsel in 3 crimi-
2	nal or felony appeals, at least 1 of which
3	was an appeal of a murder or aggravated
4	murder conviction,
5	which were fully briefed.
6	"(B) QUALIFYING CAPITAL APPELLATE
7	EXPERIENCE (MUST HAVE 1).—
8	"(i) lead or sole counsel within the
9	last 5 years in the appeal or unitary review
10	of at least 1 capital case;
11	"(ii) co-counsel in the appeal or uni-
12	tary review of no fewer than 2 capital
13	cases, 1 of which occurred within the last
14	5 years; or
15	"(iii) successful completion within the
16	preceding 2 years of a training program in
17	the litigation of capital appeals that has
18	been certified by the counsel certification
19	authority or, if the authority has not cer-
20	tified a program, successful completion of
21	an at least 12-hour training program in
22	capital litigation with a focus on appeals
23	for which continuing legal education
24	(CLE) credit is available, and which the
5	CLE authority in the State has certified as

1	comporting with the objectives and the re-
2	quirements of this section.
- 3	"(C) ALTERNATIVE QUALIFYING EXPERI-
4	ENCE FOR APPEALS.—Notwithstanding sub-
5	paragraphs (A) and (B), an attorney shall be
6	eligible for certification pursuant to paragraph
7	(2) or (3) of subsection (c) or for appointment
8	pursuant to subsection (f) if the attorney—
9	"(i) has been employed for more than
10	1 year by a capital resource center, a unit
11	or its equivalent that specializes in capital
12	cases within a public defender office, or a
13	public interest law office specializing in
14	capital litigation; or
15	"(ii) has been certified by the State
16	capital litigation resource center as com-
17	petent to be assigned to a capital appeal;
18	and
19	"(5) in the case of counsel appointed for post-
20	conviction proceedings, at least 2 of the qualifica-
21	tions listed in subparagraph (A) and at least 1 of
22	the qualifications listed in subparagraph (B), or 1 of
23	the alternative qualifications listed in subparagraph
24	(C).

1	"(A) QUALIFYING POST-CONVICTION EXPE-
2	RIENCE (MUST HAVE 2).—Prior experience with-
3	in the past 10 years as—
4	"(i) lead or sole counsel in no fewer
5	than 3 post-conviction proceedings;
6	"(ii) co-counsel in no fewer than 5
7	post-conviction proceedings;
8	"(iii) 1 of the trial qualifications listed
9	in paragraph (3)(A); or
10	"(iv) 1 of the appellate qualifications
11	listed in paragraph (4)(A).
12	"(B) QUALIFYING CAPITAL POST-CONVIC-
13	TION EXPERIENCE (MUST HAVE 1).—
14	"(i) lead or sole counsel within the
15	last 5 years in the trial (through sentenc-
16	ing), appeal, or post-conviction review of at
17	least 1 capital case;
18	"(ii) co-counsel in the trial (through
19	sentencing), appeal, or post-conviction re-
20	view of no fewer than 2 capital cases, 1 of
21	which occurred within the last 5 years; or
22	"(iii) successful completion during the
23	preceding 2 years of a training program in
24	the litigation of capital post-conviction pro-
25	ceedings that has been certified by the

1	counsel certification authority or, if the au-
2	thority has not certified a program, suc-
3	cessful completion of an at least 12-hour
4	training program in capital litigation with
5	a focus on post-conviction proceedings for
6	which continuing legal education (CLE)
7	credit is available, and which the CLE au-
8	thority in the State has certified as com-
9	porting with the objectives and require-
10	ments of this section.
11	"(C) ALTERNATIVE QUALIFYING EXPERI-
12	ENCE FOR POST-CONVICTION PROCEEDINGS.—
13	Notwithstanding subparagraphs (A) and (B),
14	an attorney shall be eligible for certification
15	pursuant to paragraph (2) or (3) of subsection
16	(c) or appointment pursuant to subsection (f) if
17	the attorney—
18	"(i) has conducted 3 evidentiary hear-
19	ings and has been employed for more than
20	1 year by a capital litigation resource cen-
21	ter, by a unit or its equivalent that special-
22	izes in capital cases within a public de-
23	fender office, or by a public interest law of-
24	fice specializing in capital litigation, or

]	"(ii) has conducted 3 evidentiary
2	hearings and has been certified by the
3	State capital litigation resource center as
4	competent to be assigned to a capital post-
5	conviction proceeding.
6	"(e) APPOINTMENT OF CERTIFIED COUNSEL.—(1)
7	The State court shall appoint at least 2 attorneys to rep-
8	
9	
10	
11	"(A) a lead counsel who is named on the roster
12	•
13	"(B) a defender organization or resource cen-
14	ter, which shall designate appropriate attorneys af-
15	filiated with the organization, including a lead coun-
16	sel who is named on the roster; or
17	"(C) a lead counsel certified pursuant to sub-
18	section (c)(4).
19	"(2) The State court may appoint additional attor-
20	neys upon a showing of need.
21	"(f) APPOINTMENT OF NONCERTIFIED COUNSEL.—
22	(1) If there is no roster of attornevs published pursuant
23	to subsection (c)(5), or if no attorney on the roster can
24	accept the appointment and if no attorney certified pursu-
25	ant to subsection (c)(4) has been appointed, the State

1 court shall appoint at least 2 attorneys to represent a
2 indigent at trial, and at least 1 attorney to represent a
3 indigent at the appellate, unitary or post-conviction review
4 stage, including—
5 "(A) a lead counsel who possesses the minimum
6 qualifications required by subsection (d); or
7 "(B) a defender organization or resource cen-
8 ter, which shall designate appropriate attorneys af-
9 filiated with the organization, including a lead coun-
sel who possesses the qualifications required by sub-
11 section (d).
12 "(2) No attorney shall be appointed pursuant to this
13 subsection unless the State court has first conducted an
14 evidentiary hearing on the record in which the court deter-
i5 mines, after the attorney gives sworn testimony and pre-
16 sents documentary proof that the attorney possesses each
17 of the qualifications required by subsection (d), that the
18 attorney possesses the requisite qualifications. In making
19 its determination, the court, shall, to each qualification re-
20 quired by subsection (d), shall make a specific finding on
21 the record that the attorney possesses the qualification.
22 "(g) No attorney may be denied certification pursu-
23 ant to paragraph (2) or (3) of subsection (c) or appoint-
24 ment pursuant to subsection (f) solely because of prior em-
25 ployment as a prosecutor.

1 "(h) Prior to appointing counsel pursuant to this sec-
2 tion, the State court shall inquire as to whether counsel
3 maintains a workload which, by reason of its excessive
4 size, will interfere with the rendering of quality represen-
5 tation or create a substantial risk of a breach of profes-
6 sional obligations.
7 "(i) If a person entitled to an appointment of counsel
8 declines to accept an appointment, the State court shall
9 conduct, or cause to be conducted, a hearing, at which
10 the person and counsel proposed to be appointed shall be
11 present, to determine the person's competence to decline
12 the appointment, and whether the person has competently
13 and knowingly declined it.
"(j) If a State court fails to appoint counsel in a pro-
15 ceeding specified in subsection (a), or if a State court in
16 a proceeding described in subsection (a)—
17 "(1) fails to appoint the number of counsel re-
quired in subsection (e);
19 "(2) appoints counsel whose name is not on the
roster published pursuant to subsection (c)(5);
21 "(3) appoints counsel who has failed to present
a certification issued pursuant to subsection (c)(4);
23 or
24 "(4) when subsection (f) applies, fails to hold
25 the hearing, receive the requisite testimony and

