

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

ADVISORY COMMITTEE ON CRIMINAL RULES MEETING

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

APRIL 6, 2009

Thurgood Marshall  
Federal Judiciary Building  
One Columbus Circle, N.E.  
Mecham Conference Center  
Washington, D.C. 20544

Court Reporter: Catalina Kerr, RPR  
U.S. District Courthouse  
Room 6716  
Washington, D.C. 20001  
202.354.3258

Proceedings recorded by mechanical stenography, transcript  
produced by computer.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

**APPEARANCES :**

Honorable Richard C. Tallman, Chair  
Professor Sara Sun Beale, Reporter  
Professor Nancy J. King  
Professor Andrew D. Leipold  
Professor Daniel R. Coquillette  
Honorable Anthony J. Battaglia  
Honorable Robert H. Edmunds, Jr.  
Honorable Morrison C. England, Jr.  
Honorable James P. Jones  
Honorable John F. Keenan  
Honorable Donald W. Molloy  
Honorable Rita M. Glavin  
Honorable James B. Zagel  
Honorable Reena Raggi, Liaison Member  
Honorable Lee H. Rosenthal, Chair, Standing Rules Committee  
Rachel Brill, Esq.  
Leo P. Cunningham, Esq.  
Thomas P. McNamara, Esq.  
Henry Wigglesworth, Esq.  
Jeffrey Barr, Esq.  
John Rabiej, Chief, Rules Committee Support Office  
Laural Hooper, Federal Judicial Center  
Jonathan Wroblewski, Director, Office of Policy & Legislation  
Kathleen Felton, Deputy Chief, Appellate Section  
Bruce Rifkin, Clerk, U.S. District Court  
Peter G. McCabe, Secretary, Com. on Rules of Prac. & Proc., DC  
James N. Ishida, Attorney Advisor

\*-\*-\*-\*

C O N T E N T S

**TESTIMONY BY:**

RICHARD ANDERSON .....	7
MICHAEL S. NACHMANOFF .....	25

*P-R-O-C-E-E-D-I-N-G-S*

(8:30 A.M.)

MR. TALLMAN: All right. The meeting will come to order. I want to welcome everyone to our spring meeting in Washington, D.C. As you know, we are conducting joint proceedings this morning, beginning with testimony from two witnesses who have asked to comment on some of the pending rule changes that we had sent out for notice and comment, and we'll take that item of business up first before we move into the formal committee meeting.

I do want to recognize the newest member of the Criminal Rules Committee who is seated to the right of Rachel Brill, and that's Mr. Bruce Rifkin. Bruce is the clerk of the court of the United States District Court for the Western District of Washington and the District Executive. I have known Bruce for more years than I care to admit. You will recall that the committee felt that it would be important to have participation by a representative of our court because of the various issues that impact on clerk's operations, and we were able to convince Mr. Rifkin to join us, so the Chief Justice concurred and he'll be joining us for I think the initial three years on the committee. Welcome.

And I will have everybody introduce themselves, and I also want to welcome the Acting Assistant Attorney General for the Criminal Division, Rita Glavin, who is joining us for

1 the meeting this morning, and I think that's all the new  
2 faces.

3 But John Rabiej, would you start down at the end of  
4 the table?

5 MR. RABIEJ: My name is John Rabiej with the Rules  
6 Committee support office.

7 COURT REPORTER: I would ask one thing.

8 MR. TALLMAN: Go ahead.

9 COURT REPORTER: Please speak in the microphone.

10 MR. ROSENTHAL: I'm Lee Rosenthal. I'm a district  
11 judge in Houston, Texas and Chair of the Standing Committee.

12 MR. COQUILLETTE: I'm Dan Coquillette. I'm on the  
13 faculty at Boston College in Harvard Law School, and I'm  
14 reporter for the Standing Committee.

15 MS. RAGGI: I'm Reena Raggi. I sit on the Second  
16 Circuit Court of Appeals in New York. I'm on the Standing  
17 Committee, and I'm a liaison to this committee.

18 MR. JONES: I'm Jim Jones. I'm a district judge  
19 from Virginia, and I'm a member of the committee.

20 MR. LEIPOLD: I'm Andy Leipold. I'm a professor at  
21 the University of Illinois Law School.

22 MR. MOLLOY: Don Molloy, district judge in Montana.

23 MR. BATTAGLIA: Tony Battaglia, magistrate judge,  
24 Southern District of California.

25 MR. ZAGEL: Jim Zagel, I'm a district judge in

1 Chicago.

2 MR. CUNNINGHAM: Leo Cunningham. I'm a practicing  
3 lawyer in California.

4 MR. ENGLAND: Morrison England, district judge in  
5 Sacramento, California.

6 MR. MCCABE: I'm Peter McCabe, Assistant Director of  
7 the Administrative Office. I'm the secretary.

8 MR. TALLMAN: I'm Dick Tallman. I'm the Ninth  
9 Circuit in Seattle, and I'm the Chair of the Criminal Rules  
10 Committee.

11 MS. BEALE: Sara Beale. I teach at Duke Law School,  
12 and the reporter for the Rules Committee.

13 COURT REPORTER: Teach where? I'm sorry?

14 MS. BEALE: Duke Law School.

15 MR. TALLMAN: My kind of reporter. Rather than have  
16 a gap in the transcript, we're actually going to have a real  
17 verbatim transcript.

18 MR. KEENAN: I'm John Keenan. I sit in the Southern  
19 District of New York.

20 MR. MCNAMARA: I'm Tom McNamara. I'm the Federal  
21 Public Defender for the Eastern District of North Carolina.

22 MR. EDMUNDS: I'm Bob Edmunds. I'm the Justice on  
23 the North Carolina Supreme Court.

24 MS. KING: I'm Nancy King. I teach at Vanderbilt  
25 Law School and serve as one of administrative supports.

1 MS. GLAVIN: I'm Rita Glavin. I'm the Acting  
2 Assistant Attorney General for the Criminal Division.

3 MR. WROBLEWSKI: I'm Jonathan Wroblewski. I'm the  
4 director of the Office of Policy & Legislation in the criminal  
5 division.

6 MS. FELTON: I'm Kathleen Felton, the Deputy Chief  
7 of the Appellate Section, Criminal Division.

8 MS. BRILL: I'm Rachel Brill. I practice in San  
9 Juan, Puerto Rico.

10 MR. RIFKIN: I'm Bruce Rifkin. I work for the  
11 district court in Washington.

12 MR. WIGGLESWORTH: I'm Henry Wigglesworth, and I am  
13 the newest member of the Office of the Judge's Program. I'm  
14 an attorney advisor.

15 MR. BARR: I'm Jeff Barr, also an attorney here at  
16 the AO in Peter McCabe's office.

17 MS. HOOPER: Laura Hooper, research attorney with  
18 the Federal Judicial Center.

19 MR. ISHIDA: I'm James Ishida, an attorney at the  
20 Administrative Office.

21 MR. TALLMAN: All right. Thank you and welcome.  
22 One last logistical item. Everyone should have a menu for  
23 lunch. We are going to have a working lunch today because  
24 we've got a pretty heavy agenda.

25 The Chair will do his best to get through the

1 business of the committee so that we can finish on time  
2 tomorrow at noon, but we'll see where we are at the end of the  
3 day, but I want to push through today in the hope that we can  
4 try this case in a day-and-a-half.

5 All right. Any other questions before we commence  
6 our formal testimony?

7 Hearing none, Mr. Richard Anderson is the Federal  
8 Public Defender in Dallas, Texas, and he's going to be our  
9 first witness this morning.

10 Mr. Anderson, welcome.

11 MR. ANDERSON: Good morning. Thank you-all for  
12 inviting me.

13 MR. TALLMAN: Let me just say, before Mr. Anderson  
14 begins. The format that we'll follow is I told the witnesses  
15 they could have 10 or 15 minutes to give some prepared  
16 remarks, and then I will open the discussion up to questions  
17 from any member of the committee.

18 Mr. Anderson, you may proceed.

19 COURT REPORTER: One other request. Before you  
20 speak, say your name, please. That would help, too. In the  
21 microphone, too, please.

22 MR. ANDERSON: I am Richard Alan Anderson. I'm the  
23 Federal Public Defender for the Northern District of Texas in  
24 Dallas. I want to thank you-all for inviting me here to speak  
25 concerning Rule 15, or the proposed amendments to Rule 15. I

1 want to thank you-all for the wonderful weather yesterday.  
2 And although it does appear that people in D.C. have never  
3 seen a tree before, and that's my observation. I almost got  
4 my eye poked out several times just walking down the street.

5 I am here to speak against the proposed amendment  
6 for the rules on behalf of the Federal Public Defenders and  
7 the Community Defenders around the country and alternatively  
8 in favor of the amendment that the Federal Defenders and  
9 Community Defenders have proposed substitute language in the  
10 event that -- in the event that I don't sell the first issue.

