# RENEWAL OF THE FEDERAL RULEMAKING PROCESS*

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INTRODUCTION

The federal rules of practice and procedure regulate litigation in the federal courts and are designed "to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." [FN1] The Federal Rules of Civil Procedure, in particular, have been described as "among the most significant accomplishments of American jurisprudence," [FN2] setting the standard "against which all other systems of procedure must be judged." [FN3] The success of the civil rules led to the establishment of federal rules for criminal, appellate, and bankruptcy procedure, as well as federal rules of evidence.

The process by which the federal rules [FN4] are promulgated, although subject to periodic criticism, has been praised as "perhaps the most thoroughly open, deliberative, and exacting process in the nation for developing substantively neutral rules." [FN5] The essence of the federal rulemaking process has remained constant for the past sixty years. Its basic features include: (1) the drafting of new rules and rule amendments by prestigious advisory committees composed of judges, lawyers, and law professors; (2) circulation of the committees' drafts to the bench, bar, and public for comment; (3) fresh consideration of *1657 the proposed changes by the advisory committees, after taking into account the comments of the bench, bar, and public; (4) careful review of the advisory committees' proposals; (5) promulgation of the proposals by the Supreme Court; and (6) "enactment" of the proposals into law following the expiration of a statutory period in which Congress is given an opportunity to reject, modify, or defer them.

At various points over the last sixty years both Congress and the judiciary have acted to reaffirm and renew the rulemaking process, with the objective of making it more effective and more open. Significant organizational and procedural improvements have been made as a result both of self-evaluation efforts by the judiciary and criticisms from the bar and Congress. One recommendation in the *Proposed Long Range Plan for the Federal Courts*, [FN6] which was recently approved by the Judicial Conference of the United States, [FN7] reaffirms the judiciary's commitment to periodic, comprehensive reexaminations of the rulemaking process. [FN8] The Plan recommends that:

C rules of practice, procedure, and evidence should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act;

C the national rules should strive for greater uniformity of practice and procedure in the federal courts, but individual courts should have some limited rulemaking authority to account for differing local circumstances and to experiment with innovative procedures; and

C the Judicial Conference and the courts should seek significant participation in rulemaking by the

interested public and representatives of the bar, including federal and state judges. [FN9]

Part I of this Article provides a brief history of the federal rulemaking process. Part II describes the current rulemaking procedures, focusing on how they have been changed to address past criticisms. Part III discusses future initiatives in the rulemaking process.

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## I. HISTORICAL BACKGROUND

Although there has been debate among scholars over the authority of the federal judiciary, vis-a-vis Congress, to promulgate procedural rules for the federal courts, [FN10] the matter was resolved by the Rules Enabling Act of 1934. [FN11] By virtue of the Act, Congress delegated almost all rulemaking authority to the judiciary, reserving to itself the post facto right to reject, enact, amend, or defer any of the rules. The legislation delegated to the Supreme Court the explicit power to prescribe rules for the district courts governing practice and procedure in civil actions. [FN12]

In 1935, the Supreme Court appointed a blue ribbon advisory committee to draft the first Federal Rules of Civil Procedure. [FN13] Over the next two years, the advisory committee widely circulated proposed drafts to the bench and bar for comment, and it made numerous changes to the drafts thanks to extensive assistance from the legal profession. [FN14] After the Supreme Court adopted the rules and Congress *1659 did not act to modify them, the civil rules took effect in September 1938. [FN15]

In 1940, Congress authorized the Supreme Court to promulgate rules governing criminal cases in the district courts. [FN16] The Supreme Court followed the same procedure it had used to prepare the civil rules. A distinguished advisory committee prepared and circulated draft rule proposals, received comments from the bench and bar, and submitted the proposed rules to the Court. [FN17] The Federal Rules of Criminal Procedure took effect, by operation of law, without congressional action in March 1946. [FN18]

