114th Congress, 2d Session – – – – – – – – – – – – House Document 114–127

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO 28 U.S.C. 2075; ADDED BY PUBLIC LAW 88–623, SEC. 1 (AS AMENDED BY PUBLIC LAW 103–394, SEC. 104(f)); (108 STAT. 4110) AND 28 U.S.C. 331; JUNE 25, 1948, CH. 646 (AS AMENDED BY PUBLIC LAW 110–177, SEC. 101(b)); (121 STAT. 2534)

APRIL 29, 2016.—Referred to the Committee on the Judiciary and ordered to be printed

---

U.S. GOVERNMENT PUBLISHING OFFICE
59–011 WASHINGTON : 2016

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 28, 2016.

Hon. PAUL D. RYAN,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2075 of Title 28, United States Code.

Accompanying these rules are the following materials submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 9, 2015; a redline version of the rules with Committee Notes; an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 6, 2015 Report of the Advisory Committee on Criminal Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 28, 2016

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 4, 41, and 45.

[*See infra* pp. ___ ___ ___.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2016, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2075 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If an organizational defendant fails to appear in response to a summons, a judge may take any action authorized by United States law.

* * * * *

(c) Execution or Service, and Return.

(1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.

(3) ***Manner.***

(A) A warrant is executed by arresting the defendant. Upon arrest, an officer possessing the original or a duplicate

original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion residing at that location and by

mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a

managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one that is:

(a) stipulated by the parties;

(b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) permitted by an applicable international agreement.

* * * * *

Rule 41. Search and Seizure

* * * * *

(b) Venue for a Warrant Application. At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

* * * * *

(f) Executing and Returning the Warrant.

(1) ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to

use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

* * * * *

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified time after being served and service is made under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

October 9, 2015

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: James C. Duff

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 4, 41, and 45 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September 2015 session. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendments, I am transmitting: (i) "clean" copies of the affected rules incorporating the proposed amendments and accompanying Committee Notes; (ii) a redline version of the same; (iii) an excerpt from the September 2015 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2015 Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Attachments

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 4. Arrest Warrant or Summons on a Complaint

(a) Issuance. If the complaint or one or more affidavits filed with the complaint establish probable cause to believe that an offense has been committed and that the defendant committed it, the judge must issue an arrest warrant to an officer authorized to execute it. At the request of an attorney for the government, the judge must issue a summons, instead of a warrant, to a person authorized to serve it. A judge may issue more than one warrant or summons on the same complaint. If an individual defendant fails to appear in response to a summons, a judge may, and upon request of an attorney for the government must, issue a warrant. If an organizational defendant fails to appear in response

---

* New material is underlined; matter to be omitted is lined through.

to a summons, a judge may take any action authorized by United States law.

* * * * *

(c) Execution or Service, and Return.

(1) ***By Whom.*** Only a marshal or other authorized officer may execute a warrant. Any person authorized to serve a summons in a federal civil action may serve a summons.

(2) ***Location.*** A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest. A summons to an organization under Rule 4(c)(3)(D) may also be served at a place not within a judicial district of the United States.

(3) ***Manner.***

(A) A warrant is executed by arresting the

defendant. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant. If the officer does not possess the warrant, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request, must show the original or a duplicate original warrant to the defendant as soon as possible.

(B) A summons is served on an individual defendant:

(i) by delivering a copy to the defendant personally; or

(ii) by leaving a copy at the defendant's residence or usual place of abode with a person of suitable age and discretion

residing at that location and by mailing a copy to the defendant's last known address.

(C) A summons is served on an organization in a judicial district of the United States by delivering a copy to an officer, to a managing or general agent, or to another agent appointed or legally authorized to receive service of process. ~~A copy~~If the agent is one authorized by statute and the statute so requires, a copy must also be mailed to the organization~~organization's last known address within the district or to its principal place of business elsewhere in the United States~~.

(D) A summons is served on an organization not within a judicial district of the United States:

(i) by delivering a copy, in a manner authorized by the foreign jurisdiction's law, to an officer, to a managing or general agent, or to an agent appointed or legally authorized to receive service of process; or

(ii) by any other means that gives notice, including one that is:

(a) stipulated by the parties;

(b) undertaken by a foreign authority in response to a letter rogatory, a letter of request, or a request submitted under an applicable international agreement; or

(c) permitted by an applicable international agreement.

* * * * *

Committee Note

Subdivision (a). The amendment addresses a gap in the current rule, which makes no provision for organizational defendants who fail to appear in response to a criminal summons. The amendment explicitly limits the issuance of a warrant to individual defendants who fail to appear, and provides that the judge may take whatever action is authorized by law when an organizational defendant fails to appear. The rule does not attempt to specify the remedial actions a court may take when an organizational defendant fails to appear.

Subdivision (c)(2). The amendment authorizes service of a criminal summons on an organization outside a judicial district of the United States.

Subdivision (c)(3)(C). The amendment makes two changes to subdivision (c)(3)(C) governing service of a summons on an organization. First, like Civil Rule 4(h), the amended provision does not require a separate mailing to the organization when delivery has been made in the United States to an officer or to a managing or general agent. Service of process on an officer or a managing or general agent is in effect service on the principal. Mailing is required when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the entity.

Second, also like Civil Rule 4(h), the amendment recognizes that service outside the United States requires separate consideration, and it restricts Rule 4(c)(3)(C) and its modified mailing requirement to service on organizations within the United States. Service upon organizations outside the United States is governed by new subdivision (c)(3)(D).

These two modifications of the mailing requirement remove an unnecessary impediment to the initiation of criminal proceedings against organizations that commit domestic offenses but have no place of business or mailing address within the United States. Given the realities of today's global economy, electronic communication, and federal criminal practice, the mailing requirement should not shield a defendant organization when the Rule's core objective—notice of pending criminal proceedings—is accomplished.

Subdivision (c)(3)(D). This new subdivision states that a criminal summons may be served on an organizational defendant outside the United States and enumerates a non-exhaustive list of permissible means of service that provide notice to that defendant.

Although it is presumed that the enumerated means will provide notice, whether actual notice has been provided may be challenged in an individual case.

Subdivision (c)(3)(D)(i). Subdivision (i) notes that a foreign jurisdiction's law may authorize delivery of a copy of the criminal summons to an officer, or to a

managing or general agent. This is a permissible means for serving an organization outside of the United States, just as it is for organizations within the United States. The subdivision also recognizes that a foreign jurisdiction's law may provide for service of a criminal summons by delivery to an appointed or legally authorized agent in a manner that provides notice to the entity, and states that this is an acceptable means of service.

Subdivision (c)(3)(D)(ii). Subdivision (ii) provides a non-exhaustive list illustrating other permissible means of giving service on organizations outside the United States, all of which must be carried out in a manner that "gives notice."