- 1 proof, or make the determination required by sub-
- 2 section (f),
- 3 a Federal court, in a proceeding under this chapter, shall
- 4 neither presume findings of fact made at such proceeding
- 5 to be correct nor decline to consider a claim on the ground
- 6 that it was not raised in such proceeding at the time or
- 7 in the manner prescribed by State law. In no cir-
- 8 cumstances other than those described in this subsection
- 9 shall a determination of noncompliance with this section
- 10 provide a basis for relief to a petitioner proceeding under
- 11 this chapter.
- 12 "(k) No attorney appointed to represent a prisoner
- 13 in State post-conviction proceedings shall have previously
- 14 represented the prisoner at trial or on direct appeal in the
- 15 case for which the appointment is made, unless the pris-
- 16 oner and attorney expressly request continued representa-
- 17 tion.
- 18 "(1) Notwithstanding the rates and maximum limits
- 19 generally applicable to criminal cases and any other provi-
- 20 sion of law to the contrary, the highest State court with
- 21 jurisdiction over criminal cases shall, after notice and com-
- 22 ment, establish a schedule of hourly rates for the com-
- 23 pensation of attorneys appointed pursuant to this section
- 24 that are reasonable in light of the qualifications of attor-
- 25 neys appointed and the local practices for legal representa-

tion in cases reflecting the complexity and responsibility of capital cases. For each attorney appointed pursuant to this section, the State court shall separately order compensation at the rates set by the highest State court for the hours the attorneys reasonably expended on the case and for reasonable expenses paid for investigative, expert, and other reasonably necessary services. Any aggrieved party may bring a private cause of action in Federal district court to enforce the provisions of this subsection for 10 the establishment of a schedule of reasonable hourly rates for the compensation of attorneys. In such an action, the 12 Federal court shall not independently determine the appropriate rates, but shall decide whether the hourly rates as scheduled by the State court are within the range of reasonableness consistent with the criteria stated in this subsection. If the hourly rates as scheduled are not within the range of reasonableness, or if no schedule of rates has been established, the court shall grant appropriate injunc-18 tive or declaratory relief, except that the court shall not 19 grant relief that disturbs any criminal conviction or sen-20 tence, obstructs the prosecution of State criminal proceed-21 ings, or alters proceedings arising under this chapter. "(m) The ineffectiveness or incompetence of counsel 23 appointed pursuant to this section during State or Federal 24 25 post-conviction proceedings shall not be a ground for relief

in a proceeding arising under section 2254. This limitation shall not preclude the appointment of different counsel at any phase of State or Federal post-conviction proceedings. "(n) Nothing in this section changes the constitu-4 tional standard governing claims of ineffective assistance of counsel pursuant to the sixth amendment to the Constitution of the United States. A determination of noncompliance with this section (as opposed to the facts which support such a determination) shall not provide a basis for a claim of constitutionally ineffective assistance of 10 11 counsel. "(o) The requirements of this section shall apply to 12 any appointment of counsel made after the effective date 13 of this Act in any trial, direct appeal, or unitary review 14 of a capital indigent. Counsel shall be appointed as pro-15 vided in this section in any post-conviction proceeding 16 commenced after the effective date of this Act. In no case 17 shall counsel appointed for a proceeding commenced be-18 fore the effective date of this Act be subject to the require-19 ments of this section, nor shall any person whose counsel 20 was appointed for any trial, appeal, post-conviction or unitary review before the effective date of this Act be entitled 22 to any relief, including application of subsection (j), based on a claim that counsel was not appointed in conformity with subsection (e) or (f).".

1	(b) TECHNICAL AMENDMENT.—The chapter analysis
2	for chapter 153 of title 28, United States Code, as amend-
3	ed by section 304(a)(2), is amended by adding at the end
4	the following new item:
	"2258. Counsel in capital cases; State court.".
5	SEC. 9. CAPITAL LITIGATION FUNDING.
6	(a) Grants Under the Edward Byrne Grant
7	Program.—
8	(1) IN GENERAL.—Part E of title I of the Om-
9	nibus Crime Control and Safe Streets Act of 1968
10	(42 U.S.C. 3711 et seq.) is amended by adding at
11	the end the following new section:
12	"HABEAS CORPUS LITIGATION
13	"SEC. 511A. Notwithstanding any other provision of
14	this title, the Director shall provide grants to the States,
15	from the funding allocated pursuant to section 511, for
16	the purpose of supporting litigation pertaining to Federal
17	habeas corpus petitions in capital cases. The total funding
18	available for such grants within any fiscal year shall be
19	equal to the funding provided to capital resource centers,
20	pursuant to Federal appropriation, in the same fiscal
21	year.".
22	(2) TECHNICAL AMENDMENT.—The table of
23	contents of title I of the Omnibus Crime Control and
24	Safe Streets Act of 1968 (42 U.S.C. preceding

1	3701) is amended by inserting after the item relat-
2	ing to section 511 the following new item:
	"Sec. 511A. Habeas corpus litigation.".
3	(b) GRANTS FOR STATE CAPITAL LITIGATION.—Title
4	I of the Omnibus Crime Control and Safe Streets Act of
5	1968 (42 U.S.C. 3711 et seq.), as amended by section
6	103(a) is amended—
7	(1) by redesignating part R as part S;
8	(2) by redesignating section 1801 as section
9	1901; and
10	(3) by inserting after part Q the following new
11	part:
12	"PART R—GRANTS FOR STATE CAPITAL
13	LITIGATION
13 14	LITIGATION "SEC. 1801. GRANT AUTHORIZATION.
14	"SEC. 1801. GRANT AUTHORIZATION.
14 15 16	"SEC. 1801. GRANT AUTHORIZATION. "The Director of the Bureau of Justice Assistance
14 15 16 17	"SEC. 1801. GRANT AUTHORIZATION. "The Director of the Bureau of Justice Assistance shall make grants to States from amounts appropriated
14 15 16 17	"SEC. 1801. GRANT AUTHORIZATION. "The Director of the Bureau of Justice Assistance shall make grants to States from amounts appropriated to carry out this part for the use by States and by local
14 15 16 17 18	"SEC. 1801. GRANT AUTHORIZATION. "The Director of the Bureau of Justice Assistance shall make grants to States from amounts appropriated to carry out this part for the use by States and by local entities in the States to comply with section 2258 of title
14 15 16 17 18 19	"SEC. 1801. GRANT AUTHORIZATION. "The Director of the Bureau of Justice Assistance shall make grants to States from amounts appropriated to carry out this part for the use by States and by local entities in the States to comply with section 2258 of title 28, United States Code.
14 15 16 17 18 19 20 21	"SEC. 1801. GRANT AUTHORIZATION. "The Director of the Bureau of Justice Assistance shall make grants to States from amounts appropriated to carry out this part for the use by States and by local entities in the States to comply with section 2258 of title 28, United States Code. "SEC. 1802. STATE APPLICATIONS.
14 15 16 17 18 19 20 21	"SEC. 1801. GRANT AUTHORIZATION. "The Director of the Bureau of Justice Assistance shall make grants to States from amounts appropriated to carry out this part for the use by States and by local entities in the States to comply with section 2258 of title 28, United States Code. "SEC. 1802. STATE APPLICATIONS. "(a) IN GENERAL.—(1) To request a grant under

-07.

1	"(2) An application under paragraph (1) shall include
2	assurances that Federal funds received under this part
3	shall be used to supplement, not supplant, non-Federal
4	funds that would otherwise be available for activities fund-
5	ed under this part.
6	"(b) STATE OFFICE.—The office designated under
7	section 507—
8	"(1) shall prepare an application under this sec-
9	tion; and
10	"(2) shall administer grant funds received
11	under this part, including review of spending, proc-
12	essing, progress, financial reporting, technical assist-
13	ance, grant adjustments, accounting, auditing, and
14	fund disbursement.
15	"SEC. 1803. REVIEW OF STATE APPLICATIONS.
16	"(a) IN GENERAL.—The Director shall make a grant
17	under section 1801 to carry out the activities described
18	in the application submitted by an applicant under section
19	1802 upon determining that—
20	"(1) the application is consistent with the re-
21	quirements of this part; and
22	"(2) before the approval of the application, the
23	Bureau has made an affirmative finding in writing
24	that the proposed activities have been reviewed in
25	accordance with this part.

- 1 "(b) APPROVAL.—Each application submitted under
- 2 section 1802 shall be considered to be approved, in whole
- 3 or in part, by the Director not later than 45 days after
- 4 first received unless the Director informs the applicant of
- 5 specific reasons for disapproval.
- 6 "(c) DISAPPROVAL NOTICE AND RECONSIDER-
- 7 ATION.—The Director shall not disapprove any application
- 8 without first affording the applicant reasonable notice and
- 9 opportunity for reconsideration.
- 10 "SEC. 1804. DISTRIBUTION OF FUNDS.
- 11 "For fiscal years 1994, 1995, and 1996, the Federal
- 12 share of a grant made under this part may not exceed
- 13 75 percent of the total costs of the activities described in
- 14 the application submitted under section 1702 for the fiscal
- 15 year for which the project receives assistance under this
- 16 part. Thereafter, the Federal share of a grant made under
- 17 this part may not exceed 50 percent.
- 18 "SEC. 1805. EVALUATION.
- 19 "(a) IN GENERAL.—(1) A State that receives a grant
- 20 under this part shall submit to the Director an evaluation
- 21 not later than March 1 of each year in accordance with
- 22 guidelines issued by the Director.
- 23 "(2) The Director may waive the requirement speci-
- 24 fied in subsection (a) if the Director determines that such

- 1 evaluation is not warranted in the case of any particular
- 2 State.
- 3 "(b) DISTRIBUTION.—A State or local entity may use
- 4 not more than 5 percent of the funds it receives under
- 5 this part to develop an evaluation program under this sec-
- 6 tion.".
- 7 (c) TECHNICAL AMENDMENT.—The table of contents
- 8 of title I of the Omnibus Crime Control and Safe Streets
- 9 Act of 1968 (42 U.S.C. 3711 et seq.), as amended by sec-
- 10 tion 103(b), is amended by striking the matter relating
- 11 to part R and inserting the following:

"PART R-GRANTS FOR STATE CAPITAL LITIGATION

"PART S-TRANSITION; EFFECTIVE DATE; REPEALER"

- 12 (d) AUTHORIZATION OF APPROPRIATIONS.—Section
- 13 1001(a) of title I of the Omnibus Crime Control and Safe
- 14 Streets Act of 1968 (42 U.S.C. 3793(a)), as amended by
- 15 section 103(c), is amended by adding at the end the fol-
- 16 lowing new paragraph:
- 17 "(12) There are authorized to be appropriated such
- 18 sums as are necessary to carry out activities under part
- 19 R.".