In 1958, Congress enacted legislation transferring the major responsibility for the rulemaking function from the Supreme Court to the Judicial Conference of the United States. [FN19] The Conference was mandated to "carry on a continuous study of the operation and effect of the [federal] rules" and to recommend appropriate amendments in the rules. [FN20] The Supreme Court retained its statutory authority to promulgate the rules, but it would henceforth do so by acting on recommendations made by the Judicial Conference. [FN21]

Following enactment of the 1958 legislation, the Judicial Conference established a Standing Committee on Rules of Practice and Procedure and five advisory committees, to amend or create the civil, criminal, bankruptcy, appellate, and

admiralty rules. [FN22] The Standing Committee's mission was to supervise the rulemaking process for the Conference and to coordinate and approve the work of the advisory committees. [FN23]

The Admiralty Rules were merged into the Federal Rules of Civil Procedure in 1966. [FN24] The Federal Rules of Appellate Procedure took effect in 1968, [FN25] the federal Bankruptcy Rules became law in1973, *1660 [ FN26] and the rules governing post-conviction collateral remedies for prisoners took effect in 1977. [FN27] The separate rules for misdemeanor and petty offense cases before magistrate judges were merged into the Federal Rules of Criminal Procedure in 1990. [FN28]

New proposed rules and amendments to the rules approved by the Supreme Court were accepted by Congress without change for approximately thirty-five years following promulgation of the Federal Rules of Civil Procedure. [FN29] The picture changed sharply in the 1970s, however, as a result of controversy surrounding the Federal Rules of Evidence.

Chief Justice Earl Warren appointed an advisory committee to draft rules of evidence in 1965, and the Supreme Court transmitted the rules to Congress in 1972. [FN30] Immediate concern was expressed that the judiciary had exceeded its statutory authority on the grounds that: (1) the Rules Enabling Act, which authorized the Supreme Court to promulgate rules of "practice and procedure," was not broad enough to govern the promulgation of rules of evidence; and (2) the new rules had impermissibly overstepped the boundary between procedure and substance, particularly in attempting to supersede evidentiary privileges established by state law. [FN31]

Congress deferred the proposed rules indefinitely and held extensive hearings on them. Eventually, the Federal Rules of Evidence were revised by Congress and enacted into law by affirmative legislation. [FN32] The principal legislative revision was to eliminate the proposed federal evidentiary privileges, thereby continuing to leave the matter to federal common law and applicable state law. [FN33] Congress also amended the Rules Enabling Act to give the judiciary explicit authority to amend the Federal Rules of Evidence. [FN34] It provided, *1661 however, that no rule establishing, abolishing, or modifying a privilege has any force unless approved by an act of Congress. [FN35]

Following enactment of the Federal Rules of Evidence, Congress periodically intervened to delay, reject, or modify proposed federal rules. [FN36] The controversy over the evidence rules also evoked criticism directed at the procedures under which the new rules had been promulgated. Generally, the complaints were that the process was not sufficiently "open" and had not allowed for adequate public input. [FN37] Accordingly, one member of the House Judiciary Committee suggested that the time was ripe to reexamine the rulemaking process and possibly amend the Rules Enabling Act. [FN38]

Chief Justice Warren E. Burger, in his 1979 The State of the Federal Judiciary report, took note of the controversy and suggested that it was time to take a "fresh look" at the entire rulemaking process. [FN39] He requested that the Judicial Conference and the Federal Judicial Center, the judiciary's primary research arm, study the matter in light of the experience under the Rules Enabling Act. [FN40] In response, the Federal Judicial Center prepared a report to assist the Standing Committee on Rules of Practice and Procedure. [FN41] The report analyzed the strengths and weaknesses of the process and focused on those aspects of the process that had been singled out for criticisms and change. [FN42]

The Standing Committee conducted a comprehensive review of rulemaking procedures and instituted a number of changes. The innovations included making the records considered by the rules committees available to the public, documenting all changes made by the committees at the various stages of the process, and conducting public hearings on proposed amendments. The Conference also committed its procedures to writing and published them for the benefit of the bench and bar. [FN43]

