

AGENDA G-7  
Rules of Practice & Procedure  
September 1983

SUMMARY

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

This report contains the following recommendation for the consideration of the Conference:

That the Judicial Conference adopt the views of the Committee on proposed legislation to amend the Rules Enabling Acts and authorize the Committee to inform Mr. Kastenmeier of Conference action thereon.

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

TO THE CHIEF JUSTICE OF THE UNITED STATES, CHAIRMAN; AND  
MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Your Committee on Rules of Practice and Procedure (Standing Committee) met in Washington, D.C. on June 16-17, 1983. All members of the Committee, the Committee's secretary, Mr. Joseph F. Spaniol, Jr., and Mr. Leland E. Beck of the Administrative Office staff were in attendance. The Chairmen of the Advisory Committees on Appellate, Civil and Criminal Rules attended various portions of the meeting to report on the status of the work of their Committees and to participate in the consideration of operating procedures. Professor Kenneth Ripple, reporter to the Appellate Rules Committee and Professor Arthur Miller, reporter to the Civil Rules Committee were also in attendance.

At the invitation of the Standing Committee, members of the staff of the Senate and House Judiciary Committees met briefly with the Committee to discuss suggestions for improving the rulemaking process. Those staff members who attended are listed in Appendix A.

Status of Advisory Committee Work

The Chairmen of the Advisory Committees on Appellate, Civil, and Criminal Rules have submitted to your Committee additional proposed Rules amendments, with the request that they be published for public comment. The Standing Committee has

decided to withhold publication of new proposed rules changes until the proposed Civil and Criminal Rules amendments and the new Bankruptcy Rules adopted by the Supreme Court and submitted by the Chief Justice to Congress in April have received Congressional consideration.

The Advisory Committee on Bankruptcy Rules is awaiting Congressional action on the new Bankruptcy Rules and has not met since the new rules were approved by the Judicial Conference and adopted by the Supreme Court.

#### Proposed Amendments to the Rules Enabling Acts

On April 21, 1983 the Chairman of the Standing Committee testified at oversight hearings on the operation of the Judicial Conference rules program that were conducted by the House Judiciary Subcommittee on Courts, Civil Liberties and the Administration of Justice, of which Congressman Robert W. Kastenmeier is the Chairman. Also testifying were a representative of the American Bar Association, James F. Holderman, Esq., and a representative from the Public Citizen Litigation Group, Alan B. Morrison, Esq.

At the hearing Mr. Holderman recommended that the Rules Enabling Acts be amended to give the Judicial Conference authority to promulgate Rules of Practice and Procedure, or to authorize the Supreme Court to delegate its authority to the Judicial Conference. Mr. Morrison also recommended that the Judicial Conference be given this authority. Both witnesses suggested that the period allowed for Congressional consideration (currently 180 days for Evidence Rules and 90 days for all other rules) be made uniform. They also proposed several procedural changes to increase public understanding of the rulemaking process.

Subsequent to the hearing, Mr. Kastenmeier forwarded to the Chief Justice and your Chairman copies of a draft bill which would amend the Rules Enabling Acts to

modify the present rulemaking process in several significant respects. Mr. Kastenmeier made clear that the purpose of the draft bill was "to solicit formal comments prior to introduction." A copy of Mr. Kastenmeier's draft bill is set out in Appendix B. Your Committee's recommendations with respect to the provisions thereof are as follows:

A. Rulemaking Authority

The draft bill would amend the Rules Enabling Acts to vest the rulemaking authority in the Judicial Conference, rather than the Supreme Court. Your Committee considered this proposal, as well as the alternate suggestion of the American Bar Association that the rulemaking authority remain with the Supreme Court but that the Court be authorized to delegate this responsibility to the Judicial Conference.

In response to Mr. Kastenmeier's inquiry, the Chief Justice has advised that "the members of the Court see no reason to oppose legislation to eliminate this Court from the rulemaking process." It is the view of the Standing Committee that the question of whether the Supreme Court should continue to promulgate rules changes is a question of policy for the Supreme Court and the Congress, but that if a change is to be made, the authority to promulgate rules and rules amendments should be vested in the Judicial Conference, either directly or by delegation from the Supreme Court.