[&]quot;Sec. 1801. Grant authorization.

[&]quot;Sec. 1802. State applications.

[&]quot;Sec. 1803. Review of State applications.

[&]quot;Sec. 1804. Distribution of funds.

[&]quot;Sec. 1805. Evaluation.

1 SEC. 10. CERTIFICATION OF COMPLIANCE.

- 2 (a) IN GENERAL.—Subpart 1 of part E of title I of
- 3 the Omnibus Crime Control and Safe Streets Act of 1968
- 4 (42 U.S.C. 501 et seq.) is amended by adding at the end
- 5 the following new section:
- 6 "CERTIFICATION OF COMPLIANCE"
- 7 "Sec. 509A. In any application for a grant under this
- 8 subpart, a State in which a sentence of death may be im-
- 9 posed shall certify whether it will comply with the provi-
- 10 sions of section 2258 of title 28, United States Code. If
- 11 the State chooses not to certify that it will comply with
- 12 the provisions of that section, the amount of funds that
- 13 the State is eligible to receive under that subpart shall
- 14 be reduced by 75 percent. If the State certifies that it will
- 15 comply with the provisions of section 2258 of title 28,
- 16 United States Code, the amount of funds that the State
- 17 is eligible to receive under that subpart shall not be re-
- 18 duced by virtue of any failure or alleged failure to carry
- 19 out any of the requirements of that section. The sole en-
- 20 forcement mechanisms for the requirements set forth in
- 21 that section shall be those provided in that section, to
- 22 which the State shall be deemed to have consented by cer-
- 23 tifying that it will comply with the provisions of that sec-
- 24 tion.".
- 25 (b) TECHNICAL AMENDMENT.—The table of contents
- 26 of title I of the Omnibus Crime Control and Safe Streets

- 1 Act of 1968 (42 U.S.C. preceding 3701) is amended by
- 2 inserting after the item relating to section 509 the follow-
- 3 ing new item:

"Sec. 509A. Certification of compliance.".

- 4 SEC. 11. EFFECTIVE DATE.
- 5 (a) In General.—Except as provided in subsection
- 6 (b), this title and the amendments made by this title shall
- 7 take effect on the date that is 180 days after the date
- 8 of enactment of this Act.
- 9 (b) Section 2258(b) of Title 28, United States
- 10 CODE.—Section 2258(b) of title 28, United States Code,
- 11 as added by section 208(a), shall take effect on the date
- 12 of enactment of this Act.

0

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 57

DATE: September 7, 1993

The Standing Committee has been debating for some time uniform amendments to all of the rules vis a vis uniform numbering of local rules, etc. Attached is the most recent iteration of what Rule 57 would look like. Similar amendments to the Civil, Appellate and Bankruptcy rules are being coordinated by the Reporter for the Standing Committee and will probably be circulated later this Fall for public comment.

RULES OF CRIMINAL PROCEDURE

Rule 57. Rules by District Courts

2

12

13

14

15

16

17

18

19

20

21

22

23

1

(a) IN GENERAL. Each district court by action of a 3 majority of the district judges thereof may from time to 4 time, after giving appropriate notice and an opportunity to 5 comment, make and amend rules governing its practice net 6 7 inconsistent these-rules. Local rules must conform to any uniform numbering system prescribed by the Judicial 8 9 Conference of the United States. A judge may regulate practice in any manner consistent with federal laws, these 10 rules, and local rules of the district. No sanction or 11 other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator has been furnished actual notice of the requirement in the pertinent case. A local rule imposing a requirement of form must not be enforced in a manner that causes a party to lose rights because of a negligent failure to comply with the requirement. (b) EFFECTIVE DATE AND NOTICE. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the

district court or abrogated by the judicial council of the

Advisory Committee on Criminal Rules Rule 57 Fall 1993

1

2

3

4

5

6

7

8

RULES OF CRIMINAL PROCEDURE

circuit in which the district court is located. Copies of the rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and shall be made available to the public. In-all-eases-net provided-by-rule,-the-district-judges-and-magistrate-judges may-regulate-their-practice-in-any-manner-net-inconsistent with-these-rules-or-those-of-the-district-in-which-they-act.

COMMITTEE NOTE

Rule 57 provides flexibility to district courts to promulgate local rules of practice and procedure. Specifically, it permits the court to regulate practice in any manner consistent with the Acts of Congress, with rules adopted under 28 U.S.C. § 2072 and 2075, and with the districts local rules. But experience has demonstrated several problems. The amendments are intended to address those problems.

First, the amendment requires that the numbering of local rules conform with any numbering system that may be prescribed by the Judicial Conference. Lack of uniform numbering might create unnecessary traps for counsel and litigants. A uniform number system would make it easier for an increasingly national bar to locate a local rule that applies to a particular procedural issue.

Second, the rule recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. In the past, some courts have also used internal operating procedures, standing orders, and other internal directives. This can lead to problems. Counsel or litigants may be unaware of the various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally,

RULES OF CRIMINAL PROCEDURE

counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has actual notice of the requirement.

There should be no adverse consequence to a party or attorney for violating special requirements relating to practice before a particular judge unless the party or attorney has actual notice of those requirements. Furnishing litigants with a copy outlining the judge's practices -- or attaching instructions to a notice setting a case for conference or trial -- would suffice to give actual notice, as would an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained.

MEMO TO: Advisory Committee on Criminal Rules

FROM: Dave Schlueter, Reporter

RE: Proposed Amendment to Rule 59: Technical

Amendments

DATE: September 7, 1993

Attached is the most recent version of Rule 59 which includes a provision for making technical amendments to the Rules. The Standing Committee has been considering similar amendments to all of the Rules for the past year or so and as of its June 1993 meeting seemed satisfied with this particular language.

This rule, along with the other parallel rules in the Civil, Appellate, Evidence, and Bankruptcy Rules, will probably be circulated for public comment sometime this Fall.

It is not contemplated that any further action will be required from the Advisory Committees until after the comment period has ended.

RULES OF CRIMINAL PROCEDURE

But the same of the same

Rule 59. Effective Date: Technical Amendments

- 2 <u>(a)</u> These rules take effect on the day which is 3
- 3 months subsequent to the adjournment of the first regular
- 4 session of the 79th Congress, but if that day is prior to
- 5 September 1, 1945, then they take effect on September 1,
- 6 1945. They govern all criminal proceedings thereafter
- 7 commenced and so far as just and practicable all proceedings
- 8 then pending.

1

- 9 (b) The Judicial Conference of the United States may
- amend these rules to correct errors in spelling, cross-
- references, or typography, or to make technical changes
- needed to conform these rules to statutory changes.

COMMITTEE NOTE

The Rule is amended to enable the Judicial Conference to make minor technical amendments to these rules without having to burden the Supreme Court and Congress with reviewing such changes. This delegation of authority will relate only to uncontroversial, nonsubstantive matters.

L. RALPH MECHAM DIRECTOR

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ CHIEF RULES COMMITTEE SUPPORT OFFICE

JAMES E. MACKLIN, JR. DEPUTY DIRECTOR

WASHINGTON, D.C. 20544 August 27, 1993

MEMORANDUM TO JUDGE ROBERT E. KEETON

SUBJECT: Report of the Court Administration and Case Management Committee to the Judicial Conference

I am attaching a copy of the full report of the Committee on Court Administration and Case Management for your review. The report contains several recommendations that may affect the rulemaking process.

- I. Recommendations Affecting Rules Generally
- A. The committee recommended that the Conference approve proposed guidelines authorizing filing by facsimile.