Paragraph (a) recognizes that service may be made by a means stipulated by the parties.

Paragraph (b) recognizes that service may be made by the diplomatic methods of letters rogatory and letters of request, and the last clause of the paragraph provides for service under international agreements that obligate the parties to provide broad measures of assistance, including the service of judicial documents. These include crime-specific multilateral agreements (e.g., the United Nations Convention Against Corruption (UNCAC), S. Treaty Doc. No. 109-6 (2003)), regional agreements (e.g., the Inter-American Convention on Mutual Assistance in Criminal Matters (OAS MLAT), S. Treaty Doc. No. 105-25 (1995)), and bilateral agreements.

Paragraph (c) recognizes that other means of service that provide notice and are permitted by an applicable

international agreement are also acceptable when serving organizations outside the United States.

As used in this rule, the phrase "applicable international agreement" refers to an agreement that has been ratified by the United States and the foreign jurisdiction and is in force.

Rule 41. Search and Seizure

* * * * *

(b) ~~**Authority to Issue a Warrant**~~**Venue for a Warrant Application.** At the request of a federal law enforcement officer or an attorney for the government:

* * * * *

(6) a magistrate judge with authority in any district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and to seize or copy electronically stored information located within or outside that district if:

(A) the district where the media or information is located has been concealed through technological means; or

(B) in an investigation of a violation of 18 U.S.C. § 1030(a)(5), the media are protected computers that have been damaged without authorization and are located in five or more districts.

* * * * *

(f) Executing and Returning the Warrant.

(1) ***Warrant to Search for and Seize a Person or Property.***

* * * * *

(C) *Receipt.* The officer executing the warrant must give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken or leave a copy of the warrant and receipt at the place where the officer took the property. For a warrant to

use remote access to search electronic storage media and seize or copy electronically stored information, the officer must make reasonable efforts to serve a copy of the warrant and receipt on the person whose property was searched or who possessed the information that was seized or copied. Service may be accomplished by any means, including electronic means, reasonably calculated to reach that person.

* * * * *

Committee Note

Subdivision (b). The revision to the caption is not substantive. Adding the word "venue" makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met.

Subdivision (b)(6). The amendment provides that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

First, subparagraph (b)(6)(A) provides authority to issue a warrant to use remote access within or outside that district when the district in which the media or information is located is not known because of the use of technology such as anonymizing software.

Second, (b)(6)(B) allows a warrant to use remote access within or outside the district in an investigation of a violation of 18 U.S.C. § 1030(a)(5) if the media to be searched are protected computers that have been damaged without authorization, and they are located in many districts. Criminal activity under 18 U.S.C. § 1030(a)(5) (such as the creation and control of "botnets") may target multiple computers in several districts. In investigations of this nature, the amendment would eliminate the burden of attempting to secure multiple warrants in numerous districts, and allow a single judge to oversee the investigation.

As used in this rule, the terms "protected computer" and "damage" have the meaning provided in 18 U.S.C. §1030(e)(2) & (8).

The amendment does not address constitutional questions, such as the specificity of description that the

Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information, leaving the application of this and other constitutional standards to ongoing case law development.

Subdivision (f)(1)(C). The amendment is intended to ensure that reasonable efforts are made to provide notice of the search, seizure, or copying, as well as a receipt for any information that was seized or copied, to the person whose property was searched or who possessed the information that was seized or copied. Rule 41(f)(3) allows delayed notice only "if the delay is authorized by statute." See 18 U.S.C. § 3103a (authorizing delayed notice in limited circumstances).

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified ~~period~~ time after ~~service~~ being served and service is made ~~in the manner provided~~ under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to), 3 days are added after the period would otherwise expire under subdivision (a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c)—like Civil Rule 6(d)—is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Eliminating Rule 5(b) subparagraph (2)(E) from the modes of service that allow 3 added days means that the 3

added days cannot be retained by consenting to service by electronic means. Consent to electronic service in registering for electronic case filing, for example, does not count as consent to service "by any other means of delivery" under subparagraph (F).

Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice.

EXCERPT FROM THE SEPTEMBER 2015
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 4, 41, and 45, with a recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench, bar, and published for public comment in August 2014, and are recommended for approval as published, with the revisions noted below.

Rule 4

The proposed amendment to Rule 4 addresses service of summons on organizational defendants that have no agent or principal place of business within the United States. The current rule provides for service of an arrest warrant or summons within a judicial district of the United States. The Department of Justice advised that current Rule 4 poses an obstacle to the prosecution of foreign corporations that have committed offenses punishable in the United States. Often, such corporations cannot be served because they have no last known address or principal place of business in the United States. Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that the Criminal Rules should provide a mechanism for foreign service on an organization.

The proposed amendment makes several changes to Rule 4. First, it fills a gap in the current rule (without expanding judicial authority) by specifying that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. Second, the amendment changes the mailing requirement for service of a summons on an organization within the United States by eliminating the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but requires mailing when delivery has been made to an agent authorized by statute, if the statute itself requires mailing to the organization. Third, the amendment authorizes service on an organizational defendant outside of the United States by prescribing a non-exclusive list of methods for service, including service in a manner authorized by the applicable foreign jurisdiction's law, stipulated by the parties, undertaken by foreign authority in response to a letter rogatory or similar request, or pursuant to an international agreement. In addition to these specifically enumerated means of service, the proposal contains an open-ended provision that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the other means enumerated in the rule.

The Advisory Committee considered at length whether to require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. The Advisory Committee concluded that the Criminal Rules should not adopt such a requirement. In its view, requiring prior judicial approval might raise difficult questions regarding the appropriate institutional roles of the courts and the executive branch, as well as unripe questions of international law.

Six comments were received and one witness testified about the proposed amendment at a public hearing in Washington, D.C. In addition, the Department of Justice provided written responses to the issues raised by the comments. The commentators generally agreed the proposal: addresses a gap in the current rules that poses an obstacle to the prosecution of foreign corporations that have committed crimes in the United States; provides methods of service that are reasonably calculated to provide notice and comply with applicable laws; and gives courts appropriate discretion to fashion remedies. The Advisory Committee carefully considered the comments and suggested revisions received, and unanimously approved the proposed amendment as published.

Rule 41

The proposed amendment to Rule 41 addresses venue for obtaining warrants for certain remote electronic searches. At present, the rule generally limits searches to locations within a district, with a few specified exceptions. The proposal to amend Rule 41 is narrowly tailored to address two increasingly common situations in which the existing territorial or venue requirements may hamper the investigation of serious federal crimes: (1) where the warrant sufficiently describes the computer to be searched but the district within which that computer is located is unknown, and (2) where the investigation requires law enforcement to coordinate searches of numerous computers in numerous districts.

