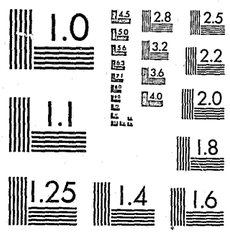

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Federal Rulemaking: Problems and Possibilities

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FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES

By Winifred R. Brown

Federal Judicial Center
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This publication is a product of a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development on matters of judicial administration. The analyses, conclusions, and points of view are those of the author. This work has been subjected to staff review within the Center, and publication signifies that it is regarded as responsible and valuable. It should be emphasized, however, that on matters of policy the Center speaks only through its Board.

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FOREWORD

One of the major achievements of federal judicial administration in the twentieth century has been the rulemaking process. The ultimate test of the process is, of course, the worth of the rules produced; overall, the federal civil, criminal, and appellate procedural rules and the rules of evidence have served both the federal courts and the litigants well. Indeed, one sign of the merit of the rules is the degree to which the state courts have adopted the federal rules for their own use.

The reason that the federal rules have proved so valuable is that the mechanisms established for federal judicial rulemaking are basically sound. And the reason, in turn, for the soundness of those mechanisms is the constant willingness of both bench and bar to consider whether revisions in those mechanisms are necessary due to changing circumstances and conditions. This report, in the same spirit, is not an overall assessment of the rulemaking process, but instead is an effort to identify areas that may merit improvement.

The tenor of discussion in 1957 and 1958, when the last revision of those mechanisms was effected, was not that the rulemaking procedure was in need of drastic overhaul, but that it needed refinement in light of such changes as increasing burdens on the Supreme Court and the need to ensure broader participation in the process. What Professor James William Moore said at that

time of the civil procedure rules had applicability to the rule-making process as well:

> Experience under them for approximately 20 years has, on the whole, been very satisfactory. I do not mean this as a counsel of perfection. But there can be little doubt that the current practice is infinitely better than it was under the Equity Rules and the Conformity Act.*

Nevertheless, a clear need was seen for revision, and the advisory and standing committees of the Judicial Conference were established to meet that need.

In 1979, Chief Justice Burger raised the question of the Supreme Court's role in the rulemaking process, a question that had been troubling observers of the federal rulemaking process and that was thought to merit study. In the 1979 Annual Report on the State of the Judiciary, the Chief Justice noted that

> [w]ith the vast increase of burdens on the Justices over the past 20 years, there are valid questions as to whether Justices can give proposed rules the kind of close study needed, and whether the Court's approval is really meaningful. Perhaps the time has now come to take another look at the entire rulemaking process.

The Chief Justice requested the Federal Judicial Center and the Judicial Conference to study this question. "It may well be," he said, "that no change is indicated, but the subject is important enough to merit a fresh look."

This report, Federal Rulemaking: Problems and Possibilities, was produced in response to that call by the Chief Justice, and has been pursued in the same spirit of seeking improvement

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* The Rule-Making Function and the Judicial Conference of the United States, 21 F.R.D. 117, 126 (1958).

that motivated the call. The very nature of the charge meant that it was not intended to be, and is not, a thorough review of the strengths and weaknesses of the process. The focus was to be on those aspects of the process that had been singled out for criticism and that might benefit from change. To borrow from chapter three of this report:

> Any catalog of criticisms carries the risk of unwarranted negativism. That risk is justified, however, by the desire to ensure that all views of even potential merit are brought to the attention of policy makers.

The Standing Committee on Rules of Practice and Procedure of the Judicial Conference has long been concerned with improving the rulemaking process. Both the present chairman, Judge Edward T. Gignoux, and his predecessor, Judge Roszel C. Thomsen, have been supportive of this effort. We would like to hope that this report will be of help in the ongoing effort to improve the rulemaking process.

A. Leo Levin
Director

PREFACE

In general, this report draws upon three major sources: ideas expressed at the December 14, 1979 conference on federal rulemaking, sponsored by the Federal Judicial Center; the discussion paper prepared for that conference by Dean Roger Cramton of Cornell Law School; and the published literature on the subject of federal judicial rulemaking.

The Center is greatly indebted to all those who participated in the conference on rulemaking, sharing their wide experience and informed views. We are also grateful to Judge Roszel Thomsen, former chairman of the Standing Committee on Rules of Practice and Procedure, and Joseph Spaniol, deputy director of the Administrative Office of the United States Courts, for advance reading of chapter two of this report in draft form. Mr. Spaniol and his staff assistant for rules, Barbara Nordberg, have been most helpful in making the files of the Administrative Office available to us, and in answering with unfailing good humor our frequent inquiries.

I. HISTORY AND BACKGROUND

The procedure used in drafting and promulgating the Federal Rules of Civil Procedure adopted in 1938 was followed for all amendments to those rules, and for new rules, for almost two decades. A distinguished advisory committee, assisted by a distinguished reporter, prepared and circulated drafts, revised them following public comment, and transmitted them to the Supreme Court for review. The Court made such changes as it found appropriate and reported them to Congress, which, in practice, permitted them to go into effect in accordance with the statutory, or Court-specified, deadline. (Under the terms of the enabling act,[1] rules cannot go into effect until ninety days after the Court has transmitted them to Congress. The Court can specify this or any later effective date.) Although Congress waited until 1940 to grant the Supreme Court parallel authority to promulgate rules for criminal procedure up to and including verdict, it thereafter followed in the criminal rules area the same practice of permitting rules to go into effect without modification.

By the late 1950s, problems had developed concerning a few of the more controversial rules, and there was a recognized need

1. In this report, as in the literature generally, "the enabling act" refers to 28 U.S.C. § 2072 (1976), the basic enabling act for rules in civil actions, first enacted in 1934.

for a permanent mechanism to provide the Supreme Court with advice and assistance from a variety of sources within the profession. There was some sentiment that the Judicial Conference should draft, and possibly promulgate, the rules, but there was also opposition to this proposal, and the Conference itself did not wish to assume the function. In 1958, Congress instead imposed on the Conference (on its own recommendation and with the approval of the Court) responsibility for continuing study of the operation and effect of the rules, and for recommendation of changes and additions.

The Conference's new role led to creation of advisory committees in various areas, and to review of their work by a standing committee of the Conference and by the Conference itself. This appeared to be a satisfactory solution. Many rules and rule amendments were promulgated; Congress permitted all of them to go into effect without modification, until 1972.

Congressional reaction to the evidence rules submitted in 1972 is familiar to everyone with an interest in judicial rulemaking and is given only cursory treatment in this report.[2] Scholars have analyzed the history in detail, some writers finding part of the explanation in congressional concern with separation of powers at the time of the Watergate revelations. Apart from the unfortunate timing of their transmittal, there were serious objections to some of the rules themselves--particularly to those relating to privilege--and a few objections to adoption of any set of rules in the evidence area.

2. An outline of the rules' development appears at note 143 infra.

For a variety of reasons, transmittal of the evidence rules marked the beginning of sharp criticism of the system by which rules and rule amendments are adopted. Congress went on to examine at length, and make major and detailed revisions in, criminal rules submitted in 1974 and habeas corpus amendments submitted in 1976. While it has subsequently permitted appellate, bankruptcy, civil, and some criminal rule amendments to go into effect without modification, Congress deferred other criminal rule amendments. Members of both Senate and House Judiciary Committees have introduced bills that would make important changes in the system by which rules are now drafted and adopted; and examination of "the whole issue" of federal judicial rulemaking has been called for on the floor of the Senate.

A number of writers have criticized the existing process and the basic framework supporting it. They have offered a variety of proposals, some designed to achieve more openness and participation under the present system, others to change that system in varying degrees. Many of these critics are concerned that the judicial rulemaking process has been damaged by what they regard as excessive congressional review.

In his State of the Judiciary Address to the American Bar Association convention in Atlanta in 1979, Chief Justice Burger took note of issues raised by the evidence rules experience, and of questions raised by individual justices over the years about

the Supreme Court's role. He told the convention that, although no change may be indicated, the subject is important enough to merit a "fresh look."

In response to all these developments, the Federal Judicial Center asked Dean Roger Cramton of Cornell Law School to prepare a "think piece" that could be considered at a small conference of persons whose background would enable them to criticize the present system constructively and to suggest and evaluate alternatives. Fifteen highly qualified advisers joined members of the Center staff for a one-day discussion on December 14, 1979.[3] Professor Cramton's paper provided a point of departure, but the discussion ranged widely, covering all aspects of the present system and a variety of proposals. Because of the desire to encourage the freest possible exploration of ideas, it was understood that there would be no attribution of comments or proposals to any participant. For this reason, some of the criticisms or proposals discussed in this report are not cited to source.

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3. Participants in the Conference were: Henry Brachtl, Esq. (Lipper, Lowey & Dannenberg, N.Y., N.Y.); Prof. Edward W. Cleary (Ariz. State University College of Law); Dean Roger Cramton (Cornell Law School); Judge James E. Doyle (W.D. Wis.); John P. Frank, Esq. (Lewis & Roca, Phoenix, Ariz.); Charles Grau, Esq. (American Judicature Society); Judge Charles W. Joiner (E.D. Mich.); Justice Benjamin Kaplan (Supreme Judicial Court, Boston, Mass.); William K. Slate (Clerk, United States Court of Appeals for the Fourth Circuit); Prof. David L. Shapiro (Harvard Law School); Judge Jack B. Weinstein (E.D.N.Y.).

Observers were Judge William L. Hungate (E.D. Mo.), member of the Advisory Committee on Criminal Rules; Judge Roszel C. Thomsen (D. Md.), member of the Standing Committee on Rules of Practice and Procedure; Judge Walter E. Hoffman (E.D. Va.), chairman of the Advisory Committee on Criminal Rules; and Joseph F. Spaniol, Jr., deputy director of the Administrative Office of the United States Courts.

II. THE EXISTING STRUCTURE AND PROCESS

The procedure by which rules (or rule amendments) are now drafted, reviewed, and promulgated was adopted after Congress imposed responsibilities for this work on the Judicial Conference in 1958.[4] From the beginning, the Conference decided to carry out its mandate through a Standing Committee on Rules of Practice and Procedure (hereinafter "the standing committee"), which would review the work of advisory committees and in turn be reviewed by the full Conference. At the base of the pyramid, and with major responsibility in the rulemaking process, are advisory committees for the civil, criminal, appellate, and bankruptcy areas,[5] each served by a reporter who prepares reports, memoranda, and suggested draft rules. This method of work was initiated by the American Law Institute and used by the original Advisory Committee on Rules for Civil Procedure.[6]

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4. Congress directed the Conference to 1) carry on continuing study of the operation and effect of rules of practice and procedure as prescribed by the Supreme Court for other federal courts and 2) recommend any changes and additions to those rules that it finds desirable. Act of July 11, 1959, Pub. L. No. 85-513, 72 Stat. 356.

5. Because admiralty procedures have been generally merged with civil procedures, there is no longer an admiralty committee. Additional committees are appointed as needed.

A subcommittee of the criminal rules advisory committee drafted the revised Rules for Misdemeanor Trials before United States Magistrates, effective June 1, 1980. 85 F.R.D. 379 (1980).

6. See Maris, Federal Procedural Rule-Making: The Program of the Judicial Conference, 47 A.B.A.J. 772 (1961).

The advisory committee reviews and, where necessary, revises the reporter's draft, circulates the resulting committee draft for comment by bench and bar, and reconsiders the draft in light of the filed comments. It usually makes revisions based on these comments before sending a final draft to the standing committee for review. If revisions are sufficiently important, the advisory committee will circulate a new draft and may make still further revisions based on new comments. It may also, if appropriate, schedule public hearings. In any event, the chairman or a member of the standing committee will usually have acted as a liaison in order to become more familiar with the draft before the chairman of the advisory committee presents it to the standing committee. (All standing committee members may attend advisory committee meetings.)

Review by the full standing committee is thorough. Although not directed to any large-scale rewriting or revision, changes--usually of a technical or clarifying nature--may be made before the document is transmitted to the full Judicial Conference for review. If the standing committee believes that more substantial changes are required, it will return the draft to the advisory committee for further work. In this case, the committees will consider whether the nature of the changes makes another public circulation appropriate.

Semiannual Judicial Conference meetings are usually scheduled for March and September. Rules are almost invariably submitted for consideration at the September meeting to leave the

Supreme Court sufficient time for review before the rules are transmitted to Congress in accordance with the statutory May 1 deadline.[7] Because review of rules is just one item on its very full agenda, the amount of meeting time that the Conference can devote to this work is limited. Normally, it approves the rules as submitted by its committee and--through the Administrative Office of the United States Courts--submits them to the Supreme Court.[8]

The Supreme Court is believed to review the rules at a Court conference session. Court review in recent years has normally resulted in approval, promulgation, and transmittal of the rules to Congress. Congress may permit them to go into effect by taking no action for a specified period--generally ninety days.[9] It may, on the other hand, reject or amend any or

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7. 28 U.S.C. § 2072 (1976) provides that the general civil rules prescribed by the Supreme Court shall not take effect until they have been reported to Congress by the chief justice "at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported." See also 18 U.S.C. §§ 3771, 3772 (1976) (criminal) and 28 U.S.C. § 2075 (1976) (bankruptcy). Cf. 28 U.S.C. § 2076 (1976) (evidence).

8. Throughout the entire rulemaking process, the Administrative Office acts as a secretariat to the Conference and its committees, circulating drafts, arranging meetings, and providing a wide range of legal and administrative services.

9. For amendments to rules of evidence, the period is 180 days, and the same time span has been proposed for other areas. Criminal procedure rules for proceedings after verdict, and rules with respect to trials before United States magistrates, are not required to be submitted to Congress. 18 U.S.C. §§ 3772, 3402 (1976). In practice, however, criminal rules for proceedings after verdict are submitted.

all of the rules; or it may defer their effectiveness for however long it elects.[10] If it defers effectiveness, Congress may eventually allow them to go into effect, reject or amend them, or enact its own rules.

This introductory outline of the process provides no insight into either the professional scholarship and care that go into rulemaking or the problems that seem to have led to the current criticism. To understand these factors, it is necessary to examine more closely the structural components of the process and its actual functioning in specific areas of rulemaking.

For purposes of this study, we have limited our analysis to those procedures that apply to 1) civil rule amendments that were promulgated by the Supreme Court on April 29, 1980 and went into effect on August 1, 1980;[11] 2) appellate rule amendments that were reported to Congress on April 30, 1979 and went into effect August 1, 1979;[12] and 3) criminal rule amendments submitted to Congress on April 30, 1979,[13] some of which went into effect on

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10. Deferral must be by both houses except in the case of evidence rule amendments, which may be deferred by either house. Rules relating to privilege cannot go into effect without action but must be approved by Congress. 28 U.S.C. § 2076 (1976).

11. These amendments are concerned with such matters as service of process, scope and methods of discovery, subpoenas for discovery, court supervision of discovery, and sanctions for failure to make, or cooperate in, discovery.

12. These amendments were concerned with a variety of matters, including notice of appeal, appeal of right in civil cases, review of tax court decisions, the record on appeal, oral argument, and petitions for rehearing.

13. These amendments were concerned, inter alia, with the

August 1, 1979 and some of which were deferred.[14] Correspondingly, analysis of committee structure and function is based on the civil, criminal, and appellate committees. We have selected these particular rules because they are both recent and important. Because some knowledge of past procedures is needed to understand current criticisms of the process, we have, however, included some references to rules promulgated at earlier dates.

The Advisory Committees

Committee Structure

At the heart of the rulemaking process are clearly the advisory committees and their reporters. Members of these committees are appointed by the chief justice in his capacity as chairman of the Judicial Conference. The current civil rules committee has twelve members, including one circuit judge, four district judges, and seven practicing attorneys. The fourteen members of the criminal rules committee include one circuit judge, seven district judges, two officials of the Department of Justice (the solicitor general and an assistant attorney general), one federal public defender, and three attorneys in private practice. The

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secrecy of grand jury proceedings, warrant or summons on indictment or information, admissibility of pleas and plea discussions, production of statements of witnesses, revocation of probation, correction or reduction of sentences, search and seizure, and joint representation.

14. The appellate amendments and the criminal rule amendments were reported in a package with amendments to rule 410 of the evidence rules, and amendments to 28 U.S.C. §§ 2254, 2255 (1976) [hereinafter referred to as "habeas corpus amendments."]

appellate rules committee's fourteen members include nine circuit judges, the chief judge of the customs court, and four practicing attorneys.

Members are generally appointed for four-year terms, as provided in the 1958 Judicial Conference resolution establishing advisory committees.[15] More recent appointments to the criminal rules committee have been for three years, possibly so that the terms of about half the committee would end simultaneously. On the civil and criminal rules committees, appointment dates and term lengths combine to provide continuity as well as change.[16] This is less true of the appellate rules committee.[17] On all three committees, there is considerable flexibility in appointments and reappointments, affected by the need to retain experienced members and to complete committee projects.[18] All three

15. Annual Report of the Proceedings of the Judicial Conference of the United States 6-7 (1958). This resolution also provided that the first appointments should be for staggered two- and four-year terms.

16. The terms of eight members of the civil rules committee will expire in May 1982. There is, however, some overlapping: one term expired in October 1980, two will expire in January 1982, and one in January 1984. Terms of five members of the criminal rules committee expired in 1980; terms of seven members will expire in 1982.

17. All seven specifically limited terms on the appellate rules committee will expire in May, June, or July 1982. Assuming that (in accordance with the 1958 Conference resolution) four-year terms are understood for all appointments not specifically so limited, the terms of all but two committee members will expire at that time.

18. The 1958 resolution limited reappointment to one time but this has not been followed over the years. Note 15 supra.

have a chairman and one or two members whose service goes back to the early 1960s; all three have a few members whose terms began in the early 1970s. All three also have a substantial number of members appointed for the first time after 1975.

It is clear that professional ability and experience are the criteria for selection of committee members. Committee chairmen conscientiously seek information about possible appointees and are frequently the source of recommendations to the chief justice. Almost all members of the committees have had trial court experience as litigators or judges.[19] Geographical distribution has been given attention, although a relatively large number of appointees are from the East Coast. All members serve on a part-time basis, without compensation. The only person compensated for services is the reporter, who is paid at approximately a Civil Service Grade 18 level,[20] up to a maximum of $10,000 per year.

Reporters, Sources, and the Early Work

Reporters, like committee members, are appointed by the chief justice in his capacity as chairman of the Judicial Confer-

19. Several members of the civil rules committee are, or have been, trial lawyers. Several members of the criminal rules committee have served as government attorneys in such capacities as assistant United States attorney or city or county attorney. The assistant attorney general, Criminal Division, Department of Justice, is a member. A federal public defender has been on the committee since 1976. Several members are, or have been, primarily attorneys for defendants.

20. As of January 1980, this is $180 per day.

ence. In accordance with custom, current reporters for the civil, criminal, and appellate committees are law professors.[21] Reporters' terms are related to those of committee members[22] and reappointments are frequent. The current reporter for the criminal rules committee, for example, was originally appointed an associate reporter in November 1972; his most recent reappointment as reporter was to a three-year term in June 1979.[23]

As outlined by Judge Maris,[24] it was the original intention and early practice that reporters engage in continuing comprehensive study of the rules and of their operation in both federal and state courts, particularly those states that made adaptations to local needs. Such constant study was expected to uncover any restrictive glosses placed on the rules, and any need for additional rules. The reporters were to submit periodic reports on all matters, as well as analyses of filed comments and tentative drafts of rules.[25]

Over the years, such a program of periodic reports based on

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21. Current reporters are from Harvard, the University of Illinois, and Notre Dame.

22. All three terms end in 1982, as do those of a majority of members.

23. There is a tradition of long service in these positions. See note 58 infra.

24. Maris, supra note 6.

25. Judge Maris also foresaw permanent standing rules committees for each circuit conference and encouraged formation of such committees by all federal and state bar associations. He saw these committees as collecting and forwarding complaints about the rules and giving close study to committee drafts. Id.

continuing study has not proved achievable. However, the committees continue to receive all comments on the rules, which are circulated to all members. Review and winnowing of comments remain among the reporter's most important functions.

A reporter will have received information from a variety of sources before a first draft is presented to the committee. In the case of the criminal rules sent to Congress on April 30, 1979, for example, proposals (or ideas for proposals) originated with a federal judge, two United States senators, the Justice Department, a district court clerk, and the Magistrates Division of the Administrative Office.[26] The reporter circulated to the committee in advance of its first meeting (in February 1978) a series of memoranda dated January 5, 1978, January 6, 1978, and January 28, 1978 that analyzed proposals, relevant law, history of previous related proposals, and some optional courses of action. The memoranda also offered tentative preliminary drafts for the committee's consideration.

In the case of the civil rule amendments promulgated by the Supreme Court on April 29, 1980, the advisory committee worked primarily from a draft prepared by an American Bar Association

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26. Need for amendment of the habeas corpus rules was noted by the Supreme Court itself in Harris v. Nelson, 394 U.S. 286 (1969). See Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15 (1977).

Congressional action can also be a source of rule amendments. Early congressional steps toward enactment of the Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 644, for example, made clear the need for revision of the Rules for Misdemeanor Trials before United States Magistrates.

committee. Following a National Conference on Causes of Popular Dissatisfaction with the Administration of Justice, held in St. Paul in April 1976, a task force was created which requested the American Bar Association's Section on Litigation to study abuses in pretrial procedures. A special committee of the litigation section worked on pertinent rule revisions from August 1976 to September 1977. It published its report in October 1977 and submitted it to the civil rules advisory committee.[27] At prior meetings, the committee had, in fact, discussed many of the issues raised by the American Bar Association draft.

The appellate rule amendments originated in an August 1974 Administrative Office memorandum on problems under then-existing rules.[28] This memorandum was circulated to committee members before their first meeting, and the committee apparently decided at that meeting to proceed. A tentative draft of amendments was available for a May 1975 advisory committee meeting, and a revised draft, for an October 1975 meeting. Administrative Office files show that by the time the third draft was prepared (February 1976, Tucson), suggestions had been received from the Labor Department, the Securities and Exchange Commission, the Justice Department, and the California State Bar, as well as from individual judges. The final draft was considered at a meeting in Boulder in September 1976.

27. The report was officially approved by the American Bar Association, and a final corrected draft submitted in December 1977.

28. The rules referred to in this memorandum were Fed. R. Civ. P. 3(a), 4, 10, 13, 21, 24, 33, and 34. Rules proposed for amendment in the preliminary draft were Fed. R. Civ. P. 1, 3, 4, 5, 6, 10, 11, 12, 13, 24, 27, 28, 34, 35, and 39.