In 1983, the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice initiated a comprehensive review of the rulemaking process. [FN44] The House Subcommittee conducted hearings in both the 98th and 99th Congresses, during which it invited comment on the rulemaking process and engaged in a productive dialogue with the Judicial Conference and the Standing Committee chairman. [FN45]

Following five years of study, hearings, and dialogue, the House subcommittee marked up a bill to codify formally some of the rulemaking procedures already being used by the Judicial Conference and also to require that all meetings of rules committees be open to the public and that minutes of the meetings be prepared. [FN46] The legislation ratified the Judicial Conference's authority to appoint a standing committee and appropriate advisory committees. [FN47]

The House version of the legislation specified "that each rules committee consist of 'a balanced cross section of bench and bar, and trial and appellate judges.'" [FN48] The judiciary endorsed this provision. [FN49] As eventually enacted, however, the legislation did not contain the requirement of a balanced cross section, merely providing for the committees to consist of trial judges, appellate judges, and members of the bar. [FN50]

One of the major objectives of the House sponsors of the legislation was to eliminate the "supersession" clause of the 1934 Act, providing that "all laws in conflict with . . . rules [promulgated under the Act] shall be of no further force or effect after such rules have taken effect." [FN51] It was asserted that the clause was unnecessary because its original purpose (to override various procedural rules scattered throughout the United States Code) had passed. [FN52] More importantly, it was argued that the provision was of questionable constitutional

validity in light of INS v. Chadha, [FN53] because the Rules Enabling Act authorizes the repeal of statutes without conforming to the requirements of Article I. [FN54] The Senate, however, did not accept the House provision, [FN55] and the Rules Enabling Act amendments were enacted in 1988 without deleting the supersession clause. [FN56]

The 1988 amendments also attempted to stem the proliferation of local rules of courts and to provide for more public participation in the adoption of local rules. The House subcommittee expressed particular concern that some local court rules were inconsistent with federal rules and statutes. [FN57] It noted, however, that the Judicial Conference had taken steps to deal with the problems of local rules by: (1) establishing a Local Rules Project to review all local rules, and (2) amending the national rules [FN58] to require that local court rules be prescribed only after giving appropriate public notice and an opportunity to comment. [FN59]

Congress codified these local rule requirements in the Rules Enabling Act. [FN60] It also required each court, other than the Supreme Court, to appoint an advisory committee to study the court's rules of practice and internal operating procedures and make recommendations concerning them. [FN61] The legislation gave the judicial councils of the circuits authority to modify or abrogate any district court local rules and the Judicial Conference the authority to modify or abrogate the local rules of any court of appeals or other federal court except the Supreme Court. [FN62]

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Ironically, while Congress attempted to promote national uniformity and limit the proliferation of local court rules in 1988, it took an entirely different approach just two years later in enacting the Civil Justice Reform Act of 1990. [FN63] That legislation requires each district court to implement its own, individualized civil justice expense and delay reduction plan. [FN64]

## II. CURRENT RULEMAKING PROCEDURES

Although many changes have been made in operating procedures, the rulemaking structure today is essentially the same as that established by the Judicial Conference following the 1958 legislation assigning it the central role in drafting and monitoring the federal rules. [FN65] The Conference's Standing Committee supervises the rulemaking process and recommends to the Conference such changes to the rules as it believes are necessary to maintain consistency and promote the interest of justice. [FN66]

The Standing Committee is assisted by five advisory committees, each of which is responsible for one set of federal rules, i.e., civil, criminal, appellate, bankruptcy, or evidence. [FN67] The advisory committees conduct ongoing studies of the operation of their respective rules, prepare appropriate amendments and new

rules, draft explanatory committee notes, conduct hearings, and submit proposed changes through the Standing Committee to the Judicial Conference.