The proposal would address this issue by amending Rule 41(b) to include two additional exceptions to the list of out-of-district searches permitted under that subsection.[1] Language in a

[1] At present, Rule 41(b) authorizes search warrants for property located outside the judge's district in only four situations: (1) for property in the district that might be removed before execution of the warrant; (2) for tracking devices installed in the district, which may be monitored outside the district; (3) for investigations of domestic or international terrorism; and (4) for property located in a U.S. territory or a U.S. diplomatic or consular mission.

new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside or outside of the district: (1) when a suspect has used technology to conceal the location of the media to be searched; or (2) in an investigation into a violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)(5), when the media to be searched include damaged computers located in five or more districts. The proposal also amends Rule 41(f)(1)(C) to specify the process for providing notice of a remote access search.

As expected, the proposed amendment generated significant response; the Advisory Committee received 44 written comments, and 8 witnesses testified at a public hearing in Washington, D.C. In addition, the Department of Justice submitted written responses to the issues raised by the comments and testimony. Many commentators raised concerns regarding the substantive limits on government searches, which are not affected by the proposal. In fact, much of the opposition reflected a misunderstanding of the scope of the proposal. The proposal addresses venue; it does not itself create authority for electronic searches or alter applicable constitutional requirements.

The Advisory Committee approved revisions to the published proposal aimed at clarifying the procedural nature of the proposed amendment. It changed the published caption from "Authority to Issue a Warrant" to "Venue for a Warrant Application" and revised the Committee Note to state that the constitutional requirements for the issuance of a warrant are not altered by the amendment. The Advisory Committee also approved revisions to the notice provision and accompanying Committee Note that directly respond to points raised by commentators.

3-Day Rule

Rule 45(c). The proposed amendment to Rule 45(c) parallels the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Civil Rule 6(d). It eliminates the 3-day extension of time periods when service is effected electronically.

As discussed *supra*, pp. 7-8, the Department of Justice expressed concerns about potential hardship from elimination of electronic service from the 3-day rule. The Advisory Committee on Criminal Rules was sympathetic to these concerns, recognizing that the three additional days are particularly important for criminal practitioners who often must speak directly with their clients and, therefore, frequently need additional time. The Advisory Committee approved the addition of language to the published Committee Note to address the concerns raised by the Department of Justice; the Standing Committee concurred with minor modifications.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 4, 41, and 45, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

Jeffrey S. Sutton, Chair

Dean C. Colson
Brent E. Dickson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Susan P. Graber
David F. Levi
Patrick J. Schiltz
Amy J. St. Eve
Larry D. Thompson
Richard C. Wesley
Sally Yates
Jack Zouhary

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

TO: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Reena Raggi, Chair
Advisory Committee on Criminal Rules

DATE: May 6, 2015

RE: Report of the Advisory Committee on Criminal Rules

I. INTRODUCTION

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on March 16-17, 2015, in Orlando, Florida, and took action on a number of proposals.

* * * * *

This report presents three action items for Standing Committee consideration. The Advisory Committee recommends that:

(1) a proposed amendment to Rule 4 (service of summons on organizational defendants), previously published for public comment, be approved as published and transmitted to the Judicial Conference; and

(2) a proposed amendment to Rule 41 (venue for approval of warrant for certain remote electronic searches), previously published for public comment, be approved as amended and transmitted to the Judicial Conference; and

(3) a proposed amendment to Rule 45 (additional time after certain kinds of service), previously published for public comment, be approved as amended and transmitted to the Judicial Conference.

* * * * *

II. ACTION ITEMS

A. ACTION ITEM—Rule 4 (service of summons on organizational defendants)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment as published and transmit it to the Judicial Conference. The amendment is at Tab C.

1. Reasons for the proposal

The proposed amendment originated in an October 2012 letter from Assistant Attorney General Lanny Breuer, who advised the Committee that Rule 4 now poses an obstacle to the prosecution of foreign corporations that have committed offenses that may be punished in the United States. In some cases, such corporations cannot be served because they have no last known address or principal place of business in the United States. General Breuer emphasized the "new reality": a truly global economy reliant on electronic communications, in which organizations without an office or agent in the United States can readily conduct both real and virtual activities here. He argued that this new reality has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings."

At present, the Federal Rules of Criminal Procedure provide for service of an arrest warrant or summons only within a judicial district of the United States. Fed. R. Crim. P. 4(c)(2), which governs the location of service, states that an arrest warrant or summons may be served "within the jurisdiction of the United States."[1] In contrast, Fed. R. Civ. P. 4(f) authorizes service on individual defendants in a foreign country, and Fed. R. Civ. P. 4(h)(2) allows service on organizational defendants as provided by Rule 4(f).

2. The proposed amendment

Given the increasing number of criminal prosecutions involving foreign entities, the Advisory Committee agreed that it would be appropriate for the Federal Rules of Criminal Procedure to provide a mechanism for foreign service on an organization. The Advisory Committee recognized that the government may not be able to prosecute foreign entities that fail to respond to service. Nevertheless, it is expected that entities subject to collateral consequences (forfeiture, debarment, etc.) will appear. The proposed amendment makes the following changes in Rule 4:

---

[1] Fed. R. Crim. P. 4(c)(2) does provide, however, that service may also be made "anywhere else a federal statute authorizes an arrest."

(1) It specifies that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons. This fills a gap in the current rule, without any expansion of judicial authority.

(2) For service of a summons on an organization within the United States, it:

- eliminates the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but

- requires mailing when delivery has been made on an agent authorized by statute, if the statute itself requires mailing to the organization.

(3) It also authorizes service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

In addition to the enumerated means of service, the proposal contains an open-ended provision in (c)(3)(D)(ii) that allows service "by any other means that gives notice." This provision provides flexibility for cases in which the Department of Justice concludes that service cannot be made (or made without undue difficulty) by the enumerated means. One of the principal issues considered by the Advisory Committee was whether to require prior judicial approval of other means of service. Civil Rule 4(f)(3) provides for foreign service on an organization "by other means not prohibited by international agreement, as the court orders."(emphasis added). The Committee concluded the Criminal Rules should not require prior judicial approval before service of a criminal summons could be made in a foreign country by other unspecified means. In its view, a requirement of prior judicial approval might raise difficult questions of international law and the institutional roles of the courts and the executive branch.[2]

The Committee considered the possibility that in rare cases the Department of Justice might seek to make service under (c)(3)(D)(ii) in a foreign nation without its cooperation or consent. Representatives of the Department stated that such service would be made only as a last resort, and only after the Criminal Division's Office of International Affairs and representatives of the Department of State had considered the foreign policy and reciprocity implications of such an action. The Department also stressed the Executive Branch's primacy in foreign relations and its obligation to ensure that the laws are faithfully executed. Finally, the Department noted that the federal courts are not deprived of jurisdiction to try a defendant whose presence before the court was procured by illegal means. This principle was reaffirmed in United States v. Alvarez-