Meetings

Frequency of advisory committee meetings depends on the volume of work, but timing is conditioned by the Judicial Conference schedule and the legislative requirement for submission to Congress prior to May 1.[29] Committee meetings are generally held for two days at the Administrative Office.[30] By long-established practice, there is no public advance notice, and there are no available transcripts. (Committee meetings are recorded but are not transcribed unless the reporter requires transcription of a particular portion.) The committees engage in detailed discussion before voting on the individual rules.

Although meetings are not open to the general public for either participation or observation, the criminal rules committee makes a practice of inviting staff of appropriate congressmen, as well as representatives of the Justice Department.[31] Administrative Office files show no written invitations to congressional

29. The schedule of American Bar Association meetings may also be a factor, either because of member attendance or the substantive matters being considered at those meetings.

30. The Administrative Office makes all arrangements and provides each member with a deskbook--a compilation including all relevant material on each rule on the agenda.

31. Congressional staff attendance has been described as "not that good." Representatives of the Justice Department have attended meetings, and the participation of invitees generally has been described as "helpful."

staff from the civil rules committee, but oral invitations may have been issued.[32]

Circulation of Drafts; Comments; Revision and Adoption

The Criminal Amendments. With extensive analytical materials available, the criminal rules committee made choices and changes at its first meeting (February 2-3, 1978) and decided on circulation of a preliminary draft. This draft, dated February 28, 1978, requested comments no later than May 30. The Administrative Office sent six thousand copies to persons and organizations on the criminal rules committee mailing list in early March, but the draft did not appear in the advance sheets until much later--Federal Reporter and Federal Supplement on April 24, Supreme Court Reporter on May 1, and Federal Rules Decisions on May 23. For some members of the bar and the public, then, the comment period was in fact closer to thirty days than to the intended ninety days.

Thirty-four comments were received, with judges, magistrates, professors, and public defenders filing the largest number.[33] Preparatory to the advisory committee's July 6-7, 1978

32. Representatives of the Justice Department, the National Commission for Review of Antitrust Laws and Procedures, and the American Bar Association Special Committee to Study Discovery Abuse did attend the first advisory committee meeting. Two former congressmen are on the civil rules advisory committee.

33. Twelve comments were filed by judges or magistrates; six by professors; four by public defenders; two by the Justice Department (Immigration Service, Legislative and Special Project Section); one each by the American Bar Association and the Kentucky Bar Association; two by clerks of court; and six by practicing lawyers.

meeting, the reporter reviewed all comments and sent each committee member a summary and analysis, together with the views of an editorial committee,[34] and a revised draft of the proposals reflecting those views. Because the proposals were for the most part corrective (that is, designed to bring rules into conformity with changes in the law), and because it believed that all points of view had been obtained, the committee decided at the July 6-7 meeting to approve the rules for submission to the standing committee.[35] In these particular circumstances, the criminal rules committee was able to adopt a draft within five months of its first meeting on the amendments.

The Civil Amendments. The civil rules committee reviewed the American Bar Association draft at its first two meetings (December 12-13, 1977 and January 12-13, 1978) and decided to circulate for comment (in some cases with modifications) all but two of the American Bar Association proposals,[36] plus committee

34. The editorial committee had reviewed the comments at a June 19, 1978 meeting.

35. Report of the Standing Committee on Rules of Practice and Procedure to the Judicial Conference (Sept. 1978). The reporter believed that--in spite of the short comment period--the responses equaled in both quantity and quality those filed on previous occasions.

36. The American Bar Association had sought to control discovery abuses by amending Fed. R. Civ. P. 26(b)(1) to restrict discovery to the "issues" presented by the action, and by amending Fed. R. Civ. P. 33(a) to limit to thirty the number of interrogatories that may be asked of right. The committee decided to propose alternative ways of dealing with discovery problems.

proposals for revision of a few additional rules. The preliminary draft[37] was dated March 31, 1978 and requested comments by July 1, 1978, so that, like the criminal rules draft, it appeared to allow a ninety-day comment period. As in the case of the criminal draft, however, the period was in fact considerably shorter.[38] The attorney general and several organizations and individuals requested an extension of time and, because of the short period originally allowed and the controversial nature of some of the proposals, the due date was extended to November 30, 1978.[39] More than 120 comments were received from individuals and a broad range of organizations.[40]

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37. 77 F.R.D. 613 (1978).

38. The draft was sent to West Publishing Company and nine other publishers on April 20; it was mailed to some eight thousand persons or organizations on April 21, 1978. It did not appear in advance sheets of the Supreme Court Reporter, Federal Reporter and Federal Supplement until May 15, 1978; it did not appear in Federal Rules Decisions until the monthly issue sent out by West on May 23, 1978.

39. Reports of the Proceedings of the Judicial Conference, 84-85 (September 1978).
In his 1978 report to the Judicial Conference, Judge Thomsen, chairman of the standing committee, stated that the standing committee had considered both the need to speed up the rulemaking process and the need to permit adequate time for the formulation and submission of proposed changes. The standing committee had suggested that advisory committees consider the appropriate period of time to be allowed for comment. Id. at 85.

40. Comments were received from various bar associations, practicing lawyers, the Department of Justice, clerks of court, the National Shorthand Reporters Association, the NAACP Legal Defense and Educational Fund, the General Counsel of the NAACP Special Contribution Fund, the Institute for Public Representation (Georgetown University Law Center), the American Civil Liberties Union, various associations of newspaper publishers and editors, Legal Aid and Services Associations, the Migrant Legal Action Program, and the Public Citizen Litigation Group.

In addition, and also apparently because of the controversial nature of the amendments, the committee decided to hold hearings. The bar was informed of this by notice dated July 15, 1978. In order to contain costs, about three thousand copies of the notice of hearings were sent out, using a smaller mailing list than that used for the draft rules.[41]

Hearings were held in Washington on October 16 and in Los Angeles on October 26. Judge Mansfield, chairman of the Advisory Committee on Civil Rules, presided at both hearings. In addition to Judge Thomsen (chairman of the standing committee) and a reporter, five advisory committee members were present at the Washington hearing; three different advisory committee members were present at the Los Angeles hearing; one member attended both hearings. Witnesses in Washington represented a somewhat broader cross-section of the bar and the public than those in Los Angeles.[42] Because the comment date had been extended until

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41. Notice of the hearings was published in Federal Reporter and Federal Supplement advance sheets for July 31, 1978; in Federal Rules Decisions advance sheets for August 1978; in Law Week for August 1, 1978; in the American Bar Association Washington Letter for August 1, 1978; and in Federal Case News for August 4, 1978. (It may have received additional publication, since it was sent to other publishers.) It was mailed to the judicial branch; the House and Senate Judiciary Committees and staff counsel; the House and Senate Appropriations Committees' subcommittees on the judiciary; Department of Justice; state courts; Executive Director and Committee on Procedures of the American College of Trial Lawyers; organizations represented in the American Bar Association House of Delegates; American Bar Association officers; miscellaneous attorneys on the Administrative Office's list by request; and anyone who commented on the preliminary draft of March 1978.

42. Witnesses at the Washington hearings were: representatives of the American Bar Association; the National Shorthand

November 30, 1978, participants could have filed additional material subsequent to the hearings, but generally did not do so.[43]

The advisory committee met again in December 1978 and in January 1979 to review its proposals in light of the public comments. (By then, a Federal Judicial Center empirical study, analyzing discovery in more than three thousand cases, was also available to the committee.)[44] It decided to withdraw some of its preliminary draft proposals and to modify others. Because it considered these changes important, it circulated a revised pre-

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Reporters Association; the NAACP Legal Defense and Educational Fund; the National Council of the United States Magistrates; a New York admiralty law firm; the bar associations of the cities of New York and of Philadelphia; Special Counsel to the National Commission for Review of Antitrust Laws and Procedures; two clerks of court; a patent attorney; and a private practitioner specializing in complex litigation.

Witnesses in Los Angeles were: representatives of the American Bar Association and of the Los Angeles County Bar Association; the chairman of the Ninth Circuit Judicial Conference Ad Hoc Committee on Discovery; two private practitioners; and the two directors of an Arizona State University study of discovery.

43. A patent attorney who testified at the Washington hearings filed follow-up materials, and a United States magistrate who had not participated in the hearings filed a comment on an argument made at the Los Angeles hearing. He simultaneously filed a critique of the proposed rules, but this would probably have been filed without regard to the hearings because it is a detailed study delivered as a speech in October 1978. Two hearing participants (the National Commission for Review of Antitrust Laws and the directors of the Arizona State University discovery study) filed reports in October and November, but these materials clearly would have been filed even if no hearings had been held.

44. P. Connolly, E. Holleman, & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (Federal Judicial Center 1978).

liminary draft, dated February 12, 1979, and requested comments by May 11, 1979.[45] Both West Company publication and Administrative Office circulation to persons who had commented on the first draft provided the full ninety-day review period.[46]

The advisory committee received more than eighty comments on the revised preliminary draft. At its May 1979 meeting, the committee considered the draft in the light of these comments, made some changes, and approved a draft for consideration by the standing committee at its June 25-26 meeting.[47]

The Appellate Amendments. The appellate advisory committee did not immediately circulate the draft presented by its reporter at its September 1976 meeting (his fourth draft). There was considerable liaison between the appellate and criminal advisory committees and the standing committee before the appellate and criminal drafts were published.[48] In addition to substantive

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45. 80 F.R.D. 323 (1979).

46. Persons who had commented on the March 1978 draft were sent copies of the new draft on February 6, 1979; the new draft also appeared in Federal Reporter and Federal Supplement advance sheets dated February 12, 1979; Supreme Court Reporter advance sheets dated February 15, 1979; and Federal Rules Decisions advance sheets mailed by West on February 28, 1979. The new draft was sent to other publishers and to the full civil rules mailing list on February 21, 1979.

47. A total of about eighteen months thus elapsed between the advisory committee's first meeting considering the American Bar Association draft and approval of a committee draft for transmission to the standing committee.

48. On the basis of Administrative Office files, it appears that the particular concern was a draft then being considered for a proposed Fed. R. Crim. P. 35.1 (appellate review of sentences) and its relationship to the appellate rules.

issues, there were problems in coordinating the comment period and advisory committee meeting dates with the fixed schedule of the Judicial Conference.[49] The preliminary draft was published in April 1977 (dated March 31, 1977) and comments were requested by November 15, 1977. Those on the appellate rule mailing list had a comment period of about six months.[50]

Twenty-seven comments were filed.[51] The reporter prepared a critical summary of the comments for the December 1977 meeting of the advisory committee, at which the committee approved the draft.[52]

Advisory Committee Notes and Other Documents

Procedures concerning documents are common to all advisory

49. The standing committee initially proposed that the draft be published on a schedule short enough to permit consideration at the September 1977 meeting of the Judicial Conference. This would have permitted submission to the Court and Congress in accordance with the customary time table. (See text accompanying note 7 supra.) However, the advisory committee believed that publication could not be accomplished until May, and that a six-month comment period was necessary. It therefore planned to meet in December 1977 to report to the standing committee in January, so that the standing committee could report to the March 1978 Judicial Conference meeting.

50. The rules were mailed around May 23, 1977 but, due to oversight, there was no notice by publication.

51. Those filing were the District Court Clerks' Committee; the Appellate Section of the Department of Justice; the State Bar of California; the Federal Public Defenders of San Diego; the American Bar Association Section of Criminal Justice; the Fifth Circuit council (with respect to rule 34 only); and individual judges, clerks, circuit executives, attorneys, and professors.

52. Contrary to the committee's original plan, the draft was not considered by the standing committee until its July 1978 meeting.

committees. Filed comments are kept at the Administrative Office, where they are available to persons with a legitimate purpose in seeing them. As previously noted, minutes of meetings are not available; nor have reporter's notes, memoranda, or drafts been made public.[53]

Drafts published by the advisory committees are accompanied by official "Notes," explaining the purposes of the proposed rules or amendments. Notes may spell out criticisms of the old rule, explain how the proposed rule could be used, point out what it does not do, or outline alternatives that were considered. Notes range from one sentence stating that an amendment is "clarifying" to long scholarly analyses of case law developments requiring or supporting the proposed changes. They contain no indication of any differences of opinion on the committees; all committee decisions appear to be unanimous.

As illustrated by the civil rule amendments promulgated on April 29, 1980, the notes contain no specific information about proposals that are revised or rejected in the course of a draft's development. Although the notes accompanying the preliminary draft explain in some detail the committee's action in rejecting or modifying American Bar Association proposals, there are unexplained material differences between the preliminary and the revised preliminary drafts.[54] For example, the preliminary draft

53. See p. 27 infra, concerning the standing committee's newly granted authority to release documents.

54. Preliminary Draft of Proposed Amendments, dated March 1978; Revised Preliminary Draft, dated February 1979.

would have amended existing rule 26(b)(1) to eliminate some language defining the scope of discovery; the advisory notes explained why this amendment was being proposed instead of the "issue" suggestion of the American Bar Association. The preliminary draft would also have amended rule 33(a) to permit a district court to limit the number of interrogatories a party could use; the accompanying advisory note explained why this provision--rather than the numerical limit suggested by the American Bar Association--was adopted. The revised preliminary draft omits any revision of either rule 26(b)(1) or rule 33(a) and makes material changes in the preliminary draft's proposal for a discovery conference (rule 26(f)). Although the advisory committee note on rule 26(f) offers a general explanation,[55] there is no note concerned with the specific omissions. Because withdrawals or modifications throughout the revised draft are left unexplained, it is difficult to infer, even in general, why they were made.[56]

Until the adoption of these particular rules, changes of

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55. The advisory committee note states that the committee had considered a number of proposals to eliminate abuse, including changes in Fed. R. Civ. P. 26(b)(1) and 33(a). It then expresses the committee's belief that discovery abuse is not so general as to require "such basic changes" in the rules governing all cases, and cites the Federal Judicial Center study (note 44 supra) as tending to support this belief.

56. Some information as to why the original proposals were changed may have been given orally to representatives of the Justice Department, the National Commission for the Review of Antitrust Laws and Procedures, and the American Bar Association, who attended the advisory committee meeting in December 1977. (These representatives did not attend the January 1978 meeting.)

this type were explained orally to the standing committee by the chairman and the reporter of an advisory committee. With these rules, the civil rule advisory committee introduced a new procedure--preparation of a "gap" report, which explains changes and is intended to accompany the draft throughout the remainder of the process, that is, from transmission to the standing committee through submission to Congress.

The Standing Committee

The function of the standing committee is to coordinate the work of advisory committees, to suggest matters for committee study, to consider committee proposals (and transmit them to the Conference when approved), and to make general recommendations to the Conference with respect to practice and procedure.[57]

The current standing committee has eight members including one circuit judge, two district judges (including the chairman), two law professors, and three practicing attorneys. The chairman's experience with the civil rules committee goes back to 1960. Both law professors have previously served as reporters to advisory committees.[58]

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57. Annual Report of the Proceedings of the Judicial Conference of the United States 7 (1958).

58. Professor Remington has experience as a member of the criminal rules committee dating back to 1960, and served as reporter from 1966 through 1974. Professor Ward served as reporter to the appellate rules committee from 1961 to 1968, as reporter to the standing committee from 1968 to 1971, and as reporter to the civil rules committee from 1971 until his appointment to the standing committee in May 1978.

Members are appointed by the chief justice. With one exception, current appointments are for three- or four-year terms. Geographical distribution has been given considerable attention.

The standing committee meets for one or two days at least twice a year, about six weeks before Judicial Conference meetings. It schedules additional meetings as its work requires.

Although the standing committee does not engage in major rewriting of rules, it does review proposed rules individually, looking closely at both policy questions and details. It may consider rules in several areas at a single meeting: for example, at its July 1978 meeting, both the criminal and appellate rules were on its agenda. The standing committee made "several changes" in the criminal rules before transmitting them to the Judicial Conference.[59] It also made "technical and clarifying changes" in the appellate rules.[60] In the case of the civil rules, the committee at its June 1979 meeting adopted the advisory committee's draft after excluding one rule deemed to be unnecessary and making "technical and clarifying changes."[61]

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59. Report of the Standing Committee on Rules of Practice and Procedure to the Judicial Conference 3 (Sept. 1978).

60. Id. at 2.

61. The advisory committee's proposed Fed. R. Civ. P. 37(h) specifically provided for discretionary additional sanctions in cases where federal government officers or attorneys fail to cooperate in discovery. Rather than place such a provision in a rule, the standing committee added a paragraph to the notes, pointing out that the court has these remedies available. Report of the Standing Committee on Rules of Practice and Procedure to the Judicial Conference 2-3 (Sept. 1979).

The standing committee also maintains important liaison through attendance by its chairman, or by another member, at advisory committee meetings. As previously noted, the chairman and the reporter of an advisory committee normally present proposed drafts to standing committee meetings. Beyond this, the standing committee engages in informal liaison with other committees coordinating work in different but overlapping areas.[62]

Drafts submitted by the standing committee to the Judicial Conference have not been generally available to the public. The standing committee took a step to change this at its February 1980 meeting, when it recommended that the Conference authorize it to make available to the public, on request, any document submitted to it by an advisory committee and any recommendations submitted by it to the Conference. The Conference granted the committee this authority at its March 1980 meeting.

Earlier, at its June 1979 meeting, the committee considered requiring the issuance of "gap" or transmittal reports by all advisory committees.[63] As described in the agenda, the "gap"

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62. The standing committee had the views of three committees available in making a decision on proposed Fed. R. Crim. P. 35.1: the criminal rules committee, the committee on court administration (which had advised the criminal rules committee over a five-year period), and the appellate rules committee. The appellate committee prepared a special report, and representatives of both the appellate and criminal rules committees appeared at a standing committee meeting to present their views.

63. The agenda for the June 1979 meeting also included the problem of dealing with public criticism of the closed nature of rulemaking procedures and the time required for rule revision. The standing committee has committed itself to examine: the openness of the process; a requirement of public hearings on all

report would include not only a discussion of amendments considered and rejected, but also a statement of the extent of public access to proposed amendments, a summary of comments received, information about public hearings, and other matters that the advisory committee considers appropriate.

The standing committee has long been concerned with improving the rulemaking process. In July 1977, its chairman was authorized to discuss with the chief justice the appointment of a reporter to the standing committee to help study reform proposals. At the same time, the chairman appointed an ad hoc committee to draft procedures for the standing committee and the various advisory committees. In February 1980, the committee again discussed the desirability of appointing a standing committee reporter who would take responsibility for developing a statement of its internal procedures; a committee member agreed to prepare a statement of the procedures followed in drafting and presenting the most recent proposed changes in the civil rules.[64]

Review of proposed rules by the standing committee added very little time to the processing of the civil and criminal

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proposed amendments; special studies by the Federal Judicial Center with respect to particular problems in the operation of the rules; and the relationship between local and federal rules. It has requested its secretary to prepare a statement setting forth the procedures now followed by standing and advisory committees. The entire matter will be reviewed at an early date and a report made to the Judicial Conference. Report of the Standing Committee on Rules of Practice and Procedure to the Judicial Conference 9-10 (Sept. 1979).

64. Report of the Standing Committee on Rules of Practice and Procedure to the Judicial Conference 3-4 (March 1980).

rules here in question. In the case of the appellate rules, however, there was a delay of about seven months between approval of the rules by the advisory committee and approval at the standing committee meeting scheduled prior to the September Judicial Conference meeting.[65]

The Judicial Conference

The Conference is composed of twenty-five judges: the chief justice (chairman); the chief judges of the eleven courts of appeals, the Court of Claims, and the Court of Customs and Patent Appeals; and eleven district judges elected for three-year terms by the circuit and district judges in each circuit. As many as one-third of the district judges may change each year.[66]

As previously noted, the Conference meets twice a year--generally in March and September. In the past, meetings have usually been for two days; they are now scheduled to start on Wednesdays, so that a third day is available if required. Because of its heavy administrative responsibilities, the Conference has a limited amount of time for consideration of procedural rules at its meetings. Before the meetings, members normally have at least thirty days to study the drafts, because the Conference requires this period of advance submission by the

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65. See the time chart in the appendix infra.

66. The statute provided that, in the year following enactment, some circuits should elect district judges for one year, some for two, and some for three years. Act of Aug. 28, 1957, Pub. L. No. 85-202, 71 Stat. 476.

standing committee. The criminal, civil, and appellate rules we are here concerned with were approved by the Conference for submission to the Supreme Court in the same form in which they were transmitted to it. This has been the general pattern in recent years, although the Conference may, of course, reject the rules or require further work or revision.[67]

Because transcripts of Conference meetings are not available, the exact nature of review cannot be determined from documents. It seems likely, and in keeping with its overall function, that Conference review tends to focus on policy questions.[68] It may be inferred from its reports that the Conference also determines whether adequate consideration has been given to the proposed rules at lower levels. Individual members may, of course, give special attention to areas of particular interest.

Draft rules approved by the Conference are transmitted to the Court by the Administrative Office, and the transmittal letter contains excerpts from the standing committee's report. As previously noted, a new type of "gap" report accompanied the civil rule amendments submitted to the Court in September 1979.

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67. In September 1975, for example, the Conference sent back to committee the draft of proposed Fed. R. Crim. P. 35.1 (review of sentences in criminal cases), with directions that it be recirculated for further comments.

68. We know, for example, that the Conference decided (on recommendation of the civil rules committee) that revision of Fed. R. Civ. P. 23(b)(3) (class action) should be by legislative enactment rather than by rulemaking. Report of the Proceedings of the Judicial Conference 33 (March 1978).

The Supreme Court

Supreme Court deliberations are private, and it is not known whether the Court currently assigns responsibility for rule review to a particular justice or to a committee of justices as is done in some state courts. Before 1956, when responsibility was given to the Judicial Conference, the Court directly supervised rulemaking by advisory committees and even adopted some criminal rule amendments on its own initiative without any recommendation.[69] Between 1938 and 1955, there were several instances in which the Court rejected or required modification of rules;[70] but its acceptance and transmission to Congress of the criminal, appellate, and civil rules without modification is typical of recent practice.[71]

Current enabling acts require the Court to transmit promulgated rules to Congress at or after the beginning of a regular session but not later than May 1. The Judicial Conference sub-

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69. See Clark, The Role of the Supreme Court in Federal Rule-Making, 46 J. Am. Jud. Soc'y 250 (1963).

70. One example was the work product rule proposed in 1946. The Court preferred to handle this by decision. Hickman v. Taylor, 329 U.S. 495 (1947). The doctrine there enunciated was later incorporated in a rule. J. Weinstein, Reform of Court Rule-Making Procedures 100 (1977).

71. In March 1971, the Court did return draft evidence rules to the Conference and the entire process of circulation, comment, and revision by the advisory and standing committees was repeated. 51 F.R.D. 315 (1971). According to Judge Weinstein, the advisory committee believed that the rules were returned because of problems with a definition related to lawyer-client privilege. Weinstein, supra note 70.

mission date always ensures that the Court will have a minimum of six months to consider promulgation.