 The committee specifically included bankruptcy courts under the guideline's coverage. (Pages 10-13, Appendix A.) I have also attached an excerpt from the report of the Committee on Automation and Technology, which opposed the guidelines.
- B. Authorized the continuation of pilot program in six courts, which permits videotaping of court proceedings. (Pages 17-19.)
 - II. Recommendation Affecting Appellate Rules
- A. The committee viewed favorably a proposal by Chief Judge Clifford J. Wallace to authorize the establishment of "appellate commissioners" to assist the courts in the pre-argument stage of appellate review. The commissioners would have the authority to enter certain types of orders and to conduct preargument conferences. The committee recommended that the merits of the proposal be studied further by the AO and the FJC with a report due at its December 1993 meeting. (Pages 22-24.)
 - III. Recommendation Affecting Bankruptcy Rules
- A. The committee recommended that the Conference amend the schedule of fees for bankruptcy courts to allow a

A TRADITION OF SERVICE TO THE FEDERAL JUDICIARY

debtor to pay the \$30 administrative fee in installments. (Page 19-20.)

- IV. Recommendations Affecting Civil Rules
- A. The committee endorsed in principle a legislative proposal contained in the Civil Justice Reform Act of 1993 (S. 585) introduced by Senators DeConcini and Grassley that directly affects Civil Rule 68. It "refer(s) the issue of whether the matter is more appropriately within the authority of federal rules to the Committee on Rules of Practice and Procedure for a report to the March 1994 Session of the Judicial Conference..." (Pages 2-3.)
- B. The committee defers to the views of the Committee on Rules of Practice and Procedure on proposed legislation (S. 585) affecting the number of expert witnesses called at trial. (Pages 4-5.)
- C. The committee supports the enactment of legislation that would provide all courts with authority to use mandatory arbitration programs. And requests the Judicial Conference to reconsider its opposition taken at its last session. (Pages 13-17.)

As of August 25, the following recommendations of the Committee on Court Administration and Case Management have been placed on the Judicial Conference Discussion Calendar: (a) Item 4(a) and (b) regarding proposed guidelines on filing by facsimile, and (b) Item 5 regarding mandatory arbitration programs. In accordance with Judicial Conference procedures, any member of the Conference may request that a committee recommendation be placed on the discussion calendar. The deadline for the request for this session of the Conference is September 9, 1993.

John K. Roby

John K. Rabiej

Attachments

cc: Chairs and Reporters to the Advisory Rules Committees
Dean Daniel R. Coquillette

REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

and the second of the second of the second s

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

The Committee on Court Administration and Case Management met in Washington, D.C., on June 14-15, 1993. All members of the Committee were present with the exception of Judge Roger Wollman (8th Circuit), Judge David Sentelle (D.C. Circuit) and Judge D. Brock Hornby (District of Maine). The Committee was staffed by the following Administrative Office personnel: Duane R. Lee (Chief, Court Administration Division), Glen K. Palman (Deputy Chief), Robert Lowney (Assistant to the Chief) and Abel J. Mattos (Chief, Programs Branch). Also in attendance from the Administrative Office for portions of the meeting were Clarence A. Lee, Jr. (Associate Director), Noel J. Augustyn (Assistant Director, Court Programs), Thomas C. Hnatowski (Chief, Magistrate Judges Division) and David E. Weiskopf (General Counsel's Office). The Federal Judicial Center was represented by Russell R. Wheeler (Deputy Director), William B. Eldridge (Director, Research Division), Donna J. Stienstra (Senior Research Associate) and John E. Shapard (Research Associate). Juliet Griffin (Clerk, Middle District of Tennessee), Judge James R. Browning (Ninth Circuit Court of Appeals) and Doug Letter (Department of Justice) also participated.

NOTICE

NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE CONFERENCE ITSELF

Filing By Facsimile

The Judicial Conference, through its Court Administration and Case Management, Automation and Technology and Rules Committees, has examined the use of facsimile technology for the filing of court documents over the last several years. In June 1989, the former Committee on Judicial Improvements recommended amendments to the Appellate, Civil, and Bankruptcy Rules to provide for local rules permitting papers to be filed by facsimile transmission or other electronic means, consistent with guidelines promulgated by the Judicial Conference. Subsequently, the Committees on Automation and Technology and Court Administration and Case Management, while developing the guidelines required by the amended Federal Rules, determined that until such time as the technological, budgetary, and procedural implications of facsimile filings were resolved, the Conference should authorize the promulgation of local rules permitting the filing of papers by facsimile only in the most limited circumstances. In September 1991, the Judicial Conference adopted a resolution implementing guidelines for the use of facsimile for the filing of court papers (JCUS Sept 91, 52-53). The guidelines took into consideration the practical and technological constraints regarding the acceptance of court documents by facsimile, as previously identified by the Committee on Judicial Improvements. The Conference action was an initial measure, intended to provide a narrow margin of opportunity for courts to allow the filing of papers by facsimile transmission. The Conference resolution as adopted is as follows:

Effective December 1, 1991, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment, provided that such filing is permitted only (a) in compelling circumstances or (b) under a practice which was established by the court prior to May 1, 1991.

a chamber the a narrow is the state where

This resolution serves as the guideline mandated by the Federal Rules of Appellate and Civil Procedure, and by adoption of Civil Rule 5, the Federal Rules of Bankruptcy Procedure regarding the acceptance of documents by facsimile, which became effective December 1, 1991.

At its June 1992 meeting, the Committee on Court Administration and Case Management revisited this issue as it relates to the implementation of the Civil Justice Reform Act and determined that, notwithstanding the practical and economical problems related to facsimile use, courts should be allowed to determine at the local level whether to implement the practice of accepting papers for filing by facsimile transmission on a routine basis. Several courts have expressed a desire to implement local rules to routinely accept papers by this method since the Conference adopted the more restrictive policy. Therefore, your Committee recommends that the Conference modify the resolution adopted in 1991 to allow courts to adopt by local rule a broader policy regarding the acceptance of papers by facsimile transmission. Your Committee recognizes that for many courts, the technological, budgetary, and procedural problems may continue to pose enough of a hardship as to prevent any divergence from the guidelines established in 1991. Under the proposed resolution, those courts that elect to maintain the existing, narrower guidelines may continue to do so. However, your Committee also believes that those courts with the capability of accepting filings by facsimile on a more routine basis should be allowed to do so, particularly in

consideration of the obligations placed on both the courts and parties involved in federal litigation under the Civil Justice Reform Act. Your Committee has further determined that national guidelines to be followed by courts enacting local rules should be adopted. Proposed guidelines for the technical requirements for equipment, procedures for compliance with the requirement of an original signature, filing procedures, and potential fees for the service, are included as Appendix A. These guidelines were developed with assistance from appellate, district and bankruptcy clerks. Issues not governed by the guidelines may be left to the discretion of the courts.

The Committee on Automation and Technology has reviewed the proposed guidelines and this recommendation and opposes any change to the current Judicial Conference policy. This position is based upon the determination of that Committee's Subcommittee on Filing by Facsimile that "while the concept of filing by facsimile transmission may be feasible in some instances, the Federal Judiciary is not ready to change its current policy, even by means of a pilot project, unless full funding were available for nationwide implementation and until the clerks' concerns have been addressed adequately". The Subcommittee's findings were based on a survey sent to all clerks of the appellate, district, and bankruptcy courts.

Your Committee believes sufficient provisions have been included in the proposed guidelines to address all of the identified concerns. Further, the proposed resolution would simply create the option in those districts that have the inclination and the resources to accept documents by this method and would not impose the policy on those courts that object. In addition, the Committee on Rules of Practice and Procedure has expressed concern about the relationship between the proposed

guidelines and the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure. Your Committee has attempted to address these concerns through revisions to the proposed guidelines. Your Committee understands, however, that the Rules Committee remains opposed to the adoption of the guidelines in their present form, because it believes that the specific areas left to the courts' discretion under the guidelines affect the rulemaking process and require further study. Finally, the Committee on Rules believes the local option should not be applied to bankruptcy courts. Your Committee considered a similar motion and determined that there is no valid reason for excluding bankruptcy courts from the proposed resolution.

Recommendation 4: that the Judicial Conference a) adopt the following resolution:

Effective December 1, 1993, the Judicial Conference authorizes courts to adopt local rules to permit the clerk to accept for filing papers transmitted by facsimile transmission equipment or by other electronic means, provided that such filing is permitted either (a) in compelling circumstances, or (b) under a practice which was established by the court prior to May 1, 1991, or (c) on a routine basis (without prior specific approval), if the rules meet the requirements included in the Technical Guidelines for the Acceptance of Documents by Facsimile.

b) Approve the proposed Technical Guidelines for the Acceptance of Documents by Facsimile.