B. Transmission of Rules to Congress

The draft bill would require that rules amendments be transmitted to Congress by March 15, to become effective on December 15 of the year in which they are transmitted. The current Rules Enabling Acts require that rules changes be transmitted to Congress by May 1, to become effective after a waiting period of not less than 90 days (180 days for the Evidence Rules).

Your Committee is of the view that it is for Congress to determine the amount of time it needs to review proposed rules changes, but that a uniform waiting period should be provided for all rules. Your Committee questions, however, the need or desirability of a nine-month waiting period, which would further extend the already lengthy time required to effect rules changes. The Standing Committee also believes that the present May 1 cutoff date should be retained in order to permit the Judicial Conference to act on proposed rules changes at its March meeting and submit them to the Supreme Court (or directly to the Congress) during the month of April.

### C. Committee Structure

The draft bill would specify the composition of the rules committees, fix the terms of committee members, and authorize the Judicial Conference to appoint committee members. In large measure the draft bill codifies the existing committee structure. Nonetheless, your Committee is of the view that the specificity of the draft would create undesirable inflexibility and that the composition of the rules committees and the terms of committee members should be left to the Judicial Conference. Your Committee also is of the view that the authority to appoint Committee members should remain with the Chief Justice. Presumably, the provision for the appointment of rules committee members by the Judicial Conference is designed to provide a measure of relief to the Chief Justice. As a practical matter, however, your Committee believes this proposal would not attain its objective and indeed might increase rather than decrease the work of the Chief Justice.

#### D. Operating Procedures

The draft bill would specify in detail the procedures to be followed by the Standing Committee and the Advisory Committees in drafting and proposing recommended rules changes. It is your Committee's view that formalizing operating procedures in a statute is unnecessary and would create undesirable rigidity in the rulemaking process. Your Committee is aware, however, that some members of the bench, bar and public, in spite of efforts to inform them, are unfamiliar with the functioning of the present rulemaking process. The result has been to create confusion and occasional criticism. The Standing Committee has therefore adopted a written statement of Procedures in the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, a copy of which is set out in Appendix C. This statement of procedures codifies long-standing practices of the rules committees and incorporates most of the suggestions included in the draft bill. The procedures do not include, however, the draft bill's requirement of open committee meetings, which your Committee deems to be neither necessary nor desirable.

It is the view of your Committee that procedural matters should not be included in a statute.

#### E. Local Rules

The draft bill would require Circuit Council and Judicial Conference review of local rules for consistency with the Federal Rules. Your Committee has decided to initiate a study of local court rules, which have proliferated in recent years and have been increasingly criticized. In the meantime, the Advisory Committees on Civil and Appellate Rules have already begun studies of local rules of the district

courts and courts of appeals. Until these studies have been completed, it is the view of your Committee that it is not appropriate to place additional responsibilities on the busy Circuit Councils and the Judicial Conference at this time.

F. Recommendation

The foregoing views of the Committee have been set out in a letter to Mr. Kastenmeier, a copy of which is attached as Appendix D. The Standing Committee recommends that the Judicial Conference adopt these views and authorize your Committee to inform Mr. Kastenmeier of Conference action thereon.

Respectfully submitted,

Judge Edward T. Gignoux, Chairman  
Judge Carl McGowan  
Judge Amalya L. Kearse  
Judge James S. Holden  
Professor Wade H. McCree  
Professor Frank J. Remington  
Edward H. Hickey, Esquire  
Francis N. Marshall, Esquire

July 20, 1983

Congressional Staff  
Who Met With the Standing Committee  
on June 17, 1983

Senate Judiciary Committee

Arthur Briskman, Minority Counsel  
Subcommittee on Courts

John Nash, Chief Counsel  
Subcommittee on Criminal Law

House Judiciary Committee

Michael J. Remington, Chief Counsel  
Subcommittee on Courts, Civil Liberties and  
the Administration of Justice