Congress

When Congress receives rules, it refers them to the appropriate committees for consideration. Congress may permit rules to take effect by inaction--a procedure that it followed until 1973. If Congress wishes to avoid automatic effectiveness under the general enabling act, it must act within the current statutory time limit of ninety days.[72] On several occasions in recent years, Congress has found this time period too short and has given itself more time for study by passing a statute to defer effectiveness for a specified or indefinite period.[73] In the case of amendments to the evidence rules, Congress has by statute given itself a 180-day period. The Senate bill to amend the criminal code[74] would have adopted the 180-day period, while the House version[75] would have retained the ninety-day provision.

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72. The ninety-day limitation did not come into effect until 1950. Act of May 10, 1950, ch. 174, 64 Stat. 158. The Court may set an effective date that gives Congress a longer review period.

73. In 1973, Congress deferred effectiveness of the transmitted evidence rules until approval. Pub. L. No. 93-12, 87 Stat. 9. In 1974, it used the severance technique to defer some criminal rule amendments for one year until August 1, 1975. Pub. L. No. 93-361, 88 Stat. 397. In 1976, it deferred habeas corpus amendments until August 1, 1977, or until prior approval. Pub. L. No. 94-349, 90 Stat. 822.

74. S. 1722, 96th Cong., 1st Sess. (1979).

75. H.R. 6915, 96th Cong., 2d Sess. (1980).

Congress may defer all or part of the promulgated rules, and after deferral, it may approve, amend, or reject them.[76] Or it may enact its own rules, including any portions of the submitted rules that it chooses. Theoretically, it could also postpone any action indefinitely.

Congress permitted the transmitted appellate rules to go into effect on August 1, 1979, ninety days after they were reported. When the criminal rules reached it at the same time, Congress was engaged in major revision of the entire criminal code. It passed a statute[77] to defer effectiveness of those promulgated provisions that it regarded as controversial or so related to the code that prior passage might result in confusion. Remaining provisions went into effect after ninety days.[78]

There are no indications that Congress at this time plans to make major substantive revisions in the deferred rules. However,

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76. When Congress did act on the portion of the criminal rule amendments deferred in 1974, it made substantial changes relating to sensitive subjects such as pretrial discovery and negotiated pleas. Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. No. 94-64, § 3(1) to (11), (13) to (35), 89 Stat. 370-76 (1975). Study, hearings, and revision brought the time from first circulation of advisory committee drafts to enactment to a total of five years, seven months.

Congress moved much more rapidly in the habeas corpus area. The preliminary draft was circulated in January 1973, approved for transmittal to the Supreme Court in September 1975, and reported to Congress on April 26, 1976. Congress enacted a deferral statute, held hearings on two days, and enacted rules on September 28, 1976, toward the close of a session. Pub. L. No. 94-426, 90 Stat. 1334 (1976).

77. Pub. L. No. 96-42, 93 Stat. 326 (1979).

78. The deferred group included Fed. R. Crim. P. 11(e)(6)--a rule dealing with admissibility of statements made

in introducing the bill delaying effectiveness, members of both houses noted that Congress had found it necessary to postpone effective dates on four occasions in recent years. The Senate presentation referred to a need for Congress to "reexamine the whole issue of Federal judicial rulemaking."[79]

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during plea negotiations; Fed. R. Crim. P. 26.2--a rule (requested by the Justice Department) to make available to the government the disclosure procedures that the Jencks Act makes available to defendants; Fed. R. Crim. P. 44(c)--a rule dealing with assignment of counsel where several defendants are represented by one attorney; and Fed. R. Crim. P. 32.1 and 32(f)--rules dealing with modification or revocation of probation.

79. 125 Cong. Rec. S.10,460 (daily ed. July 24, 1979).

III. CRITICISMS AND PROPOSALS FOR CHANGE

As noted in the preceding chapter, the standing committee has long been concerned with improving the rulemaking process. The purpose of this chapter is to present the problems, criticisms, and proposals for reform of the process that have been advanced since the federal rules were promulgated, with particular attention to recent years. The presentation is intended to aid the standing committee and others in their continuing review by ensuring that all views of the rulemaking process receive attention and appropriate consideration.

Any catalog of criticism carries the risk of unwarranted negativism. That risk is justified, however, by the desire to ensure that all views of even potential merit are brought to the attention of policy makers. In reviewing this chapter's summary of critical literature and suggestions, several balancing observations should be kept in mind.

First, the emulation of the federal rules by the vast majority of independent court systems throughout the United States offers eloquent testimony to their fundamental success in achieving fair and effective procedure.

Second, the fundamental suggestions for change by reallocating authority among Congress, the Supreme Court, the Judicial Conference and its committees, and some new rulemaking body arise primarily from long-standing arguments about the proper role of

the judicial and legislative branches in rulemaking. Although some suggestions and comments reflect concern that the pressures of other responsibilities may limit consideration at some levels of the review process, most imply little or no criticism of the way in which rule makers have discharged their responsibility or of the way the rules have operated to regulate practice and procedure.

Third, the remaining proposals for change, for the most part, constitute relatively minor adjustments in the overall process. The suggestions tend to focus on such matters as how to expedite the process while giving adequate time for review, how to enlarge participation, and how to ease the burden on rule makers while maintaining the quality of review and experience brought to bear. If there are fundamental flaws in the performance of rule makers under the present system, they are not reflected in any consensus for major overhaul even among the critics whose views are summarized here.

Finally, it should be recognized that many of the suggested changes are already under consideration by the committees of the Judicial Conference, and responsive steps have already been taken on some points.

The following review of criticism and proposals, then, is offered in the context of these balancing observations.

The nature of the rulemaking process has been analyzed in detail, particularly at several critical periods in its development and exercise.[80] The literature deals with several issues: the source and location of the power, the question of who can best exercise the power, and the nature of the process itself. Theories of the source of rulemaking power and the character of the process are of interest here insofar as they provide perspective on current criticisms and proposals for change.

For a decade or more before the 1934 enabling act was passed, judicial and legislative roles in rulemaking were subjects of particular controversy. Legislative codes of procedure, although initially achieving needed reforms, had become increasingly rigid and concerned with detail. Ambiguities of the Conformity Act[81] made the rules applied in federal courts uncertain and variable from state to state. The Supreme Court lacked authority to enact rules for actions at law, and efforts to restore its power were consistently frustrated by Congress, which was in-

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80. See Weinstein, supra note 70; Clinton, supra note 26. See also Pound, The Rule-Making Power of the Courts, 12 A.B.A.J. 599 (1926); Wigmore, All Legislative Rules for Judiciary Procedure are Void Constitutionally, 23 Ill. L. Rev. 276 (1928); Sunderland, Character and Extent of the Rule-Making Power Granted U.S. Supreme Court and Methods of Effective Exercise, 21 A.B.A.J. 404 (1935); Clark, Power of the Supreme Court to Make Rules of Appellate Procedures, 49 Harv. L. Rev. 1303 (1936); Levin & Amsterdam, Legislative Control over Judicial Rulemaking: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 106 (1958); Wright, Procedural Reform: its Limitations and its Future 1 Ga. L. Rev. 563 (1967); Separation of Powers and the Federal Rules of Evidence, 26 Hastings L.J. 1059 (1975). For discussions of rulemaking in state courts, see C. Grau, Judicial Rulemaking: Administration, Access, and Accountability (American Judicature Society 1978) and Judicial Rulemaking in the State Courts (American Judicature Society 1978).

81. Act of June 1, 1872, ch. 255, 17 Stat. 196.

fluenced by a committee chairman who regarded rulemaking as a legislative and nondelegable function.[82]

Against this background, Wigmore made the most extreme argument for exclusive judicial authority: that the Constitution gives courts general judicial power, including power to control their own procedures, and that--with some limited exceptions--legislative rulemaking is therefore unconstitutional.[83] Dean Pound questioned whether Wigmore's constitutional argument was tenable (coming, as it did, after some seventy-five years of legislative enactment of codes) and insisted, instead, that rulemaking is an inherent judicial function that the Supreme Court, through lack of use, had abdicated to Congress, but that Congress could delegate back to the Court.[84]

Passage of the 1934 enabling act made possible the achievement of the major goals desired by Wigmore, Pound, and other reformers: adoption of uniform federal rules and completion of the union of law and equity through Court-promulgated rules; but theories of exclusive judicial power were not accepted with respect to national rulemaking.[85] On the contrary, the language of the

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82. Walsh, Rule-Making Power on the Law Side of Federal Practice, 6 Ore. L. Rev. 1 (1926), reprinted in 13 A.B.A.J. 87 (1927).

83. Wigmore, supra note 80.

84. Pound, supra note 80.

85. The theory won acceptance in some of the states, and in New Jersey the rulemaking power was treated as not subject to legislative control as late as 1955. Judge Weinstein points out that the theory has now been modified even in that state. Weinstein, supra note 70, at 77.

enabling act reflected the dominant view that the power belongs to Congress.

It is now generally agreed that the power to make rules for lower federal courts[86] has been delegated to the Supreme Court by Congress, and that Congress may withdraw or modify that power. The Court itself recognizes congressional authority, refers to its own power as delegated,[87] and expressly promulgates rules under the authority of specific enabling statutes. It does not follow that the Court has no inherent (although to date unasserted) power to make general rules indispensable to the exercise of its judicial power. The question is largely theoretical for most purposes. As Judge Weinstein has made clear, the development of American rulemaking demonstrates less concern with ideology than with pragmatic accommodation to the realities of concurrent jurisdiction.[88]

Most recent analyses are less concerned with the source, or even the location, of the power than with the nature of the process itself. Recent critics have tended to agree that when judges are sitting to adopt rules (or make other decisions beyond

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86. This report is not concerned with the power of the Supreme Court (and all federal courts) to make rules for the conduct of their own business under 28 U.S.C. § 2071 (1976).

87. Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941); Hanna v. Plumer, 380 U.S. 460, 472 (1964).

88. Weinstein, supra note 70, at 21-87.

a case in controversy), they are acting in a legislative or administrative, rather than a judicial, capacity.[89]

Emphasizing the legislative aspects of rulemaking, many observers find the process inadequate in that it fails to meet standards either followed by Congress in enacting statutes or imposed by Congress on administrative agencies for the promulgation of regulations. Legislative values of openness, representativeness, and participation are stressed, and solutions to perceived problems are sometimes sought in terms of more congressional input, or even creation of special legislative-type rulemaking bodies within the judicial branch.

Classification of the various criticisms of the rulemaking process results in inevitable overlapping and is, to some degree, unsatisfactory. For discussion purposes, however, we have grouped the criticisms into three rather arbitrary categories: those that deal primarily with the process itself, accepting the existing structure as given; those primarily concerned with the structure; and those concerned with the subject matter and content of promulgated rules--primarily criticisms relating to the judicial-legislative relationship.

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89. The Supreme Court has found that the action of the Virginia Supreme Court and its chief justice in propounding a bar code is not an act of adjudication but an act performed in their legislative capacity, for which they are entitled to legislative immunity. Supreme Court of Virginia v. Consumers Union of the United States, No. 79-198, 48 U.S.L.W. 4620, June 3, 1980.

The Process

Lack of Openness

The present process is criticized as "closed" or "private." This complaint holds that the public does not know what the general rulemaking procedures are and lacks sufficient information at all steps in the process, from early advisory committee deliberations through promulgation. Resultant lack of participation, it is alleged, means that the process does not receive sufficient public input. Therefore, the process does not recognize and deal with problems and interest groups at an early stage--a weakness that leads to lack of support by the bar and lack of acceptance by Congress. Some criticism goes further to assert that lack of openness adversely affects the quality of rules[90] or is a factor in the failure of the process to meet "the expectations of our constitutional traditions."[91]

Publication of Rulemaking Procedures. The general rulemaking procedures of the Conference and its committees have never been published. There is a 1961 descriptive article by Judge Maris,[92] but current procedures are in some respects different from those he foresaw, and there is nowhere any detailed sys-

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90. 125 Cong. Rec. H62, 71 (daily ed. Jan. 15, 1979) (remarks of Representative Holtzman on H.R. 480 and H.R. 481).

91. Lesnick, The Federal Rule Making Process: A Time for Reexamination, 61 A.B.A.J. 579, 582 (1975).

92. Maris, supra note 6.

tematic formulation.[93] Professor Lesnick contends that formulation and publication of Conference procedures would make participation by interested persons easier and would require Conference consideration of the degree to which its procedures ensure the broad input intended by original proponents of Conference rulemaking.[94] Other students of the system support publication, and several states have published procedures.[95] H.R. 480 and H.R. 481, introduced in the first session of the Ninety-sixth Congress by Representative Holtzman, would have required publication of Conference rulemaking procedures in the Federal Register. The bills would also have required the submission of rulemaking procedures to "any appropriate private publishers of regularly issued materials published for the legal community, for inclusion in those materials."

Notice of Rulemaking. The first public notice that changes are being considered is the publication and circulation of a preliminary draft of proposed rules. The drafts are tentative, subject to change by the advisory committee, and in no way endorsed

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93. Some procedures are, in fact, unknown even to persons generally familiar with rulemaking. It does not seem to be generally known, for example, that advisory committees receive comments and complaints at all times, not only when drafts are in circulation.

94. Lesnick, supra note 91. See also Weinstein, supra note 70, at 106.
The Commission on Revision of the Federal Court Appellate System recommended publication of internal court procedures. Structure and Internal Procedures: Recommendations for Change 44 (1975).

95. C. Grau, supra note 80.

by the Conference. They have, however, already been considered at one or more advisory committee meetings and have probably been through one or more revisions.

Several critics propose that notice be given before the advisory committee adopts a draft. Representative Holtzman's bills would have required public notice ninety days before any advisory committee meeting giving "formal consideration . . . to a proposed rule." The notice would have included "a list of issues that the proposal raises and any copy of the proposal, if such copy is then available."[96] This provision could be interpreted to require publication of a reporter's draft, although a reporter's draft rules are not "proposed" in the sense used by the committee.

Some critics would, in appropriate cases, move notice back an additional step, to the time when a problem is first identified. This notice would presumably be similar to the Advance Notice of Proposed Rulemaking that administrative agencies use to obtain views on whether any action should be taken, as well as on the merits of various possible actions.

The present system has also been criticized on the grounds that notice--when it is given--does not reach a sufficiently wide segment of the bar and the public. Professor Lesnick has cited the evidence rules as an illustration of the inadequacy of notice given through publication in West Company advance sheets and dis-

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96. H.R. 480, 96th Cong., 1st Sess. § 2074(b) (1979); H.R. 481, 96th Cong., 1st Sess. § 2074(b) (1979).

tribution to Administrative Office mailing lists.[97] The Administrative Office, in fact, mails proposed rules to several additional publishers, requesting that they make them available to their subscribers; but it is not clear to what extent these publishers actually print the draft rules.[98]

Representative Holtzman and several other critics have proposed publication in the Federal Register, as well as appropriate West Company publications.[99] Publication in the Congressional Record has also been suggested, in order to get congressional input at an early stage.

The mailing lists have been the subject of some criticism. In 1974, Professor Lesnick noted that they were not available to the public,[100] and in 1975, he complained that the lists were limited to bar associations and public officials.[101] Earlier, in 1973, the Washington Council of Lawyers had complained that the

97. Lesnick, supra note 91, at 580.

98. West Publishing Company publishes all proposed rules as a matter of courtesy, and Matthew Bender regularly publishes proposed bankruptcy rules.

99. Congress authorized the Federal Register to publish notices from the judicial branch. Act of Oct. 28, 1978, Pub. L. No. 95-539, 92 Stat. 2040. Previously, the Federal Register's authority had been limited to notices of the executive branch and independent agencies.

100. Proposed Amendments to Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess., 199 (1974) [hereinafter cited as Hearings on Proposed Amendments to Federal Rules of Criminal Procedure] (testimony and statement of Howard Lesnick).

101. Lesnick, supra note 91.

lists were limited to lawyers (a matter of particular concern with respect to privilege questions) and had pointed to an absence of comments from civil liberties lawyers, public defenders, and lawyers for dissidents, poverty groups, and minorities.[102]

The current civil rules mailing list is basically a list of judges, lawyers, officials, professional associations, law libraries, and professors, although it does include the American Civil Liberties Union.[103] Filed comments on the discovery amendments submitted to the Court on September 25, 1979, however, demonstrated that certain issues elicit responses from a wide range of organizations.[104]

The current criminal rules mailing list includes, in addition to the usual officials and bar associations, the American Civil Liberties Union, the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association,

102. Proposed Rules of Evidence: Hearings Before the Special Subcomm. on Reform of Federal Criminal Laws of the House Comm. on the Judiciary, 93d Cong., 1st Sess., 160-61, 176-77 (1973) [hereinafter cited as Hearings on Proposed Rules of Evidence] (testimony and statement of Charles Halpern). Mr. Halpern suggested that the committee might have overcome its unrepresentative character had it actively sought comments from groups such as the NAACP's Legal Defense and Educational Fund, the National Bar Association, the National Lawyers Guild, and the Office of Equal Opportunity's Legal Services Programs. Id. at 179.

103. It includes the National Bar Association, a black professional organization the absence of which Mr. Halpern criticized.

104. See note 40 supra.

and Texas Criminal Defense Lawyers.[105] The appellate rule list includes almost all of the criminal list.

Some critics continue to support an active effort to obtain comments from a wider range of persons and organizations, specifically including lay groups that might be affected by rule changes. The Holtzman bills would have directed the Conference, first, to seek comment from "a wide variety of persons and organizations that may be affected by the adoption of the proposal;" and second, to provide notice--to the extent practicable--to "organizations representing those segments of the legal community that are concerned (or have in the past indicated a concern) with matters the proposal affects, and to an appropriate committee of each House of Congress."[106] Dean Cramton suggests using The Third Branch, the newsletter of the Federal Judicial Center and the Administrative Office, as well as an information officer to keep the public informed of any work in progress on the rules. Judge Weinstein acknowledges the difficulty in interesting lawyers in rules before they are adopted, and Professor Hazard suggests that the reason may be that the public and most members of

105. In 1973, the National Association of Criminal Defense Lawyers complained of lack of notice in connection with habeas corpus rules and Reporter LaFave stated that "the mailing list is perhaps not as complete as it ought to be." Habeas Corpus: Hearings on H.R. 15319 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary, 94th Cong., 2d Sess. 19,103 (1976) [hereinafter cited as Hearings on H.R. 15319].

106. H.R. 480, 96th Cong., 1st Sess. §2074(c) (1979); H.R. 481, 96th Cong., 1st Sess. § 2074(c) (1979).

the bar in fact have little to say about procedural rules.[107]

Meetings. Considerable criticism is directed to the fact that all meetings in the rulemaking process are closed to public observation. Apart from the democratic value of openness per se, it is said that open meetings would generate confidence in the process and result in better acceptance of the rules, because the public would be informed of the reasoning behind them. Proponents of open meetings believe that, because of the relatively noncontroversial nature of most rules, few people would attend, there would be little adverse effect on discussion, and additional administrative expenses would be minimal.

Other students of the process oppose open meetings, at least in the initial stages of rule drafting and development. They believe that the presence of any observers would inhibit free, spontaneous discussion, exploration of positions, and the development of good working relationships within the committee. They are particularly concerned about observation by representatives of the specialized media, with all of the risks of inaccurate or out-of-context reporting. While some of these objections to openness are particularly applicable to early advisory committee meetings, some are relevant, to a lesser degree, to later advisory committee meetings where comments and revisions in response to a preliminary draft are considered. Standing committee and

107. Hazard, Book Review, 87 Yale L.J. 1284, 1291 (1978) (review of J. Weinstein, Reform of Court Rule-Making Procedures).

Judicial Conference meetings present questions different from those arising in advisory committee meetings because of the level and nature of subjects discussed, and because participants are engaged in review and approval rather than in drafting and formulation.[108]

Dean Cramton has suggested (with respect to both standing and advisory committee meetings) that analysis of the subject matter discussed would be helpful in making a decision about openness, because it would permit assessment of what, if any, harm would be done by conducting open meetings.[109] Although Dean Cramton's proposal is limited to advisory and standing committees, the question of opening Judicial Conference meetings was raised in congressional hearings as early as 1970.[110] The Holtzman bills, although they did not refer specifically to open meetings, implied a right of observation by their requirement of ninety days' advance public notice of proposals to be discussed at meetings.

The June 1980 version of S. 2045 (Senator DeConcini's

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108. The distinction made by the drafters of the Government in the Sunshine Act (GISA) between the deliberations of agency heads and the deliberative process at the staff level is of interest here. Pub. L. No. 94-409, 5 U.S.C. 552 (b) (1976). See note 283 infra.

109. Although Dean Cramton has not formed a final opinion about opening meetings, and some of the arguments against openness seem applicable to minutes or transcripts, he would make minutes or transcripts of advisory and standing committee meetings available in a convenient public file and would, on request, provide copies at charges based on cost.

110. See text accompanying note 115 infra.

"Judicial Conference in the Sunshine" bill)[111] would have opened to public observation all Conference and Conference committee meetings, except meetings that involve specified subject matter and are closed in accordance with detailed procedures. Essentially, a "judicial entity" (meaning the Conference, each of its committees and subcommittees, and each judicial council) could close a meeting (or portion of a meeting): 1) if it involved accusing a person of a crime, formally censuring a person, or discussing his personal ethics; personnel matters of a specific nature; or a specific case or controversy presently before a federal or state court, if the case or controversy is the principal subject matter of the meeting; and 2) if a majority of the entire membership of the judicial entity voted to close. Each judicial entity would have to announce the time, place, and subject matter of each meeting at least a week in advance, and make materials discussed at meetings available to the public. Transcripts of open meetings would also have to be made available.

Unlike the earlier version of S. 2045, the June 1980 revision contained a section that specifically related to rulemaking.[112] Its language was vague but probably would not have required more than is already done about accepting requests for rules and soliciting comments. It would have required prompt

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111. S. 2045, 96th Cong., 2d Sess. § 335(b) (1980).

112. S. 2045, 96th Cong., 2d Sess. § 335(h) (1980).

notice of the denial of any request with a brief statement of the grounds for denial. The Conference would have been required to promulgate regulations to implement the act; and the director of the Administrative Office would have been required to report annually to Congress with respect to details of compliance. Although the bill incorporated many of the provisions of the Government in the Sunshine Act (GISA), its requirements, even in revised form, were in some respects broader.[113] The Senate Judiciary Committee at its June 24, 1980 meeting held the bill over indefinitely.