Arbitration

The Judicial Improvements and Access to Justice Act of 1988, Public Law No. 100-702, provided formal statutory authorization to continue the mandatory non-binding arbitration programs previously piloted by the Judicial Conference in ten

district courts. The Act also permitted the Judicial Conference to designate ten additional courts to adopt programs of nonbinding voluntary arbitration.

Pursuant to Section 903(b) of the 1988 Act, the Federal Judicial Center submitted a report to Congress in 1990 on the implementation of the Act which included a recommendation for enactment of an arbitration provision in title 28, United States Code, authorizing arbitration in all federal district courts, to be mandatory or voluntary in the discretion of the court, without diminishing the authority of individual judges to manage their assigned cases.

In January 1993, your Committee, after review of the Federal Judicial Center report, recommended that the Judicial Conference support the enactment of legislation to provide continued authorization for the 20-district arbitration programs created by the 1988 legislation beyond the sunset date of that legislation and further, that the Conference support authorizing all federal district courts to utilize mandatory or voluntary arbitration programs at the individual court's discretion. This latter recommendation was made on the belief that the experience to date provides justification for allowing individual federal courts to institute techniques, including court annexed arbitration, tailored to suit their specific needs. The Judicial Conference, at its March 1993 session supported the enactment of legislation to continue the 20-district arbitration programs and to authorize federal district courts to utilize voluntary arbitration but declined to support legislation authorizing mandatory arbitration (JCUS MAR-93, p.12). The Court Arbitration Authorization Act of 1993, H.R. 1102, which has now been introduced by Congressman Hughes, would remove the sunset provision

Agenda F-7 (Appendix A) Court Administration/Case Mngt. September 1993

GUIDELINES FOR FILING BY FACSIMILE

I. General Purpose and Scope:

- (1) Purpose of the Guidelines: The Guidelines for Filing by Facsimile are the standards established by the Judicial Conference of the United States to assist those courts that permit filing of papers by facsimile transmission pursuant to the Federal Rules of Appellate, Civil, Criminal and Bankruptcy Procedure.
- (2) Compliance with Rules of Procedure: These Guidelines for Filing by Facsimile are designed to guide the activities of litigants and court personnel relating to facsimile filing consistently with, and where authorized by, all applicable rules of procedure adopted under 28 U.S.C. §§ 2072 and 2075. They do not amend, modify, or excuse noncompliance with any applicable rules.
- (3) Prohibited Documents: Papers may not be sent by facsimile transmission to the court for filing unless the court has expressly authorized such transmissions by local rule or by order in a particular case. In addition, bankruptcy petitions and schedules may not be sent by facsimile transmission.

II. Definitions:

- (1) "Facsimile transmission" means sending a copy of a document by a system that encodes a document into electronic signals, transmits these electronic signals, and reconstructs the signals to print a duplicate of the original document at the receiving end.
- (2) "Facsimile filing" or "filing by fax" means a court's receipt of a paper generated by a facsimile machine in the clerk's office. Electronic transmission of a document by facsimile machine does not constitute filing; rather, filing is complete only when the document is received by the clerk.
- (3) "Facsimile machine" means a machine used to transmit or receive documents.
- (4) "Fax" is an abbreviation for "facsimile" and, as indicated by the context, may refer to a facsimile transmission or to a document so transmitted.

III. Technical requirements:

For purposes of these guidelines, in order for courts to accept the filing of papers by facsimile on a routine basis, the following technical requirements must be met. 1

- (1) Facsimile Machine Standards:
 - (a) A facsimile machine must be able to send or receive a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union (CCITT), in regular resolution.
 - (b) The receiving unit must be connected to and print through a printer using xerographic technology, or a facsimile modem that is connected to a personal computer that prints through a printer using xerographic technology. Only plain paper (no thermal paper) facsimile machines may be used.
- (2) Additional Facsimile Standards for Senders:
 - (a) Each sender must have the following equipment standards:
 - (i) CCITT Compatibility Group 3 2;
 - (ii) Modem Speed 9600-2400 bps (bits per second) with automatic stepdown; and
 - (iii) Image Resolution Standard 203 x 98.
 - (b) A facsimile machine used to send documents to a court must be able to produce a transmission record, as proof of transmission at

¹ The Administrative Office will monitor technological advances and will recommend modifications to these guidelines when necessary.

² Group 3 fax machines are currently the most common, accounting for 97% of the devices on the market. Group 3 compatibility is mandatory for public applications at the present time. Group 3 fax can utilize the public telephone network (voice grade lines) and does not require special data lines. Group 3 fax devices transmit at under 1 minute per page, may have laser printing capability, and use various standard data compression techniques to increase transmission speed.

the time transmission is completed. 3

- IV. Resource Availability: No additional personnel (FTEs) or funds for equipment will be made available due to a court's adoption of a fax filing policy. Courts should be aware of the potential burdens on the clerk's office and should examine thoroughly the potential impact on the court before adopting a fax policy.
- V. Original Signature: If authorized by local rules or by order in a particular case, a clerk may provisionally accept a document having the image of the original manual signature on the facsimile copy. A court may order prompt filing of the original signed document, as well. If not filed, the original signed document must be maintained by the attorney of record or the party originating the document until the litigation concludes.
- VI. Transmission record: The sending party must maintain a copy of all papers filed by facsimile and a copy of the transmission record until the litigation concludes.

VII. Cover sheet:

- (1) Each document transmitted to the clerk must be accompanied by a cover sheet which lists the following:
 - (a) the court in which the pleading is to be filed;
 - (b) the type of action, e.g., civil, criminal, bankruptcy, or adversary proceeding;
 - (c) the case title information;
 - (d) the case number identification (except when the document is the original complaint);
 - (e) the title of document(s);
 - (f) the sender's name, address, telephone number, and fax number;
 - (g) the number of pages transmitted including cover sheet;
 - (h) the billing or charge information for court fees; and
 - (i) the date and time of transmission.

³ This is in addition to the requirement that the original document be maintained.

- Unless a local rule or court order in a particular case requires otherwise, the cover sheet must be the first page transmitted. The cover sheet need not be filed in the case and is not counted toward any page limit established by the court.
- (3) The facsimile cover sheet does not replace any cover sheet that the court may require. It is for the clerk's use in identifying the document and identifying any applicable fees.

VIII. Fees:

- (1) Payment of filing fees and any additional charges prescribed or authorized by the Judicial Conference for the use of the facsimile filing option shall be made in a manner determined by the Administrative Office.
- (2) If a court authorizes the filing of papers by facsimile on a routine basis, the clerk must ensure that appropriate filing fees and any additional charges are paid.
- (3) Other Fees for Filing by Fax 4
 - (a) When documents are received on the court's fax equipment, the court shall collect the following fees, in addition to any other filing fees required by law:

For the first ten pages of the document, excluding the cover sheet and special handling instruction sheet \$ 5.00

For each additional page \$.75

Any necessary copies to be reproduced by the court, for each page 5\$.50

(b) No fees are to be charged for services rendered on behalf of the United States.

⁴ These fees may be collected once the Judicial Conference approves amendments to the Miscellaneous Fee Schedules promulgated under 28 U.S.C. §§ 1913, 1914, and 1930.

See Miscellaneous Fee Schedules.

Liteary discounty 21

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

GARY MEZZANATTO,

Defendant-Appellant.

No. 92-50261 D.C. No.

CR-91-739-01-EBG OPINION

Appeal from the United States District Court Earl B. Gilliam, District Judge, Presiding for the Southern District of California

February 2, 1993—Pasadena, California Argued and Submitted

Filed July 7, 1993

Before: J. Clifford Wallace, Chief Judge, Joseph T. Sneed and Cynthia Holcomb Hall, Circuit Judges .--

Opinion by Judge Sneed; Dissent by Chief Judge Wallace

SUMMARY

Criminal Law and Procedure/Defendants and Accused, Rights of

dant during plea negotiations is not subject to waiver. of Evidence 410 and Federal Rule of Criminal Procedure conviction. The court held that the prohibition in Federal Rule 11(e)(6) of the admissibility of statements made by a defen-The court of appeals reversed a district court judgment of

PRINTED FOR
ADMINISTRATIVE OFFICE—U.S. COURTS
BY BARCLAYS / ELECTROGRAPHIC—SAN FRANCISCO—(415) 588-1155

The summary, which does not constitute a part of the opinion of the court, is copyrighted © 1993 by Barclays Law Publishers.