[2] These issues would be raised most starkly by a request for judicial approval of service of criminal process in a foreign country without its consent or cooperation, and in violation of its laws, or even in violation of international agreement. Fed. R. Civ. P. 4(f)(3) may permit such a request. Where there is no internationally agreed means of service prescribed, Fed. R. Civ. P. 4(f)(2) then authorizes service by various means, and Fed. R. Civ. P. 4(f)(3) provides for service by "any other means not prohibited by international agreement, as the court orders." Although Fed. R. Civ. P. 4(f)(2)(C) precludes service "prohibited by the foreign country's law," that restriction is absent from Fed. R. Civ. P. 4(f)(3). The proposed amendment to Criminal Rule 4 authorizes service "permitted by an applicable international agreement," but does not prohibit service that is not so permitted, as long as service "gives notice."

Machain, 504 U.S. 655 (1992) (holding that abduction of defendant in Mexico in violation of extradition treaty did not deprive court of jurisdiction). Similarly, if service were made on an organizational defendant in a foreign nation without its consent, or in violation of international agreement, the court would not be deprived of jurisdiction. Under the Committee's proposal–which does not require prior judicial approval of the means of service–a court would never be asked to give advance approval of service contrary to the law of another state or in violation of international law. Rather, a court would consider any legal challenges to such service only when raised in a proceeding before it.

3. Public Comments and Subcommittee Review

a. Public comments

Six written comments on the proposed amendment were received, and one speaker (from the Federal Bar Council for the Second Circuit) testified about the proposed amendment. The Federal Bar Council, the Federal Magistrate Judges Association (FMJA), Mr. Kyle Druding, and the National Association of Criminal Defense Lawyers (NACDL) all supported the proposed amendment, though the FMJA and NACDL suggested revisions. Robert Feldman, Esq. of Quinn Emanuel Urquart & Sullivan opposed the amendment and urged that it be withdrawn. Additionally, the Department of Justice provided written responses. Each comment is summarized at Tab C.

With the exception of Quinn Emanuel, the commenters generally agreed that the amendment (1) addresses a gap in the current rules that may hinder the prosecution of foreign corporations that commit crimes in the United States but have no physical presence here, (2) provides methods of service that are reasonably calculated to provide notice and comply with applicable laws, and (3) gives courts appropriate discretion to fashion remedies.

b. The Subcommittee's review and recommendations

The Rule 4 Subcommittee, chaired by Judge David Lawson, received both summaries and the full text of the comments, and it held a teleconference to review the comments. The Subcommittee unanimously recommended that the Advisory Committee approve the proposed amendment as published and transmit it to the Standing Committee.

4. Recommended action

After a full discussion, the Advisory Committee concurred in the recommendation that the proposed amendment as published should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

Only one comment opposed the amendment and recommended that it be withdrawn. The law firm of Quinn Emanuel Urquart & Sullivan represents the Pangang Group Company and affiliated entities, a state-owned Chinese corporation. The Department of Justice has been

unable to serve process on Pangang under current Rule 4.[3] The proposal to amend the rule would provide a mechanism for effecting service on foreign corporations that commit serious crimes in the United States without having any physical presence here. The amendment is intended to allow reliable service with adequate notice on these organizations so that U.S. courts can adjudicate the merits of criminal allegations and ensure appropriate accountability.

The Committee carefully considered Quinn Emanuel's arguments, and found them unpersuasive. Quinn Emanuel argued that the proposed amendment would essentially foreclose judicial review of the adequacy of notice to foreign corporations, because "the very act of challenging service might be said to conclusively establish the notice that would make service complete." Corporate defendants who wish to contest service, they argued, would face "a Hobson's choice." The Committee agreed that if a lawyer for a corporation appears in a criminal case it may be difficult to convince the court that the corporation did not receive notice. But this is appropriate. A court should be able to take into account the appearance of counsel when evaluating a corporation's claim that it did not receive notice. Moreover, nothing in the proposed amendment addresses or limits any authority of the court to allow a special appearance to contest service on other grounds, nor does it address the ability of a corporate defendant to contest notice in a collateral proceeding. Quoting *Omni Capital Int'l v. Wolff & Co.*, 484 U.S. 97, 104 (1987), Quinn Emanuel also argued that in suggesting notice was the sole criterion for service, the Rule would "eliminate a historical function of service." The Committee concluded that the *Omni Capital* decision is fully consistent with the proposed amendment. In the sentence following the language quoted by Quinn Emanuel the Court made it clear that service in compliance with the Civil Rules provided the additional element of "amenability to service." The Court explained, "Absent consent, this means there must be authorization for service of summons on the defendant." Here, the purpose of the proposed amendment is to provide the necessary "authorization for service" (as well as notice to the defendant).

The lawyers from Quinn Emanuel raised another argument that the Committee had considered as it was formulating the proposal, namely, that "other governments may reciprocate by adopting a similar regime" to "ensnare U.S. corporations in criminal prosecutions around the globe." In a related objection, Quinn Emanuel noted that a court might interpret the amendment to permit "a manner of service prohibited by international agreement . . . , so long as it appears to

[3] On July 10, 2014, after a two month jury trial, Walter Liew, the owner and president of a California-based engineering consulting company, was sentenced to 15 years in prison for conspiring to steal trade secrets from E.I. du Pont de Nemours & Company ("DuPont") related to the manufacture of titanium dioxide and for the benefit of Pangang. *See, Walter Liew Sentenced to Fifteen Years in Prison for Economic Espionage,* justice.gov (Jul. 11, 2014), www.justice.(_2,ov/usao-ndca/pr/walter-liew-sentenced-fifteen-years-prison-economic-espiona2,e. Liew was aware that DuPont had developed industry-leading titanium dioxide technology over many years of research and development and assembled a team of former DuPont employees to assist him in his efforts to convey DuPont's titanium dioxide technology to entities in the People's Republic of China, including Pangang. At Liew's sentencing; the Honorable Jeffrey S. White, U.S. District Court Judge, stated that the 15-year sentence was intended, in part, to send a message that the theft and sale of trade secrets for the benefit of a foreign government is a serious crime that threatens our national economic security. *Id.* Despite the fact that Pangang was indicted years ago along with Liew, and has actual notice of the indictment, to date, the United States has been unable to effectively serve Pangang pursuant to the current Rule 4. *See, e.g., United States v. Pangang Group Co., Ltd,* 879 F. Supp. 2d 1052 (N.D. Cal. 2012).