11 And I will -- the thing that judges always like to  
12 hear, I will try to get back a little bit of my time, but I'm  
13 going to talk to you basically -- I'm not going to go over  
14 everything that was pointed out. I would like the record to  
15 reflect that we're resubmitting my letter on behalf of the  
16 Federal Defenders and the Community Defenders dated  
17 February 17<sup>th</sup> of 2009 for your consideration.

18 The letter basically makes four points, and the  
19 letter addresses in basic terms, first of all, with regard to  
20 the proposed rule, the questionable constitutionality since  
21 the proffered decision. The second aspect it points out is  
22 the over-breadth of the language of the proposed amendment  
23 failing to even meet the Craig standards. The third, the  
24 aspect of how it impairs the defense function. And finally  
25 our proposed amendments or suggested amendments in the event

1 that the Committee decides to recommend -- to go forward with  
2 a recommendation that Rule 15 is amended.

3 I feel like the -- we're talking about a rule that  
4 we all know seldom gets used and has seldom been used in the  
5 past, and what I would like to do, with your permission, is I  
6 think the letter speaks to -- the scholarship and everything  
7 in the letter speaks to the issues that we have raised. I'd  
8 like to kind of give you a lawyer's perspective.

9 MS. BEALE: The letter is on page 183 of the agenda  
10 book. The pages numbers are down in the bottom right-hand  
11 side in the corner.

12 MR. ANDERSON: Right. And our proposed red line  
13 amendment, I would assume, is right at the end of the letter.

14 MS. BEALE: That should be correct. Yes, that's the  
15 case, and the -- that proposal begins on, I think, page 192 of  
16 the agenda book.

17 MR. ANDERSON: Thank you. Before I became the  
18 Federal Public Defender for the Northern District of Texas, I  
19 practiced criminal defense law for 33 years in private  
20 practice, and the -- and for the last 20 years of that was  
21 almost exclusively federal criminal defense. And about  
22 halfway through that career, I was -- I was introduced to the  
23 wonderful world of umlauts and rogatories and issues with  
24 regard to foreign witnesses in the use of a -- in a criminal  
25 trial.

1           The first case I had was a Spanish citizen who  
2 was -- who made the mistake of coming to Amarillo, Texas to  
3 the Bell Helicopter facility there to buy some Apache gun  
4 ships ostensibly for the Portuguese army but rumor has it they  
5 were going to end up in Libya.

6           The second opportunity I had was a true  
7 entrepreneur, an Englishman who during the eight-year war  
8 between Iran and Iraq was selling tanks to Iran and TOW  
9 missiles to Iraq, kind of an equal opportunity arms smuggler.

10           And then the last and most recent opportunity that  
11 I've had to delve into this issue and actually have personal  
12 experience with it was representing a Palestinian in Dallas  
13 who was exporting computers to Malta that eventually ended up  
14 in Libya. And as a result of that representation, I have had  
15 the opportunity to either take or attempt to take foreign  
16 depositions in three separate cases and had different  
17 experiences each time that I had the opportunity to go in and  
18 try to do my best for my client and also to -- to find  
19 information that will hopefully assist the jury in making the  
20 important decision that they had to make on each of our  
21 clients.

22           The first thing I need to dispel is when you look at  
23 the rule in kind of just in the proposed rule and kind of a  
24 sterile atmosphere, it has what I call a Hollywood quality.  
25 You think, "Well, it's going to be wonderful technology. It's

1 going to be easy to institute and to work out." Everything is  
2 just -- it's like the -- you always find -- in Hollywood you  
3 always find a parking place in front of the building you're  
4 going to or your cell phone never runs out of batteries and  
5 always get reception and you most certainly never run out of  
6 bullets.

7           The -- the times that I have been overseas on --  
8 when the Government wanted to take depositions of witnesses,  
9 including a co-defendant in England, the procedures were --  
10 with regard to face-to-face confrontation, were not only less  
11 than satisfactory, they were downright abysmal. This  
12 doesn't -- this doesn't always take place in the U.S. Embassy  
13 on American soil. My bar card has very few limitations on it.  
14 I can even practice law without my glasses, at least in the  
15 jurisdictions that I'm licensed to appear before.

16           It is -- I know it's going to come as an absolute  
17 shock to you that most foreign jurisdictions don't like us  
18 coming in and practicing law in their jurisdictions. Even if  
19 we have our members of our judiciary supposedly holding the  
20 court in the -- my experience has been that most of the time  
21 you also have to have the stamp or the imprimatur of the  
22 foreign government's judiciary imposed over it and that is a  
23 huge stamp when you're talking about trying to get a flow  
24 for -- of a cross-examination or even a flow of a direct  
25 examination with a witness.

1           The situation that I had the most recently was the  
2 depositions we took in Malta of a couple of witnesses who  
3 because they were in the gun sites of the United States  
4 Government, decided that they weren't going to travel to the  
5 United States to give their testimony, and the judge granted a  
6 Rule 15 deposition under the theory that, as you've seen in  
7 the cases that we cited in the letter, that we get over there  
8 and we're going to have these fabulous satellite  
9 communications and I was going to have instantaneous  
10 communication with my client who was a shut-in at the Federal  
11 Detention Center in Seagoville. And the other of the five  
12 lawyers that were in the case, two of the lawyers were over in  
13 Malta, the other three were at the detention center with our  
14 clients. There was going to be a closed-circuit feed and  
15 there was going to be the ability to ask questions so that the  
16 client would have some input.

17           We didn't, unfortunately, like in the Eleventh  
18 Circuit Case, have cameras focused on the individual accused  
19 to be able to register their views and opinions of the various  
20 testimonies like you would if you had the actual confrontation  
21 in a courtroom. And the technology is just not there yet. It  
22 wasn't there three years ago.

23           I have tried to use that technology. We use it  
24 somewhat in the Northern District of Texas by using the  
25 bankruptcy facilities to use the technology to do some

1 proceedings and it is beyond less than satisfactory. The --  
2 first of all, you have to have a judge that has patience so  
3 that you can consult your client. I know that that is a  
4 quality that comes -- that just automatically is bestowed upon  
5 the judiciary when it's -- when they are appointed or elected,  
6 but point in fact is there is -- you have to have an  
7 outstanding amount of patience.

8           In Malta, we were not allowed to practice law, so we  
9 had to do our direct examination and cross-examination through  
10 Maltese attorneys. And I know that it also doesn't come as a  
11 shock to you that sometimes in talking to even a fellow  
12 attorney, things get lost in the translation concerning the  
13 issues or the points that you're trying to make.

14           The judge that we had was a judge in Malta and we  
15 also had a judge who was at the detention center in  
16 Seagoville, and we -- the judge at Seagoville was a lot more  
17 patient than the judge in Malta was with the proceedings, and  
18 so as a result, being able to communicate with the client,  
19 being able to ask questions that were of a -- that were  
20 important -- Yes, sir.

21           MR. TALLMAN: No, I'm giving you the five-minute  
22 sign.

23           MR. ANDERSON: I got it. All right. I'm going to  
24 give it back to you still. All right. I'm just going to tell  
25 you that the experience, the technology is absolutely not

1 there, and it was from a lawyer who has been practicing,  
2 hopefully, at a fairly high level for a number of years, it  
3 was as a true confrontation of witnesses on behalf of my  
4 client in each and every case, and two of the cases the  
5 depositions ended up not even being used because they were of  
6 such poor quality, and I'd like to think that the Government  
7 thought even -- even the Government thought their witnesses  
8 were not of the kind of quality that they wanted to sponsor in  
9 front of the jury.

10 But the one in Malta, it did get used, and I am --  
11 and I am sad to say that I don't think that I was anywhere  
12 near as effective as I wanted to be or needed to be on behalf  
13 of my client there.

14 I would like, at the very end, to leave you one  
15 quote from a Fifth Circuit case concerning this. It is not in  
16 my letter. It is from *United States versus Aguilar-Ayala*, 973  
17 F.2d 411.

18 MR. TALLMAN: You want to spell that for the court  
19 reporter?

20 MR. ANDERSON: Certainly. It's Aguilar,  
21 A-g-u-i-l-a-r, dash, Ayala, A-y-a-l-a, 973 F.2d 411.

22 And I wish you -- those of you who know Judge Jones,  
23 if you would tell her that I quoted the Fifth Circuit. I need  
24 the points.

25 It says, (reading) No doubt, few defendants regard

1 trial by deposition as an adequate substitute for confronting  
2 the witness in the presence of the jury. Only through live  
3 cross-examination can the jury fully appreciate the strength  
4 or weakness of a witness' testimony by closely observing the  
5 witness' demeanor, expressions, intonations. Videotaped  
6 deposition testimony subject to all of the rigors of  
7 cross-examination may be a good surrogate for live testimony  
8 as you will find, but it is still only a substitute. Even  
9 the advanced technology of our day cannot breathe life into a  
10 two-dimensional broadcast. Trial by deposition steps hard on  
11 a criminal defendant's right to confront the accusers.

12           And I will tell you that I have found that on a  
13 personal level to be -- to be oh so true. I would submit to  
14 you that if you do decide, because of the types of cases that  
15 we're now trying in a global community, to amend Rule 15, that  
16 you focus on the suggestions that were made by the Federal  
17 Defenders and the Community Defenders at the end of my letter.