Senator DeConcini's bill was based on the explicit premise that judges sitting as members of the Conference or the judicial councils are acting as administrators and legislators in their area of competence.[114] One of its purposes is to make a record that will serve as a basis for congressional review. In introducing his bill, Senator DeConcini referred to Senator Ervin's earlier interest in opening full sessions of the Conference on the grounds that Congress should know how carefully the Conference researches its positions, so that it can decide what weight to attach to them.[115]

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113. The Administrative Office prepared a detailed legal and interpretive analysis of the bill dated June 18, 1980.

114. 125 Cong. Rec. S17,218 (daily ed. Nov. 26, 1979).

115. Id. See also The Independence of Federal Judges: Hearings Before the Subcomm. on Separation of Powers of the Senate of the Comm. on the Judiciary, 91st Cong., 2d Sess. 312 (1970) [hereinafter cited as Hearings on the Independence of Federal Judges].

Hearings. Several critics have complained of the absence or infrequency of hearings, and have suggested that congressional or administrative hearings be used as models. Proposals differ on the stage at which they would require hearings, and on the degree of discretion they would allow the committees.

Judge Weinstein would require the standing committee to hold public hearings on all rules.[116] Where rules affect "substantive" areas, he would also have hearings at the drafting stage.[117]

Professor Wright, Dean Cramton, and Judge Joiner would grant the committees discretion to determine whether (and where) hearings are appropriate. Professor Wright feels that hearings are generally a waste of time, particularly in the strictly procedural field to which he would confine rulemaking. He would limit hearings to the advisory committee stage, because this is where formulation takes place.[118] Dean Cramton, on the other hand, recommends that hearings be held at any stage at which they are found appropriate. When a new set of rules or major revisions are involved, he would hold regional hearings at different stages of development. In some cases, he would hold hearings as soon as

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116. In addition to general considerations of openness, Judge Weinstein cites administrative agency requirements. However, his proposals seem to go beyond the requirements of the Administrative Procedure Act, 5 U.S.C. 551 (1976).

117. Weinstein, supra note 70, at 95, 114, 150.

118. Wright, Book Review, 9 St. Mary's L.J. 652, 658 (1978) (review of J. Weinstein, Reform of Court Rule-Making Procedures).

a problem is identified, so that possible pitfalls and effects on various interest groups would come to the committee's attention before drafting is begun. Judge Joiner favors a series of hearings at early stages and throughout the process to develop a record, as is done at congressional hearings.[119]

Professor Clinton believes that hearings could help overcome what he regards as a serious absence of public input, would provide a record to facilitate congressional review, and would avoid duplicative congressional hearings.[120]

Not all students of the rulemaking process believe that hearings are constructive. Some are skeptical about the substantive contribution of the hearings on civil rule amendments (primarily those concerned with discovery) promulgated by the Supreme Court on April 29, 1980. There were not many participants at the Los Angeles hearings,[121] and the hearings generally appear to have produced little commentary not otherwise available. A few persons familiar with the development of the rules criticize the expenditure of time and money for "window dressing."

Some critics believe that, entirely apart from substantive productivity in particular instances, hearings are valuable because they increase the sense of public participation, and hence

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119. Proceedings of a Session of the Conference of Metropolitan District Chief Judges on Rules and Rule Making, 79 F.R.D. 471, 477 (1978) [hereinafter cited as Proceedings on Rulemaking].

120. Clinton, supra note 26.

121. See note 42 supra.

the acceptance of the final product.[122] The opportunity to make an oral presentation of one's point of view before committee members is regarded as having more potential impact than the submission of written comments.[123] It is also suggested that hearings may provide a kind of preview of congressional reaction and advance exposure to the positions of groups that will assert their interests before Congress. The hope, of course, is that time spent on hearings by the advisory or standing committee will eliminate the need for congressional hearings. Congress, however, may well be more willing to intervene in cases that have aroused public controversy.

Advisory Committee Notes. Advisory committee notes have been praised for their scholarship and helpfulness, even by critics of the process. Advocates of openness nonetheless criticize the notes for failing to disclose minority views, to explain the reasons for rejection or modification of earlier committee proposals, and--on some occasions--to give what critics regard as sufficient weight to views and authorities the committees re-

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122. Responses to an American Judicature Society questionnaire show that, as of 1978, twenty-seven states provided for public hearings. Participation usually comes from a small set of groups which justices feel have little to contribute. However, Grau (supra note 80, at 55) believes that open hearings can provide an important public forum for groups directly affected by proposed rules.

123. See Hearings on Proposed Amendments to Federal Rules of Criminal Procedure (testimony of Howard Lesnick), supra note 100.

ject.[124] One critic has referred to committee notes as "biased and relatively one-sided."[125]

Critics stressing the legislative aspects of rulemaking point out that present practices fail to alert interested persons to controversial matters under consideration and fail to provide a record to assist review and interpretation. Detailed questions about the division of votes on the controversial rule with respect to delayed or successive petitions were raised during congressional hearings on the habeas corpus amendments.[126] The Holtzman bills, while not requiring minority reports per se, would have required the Conference to record and publish the number of votes for and against any rule it recommends to the Court, together with "any dissenting views submitted in a timely fashion, and an explanation of why such rule was recommended . . . ."[127]

Critics have urged that the committees respond to filed comments that support positions different from those taken in a draft, and have recommended that the Supreme Court automatically

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124. Friedenthal, The Rulemaking Power of the Supreme Court: A Contemporary Crisis, 27 Stan. L. Rev. 679-86 (1975). Professor Lesnick also criticizes lack of disclosure of minority views on the standing committee and Judicial Conference. Senator Ervin raised the question of publishing Judicial Conference minority reports in 1970. Hearings on the Independence of Federal Judges, supra note 115, at 312.

125. Clinton, supra note 26, at 84 n.387.

126. Hearings on H.R. 15319, supra note 105, at 113.

127. H.R. 480, 96th Cong., 1st Sess. § 2074(e) (1979); H.R. 481, 96th Cong., 1st Sess. § 2074(e) (1979).

recommit rules whenever advisory committee notes do not answer criticisms and objections. Complaints with respect to the merits of committee treatment of contrary case law or other authorities are beyond the scope of this report.[128]

Availability of Documents. The Judicial Conference, at its March 1980 meeting, granted the standing committee the authority to make available to the public, on request, any document submitted to it by an advisory committee and any recommendations submitted by it to the Conference. Exercise of this authority could meet several of the criticisms discussed below.

Unavailability of documents, from reporter's notes through the draft submitted by the Judicial Conference to the Supreme Court, has been a particular source of complaint. Professor Lesnick's criticism of the unavailability of comments filed in response to circulated drafts has been made by others and has recently been revived in the press.[129] Presumably, the theory is that if all interested persons had ready access to comments, they would use them in preparing their own comments, or would respond to them, as in proceedings before administrative agencies.

There is now no special comment file for public examination. There are, in fact, few requests, and the comments are available

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128. Complaints have been made with respect to committee notes on the work product, evidence, and habeas corpus rules. Friedenthal, supra note 124; Clinton, supra note 26, at 34-46.

129. Holleman, FJC Meets in Closed Session to Discuss Openness, Legal Times of Washington, Dec. 24, 1979, at 5.

in files of the Administrative Office to persons showing a legitimate interest.[130]

Judge Weinstein, Dean Cramton, and Professor Lesnick propose that all documents considered in connection with any rule be made available to the public on request. This proposal would make available not only the comments but also reporters' summaries of comments prepared for committee use.[131]

Unavailability of drafts following final circulation for comments has been criticized, particularly on the grounds that material changes might be made without the knowledge of interested participants. Critics continue to cite experience with the evidence rules, when important changes in controversial sections were made after the last public circulation of the draft. One critic also cites an earlier, apparently similar, experience with the work product rule.[132]

Standing committee policy is to recirculate a draft if any

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130. In his testimony on the evidence rules on behalf of the Washington Council of Lawyers in 1973, Charles Halpern noted that Judge Maris had given the council the opportunity to review the file and expressed the hope that this would be a precedent for opening procedures generally. Hearings on Proposed Rules of Evidence, supra note 102, at 159.

131. Administrative agency staff summaries of factual material in a record have been held exempt from disclosure under the Freedom of Information Act on the grounds that they involve selection, which is part of the deliberative process. Montrose Chemical Corp. v. Train, 491 F.2d 63 (D.C. Cir. 1974) (the court noted that a different result might be reached if all the summarized material were not in the public domain). Reporters' summaries would seem to involve a similar process of selection.

132. Friedenthal, supra note 124, at 673, 680.

substantial changes are made, as was done with the recently promulgated civil rule amendments. But unavailability of drafts during the period between circulation and promulgation in the past feeds the suspicion left by the evidence rule experience. Professor Friedenthal suggested in 1975 that the Court should refuse to accept any drafts that have not been circulated for comment.[133] H.R. 480 and H.R. 481 would have prohibited submission of any rule to the Court without public notice; they would also have required explanation of any changes made by a committee. Critics generally agree that drafts should be publicly available on request at all times, and there is some sentiment for publication of the draft submitted to the Court.

As previously noted, there is in fact strong support for the proposition that all documents in the process be made public on request, if not by publication. In the case of major rule revisions, Dean Cramton has suggested preparation of a legislative history, to be made available at accessible locations throughout the country.

In this connection, it is interesting that, although neither the Freedom of Information Act nor the Privacy Act applies to the Conference,[134] Senator DeConcini's "Judicial Conference in the

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133. Id. at 685.

134. The Freedom of Information Act is by its terms applicable only to agencies, and "agency" is defined as including establishments in the executive branch and independent regulatory agencies. 5 U.S.C. § 552(a) and (e) (1976). Furthermore, the Administrative Procedure Act Definition (incorporated by the Freedom of Information Act) specifically excludes "the courts of

Sunshine" bill included a clause stating that nothing in the bill authorized withholding any record or document that would otherwise be accessible under the Privacy Act.[135] Professor Lesnick, in 1975, tentatively suggested a line of argument to bring the Conference under the Freedom of Information Act.[136] His basic view is that even if Freedom of Information Act provisions are not technically applicable to the Conference, there should be "some analogous mode of ensuring optimal public visibility and participation."[137]

Monitoring

Additional criticisms of present procedures relate to monitoring of the rules[138] and to the time required to effect amendment. Some critics see a relationship between these criticisms: more constant monitoring could shorten the process, because com-

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the United States." 5 U.S.C. § 551(1)(B) (1976). The Privacy Act adopts the Freedom of Information Act definition. 5 U.S.C. § 552a(a)(1) (1976).

135. S. 2045, 96th Cong., 2d Sess. § 335(k)(1) (1980).

136. Lesnick argued that judges on the Conference are not acting as a court when formulating rules; that the definition of "court of the United States" in title 28 does not extend to the Judicial Conference; and that, in light of its size, complexity, and separate statutory authorization, the Conference is not, for this purpose, an arm of the Supreme Court.

137. Lesnick, supra note 91, at 581.

138. As used in this section, monitoring means observation of the functioning of rules and includes following legislative developments to determine whether new rules may be required.

mittees would be in a position to make changes more expeditiously.

Advisory committees and their reporters are responsible for monitoring the rules. Despite committees' receptivity to comments and criticism at all times,[139] several critics perceive a need for more active ongoing study as foreseen at the time responsibility was given to the Judicial Conference.[140]

In the opinion of some, more funding and stronger staffing could bring about effective monitoring within the present structural framework. Judge Joiner proposes hiring a full-time secretariat to engage in constant oversight and report frequently to the advisory committees. He would have the committees meet at least quarterly to keep abreast of problems and developments and to take appropriate action. Other observers respond that more active monitoring would inevitably lead to too much revision and tinkering, depriving the bar of any period in which to adjust to amendments. Ten years has been suggested as an appropriate length of time between rule changes.[141]

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139. The standing committee receives letters regularly and forwards them to the appropriate committees.

140. See p. 12 supra.

141. Justices Black and Douglas have in the past questioned whether certain rule changes were too small to be worth promulgating, or whether too many changes were being made. See Statement of Justice Black dissenting from 1966 amendments, 383 U.S. 1029, 1032; Statement of Justice Douglas in 1961 dissenting from promulgation of civil amendments, 368 U.S. 1009, 1012.
Justices Powell, Stewart, and Rehnquist dissented from the 1980 promulgation of civil rule amendments on grounds that the "tinkering changes" the amendments make will delay genuinely

It has been suggested that the committees could perform a valuable function in situations calling for action short of revision by issuing advisory opinions. Such opinions are seen as appropriate, for example, where a court has interpreted a federal rule in a manner not consistent with the committee's proposal, or where, for other reasons, there is confusion among bar members or court administrators.

A number of other suggestions have been made for obtaining more monitoring within the system: hiring more reporters; encouraging law review articles; and sponsoring institutes for study, analysis, and discussion. Proposed continuing legal education for judges in use of the rules may also serve an incidental monitoring function by uncovering problems judges experience.[142]

Time Requirements

Since enactment of the evidence rules, there has been particular concern with the length of time required to put new rules and amendments into effect. Major rules that Congress has elected to review have taken a notably long time to effect. The

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effective reforms. They would have returned the proposed rules to the Conference, directing it to initiate a thorough examination of the discovery rules. Dissent from Court Order of April 29, 1980, adopting amendments to the Federal Rules of Civil Procedure, 446 U.S. 997 (1980).

142. Judge Joiner proposes that the help of the American Bar Association, the Association of American Law Schools, and the courts be solicited in attempts to provide continuing education programs. Proceedings on Rulemaking, supra note 119, at 478.

evidence rules required about ten years from the date the advisory committee started work on the draft to their effective date; about two of those years were consumed in congressional review.[143] Criminal rules transmitted to Congress in 1974 required five years and seven months from first circulation of drafts to enactment; fifteen months of this period were consumed in congressional review.[144]

The committees are clearly concerned with time factors.[145]

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143. An ad hoc committee appointed in 1961 concluded that revision of the rules was feasible and advisable, and an advisory committee began work on drafting the amendments in June 1965. In March 1969, the standing committee published and circulated a preliminary draft. 46 F.R.D. 161 (1969). The advisory committee then made revisions in light of the public comments; the standing committee made a few more changes; the Judicial Conference submitted a draft to the Supreme Court in October 1970. The Court returned the draft to the Conference for further consideration in March 1971, and the entire process of circulation, comment, and revision by the advisory and standing committees was repeated. 51 F.R.D. 315 (1971).

The Judicial Conference sent the new revised draft to the Court in October 1971. While it was before the Court, the standing committee adopted amendments to rule 509 (secrets of state) and rule 510 (identification of informers). The Judicial Conference approved these amendments in March 1972 and submitted them to the Court. The Court promulgated the evidence rules, including these revisions, in November 1972, with an effective date of July 1, 1973. It transmitted them to Congress in February 1973. Congress enacted rules by An Act to Establish Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975). The rules became effective July 1, 1975.

144. In the narrower field of habeas corpus amendments, on the other hand, review was accomplished quickly at the end of a session. Congress postponed effectiveness on July 8, 1976, held hearings on August 5 and 30, and enacted rules on September 28, 1976. 28 U.S.C. §§ 2254, 2255 (1976).

145. The time chart in the appendix infra shows the time consumed by the rulemaking process in the case of the civil, criminal, and appellate rules whose development is traced in chapter two.

Current comment periods are relatively short, and the standing committee has spoken of the need to study them and achieve flexibility. On occasion, there have been complaints that the time allowed for comments has been insufficient, but the committees can always grant extensions, and lack of time does not seem to be a general problem.

Recent criminal rule amendments went from first advisory committee meeting to promulgation in about fourteen months--a record comparable to the "emergency" civil and admiralty amendments of 1961. Civil amendments promulgated by the Court on April 29, 1980 were submitted to it one year and nine months after the first advisory committee meeting, even though hearings were held and the draft was circulated twice.[146] The required length of time is affected by many factors, for example, the nature of the rules, the history of previous related proposals, the point of departure for the committee's work, and the need for urgency.[147]

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146. Even more expeditious action was taken on rules for misdemeanor trials before magistrates. These are not typical rules, since this is a highly specialized area and there is no requirement that these rules be submitted to Congress. But the speed with which these rules were promulgated does illustrate the value of close observation of congressional developments and work by an expert task force prior to advisory committee consideration. The Federal Magistrate Act of 1979, supra note 26, was signed by the president on October 10, 1979 and draft rules were published and circulated for comment the same month. The advisory committee considered comments on the draft at the January 1980 meeting; the standing committee reviewed the draft in February, and the Judicial Conference reviewed it in March. The Supreme Court, by Order of April 14, 1980, promulgated the rules effective June 1, 1980. 445 U.S. 975 (1980).

147. Appellate rule amendments effective August 1, 1979 required about five years from the first advisory committee meeting to their effective date. The chairman of the advisory committee died during the drafting period and there were problems in meeting the fixed Judicial Conference schedule. See pp. 21-22 supra.

Although there has been considerable criticism of the time required for rule revision, there is, surprisingly, no criticism that particular stages in the Court phase of the rulemaking process take too long.[148] The problem is more often seen as arising from the number of stages and from the fixed dates of some of the meetings.

Other Criticisms

A few other criticisms of the process are discussed in other sections of this chapter. Suggestions that congressional participation should be sought at an earlier stage, and proposals for wider application of (or elimination of) the one-house veto, are intertwined with the whole judicial-congressional relationship.[149] The alleged need for the Supreme Court to reassert its earlier role in review is also discussed, along with other proposals concerning the Court.[150]

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148. Several commentators agree that ninety days is too short a time for congressional review and support extension of the period to 180 days. The hope is that this additional time will eliminate deferrals.

149. See pp. 86-102 infra.

150. See pp. 70-78 infra.

The Structure

Advisory Committees

Composition. Advisory committee structure and function have been the subjects of remarkably little criticism. Without exception, critics of the system would retain the basic advisory committee work pattern, although some would modify the composition, method of appointment, or size of the committees.

Complaints have arisen that committee membership is too narrowly based and fails to represent some segments of the profession and the public. Opportunity for wider participation was one of the major objectives when the present Judicial Conference rulemaking system was introduced in 1958.[151] Questions are now being raised about the degree to which this objective has been achieved. The concern in 1958 was with increased representation of various types of legal practice and wider geographical range; more recent criticism, however, is also directed to representation of the interests of various social and economic groups. Judge Weinstein has suggested that the committees are inevitably "susceptible" to the views of the courts, government bodies, and groups they represent.[152] Others have suggested that the committees have too few trial lawyers[153] or defense lawyers, or too

151. See Maris, supra note 6; The Rulemaking Function and the Judicial Conference, 21 F.R.D. 117, 118 (1958) (remarks of Chief Justice Warren).

152. Weinstein, supra note 70, at 8.

153. 125 Cong. Rec. H62 (daily ed. Jan. 15, 1979) (remarks of Representative Holtzman on H.R. 481).

many federal judges[154] and "established, successful" lawyers.[155] Professor Wright has suggested that the composition of the evidence advisory committee resulted in rules best suited to big civil cases.[156] Professor Lesnick, supported by Judge Weinstein, calls for representation of the "under-represented," whom he identifies as "the poor, racial and ethnic minorities, women, children, and those generally less able to call on the services of the legal profession."[157] Dean Cramton also favors broader representation of interests on the committee.

An initial question is whether and to what extent social and economic considerations are relevant to the committees' work. Those finding such considerations relevant are impressed with the degree to which rulemaking--particularly in such areas as class actions, privilege, plea bargaining, and discovery--impinges on the lives of ordinary citizens in their access to, and use of, the courts. They tend to see rulemaking as a legislative process

154. A proposal has been made that no more than half the membership of any committee be made up of federal judges.

155. Hearings on Proposed Amendments to Federal Rules of Criminal Procedure (testimony of Howard Lesnick), supra note 100, at 200.

156. Wright & Graham, Federal Practice and Procedure: Evidence § 5006, at 99 (1977).
Charles Halpern, for the Washington Council of Lawyers, complained that the evidence advisory committee had no lawyers concerned with problems of the poor, no environmental or consumer lawyers, no lawyers actively involved in vindication of minority rights, and no lawyer with active trial experience in representation of political dissidents. Hearings on Proposed Rules of Evidence, supra note 102, at 178-79.

157. Lesnick, supra note 91, at 581.

and not as a technical matter to be left to legal specialists. Those finding social and economic considerations irrelevant see rulemaking as a more objective process than legislation. They ask whether there can really be a "minority" or "women's" position on the types of question that come before the committees, and they object to the charade of "token" representation. Professor Hazard questions, for example, whether committees composed differently would have considered any feasible proposals that were not in fact considered in connection with rules promulgated in the past. He suggests that representation of "radical-activist" views on committees (a proposal he regards as a possible reading of Lesnick) might result in the "combination of paralysis and power politics" exemplified by the privilege issue at the time evidence rules were adopted.[158]

Assuming that the representation of groups or constituencies is seen as relevant to committee work, the question of how to represent them remains. There does not appear to be much support for lay committee members, although Professor Lesnick alludes to this possibility (he assumes, however, that all members will be lawyers). Judge Weinstein describes lay membership as appropriate.[159] Proposals are, rather, that lawyers who are women or members of minority groups should be included as members. Diversity can be taken into account in ways other than membership, for

158. Hazard, supra note 107, at 1284.

159. Weinstein, supra note 70, at 96.

example, by invitations to participate in particular meetings, to file comments, or to participate in hearings; but it is clear that committee membership would be regarded as the most satisfactory.[160]

The American Bar Association's Action Commission to Reduce Court Costs and Delay has been cited as a good model for taking into account the interests of various groups. This commission consists of sixteen members, including the president of the Urban League and the director of Consumers Union.

In connection with representation of various groups affected by the rules, the suggestion has been made that membership for (or liaison with) the clerks of court be considered, since clerks of court are engaged in interpretation and application of the rules on a daily basis. It is believed that they could provide insight into a special range of practical experience and help to ensure that rules are drafted to advance desired policies.

Corollary to proposals for better representation are proposals to increase committee size, despite doubts about the effectiveness of a working group composed of more than eight to thirteen people. There is concern that an increase in size might produce excessively long meetings, taking too much time from volunteer members.

160. See Reports of the Research Institute on Legal Assistance, 11 Clearinghouse Review 861, 862 (1978), mentioning service on advisory committees as a direct method by which Legal Services can affect decision making.

The present process already includes considerable liaison between the advisory and standing committees. There are suggestions that this liaison should be made formal, perhaps through the appointment of one or more standing committee members to each advisory committee.