David W. Beier, III, Assistant Counsel  
Subcommittee on Courts, Civil Liberties and  
the Administration of Justice

Thomas W. Hutchison, Chief Counsel  
Subcommittee on Criminal Justice

Raymond V. Smietanka, Minority Counsel  
Subcommittee on Criminal Justice

John Green, Committee Intern



AGENDA G-7  
Appendix B  
September 1983

Letter of May 3, 1983  
From Congressman Robert W. Kastenmeier  
To Judge Gignoux Requesting Comments  
On a Draft Bill Prior  
to Introduction

CK BROOKS TEX  
BERT W. KASTENMEIER WIS  
EDWARDS CALIF  
HN CONYERS JR MICH  
HN F. SEIBERLING OHIO  
MANO L. MAZZOLI KY  
J. HUGHES N.J.  
IALL JR TEX  
L. LYNAR OKLA  
TRICIA SCHROEDER COLO  
N. GLICKMAN KANS  
AROLD WASHINGTON ILL  
RNEY FRANK MASS  
O. W. CROCKETT JR MICH  
CHARLES E. SCHUMER N.Y.  
UCE A. MORRISON CONN  
WARD F. FEIGHAN OHIO  
WRENCE J. SMITH FLA  
DWARD L. BERMAN CALIF

HAMILTON FISH JR N.Y.  
CARLOS J. MOORHEAD CALIF  
HENRY J. HYDE ILL  
THOMAS N. KINDNESS OHIO  
HAROLD S. SAWYER MICH  
DAN LUNGREN CALIF  
F. JAMES BENSENBRENNER JR WIS  
BILL MCCOLLUM FLA  
E. CLAY SHAW JR FLA  
GEORGE W. GERAS PA  
MICHAEL DEWINE OHIO

U.S. House of Representatives  
Committee on the Judiciary  
Washington, D.C. 20515  
Telephone: 202-225-3951

STAFF DIRECTOR  
GARNER J. CLINE  
ASSOCIATE COUNSEL  
FRANKLIN G. POLK

5/19/83

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May 3, 1983

Honorable Edward Gignoux  
Judge  
United States Court of Appeals  
156 Federal Street  
P.O. Box 8  
Portland, Maine 04112

Dear Judge Gignoux:

It was a pleasure to have you appear before my Subcommittee as a witness. As you proved in your previous testimony on legislation to eliminate the diversity jurisdiction of the Federal courts, your knowledge of issues relating to the structure and jurisdiction of Federal courts is unmatched.

As a result of the hearing on the Rules Enabling Acts I have prepared a draft bill to modify the current process. I use the term "draft" bill with great care. The major purpose of the bill is to solicit formal comments prior to introduction. As you will note the bill takes the position that the rules should come to the Congress from the Judicial Conference rather than from the Supreme Court. This approach is taken so that we can obtain the views of the various Justices of the Court as well as others on this proposal.

The other items contained in the bill relating to procedures for the promulgation are similarly offered for discussion purposes. It would be most helpful to me if we could receive your informal suggestions and those of the Standing Committee after its June meeting.

Thank you again for appearing before us. I look forward to working with you in the future.

Sincerely,



Robert W. Kastenmeier  
Chairman, Subcommittee on Courts,  
Civil Liberties and the  
Administration of Justice

RWK:dbv

[DISCUSSION DRAFT]  
[24 March 1983]

98TH CONGRESS  
1ST SESSION

H. R. \_\_\_\_\_

IN THE HOUSE OF REPRESENTATIVES

Mr. \_\_\_\_\_ introduced the following bill; which was referred to the Committee on \_\_\_\_\_

A BILL

To amend the provisions of titles 18 and 28 of the United States Code commonly called the "enabling Acts" to make modifications in the system for the promulgation of certain rules for certain Federal judicial proceedings, and for other purposes.