18           These are suggestions, first of all, to make it and  
19 only in that rarest of cases, to have some sort of filter at  
20 the very top of the Department of Justice to make that  
21 decision when those -- when those depositions can be asked for  
22 and to provide the type of security and technology that allows  
23 an accused to have input into confronting the accuser, and  
24 those ought to be, should be, have to be the absolute minimum  
25 qualifications for coming forward and presenting this type of

1 testimony to a trier of fact that has the life of the accused  
2 in their hands.

3 MR. TALLMAN: Thank you, Mr. Anderson. Questions  
4 from the Committee?

5 All right. Yes, Mr. Cunningham.

6 MR. CUNNINGHAM: Mr. Anderson, I'm Leo Cunningham.  
7 I'm one of the practitioners. I had a couple of questions  
8 about the Defender's proposed alternative and a couple of  
9 choices that were made. I'll ask you about both of them, and  
10 then you can answer them as you like.

11 I was also on the subcommittee on the matter, and I  
12 think these questions percolated up into the subcommittee.  
13 One was that the Defenders have, by their amendment, made this  
14 applicable only to Government witnesses as opposed to possibly  
15 co-defendants? We were curious as to why that decision was  
16 made, and then the second question -- well, let's talk about  
17 that one first.

18 MR. ANDERSON: The -- basically, as we mentioned in  
19 our note to the rules, it would be so rare, because quite  
20 frankly, as a trial lawyer, I am going to be blaming the  
21 individual who has not subjected themselves to the  
22 jurisdiction of the United States, all right, and if -- and  
23 I'm not going to be wanting to talk to that witness anyway  
24 because I would like to make up what they have to say as  
25 compared to actually hear it, and the flip-side is, if the

1 Government wants that witness, then they become a Government  
2 witness and the rule applies.

3 MR. CUNNINGHAM: So my second question related to  
4 language that was inserted in the "B" provisions, that is the  
5 findings that had to be made, and in particular, there's a  
6 requirement that the witness' presence for deposition in the  
7 United States not be obtainable, and your proposal is -- the  
8 Defenders' proposal added the language, "due diligent effort,"  
9 and there was discussion on the subcommittee as to whether  
10 that might not in fact water down the requirement regarding  
11 availability by allowing it to be excused if there were  
12 diligent efforts made, whatever those might be.

13 MR. ANDERSON: I understand the point that you're  
14 making. I think that the issue that the Defenders were  
15 focusing on at this time -- at that time is obviously, from  
16 the defense function, we don't have the opportunity to  
17 exercise any kind of due diligence to get a witness who is  
18 outside the subpoena power of our jurisdiction. Only the  
19 Government can take the opportunity to do -- to make those  
20 kind of steps to see whether or not that the witness would be  
21 allowed to appear.

22 I think that the point the Defenders were trying to  
23 make is this: Is that -- that there ought to be a procedure,  
24 there ought to be a procedure that the Government has gone  
25 through and attempt to extradite, if the individual is a

1 co-defendant, and attempt to secure their testimony some other  
2 way so that the judge who is making the determination as to  
3 whether or not to grant a Rule 15 deposition, knowing that it  
4 is merely a substitute for the right of confrontation to be  
5 able to say, yes, the Government has gone forward and taken  
6 those steps necessary and they -- and they're not going to be  
7 able to succeed or they're going to come up short. That lets  
8 the judge know that the Government was serious about taking --  
9 about taking this step to get this witness and it doesn't  
10 allow the Government to say, at least in our opinion, "Well,  
11 we're going to just -- you know, it's going to be easier for  
12 us to take a deposition than to go through the process of  
13 attempting to get the individual into the jurisdiction of the  
14 United States so that their testimony can be heard."

15           And I think that was the thought process behind  
16 using the due diligence language.

17           MR. CUNNINGHAM: Thank you.

18           MR. TALLMAN: Yes, Mr. McNamara.

19           MR. MCNAMARA: Mr. Anderson...

20           THE COURT: You do need the microphone, and please  
21 identify yourself for the court reporter.

22           MR. MCNAMARA: I'm Tom McNamara.

23           MR. ANDERSON: Make it a softball, Tom.

24           MR. MCNAMARA: I was thinking of one.

25           Now, with the proposal to limit this to Government

1 witnesses, would there still not be a Crawford problem when  
2 they try to introduce the Government witnesses' testimony?

3 MR. ANDERSON: There is still -- there is still a  
4 Crawford problem because the transition of Rule 15 and most of  
5 the cases were decided under -- most of the cases we see are  
6 defined under *Craig* or *Ohio versus Roberts*. The transition  
7 issue is we can't speak for what the court is going to say in  
8 the final analysis about how *Crawford* opposes -- I quoted  
9 Judge Scalia's language in the letter. We were trying to be  
10 very careful. We try to be very careful in predicting what we  
11 think judges will do with a particular case. It has a  
12 tendency to come back and haunt us when we're wrong, so  
13 basically we were pointing out, will there still be a *Crawford*  
14 problem? And the answer is, very possibly yes. Will that be  
15 true under Current Rule 15, Proposed Rule 15, or Amendment  
16 Rule 15? And the answer is yes. It's not -- it's not an  
17 issue that I think we can answer.

18 MR. TALLMAN: Yes. Professor Beale.

19 MS. BEALE: Mr. Anderson, this is Sara Beale. You  
20 had proposed a certification by the Attorney General that the  
21 case met certain criteria, and the subcommittee talked about  
22 that language and actually was favorable to the general idea.  
23 And in -- in seeking to insert that into the rule itself,  
24 there was some question about the language, and I wondered if  
25 you had any opinion on the language, and the particular

1 question is, "certify" or "authorize" so there are a variety  
2 of statutory examples that use one term or the other. And in  
3 the wiretap area, for example, it's "authorize," and in some  
4 other areas it's "certified." Do you have any -- do you feel  
5 there is an important difference there, and if so, why and  
6 what you think is the correct --

7 MR. ANDERSON: We try to set it at the highest  
8 standard that we could come up with, which we believe, based  
9 on the case law we reviewed, was the certification process.  
10 The reason being, once again, so that it will only be used in  
11 the rarest of circumstances when the Government needs the  
12 testimony and it is in the public -- the public policy  
13 interest to -- to kind of go around the general rule of  
14 face-to-face confrontation.

15 If it became authorized rather than certified, are  
16 we going to throw ourselves on the sword? The answer is  
17 probably not, at least not from a distance, but we sought to  
18 seek the highest form of accountability, for lack of a better  
19 term, before the process of face-to-face confrontation was --  
20 was gone around.

21 MS. BEALE: Thank you.

22 MR. TALLMAN: Any other question? Let me just --  
23 this is the Chair. Let me just ask one general question,  
24 Mr. Anderson. You spent a significant amount of time talking  
25 about the logistical difficulties, the technical difficulties

1 and so on. Why can't we leave that to the responsibility of  
2 the trial judges to rule on questions of admissibility,  
3 reliability, and if necessary, exclude the testimony  
4 completely if the judge is convinced by the representations of  
5 the parties that they just didn't get a fair opportunity to  
6 fully examine and record the testimony of the witness?

7 MR. ANDERSON: I think the rule -- I think the trial  
8 judge still can do this under the proposed rules that we have  
9 made. It just sets the bar at a stage in which we know that  
10 the Government or whoever the proponent is, is going to have  
11 to at least clear that bar before the judge becomes part of  
12 the actor -- becomes the actor in making a determination of  
13 whether or not the procedure and the testimony and the  
14 safeguards that were done were sufficient to ensure the type  
15 of reliability and the -- and as close to a face-to-face  
16 confrontation as one can have under the -- under the  
17 restrictions of being -- of doing it overseas.

18 MR. TALLMAN: Well, without regard to the *Crawford*  
19 issue, how is this any different from a district judge  
20 presiding over a civil trial where this type of evidence is  
21 sought to be introduced and objections are made as to the  
22 reliability or admissibility of the foreign evidence?

23 MR. ANDERSON: And I'm not so sure that I am  
24 qualified to speak to that other than to tell you that I think  
25 that when the discussion among the Defenders was that setting

1 the bar at a particular level, as instructions to the bench  
2 and the bar, allows a baseline, and after that, if a judge  
3 requires more, then a judge requires more, and that --

4 MR. TALLMAN: I just don't understand, though, what  
5 the difference is once we eliminate the *Crawford* issue, and I  
6 recognize that's a significant issue. It's one that has  
7 troubled the committee and the subcommittee for some time, but  
8 taking that issue aside, I just don't understand how the other  
9 arguments that you make with regard to the difficulty of  
10 obtaining this testimony in various venues is any different as  
11 between a civil case and a criminal case.

12 MR. ANDERSON: And I'm not so sure that it is any  
13 different. I'm not so sure that the decision as to whether or  
14 not the technology and the manner and the procedure that was  
15 done was -- is sufficient to ensure reliability. I don't  
16 think there is any difference even under the current Rule 15.