7041

1000

government informed Mezzanatto before the negotiations that any statements made in the process would be used to impeach any inconsistent testimony Mezzanatto gave at trial. Mezzanatto Appellant Gary Mezzanatto was charged with drug crimes. Mezzanatto sought plea bargaining. The agreed. No plea agreement was reached. At trial, Mezzanatto offered contradictory testimony, and his statements during plea negotiations were introduced over his objection for the purpose of impeachment. Mezzanatto was convicted. He appealed.

[1] Evidence Rule 410 and criminal procedure Rule 11(e)(6) prohibit the introduction at trial of statements made during plea negotiations. The exceptions to the prohibition do not include the use of such statements for impeachment. [2] Whether the protection of the rules could be waived was an issue of first impression. [4] If the rules were subject to waiver, candid and effective plea bargaining could be severly The legislative history of the rules made clear that such statements were not admissible to impeach Mezzanatto. [3] injured, with a chilling effect on the entire process. [5] Therefore, the prohibition was not subject to waiver. Chief Judge Wallace, dissenting, opined that the panel's rationale did not support its position, and that there was no principled way to set the two rules in question apart from those rules and rights which were subject to waiver.

COUNSEL

Mark R. Lippman, La Jolla, California, for the defendantappellant.

Shane P. Harrigan, Assistant United States Attorney, San Diego, California, for the plaintiff-appellee.

UNITED STATES V. MEZZANATTO

OPINION

SNEED, Circuit Judge:

plea negotiations for impeachment purposes. We reverse the Appellant challenges the district court's ruling allowing the prosecution to introduce statements he made during failed appellant's conviction and remand for a new trial,

FACTS AND PRIOR PROCEEDINGS

methamphetamine in violation of 21 U.S.C. § 841(a)(1). At Mezzanatto's request, the government held a plea bargaining ing the meeting could be used to impeach any inconsistent Appellant Gary Mezzanatto was charged with possession of neeting with him. Before the start of this meeting, the prosecutor informed Mezzanatto that any statements he made durtestimony he offered at trial, if the case proceeded that far. Mezzanatto agreed to this, and the meeting began. The parties lid not reach an agreement. At trial, Mezzanatto offered testimony that was inconsistent with statements he made during the negotiations. The govern-The appellant objected, but the court overruled the objections ment introduced the prior statements to impeach Mezzanatto. and allowed the statements for impeachment. The jury found Mezzanatto guilty, and the district court imposed a 170 month prison term to be followed by five years of supervised release.

JURISDICTION AND STANDARDS OF REVIEW

The district court had jurisdiction under 18 U.S.C. § 3231, and we have jurisdiction under 28 U.S.C. § 1291. Whether

States, 966 F.2d 487, 489 (9th Cir. 1992). we review these issues de novo. See Anderson v. United questions of law and of statutory interpretation, and therefore, against the introduction of plea negotiations statements are defendant and whether a defendant may waive the prohibition plea negotiation statements may be introduced to impeach a

JH.

DISCUSSION

A. Issues on Appeal.

410. Rule 410 reads: nearly identical in form and is identical in substance to Rule Federal Rule of Criminal Procedure 11(e)(6). Rule 11(e)(6) is This appeal involves Federal Rule of Evidence 410 and

Related Statements Inadmissibility of Pleas, Plea Discussions, and

proceeding, admissible against the defendant who dence of the following is not, in any civil or criminal made the plea or was a participant in the plea discus-Except as otherwise provided in this rule, evi-

- (1) a plea of guilty which was later withdrawn;
- (2) a plea of nolo contendere;
- ceedings under Rule 11 of the Federal Rules of regarding either of the foregoing pleas; or 💯 🖘 Criminal Procedure or comparable state procedure (3) any statement made in the course of any pro-
- cussions with an attorney for the prosecuting author-(4) any statement made in the course of plea dis-

result in a plea of guilty later withdrawn. ity which do not result in a plea of guilty or which

on the record and in the presence of counsel. the statement was made by the defendant under oath criminal proceeding for perjury or false statement if considered contemporaneously with it, or (ii) in a introduced and the statement ought in fairness be course of the same plea or plea discussions has been proceeding wherein another statement made in the However, such a statement is admissible (i) in any

examine the scope of the two rules. whether a defendant may waive the prohibition against the introduction of statements made during plea negotiations, we Before reaching the primary issue this case presents,

The Scope of the Rules.

exceptions to an otherwise absolute rule do not include the testify contrary to their plea negotiation statements. These two to permit punishment of defendants who take the stand and against the defendant for perjury. This exception is designed of certain plea negotiation statements in a separate proceeding statements so that the jury receives a full account of the issue dant introduces a statement made during plea negotiations, the selective admission of plea negotiation statements. If a defenstatements admissible. The first is an exception to prevent made in the course of plea discussions are generally not use of such statements for impeachment. presented. The only other exception allows for the admission prosecution may introduce other relevant plea negotiation admissible at trial. In only two instances are plea negotiation Criminal Procedure 11(e)(6) are quite clear that statements [1] Federal Rule of Evidence 410 and Federal Rule of

plea negotiation statements are not admissible to impeach a [2] The legislative history of these Rules is quite clear that

defendant. A version of Rule 410, which never became effective, did allow plea negotiation statements to be introduced for impeachment, but this language was ultimately rejected. S. Rep. No. 1277, 93d Cong., 2d Sess. 10 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7057; H.R. Conf. Rep. No. 414, 94th—Cong., 1st Sess. 10 (1975), reprinted in 1975 U.S.C.C.A.N. 713, 714; see also Fed. R. Evid. 410 (1974); Pub. L. 94-149, 89 Stat. 805 (1975). Congress unmistakably did not want statements made during plea negotiations to be used to impeach defendants. Detailing this history concerning impeachment, the Second Circuit said, "We regard this legislative history as demonstrating Congress' explicit intention to preclude use of statements made in plea negotiations for impeachment purposes." United States v. Lawson, 683 F.2d 688, 692-93 (2d Cir. 1982); accord United States v. Martinez, 536 F.2d 1107, 1108 (5th Cir. 1976).

Commentators offer no disagreement. See, e.g., Charles A. Wright & Kenneth W. Graham, Jr., 23 Federal Practice and Procedure § 5349 (1980); David W. Louisell & Christopher B. Mueller, 2 Federal Evidence § 188 (1985). No one argues that Congress did not mean what it said.

This brings us to the issue to which Congress did not speak. Can the defendant waive the protection of these rules?

C. The Protection Against the Admission of Statements Made During Plea Negotiations Cannot Be Waived.

[3] The issue of waiver of the protection of Rules 410 and 11(e)(6) is one of first impression. The government contends that this rule may be waived by a defendant, and it argues that Mezzanatto knowingly and intelligently waived this protection. Mezzanatto insists that the prohibition in Rules 410 and 11(e)(6) may not be waived. We agree with the appellant.

The importance of the prohibition against the admission of plear negotiation statements is best understood in the broader context of the criminal justice system. Plea bargains are an important and useful part of our criminal justice system. They allow criminal cases to be resolved in a quick and costeffective manner while maintaining the just administration necessary to the criminal justice system. Rules 410 and 11(e) (6) were designed to promote plea agreements by encouraging frank discussion in negotiations because such unrestrained candor promotes effective plea bargaining. See Fed. R. Crim. P. 11 adv. comm. note (1979), reprinted in 18 U.S.C. App. (1988).

For instance, prosecutors of those engaged in criminal conspiracies desire the fullest cooperation of those accused of participation therein. Frequently only by such cooperation can the organizers of the conspiracy, the higher-ups, be identified and prosecuted Rules 11(e)(6) and 410(4) aid in obtaining this cooperation. The lesser members of the conspiracy will more freely provide useful information to the prosecutors if he knows that none of his statements in plea bargaining sessions can be used against him.

Moreover, full cooperation may enhance the prospects of a better plea bargain from the prosecutor. In a sense, most defendants who enter plea bargaining do so with the prospect of exchanging information about other offenses or defendants for a lesser punishment for themselves. The rules at issue here permit the plea bargainer to maximize what he has "to sell" with the ability to withdraw from the bargain proposed by the prosecutor without being harmed by any of his statements made in the course of an aborted plea bargaining session.

¹This issue was before the District of Columbia Circuit, but it resolved the case on other grounds. *United States v. Wood*, 879 F.2d 927, 937 (D.C. Cir. 1989).

^{*}See Blackledge v. Allison, 431 U.S. 63, 71 (1977) ("[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."), Santobello v. New. York, 404 U.S. 257, 261 (1971) ("Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons.").