Method of Appointment. There is some opinion that the method of appointing standing and advisory committee members limits representation to a narrow segment of the bar and results in elitism. Professor Lesnick points to the appointive power as one factor in what he regards as excessive centralization of power in the chief justice. Judge Weinstein, while not objecting to that centralization, believes that, because they are appointed by the chief justice, committee members feel "strong psychological pressure" to modify the rules in the manner they think the chief justice would approve.[161]

Judge Weinstein would not, however, make radical changes. Under his proposal to substitute the Judicial Conference for the Supreme Court as promulgator, the Conference would appoint the standing committee. This would mean "delegation to a nominating committee dominated by the chief justice" or appointment by the chief justice "with the advice of the Conference."[162] The Conference, with the chief justice as chairman, would decide who

161. Weinstein, supra note 70, at 111. Some committee members do not share this view.

162. Id. at 111-12, 149.

should appoint the advisory committees and their reporters.[163]

While Judge Weinstein believes that the issue of minority memberships should be considered and a variety of groups consulted, he does not advocate imposition of fixed representational requirements.[164]

The chief justice would retain considerable, although reduced, influence on appointments under Dean Cramton's proposal for a rulemaking commission. The entire Supreme Court would appoint the commission, and the commission would appoint the advisory committee members.[165] Professor Lesnick would transfer the authority to appoint committee members to the chairman of his proposed commission. Presumably, this would result in committee members from a wider range of backgrounds, as congressional leaders would have a substantial role in appointing members to the commission and there would be congressional representation on the commission.[166]

Terms. In 1956, when the Supreme Court dismissed the original advisory committee without acting on the rules it proposed in 1955, there was some controversy about the indefinite terms of its members. The 1958 Judicial Conference resolution, which

163. Id. at 113.

164. Id.

165. See p. 84 infra.

166. See pp. 82-83 infra. Dean Cramton would also have his proposed commission appoint advisory committee members. See p. 84 infra.

specified four-year terms with one possible reappointment, has proved onerous because of the limited number of experts in this field, and because the time required to complete the drafting of particular rules is unpredictable. There has been relatively little attention or criticism directed to the question of length of terms on advisory committees, but some proposals for change include new provisions for standing committee terms, or for the terms of members of proposed commissions that would perform the standing committee function.[167]

The Supreme Court

The structural question most frequently addressed by current critics is whether the Supreme Court should continue to exercise the promulgating role given it by the enabling statutes, or whether the statutes should be amended to place the rulemaking power elsewhere.

The following arguments have been made against promulgation by the Court: 1) that review of the rules is a burden for which the Court lacks time and staff and with which it is uncomfortable; 2) that the Court should not take responsibility for the rules when the Conference is responsible for their drafting and the Court is acting as a "conduit"; 3) that Supreme Court justices are removed from day-to-day experience with lower court practice and therefore have no special insight to contribute to review of the rules; 4) that in some instances Court promulgation

167. See p. 84 infra.

of rules amounts to issuance of an advisory opinion; 5) that public criticism of promulgated rules at congressional hearings results in loss of prestige for the Court; and 6) that placing its imprimatur on the rules through promulgation makes it impossible for the Court, or for lower federal courts, to rule objectively in cases where the validity of the rules is later attacked.

Burden and "Conduit" Arguments. As early as 1944, Justice Frankfurter, dissenting from the promulgation of criminal procedure rules, expressed concern that the reviewing function would distract from the Court's essential business, which was already increasing in volume and complexity.[168] At that time, the Court directly supervised the work of the original advisory committee and, as Judge Clark pointed out, reviewed it in some detail.[169]

When the Judicial Conference was brought into the rulemaking process in 1958, its role was not seen as reducing the Court's responsibility, but rather as providing the Court the best professional advice and a variety of viewpoints.[170] In 1963, however, Justices Black and Douglas, dissenting from promulgation of civil rule amendments, objected to the Court's role, one ground being that it was acting as a mere conduit, exercising only an

168. 323 U.S. 821 (1944).

169. Clark, Two Decades of the Federal Civil Rules, 58 Colum. L. Rev. 435 (1958); Clark, supra note 69.

170. See The Rulemaking Function and the Judicial Conference (remarks of Chief Justice Warren), supra note 151; Maris, supra note 6.

occasional veto and approving rules in a perfunctory way.[171] Again in 1972, dissenting from promulgation of the evidence rules, Justice Douglas complained that the Court is a conduit to Congress and does not write the rules, supervise their writing, or appraise them on their merits, weighing the pros and cons.[172] Echoes of these criticisms were heard in Congress at the time of the evidence rules submission and have continued to be heard there in connection with congressional review of rules and proposed legislation.[173]

In 1980, Justice Powell, writing for himself and Justices Stewart and Rehnquist in dissenting from the Court's promulgation of discovery amendments, described the Court's rulemaking role as "largely formalistic" and pointed out that both the Conference and the Court must rely on the careful work of the standing committee and the advisory committees. "Congress should bear in mind," he wrote, "that our approval of proposed Rules is more a

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171. 374 U.S. 861, 869-70 (1963). On other occasions, one or both justices dissented on other grounds or without opinions. The Court's orders and pertinent portions of the dissenting opinions are collected in 12 Wright & Miller, Federal Practice and Procedure: Civil, appendix B at 335 (1973) and in 3 Wright & Miller, Federal Practice and Procedure: Criminal, appendix at 435 (1978).

172. 409 U.S. 1132, 1133 (1973). See also statement of Justice Black, dissenting from adoption of civil rule amendments, 383 U.S. 1029, 1032 (1966).

173. See, e.g., Hearings on Proposed Amendments to Federal Rules of Criminal Procedure (testimony of Howard Lesnick), supra note 100; 125 Cong. Rec. H61 (daily ed. Jan. 15, 1979) (remarks of Representative Holtzman on H.R. 480 and H.R. 481); and Hearings on H.R. 15319, supra note 105, at 30.

certification that they are products of proper procedures than a considered judgment on the merits of the proposals themselves."[174]

Professor Friedenthal contends that the quality of rules has deteriorated because of reduced Court involvement. He urges the Court to return to a more active role in the process and suggests that a full-time staff assistant could help relieve some of the burden. Professor Hazard, who favors retention of the Supreme Court as promulgator, is not impressed with the argument that the Court lacks time for adequate review; he points to what he sees as inconsistency between this argument and the contention that the Court cannot objectively review the rules because it is intellectually committed to them.

Removal from Trial Work. Criticism of the Court's role based on removal of the justices from trial work was also made by Justice Frankfurter in 1944[175] and later repeated by Justice Douglas.[176] Judge Weinstein and others prefer promulgation by the Judicial Conference because its membership includes judges who are most familiar with the matters dealt with in the rules. Professor Hazard, on the other hand, points out that several

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174. Dissent from Court Order of April 29, 1980, adopting amendments to the Federal Rules of Civil Procedure, 446 U.S. 997 (1980).

175. 323 U.S. 821 (1944). Justice Frankfurter's particular concern with the Court's removal from trial work was in the criminal procedure area, which he believed involved issues of security and citizens' liberties that should be left to Congress.

176. 384 U.S. 1031 (1966); 409 U.S. 1132, 1133 (1972).

members of the current Supreme Court have strong backgrounds in litigation and trial work, and that all have broad general experience and access to any necessary expert advice.[177]

The Advisory Opinion Argument. Judge Weinstein cites the history of the privilege sections of the evidence rules in support of his argument that promulgation sometimes places the Court in the position of issuing advisory opinions.[178] His contention is that lower courts may look to the promulgated but rejected draft for an advisory opinion on what are "common law principles . . . interpreted by the courts of the United States in the light of reason and experience." He offers no other example and rejects, after detailed consideration, more general arguments that all court rulemaking violates the advisory opinion restriction or the justiciability concept.[179]

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177. Hazard, supra note 107, at 1288.

178. Congress rejected the detailed privilege rules promulgated by the Court, providing instead that questions of privilege should be determined by state law in diversity cases (except with respect to federal questions) and in other cases by "common law principles as they may be interpreted by the courts of the United States in the light of reason and experience."

179. Weinstein, supra note 70, at 53. Separation of Powers and the Federal Rules of Evidence (supra note 80) proposes that, in an area where the writer believes the Court cannot promulgate rules without issuing an advisory opinion (because of the substantive right limitation), the Judicial Conference could informally advise Congress on rule formulation. The author's particular concern was with privilege, which he regards as substantive and hence outside the Court's authority, although encompassed by the evidence enabling act. Judge Weinstein regards this suggestion as useful in other areas. Weinstein, supra note 70, at 192-93, n.382.

Loss of Prestige. Judge Weinstein is concerned that public criticism of Court-promulgated rules at congressional hearings creates unnecessary conflict between the Court and Congress, reducing the Court's prestige and its reputation for unbiased objectivity. He believes that detailed congressional intervention with respect to the evidence rules and the 1975 criminal rule amendments diminished the prestige of the judiciary as a rule-making institution.[180]

Problem of Objective Adjudication. The most frequent and serious argument against the role of the Supreme Court is that promulgation interferes with objective consideration of the validity of the rules in litigated cases. This problem was mentioned by Justice Frankfurter in his 1944 dissent from promulgation of criminal rule amendments, where he pointed out the dangers of prejudging, on an abstract basis, questions that might arise in future litigation. Justices Black and Douglas referred to the "embarrassment" of passing on promulgated rules in 1963,[181] and Justice Black questioned the meaning of promulgation in his dissent from transmittal of amendments to the civil and criminal rules in 1966.[182]

A majority of the Court has never found review of a promulgated rule to be a problem. One year after Justice Frankfurter's

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180. Weinstein, supra note 70, at 148.

181. 374 U.S. 865, 870 (1963).

182. 383 U.S. 1029, 1032 (1966).

criticism, in a decision rejecting an attack on the validity of rule 4(f), the Court specifically stated that its promulgation of rules formulated and recommended by the advisory committee does not foreclose later consideration of their validity, meaning, or constitutionality.[183] Twenty years later, in holding that the service provisions of rule 4(d)(1) were valid and that Erie Railroad Co. v. Tompkins[184] did not require application of a conflicting state requirement, the Court referred to federal rules as embodying the "prima facie judgment that the rule in question transgresses neither the terms of the Enabling Act nor the constitutional restrictions." It also noted that Erie had never been invoked to void a federal rule.[185]

Professor Lesnick cites this case as demonstrating that promulgation creates a presumption of validity, which is not based on proper judicial or legislative procedures and which hence does not provide serious consideration of policy or constitutional questions. Judge Weinstein and Professor Clinton agree that the critical question of whether the rule was substantive or procedural was decided at the time of its adoption, and that the Court's intellectual investment and prestige are so involved in

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183. Mississippi Pub. Corp. v. Murphree, 326 U.S. 438 (1946).

184. 304 U.S. 64 (1938).

185. Hanna v. Plumer, 380 U.S. 460, 470, 471 (1965).

promulgation that it cannot act with objectivity on a later challenge.[186]

Professor Hazard, on the other hand, questions the seriousness of the objectivity problem. He believes that it is no more difficult for the Court to be objective about questions concerning the validity of procedural rules than about questions in other areas where it is involved in the formulation process, for example, standing to sue, abstentions, and deference to pending state court proceedings.[187] Other critics point out that district courts do not find it difficult to decide admiralty cases when they have earlier passed on the question of seizure.

In 1924, the Supreme Court found one of its General Orders and a bankruptcy form invalid as making substantive additions to the Bankruptcy Act.[188] There appears, however, to be no Supreme Court decision holding one of its promulgated rules invalid since the 1938 enabling act.[189] Lower courts, where most challenges remain, have frequently rejected attacks on federal rules, referring to the strong presumption of validity of rules approved by the Court.[190] In Grand Bahama Petroleum Co., Ltd. v. Canadian

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186. Weinstein, supra note 70, at 98-99; Clinton, supra note 26, at 64. See also Hart & Wechsler, The Federal Courts and the Federal System 748 (2d ed. 1973).

187. Hazard, supra note 107, at 1289.

188. Meek v. Centre County Banking Co., 268 U.S. 426, 434 (1925).

189. Cases involving attacks on several rules as affecting "substantive" rights are discussed at pp. 86-89 infra.

190. HFG Co. v. Pioneer Pub. Co., 162 F.2d 536 (7th Cir.

Transportation Agencies, Ltd.,[191] however, the district court examined admiralty rule B(1), found it unconstitutional, and made suggestions for its revision. In so doing, it pointed out that the Court does not promulgate rules in the same manner as it decides cases. The opinion stated, citing Murphree, that while the Court considers the constitutionality of a rule recommended by a committee, its members cannot anticipate every constitutional objection.[192]

Centralization of Power in the Chief Justice

Professor Lesnick and Dean Cramton object to the centralization of power that the present system places in a chief justice. Their concern is with the combination of his responsibilities: to appoint both drafting and reviewing committees, and to preside at both the second (Judicial Conference) and third (Supreme Court) levels of review. Professor Lesnick finds this situation aggravated by life tenure, which he sees as destroying accountability to the people.

1947); Levine v. United States, 182 F.2d 556 (8th Cir. 1950), cert. denied, 340 U.S. 921 (1951); Helms v. Richmond-Petersburg Turnpike Authority, 52 F.R.D. 530 (E.D. Va. 1971); In re Wall, 403 F. Supp. 357 (E.D. Ark. 1975); In re Decker, 595 F.2d 185 (3d Cir. 1979).

191. 450 F. Supp. 447 (W.D. Wash. 1978).

192. The Court rejected 1) arguments based on "institutional propriety," 2) arguments that federal rules should not be changed by case law, and 3) arguments that district courts lack power to declare a Supreme Court rule unconstitutional because a finding of unconstitutionality is equivalent to an order to the Court to rewrite a rule--a power vested exclusively in the Supreme Court. Id.

Judge Weinstein regards the central role of the chief justice as affording an opportunity for leadership, while Dean Cramton believes sufficient opportunity for leadership would remain if the chief justice's role in rulemaking were somewhat curtailed.[193]

Proposals

Basic to all the comprehensive proposals designed to correct perceived weaknesses of the present structure is the thought that, although Congress delegated the rulemaking power to the Supreme Court in 1934, it may no longer consider it essential that the Court perform this function. Some critics go so far as to suggest that Congress might have more confidence in the Judicial Conference, which it created, or in a commission that it would create for the special purpose of rulemaking.

The Weinstein Proposal. Judge Weinstein proposes that legislation be enacted to transfer the promulgation function to the Judicial Conference.[194] Promulgation by the Conference was considered in 1958[195] and proposed in several dissents by

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193. James Oakes, in a review of Weinstein's Reform of Court Rule-Making Procedures, suggests that, in the unlikely event that some future chief justice might not have the time or inclination to fill the leadership role, it might be possible to have him appoint a Court member as designee to preside at Conference sessions and work with the standing committee. Oakes, Book Review, 78 Colum. L. Rev. 205, 208 (1978).

194. Judge Weinstein does not suggest that the Conference also engage in active drafting of the rules. He believes that this combined role would probably be undesirable. Weinstein, supra note 70, at 110.

195. Clark, supra note 69, at 253.

Justices Black and Douglas.[196] It was opposed by Judge Clark and Professor Moore.[197]

Judge Weinstein does not seem to suggest that the Conference engage in more extensive study of the rules than it does at present. His preference for the Conference is based on the grounds that its judges are closer to trial practice; that there would be no advisory opinion question because the Conference does not sit as a court; and, most important, that the question of the Court's objectivity with respect to the validity of the rules would be eliminated. Not being responsible for promulgating the rules, the Court would be free to depart from them to meet problems not foreseen or adequately handled by the rule makers. The Court's contribution through cases could, where desirable, be reflected in subsequent amendments.

Judge Weinstein sees Judicial Conference promulgation as retaining many of the advantages of the present system while at the same time effecting improvements. The chief justice would continue to have an influential role as chairman of the Conference and would provide some input from the Court. Time would be saved because one layer of review would be eliminated. The

196. 374 U.S. 865, 869 (1963); 383 U.S. 1032, 1089 (1966) (Douglas, J., dissenting); 409 U.S. 1132, 1133 (1972) (Douglas, J., dissenting).

197. 1B Moore's Federal Practice ¶ 0.512, at 5311. Judge Clark pointed out that the Conference is large and unwieldy, and that it meets two times a year for limited periods to consider a lengthening agenda, mainly concerned with manpower and budget questions. Clark, supra note 69, at 256.

imprimatur of the Conference would carry enough prestige to induce acceptance generally, and Congress would accept rules coming from the Conference, because the Conference was created by Congress.

Judge Weinstein would not make any material changes in the basic function of the standing committee, although he would like its role to be spelled out in the statute.[198] He would make changes in its composition and in appointments, terms of service, and hearing practices. He suggests a ratio of four judges (two trial, two appellate), two law professors, and at least four practitioners, and he favors appointments for five-year terms on a rotating basis. Appointments would be made by the Judicial Conference--which in practice would mean that the chief justice would retain considerable influence. Judge Weinstein's proposal to make the Conference the promulgator of the rules has met with some support from other critics, although they do not necessarily accept all its details.[199] Professors Hazard and Lesnick have addressed what they see as its shortcomings. Insofar as the objective is to obtain more unbiased consideration of the validity of the rules in litigated cases, Professor Hazard suggests that the Court would probably take less interest in these questions if it were not responsible for promulgation, and that the quality of the process itself would become a source of greater

198. Weinstein, supra note 70, at 110-11.

199. Wright, supra note 118; Oakes, supra note 193; Clinton, supra note 26.

concern.[200] Furthermore, he asserts that because the Judicial Conference would be promulgating the rules as the institution designated by Congress to do so, its rules would have a presumption of validity equal to the present presumption in favor of Court rules.

Professor Lesnick suggests that, because the rules can take effect without congressional action, and because the enabling act provides that they override statutes, Congress might hesitate to give the power to an organization that it created and that is, accordingly, on a lower level. If the power were given to the Conference, Lesnick fears that the result would be even more detailed congressional review than has taken place in the past.

The Lesnick Proposal. Professor Lesnick's proposal is tentative and has not been developed in detail, but it clearly reflects his view of rulemaking as a legislative process and his concern with openness and decentralization of power.[201] He would remove both the Judicial Conference and the Supreme Court stages from the present process. Ideally, he would have an independent legislative commission whose members would be chosen by the leaders of both legislative and judicial branches and would

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200. Professor Hazard suggests that had the question in Hanna involved an administrative agency regulation, the Court would not have been concerned with it, although administrative procedures are less thorough than those by which federal rules are promulgated.

201. Professor Lesnick favors a full-scale examination of rulemaking procedures in the hope of generating new proposals. Lesnick, supra note 91, at 579.

include representatives of Congress.[202] He has not specified the composition of the commission.[203] Its chairman would appoint advisory committees that would draft the rules. The commission would review the drafts and submit them directly to Congress, where they would presumably receive less detailed review than do rules promulgated under the present system.

Professor Lesnick suggests that Congress might be willing to delegate rulemaking power to such a commission because it would be created by Congress especially for this purpose, and because Congress would have a share in the appointive power and substantial representation. Perhaps most important from his viewpoint, the process would no longer be considered a judicial one, and legislative values of openness rather than judicial values of insulation and confidentiality would prevail. Assuming that his proposal for a commission is not adopted, Professor Lesnick would favor substitution of the Judicial Conference for the Supreme Court as the promulgating authority, in spite of his misgivings about that suggestion. Dean Cramton has pointed out some possibly negative aspects of Professor Lesnick's proposal: that it

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202. In testimony during hearings on the 1974 criminal amendments, Professor Lesnick suggested that the president might also make appointments to such a commission. Hearings on Proposed Amendments to Federal Rules of Criminal Procedure, supra note 100, at 202.

203. The Commission on Revision of the Federal Court Appellate System, whose procedures Professor Lesnick praises, had sixteen members--four appointed by the President of the Senate, four by the Speaker of the House, four by the President, and four by the Chief Justice.

constitutes a substantial departure from prior experience, and that it would be a more political body with less specialized competence. Judge Weinstein objects to executive or legislative branch participation in drafting the rules, through a commission or otherwise.

The Cramton Proposal. Dean Cramton's proposals are also tentative, and he leaves many questions open for consideration. Like Professor Lesnick, he would have Congress delegate the rulemaking authority directly to a commission responsible to Congress, thus removing both the Supreme Court and the Judicial Conference stages. Dean Cramton, however, leaves open a question as to whether the commission should report to the Court or the Conference. He would seek to retain the advantages of Supreme Court prestige and authority by having the Court appoint commission members. He would reduce the duties of the chief justice by having the entire Court membership assume this responsibility. Appointment would be by formal vote of the whole Court after a public nominating process in which names would be solicited from the judiciary, the law schools, the profession, and the public. Dean Cramton proposes a five-year term of office for commission members (like that of Judge Weinstein's standing committee), and he would have three of the fifteen members appointed annually. The commission would itself appoint advisory committee members, and commission members would probably serve on various advisory committees to effect liaison. The Judicial Conference and individual judges would be free to participate in the process, if they so chose.

The Holtzman Bills. Representative Holtzman's bills offered two alternatives. Under H.R. 480, the Court would have retained rulemaking authority, but procedures would have been modified, and congressional deferral or rejection would have been made easier by extension of the review period and use of a one-house veto. H.R. 481 would have placed the rulemaking authority in the Judicial Conference. It did not appear that Conference rules would be accorded any presumption of validity as the product of an institution created by Congress. On the contrary, affirmative congressional action would be required to trigger effectiveness.

Other Proposals. Several other suggestions for structural changes have been made, most of them less comprehensive than those already discussed. One of these is that--if one step is to be omitted--review by the Judicial Conference, rather than by the Supreme Court, should be eliminated. Other proposals, assuming the establishment of a rulemaking commission, are concerned with appointment of its members. They would require the Conference itself to appoint a commission, with a rotating membership composed of one judge from each judicial council; let appointment to a commission be shared by the president and the chief justice; let appointment be shared by the Conference and the councils; or require, because of the importance of the rules in state courts, that state judges be included on any commission.

One proposal designed to retain the prestige of Supreme

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Court participation calls for rules to be referred automatically to Congress within a specified period--say sixty to seventy-five days after the Conference submits them to the Court--unless the Court acts on them on its own initiative or in response to objections filed with the Court's clerk. (This proposal is referred to as the Court-Conference proposal.) During the specified period, the Court could approve, amend, postpone action, or return the rules to the Conference for further fact-finding or other work. If the Court took no action, approval would be assumed, and the Conference would transmit the rule to Congress on the Court's behalf.

The Content of the Rules and the Congressional Relationship

Existence and Exercise of Power

The criticism is made that, particularly in the last two decades, the Court has asserted rulemaking power in areas where its authority was doubtful or should not have been exercised. The rulemaking authority of the Court is limited by Article I of the Constitution, which vests legislative power in Congress and requires that all bills approved by Congress be submitted to the president. In addition, the enabling act limits the Court's authority to "rules of practice and procedure," and stipulates that promulgated rules shall not abrogate, enlarge, or modify any "substantive" right.[204] Preservation of the right to a jury is

204. 28 U.S.C. § 2072 (1976).

also enjoined. Several promulgated rules have been challenged as "substantive" in litigated cases; discussions have not so held. Others have been criticized as unconstitutional or "substantive" by justices dissenting from their promulgation, by members of Congress, and by legal scholars.