17 What this does is sets some inquiries that the Court  
18 must make to make a determination right off the bat whether or  
19 not this will not be an exercise in futility, whether or not  
20 the individual who's going to be exercising a Fifth Amendment  
21 right or any of those activities and to make sure that it is  
22 truly material and passing upon what the Attorney General or  
23 whoever it is that is doing the certification or the  
24 authorization is that it is truly in the interest of public  
25 policy to push this forward.

1           MR. TALLMAN: All right. Thank you, Mr. Anderson.  
2 Any further questions? Yes.

3           MS. BRILL: Can I ask one follow-up question to  
4 that?

5           MR. TALLMAN: Of course.

6           MS. BRILL: This is Rachel Brill. As someone who  
7 has conducted some of these depositions and somewhat recently,  
8 and -- what would -- practically, what would you say are the  
9 minimum requirements for a meaningful participation by the  
10 defendant?

11           MR. ANDERSON: I think the Eleventh Circuit and the  
12 case that I quoted in the Eleventh Circuit where they actually  
13 ended up rejecting the deposition testimony but set out kind  
14 of the guidelines pretty much got it right. You have to be  
15 able to be in a position where there is a simultaneous feed to  
16 the accused. There has to be an opportunity for the accused  
17 to be properly viewed also to make a determination of what  
18 reactions the accused has. There has to be the availability  
19 of the accused's input to his lawyer or her lawyer in the --  
20 in the questioning process. And I think -- I think those are  
21 absolutely the minimum standards that are required.

22           In our case in Malta, we had a private phone line  
23 and sometimes it worked and sometimes it didn't and sometimes  
24 the judge said, go ahead and sometimes the judge waited, so it  
25 was a -- but at the very minimum, the accused has to have some

1 input into the questioning process, has to have some -- or at  
2 least into the lawyer's determination of what time questioning  
3 process will be.

4           There has to be -- we did it both by live video feed  
5 and by -- by videotape deposition. The live video feed was  
6 less than satisfactory. Unfortunately, the videotape  
7 deposition was all too clear, unfortunately for my client, but  
8 at any rate, the -- I think what the Eleventh Circuit set out  
9 in that case is probably the minimum qualifications.

10           MR. TALLMAN: Mr. Anderson, are you familiar with  
11 the Fourth Circuit decision of the *United States versus Ali*?

12           MR. ANDERSON: I am.

13           MR. TALLMAN: And would you agree that the  
14 procedure, the technical procedures and equipment and so on  
15 that was used in that case would meet the standards that you  
16 just said?

17           MR. ANDERSON: I have read the court's order in *Ali*  
18 and it appears to be similar as to -- other than -- other than  
19 obviously making the findings about "in the public interest"  
20 and things like that which would only be required under our  
21 proposed amendments, but the -- but the technical --  
22 technological aspects of it are good and very similar to what  
23 we had, if it works.

24           MR. TALLMAN: Any further questions by committee  
25 members?

1 All right. Seeing none, Mr. Anderson, thank you  
2 very much for appearing here this morning. We will give your  
3 testimony and your written materials careful consideration in  
4 our deliberation, and I thank you for making the trip up here.

5 MR. ANDERSON: Thank you for your patience and  
6 allowing me to appear. Thank you.

7 MR. TALLMAN: Thank you.

8 Our next witness is Mr. Michael Nachmanoff. I  
9 probably have totally butchered your last name. I apologize.  
10 He is the Federal Public Defender for the Eastern District of  
11 Virginia and is here to address us with regard to the Crime  
12 Victims Rights Act proposed rules and Rule 32 on sentencing.

13 MR. NACHMANOFF: Good morning, distinguished members  
14 of the committee. I'd like to start by thanking you-all for  
15 giving me the opportunity to speak this morning. I will be  
16 talking about the proposed amendments to Rule 5, 12.3 and 21.  
17 Those are the Crime Victims Rights Act amendments, and then  
18 32.1 very briefly, which addresses the standard regarding  
19 supervised release and probation violations.

20 MS. BEALE: May I ask a quick question? Are you, to  
21 some significant degree, going to cover the same ground in  
22 Mr. Hillier's letter, and if so, I'll call that to the  
23 Committee's attention in our agenda book.

24 MR. NACHMANOFF: Yes, that's exactly right. I'm  
25 here for Tom Hillier, and I apologize. I'm not Tom Hillier.

1 I can't be Tom Hillier, but I'm going to do my best. I'm very  
2 much going to address the issues that are in his letter which  
3 reflects the views of the Federal and Community Defenders.

4 MS. BEALE: Thank you. And that letter begins on  
5 page 165 of the agenda book.

6 MR. NACHMANOFF: Let me note at the outset that we  
7 are not alone in asking the Committee today to step back and  
8 delay any further action based on the Crime Victims Rights  
9 Act, and that's what we're asking this committee to consider  
10 this morning.

11 The National Association of Criminal Defense  
12 Lawyers, the NACDL, has also submitted written materials and  
13 objected to these proposed amendments as well, and so I just  
14 want to draw the Committee's attention to the NACDL's  
15 materials.

16 As this Committee well knows, the criminal rules  
17 were most recently amended as of December 1<sup>st</sup>, so four  
18 months ago, and several of those amendments dealt with the  
19 CVRA, the Crime Victims Rights Act, and so we've had four  
20 months to see what's happened since then and that's not a very  
21 long period of time, but I think that we can learn some  
22 lessons already from some of the litigation that those changes  
23 have engendered, and I want to begin, before addressing Rules  
24 5, 12.3 and 21 by talking very briefly about some litigation  
25 that is ongoing right now in the Eastern District of

1 California.

2           And I am mindful of the fact that we have a  
3 representative from the bench here from the Eastern District  
4 of California and I want to make clear that none of the cases  
5 that I'm going to discuss briefly are before Judge England,  
6 but there are three matters that have come up and there is  
7 some very messy litigation going on in the Eastern District of  
8 California regarding the newest changes to Rule 17(c)(3)  
9 regarding ex parte applications for subpoenas.

10           And all three of these cases involve allegations of  
11 sex trafficking of minors where, as one can imagine,  
12 information about some of the Government witnesses would be of  
13 critical importance to the defense.

14           In two of those cases, the Government has filed  
15 pre-emptive motions to bar the defense from filing ex parte to  
16 seek subpoenas from the court, and in the other case, the  
17 motion was filed by a Victims Rights' advocate.

18           Interestingly, in that case, the Victims Rights'  
19 advocate is a representative of the mother of the victim. The  
20 victim is an adult. The individual was a minor at the time of  
21 the alleged offenses but is now an adult and yet has an  
22 attorney who's representing the mother who claims to have  
23 standing, which I think reflects some of the difficult and  
24 thorny problems that the courts are facing now and will face  
25 in the future for the CVRA.

1           In these three cases, there are now a variety of  
2 results that have occurred over this litigation. One is still  
3 under advisement. The other has been mooted after a mandamus  
4 action by that Victims Rights' advocate representing the  
5 mother of the adult victim, and the third, the court just last  
6 week agreed that the recent change to Rule 17 has somehow  
7 fundamentally changed the way defense attorneys can seek ex  
8 parte applications and he has concluded that he cannot grant  
9 ex parte applications in this particular circumstance.

10           And I think that these cases can serve as a  
11 cautionary tale and are important for consideration as we look  
12 at the new round of amendments. For one thing, the committee  
13 was very careful in these last round of amendments, and I've  
14 reviewed very carefully the minutes and the transcripts and  
15 all of the materials and the reports that have gone on over  
16 the past couple of years that led to these amendments. With  
17 regard to Rule 17, the Committee was very careful not to  
18 eliminate the court's power to consider ex parte applications.  
19 It is fundamentally part of the court's inherent power and it  
20 is critical to the protection of a defendant's constitutional  
21 right to keep defense strategy from the Government under  
22 certain circumstances.

23           The second thing that is clear is that in this round  
24 of amendments, including with regard to Rule 17, this  
25 Committee was very careful in trying to abide by its mandate

1 under the Rules Enabling Act, and what the Committee was  
2 trying to do was to create a procedure that was consistent  
3 with the CVRA that dealt with the specific issue with regard  
4 to ex parte applications for subpoenas, not to eliminate them  
5 but to provide a procedural mechanism that courts are required  
6 to abide by and consider when there is a particular category  
7 of information regarding personal and confidential information  
8 of individuals who could be considered victims.

9           It was not to abolish the ability of the defense to  
10 make an ex parte application and it was not designed to  
11 prohibit the courts from granting those ex parte applications.  
12 What it did was require a mechanism for judges to consider so  
13 that notice could be given so that then victims could come in  
14 to try and litigate or modify or quash those subpoenas if that  
15 was appropriate and if they wanted to do that.

16           Setting aside the issue of whether or not people are  
17 coming in to act on behalf of victims who are not the victims  
18 themselves, whether it is an attorney representing a mother of  
19 an adult with nothing in the record to show that the victim,  
20 the adult victim herself asked that this happen or authorized  
21 it to happen; in fact, there's some information in the record  
22 to suggest that this victim was not aware of it.