1 Be it enacted by the Senate and House of Representatives  
2 of the United States of America in Congress assembled,

1 That this Act may be cited as the "Rules Enabling Act of  
2 1983".

3 RULES ENABLING ACT AMENDMENTS

4 SEC. 2. (a) That title 28 of the United States Code is  
5 amended by striking out section 2072 and all that follows  
6 through section 2076 and inserting in lieu thereof the  
7 following:

8 "§2072. Rules of procedure; power to prescribe

9 "The Judicial Conference shall have the power to  
10 prescribe rules of practice and procedure (including  
11 pleading and all other such incidental matters) for cases  
12 (including all bankruptcy matters) in the district courts  
13 (including before magistrates thereof) and the courts of  
14 appeals of the United States.

15 "§2073. Rules of procedure; method of prescribing

16 "(a)(1) The Judicial Conference shall appoint  
17 committees, consisting of a balanced cross section of bench  
18 and bar, and trial and appellate judges, to assist the  
19 Conference by recommending rules to be prescribed under  
20 section 2072 of this title. The term of a member of such a  
21 committee is five years.

22 "(2) No person shall serve as a member of any one of  
23 the committees appointed under subsection (a) of this  
24 section for a total of more than ten years.

25 "(b)(1) A separate committee appointed under subsection

1 (a) of this section shall consider each of the following  
2 areas:

- 3           ''(A) Civil rules.  
4           ''(B) Criminal rules.  
5           ''(C) Evidence.  
6           ''(D) Bankruptcy.  
7           ''(E) Appellate procedure.

8           ''(2) In addition to the committees listed in paragraph  
9 (1) of this subsection, there shall be appointed under  
10 subsection (a) of this section a standing committee on rules  
11 of practice and procedure, which shall review each  
12 recommendation of each of the committees so listed for  
13 consistency with each other and existing rules and recommend  
14 to the *Judicial Conference such changes as may be necessary*  
15 to maintain that consistency and otherwise promote the  
16 *interest of justice.*

17           ''(c)(1) Each meeting for the transaction of business  
18 under this chapter by any committee appointed under  
19 subsection (a) of this section shall be open to the public,  
20 except when the body so meeting, in open session and with a  
21 majority present, determines that all or part of the  
22 remainder of the meeting on that day shall be closed to the  
23 public. A transcript of each such meeting in open session  
24 shall be maintained by the committee and made available to  
25 the public.

1       "(2) Any meeting for the transaction of business under  
2 this chapter by a committee appointed under subsection (a)  
3 of this section shall be preceded by sufficient notice to  
4 enable all interested persons to attend.

5       "(d) In making a recommendation under this section or  
6 prescribing a rule under section 2072 the body making that  
7 recommendation or prescribing that rule shall provide a  
8 proposed rule, an explanatory note on the rule, and a  
9 written report explaining the body's action, including any  
10 minority or other separate views.

11       "§2074. Rules of procedure; submission to Congress;  
12               effective date

13       "(a) The Judicial Conference shall transmit to the  
14 Congress not later than March 15 of the year in which a rule  
15 prescribed under section 2072 is to become effective a copy  
16 of the proposed rule. Such rule shall take effect on  
17 December 15 of the year in which such rule is so transmitted  
18 unless otherwise provided by law. Upon so taking effect the  
19 rule shall supersede--

20               "(1) any contrary provision of law then in effect;

21               and

22               "(2) any contrary rule, except a rule of the  
23 Supreme Court, prescribed under section 2071 of this  
24 title.

25       "(b) Any such rule creating, abolishing, or modifying a

1 privilege shall have no force or effect unless approved by  
2 Act of Congress.''.  
3

4 (b) The table of sections at the beginning of chapter  
5 131 of title 28 of the United States Code is amended by  
6 striking out the item relating to section 2072 and all that  
7 follows through the item relating to section 2076 and  
8 inserting in lieu thereof the following:

''2072. Rules of procedure; power to prescribe.  
''2073. Rules of procedure; method of prescribing.  
''2074. Rules of procedure; submission to Congress;  
effective date.''