*A. Committee Membership*

The committees are composed of federal judges, practicing lawyers, law professors, state chief justices, and representatives of the Department of Justice. Each committee has a Reporter, a law professor with demonstrated *1665 expertise in the committee's subject area, who is responsible for coordinating the committee's agenda and drafting appropriate amendments to the rules and explanatory committee notes. The Administrative Office of the United States Courts, through the Office of the Secretary and the Rules Committee Support Office, coordinates the operational aspects of the rules process, provides administrative and legal support to the committees, and maintains the committees' records.

During congressional hearings in the 1970s and 1980s, it was argued that the rulemaking committees were not broadly based and did not adequately reflect the diversity of the legal community. [FN68] In addition, there has been criticism that there are not enough practicing lawyers on the committees. [FN69] The present composition of the committees is as follows:

| | *Committees* | | | | | |
|---|---|---|---|---|---|---|
| | App.... | Bankr. | Civil | Crim. | Evid. | Standing |
| *Attorneys and Professors* | | | | | | |
| Private Practice Att'ys | 3 ..... | 5 | 4 | 3 | 3 | 3 |
| Government Att'ys | 1 ..... | 1 | 1 | 1 | 1 | 1 |
| Law Professors | - ..... | 1 | 1 | 1 | 2 | 2 |
| *Federal Judges* | | | | | | |
| Circuit Judges | 4 ..... | 1 | 3 | 1 | 2 | 3 |
| District Judges | - ..... | 2 | 3 | 5 | 2 | 5 |
| Other Judges | - ..... | 5 | - | 1 | 1 | - |
| *Other* | | | | | | |
| State Chief Justice | 1 ..... | - | 1 | 1 | 1 | 1 |
| Total | 9 ..... | 15 | 13 | 13 | 12 | 15 |

The advisory committee that drafted the original Federal Rules of Civil Procedure was comprised entirely of lawyers and professors. Judges were added to the committees shortly thereafter and eventually became *1666 a large majority on each committee. In the past few years, however, the number of attorneys vis-a-vis

judges on the committees has been increasing. Federal judges presently are a minority on three of the six committees, and they constitute about fifty percent of the membership of the committees as a whole.

The committees' membership is geographically balanced and increasingly represents different perspectives within the legal profession, including members of large and small law firms, government attorneys, "public interest" lawyers, teachers, federal defenders, and criminal defense attorneys. Diversity in membership has increased, but the primary criteria for membership remain professional ability and experience.

Commentators suggested that there be greater turnover in the membership of the committees. [FN70] This objective has been achieved. At present, members of the rules committees, as with almost all Judicial Conference committees, serve for terms of three years. [FN71] Only one reappointment is allowed. [FN72] Thus, a member may serve on a committee for a maximum of six years. Chairs of the committees are normally appointed for just one three- year term. [FN73] The current chair of the Standing Committee is District Judge Alicemarie H. Stotler of the Central District of California, who was appointed by the Chief Justice in 1993.

Several of the committees invite persons with important and specialized knowledge to assist them as a resource at committee meetings. The appellate and bankruptcy committees, for example, have included a clerk of court in their deliberations for many years. The clerks are extremely helpful in identifying the practical impact of the rules on administrative operations and on case management. In addition, the bankruptcy committee invites the director of the U.S. trustee program to participate in committee meetings.

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*B. Publication of Procedures*

During the early 1980s, the Judicial Conference was criticized for not having published its rulemaking procedures. [FN74] In response, in 1983 the Standing Committee developed a written Statement of Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, which incorporated long-standing practices of the rules committees and adopted many suggested procedural improvements. [FN75] The publication requirement was codified in the 1988 amendments to the Rules Enabling Act. [FN76]

The rulemaking procedures are now published as an integral part of the public announcement of all proposed rule amendments when they are distributed to the bench and bar. A new easy-to-read pamphlet, The Federal Rules of Practice and Procedure: A Summary for Bench and Bar, [FN77] is also included with all distributions to the public and is made available to bar groups and others as a

means of fostering knowledge about the rulemaking process and stimulating comments on the rules.