23           The -- the issue, however, gets to the heart of what  
24 this Committee does and why this Committee should be very  
25 cautious in making sure that it doesn't violate the Rules

1 Enabling Act. The Government has taken the position in this  
2 litigation that there has been a substantive change to the  
3 standard by which judges consider issuance of subpoenas, and  
4 of course, the substantive standard is based on *Nixon*, and it  
5 has to do with whether it's oppressive.

6 This Committee was very careful in its minutes and  
7 in the transcripts that I've reviewed in making sure that the  
8 Rule 17 changes were not going to in any way change that  
9 substantive standard. The rule can't do that, of course, but  
10 that's exactly what is being litigated and what is being  
11 argued now.

12 So, before this Committee moves forward in  
13 recommending further changes based on the CVRA, I would ask  
14 you-all to consider some of the unintended consequences that  
15 we're beginning to see with Rule 17.

16 The first rule that I want to talk about is Rule 5,  
17 and Rule 5 is the proposal to include language regarding the  
18 consideration of a victim's right to be protected, the right  
19 to safety and to be protected from the accused.

20 As we've noted in our written materials, this rule  
21 would be in direct conflict with the Bail Reform Act. The  
22 Bail Reform Act has a careful balance that was designed to  
23 avoid violating the due process clause, and that is the only  
24 reason, because it was able to strike that balance, that it  
25 was later upheld by the Supreme Court.

1           The Bail Reform Act, of course, as this Committee  
2 notes in its own notes regarding this proposed amendment, the  
3 Bail Reform Act already addresses this issue of protection of  
4 the accused because danger to the community, of course, is a  
5 critical factor to be considered in bail decisions.

6           Of course, Section 3142 specifies a whole host of  
7 factors to be considered, and one of the problems that we've  
8 identified is that this would elevate one factor over the  
9 others and that that is inappropriate. What it also does is  
10 it requires consideration of the victim's right to be  
11 protected from the accused in every single case, and the Bail  
12 Reform Act, of course, specifies the danger of the community  
13 is to be considered only in certain cases, cases where the  
14 charged crime is of a particular nature or whether or not  
15 there's a risk of obstruction of justice or witness or juror  
16 intimidation and then the factor of danger to the community,  
17 including the victim is to be considered only in consideration  
18 with all of the other factors that are set out in 3142.

19           This entire balance, of course, is totally shifted  
20 and undermined and skewed by the inclusion of this language  
21 that would be required to be considered in every single case,  
22 and so it would be inappropriate.

23           The Committee notes themselves say that this isn't  
24 necessary, that the purpose of this addition would be to draw  
25 attention to this factor, and that's exactly why it should be

1 rejected.

2           Significantly, the Magistrate Judges Association has  
3 recommended against this change, and I think that's worthy of  
4 significant consideration. It is the magistrate judges, of  
5 course, who are dealing with this statute day-in/day-out.  
6 Thank you. And they have suggested that it would be both  
7 redundant and unnecessary and that it could be construed as  
8 elevating the rights of victims over the other considerations  
9 in the Bail Reform Act.

10           As a final illustration as to why, I think, this  
11 particular rule is not appropriate, I would draw the attention  
12 of the Committee to the case of *United States v. Rubin*, which  
13 is a case from the Eastern District of New York, and that is a  
14 case that involved financial fraud, and in that case, victims  
15 of the fraud objected to release and further objected to the  
16 court's decision to allow the defendant in that case to travel  
17 overseas to see a sick relative.

18           The vast majority of cases in the federal courts  
19 don't involve the kinds of victims that I think this Committee  
20 perhaps is thinking about in terms of protection from the  
21 accused. The idea that those who may be victims of financial  
22 fraud need to be protected with regard to release issues from  
23 the accused just doesn't get at what the Bail Reform Act is  
24 about and so we would ask the Committee to reject that  
25 proposal.

1           To try and move quickly through the other ones, I  
2 know my time is limited. Rule 12.3 is the notice of the  
3 public authority defense, and the changes proposed here are in  
4 exact analogue to the changes that were approved with regard  
5 to the alibi defense, and Federal and Community Defenders  
6 objected strongly to those changes, and I realize that horse  
7 has left the barn. We're four months out and right now I  
8 don't have any anecdotal information regarding litigation,  
9 regarding alibi defenses to report, but what I would suggest  
10 is this: Federal and Community Defenders raise what we think  
11 are significant constitutional problems with both of these  
12 issues, 12.1 and 12.3, which is the reciprocal discovery  
13 rights. *Juarez v. Oregon* makes it clear that where defendants  
14 are required to give information about their defense, provide  
15 specific information, the Government has to give reciprocal  
16 information.

17           Limiting that information by creating a presumption  
18 that somehow defense counsel or defendants will be doing  
19 something untoward with the address and telephone information  
20 of victims, I think, is not really based on what happens when  
21 we do our work, but more important puts the defense in an  
22 impossible position, and that is, the defense has to decide  
23 whether or not to give the Government notice of a defense  
24 without knowing whether or not those reciprocal rights will be  
25 honored, and I think there's clearly going to be litigation in

1 the alibi area. But one thing we don't know is how many  
2 people in the last four months have chosen not to raise an  
3 alibi notice because they have uncertainty.

4           When we do defense work, it's all about risk  
5 management and trying to eliminate risk and figure out what's  
6 going on. What we have to do right now with regard to alibis  
7 is decide whether or not the risk of presenting that notice  
8 and that defense is going to then result in being limited in  
9 the information that we get back with regard to rebuttal  
10 witnesses. And let me be clear that the importance of the  
11 address and the telephone number cannot be understated.

12           As defense counsel, our obligation is to run down  
13 leads and find information that will help our case. Knowing  
14 where people live, going and talking to neighbors, if  
15 necessary, checking phone records can be critical to  
16 understanding how to cross-examine a witness, and the way the  
17 rule stands now, a defense attorney does not know, cannot know  
18 whether that information is going to be released.

19           There is a mechanism, it's clear, but it requires a  
20 showing, and every judge is going to have to decide whether or  
21 not that showing is made in a particular case.

22           So what we would suggest is waiting, waiting until  
23 the courts address the issue with regard to alibi before  
24 furthering this and implementing it into 12.3.

25           Let me make one final point about 12.3, which is

1 that for the life of me I cannot think of an example in which  
2 someone would notice a public authority defense and the  
3 Government would rely on a victim to rebut that public  
4 authority defense. It is simply not a hypothetical that I can  
5 picture in my mind, and if that's the case, what I would  
6 suggest is that this Committee should not pass a rule that  
7 really doesn't have an application; in other words, just to do  
8 it for the symmetry of being an analogue to 12.1. If it  
9 really simply cannot be applied in the real world, it  
10 shouldn't be -- shouldn't be done.

11 Rule 21 is transference for convenience. I think  
12 this is one in which the most important point is there is  
13 simply no basis in the CVRA for adding the word "victim" to  
14 Rule 21(b). There is no right in the Crime Victims Rights Act  
15 to be present. There is no right to attend the trial.  
16 There's a right not to be excluded, clearly. There's a right  
17 to be heard under certain circumstances and there are the  
18 general rights of dignity and privacy, but there is no right  
19 to be present, to be an audience member at the trial. Now,  
20 that's not to say that it's not important for victims to be  
21 able to attend trials and to be present, but this would be  
22 implementing a rule for which there is no basis, and the  
23 Committee notes do not reference anything in the CVRA, and I  
24 think that is telling and is a reason by itself not to add  
25 this language to Rule 21.

1           There is a more practical reason. There are two  
2 practical reasons. One is that the issue of convenience is  
3 very important for the people who have to be in the courtroom.  
4 The court must consider the convenience to the parties, to the  
5 defendant certainly, to the Government, to the witnesses.  
6 They cannot -- you can't have a trial with that -- without  
7 those individuals being there. Testifying victims certainly  
8 should be considered and are under the current rule because  
9 they are witnesses.

10           The people in the audience, however, are not  
11 critical. They are not essential to the trial taking place,  
12 and therefore, there is a real distinction to be made between  
13 consideration of the convenience of the witnesses, the  
14 parties, the lawyers and those who want to watch it.

15           Secondly, and I speak from personal experience here,  
16 in the Eastern District of Virginia we had the *Moussaoui* case,  
17 and that case was with our office. That case involved more  
18 victims than any other case, I think, and hopefully we will  
19 ever see in any trial. Technology was used very effectively  
20 in that trial to provide remote opportunities for victims to  
21 go to the courthouse and see in realtime and to be as present  
22 as they could be without being in the courtroom itself.

23           You know, the supporters of the Crime Victims Rights  
24 Act, including Senator Kyl, if I'm not mistaken, who of course  
25 are the greatest supporters and proponents of the CVRA were

1 very clear that when this statute was passed they did not want  
2 Congress or the Government to be responsible for paying the  
3 travel expenses of victims to go sit in the audience at a  
4 trial. It would just be extraordinarily burdensome and  
5 expensive.