Arguments that a rule violates the substantive right prohibition of the enabling act have never been accepted by a majority of the Court.[205] In Sibbach v. Wilson,[206] the Court, by a five-to-four decision, upheld the validity of rule 35, requiring submission to physical and mental examination. In doing so, the Court rejected petitioner's definition of "substantive" as "important" and "substantial." The proper test, the Court said, is "whether a rule really regulates procedure,--the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them."[207] The Court also rejected the argument that the rule worked a major change of policy not intended by Congress. There were, the Court said, different policies in different states; the rules were consistent with the policy behind the enabling act; and Congress had had the opportunity to veto the rule, if it disagreed with the policy.[208] Justice

205. But see note 188 supra.

206. 312 U.S. 1 (1940).

207. Id. at 14.

208. The Court pointed out that rule 35 had been attacked before the committees of both houses, and that the advisory committee report and notes called attention to contrary practice.

Frankfurter, writing for himself and Justices Black, Douglas, and Murphy, dissented on the grounds that the case was controlled by an earlier decision recognizing the inviolability of the person, and that "a drastic change in public policy in a matter deeply touching the sensibilities of people or even their prejudices as to privacy, ought not to be inferred from a general authorization to formulate rules . . . ."[209]

In Mississippi Publishing Corp. v. Murphree,[210] the Court rejected the argument that rule 4(f)--providing for service of process anywhere within the state in which the district court sits--affects a substantive right.[211] In Hanna v. Plumer,[212] the Court unanimously upheld the validity and application of rule 4(d)(1), although Justice Harlan dissented from some of the Court's reasoning, which he found gave too much weight to the federal rules, and Justice Black only concurred in the result.[213]

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209. The dissenters regarded any inference of tacit approval because of Congress's failure to act as "an appeal to unreality," given the mechanics of legislation and the practical conditions surrounding the business of Congress when the rules were submitted. 312 U.S. 1, 18 (1940).

210. 326 U.S. 438 (1946).

211. Id. at 445.

212. 380 U.S. 460 (1965).

213. Specifically, the Court held that where a federal rule and local law directly conflict and the federal rule covers the question, the federal rule applies unless it is invalid, i.e., unless the prima facie judgment of the Conference committee, Court, and Congress is shown to be wrong. In the course of its opinion, it described the rulemaking power as including a "power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either." 380 U.S. 460, 472 (1965).
Justice Harlan read this description of the rulemaking power to mean that the federal rules are absolute because rule makers presumably make rational classifications. He proposed that the test of "substantive" for both Erie and enabling act purposes should be whether choice of the rule "would substantially affect these primary decisions respecting human conduct which our constitutional system leaves to state regulation." Id.

In Schlagenhauf v. Holder,[214] the Court rejected the substantive right argument with respect to rule 35 as applied to a defendant.[215]

There is criticism that the Court has taken too broad a view of its authority. Justices Black and Douglas raised constitutional, as well as policy and statutory, objections in dissenting from rule promulgation on several occasions.[216] The long line of

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214. 379 U.S. 104 (1964).

215. Justice Douglas dissented from this aspect of the decision. He would have referred the problem to the civil rules committee for study of safeguards that should be built into the rule as applied to defendants. 379 U.S. 104, 124-27 (1964).

216. In 1961, Justice Douglas objected to promulgation of an amendment to Fed. R. Civ. P. 25(d) providing for automatic substitution of the successor of a public officer as a party, on the grounds that it effected a basic change in a clearly expressed congressional policy; and Justice Black withheld approval of all the then-promulgated amendments, stating only that "it would be better for Congress to act directly by legislation on the matters treated by the Rules." 368 U.S. 1015 (1961). In 1963, both justices attacked the constitutionality of the enabling act itself, as well as the promulgation of rules relating to directed verdicts, summary judgments, special verdicts, dismissal of actions, service of process, garnishment, and attachment. They saw these rules as amounting to legislation, and thus violating the constitution as well as the substantive rights prohibition of the enabling act. 374 U.S. 865 (1963). In 1966, Justice Black dissented on constitutional grounds from promulgation of all the then-promulgated civil and criminal rules. 383 U.S. 1032. Justice Douglas dissented from promulgation of certain rules relating to discovery, pretrial conferences and presentence reports, on the grounds that they might affect consti-

their dissents had inevitable repercussions in Congress, and Justice Douglas's dissent from promulgation of the evidence rules was an acknowledged factor in their prompt deferral.[217]

For all the congressional criticism of some of the rules, and for all the restrictions placed on the Court's power, enactment of the evidence rules enabling act made clear that the Court does have authority in the evidence area, including privilege.[218] At the same time, the requirement of congressional action before privilege amendments become effective seems to imply a congressional view of privilege as a substantive area or at least as having substantive aspects.[219]

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tutional rights of defendants and required further consideration by the Judicial Conference. 383 U.S. 1089 (1966). In 1972, Justice Douglas dissented from promulgation of Fed. R. Crim. P. 50(b) (Plan for Achieving Prompt Disposition of Criminal Cases) on the grounds that it involved a legislative determination, and that the Court is not able to make judgments among policy choices where the weighing of relative advantages depends on extensive fact-finding. 56 F.R.D. 143, 182 (1972). Justice Douglas objected to promulgation of the evidence rules on the grounds that evidence rules are not "rules of practice and procedure." 409 U.S. 1132, 1133 (1972). And in 1974, he objected to promulgation of criminal procedure amendments on the grounds that the Court had no hand in their drafting and no competence to design them in keeping with the titles and spirit of the Constitution. 416 U.S. 1003.

217. Act to Promote the Separation of Powers by Suspending Rules of Evidence, Pub. L. No. 93-12, 87 Stat. 9 (1973).

218. 28 U.S.C. § 2076 (1976). The authority is to amend the congressionally enacted rules, and the congressional review period is 180 days, rather than 90 days; all evidence rules are subject to one-house veto and one-house deferral; privilege amendments cannot become effective without congressional action.

219. The House committee report states that many evidence rules--particularly those in the privilege and hearsay fields--involve "substantial policy judgments," that it is appropriate

Several students of the rulemaking process have criticized the promulgation of privilege rules, or have objected to future amendment of those rules, on grounds that the Court lacks authority or, to the extent that it has authority, that it should refrain from using it in an area where social policy objectives are of such importance.[220] Questions are also raised as to the judicial and legislative roles in rulemaking for other sensitive areas such as habeas corpus, negotiated pleas, and class actions.

Various proposals deal with difficulties of the substantive right question. Professor Wright would limit Court rulemaking to "purely procedural" questions, and even here, he favors legislation if a rule would have important side effects on substantive rights. He points out that Congress represents a better balance of interests for consideration of such rules than does any committee. Professor Lesnick, who also favors a broader interpretation of substantive rights, suggests that Congress spell out

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for Congress to play a greater role than provided for in the enabling acts, and that a new procedure should therefore be adopted. H.R. Rep. 93-650, 93d Cong., 1st Sess. (1973). See note 229 infra. The House bill would not have required affirmative action but would have permitted either house to veto privilege amendments. Representative Holtzman's separate statement took the position that this procedure was unwise and unconstitutional because the Court cannot legislate on substantive matters and can only pass on them in the case-controversy context.

220. Goldberg, The Supreme Court, Congress, and Rules of Evidence 5 Seton Hall L. Rev. 667 (1974). See also Martin, Inherent Judicial Power: Flexibility Congress did not Write into the Federal Rules of Evidence, 57 Tex. L. Rev. 167 (1979).
Professor Wright (supra note 80) took the position, prior to promulgation, that the Court had authority in the privilege area, but should refrain from using it because it would be inconsistent with proper ordering of the federal system.

restrictions in the enabling act, or that the Judicial Conference adopt a rule clarifying "substantive" for the guidance of its committees.[221] Other critics stress that important functions of the standing committee are to identify and veto at an early stage any projects for rulemaking in substantive areas. Professor Clinton believes that difficulties in untangling housekeeping rules from rules affecting substantive rights are so great that Congress should either specifically delineate boundaries of Court rulemaking, as it began to do concerning evidence, or assume the burden of affirmative approval of all rules of practice and procedure for federal courts.[222]

Not all students of the process agree that Court rulemaking has overstepped its bounds or failed to exercise proper restraint with respect to subject matter.[223] Some believe that the Court has a responsibility to formulate rules in controversial areas and should realistically expect Congress to examine them closely. Judge Weinstein, although he agrees that in retrospect the promulgation of privilege rules was probably a mistake, does not disapprove Court rulemaking on habeas corpus, negotiated pleas, and class actions. Rather, he treats these areas as suitable for

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221. Hearings on Proposed Amendments to Federal Rules of Criminal Procedure, supra note 100, at 208.

222. Clinton, supra note 26.

223. Judge Joiner suggests that in areas where there have been serious conflicts, rulemaking suffered from lack of congressional leadership. Proceedings on Rulemaking, supra note 119, at 476-77.

thorough congressional review.[224] An alternative proposal for dealing with controversial areas is that the advisory committees identify controversial issues at an early stage, but rather than examine them in open, lengthy legislative procedures, move draft rules quickly to Congress, where consideration of social policy questions is more appropriate and better done.

Congressional Relationship

Review of Promulgated Rules. Participants in and observers of Court rulemaking point out that, whatever the results, detailed congressional rewriting of transmitted rules takes too long, and tends to undermine the process. Critics question whether, apart from privilege, changes made by Congress in the Court's evidence rules merited the effort.[225] There are also doubts as to what some of the extensive 1975 congressional revisions of the criminal rule amendments accomplished.[226] Professor Clinton takes the position that congressional revision

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224. Judge Weinstein finds legislation more suitable for a subject such as speedy trials. Congress did in fact act in this area after promulgation of rule 50(b) over Justice Douglas's dissent. See note 216 supra.

225. See Weinstein, supra note 70, at 11, 75. Judge Weinstein also questions whether Congress has in fact succeeded in leaving the federal law of privilege where it found it. Id. at 74. Professor Hazard contends that Congress simply postponed decision because political factors made it unable to act. See also Wright, supra note 118, at 655, citing, in addition, Wright & Graham, 21 Federal Practice and Procedure: Evidence § 5006, at 108-09 (1977).

226. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A.J. 1203 (1975); Weinstein, supra note 70, at 70-71, 148.

of rule 9 of the habeas corpus amendments prevented undesirable alteration of existing law, but he regards the present review system as defective.

As a corollary to his proposals for improving the rulemaking process, Judge Weinstein suggests that Congress should exercise self-restraint with respect to transmitted rules, avoiding unnecessary attention to procedural details. He regards review of the initial draft of a set of rules and the new policies they contain as appropriate; but he opposes review of occasional subsequent amendments, unless they involve sharp policy changes. His plea for a "presumption of validity" parallels Judge Hungate's statement--after the extensive 1975 revisions of the criminal amendments--that Congress should accord a "healthy respect" to Court-proposed amendments.

Professor Clinton makes a radically different proposal: a statutory requirement that all rules be submitted to Congress as ordinary bills. His law review article[227] argues that this requirement would simply formalize congressional review of evidence, criminal, and habeas corpus rules.[228] Representative Holtzman's bill placing rulemaking authority in the Judicial

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227. Clinton, supra note 26.

228. Since then, however, Congress has permitted a set of appellate rules, civil (discovery) rule amendments, and some criminal rule amendments to go into effect in accordance with the statutory deadline. Bankruptcy rules also went into effect in accordance with the statutory timetable in 1976, an exception noted by Professor Clinton.

Conference (H.R. 481) would have required affirmative action on all promulgated rules.[229]

Participation in Court Rulemaking. There is support for the idea that some of the negative aspects of congressional review may be avoided through a closer relationship between the judicial and legislative branches during the drafting and revision processes. Alternative proposals call for members of Congress or their staffs to serve as members of advisory committees, or for liaison to be achieved through attendance at meetings and informal communication.[230] The membership proposal has been criticized on the grounds that legislative involvement in the drafting process could give senior congressional leaders undue influence and jeopardize the impartiality of Congress on review.[231] There is some support for liaison through regular meetings with members of Congress or their staffs prior to transmittal;[232] and there is substantial support for inviting members of Congress to attend

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229. This procedure was considered and rejected with respect to amendments of all the evidence rules. The House believed that any amendments would likely be "of modest dimensions" and feared that some worthwhile amendments might not be adopted because of other demands on Congress. H.R. Rep. No. 93-650, 93d Cong., 1st Sess. 18 (1973).

230. Hearings on Proposed Amendments to Federal Rules of Criminal Procedure (statement of Judge Thomsen), supra note 100, at 5-6 (1974).

231. Weinstein, supra note 70, at 109-10.

232. Proceedings on Rulemaking, supra note 119, at 478. Dean Cramton would also support this type of liaison.

advisory committee meetings as observers.[233] Judge Weinstein is concerned that the mere presence of congressional observers might give the legislators who designate them undue influence and might tend to co-opt Congress.

Additional Statutory Problems and Proposals

Time Requirements. Existing enabling acts generally require that promulgated rules be transmitted to Congress "at or after the beginning of a regular session thereof but not later than the first day of May" and provide that they shall not take effect until the expiration of ninety days after transmittal.[234]

The ninety-day period within which Congress must act to avoid effectiveness has clearly been a burden to Congress in recent years. Difficulties have resulted in a series of orders that defer effectiveness for specified or indefinite periods, that is, until further congressional action.[235] Congress has on some occasions avoided deferral of entire transmitted packages by severing noncontroversial rules from those it decides require further study.

Judge Weinstein, Professor Clinton, and Professor Lesnick

233. See text accompanying notes 31 and 32 supra, concerning present practices.

234. The evidence enabling act, 28 U.S.C. § 2076 (1976), specifies a 180-day period. Although there is no statutory requirement for transmission of rules with respect to criminal procedures after verdict, they are in fact transmitted along with other criminal rules.

235. See note 73 supra.

agree that the ninety-day period is impractical in view of current workloads, and they favor extension of the 180-day evidence amendment provision to other areas. As an alternative, Professor Clinton suggests that Congress consider returning to the pre-1950 provisions that provided a full legislative session for review. The rulemaking provisions of S. 1722 (Senator Kennedy's bill to revise the criminal code) and H.R. 480 would have changed the review period to 180 days. H.R. 6915 (Representative Drinan's bill to revise the criminal code) would have retained the ninety-day period. Judge Hoffman's statement before the Senate Judiciary Committee on October 5, 1979 took the position that the ninety-day period is adequate, and that adoption of a longer period is undesirable in view of the already considerable length of the rulemaking process.[236]

In recent years, the May 1 deadline has sometimes proved burdensome to committees, and inclusion of this date in the statutes is criticized as an anachronism based on earlier congressional recess dates. The rulemaking provisions of H.R. 6915 and S. 1722 would, however, have retained the May 1 deadline,[237] as

236. Reforms of the Federal Criminal Laws: Hearings on S. 1722 and S. 1723 Before the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 10,722 (1979).

237. H.R. 6915, 96th Cong., 2d Sess. (1980) contained rulemaking provisions for procedures to and including verdict (§ 5103); procedures after verdict (§ 5104); and procedures in cases before magistrates (§ 5105). It retains the May 1 deadline for procedures to and including verdict, and would not introduce any statutory requirement for submission to Congress of rules relating to procedure after verdict or cases conducted by magistrates.
S. 1722, 96th Cong., 1st Sess. (1980) would have incorpo-

would H.R. 480, Representative Holtzman's bill that would keep the rulemaking power in the Supreme Court. Holtzman's alternative bill, H.R. 481, which placed the authority in the Judicial Conference, contained no specified date, probably because it would require affirmative congressional action before any rules became effective.

The Invalidating Provision. Most current enabling acts contain, in identical or slightly varied form, the invalidating provision that has been in section 2072 since 1934:

> All laws in conflict with such rules [i.e., rules of practice and procedure prescribed under the enabling act] shall be of no further force or effect after such rules have taken effect.[238]

The meaning or weight to be given to the provision at this time is not entirely clear, although its inclusion in the enabling act was regarded as essential.[239] Professor Moore states that it was decided not to specify the superseded statutes, because it is not always possible to tell the exact effect of the invalidating provision outside the context of a litigated case, and because of

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rated provisions for evidence rules (§ 3712) and appellate rules (§ 3722), as well as rules of criminal procedure prior to, including, and relating to entry of judgment in district courts or proceedings before magistrates (§ 3702). It retains the May 1 deadline for all these rules.

238. 28 U.S.C. §§ 2072, 2075 (1976); 18 U.S.C. §§ 3771, 3772 (1976). The 1933 enabling act for postverdict criminal rules contained a similar provision. Act of Feb. 24, 1933, ch. 119, § 3, 47 Stat. 904.

239. See Clark, The Handmaid of Justice, 23 Wash. U.L.Q. 297 (1938) noting similar state provisions and pointing out that a similar Wisconsin statute had been upheld by the Wisconsin Supreme Court.

the large number of procedural provisions scattered throughout the code.[240] Professor Moore further states that the 1948 revision of the Judicial Code "for the most part" eliminated the statutes that were made obsolete by the adoption of the rules.[241] Professor Clinton suggests that the provision may have been adopted so that the Conformity Act would be automatically repealed when the Court promulgated rules, but would remain in effect until that time. As he recognizes, this hypothesis leaves no explanation for continued inclusion of the clause in later enabling acts.

There are several cases in which the effect of the invalidating clause is determined. It has been held, for example, that a statute prescribing a sixty-day time period for appeals where a United States agency is a party, and a statute limiting costs for brief printing in admiralty appeals, are invalidated by federal appellate rules.[242] There is some conflicting authority, but the widely accepted view is that the restrictive venue provisions imposed by Congress in the National Bank Act are overridden by the

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240. 2 Moore's Federal Practice, ¶ 1.02 [5], at 129. (2d ed. 1979).

Judge Dobie stated the effect of the invalidating provision very broadly in 1939: "The federal equity rules are superseded and federal statutes inconsistent with the rules are repealed, though federal statutes on points not covered by the rules remain in full force and virtue." Dobie, The Federal Rules of Civil Procedure, 25 Va. L. Rev. 261, 262 (1939).

241. Moore's Federal Practice, supra note 240, at 131.

242. Griffith Co. v. N.L.R.B., 545 F.2d 1194 (9th Cir. 1976), cert. denied sub nom. Waggoner v. Griffith Co., 434 U.S. 854 (1977); Waterman S.S. Corp. v. Gay Cottons, 419 F.2d 372 (9th Cir. 1969).

liberal provisions of rule 14 as to third-party practice.[243] Statutory provisions permitting appeals from certain interlocutory decrees in admiralty cases are not repealed by rule 54(b).[244] Dicta in a 1963 Supreme Court case expressly noted the force of the invalidating clause, but the Court found that the statute involved did not conflict with the rule.[245]

Justices Black and Douglas criticized the invalidating

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243. Compare Jones v. Kreminski, 404 F. Supp. 667 (D. Conn. 1975) and Odette v. Shearson, Hammill, & Co., Inc., 394 F. Supp. 946 (S.D.N.Y. 1975) with Swiss Israel Trade Bank v. Mobley, 319 F. Supp. 374 (S.D. Ga. 1970).

244. In re Northern Transatlantic Carriers Corp., 423 F.2d 139 (1st Cir. 1970).
Although it has generally been recognized that the invalidating clause applies to federal statutes, the court in McCollum Aviation Inc. v. Cim Associates, 438 F. Supp. 245 (S.D. Fla. 1977), referred to it in holding that a state statute requiring authority to transact business as a prerequisite to bringing suit in the state's courts took precedence over Fed. R. Civ. P. 17(b). In United States v. Isaacs, 351 F. Supp. 1323, 1328 (N.D. Ill. 1972), the question of relative weight to be given to a rule and a statute was raised but was not really an issue, because the statute was enacted subsequent to the rule.

245. Davis v. United States, 411 U.S. 233, 241 (1973), in which the Court said:

> Were we confronted with an express conflict between the Rule and a prior statute, the force of § 3771, providing that '[a]ll laws in conflict with rules shall be of no further force or effect,' is such that the prior inconsistent statute would be deemed to have been repealed. Cf. Sibbach v. Wilson & Co., 312 U.S. 1, 10 (1941). The Federal Rules of Criminal Procedure do not ex proprio vigore govern post-conviction proceedings, and had Congress in enacting the statutes governing federal collateral relief specifically there dealt with the issue of waiver, we would be faced with a difficult question of repeal by implication of such a provision by the later enacted rules of criminal procedure. But Congress did not deal with the question of waiver in the federal collateral relief statutes . . . .

clause as unconstitutional in 1963 and 1966.[246] Professor Clinton regards the clause as both unconstitutional and unwise; Judge Weinstein and Professor Lesnick recommend its elimination from the statute. Dean Cramton also questions the wisdom or necessity of the provision and describes it as of "dubious constitutionality." Essentially, Professor Clinton's constitutional argument is an elaboration of the Black-Douglas position. He argues that the clause amounts to unlimited delegation of legislative authority to the Court and is not saved by a reserved "veto" power, because a veto is not the affirmative legislative action required by section 7 of Article I. Apart from constitutional issues, Professor Clinton regards the grant of invalidating power to the Court as unwise because of what he sees as the lack of effective statutory restriction[247], the closed nature of the rulemaking process, the absence of a case or controversy context, and the making of policy decisions by advisory committees.

H.R. 480 and H.R. 481 would have omitted the invalidating provision. Both H.R. 6915 and S. 1722 retained the clause, with very slight modification of its language.[248]

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246. See note 216 supra.

247. As discussed in chapter four infra, Professor Clinton believes that the "substantive" rights restriction has been too narrowly construed by the Court both in litigated cases and in rulemaking. He also sees the jury trial interdiction as ineffective.

248. H.R. 6915, 96th Cong., 2d Sess. § 5103 (1980); S. 1722, 96th Cong., 1st Sess. §§ 3702, 3712, 3722 (1979).

One House "Veto." The evidence rules enabling act permits either house to defer effectiveness of promulgated evidence rules until a specified later date, or until approval by Congress, that is, indefinitely. This provision has been attacked by critics, and questions are raised as to its constitutionality and the degree to which it concentrates power in important committee chairmen of one house of Congress. In addition, as a practical matter, Professor Lesnick is concerned with the dangers of possible stalemate in a situation where the rules are inoperative and the legislature unable to act. He proposes that Congress relinquish the power, revise the statute to limit deferrals to one time and for a set period, or in any event, refrain from extending the power beyond the evidence rules to other rules.[249]

H.R. 480 included a one-house veto provision requiring a resolution of disapproval to be adopted within the 180-day period.[250] Neither H.R. 6915 nor S. 1722 included a one-house veto provision.