*C. Soliciting Comments from the Public*

A number of people complained that inadequate advance notice had been provided of proposed amendments to the rules, thereby depriving the public of a meaningful opportunity to shape the rules before promulgation. [FN78] In addition, it was said that the mailing list for distribution of proposed amendments was too limited. [FN79] Accordingly, proposals for amendments in the rules did not reach a sufficiently broad cross section of the legal profession.

Today, extensive efforts are made to reach all segments of the bench and bar, as well as organizations and individuals likely to be interested in or affected by proposed changes to the rules. The *1668 Administrative Office mails all rules proposals to about forty major legal publishing firms, and they are reprinted in advance sheets. They are also mailed to more than 10,000 persons and organizations on its rules mailing list, including:

- federal judges and other federal court officers,
- U.S. Attorneys and other Department of Justice officials,
- other federal government agencies and officials,
- federal defenders,
- state chief justices,
- state attorneys general,
- legal publications,
- law schools,
- bar associations, and
- any lawyer, individual, or organization who requests distribution.

In addition to circulating the full text of all proposed rule amendments and advisory committee notes, the Administrative Office now prepares "user- friendly" pamphlets summarizing the proposed amendments and highlighting the dates of scheduled public hearings and the cut off date for written comments. The pamphlets are distributed together with the full text of the amendments and advisory committee notes. The bench and bar are informed in all publications that further information and materials may be obtained from the Secretary and the Rules Committee Support Office, whose address and telephone number are provided.

To supplement the general mailings, the advisory committees have sought to obtain important input through special mailings to targeted segments of the legal profession and interested organizations. In September 1994, for example, the Advisory Committee on the Rules of Evidence solicited public comment on statutory changes to Federal Rules of Evidence 413, 414, and 415, dealing with

evidence of prior, similar acts in cases involving sexual assault or child molestation. [FN80] The mailing was sent to 900 professors of evidence, 40 women's rights organizations, and 1000 other interested individuals and organizations.

The goal of the committees is to stimulate greater participation by the bar in the rulemaking process by actively encouraging individuals and organizations to comment on specific amendments to the rules and to identify problems in the operation and effect of the rules generally. *1669 The public comments are extraordinarily helpful and are taken very seriously by the committees. They regularly result in improvements in the amendments, and have led to the withdrawal of proposed amendments. [FN81]

In addition to increasing the amount, readability, and distribution of printed information on the rules, the advisory committees seek input from the bar outside the context of specific pending amendments. The Advisory Committee on Civil Rules has invited bar organizations to send representatives to attend its meetings, and it has, in appropriate cases, solicited the views of lawyers and professors on preliminary proposals before they were drafted.

The advisory committees have also convened special meetings with lawyers and nonlawyers to assess the potential need for rule changes to certain discrete areas of practice. The civil advisory committee, for example, has invited knowledgeable, experienced lawyers to meet with it to explore the problems of class actions and mass tort litigation. The bankruptcy committee has met with chapter 13 lawyers and trustees to examine the impact of the bankruptcy rules on chapter 13 cases. It has also invited publishers to provide input on the bankruptcy forms.

*D. Documentation of Changes*

People had voiced complaints that the deliberations of the committees were not adequately documented and that it was difficult to discern the rationale for proposed changes to the rules and to discover the minority views of members. [FN82] Additionally, some expressed concern that proposed amendments were materially changed after they had been circulated for comment and that no opportunity for further comment had been provided. [FN83]

Under current procedures, each action taken by a committee with regard to a proposed amendment is documented and included in the public record. The advisory committees are required to submit a separate "Gap" report, summarizing the public comments and explaining any changes made following publication. The Standing Committee submits a report to the Judicial Conference setting forth the *1670 reasons for all proposed amendments and identifying any changes it made in the recommendations of the advisory committee. After the Conference approves amendments, the Administrative Office transmits to the Supreme Court the text of the proposed amendments, the advisory committee notes, pertinent portions from

the advisory committee and Standing Committee reports, and a special report identifying any controversial proposals and explaining the source and nature of the controversy.