have provided notice to the accused," an interpretation it found objectionable. Both of these concerns were anticipated by the Committee well before the proposal was approved for publication. In response to a specific request from a Committee member, the Department of Justice provided written assurance that it had consulted with appropriate authorities in the Executive Branch about the potential international relations ramifications of the proposed amendment. The Committee agreed that in light of this assurance, concerns about any impact on diplomatic relations were not a basis for rejecting the proposed amendment.

b. Suggested revisions

The FMJA, Quinn Emanuel, and NACDL suggested revisions that the Advisory Committee declined to adopt. The FMJA suggested that an addition to the Committee Note stating that the means of service must satisfy constitutional due process. Quinn Emanuel's attorneys also argued if a corporate defendant did not receive notice and failed to appear, the court might impose sanctions, or appoint counsel and conduct trial in absentia. Similarly, NACDL requested that the amendment be revised to include in the rule's text that actions by a judge upon a corporation's failure to appear must be "consistent with Rule 43(a)," or, in the alternative that this requirement be stated in the Note. The Advisory Committee considered and rejected these suggestions. It is always assumed that a rule will be interpreted against the backdrop of existing rules, statutes, and constitutional doctrine. Absent some compelling reason to believe this point will be misunderstood, adding such a command to a rule's text or Note is unnecessary. Indeed, doing so might have the undesirable effect of suggesting that in the absence of such a cross reference, other statutes and rules are not applicable.

The Advisory Committee also rejected proposed revisions that would add procedural hurdles and might invite extended litigation. NACDL suggested that the proposed amendment be modified to allow service by alternative means only if it was not possible to deliver a copy in a manner authorized by the foreign jurisdiction's law, to a officer, manager or other general agent, or an agent appointed to receive process. The Advisory Committee chose neither to add such a condition nor to prioritize the means of service, as that would invite unnecessary litigation over whether the triggering condition had been met. Similarly, the Committee rejected the further suggestion of NACDL that the new provisions be limited to cases in which "the organization does not have a place of business or mailing address within the United States at or through which actual notice to a principal of the organization can likely be given." As noted by the Department of Justice, litigation in a recent case on the question whether a subsidiary of a foreign corporation could be served took eight months. Finally, the Committee rejected Quinn Emanuel's argument that "any other means that gives notice" renders superfluous the other sections of the proposed amendment. Similarly, the Committee considered and rejected a suggestion that the government be required to show other options were not feasible or had been exhausted before resorting to certain options for service as unnecessarily burdensome and time consuming.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 4 be approved as published and transmitted to the Judicial Conference.

B. ACTION ITEM—Rule 41 (venue for approval of warrant for certain remote electronic searches)

After review of the public comments, the Advisory Committee voted with one dissent to recommend that Standing Committee approve the proposed amendment as revised after publication and transmit it to the Judicial Conference.

The proposed amendment (Tab D) provides that in two specific circumstances a magistrate judge in a district where the activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when that media or information is or may be located outside of the district.

The proposal has two parts. The first change is an amendment to Rule 41(b), which generally limits warrant authority to searches within a district,[4] but permits out-of-district searches in specified circumstances.[5] The amendment would add specified remote access searches for electronic information to the list of other extraterritorial searches permitted under Rule 41(b). Language in a new subsection 41(b)(6) would authorize a court to issue a warrant to use remote access to search electronic storage media and seize electronically stored information inside *or outside* of the district in two specific circumstances.

The second part of the proposal is a change to Rule 41(f)(1)(C), regulating notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search.

1. Reasons for the proposed amendment

Rule 41's territorial venue provisions–which generally limit searches to locations within a district–create special difficulties for the Government when it is investigating crimes involving electronic information. The proposal speaks to two increasingly common situations affected by the territorial restriction, each involving remote access searches, in which the government seeks to obtain access to electronic information or an electronic storage device by sending surveillance software over the Internet.

In the first situation, the warrant sufficiently describes the computer to be searched, but the district within which the computer is located is unknown. This situation is occurring with increasing frequency because persons who commit crimes using the Internet are using sophisticated anonymizing technologies. For example, persons sending fraudulent

---

[4] Rule 41(b)(1) ("a magistrate judge with authority in the district – or if none is reasonably available, a judge of a state court of record in the district – has authority to issue a warrant to search for and seize a person or property located within the district").

[5] Currently, Rule 41(b) (2) – (5) authorize out-of-district or extra-territorial warrants for: (1) property in the district when the warrant is issued that might be moved outside the district before the warrant is executed; (2) tracking devices, which may be monitored outside the district if installed within the district; (3) investigations of domestic or international terrorism; and (4) property located in a United States territory or a United States diplomatic or consular mission.

communications to victims and child abusers sharing child pornography may use proxy services designed to hide their true IP addresses. Proxy services function as intermediaries for Internet communications: when one communicates through an anonymizing proxy service, the communication passes through the proxy, and the recipient of the communication receives the proxy's IP address, not the originator's true IP address. Accordingly, agents are unable to identify the physical location and judicial district of the originating computer.

A warrant for a remote access search when a computer's location is not known would enable investigators to send an email, remotely install software on the device receiving the email, and determine the true IP address or identifying information for that device. The Department of Justice provided the Committee with several examples of affidavits seeking a warrant to conduct such a search. Although some judges have reportedly approved such searches, one judge recently concluded that the territorial requirement in Rule 41(b) precluded a warrant for a remote search when the location of the computer was not known, and he suggested that the Committee consider updating the territorial limitation to accommodate advancements in technology. *In re Warrant to Search a Target Computer at Premises Unknown*, 958 F. Supp. 2d 753 (S.D. Tex. 2013) (noting that "there may well be a good reason to update the territorial limits of that rule in light of advancing computer search technology").

The second situation involves the use of multiple computers in many districts simultaneously as part of complex criminal schemes. An increasingly common form of online crime involves the surreptitious infection of multiple computers with malicious software that makes them part of a "botnet," which is a collection of compromised computers that operate under the remote command and control of an individual or group. Botnets may range in size from hundreds to millions of compromised computers, including computers in homes, businesses, and government systems. Botnets are used to steal personal and financial data, conduct large-scale denial of service attacks, and distribute malware designed to invade the privacy of users of the host computers.

Effective investigation of these crimes often requires law enforcement to act in many judicial districts simultaneously. Under the current Rule 41, however, except in cases of domestic or international terrorism, investigators may need to coordinate with agents, prosecutors, and magistrate judges in every judicial district in which the computers are known to be located to obtain warrants authorizing the remote access of those computers. Coordinating simultaneous warrant applications in many districts–or perhaps all 94 districts–requires a tremendous commitment of resources by investigators, and it also imposes substantial demands on many magistrate judges. Moreover, because these cases concern a common scheme to infect the victim computers with malware, the warrant applications in each district will be virtually identical.