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249. Lesnick, supra note 91, at 583-84.

250. Holtzman's statements introducing the bill indicate her concern that, under the present system, bad rules can go into effect by default if both houses can't agree, one house fails to act, or the president fails to sign the bill. She regards such a system as inconsistent with congressional responsibility for rulemaking, which she describes as equal with that of the judicial branch. 125 Cong. Rec. H71-72 (daily ed. Jan. 15, 1979).

IV. SOME PROPOSALS EXAMINED

The criticisms and proposals set out in chapter three raise basic questions about the existing system. Does it provide adequate consideration and review of the rules? Does it provide sufficient public participation? Is it efficient? In turn, the criticisms and proposals present their own set of questions. To what extent are the alleged shortcomings in the present system real? How would the proposals help? Would they introduce new problems? Many of the proposals respond to perceived problems arising from the Supreme Court's role as rule promulgator. Some proposals seek to protect the Court from serious threats to its fundamental function as the final arbiter of the meaning of constitutional and statutory provisions. Other proposals seek to protect the rulemaking process from dangers that arise when the same institution is both promulgator and interpreter.

Arguments that the Court may lose prestige because of criticism at congressional hearings[251] are difficult to evaluate. Anybody engaged in decision making in controversial areas will provoke criticism, and the Court risks its prestige every time it issues an opinion on a difficult question. The importance of avoiding additional risk--when balanced against factors favoring Court promulgation--is not clear. The extraordinary juxtaposi-

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251. See text accompanying note 180 supra.

tion of circumstances surrounding the evidence rules is most unlikely to recur,[252] and congressional treatment of the criminal rules transmitted in 1974 was probably influenced by the timing of their submission (while the evidence rules were still before Congress), as well as by the sensitivity of the subject matter.

Whether rule promulgation is an undesired burden for the Court is a question for its members. Those outside the Court are not in a position to know members' views; they can only draw tenuous conclusions from dissenting opinions.

A lack of current trial experience is perceived to limit the ability of the Court to appreciate the impact of rules on everyday operation of lower court processes, but the Court is not devoid of recent experience with trial litigation under the federal rules. More important, the contribution of current trial experience is maximized by placing that experience at the formulation level; the present structure includes substantial numbers of district judges and practitioners on the advisory committees,

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252. There were several possible causes for any loss of prestige in connection with the evidence rules. Probably most important was the fact that substantial changes were made after the rules were submitted to the Court, that these changes generally favored the executive branch position, and that they appeared to have been made as a result of pressure from the Justice Department at the time of the Watergate revelations and the resultant executive-legislative power struggle. (In fact, there had also been pressure from the chairman of the Senate Subcommittee on Criminal Law and Procedure with respect to court rulemaking generally.) See Berger, How the Privilege for Governmental Information Met Its Watergate, 25 Case W. Res. L. Rev. 747, 775-76 (1975). See also Wright, supra note 118, at 654-55, which discusses various factors working against acceptance of the evidence rules.

the standing committee, and the Judicial Conference. At the reviewing stage, current trial experience, while valuable, is no more indispensable to the Court's promulgation than it is to congressional review and acceptance or rejection.

The most serious concerns are those relating to the allegedly cursory nature of the Court's review and its alleged inability to consider promulgated rules impartially in litigated cases, with the result that constitutional questions are sometimes determined in the abstract by advisory committees, without either judicial or legislative safeguards. Conclusions that review is cursory have been based on the absence of Court-imposed changes in recent years, on statements in Black-Douglas dissenting opinions, and on the presumption that, in view of its heavy case load, the Court necessarily lacks time to examine the substance of the rules.

Logically, there would seem to be merit in Professor Hazard's point that, if the Court's review is only cursory, it does not have sufficient intellectual investment in the rules to impair its objectivity in a litigated case. But criticism of lack of objectivity is not based as much on logic as on the perception that institutional pride would inevitably affect the Court's perspective.[253]

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253. Judge Weinstein cites as additional evidence of lack of objectivity the fact that some members of the evidence rules advisory committee were expected to support the promulgated rules before Congress, although at that point they believed that revision of the promulgated draft was desirable. Weinstein, supra note 70, at 101-02.

Decisions in the few pertinent cases do not establish lack of objectivity.[254] Although the current Court has made clear that the Hanna holding is still good law,[255] it is not entirely clear how it would treat the Hanna statement that promulgation amounts to a prima facie determination of validity.[256] In any event, a prima facie determination is not a conclusive one.

Whatever the facts regarding judicial detachment in any given instance, public perception of lack of objectivity and confusion about the weight to be given to promulgation are both problems. Lower courts have generally attached considerable weight to the Court's action in promulgating rules, and to the failure of Congress to reject them.[257]

In a certain sense, its role as promulgator puts the Court in an anomalous position in relation to some of its critics. If it is only certifying procedures, complaints that constitutional and other important questions are not being given sufficient consideration prior to promulgation are given credence. (This

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254. There are some differences as to the merits of the holdings, but criticism of those decisions has generally focused on the reasoning rather than the results.

255. In Walker v. Armco Steel Corp., 446 U.S. 740 (1980) the Court restated the Hanna holding, emphasizing its limitation to cases where there is an unavoidable conflict between a federal and a state rule.

256. Justice Powell's dissent from the 1980 order adopting civil rule amendments stated for three members of the Court that promulgation is more a certification of procedures that have been followed than "a considered judgment on the merits of the proposals." 446 U.S. 997 (1980).

257. See note 190 supra.

is, of course, a basic criticism, as most rules are not challenged in any court.) On the other hand, if the Court is making prima facie determinations of validity after serious examination of these questions, complaints based on lack of objectivity in subsequent litigation are given weight.

These disadvantages must be weighed against the advantages. In a federal system based on separation of powers, the position and prestige of the Court are assets for judicial rulemaking, assets that may be particularly important in a period when Congress is asserting a more active role in review and legislation.[258] Whatever it connotes in terms of review, the Court's imprimatur is a significant symbol for acceptance of rules by members of state and federal bars--more significant than promulgation by a commission, or by the Conference.[259]

The Court has a special supervisory duty as head of the federal court system,[260] a position that permits it to review

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258. The 1978 proposal to enact details concerning the method for notice in class actions is of interest; it would have in effect amended Fed. R. Civ. P. 23(c)(2). The Citizens' Right of Access to the Courts Act, S. 2390, 95th Cong., 2d Sess. (1978). See Professor Miller's remarks at 79 F.R.D. 471, 492 (1978) and Hearings on S. 2390 Before the Subcomm. on Citizens' and Shareholders' Rights and Remedies of the Comm. on the Judiciary, 95th Cong., 2d Sess. 6-7 (1978). The provision was omitted from a later version of the bill, S. 680, Citizens' Right to Standing in Federal Courts Act, 96th Cong., 1st Sess. (1980).

259. Differences in Representative Holtzman's two bills, (H.R. 480, keeping the promulgation role in the Court, and H.R. 481, placing it in the Judicial Conference) suggested such a distinction. Under H.R. 481, no promulgated rule would become effective without an act of Congress.

260. The Court has also recognized a special supervisory

proposed rules in light of the substantive law for which it has the ultimate responsibility.[261] And, assuming that the needed review is essentially a certification of procedures, it may be that this certification can be best done by the Court, because it is outside the Conference-committee system.

Only the Court can evaluate the practicality of proposals that it engage in more detailed examination of the rules, with or without assistance of additional staff or other administrative support. Effecting such proposals could meet criticism of cursory review by the Court, but could aggravate the problem of objectivity in litigated cases.

Structural Proposals

The Court-Conference Proposal

The proposal that the Conference transmit rules to Congress after a fixed period, unless the Court acts on them sua sponte or in response to a statement filed with its clerk,[262] is designed to retain the advantages of Court promulgation while opening the

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duty with respect to the rules. See Schlagenhaugh v. Holder, 379 U.S. 104, 111-12 (1964), in which the Court indicated that, had the issue involved different subject matter, it would have remanded for determination by the court of appeals, instead of itself ruling on the merits and guidelines.

261. It can also take account of cases pending before it. Judge Weinstein has pointed out that then-current litigation involving issues raised by the work product rule and by privilege rules caused the Court to reject a proposed work product amendment in 1947 and to return privilege rules to the Conference. Weinstein, supra note 70, at 100-01.

262. See pp. 85-86 supra.

process to public input. It would make direct statements from persons outside the rulemaking system available to the Court, thus informing it in advance and first-hand of the substance and intensity of criticism that might later be made to Congress.[263]

The system could result in some shortening of the time required for rule amendment, although rules are not normally before the Court for a long period.[264] Of course, review of the statements would impose burdens.

The Judicial Conference Alternative

Promulgation by the Judicial Conference would eliminate all question of the Supreme Court's objectivity in considering constitutional and statutory challenges to the rules in litigated cases.[265] With one district judge from each circuit serving on the Judicial Conference, almost half the promulgators would be judges with current trial experience. Questions of damage to the Court's prestige as a result of public criticism at congressional hearings would be eliminated, as would any possible advisory opinion issue; and removal of the Supreme Court review stage would result in some time saving. The Judicial Conference alter-

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263. Summaries of these positions might already be available to the Court in more objective form in standing committee reports.

264. See the time chart in the appendix infra.

265. Some question of objectivity would remain because individual judges on the Conference could be faced with questions of validity on their courts. They could, however, avoid this problem by disqualifying themselves, and there would be no problem of institutional identity or prestige.

native would require the fewest changes in the existing system, but it has some deficiencies.

The Conference, like the Court, has made few revisions in proposed rules in recent years,[266] and there could again be complaints of cursory review. Objections to the size and unwieldiness of the Conference, and the infrequency and crowded agendas of its meetings, would persist. Fixed meeting dates impose rigid deadlines, possibly adding substantial time to the rulemaking process. Promulgation by the Conference would raise serious problems if the enabling statute required affirmative congressional action on all rules.

The Commission Alternative

A rulemaking commission, as a single-purpose body, would assume the functions now performed by the standing committee, the Conference, and the Court. Current trial experience and other important factors could be assured by appointment procedures. A new institution with a legislative orientation to rulemaking could employ open procedures with relatively little difficulty and no threat to other functions.

There would be no question about the Court's prestige or objectivity in litigated cases. Concerns about centralization of power could be removed by the method of nominating commission

266. It did, however, refer the originally transmitted draft of rule 35.1 back to the advisory committee in September 1975, directing that it be circulated to bench and bar for further comments.

members. Time required for rule promulgation would be substantially reduced by elimination of both Conference and Court review stages.

Commission proposals also raise common problems. They involve major structural change in an area where existing procedures are well established and have produced a widely praised and widely accepted product. If the authority of the new commission were not fully accepted by the bench and bar, the functioning of the rules would be affected. In addition, depending on appointment methods and the composition of the commission, its members might be subject to special interest pressures. Although a commission might be more representative and democratic, it might also be more political and less expert.

The nominating process and commission composition are critically interrelated; alternative procedures would produce very different commissions. Dean Cramton's proposal that the entire Supreme Court make appointments after a public nominating process would bring in numerous nominees from a broad base: the judiciary, law schools, the legal profession, and the general public. The process could be time-consuming, with responsibility devolving primarily on the chief justice. In addition, because the type of representational considerations raised in connection with advisory committees[267] are also raised in connection with commissions, selection could involve sensitive political considera-

267. See pp. 64-68 supra.

tions. Criticism of Court appointments could be as great a threat to the Court's prestige as criticism of its rule promulgation. If the Court were nonetheless willing to assume the nominating responsibility, the quality of appointees could be expected to remain high.

An alternative suggestion that the Judicial Conference appoint one judge from each circuit council would retain prestige for the process and assure the quality of appointees. It would eliminate any question of special interest representation. An all-judge composition might make transition to a commission more acceptable. Since all members would be appellate judges, the commission would represent a narrower range of occupational backgrounds than does the current standing committee; this may change if circuit councils are restructured.

Appointment sharing by the Conference and the councils could result in distribution of appointments among a wider segment of the bar. A nominating committee could, for example, consist of a small number of judges from the judicial councils and an equal number of district judges from the Conference. Such a committee would have knowledge of interested and expert persons in the circuits and could (if the statute permitted) nominate practicing lawyers or law professors, as well as federal and state judges, to a commission.

Sharing of appointments by the president and the chief justice would probably produce a broadly based commission, because the president would be likely to take political and representa-

tional factors into account. Absent contrary statutory requirements, the commission might include representatives of the executive branch or of public or special interest groups. The desirability of an executive role in the nominating process or on the commission is, at the least, highly debatable. The Department of Justice already participates at the advisory committee stage, as do other departments and agencies, but that is quite different from a role in promulgating rules to govern the judicial branch in its most fundamental duties.

Professor Lesnick would have commission members chosen by leaders of the legislative and judicial branches, and he would include members of Congress as commission members.[268] He does not specify how many legislative members would be on the commission, or in what ratio to other members.[269]

It may be, as Professor Lesnick suggests, that Congress would be particularly receptive to rules produced by a commission that it had a voice in selecting and whose members included members of Congress. There is, however, substantial risk that there would be some loss of objectivity and expertise, that commission appointments would become politicized, and that individual mem-

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268. The executive branch might also participate. See note 202 supra.

269. Professor Lesnick and others, although expressing admiration for the cooperation of the three branches in the work of the Commission on Revision of the Federal Court Appellate System, do not specifically suggest that a rulemaking commission be similarly composed. See note 203 supra. Different policies would seem to apply to a commission to review rules written by the judicial branch and subject to congressional veto.

bers of Congress would seek to exert influence before the congressional review stage. There is also some danger of foreclosure of the congressional position on review. Apart from all of these considerations, it is questionable how much time or inclination members of Congress would have for review of the rules.

Inclusion of the legislative and executive branches in the nominating process and on the commission raises basic issues as to what extent the control of rulemaking--in the phases before congressional review--should remain in the hands of the judiciary. Policy considerations with respect to a commission may differ from those at the advisory committee level, because a commission would be concerned with review and would substitute for the standing committee, the Conference, and the Court in this aspect of its work.

The degree of outside participation in the process generally could have some bearing on the policy for commission membership. Opportunity for increased public participation might lessen pressure for representation of interest groups on a commission.

The number of members, terms of office, and provisions for staff are also important. Dean Cramton's suggestion for fifteen members would make the commission larger than the current standing committee, but there is considerable sentiment that the present standing committee should be enlarged. His proposed five-year term corresponds with Judge Weinstein's recommendation for the standing committee term. Annual rotation of one-fifth of the

commission, as he suggests, would ensure both new ideas and continuity.

Although he sees a commission as totally independent of the Conference and the Supreme Court, Dean Cramton raises the question of whether it should report to those institutions on a regular basis. Presumably, any such reports would be status reports made as a matter of courtesy and for informational purposes. It would be important that reporting not appear to be part of a review process, because that would defeat the purpose of removing questions of the Court's objectivity. The Court and the Conference could, of course, make proposals and suggestions to the commission.

Advisory Committee Structure

There are no proposed alternatives to the basic framework of volunteer committee members assisted by a paid reporter of academic background. Structural criticisms and proposals focus on advisory committee composition and the related question of appointment methods. Some of this criticism is not justified,[270] but there are persistent questions as to whether the committees should be drawn from a wider segment of the bar and reflect more accurately the interests of various segments of our society.

Professor Hazard argues that procedural rulemaking is so technical as to interest only a small group of specialists, and that these specialists are capable of taking all relevant issues

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270. See note 19 and pp. 65-66 supra.

into account.[271] But with the scope of rulemaking broadening, as is the role of courts generally, special interest groups are increasingly likely to assert the relevance of their concerns, and they may not be satisfied with representation of their interests by the committees as now constituted.

Assuming that representation of various social and economic groups on advisory committees can be justified, how is it to be achieved? Reservation of places for representatives of particular social or economic groups on each advisory committee, if rigidly prescribed and limited to specific groups or organizations, might reduce the number of technical experts. Alternatively, representation of groups, whether social (for example, women and minorities) or job-determined (for example, state judges or clerks of court) would increase the size of committees, possibly threatening their working effectiveness.[272]

The quality of a committee depends significantly on the person or institution making appointments to it. Judge Weinstein's suggested nominating system,[273] to be employed if the Judicial Conference becomes promulgator, would mean that nomina-

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271. See note 107 supra.

272. The North Dakota experience has been that committees of twenty assure a workable quorum of twelve to fifteen at meetings, and that committees any larger than twenty are administratively difficult. Erickstad, A New Rule-Making Process for North Dakota (speech to the Judicial Rulemaking Workshop sponsored by the National Judicial College and the American Judicature Society, May 22, 1978).

273. See p. 81 supra.

tions would be influenced by the chief justice. Conference members would be able to suggest appropriate members, and the present high quality of appointees would be maintained. On the other hand, complaints of centralization of power and of basing appointments on recommendations from within a select group could persist. Proponents of rulemaking commissions would have the commission itself or its chairman appoint the advisory committees, in which case committee appointees probably would reflect the make-up of the commission.

Whether the Court remains as promulgator or some alternative is adopted, attention should be given to the length of terms on both standing and advisory committees, and to the provision for reappointment. Current appointments to all committees are for four years, as specified by the 1958 Judicial Conference resolution, or for three years,[274] but problems seem to have arisen with the limitation to a single reappointment. It is perhaps for this reason that Judge Weinstein and Dean Cramton suggest a five-year term and a maximum of one reappointment for standing committee or commission members. Possible alternatives include retention of the present three- or four-year term, with the possibility of two reappointments. The shorter initial terms might be more attractive, and the possibility of two reappointments would offer more flexibility.

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274. See p. 10 supra.

Proposals Relating to Process

Openness

Major proposals for achieving openness emphasize improving public awareness and participation through more notice of rulemaking, open meetings, hearings, more comprehensive committee notes, and increased availability of documents. The existing notice system, combined with closed meetings and limited distribution of documents, is insulated from outside pressures--a condition favorable to scholarly, objective work. Reporters can prepare memoranda and drafts with no concern beyond assisting committees. Advisory committees can discuss the drafts with complete candor, exploring ideas and exchanging views without fear that tentative suggestions will be reported or misinterpreted. But the interested public and probably most of the profession do not know how the rulemaking process works, and rule makers may not be fully aware of the scope and intensity of some outside views.

Notice. The initial question is the stage at which notice of rule proposals should be given--specifically, whether it should be given earlier in the process. The first notice is now given by circulation of a polished advisory committee draft that has generally gone through some revision by an advisory committee. For all practical purposes, a decision to amend has probably been made, and views, although subject to revision, have gone through development and formulation.[275]

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275. Once a draft has been prepared and circulated, there

In cases where there is uncertainty about the desirability of rulemaking on a particular subject or amending a particular rule, a procedure similar to the administrative agencies' Advance Notice of Proposed Rulemaking, which invites comments on the desirability of revision, would have the advantage of bringing problems to the attention of advisory committees at a very early stage.[276] The committee and its reviewing authority (standing committee and Conference, or commission) would have the benefit of a wide variety of points of view before deciding to go forward. If the Court is to retain the ultimate responsibility for the rules, there is an argument for bringing these matters to its attention when difficult policy questions are involved.

Circulation of a reporter's draft would be a marked departure from present practices. It may not be suited to advisory committee composition or work patterns, because a professionally distinguished committee might not want to circulate a draft which it has not fully considered. Reporters' drafts with which a committee is tentatively satisfied have been circulated subject to further consideration, which has resulted in modifications in a number of cases. Circulation of a reporter's unconsidered draft to a long mailing list, followed by a comment period, would

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is likely to be some tendency, however subconscious, to continue the process.

276. Where the basis for uncertainty relates to questions of legal authority, the advisory committee might prefer the ad hoc committee alternative used in connection with the evidence rules.

lengthen the already drawn-out process, and produce further complications.

As an alternative, notice could be given that a reporter's draft would be considered at a scheduled meeting,[277] assuming it were decided that open drafting sessions were acceptable. Distribution of the draft to observers of the meeting would probably be necessary to make attendance meaningful. This would not amount to formal circulation for comment, but it could produce complaints that persons unable to attend the meeting lacked the advantage of submitting comments at an early stage.[278]

Who should receive notice, and how, are interrelated questions. There is no suggestion that the present practice of using a mailing list and publication in the West Company's federal case reporting system should be abandoned. Proposals relate only to broadened or supplemental notice. The Federal Register would reach persons who do not receive Federal Rules Decisions or the Federal Reporter. Charges, while high, are not prohibitive,[279] and publication normally occurs about three days after submission.[280]

The utility of publication in the Congressional Record is

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277. See p. 43 supra.

278. See text accompanying note 286 infra.

279. Charges are $372 per page for this type of material.

280. Because of fixed publishing dates, publication in Federal Rules Decisions, Federal Reporter, and Federal Supplement is sometimes substantially delayed. Related notice problems are discussed at pp. 16, 18 supra.

not clear, because the Administrative Office mailing lists include all concerned committees. Possibly, notices containing the highlights of proposed rules could state that drafts are being circulated and will be sent to anyone requesting them. Similar notices might be included in The Third Branch.

Mailing lists for the rules are already long, and some of the institutions whose omission was criticized earlier have now been added. There are a few ways in which the lists could be extended to obtain feedback from a wider range of commentators. A number of public interest practitioners might be reached by circulation to the National Clearinghouse for Legal Services, and additional civil rights lawyers might be reached through the National Lawyers Guild. State bar associations could be asked to call drafts to the attention of all members, as well as to their rules committees, and perhaps also to the attention of all county bar associations. All city bar associations with active rules committees could be added to the list.

More attention could be given to the encouragement of comments, and publicity should be given to the fact that anyone can be placed on a mailing list or obtain any particular draft. Mailing lists are available on request; if this were better known, it might lead to suggestions for additional circulation. It may be that, except for the most controversial matters, there is no widespread interest in commenting on proposed rules;[281] a

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281. There were only twenty-seven comments on appellate rules concerned with such matters as appeal of right in civil

period of active encouragement of comments would provide a test to determine the extent of outside interest.

Open Meetings. Open meetings allegedly increase understanding and confidence among the interested public and, perhaps, more general interest and participation. Open meetings provide an opportunity for Conference committees to make a record showing matters considered and the care with which decisions are made. Concerns that the presence of observers might inhibit spontaneous discussion for fear of incorrect press reporting or other reasons are particularly relevant to early advisory committee meetings.[282] These concerns would probably be less serious once a draft has been approved for circulation, but the need for free exchange with respect to comments and revisions would continue at all working meetings. The Conference might wish to consider the opening of standing committee meetings, since those meetings do not raise the same problems.[283]

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cases, review of tax court decisions, and petitions for rehearing, and only thirty-four on criminal rules dealing with such seemingly controversial subjects as the secrecy of grand jury proceedings, warrant or summons on indictment or information, admissibility of pleas and plea discussions, production of statements of witnesses, revocation of probation, correction or reduction of sentences, search and seizure, and joint representation.