If an advisory committee or the Standing Committee makes any "substantial" change in a rule after publication, it normally provides an additional period for public notice and comment. Changes more extensive than the original publication are republished. On the other hand, if a change is similar to, but less extensive than the original publication, it will not generally be republished. Similarly, purely technical changes and corrections are not normally published for comment.

*E. Public Hearings*

During the course of the controversy over adoption of the Federal Rules of Evidence in the early 1970s, there were complaints that the judiciary had not held public hearings on the proposed rules. [FN84] Written statements were seen as an inadequate substitute for the opportunity of the public to appear in person and engage in a face-to-face dialogue with decision makers. Today, public hearings are scheduled on all proposed changes to the rules. Where the subject matter of the changes is controversial, such as the 1992 amendments to Rule 26 of the Federal Rules of Civil Procedure, large numbers of individuals and organizations will ask to testify. On the other hand, many hearings attract few or no requests to testify and are canceled for lack of public interest.

*F. Open Meetings*

There had been criticism that the meetings of the Standing Committee and the advisory committees were not open to the public. [FN85] Until enactment of the 1988 amendments to the Rules Enabling Act, meetings of the Standing Committee and the advisory committees *1671 had generally been closed to the public. The 1988 amendments to the Rules Enabling Act require open meetings, but allow a committee to go into executive session for cause. [FN86]

All meetings of the rules committees are open to the public and are announced in advance in the Federal Register and leading legal publications. For the most part, though, public attendance is light, except when committees address controversial items. [FN87]

*G. Open Records*

There had been complaints that committee agendas and materials relied upon in promulgating rules were not made available to the public. [FN88] Filed comments were made available only to persons with a "legitimate purpose" in seeing them,

and minutes, reporters' notes, memoranda, and drafts were not made public until 1980. [FN89]

Today, all records are open and readily available from the Administrative Office, including minutes of committee meetings, suggestions and comments submitted by individuals and organizations, statements of witnesses, transcripts of public hearings, and memoranda prepared by the reporters. In addition, the reports of the Standing Committee to the Judicial Conference and the minutes of Standing Committee and advisory committee meetings are available on-line through computer-assisted legal research.

All records more than two years old -- dating back to 1935 -- have been placed on microfiche and indexed. They are available for review either at the Administrative Office or at a government repository and may be purchased from a commercial service. Planning has begun on developing an electronic docket of all records and expanding the availability of materials electronically.

*H. Length of the Process*

The rulemaking process demands exacting and meticulous care in drafting proposed rule changes. It is time-consuming and involves a minimum of seven stages of formal input and review. From beginning to end, it usually takes two to three years for a suggestion to be enacted as a rule, fourteen months of which is directly attributable to *1672 the built-in statutory period for review by the Supreme Court and Congress. This seven-step process is discussed below.

*1. Initial consideration by the advisory committee*

Proposed changes to the rules are initiated in writing by lawyers, judges, clerks of court, law professors, government agencies, or other individuals and organizations. The Secretary acknowledges each suggestion and distributes it to the appropriate advisory committee, whose Reporter analyzes it and makes appropriate recommendations for consideration by the committee. The suggestions and the Reporter's recommendations are placed on the committee's agenda and normally discussed at its next meeting. The Secretary now advises each person making a suggestion of its eventual disposition. When an advisory committee decides that a particular change in the rules has merit, it normally asks its Reporter to prepare a draft amendment to the rules and an explanatory committee note.

*2. Publication and public comment*

Once an advisory committee has voted initially to pursue a new rule or an amendment to the rules, it must obtain the approval of the Standing Committee, or

its chair, to publish the proposal for public comment. In seeking publication, the advisory committee must explain to the Standing Committee the reasons for its proposal, including any minority or separate views.