8 COMPILATION AND REVIEW OF LOCAL RULES

9 SEC. 3. Section 2071 of title 28 of the United States  
10 Code is amended by adding at the end the following: ''The  
11 Judicial Conference shall periodically compile the rules  
12 prescribed under this section by courts other than the  
13 Supreme Court of the United States and orders made under  
14 section 332(d)(1) of this title so as to provide a current  
15 record of such rules. After a preliminary review by the  
16 circuit judicial councils (in consultation with their  
17 advisory committees created under section 333 of this title)  
18 the Judicial Conference shall periodically review such rules  
19 for consistency with rules prescribed under section 2072 of  
20 this title.''.  
21

22 CONFORMING AND OTHER TECHNICAL AMENDMENTS

23 SEC. 4. (a)(1) Title 18 of the United States Code is  
amended by striking out chapter 237.

1 (2) The table of chapters for part II of title 18 of the  
2 United States Code is amended by striking out the item  
3 relating to chapter 237.

4 (b)(1) Section 3402 of title 18 of the United States  
5 Code is amended by striking out the second paragraph.

6 (2) Section 636(d) of title 28 of the United States Code  
7 is amended by striking out "section 3402 of title 18,  
8 United States Code" and inserting "section 2072 of this  
9 title" in lieu thereof.

10 (c) Section 9 of the Act entitled "An Act to provide an  
11 adequate basis for the administration of the Lake Mead  
12 National Recreation Area, Arizona and Nevada, and for other  
13 purposes" approved October 8, 1964 (Public Law 89-639) is  
14 amended by striking out the sentence beginning "The  
15 provisions of title 18, section 3402".

16 (d) Section 22(b) of the Organic Act of Guam is amended  
17 by striking out ", in civil cases" and all that follows  
18 through "bankruptcy cases".

19 (e) Section 25 of the Organic Act of the Virgin Islands  
20 is amended by striking out ", in civil cases" and all that  
21 follows through "bankruptcy cases".



**PROCEDURES FOR THE CONDUCT OF BUSINESS BY THE  
JUDICIAL CONFERENCE COMMITTEES ON  
RULES OF PRACTICE AND PROCEDURE**

Scope

These procedures govern the operations of the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) and the various Judicial Conference Advisory Committees on Rules of Practice and Procedure in drafting and recommending new rules of practice and procedure and amendments to existing rules.

**Part I - Advisory Committees**

1. Functions

Each Advisory Committee shall carry on "a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use" in its particular field, taking into consideration suggestions and recommendations received from any source, new statutes and court decisions affecting the rules, and legal commentary. Each Advisory Committee shall submit to the Standing Committee its recommendations for rules changes.

2. Suggestions and Recommendations

Suggestions and recommendations with respect to the rules should be sent to the Secretary to the Standing Committee, Administrative Office of the United States Courts, Washington, D.C. 20544, who shall acknowledge in writing every written suggestion or recommendation so received and refer all suggestions and recommendations to the appropriate Advisory Committee. The Secretary, in consultation with the Chairman of the Advisory Committee, shall advise the person making a recommendation or suggestion of the action taken thereon by the Advisory Committee.

3. Drafting Rules Changes

- a. An Advisory Committee shall meet at such times and places as the Chairman may authorize.
- b. The reporter assigned to each Advisory Committee shall, under the direction of the Committee or its Chairman, prepare initial draft rules changes, "Committee Notes" explaining their purpose and intent, summaries of all written recommendations and suggestions received by the Advisory Committee, and shall forward them to the Advisory Committee.

- c. The Advisory Committee shall then consider the draft proposed new rules and rules amendments, together with the Committee Notes, make revisions therein, and submit them to the Standing Committee, or its Chairman, for approval of publication.