2. The proposed amendment

The Committee's proposed amendment is narrowly tailored to address these two increasingly common situations in which the territorial or venue requirements now imposed by Rule 41(b) may hamper the investigation of serious federal crimes. The Committee considered, but declined to adopt, broader language relaxing these territorial restrictions. It is important to

note that the proposed amendment changes only the territorial limitation that is presently imposed by Rule 41(b). Using language drawn from Rule 41(b)(3) and (5), the proposed amendment states that a magistrate judge "with authority in any district where activities related to a crime may have occurred" (normally the district most concerned with the investigation) may issue a warrant that meets the criteria in new paragraph (b)(6). The proposed amendment does not address constitutional questions that may be raised by warrants for remote electronic searches, such as the specificity of description that the Fourth Amendment may require in a warrant for remotely searching electronic storage media or seizing or copying electronically stored information. The amendment leaves the application of this and other constitutional standards to ongoing case law development.

In a very limited class of investigations the Committee's proposed amendment would also eliminate the burden of attempting to secure multiple warrants in numerous districts. The proposed amendment is limited to investigations of violations of 18 U.S.C. § 1030(a)(5),[6] where the media to be searched are "protected computers" that have been "damaged without authorization." The definition of a protected computer includes any computer "which is used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2). The statute defines "damage" as "any impairment to the integrity or availability of data, a program, a system, or information." 18 U.S.C. § 1030(e)(8). In cases involving an investigation of this nature, the amendment allows a single magistrate judge with authority in any district where activities related to a violation of 18 U.S.C. § 1030(a)(5) may have occurred to oversee the investigation and issue a warrant for a remote electronic search if the media to be searched are protected computers located in five or more districts. The proposed amendment would enable investigators to conduct a search and seize electronically stored information by remotely installing software on a large number of affected victim computers pursuant to one warrant issued by a single judge. The current rule, in contrast, requires obtaining multiple warrants to do so, in each of the many districts in which an affected computer may be located.

Finally, the proposed amendment includes a change to Rule 41(f)(1)(C), which requires notice that a search has been conducted. New language would be added at the end of that provision indicating the process for providing notice of a remote access search. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The Committee recognized that when an electronic search is conducted remotely, it is not feasible to provide notice in precisely the same manner as when tangible property has been removed from physical premises. The proposal requires that when the search is by remote access, reasonable efforts be made to provide notice to the person whose information was seized or whose property was searched.

---

[6] 18 U.S.C. § 1030(5) provides that criminal penalties shall be imposed on whoever:

(A) knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer;
(B) intentionally accesses a protected computer without authorization, and as a result of such conduct, recklessly causes damage; or
(C) intentionally accesses a protected computer without authorization, and as a result of such conduct, causes damage and loss.

3. Public Comments and Subcommittee Review

a. The public comments

During the public comment period the Committee received 44 written comments from individuals and organizations, and eight witnesses testified at the Committee's hearing in November:

> The Federal Bar Council, the Federal Magistrate Judges' Association, the National Association of Assistant United States Attorneys, and former advocate for missing and exploited children Carolyn Atwell-Davis all supported the amendment without change.
>
> The amendment was opposed by the American Civil Liberties Union (ACLU), the National Association of Criminal Defense Attorneys (NACDL), the Pennsylvania Bar Association, the Reporters Committee on the Freedom of the Press, the Clandestine Reporters Working Group, and several foundations and centers that focus on privacy and/or technology. Twenty-eight unaffiliated individuals wrote to oppose the amendment.

The Department of Justice submitted several written responses to issues raised in the public comments.

A summary of the comments is provided at Tab D. The main themes in the comments opposing the amendment are summarized below.

(i) Fourth Amendment concerns

The most common theme in the comments opposing the amendment was a concern that it relaxed or undercut the protections for personal privacy guaranteed by the Fourth Amendment. These comments focused principally on proposed (b)(6)(A), which allows the court in a district in which activities related to a crime may have occurred to grant a warrant for remote access when anonymizing technology has been employed to conceal the location of the target device or information.

Multiple comments argued that remote searches could not meet the Fourth Amendment's particularity requirement, and others emphasized that they would constitute surreptitious entries and invasive or destructive searches requiring a heightened showing of reasonableness. Many of these comments also challenged the constitutional adequacy of the notice provisions. Finally, several comments urged that the serious constitutional issues raised by remote searches would be insulated from judicial review.

A particular concern raised in many comments was that the use of anonymizing technology, such as Virtual Private Networks (VPNs), would subject law abiding citizens to remote electronic searches.

(ii) Title III

Multiple comments urged that warrant applications for remote electronic searches should be subject to requirements like those under the Wiretap Act, 18 U.S.C. § 2518 (Title III), or a surveillance warrant containing equivalent protections.

(iii) Extraterritoriality and international law concerns

Some comments focused on the possibility that the devices to be searched–whose location was by definition unknown–might be located outside the United States. They urged that the courts should not authorize searches outside the United States that would violate international law and the sovereignty of other nations, as well as any applicable mutual legal assistance treaties.

(iv) The role of Congress

An additional theme running through many of these comments was that the proposed amendment raised policy issues that should be resolved by Congress, not through procedural rulemaking. Some comments argued that only Congress could balance the competing policies and adopt appropriate safeguards. Others urged that the proposed amendment exceeded the authority granted by the Rules Enabling Act.

(v) Notice concerns

Finally, multiple comments expressed concern that the notice provisions were insufficiently protective, because they required only that reasonable efforts be made to provide notice. This, commenters argued, might lead to no notice being given to parties who were subject to remote electronic searches, or to long delays in giving notice. Some commenters also argued that all parties whose rights were affected by a search must be given notice, not either the person whose property was searched or whose information was seized or copied.

b. The Subcommittee's review and recommendation

The Rule 41 Subcommittee, chaired by Judge Raymond Kethledge, received both summaries and the full text of all comments, and it held multiple teleconferences to review the comments. The Subcommittee unanimously recommended that, with several minor revisions, the Advisory Committee should approve the proposed amendment and transmit it to the Judicial Conference.

4. Recommended action

After extended discussion, the Advisory Committee concurred in the recommendation that the proposed amendment, with minor revisions proposed by the Subcommittee, should be approved for transmission to the Standing Committee.

a. Opposition to the proposed amendment

In general the Committee concluded that the concerns of those opposing the amendment were about the substantive limits on government searches, which are not affected by the proposed amendment. Opposition comments did not address the procedure for designating the district in which a court will initially decide whether substantive requirements have been satisfied in the two circumstances prompting the amendment. Thus they furnished no basis for withdrawing the proposed amendment. The Committee is confident that judges will address Fourth Amendment requirements on a case-by-case basis both in issuing warrants under these amendments and in reviewing them when challenges are made thereafter.