6 MR. TALLMAN: If you could wrap it up. Your time  
7 has expired.

8 MR. NACHMANOFF: Absolutely. My point is that  
9 having the remote opportunity to see a trial, to participate  
10 but to do it in a cost-effective way addresses the issues that  
11 I think the Committee is trying to address with regard for  
12 having respect for victims with regard to where the trial is  
13 located. The rule shouldn't be changed on that basis.

14 With regard to Rule 32.1, in order to not -- to not  
15 take time, we have proposed alternative language so that the  
16 Committee doesn't think that Federal and Community Defenders  
17 are simply asking this Committee to vote down everything. We  
18 agree it's appropriate. There should be a change to Rule 32.1  
19 to clarify the standard to be clear and convincing evidence.  
20 What we would ask the Committee to do is to consider, and this  
21 is very important, that the burden as to the clear and  
22 convincing evidence with regard to -- this is not having to do  
23 with the Crime Victims Rights Act, this is having to do with  
24 the issue of detention on a probation or supervised release  
25 matter, that the burden should be on the defendant, in most

1 cases, and those are cases where the person is facing  
2 imprisonment as recommended under a Grade B or a Grade A  
3 violation.

4 But under Grade C violations, and those are the  
5 non-violations of law, failing to file reports, sometimes a  
6 positive drug test; in those cases, the guidelines authorize  
7 that there could be a modification or an extension of  
8 probation or supervision and there won't necessarily be a  
9 sanction, even if a violation was found involving jail time.  
10 The idea that there should be a presumption in favor of  
11 detention so that as a practical matter people are spending  
12 two, three, four weeks in jail then discovering that when the  
13 violation was adjudicated, the judge didn't want to give them  
14 jail time at all, in those cases the burden should be on the  
15 Government. That's consistent with the reading of 3143 which  
16 says, "The presumption is in favor of detention except where  
17 there is no jail time to be recommended," and so what we've  
18 proposed is simply consistent with that and we'd ask the  
19 Committee to consider that and to approve it.

20 MR. TALLMAN: Thank you very much.

21 MR. NACHMANOFF: Sorry for taking up more time.

22 MR. TALLMAN: That's quite all right.

23 Questions from the Committee? Yes, Judge Jones.

24 MR. JONES: Jim Jones. In regard to the proposal  
25 for Rule 21, the transfer provision that -- which our proposal

1 would allow the judge to consider the convenience of  
2 witnesses. You're -- one of the grounds of your opposition  
3 was that it's not a right that's specifically stated in the  
4 CVRA.

5           Of course, you understand that Defenders objected to  
6 the original rules, many of them that we adopted under the  
7 Act, because they were already in the rules. That is, I mean,  
8 already in the Act, that the Act specifically afforded these  
9 rights so there's no necessity for a rule. Why isn't the  
10 general principles of the Act, fairness, the congressional  
11 intent that witnesses be moved up in the universe of interest  
12 in criminal cases, why doesn't that support a judge  
13 considering at least, amongst all of these other factors,  
14 interest of victims in attending a trial that may be some  
15 distance away?

16           MR. NACHMANOFF: I think there are a couple of  
17 answers to that. I think the primary one is that the Rules  
18 Committee is not a policymaking body, and the mandate of the  
19 Rules Committee is very specific, which is to help clarify  
20 procedural rules and that if there is a general sense from the  
21 CVRA that victims should now play a greater role, that is  
22 something that needs to be specified by Congress, not by --  
23 not by this Committee, and if it is not grounded specifically  
24 in the CVRA, this Committee should not act.

25           And I think that the minutes and the transcripts and

1 the reports from this Committee that I've read have been very  
2 clear that this Committee has been determined not to implement  
3 changes in the criminal rules based on general principles but  
4 only on the very specific authorizations that are in the Crime  
5 Victims Rights Act.

6 I think there's another practical problem, however,  
7 with making a change to Rule 21, which is that if that change  
8 is implemented and judges are allowed to consider  
9 non-testifying victims or non-witness victims with regard to  
10 changes for convenience, which by the way, I think are very  
11 rare in general, certainly in my experience they're very rare  
12 that things are moved for that reason, it invites the  
13 potential for mandamus actions, and in a case like *Rubin*, or  
14 in a case like *Bernie Madoff* where you have hundreds or  
15 thousands of victims who are located all over the country, if  
16 a trial is moved, that judge is then going to be subject to  
17 potentially dozens of mandamus actions being filed by victims  
18 who felt like their point of view wasn't adequately  
19 considered.

20 Now, it's clear that the judge isn't required to do  
21 whatever the victims say by this proposal, but nothing stops,  
22 as we see from this litigation in the Eastern District of  
23 California right now, a victim from feeling like I'm going to  
24 file a mandamus, and of course the time limits on those  
25 mandamus actions, which have been criticized highly in the GAO

1 report that came out, really don't lead to considered results.  
2 They have 10 days to file a petition and then the defendant  
3 has to respond in 72 hours, and this is one of the areas that  
4 the GAO strongly recommended, coming from both Federal  
5 Defenders and more importantly, perhaps, from judges, that,  
6 you know, I think Congress perhaps didn't realize the burden  
7 it was going to place on the appellate courts, in particular,  
8 with regard to these mandamus petitions, and so every time a  
9 change is made to the criminal rules, it's inviting a huge  
10 amount of work for the appellate courts, and I think that's  
11 another reason for -- I don't think we have a circuit judge on  
12 the Committee here.

13 MR. TALLMAN: You got at least two.

14 MR. NACHMANOFF: Of course, of course, so therefore,  
15 there may be good reasons to consider that issue.

16 MR. JONES: If I might follow.

17 MR. TALLMAN: Go ahead, Jim.

18 MR. JONES: Is it the Defenders' position that  
19 under -- that the current situation in which the trial judge  
20 is not permitted to consider the interest of non-testifying  
21 victims is preferable, that is, in a policy sense? Or are  
22 you saying that we just don't have the authority to make that  
23 change because the Act does not specifically grant that right?  
24 Which is it?

25 MR. NACHMANOFF: Well, if I understand the question,

1 I think that Federal and Community Defenders take the position  
2 that with regard to moving a trial, the judge should be  
3 considering those actors who are essential to how a trial is  
4 run and that this is in no way disparaging of victims who want  
5 to watch a trial, but observers to a trial should not be the  
6 ones who drive the train with regard to where it is located,  
7 especially in a day and age when people can have other means  
8 of participating and observing in that trial without having to  
9 physically be there.

10 MR. TALLMAN: Yes, Professor Coquillette.

11 MR. COQUILLETTE: Yeah, Dan Coquillette. You made  
12 two arguments about the notice of public authority change.  
13 The first was that the Committee should wait and see what  
14 happens with the notice of alibi defense and practice, and  
15 certainly sensible argument. But the second argument was that  
16 you couldn't really imagine any real application in 12.3  
17 anyway in practice because it would be so unlikely that the  
18 Government would call on a victim to rebut the public  
19 authority defense.

20 Now, if that's the case, there's really no point in  
21 waiting to see what happens with the alibi and notice because  
22 the public authority change isn't going to have much effect  
23 anyway.

24 MR. NACHMANOFF: Well, the second point, to be  
25 clear, I don't think waiting is going to change that. I think

1 it's much more likely that this issue will come to -- you  
2 know, come to a conflict in the alibi area because while not  
3 happening every day in the courts, alibis are relatively  
4 common.

5           With regard to the second issue, my point really is  
6 that I think it's bad policy for the Committee to make changes  
7 to the rules for a situation that no one can imagine actually  
8 coming to pass. It's true that it might be harmless error in  
9 the sense that if the change is made and it never happens,  
10 nobody is any the worse for it, but I think as a deliberative  
11 body, it's important not to make changes just for the sake of  
12 change.

13           MR. COQUILLETTE: Okay.

14           MR. TALLMAN: Professor Beale.

15           MS. BEALE: Mr. Anderson [sic], I want to take you  
16 back, if I may, to Rule 5, and I wonder whether there would be  
17 a partial -- or how you would feel about adding to the  
18 language that opinions proposed requiring the judge to  
19 consider the right of the victims to be reasonably protected  
20 from the defendant and then adding "and the requirements of  
21 the Bail Reform Act" so that there is a more even-handed  
22 reference to sources of law outside of Rule 5 itself. The  
23 preceding sentence says "comes with law," and then this would  
24 essentially be cross-referencing in the Committee note, of  
25 course, as it does now, saying this is in accordance with the

1 CVRA and the Bail Reform Act. Would that -- would that  
2 address completely your concerns or not?

3 MR. NACHMANOFF: No, I don't think it would, and I  
4 don't think it would because the rule as it stands now makes  
5 reference to as -- I can't remember what the language is, but  
6 as required by statute and rule, I think, and so clearly the  
7 rule requires consideration of the Bail Reform Act and  
8 everything that it requires, which includes consideration of  
9 the victim's right to be protected under danger to the  
10 community.