4. Publication and Public Hearings

- a. When publication is approved, the Secretary shall arrange for the printing and circulation of the proposed rules changes to the bench and bar, and to the public generally, for comment to be made to the Advisory Committee. Distribution shall be as wide as possible and shall include the Chief Justice of the highest court in each State and all individuals or organizations that request copies of proposed rules changes. The Secretary shall also send copies to appropriate legal publishing firms with a request that the proposed rules changes be included in their publications.
- b. In the light of the time required to permit full consideration of proposed rule changes by bar associations, circuit judicial conferences and other interested groups, a period of at least six months shall normally be allowed for public comment.
- c. An Advisory Committee shall normally conduct public hearings on all proposed rules changes after adequate notice and at such times and places as shall be determined by the Chairman. The proceedings shall be recorded and a transcript shall be prepared for the Committee's use. The transcript shall be available to the public at the Administrative Office of the United States Courts.
- d. Exceptions to the time for comment and public hearing requirements of this paragraph may be granted by the Standing Committee, or its Chairman.

5. Subsequent Procedures

- a. At the conclusion of the comment period the reporter shall prepare a summary of the written comments received and the testimony presented at public hearings. The Advisory Committee shall review the proposed rules changes in the light of the comments and testimony. If the Advisory Committee makes any substantial change, an additional period for public comment may be provided.
- b. The Secretary to the Standing Committee, in consultation with the Chairman of the Advisory Committee, shall advise every person who has commented on a proposed rules change of the Advisory Committee action thereon.
- c. The Advisory Committee shall submit proposed rules changes and Committee Notes, as finally agreed upon, to the Standing Committee. Each submission shall be accompanied by a separate report of the comments received and shall explain any changes made subsequent to the original publication. The submission shall also include minority views of Advisory Committee members who wish to have separate views recorded.

6. Records

- a. The Chairman of the Advisory Committee shall arrange for the preparation of minutes of all Advisory Committee meetings.
- b. The records of an Advisory Committee shall consist of the written suggestions received from the public; the written comments received on drafts of proposed rules, responses thereto, transcripts of public hearings, and summaries prepared by the reporter; all correspondence relating to proposed rules changes; minutes of Advisory Committee meetings; approved drafts of rules changes; and reports to the Standing Committee. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.
- c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

**Part II - Standing Committee**

7. Functions

The Standing Committee shall coordinate the work of the several Advisory Committees, make suggestions of proposals to be studied by them, consider proposals recommended by the Advisory Committees, and transmit such proposals with its recommendation to the Judicial Conference, or recommit them to the appropriate Advisory Committee for further study and consideration.

8. Procedures

- a. The Standing Committee shall meet at such times and places as the Chairman may authorize.
- b. When an Advisory Committee's final recommendations for rules changes have been submitted, the Chairman and Reporter of the Advisory Committee shall attend the Standing Committee meeting to present the proposed rules changes and Committee Notes.
- c. The Standing Committee may accept, reject, or modify a proposal. If a modification effects a substantial<sup>1</sup> change, the proposal will be returned to the Advisory Committee with appropriate instructions.
- d. The Standing Committee shall transmit to the Judicial Conference the proposed rules changes and Committee Notes approved by it, together with the Advisory Committee report. The Standing Committee's report to the Judicial Conference shall include its recommendations and explain any changes it has made.

9. Records

- a. The Secretary shall prepare minutes of all Standing Committee meetings.
- b. The records of the Standing Committee shall consist of the minutes of Committee meetings, reports to the Judicial Conference, and correspondence concerning rules changes including correspondence with Advisory Committee Chairmen. The records shall be maintained at the Administrative Office of the United States Courts for a minimum of five years and shall be available for public inspection during reasonable office hours. Thereafter the records may be transferred to a Government Records Center in accordance with applicable Government retention and disposition schedules.
- c. Copies of records shall be furnished to any person upon payment of a reasonable fee for the cost of reproduction.