Much of the opposition to the amendment reflected a misunderstanding of current law, the scope of the amendment, and the serious problems that it addresses. First, many commenters who opposed the rule did not recognize that the government must demonstrate probable cause to obtain a warrant. As noted below, the Committee recommends a revision to the caption of the relevant section referring to "venue" in order to draw attention to the limited scope of the amendment. Second, many commenters incorrectly assumed that the amendment created the authority for remote electronic searches. To the contrary, remote electronic searches are currently taking place when the government can identify the district in which an application should be made and satisfy the probable cause requirements for a warrant. Third, the opposing comments do not take account of the real need for amendment to allow the government to respond effectively to the threats posed by technology. Technology now provides the means for identity theft, corporate espionage, terrorism, child pornography, and other serious offenses to jeopardize the economy, national security, and individual privacy. The government can itself use technology to identify the perpetrators of such crimes but needs a rule clarifying the venue where it should make the Fourth Amendment showing necessary for a warrant. At the hearings, those who opposed the amendment were candid in admitting that they could offer no alternative to the proposed amendment (other than the hope that Congress might study the general issues and respond).

The Committee concluded that it was important to provide venue, thus allowing the case law on potential constitutional issues to develop in an orderly process as courts review warrant applications. This is far preferable than after-the-fact rulings on the legality of warrantless searches for which the government claims exigent circumstances. If the New York Stock Exchange were to be hacked tomorrow using anonymizing software, under current Rule 41 there is no district in which the government could seek a warrant. It would be preferable, the Committee concluded, to allow the government to seek a warrant from the court where the investigation is taking place, rather than conducting a warrantless search. Judicial review of warrant applications better ensures Fourth Amendment rights and enhances privacy. Any concern that judges may be uninformed about the technology to be used in the searches could be addressed by judicial education. The Federal Judicial Center has recently prepared some information materials about topics such as cloud computing, and additional materials could be developed to help judges review applications for remote electronic searches.

In botnet investigations, the amendment provides venue in one district for the warrant applications, eliminating the burden of attempting to secure multiple warrants in numerous

districts and allowing a single judge to oversee the investigation. In prior botnet investigations, the burden of seeking warrants in multiple districts played a role in the government's strategy, providing a strong incentive to rely on civil processes. Again, the amendment addresses only a procedural issue, not the underlying substantive law regulating these searches. Allowing venue in a single district in no way alters the constitutional requirements that must be met before search warrants can be issued.

The Committee declined to make any major changes in the provisions governing notice. However, as noted below, it adopted several small changes recommended by the Subcommittee and also revised the Committee Note to address concerns made in the public comments.

Finally, the Committee concluded that arguments urging that the matter be left to Congress are not persuasive. Venue is not substance. Venue is process, and Rules Enabling Act tells the judiciary to promulgate rules of practice and procedure, not to wait for Congress to act. Instead, Congress responds to proposed rules. The Department came to the Committee with two procedural problems, created by the language of the existing Rule, not by the Constitution or other statute, that are impairing its ability to investigate ongoing, serious computer crimes. The Advisory Committee's role under the Rules Enabling Act is to propose amendments that address these problems and provide a forum for the government to determine the lawfulness of these searches.

One member dissented from the Committee's conclusions on these points and voted against forwarding the amendment to the Standing Committee. The dissenting member thought that the amendment is substantive, not procedural, because it has such important substantive effects, allowing judges to make ex parte determinations about core privacy concerns. The amendment, this member argued, would not permit adversarial testing of the underlying substantive law because defense counsel would not participate until too late in the process, in back-end litigation. For many people, computers are their lives, and the member concluded that these privacy concerns should be considered in the first instance by Congress. The remainder of the Committee was not persuaded; computers are no more sacrosanct than homes, and search warrants for homes have long been issued ex parte and reviewed in back-end litigation.

b. Proposed revisions

The Committee unanimously accepted the Subcommittee's recommendations for several revisions in the rule as published, none of which require republication.

(i) The caption

The Committee accepted the Subcommittee's recommendation for a change in the caption of the affected subdivision of Rule 41, substituting "Venue for a Warrant Application" for the current caption "Authority to Issue a Warrant." This change responds to the many comments that assumed the amendment would allow a remote search in any case falling within the proposed amendment (for example, any case in which an individual had used anonymizing technology such as a VPN). The current caption seems to state an unqualified "authority" to issue warrants meeting the criteria of any of the subsections. Many commenters mistakenly

interpreted the rule in this fashion, and strongly opposed it on this ground. The Committee considered and declined to adopt alternative language suggested by our style consultant, Professor Kimble, because it would less clearly indicate the limited purpose and effect of the amendment.

The Committee also adopted the Subcommittee's proposed addition to the Committee Note explaining the change in the caption. The new Note explicitly addresses the common misunderstanding in the public comments, stating what the amendment does (and does not) do: "the word 'venue' makes clear that Rule 41(b) identifies the courts that may consider an application for a warrant, not the constitutional requirements for the issuance of a warrant, which must still be met."

(ii) Notice

The Committee adopted the Subcommittee's two proposed revisions to the notice provisions for remote electronic searches and the accompanying Committee Note. The purpose of both revisions to the text is to parallel, as closely as possible, the requirements for physical searches. The addition to the Committee Note explains the changes to the text, and also responds to a common misunderstanding that underpinned multiple comments criticizing the proposed notice provisions.

The Committee added a requirement that the government provide a "receipt" for any property taken or copied (as well as a copy of the warrant authorizing the search). This parallels the current requirement that a receipt be provided for any property taken in a physical search. The Committee agreed that the omission of this requirement in the published rule was an oversight that should be remedied.

The Committee also rephrased the obligation to provide notice to "the person whose property was searched or who possessed the information that was seized or copied." Again, the purpose was to parallel the requirement for physical searches.

On the other hand, the Committee rejected the suggestion in some public comments that the government should be required to provide notice to both "the person whose property was searched" and whoever "possessed the information that was seized or copied, since that is not required in the case of physical searches. For example, if the Chicago Board of Trade is served with a warrant and files containing information regarding many customers are seized, the government may give notice of the search only to the Board of Trade, and not to each of the customers whose information may be included in one or more files. The same should be true in the case of remote electronic searches.

Finally, the Committee endorsed the Subcommittee's proposed addition to the Committee Note explaining the changes made in the notice provisions after publication, and also responding to the many comments that criticized the proposed notice provisions as insufficiently protective. The addition to the Note draws attention to the other provisions of Rule 41 that preclude delayed notice except when authorized by statute and provides a citation to the relevant statute. Professor Coquillette commented that because of the widespread confusion on this point in the public

comments, the proposed addition was an appropriate exception to the general rule that committee notes should not be used to help practitioner.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41 be approved as amended and transmitted to the Judicial Conference.