282. It has been suggested that observation could interfere with the development of the working group. It could also result in a perceived need for conferences outside of "meetings," and any such extra conferences would be a burden to volunteer committee members. On the other hand, there is some opinion that the opening of House of Representatives bill-drafting sessions has proved very successful. Cohen, Openness Works--Let's Get On With It, 38 Fed. B.J. 99, 100 (1979).

283. GISA openness requirements apply only to executive-level meetings, i.e., meetings of the full collegial body and meetings of "any subdivision thereof authorized to act on behalf of the agency." 5 U.S.C. § 552b(a) (1976). Although the standing committee is not authorized to act on behalf of the Conference, it is at a higher executive level than the advisory committees. Its members are, however, appointed in the same manner as advisory committee members, and the basis for a distinction is not clear under the stated reason for the GISA distinction between executive and staff meetings: "The agency heads are high public officials, having been selected and confirmed through a process very different from that used for staff members. Their deliberative process can be appropriately exposed to public scrutiny in order to give citizens an awareness of the process and rationale of decisionmaking." United States Administrative Conference, An Interpretive Guide to the Government in the Sunshine Act 3 (1978), citing S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

In order to determine whether the rulemaking process might be harmed as a result of open committee meetings, committee reporters might analyze subjects covered at recent meetings. Such a study might explore, in particular, the extent of discussion of litigated cases at rulemaking sessions and the risk that general knowledge of rule changes under discussion could be injurious.[284]

Three years of experience of federal administrative agencies under GISA may be indicative of the possible effects of volun-

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284. Arguments based on discussion of litigated cases and problems of advance public knowledge were made in general opposition to the original DeConcini bill. The revised bill would have exempted a meeting from openness requirements if it involved "a specific case or controversy presently before a Federal or State court, where the case or controversy is the principal subject matter of a meeting, or a portion thereof." The "principal subject matter" language provides little comfort to those concerned about discussion of specific cases. Such cases are rarely, if ever, the main or even an intended subject of discussion. Deliberation, however, may often be enlightened by incidental discussion of problems in specific cases still under review. The opportunity is lost in open meetings. S. 2045, 96th Cong., 2d Sess. § 335(d)(3) (1980).

tarily opening meetings. On balance, it seems fair to say that GISA has imposed substantial administrative chores on agency staff, particularly with respect to notices, agenda, and review of transcripts of closed meetings. The degree to which the statutory requirements have been a burden varies greatly among agencies. In spite of administrative problems, GISA has been described as having only minimal impact on deliberations.[285]

Agencies are trying to make observation at meetings meaningful. Distribution of the documents under discussion and of underlying staff reports (a practice of some but not all agencies), is mentioned as being particularly helpful.[286] There are complaints that the act has not been as effective as its sponsors had hoped, and there are suggestions for amendment of some of its requirements.[287] Persons who are sufficiently interested to attend meetings, read transcripts, or listen to recordings of meetings, however, would seem inevitably to be gaining increased understanding of administrative procedures and decisions. None of the agencies whose 1979 annual reports we examined reported receiving formal complaints concerning their "sunshine" proce-

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285. Zuckerman, Sunshine Act: Dawn of a Restrained Revolution, Legal Times of Washington, June 4, 1979, at 32. See generally Openness in Government--A Continuing Era, 38 Fed. B.J. 95 (1979).

286. Zuckerman, supra note 285.

287. See, e.g., Cutler, A Practicing Lawyer's View of Sunshine, 38 Fed. B.J. 176 (1979); Sloat, Government in the Sunshine Act: A Danger of Overexposure, 14 Harv. J. Legis. 620 (1977).

dures.[288] There has been relatively little litigation under GISA, particularly as compared with the Freedom of Information Act.[289]

Hearings. Proponents assert that hearings provide more satisfactory participation in the process than the filing of written comments, that they inform the committee of public concerns, and that, because they permit open examination of the issues during the court rulemaking phase, they may tend to avert congressional hearings and detailed congressional review. Hearings can generally be expected to add to the length of the process, although they did not do so in the case of the 1980 civil amendments; they do inevitably take valuable time from judges and other volunteers, and they do add some administrative costs.

The limited available experience suggests that, while there may be psychological or public relations advantages in a procedure that allows any interested person to present views orally to the committee, the substantive gain for the process is questionable, as it was with the recently promulgated discovery rules.[290] It may be there is simply insufficient interest in appearing at

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288. Practices adopted by various agencies are set forth in their annual reports made available to us at the offices of the counsel to the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs. We have examined 1979 reports filed by the Securities and Exchange Commission, Federal Reserve System, Federal Communications Commission, Federal Trade Commission, Civil Aeronautics Board, and the Interstate Commerce Commission.

289. Reasons for this are suggested in Klitzman, Government in the Sunshine Act--Nuts, Bolts and Tacks, 38 Fed. B.J. 114 (1979).

290. See p. 52 supra.

hearings to make arguments that could be, and perhaps were, made in writing.[291] Despite considerable support for hearings, there is insufficient experience on which to base a firm judgment of their usefulness. If the committees hold further hearings, they might consider publicizing them more widely with additional publications.

There are various questions as to the appropriate stage at which hearings should be held, whether there should be regional hearings, and whether hearings should be mandatory or left to the discretion of each committee. Differences of opinion on these questions are sometimes associated with different views on the proper scope of rulemaking. For example, Judge Weinstein, who takes a relatively broad view of the rulemaking power, would require standing committee hearings on all rules and, in addition, advisory committee hearings on any rules affecting substantive areas. Professor Wright, who would impose stricter limits on rulemaking, believes that hearings are appropriate only at the advisory committee stage and at the committee's discretion.

Committee Notes and Reports. Information on minority views

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291. In the case of the civil rules promulgated on April 29, 1980, there may have been some special factors. Notice of October hearings appeared in West publications in August (or on July 31st), when publications may not be as carefully read; and the mailing list, while large (3,000 copies), was less than half that used for circulation of the rules. Perhaps more important, the preliminary draft had requested comments by July 1, so that a substantial proportion of persons wanting to comment had probably already done so.

and the distribution of votes in advisory committees and in the Conference[292] has never been made public and will apparently not be included in the newly introduced "gap" reports.[293]

Such material would, of course, publicize any controversy and enable commentators to use the information in opposing and supporting the rules. Preparation of the necessary statements would take some time. These do not appear to be serious deterrents. Making the information available to the public would eliminate conjecture and efforts to obtain the information privately. More important, it would contribute to confidence in the objectivity and thoroughness of the process, help to establish a record, and conceivably be of some value in resolving ambiguities. It is also possible, although in the present climate not likely, that making this information available to the public would lessen the demand for open meetings.

Committee notes do not summarize comments, as administrative opinions do. They sometimes explain why positions taken in comments have been rejected (as, for example, the American Bar Association discovery proposals), but this is not a general practice. Having adequate time for preparation and keeping the rule pamphlet relatively short are considerations working against fuller explanations. The committees might, however, wish to consider discussing in the notes at least some of the important re-

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292. See pp. 23, 55 supra.

293. See pp. 27-28 supra.

jected positions. Releasing documents (specifically "gap" reports) under the authority given the standing committee by the Conference in March 1980 may render moot complaints that the public cannot determine the reasons for revisions of earlier drafts. Inclusion of this information in the notes would be more convenient for the bar and would avoid the necessity of dealing with individual requests for documents.

Availability of Documents. Many of the proposals for enlarging availability of documents may also become academic, depending on standing committee action under its new authority. Public availability of comments on proposed rules should not be a real issue. They are available in the Administrative Office to persons showing a legitimate interest. On the basis of requests to date, there is no need for any special public file.

More important general questions are whether drafts of rules should be obtainable at all times, and whether all documents considered in connection with any rule should be available.[294] Availability at all times might result in efforts to influence the action of the Court, a possibility that causes deep concern in the judiciary, even where the object is policy decision making rather than case decision making. The most important consi :a- tion would seem to be that any opportunity to communicate views be available to everyone on the same basis. Publication or

294. Members of the bar complained of lack of public availability of documents concerning the proposed evidence rules. Weinstein, supra note 70, at 75.

availability of the rules in the form in which they go to the Court would be a way of ensuring equal access to the rules.[295]

A policy of releasing all essential documents considered in connection with rules would be consistent with a general standard that courts impose on administrative agencies: materials critical to decisions by rule makers should be available to persons affected by the rules.[296] It would contribute to public and congressional confidence and provide a record that would assist the Court and Congress on review. It would also facilitate compilation of legislative histories for complicated rules--a project that would be of help to judges, the practicing bar, and scholars.

Monitoring

Those involved in rulemaking when the Judicial Conference was brought into the process in 1958 foresaw active monitoring, including observation of the rules as they function, in state as well as federal courts. There was considerable emphasis on grass-roots reports.[297]

At the present time, "going to the country," as recommended by Professor Moore,[298] could provide information about the opera-

295. The Court-Conference alternative, discussed at pp. 85-86, 108-09 supra, would go beyond this, providing equal opportunity to express views to the Court.

296. Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393 (D.C. Cir. 1973), cert. denied, 417 U.S. 921 (1974).

297. See Maris, supra note 6.

298. See The Rulemaking Function and the Judicial Confer-

tion of the rules in various kinds of proceedings, and about any variations in their usefulness in large and small cases. It could also provide information about local rules that would be appropriate for promulgation as federal rules. Apart from keeping committees informed and able to act more rapidly, active monitoring might result in increased public interest and participation.

There is, however, a danger that more active monitoring would result in continual small changes that would confuse and frustrate the bar throughout the country.[299] In addition, whatever one's views on the civil amendments promulgated in April 1980, there is clearly merit in the dissenters' point that promulgation of small changes may sometimes defer the adoption of larger, more meaningful ones.[300]

If the Conference concludes that there should be more monitoring, it should consider a number of alternative methods of effecting it. Hiring additional reporters would be the simplest solution. It would be achievable within the existing structure;

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ence, supra note 151, at 131-32, in which Professor Moore recommends that an advisory committee or committee staff "go to the country, rather than have the country come to it via the mails." He contemplated public hearings and discussion of the rules' operation at regional bar meetings, and with the judicial conferences of the circuits.

299. Professor Wright notes that the criminal rules have been amended eight times since the 1966 amendments and complains that even scholars in the field frequently find it difficult to follow changes and determine what the rules were at a particular time. See also Wright, Law of Federal Courts § 63 at 297 (3d ed. 1976).

300. See note 141 supra.

it would be flexible; and it would assure continuation of the high quality of professional work. Its inherent disadvantage would be the limited availability of part-time volunteers. Law review articles and educational conferences could serve as supplemental monitoring devices. An alternative that could provide more comprehensive coverage would be Judge Joiner's proposal to maintain a small, full-time secretariat that would report frequently to advisory committees. Under his plan, the advisory committees would meet quarterly to consider these reports and other information about rule operations.

If the Conference sees no need for additional monitoring, it might consider notifying the public of the monitoring that is already done. For instance, the public should know that the committees are receptive to comments and suggestions at all times--not only in connection with proposed rules. This fact would, presumably, be included in any publication of Conference procedures.

Associated with expanded monitoring of federal rules is the suggestion that advisory committees issue advisory opinions in cases of ambiguity or confusion about the meaning of particular federal rules. These opinions might be requested by judges or by clerks of court, or they might be issued by committees on their own initiative when they see a problem developing. The opinions would, in effect, amount to an elaboration of advisory committee notes, and they could clarify the intent. The opinions would not be binding, but they could promote uniformity of interpretation.

They could be prepared more quickly than rule amendments, and they might help to avoid too frequent amendment. The number of opinions would have to be limited, because a proliferation of advisory opinions could also be a burden to the practicing bar. Opinions must be as readily available as the rules themselves.

The role of the committees is only to advise the Conference; nevertheless, the Conference could authorize rulemaking committees to issue nonbinding opinions, as the advisory committee on judicial activities does concerning the Code of Judicial Conduct. One situation suggested as appropriate for advisory opinions is one in which a committee finds that a court has interpreted a rule at odds with committee intent.

Publication of Procedures

Formulation and publication of rulemaking procedures are among the least controversial proposals for change. There are obvious benefits to the interested public and to the system, and no apparent disadvantages. Publication might be in the Federal Register, Federal Rules Decisions, Federal Reporter, Federal Supplement, and in the Congressional Record.

Length of Process

The time allowed for comments, the employment of mechanisms for achieving openness, and the procedures for drafting and review are all important factors. It is probably not advisable to reduce the comment period to less than present limits, with the possible exception of emergency situations. (There is, in fact,

some feeling that the longer periods used in earlier years gave time for more thorough study, including analysis by law journals, and helped to prevent error.) Actual notice should conform to scheduled notice so that, to the extent possible, requests for extension of the comment period will be avoided.

Within the current structure, opportunities for shortening the process are limited. In the case of both bankruptcy and magistrate rules, innovative and efficient procedures were devised[301] when rapid change was necessary. Consideration might be given to similar mechanisms that might be effective should a need for rapid change develop in one of the less specialized rule areas.

Faster promulgation will be more difficult with some of the mechanisms proposed for increasing public participation. The relative importance of the goals of openness and dispatch may vary with the particular rules under consideration, but current criticism seems more concerned with openness than with speed.

Congressional opinion of the Court rulemaking process is important and has, with respect to both evidence and habeas corpus rules, for instance, been a significant factor. But the

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301. Passage of the Bankruptcy Reform Act, Pub. L. 95-598, 92 Stat. 2549 (1978) necessitated rapid action to provide rules consistent with the new provisions. To meet this need, the committees sent to the district courts (without previous circulation for comments) suggestions for interim rules that they could adopt under the local rule power. The advisory committee is now working on permanent rule amendments that it plans to have in place before the effective date of the act.

See also note 146 supra, concerning the rapid development and promulgation of rules for trials of misdemeanors before magistrates.

nature of congressional review is mostly dependent on the content of the rules and whether the matter is one on which Congress wishes to express its own policy.[302]

Conclusion

Critics who believe that the Court has interpreted its authority too broadly propose limitations ranging from stricter construction of "substantive right" to elimination of the invalidating clause. Some of these critics believe that Supreme Court decisions sustaining federal rules give insufficient guidance and urge more precise definition.[303] Proposals that Congress define substantive right in the enabling act or eliminate the invalidating clause (for example, proposals requiring affirmative congressional action before promulgated rules become effective, and proposals to extend or eliminate the one-house veto) are impor-

302. Criminal rules amendments promulgated in 1974, for example, had been the subject of long and careful study and considerable revision. There was no complaint as to the adequacy of circulation of the drafts, and the standing committee statement made an effort at openness with respect to procedures. Hearings on Proposed Amendments to Federal Rules of Criminal Procedure, supra note 100, at 8 (statement of Judge Lumbard). Congress nevertheless reviewed the rules for fifteen months and enacted a statute making substantial changes.

303. In the first of this line of decisions, (Sibbach v. Wilson Co., 312 U.S. 1 (1941), sustaining the validity of rule 35, which required the plaintiff to submit to a physical examination), the majority of the Court rejected contentions that a substantive right is equivalent to a substantial right; at the same time, it so combined the substantive right test with the practice and procedure test as almost to read the substantive limitation out of the act. In Murphree, 326 U.S. 438 (1946), the Court relied on Sibbach, again merging the two statutory tests

tant reflections of some current academic and congressional thinking; they are, however, not pertinent to consideration of options for the Conference. The suggestion that the Conference delineate guidelines on substantive rights for its advisory committees is not dealt with here, because that task is considered more appropriate for the Court or Congress. In transmitting particular rules to the Court, the Conference implicitly expresses the opinion that they do not violate the enabling act.

Increasingly, procedural rules are thought to have social policy implications, and suggestions as to how these rules should be handled reflect various views of the responsibility of Court rulemaking to act or refrain from acting. The suggestion that the Conference act on rules with social policy implications, but move them rapidly through the system and transmit them to Congress for airing of issues and revision to reflect congressional policy would make the drafts, in effect, advisory opinions.

for validity. The Court in Hanna, although it drew for the first time a distinction between "substantive" for enabling act purposes and for Erie purposes, again relied on Sibbach for its construction of substantive right. 380 U.S. 460 (1964). In Schlagenhauf v. Holder, 379 U.S. 104 (1964), the Court followed Sibbach in upholding rule 35 as applied to a defendant. Walker v. Armco Steel Corp., 446 U.S. 740 (1980), reaffirming Ragan v. Merchants Transfer and Warehouse Co., 337 U.S. 530 (1949), and distinguishing Hanna, did not reach validity questions. Because it found rule 3 was not intended to and did not cover the subject of tolling state statutes of limitations, it found no direct conflict between that rule and state service requirements. At the present time, then, the Court has not gone beyond the Sibbach-Hanna definition, seen by some critics as mechanistic and oversimplified. See Clinton, supra note 26, at 57; Fyr, On Classifying Class Suits: a reply to Mr. Ross, 27 Emory L.J. 267 (1978).

Apart from basic questions of judicial responsibility, committees might not want to draft rules on so tentative a basis. The Conference can, of course, always act in an advisory capacity to Congress in areas where it refrains from drafting rules in the belief that they affect substantive rights.

It is questionable whether there is any need for more liaison with Congress than current practices provide. The proposal that liaison be increased through regular meetings with members of Congress or their staffs might keep Congress more informed of all developments and provide more early legislative input. The practice could, however, amount to a kind of pretransmittal review, raising questions about legislative participation and about the influence of a limited number of members of Congress.

Several critics favor extension of the minimal ninety-day congressional review period. The Conference, however, has taken the position that the ninety-day period should be retained, because the process is already a long one, and Congress can extend the time when necessary.[304] Under the statute, the Court has power to set the effective date for any time later than ninety days after transmission, and it did so frequently in the late

304. The present timetable was adopted in 1950 because of problems with the earlier system, which required submission at the start of a congressional session and deferred effectiveness until its close. See Clark, Experience under the Amendments to the Federal Rules of Civil Procedure, 8 F.R.D. 497, 505-07 (1949).

1960s and early 1970s.[305] In the case of particularly complicated or controversial rules, the Conference might wish to consider recommending that the Court set a period longer than ninety days.

305. Orders of Feb. 6, 1966 and Mar. 1, 1971, for example, provided a four-month review period; Order of Apr. 24, 1972 provided a five-month period; Order of Dec. 18, 1972, a six-and-one-half-month period; Order of Dec. 4, 1967, seven months; and Order of Nov. 20, 1972 about seven-and-one-half months.

SUMMARY

Current criticism raises basic questions about the role of the Supreme Court. Should the Court continue to review proposed rules? If so, should the process remain as it is (a process recently described by three dissenting justices as a "certification of procedures"); revert to more detailed review of the committees' work; or be modified to reduce the Court's burden and responsibility?

If the Court wishes to be relieved of the promulgation function, should it retain its reviewing role--for example, through the Court-Conference proposal, under which the Court can reject or require revision of proposed rules? Or should the entire review function be removed from the Court, and promulgation be assigned to the Judicial Conference or to a rulemaking commission that would review the work of advisory committees? If such a commission were to be established, what should its composition be--specifically, should the legislative and executive branches participate?

Whether the Court, the Conference, or a commission is ultimately responsible, the federal rulemaking process is generally viewed as a legislative one, but with essential judicial components. Questions about procedures are to a considerable extent questions about how both judicial and legislative values can be accommodated.

Basic questions remain about how successfully the process responds to various points of view, and about its openness and efficiency. Policy on appointments to committee membership is critical to representation of diverse segments of the profession and of society, although there are other methods of encouraging participation.

Openness issues turn upon availability of information and public participation in rulemaking. Availability of information involves both documents and meetings. Should documents in the rulemaking process (particularly advisory committee notes) include more information about differing views, or about the reasons for rejection of suggested alternatives? Should all essential documents used in the process be published or be available on request? Should an exception be made for reporters' memoranda or summaries?

As for meetings, should advisory committee, standing committee, or Conference meetings be open to public observation? If so, should an exception be made for early advisory committee meetings where actual drafting is done? And how far in advance, where, and to whom should public notice of meetings be given?

Questions also remain about the importance of faster promulgation, either generally or in the case of particular rules, and about the relative values accorded to speed and openness. If all the proposals designed to increase openness are adopted, the process probably will be a longer one.

Recently, liaison with Congress has increased, stopping

short of legislative participation in the judicial phase. This liaison, together with increased openness and with restraint in defining areas of rulemaking, may help avoid expansion of congressional revision. On review of rules and in proposed bills, however, members of Congress continue to show active concern not only with the content of proposed rules, but with the process by which the Court and the Conference arrive at them.

APPENDIX: Time Chart

TIME CHART

Rules	Civil[1]	Criminal[2]	Appellate[3]
Beginning of work	ABA Draft (draft submitted to adv. comm. 10/77)	Reporter's Memoranda (dated 1/78)	Administrative Office Memoranda (dated 8/74)
First advisory committee meeting on draft	12/77	2/78	9/74
Circulation of preliminary draft	4/78	3/78	4/77
Notice of hearing	7/78	---	---
Hearings	10/78	---	---
Comments on preliminary draft (deadline)	11/78	5/78	11/77
Circulation of second preliminary draft	2/79	---	---
Comments on second preliminary draft (deadline)	5/79	---	---
Advisory committee adoption of draft	5/79	7/78	12/77
Approval by standing committee	6/79	7/78	7/78

TIME CHART (cont'd)

Rules	Civil[1]	Criminal[2]	Appellate[3]
Approval by Judicial Conference	9/79	9/78	9/78
Submission to Supreme Court	9/79	11/78	11/78
Promulgation by Supreme Court	4/80	4/79	4/79
Effective date	8/1/80	8/1/79 (for some rules, others deferred)	8/1/79

1. Amendments to civil rules 4, 26, 38, 30, 32, 33, 34, and 37-45.

2. Amendments to criminal rules 6(e), 7(c)(2), 9(a), 11(e)(2), 18, 32(c)(3)(E), 35, 41(a), (b), and (c)(1); and 40 as amended by Congress (effective 8/1/79).
Deferred amendments to criminal rules 11(e)(6), 17(h), 32(f), and 44(c); new rules 26.2 and 32.1, and amendment to evidence rule 410.

3. Amendments to appellate rules 1(a), 3(c)(d) and (e), 4(a)(1), (2), (3), (4), (5) and (6), 5(d), 6(d), 7, 10 (b)(1)(2)(3) and (4), 11(a)(b)(c) and (d), 12(a)(b) and (c), 13(a), 24(b), 27(b), 28(g)(j), 34(a) and (b), 35(b)(c), 39(c) and (d), 40(a) and (b).

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