AGENDA G-7  
Appendix -D  
September 1983

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE  
OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES  
WASHINGTON, D.C. 20544

EDWARD T. GIGNOUX  
CHAIRMAN

JOSEPH F. SPANIOL, JR.  
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES  
WALTER R. MANSFIELD  
CIVIL RULES  
WALTER E. HOFFMAN  
CRIMINAL RULES  
RUGGERO J. ALDISERT  
BANKRUPTCY RULES  
PIERCE LIVELY  
APPELLATE RULES

July 22, 1983

Honorable Robert W. Kastenmeier  
Chairman, Subcommittee on Courts, Civil Liberties  
and the Administration of Justice  
Committee on the Judiciary  
U.S. House of Representatives  
Washington, D. C. 20515

Dear Mr. Chairman:

The Judicial Conference Committee on Rules of Practice and Procedure at its session on June 17th reviewed the draft bill to amend the Rules Enabling Acts as you requested in your letter of May 3rd. I am pleased to offer the Committee's views and comments.

Rulemaking Authority

1. The draft bill would transfer the rulemaking authority from the Supreme Court to the Judicial Conference. Our Committee considered this proposal, as well as the American Bar Association's suggestion that the rulemaking authority remain with the Supreme Court but that the Court be authorized to delegate its responsibility for rulemaking to the Judicial Conference. Some members of the Committee believe there is an intangible benefit to the Federal judicial system in having the Supreme Court promulgate rules, and perhaps, an even greater benefit to the various state jurisdictions which have adopted the Federal Rules of Civil and Criminal Procedure, either in whole or in part. Having the Federal rulemaking process conducted under the aegis of the Supreme Court may be important, particularly to the States.

The Committee concluded that the question of whether the Supreme Court should continue to promulgate rules changes is a matter of policy for the Congress and the Supreme Court, but that if the Supreme Court is to be taken out of rulemaking, the Judicial Conference is the appropriate body to continue to perform this function, either directly or by delegation from the Supreme Court. We shall make this recommendation to the Judicial Conference when it meets in September and thereafter advise you of Conference action.

### Transmission of Rules to Congress

2. The draft bill would require that rules amendments be transmitted to Congress by March 15th to become effective on December 15th. We agree that Congress should determine how much time it needs to review proposed rules amendments and that the time period should be uniform for all rules. Yet a waiting period of nine months may be too long, particularly when the need for rules changes may be urgent because of new legislation or court decisions. A shorter time period, not to exceed six months, would seem more practical.

Moreover, a requirement that rules be transmitted by March 15th would make it impossible for the Judicial Conference to act at its mid-March session in time to transmit rules amendments either to the Supreme Court or directly to the Congress by the March 15th deadline. A one year delay could ensue before rules changes could become effective. We suggest that rules amendments be transmitted to Congress before the first day of May as currently authorized and that a uniform 180-day waiting period be provided for all rules changes.

### Committee Structure

3. The draft bill would specify the composition of the Rules Committees and the terms of Committee members. In large measure, the draft bill incorporates the existing organization. Nonetheless, we believe the specificity of the draft creates an undesirable inflexibility and that the determination of organizational structure and the terms of committee members should be left to the Judicial Conference. See the attached 1958 resolution of the Judicial Conference.

We are particularly disturbed by the proposed statutory provision limiting terms of members to ten years. The original Advisory Committee on Bankruptcy Rules served for twelve years, working first to revise the General Orders in Bankruptcy, and then to draft new bankruptcy rules. In midstream, Congress passed an enabling Act, 28 U.S.C. 2075, granting the Supreme Court authority to promulgate bankruptcy rules. As a result, it took twelve years for the Committee to complete its work. It would have been chaotic to have discharged the Committee after ten years when their work was so near completion.

Similarly, the Advisory Committee on Rules of Evidence was kept in existence beyond ten years while the proposed rules were pending before Congress. The Committee was thus available to work with Congress in resolving the questions which had been raised.

While these were unusual situations involving the drafting of complete new sets of rules, they point up the desirability of maintaining flexibility.

#### Appointment of Committee Members

4. The draft bill would authorize the Judicial Conference to appoint the members of the Rules Committees. Presumably, this provision is designed to provide a measure of relief to the Chief Justice. As a practical matter, however, we believe this proposal would not attain its objective. As Chairman of the Judicial Conference, the Chief Justice is responsible for the ongoing work of the Conference. Even under the language proposed in the draft bill, the Chief Justice necessarily would be involved in the selection of committee members. It is indeed likely that the Conference would delegate its appointing authority to the Chief Justice, since the Conference meets only periodically. On the other hand, if the Conference did not delegate its authority, additional meetings of either the Conference or its Executive Committee probably would be necessary. The result would be to increase rather than decrease the work of the Chief Justice. We suggest that the authority to appoint committee members remain with the Chief Justice as provided in the 1958 Judicial Conference Resolution.