11 By including the specific language, even if it's  
12 qualified, it is, I think, doing exactly what the Magistrate  
13 Judges Association has suggested, which is it's elevating, not  
14 intentionally, but elevating one factor over the others and  
15 simply making a general reference to the fact that this needs  
16 to be considered in consideration with these other factors  
17 without specifically enumerating them leaves that problem in  
18 place, and so the far better course of action is just to leave  
19 it out all together.

20 MS. BEALE: And would it be consistent with your  
21 position that you don't think that the Crime Victims Rights  
22 Act at all changes the Bail Reform Act so that the only source  
23 of law that's referenced outside of Rule 5 is the Bail Reform  
24 Act? And has any reference in the rule and then in the note  
25 to the CVRA offset the balance because it's incorrect -- it's

1 an incorrect interpretation?

2 MR. NACHMANOFF: No, I don't think so, and if I can  
3 try and be specific. The rule right now requires the judge to  
4 take in consideration all statutes, which of course would  
5 include the Bail Reform Act and the Crime Victims Rights Act,  
6 and there are specific rights relating to detention, which is  
7 the right to be heard -- reasonably be heard just as that  
8 right accrues at the time of the plea and sentencing as well,  
9 and so clearly there is something that involves victims that  
10 now relates to the Crime Victims Rights Act, but changing Rule  
11 5, I don't think, is the answer, and it certainly doesn't  
12 change any of the requirements of the balancing of factors  
13 that led to the constitutionality of the Bail Reform Act being  
14 upheld in the first place.

15 MS. BEALE: So, let me just ask one more follow-up.  
16 So, is it your belief that the CVRA provision giving the  
17 victim the right to be reasonably protected from the accused  
18 does not apply to, and of course, shouldn't take that into  
19 consideration at the rules stage detention hearing?

20 MR. NACHMANOFF: I want to make sure I'm  
21 understanding the question. Certainly the right to be  
22 protected from the accused is something by statute that the  
23 court must consider.

24 MS. BEALE: Including at that stage.

25 MR. NACHMANOFF: Including at that stage.

1 MS. BEALE: That's all.

2 MR. TALLMAN: Professor Leipold.

3 MR. LEIPOLD: Andy Leipold. Sara picked up on most  
4 of what I was going ask. You made a separate point about the  
5 inconsistency -- you made two points, redundancy and  
6 inconsistency, and it's the inconsistency that I'm a little  
7 less clear on.

8 It sounds as though you are saying that to specify  
9 in the rule that the judge must consider the right of the  
10 victim to be reasonably protected from the defendant, that if  
11 that were to be applied in cases where the Bail Reform Act  
12 preventive detention rule did not apply, that that's a  
13 modification on a substantive right that is beyond the power  
14 of this Committee?

15 MR. NACHMANOFF: That is a danger that should  
16 counsel against this change, which is that to require  
17 consideration of the right to be protected from the accused in  
18 every single case where the Bail Reform Act specifies under  
19 what circumstances danger to the community is a factor to be  
20 considered, would in fact potentially be a violation of the  
21 Rules Enabling Act and would conflict with that statute.

22 MR. LEIPOLD: So if I -- I want to make sure I have  
23 this right. So your view is that a judge may not consider the  
24 dangerousness of the accused toward the victim in any case  
25 unless the Bail Reform Act allows that type of dangerousness

1 to be taken into account; is that right or not?

2 MR. NACHMANOFF: Well, no, I don't think so, and I  
3 think that one of the important things to remember is that in  
4 those cases where there is not a presumption, the chance of  
5 there being a victim that would need to be protected from the  
6 accused is hard for me to imagine it.

7 In other words, in any violent crime, in any crime  
8 in which there would be a victim who would potentially be  
9 fearful of the accused, that would almost certainly be a  
10 presumption case. And so we come back to the example of  
11 *Rubin*, which is -- and again, I don't know all the details of  
12 that case, but let's assume that it's a financial fraud case  
13 and is not a presumption case.

14 The question is, what is the fear on the part of the  
15 accused in that case? Certainly based on the charged conduct,  
16 whether one would, you know, be frightened that the person  
17 would come and retaliate against the potential victims of  
18 financial crime is hard to imagine.

19 Now, certainly, if there is witness intimidation or  
20 reason to believe that there is going to be obstruction of  
21 justice, then again, the Bail Reform Act addresses that issue,  
22 and so there are circumstances involving nonviolent crimes  
23 where there still could be reasons why victims need to be  
24 protected from the accused, but the Bail Reform Act already  
25 addresses that.

1 MR. TALLMAN: Judge Raggi.

2 MS. RAGGI: As this series of questions perhaps  
3 suggest to you, may be a little troubling by your argument  
4 that the Bail Reform Act would not provide for consideration  
5 of protection of the community or for certain circumstances.  
6 We don't have the statute in front of us, but if I'm correct,  
7 under non-presumption cases or cases where the presumption is  
8 for the least, the Government has the ability to come in even  
9 in those cases and argue that there is a risk of flight and a  
10 danger to the community. Are you taking a different position  
11 from that?

12 MR. NACHMANOFF: No, no, no, absolutely.

13 MS. RAGGI: So to that extent, we're talking about  
14 burdens and presumptions, but the issue can come up in every  
15 case for bail, right?

16 MR. NACHMANOFF: Absolutely, and the bail -- and  
17 this underscores the fact that the Bail Reform Act already  
18 provides the court with every tool that it needs to consider  
19 all of the factors, whether it's risk of flight or danger to  
20 the community or a victim's particular needs in a case, and of  
21 course, courts have the ability to then implement conditions  
22 of release that address those factors, like electronic  
23 monitoring or GPS monitoring or things like that; and  
24 therefore, changing the rule to emphasize the need to consider  
25 victim's rights is not necessary and would disturb that

1 balance that's already been set out in the Bail Reform Act.

2 MS. RAGGI: I think that's why many of us understand  
3 your redundancy argument but not your conflicts argument, and  
4 so if your position to the Committee is that there is a  
5 conflict, I'm not sure we're seeing that.

6 MR. NACHMANOFF: Well, we would be happy to submit  
7 further information if that would be helpful to the Committee  
8 and --

9 MR. TALLMAN: Well, I think what would be helpful,  
10 if you can, is to try and answer Judge Raggi's question.  
11 We've got an awful lot of material here, but I want to see if  
12 you can answer the question.

13 Is it a conflict or did Congress simply supplement  
14 the concerns of the Bail Reform Act when it considered  
15 specifically the issue of protecting victims when it enacted  
16 the Crime Victims Rights Act, and why shouldn't we read the  
17 statutes together in deciding a particular case whether extra  
18 precautions or protections need to be imposed with regard to a  
19 defendant because we're now also considering the effect on the  
20 victim?

21 MR. NACHMANOFF: I think the conflict -- and I  
22 apologize for my ability to not be more articulate. I think  
23 the conflict arises, as we've set out in our written  
24 materials, in the constitutional sense, which is that the Bail  
25 Reform Act strikes a balance of factors in which the court has

1 to consider a variety of factors involving the defendant,  
2 involving the victim, involving the charged crime, and the  
3 Supreme Court has upheld the constitutionality of this scheme  
4 based on the balance that is struck, and that there is a  
5 compelling interest then to allow preventive detention in  
6 certain circumstances when these factors are found.

7 To interfere with that balance by changing the rule  
8 and this rule would interfere with that balance, I think, by  
9 drawing attention, as the Committee note says, to one factor  
10 without specifying that all of the other factors have to be  
11 considered, that would potentially create a constitutional  
12 problem.

13 MR. TALLMAN: Do you concede that when Congress  
14 passed the Crime Victims Rights Act that it was essentially  
15 seeking to expand the role of the victim in a criminal justice  
16 system, and in particular, to make courts more mindful of the  
17 impact of criminal proceedings on victims?

18 MR. NACHMANOFF: I think that the Congress was also  
19 in a very difficult position, much like I'm in now, in which  
20 there had been a concerted effort to pass a constitutional  
21 amendment in which the proponents of that amendment wanted to  
22 elevate the rights of victims to third-party status, to  
23 fundamentally alter our two-party adversarial system.

24 MR. TALLMAN: And the Committee has heard testimony  
25 to that at a prior public hearing from representatives of the

1 victims.

2 MR. NACHMANOFF: Absolutely. And it is clear from  
3 the legislative history and from the statute that was passed  
4 that that was rejected by Congress, that that is not what the  
5 crime -- the CVRA did. That after that constitutional  
6 amendment failed, Congress passed a compromise in which  
7 victims rights would be addressed but not in a way that  
8 elevated them to third-party status, and it's very important  
9 that now that this Committee, in making these changes to the  
10 criminal rules, not do more than that which Congress passed in  
11 the Crime Victims Rights Act.

12 MR. TALLMAN: But you would agree that there was a  
13 change in the balance before the Crime Victims Rights Act was  
14 passed?