[4] To allow waiver of these rules would be contrary to all that Congress intended to achieve. If these rules were subject to waiver, candid and effective plea bargaining could be severely injured. As the Eighth Circuit aprly explained, "[m]eaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence." United States v. Verdoorn, 528 F.2d 103, 107 (8th Cir. 1976). Waiver of the protections of Rules 410 and 11(e)(6) could easily have a chilling effect on the entire plea bargaining process. See Wayne R. LaFave & Jerold H. Israel, 2 Criminal Procedure § 20.2, at 611 (1984).

The government, not unreasonably, argues that since defendants can waive other statutory and constitutional rights, they should be able to waive Rules 410 and 11(e)(6). They rely on Newton v. Rumery, 480 U.S. 386 (1987), and United States v. Navarro-Botello, 912 F.2d 318 (9th Cir. 1990), cert. denied, 112 S. Ct. 1488 (1992), to support this argument. Neither these cases nor the analogy support the existence of a waiver power for these Rules.

In Newton, Mr. Rumery relinquished his personal right to pursue a civil remedy against the town of Newton, New Hampshire, which had arrested him, in exchange for a dis-

missal of all criminal charges against him. 480 U.S. at 390. The issue before the Court was whether such a "release-dismissal" agreement should be considered unenforceable as against public policy. *Id.* at 389. Although the Court agreed that such agreements may infringe on important interests of criminal defendants and society, *id.* at 392, the Court held that the agreement was enforceable because the "agreement would not adversely affect the relevant public interests." *Id.* at 398 (footnote omitted).

That conclusion is inapplicable to the situation here. To allow the government to enforce its waiver agreement would, as already pointed out, adversely affect the public interest in efficient criminal case resolution. Furthermore, Newton dealt with the waiver of a civil remedy and a dismissal of criminal charges. Unlike the present situation, the range of possible adverse consequences to society in Newton is quite small.

Navarro-Botello does not help the government, either. The government argues that since defendants can waive the right to appeal, as in Navarro-Botello, 912 F.2d at 319-20, or certain other constitutional rights, a defendant should be able to waive the right to exclude plea negotiation statements. It is indisputable that defendants can waive certain rights during plea negotiations. But to allow waiver of Rules 410 and 11(e) (6), which are part of the plea bargaining mechanism, could damage the system approved by Congress and the Supreme Court. They do not guarantee substantive rights so much as they guarantee fair procedure.

To equate the waiver of these rules with that of an asserted constitutional protection is a false equality. Judicially created waivers of the latter are the result of an inescapable feature of courts interpreting the Constitution by defining the right being asserted. To write in a waiver in a waiverless rule promulgated by the Supreme Court and Congress, on the other hand, is not an inescapable duty. It more resembles unwelcome advice. Given the precision with which these rules are gener-

³It is unclear whether the prohibition against the admission of plea negotiation statements in Rules 410 and 11(e)(6) should be considered an administrative rule or a personal right. But even if the prohibition is labeled a personal right, it is still not waivable. As the Supreme Court said nearly half a century ago, "a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. ... Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where if would thwart the legislative policy which it was designed to effectuate." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 704 (1945) (footnote and citations omitted). Allowing a waiver of these rules would contravene and thwart the policy—efficient case resolution through plea bargaining—these rules were designed to effectuate.

ally phrased, the comparative recentness of their promulgation, and the relative ease with which they are amended, the courts can afford to be hesitant in adding an important feature to an otherwise well-functioning rule.

Furthermore, the government should not be given the ability to extract a waiver of these rules from a defendant who is in a weak bargaining position. It should be noted that the government extracted the attempted waiver from Mezzanatto, not as part of a plea bargain, but simply as the price for the opportunity to enter into discussions that could have, but did not, lead to a plea bargain. With such a high entry cost, defense attorneys will be deterred from seeking plea bargains, and this will frustrate Congressional policy.

[5] We therefore hold that the prohibition against the admissibility of statements made during plea negotiations is not subject to waiver.

D. The Error Was Not Harmless.

Federal Rule of Criminal Procedure 11(h) requires a harmless error standard to be used for violations of plea bargaining rules. The same standard is applied for violations of Rule 410. See Lawson, 683 F.2d at 693. The contradictory impeachment evidence was clearly a significant blow to the appellant's defense. It easily could have altered the balance in the eyes of the jury. Therefore, we find the error was not harmless and set aside the conviction and reverse the judgment and remand to the district court.

We find no merit in the remainder of the appellant's con-

UNITED STATES V. MEZZANATTO

tentions, but we direct the district court's attention to the Supreme Court's teachings in *United States v. Dunnigan*, 113 S. Ct. 1111 (1993), should resentencing be required.

REVERSED and REMANDED.

Control of the Contro

明 一番の日本

WALLACE, Chief Judge, dissenting:

A criminal defendant may waive the most fundamental rights and protections afforded him or her by the Constitution or a statute. Peretz v. United States, 111 S. Ct. 2661, 2669 (1991); United States v. Navarro-Botello, 912 F.2d 318, 321 (9th Cir. 1990) (Navarro-Botello, cert. denied, 112 S. Ct. 1488 (1992). A defendant, for example, may knowingly and voluntarily waive the Fourth Amendment right to be free from Warrantless searches, see Schneckloth v. Bustamonte, 412 U.S. 218, 248-49 (1973); the Fifth Amendment privilege against self-incrimination, see Navarro-Botello, 912 F.2d at 321; the Sixth Amendment rights to counsel, see Faretta v. California, 422 U.S. 806, 834 (1975); Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938), to a jury frial, and to confront and cross-examine witnesses, see Navarro-Botello, 912 F.2d at 321; and the statutory rights to appeal, see id., and to pursue valid civil rights claims against government officials, see Town of Newton, Rumery, 480 U.S. 386, 392-98 (1987) (Newton).

A defendant, by failing to object at trial, also may implicitly walve his or her Fourth Amendment right against unlawful search and seizure, see Segurola v. United States, 275 U.S. 106, 110-11 (1927). Fifth Amendment privilege against self-incrimination, see United States v. Coleman, 707 F.2d 374, 376 (9th Cir.), cerr. denied, 464 U.S. 854 (1983), and against being placed in double jeopardy, see United States v. Bascaro, 742 F.2d 1335, 1365 (11th Cir. 1984), cerr. denied, 472 U.S. 1017 (1985), and Sixth Amendment rights to be present at all stages of trial, see United States v. Gagnon, 470 U.S. 522, 528

⁴We are not holding that the introduction of plea negotiation statements is per se reversible error. If a defendant fails to object at trial to the introduction of such testimony, he has implicitly waived the protection. Furthermore, as is explained in the following part, any error is subject to a harmless error analysis.

(1985), and to a public trial, see Levine v. United States, 362 U.S. 610, 619 (1960). As the Supreme Court summarized, "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." Yakus v. United States, 321 U.S. 414, 444 (1944).

Against this backdrop, the majority creates, without the assistance of precedent, a per se rule which invalidates any and all waivers of the protections afforded not by such basic and fundamental rights, but by Federal Rule of Evidence410 and Federal Rule of Criminal Procedure11(e)(6) (collectively Rules). The majority brushes aside the question whether the waiver is knowing and voluntary; the newly crafted majority directive is absolute. The bases of this ruling are that to allow waiver would subvert the policies advanced by the Rules, that writing in a waiver would amount to "unwelcome advice," maj. op. at 7049, and that the availability of waivers would tempt governmental abuse. Because none of these bases supports the majority's position, and because there is no principled way to set these particular Rules apart from the vast majority of rules and rights that are subject to waiver, I dissent.

As for the first basis, that allowing waivers would subvert the policies advanced by the Rules, I have several objections. I start with what is not said: the majority has not identified what is so unique about the Rules that warrants a solicitude extended to very few rights or rules. At one point the majority states, without more, that the Rules should not be waived because they guarantee "fair procedure" rather than substantive rights. Maj. op. at 7049. Yet earlier in the opinion, the majority deems this distinction irrelevant, and goes on to suggest that "personal right[s]" should be less subject to waiver than administrative procedural rules. Id. at 7048 n.3. This

apparent contradiction is symptomatic of the majority's futile search for a sound distinction between the Rules and all those rules subject to waiver.

A distinction does not appear warranted based on policy, for surely the policies behind the Rules are no more important than the policies advanced by those rights and rules that may be waived. It would be difficult to conclude, for example, that the policy of quickly and cheaply resolving cases is more important than the policy of securing ourselves in our 'persons, houses, papers, and effects." U.S. Const. amend. IV. Yet the criminal defendant who is subject to an unreasonable search and seizure may knowingly waive his Fourth Amendment rights as part of a plea bargain, or he may implicitly waive those rights by failing to object to the introduction of the resulting evidence. If a criminal defendant may waive such a fundamental constitutional right, I fail to see why the policies behind the Rules should preclude a criminal defendant, like Mezzanatto, from knowingly and voluntarily waiving the protection afforded by the Rules.