C. ACTION ITEM—Rule 45 (additional time after certain kinds of service)

After review of the public comments, the Advisory Committee voted unanimously to recommend that the Standing Committee approve the proposed amendment to Rule 45(c), with three revisions from the published version and transmit it to the Judicial Conference. The proposed amendment is at Tab E.

1. Reasons for the proposal

The proposed amendment to Rule 45(c) is a product of the Standing Committee's CM/ECF Subcommittee; parallel amendments to the civil, criminal, bankruptcy and appellate rules were published for comment. The proposed amendment would abrogate the rule providing for an additional three days whenever service is made by electronic means. It reflects the CM/ECF Subcommittee's conclusion that the reasons for allowing extra time to respond in this situation no longer exist. Concerns about delayed transmission, inaccessible attachments, and consent to service have been alleviated by advances in technology and extensive experience with electronic transmission. In addition, eliminating the extra three days would also simplify time computation. The proposed amendment, as well as the parallel amendments to the other Rules, includes new parenthetical descriptions of the forms of service for which three days will still be added.

2. Public Comments

The public comments are summarized at Tab E.

The Pennsylvania Bar Association and the National Association of Criminal Defense Lawyers (NACDL) opposed the amendment. Each noted that the three added days are particularly valuable when a filing is electronically served at inconvenient times. NACDL emphasized that many criminal defense counsel are solo practitioners or in very small firms, where they have little clerical help, and often do not see their ECF notices the day they are received. The Department of Justice expressed a similar concern about situations in which service after business hours, from a location in a different time zone, or during a weekend or holiday may significantly reduce the time available to prepare a response. The Department did not oppose the amendment, however, and instead suggested language be added to the Committee Note to address this issue.

NACDL also questioned the addition of the phrase "Time for Motion Papers" to the caption to Rule 45(c), suggesting that it may lead to confusion.

Ms. Cheryl Siler suggested that as part of the revision the existing language of Rule 45(c) should be amended to parallel Fed. R. Civ. P. 6(d), FRAP 26(c) and Fed. R. Bank. P. 9006(f). In contrast to Rule 45(c), which requires action "within a specified time *after service*," the parallel Civil and Bankruptcy Rules require action "within a specified [or prescribed] time *after being served*." Siler expressed concern that practitioners may interpret the current rule to mean the party serving a document (as well as the party being served) is entitled to 3 extra days.

The Federal Magistrate Judges Association (FMJA) expressed concern that readers of the amended rule might think that three days are still added after electronic service because of the cross reference to Civil Rule 5(b)(2)(F) "(other means consented to)." It suggested either eliminating all of the parentheticals in the proposed rule or revising the rule to refer to "(F) (other means consented to except electronic service)."

The Advisory Committee's CM/ECF Subcommittee, chaired by Judge David Lawson, held a telephone conference to consider the comments. After discussing the FMJA's concerns it decided not to recommend a change in the published rule. The likelihood of confusion did not seem significant, and any confusion that might arise would be short lived because of the efforts underway to eliminate the requirement for consent to electronic service. The parentheticals will be helpful to practitioners, and any revision to the parenthetical reference would require further amendment in the near future. Language in the proposed Committee Note directly addresses this issue. The Subcommittee recommended to the Criminal Advisory Committee that no change be made in the published rule on this issue, and the Advisory Committee agreed with that recommendation at its March meeting.

The Advisory Committee did approve three other revisions to the proposal, each recommended by its Subcommittee.

3. Suggested Revisions

a. Addition to Committee Note.

The first change is a proposed addition to the Committee Note that addresses the potential need to grant an extension to the time allowed for responding after electronic service. At the Advisory Committee's March meeting, two members initially opposed forwarding the published amendment to the Standing Committee, finding that the concerns voiced by the Pennsylvania Bar Association, NACDL, and the Department of Justice counseled against an amendment that would eliminate the three added days after electronic service. These members noted that the three added days are important for criminal practitioners because it is often necessary to speak directly with clients before filing responses, but speaking with incarcerated clients takes more time, particularly when clients are incarcerated in distant locations. However, the Committee eventually achieved unanimity on a compromise approach: adding language to the Committee Note. The Committee approved an addition to the Note drafted by the Department of Justice and recommended by the Advisory Committee's CM/ECF Subcommittee. The Committee decided that adding language to the Committee Note that mentioned the potential need for extensions was important not only for the reasons voiced by defense attorneys and the Department of Justice, but also because district court discretion to adjust deadlines in criminal cases is essential in order to

address matters on the merits when appropriate. Such flexibility is particularly important when a person's liberty is at stake. Granting extensions in some circumstances may also be more efficient because of collateral challenges that frequently follow missed deadlines. This principal was among those that guided the Committee's recent work on Rule 12. The amendments to Rule 12 emphasized the district court's discretion to extend or modify motion deadlines so that issues can be most efficiently resolved on their merits before trial, avoiding litigation under Section 2255.

To facilitate uniformity in the Committee Note that would accompany the parallel rules making their way through the various Advisory Committees, the Criminal Advisory Committee approved the revised Note language with the understanding that modifications may be required. Indeed, subsequent to the March meeting, a much shorter version of the addition was approved by the Criminal Advisory Committee's Subcommittee on CM-ECF, and then by the Chairs of each Advisory Committee. That new language has been added to the published Committee Note in each Committees' parallel proposal. It reads: "Electronic service after business hours, or just before or during a weekend or holiday, may result in a practical reduction in the time available to respond. Extensions of time may be warranted to prevent prejudice."

b. Change to the Caption

The Advisory Committee also agreed to amend the caption of the Rule published for comment to eliminate the additional words "Time for Motion Papers." These words do not appear in the caption of the existing Rule 45, and were included in the proposed amendment in order to parallel the current caption of Civil Rule 6, on which Rule 45 was patterned, as well as the caption to Bankruptcy Rule 9006. However, the added words do not describe the text of Rule 45. Instead, Rule 12 deals extensively with the time for motions.

c. Substituting "being served" for "service"

Finally, the Advisory Committee agreed to amend the proposed text of the amendment to Rule 45 as published so that it is parallel to the language of the other rules, referring to action "within a specified time after *being served*" instead of "time after *service*." The Committee is unaware of any substantive reason for the slightly different wording of Rule 45 as compared to the Civil and Bankruptcy Rules. The Committee believes it is prudent to revise the language of Rule 45(c) to eliminate the discrepancy while other changes are being made in Rule 45(c).

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as amended and transmitted to the Judicial Conference.

* * * * *