#### Operating Procedures

5. The draft bill would specify the procedures to be followed by the Rules Committees in drafting and recommending rules changes. At the June 17th meeting, our Committee formally adopted a written statement of comprehensive operating procedures governing the work of the Standing Committee and the Advisory Committees. A copy is enclosed. We intend to publish these procedures and include them in proposed rules amendments hereafter circulated to the bench and bar for comment. This statement of procedures codifies long-standing practices of the Rules Committees and incorporates most of the suggestions included in the draft bill. Our Committee believes that flexibility with respect to operating procedures is desirable and that it is unnecessary to formalize these procedures in a statute. We are also fearful that a statutory specification of procedures might lead to litigation challenging rules, not on their merits, but simply because someone believes that a statutory procedural mandate has not been followed to the letter. We suggest that procedural matters remain with the Rules Committees and the Judicial Conference.

#### Open Meetings

6. The draft bill would require that all committee meetings be open to the public, that public notice of each meeting be given, and that transcripts thereof be prepared. This proposal would introduce a degree of complexity and expense that we believe is neither necessary nor desirable. Our Committee concurs fully in the objective of full public awareness and participation in the rulemaking process, but we believe that any public perception that the process is not now sufficiently open will be ameliorated by the formal statement of operating procedures which has been adopted by the Committee.

The desire of some to have universally open meetings indicates a misunderstanding of how the Rules Committees operate. The initial meetings of an advisory committee are "drafting sessions" at which proposals are prepared for public circulation. As a legislative analogy, the work at these meetings is similar to the drafting work done prior to the introduction of a bill in Congress for public debate and scrutiny. Another analogy would be rule drafting by administrative agencies prior to publication for comment.

Honorable Robert W. Kastenmeier  
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The public participation phase of the rulemaking process opens with the widespread circulation and accompanying publicity given to proposed rules changes, and continues through the period of time provided for written comments and public hearings. The Advisory Committee then meets to consider all comments received. If a substantial change is made in the circulated proposal, existing practice calls for notice, publication, comment and public hearing with respect to any substantive change.

Occasionally, an Advisory Committee will meet to consider the suggestions it has received immediately following a public hearing in whatever city the hearing has been held. Frequently small subcommittees on style, consisting of the reporter and a few members of the full Advisory Committee, will meet at a time and place convenient to the busy members. The dates for these sessions must frequently be adjusted to meet busy schedules. Introducing a requirement of open meetings, with notice, would in our view add undesirable complexity and delay to the program. In the circumstances, we believe the objective of securing public participation should be left to the sound discretion of those charged with the rulemaking responsibility.

#### Local Rules

7. The draft bill would set up a procedure for Circuit Council and Judicial Conference review of local rules for consistency with the Federal Rules. Our Committee agrees that this whole area of local rules requires a thorough review, and the Committee will consider this complex problem at its next session. Indeed, the Advisory Committee on Appellate Rules has already begun a study of the local rules of the Courts of Appeals, and the Advisory Committee on Civil Rules is studying local District Court Rules. We are hopeful that we may achieve a satisfactory solution within the existing rulemaking process. Accordingly, placing additional responsibilities on the busy Circuit Councils and the Judicial Conference at this time does not seem wise.

#### Summary

8. Our Committee believes that it is appropriate for Congress now to address the question of Supreme Court participation in rulemaking and the question of the time allowed for Congressional review. Aside from these two issues, the Committee recommends against including the details of committee structure, membership and operating procedures in a statute.

We appreciate the opportunity to comment on your draft bill. Thank you for your gracious invitation.

Sincerely,

Edward T. Gignoux,  
Chairman

Enclosures