Nor does it appear that the effect of allowing waivers would be any greater in this context than it is in others. In fact, that effect may be diminished by the exception to the Rules that allows statements made during plea bargaining to be used in later criminal proceedings for perjury. See Fed. R. Evid.410(ii); Fed. R. Crim. P.11(e)(6)(ii). Allowing a defendant to waive the bar against using his or her plea-related statements for impeachment purposes, therefore, merely enhances a deterrent which already exists within the Rules. Thus, if the policies represented by the Rules are no more in this context, there is little ground for distinguishing the Rules from the plethora of rules and rights subject to waivers.

The majority nonetheless contends that to allow waivers would be an injury not only to the defendants affected, but to the administration of the criminal justice system as a whole.

Maj. op. at 7046-48. Although I recognize the possibility for harm to defendants and the criminal justice system that allowing waivers might create, I do not think this possibility justifies a per se rule against waivers. See Newton, 480 U.S. at 392 (holding mere possibility of harm to societal interests insufficient to create a per se rule against release-dismissal agreements). On the contrary, I believe that the majority, by implicitly vaulting plea agreements to the apex of goals sought to be achieved within the criminal justice system, has exaggerated greatly the potential harm represented by waivers.

I begin with the potential injuries to defendants. The defendant who waives his right to give inconsistent testimony at trial should the plea bargain prove fruitless seems to forfeit one "right" directly: the "right" to lie. By forfeiting his ability to provide inconsistent testimony at trial, the defendant has forsaken—or at least diminished—his "right" to lie at some stage of the prosecution. The defendant who forsakes this "right," of course, has sacrificed nothing, as no defendant has the "right" to provide false testimony. Nix v. Whiteside, 475 U.S. 157, 173 (1986).

Another potential injury to future defendants — though not the defendant in this case — identified by the majority is that they may be compelled to forsake their "right" to plea bargain, if they find that the price of waiver is too high to pay. Such hypothetical defendants also sacrifice a "right" which they never possessed. See United States v. Wheat, 813 F.2d 1399, 1405 (9th Cir. 1987) (holding that "there is no right to a plea bargain"), aff d, 486 U.S. 153 (1988). In return for this sacrifice, these defendants must stand trial. Where is the harm to a defendant who is "coerced" into going to trial? The most consistent criticism waged against plea bargaining is that defendants are often coerced into pleading guilty to crimes they did not commit. See generally Chaffin v, Stynchcombe, 412 U.S. 17, 30-31 (1973) (discussing coercive potential of several common plea-bargaining tactics). The majority has

turned this criticism on its head, by suggesting that the problem with waivers is that they will coerce defendants to forgo plea bargaming. As for the majority's contention that waivers will have a chilling effect on plea bargaining, I see three flaws. First, this prediction is completely speculative. The only evidence we have of the effects of allowing waiver is one case, this one, and the evidence here contradicts the majority's speculation. It does not necessarily follow that defendants will not enter into plea bargains if they first must waive the protection that their statements cannot be used to impeach them at trial.

Second, even assyming the majority's speculation is accurate, I would expect the system to correct itself. The majority recognizes that plea agreements are beneficial not only to criminal defendants. See maj. op. at 7047-49. Such agreements, as the majority asserts, are of great importance to the efficient administration of the criminal justice system; they are of value to the government. Id. Given the mutual benefits achieved through plea bargaining, should we expect the government continually to require waivers if such requirements significantly reduce the number of plea agreements reached?

Third, if the number of plea agreements actually does decrease, and more criminal defendants proceed to trial, it does not necessarily follow that the criminal justice system will fail. An unexplored presumption in the majority's opinion is that a reduction in the number of plea bargains would somehow undermine our criminal justice system. I am not certain that the success or failure of criminal justice necessarily turns upon the present rate of plea bargaining. To be sure, more trials would add increased burdens to an already overerowded court system, but I am not prepared to give such weight to the possible advent of more trials as does the major-

The majority's second rationale appears to be that we should not "write in a waiver" because it is not an "inescapable duty," and it would amount to "unwelcome advice." *Id.* at 7049. Our inescapable duty, as I see it, is to apply the law as it is presented to us, whether it be in the form of constitution, statute, or common law. If our application requires that we interpret the law, we can and must interpret it. The notion that we should not interpret a statute if it is "recently" promulgated (although the Rules here are approximately 20 years old), phrased with "precision" (although the Rules here are silent on the only contested issue), and relatively easily amended is a troubling, if not baffling, addition to the canons of statutory construction.

As for the majority's suggestion that we can "escape" interpretation of the Rules by not "writ[ing] in a waiver," id., I strongly disagree. Indeed, the majority's decision shows quite clearly that interpreting the Rules is unavoidable in this case. For what does the majority do but "write in" a prohibition against waiver into Rules which, as the majority recognizes, are silent regarding the issue? See id. at 7046 (recognizing that waiver is an "issue to which Congress did not speak"). Deciding not to allow waivers is every bit as interpretive as deciding that waivers should be allowed. The majority has simply inferred the opposite conclusion than I from Congress's silence.

In addition, given the plethora of rules and rights which can be waived and the paucity of those which cannot, the majority's decision that the Rules here are among the select few unsuited for waiver is a significant act of judicial interpretation. As described at the outset of this dissent, the clear weight of judicial precedent is to allow knowing and voluntary waivers of rights and rules, even where those rules are completely silent regarding waivability. In reading Congress's silence as an indication that waivers should be prohibited, the

majority has not only interpreted the Rules, but it has done so in a manner which runs counter to that precedent. Characterizing this interpretation as an act of judicial deference, in my view, is both inaccurate and insufficient to justify the majority's conclusion.

Ш

duty." Id. at 397. Given this tradition and experience, it strikes Supreme Court: "tradition and experience justify our belief that the government will exploit unwitting defendants if given me as unwarranted to fashion a rule based on the assumption that the great majority of prosecutors will be faithful to their tions offered by the Rules. The answer is clearly stated by the the opportunity. that Mezzanatto knowingly and voluntarily waived the protecany factual basis for doing so. Indeed, in this case it is clear ity here relies on this rejected assumption, despite the lack of seize the opportunity for wrongdoing," Id. at 396. The majorthat such a rule improperly "assumes that prosecutors will rule against release-dismissal agreements, the Court observed Newton. 480 U.S. at 396-97. In refusing to fashion a per se majority, this rationale was rejected by the Supreme Court in waivers allow for governmental abuse. Unfortunately for the The majority's third contention for a per se rule is that

Z

Finally, a more generalized comparison between Newton and this case highlights the shortcomings in the majority's analysis. In Newton, the Supreme Court condoned release-dismissal agreements, whereby the government agrees to drop criminal charges against a defendant in exchange for the defendant's agreement not to pursue a civil rights claim against government officials. The potential result-of-such an agreement is that the government drops legitimate criminal charges and the defendant drops legitimate civil rights claims. The Court recognized that these agreements may in some

cases infringe important societal interests, but concluded that the "mere possibility of harm to these interests" does not justify a per se rule. *Id.* at 392.

The same conclusion is applicable to this case. The interests at stake here are certainly no more compelling. Notwithstanding the majority's somewhat startling assertion that "the range of possible adverse consequences to society in *Newton* is quite small," maj. op. at 7049, few would argue that ensuring the success of plea bargaining is more important than sanctioning government officials who commit civil rights violations. In addition, the potential for coercion seems much slighter here, and the potential consequences of any coercion less troubling. The defendant in *Newton* gave up a potentially legitimate civil rights suit; Mezzanatto, by contrast, gave up his ability to provide inconsistent testimony. Because the Supreme Court did not see fit to fashion a per se rule against release-dismissal agreements, I cannot accept the majority's new per se rule in this context.

>

Mezzanatto requested the government to engage in plea discussions. Before those discussions began, he knowingly and voluntarily agreed that the testimony he provided during plea bargaining could be used to impeach him should he provide inconsistent testimony at trial. This is precisely what occurred. I see no reason not to honor Mezzanatto's agreement with the government. Because I would hold that the introduction of Mezzanatto's plea-bargaining statements was permissible, I would not need to reach the question of whether this alleged error was harmless. In addition, Mezzanatto's other challenges to his conviction and sentence are without merit. Thus, I would affirm.