15 MR. NACHMANOFF: Absolutely. Crime Victims Rights  
16 Act is changing and it's changing, I think, for those of us  
17 who are in courts frequently. We see that there are real  
18 differences, and I think the GAO report, and I didn't spend a  
19 lot of time talking about it but we make reference it to in  
20 our written materials, is extremely instructive because the  
21 GAO report is a comprehensive report that was done with regard  
22 to evaluating where we stand with regard to the CVRA.

23 And what it reflected was that victim witness  
24 advocates and victims themselves are responding to the GAO and  
25 saying that there is a far greater awareness now of victims'

1 rights and that the statute has in fact made a difference.

2           And so again, to the extent that that factors into  
3 this Committee's consideration with regard to the need for  
4 making further changes, I think the GAO report counsels  
5 against it. The GAO report essentially says that the statute  
6 and the act is having the desired effect, that there is a lot  
7 more awareness on the part of those in the criminal justice  
8 system, including judges.

9           On the other hand, there are good reasons to go  
10 slow, and the GAO report reflects the concerns expressed by  
11 judges and by Federal Defenders and others that doing more can  
12 create problems and that this Committee really shouldn't be  
13 making further changes based on it, under the notion that more  
14 attention needs to be drawn to victims' rights.

15           MR. TALLMAN: Any -- Yes, Professor King.

16           MS. KING: Thank you.

17           MS. BEALE: Into the mic.

18           MS. KING: Thank you. Your comments have been very  
19 helpful. This is Nancy King. I had a follow-up question to  
20 your arguments against the transfer amendment. You said both  
21 that the incorporation of non-testifying victims into the  
22 decision was not part of the CVRA, was not in the Act and that  
23 if we added to the rule, if the Committee decided to go  
24 forward, there would be an increase in mandamus actions, and  
25 this is my question: Did CVRA authorize this mandamus

1 procedure for rights that are in the Act, or which is it? Is  
2 the -- are you saying that victims rights' advocates are using  
3 the mandamus procedure in the Act for rights that are outside  
4 the act or that have been incorporated into the rules as --  
5 how is it that we would see an increase in mandamus actions if  
6 this really isn't in the Act itself?

7 MR. NACHMANOFF: If the amendment were passed,  
8 victims rights' advocates would be able to grasp onto the  
9 requirement that judges consider non-testifying victims with  
10 regard to transfer issues, and then to the extent they  
11 disagreed with the judge's decision, to either move the trial  
12 or not move the trial, they could then file a mandamus action.

13 Now, could they file a mandamus action now, despite  
14 the fact that there's no reference in the Act, of course they  
15 could. Presumably, it would be dismissed. It would still  
16 require the Appellate Court and the defendant and everybody  
17 else responding within 72 hours of the filing, but my point is  
18 that the mandamus actions would be triggered and far more  
19 likely based on the fact that the change is made to Rule 21,  
20 which would give a hook to those who felt that victims were  
21 not being taken into consideration with regard to Rule 21  
22 transfers when they should have been, and the rule would give  
23 them that ammunition.

24 MS. BEALE: So, is it your position that the  
25 mandamus position would apply to any right of the victim even

1 if the right is not found in the CVRA itself?

2 MR. NACHMANOFF: Well, all I can say is that we are  
3 certainly seeing with regard to the litigation in the Eastern  
4 District of California that victims rights' advocates are  
5 taking the position that because of this change that  
6 references the CVRA, it gives them the right to petition and  
7 they're doing so.

8 MS. BEALE: Right. And of course, Professor King's  
9 point and your point is that the rule -- this proposed rule  
10 does not reference CVRA.

11 It's also applicable, Mr. Anderson, only when  
12 triggered by the defendant's motion to move the trial. Is  
13 that enough for the safeguard to avoid opening up the  
14 Pandora's box? I don't really know how many of these cases  
15 are where defendants seek, and I don't think we had any  
16 testimony in the number of cases that are involved, but this  
17 is -- you know, the defendant is the gatekeeper on this end,  
18 and it's only when he seeks to move it. Do you have any sense  
19 of how frequent this is in your district and can you give us  
20 any offer on that?

21 MR. NACHMANOFF: I don't other than the fact that in  
22 my own experience I think it's very rare. Of course, the  
23 Government picks the location of the trial and so therefore  
24 they don't need Rule 21 in order to seek to move it and so it  
25 makes sense that it's limited to the defendant. However,

1 again, I think once the word "victim" is inserted, it's an  
2 invitation, I think, to litigation whenever a decision is  
3 either made to move it or not to move it.

4 MS. BEALE: And would you think that under the  
5 current rule, if it were not amended, that the court, in the  
6 interest of justice, could consider the victim's --  
7 non-testifying victim's preference as to where the case could  
8 be tried for convenience purposes?

9 MR. NACHMANOFF: I'm sorry, do I think that that  
10 would be an alternative?

11 MS. BEALE: Is it possible that courts already can  
12 do this within the broad phrasing of the interest of justice?

13 MR. NACHMANOFF: Well, I guess I would say that I  
14 would not be surprised if that were something that judges  
15 considered right now on. You know, whether or not that's  
16 permitted by the rule or not, I would think that it could be  
17 expected that they would.

18 MS. BEALE: I guess that was a rhetorical question,  
19 wasn't it? You don't have to answer that one either.

20 MR. TALLMAN: Judge Keenan.

21 MR. KEENAN: I am struck by the fact that this is  
22 triggered by a defense motion, so I don't understand why the  
23 defense is all upset about it, No. 1. And No. 2, it's  
24 strictly discretionary. The operative word is "may," not  
25 "must," and if it's discretionary and if there is a proper use

1 of discretion by the trial judge, why is he subject to  
2 mandamus, or she?

3 MR. TALLMAN: That may have been rhetorical but you  
4 can respond.

5 MR. ROSENTHAL: May I ask a related question before  
6 he answers that?

7 MS. BEALE: In the mic.

8 MR. ROSENTHAL: It's the same line of thought, which  
9 is why I wanted to add it at this time. The second operative  
10 rule is that the judge must consider. That's all that the  
11 judge has to do, and if the judge simply says, "I thought  
12 about what the victims have said, but I think that those  
13 interests are outweighed by, fill in the blank," how could a  
14 mandamus petition arise there?

15 MR. NACHMANOFF: Well, I think one of the  
16 concerns -- to answer both questions, the concern on the part  
17 of Defenders is that if this requirement is added, when a  
18 defendant makes such a motion, it may suppress an inclination  
19 on the part of a judge to grant the motion that they would  
20 otherwise grant because they are worried about the blow-back  
21 or the fall-out or the fact that there might be hundreds of  
22 victims out there all of whom may disagree, and therefore, the  
23 path of least resistance is to deny the motion and keep it  
24 where it is.

25 MR. TALLMAN: But wasn't -- was it one of the

1 motivating concerns or the provision in the Crime Victims  
2 Rights Act what happened to the families of the victims from  
3 the Oklahoma City bombing case in the Timothy McVeigh trial  
4 when the case got moved to Denver and they would not permit  
5 the family members to travel to attend the proceedings?

6 MR. NACHMANOFF: Yes. And you know, I wasn't  
7 involved in that litigation, and I don't know, but you know,  
8 much like *Moussaoui*, my guess is that if that case were  
9 litigated today, there would be the ability to accommodate in  
10 a very different way the abilities of families to observe or  
11 participate in that trial remotely in ways that would  
12 accommodate both the cost issue, right, because the Government  
13 didn't want to be in a position for having to pay for hundreds  
14 of families to go to Denver and stay in a hotel, but to be  
15 full observers in that trial because it was so important to  
16 them.

17 And so again, I think these issues with regard to  
18 convenience can be addressed in ways that they couldn't be  
19 addressed, perhaps, when the concerns that gave rise to this  
20 particular issue come up, but again, I would go back to the  
21 function of the Committee and the Rules Enabling Act and the  
22 CVRA, which is to say if it's not in there, this Committee  
23 shouldn't be considering an addition that isn't specifically  
24 authorized that would then create clarification.

25 MR. TALLMAN: Any further questions from the

1 Committee?

2           If not, I want to thank both the witnesses. Your  
3 testimony has obviously stimulated the thinking of all members  
4 of the Committee, and we are very grateful for your assistance  
5 as we contemplate these difficult issues. If there are no  
6 further witnesses who are here to testify, I will adjourn the  
7 formal taking of testimony and will move into the business  
8 meeting.

9           MR. NACHMANOFF: Thank you very much.

10          MR. TALLMAN: Thank you.

11          And Mr. Anderson, just for your information, we are  
12 going to turn first on the Rule 15 issue and you both are  
13 welcome to stay if you would like to hear the Committee  
14 discussion.

15          Would everyone like a five-minute break before we  
16 turn to business? Very well. We'll be in recess till about  
17 10:00 o'clock.

18                   *(END OF REPORTED TESTIMONY AT 9:50 A.M.)*

19                                   \*-\*-\*-\*

20

21                                   **CERTIFICATE OF REPORTER**

22           I, Catalina Kerr, certify that the foregoing is a  
23 correct transcript from the record of proceedings in the  
24 above-entitled matter.

25

\_\_\_\_\_  
Catalina Kerr

\_\_\_\_\_  
Date

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25