Once publication is approved, the Secretary arranges for printing and wide distribution of the proposed amendment to the bench and bar, to publishers, and to the general public. The public is normally given six months to comment on the proposal. During the six-month comment period, one or more public hearings on the proposed changes are scheduled.

*3. Consideration of the public comments and final approval by the advisory committee*

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

If the advisory committee decides to proceed in final form, it submits the proposed rule or amendment to the Standing Committee for approval. Each proposal must be accompanied by a separate report summarizing the comments received from the public and explaining *1673 any changes made by the advisory committee following the original publication. [FN90] The advisory committee's report must also include minority views of any members who wish to have their separate views recorded. If, on the other hand, the advisory committee decides to make any substantial change in its proposal, it will republish it for further public comment.

*4. Approval by the standing committee*

The Standing Committee considers the final recommendations of the advisory committee and may accept, reject, or modify them. If the Standing Committee approves a proposed rule change, it will transmit the change to the Judicial Conference with a recommendation for approval, accompanied by the advisory committee's reports and its own report explaining any changes it made. If the Standing Committee makes a modification that constitutes a substantial change from the recommendation made by the advisory committee, the proposal will normally be returned to the advisory committee with appropriate instructions.

*5. Judicial Conference approval*

The Judicial Conference normally considers proposed amendments to the rules at its September session each year. If it approves the amendments, they are transmitted to the Supreme Court.

*6. Supreme Court approval*

The Supreme Court has seven months, from the time the proposed amendments are received from the Conference until May 1, to review them, prescribe them, and transmit them to Congress. [FN91]

*7. Congressional review*

Congress has a statutory period of at least seven months to act on any new rules or amendments prescribed by the Supreme Court. If Congress does not enact positive legislation to reject, modify, or defer the rules or amendments, they take effect as a matter of law on December 1. [FN92]
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The lengthy process may be expedited when there is an urgent need to consider an amendment to the rules. This normally occurs when Congress has requested prompt consideration of a proposal or when legislation has been introduced in Congress to amend the rules directly by statute. The fourteen-month delay for review by the Supreme Court and Congress, however, is established by statute and cannot be reduced by the Judiciary. [FN93]

*I. Supreme Court Review*

It has been proposed that the Supreme Court be removed from the rulemaking process and that the rules be promulgated by the Judicial Conference. [FN94] The original version of the legislation that became the Rules Enabling Act amendments of 1988, for example, would have removed the Supreme Court from the rulemaking process. [FN95] The provision, however, was withdrawn after Chief Justice Burger informed the chairman of the House Judiciary subcommittee that "[t]he Justices conclude that it would be better to keep the ultimate authority of passing on rulemaking within the Court as it is now, but to allow the Court to defer to the decision of the Judicial Conference." [FN96]

On most occasions, the Court has deferred to the Judicial Conference and has prescribed without change proposed rules amendments submitted by the Judicial Conference. [FN97] Nevertheless, the Court has accorded serious, independent review to proposed amendments in the1990s, *1675 deferring a proposed amendment to Rule 4 of the Federal Rules of Civil Procedure in 1991, [FN98] approving amendments to Rule 11 of the Federal Rules of Civil Procedure and five civil discovery rules [FN99] over three dissents in 1993, [FN100] and withholding part of the amendments to Rule 412 of the Federal Rules of Civil Procedure in 1994. [FN101] The Court's recent orders transmitting rules changes to Congress have specified that: "While the Court is satisfied that the required procedures have

been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted." [FN102]

Although the length of the rulemaking process would be shortened by eliminating the role of the Supreme Court, the Court's enormous prestige clearly contributes to the legitimacy and credibility of the process.

## III. CONTINUING RENEWAL EFFORTS

Most of the criticisms of the rulemaking process over the past twenty years have been addressed by procedural improvements made by the Judicial Conference and the 1988 amendments to the Rules Enabling Act. Nevertheless, the rules committees are continuing to examine other important procedural issues that have not been fully resolved.

### *A. Long Range Planning*

The judiciary established a permanent long range planning process designed to identify the mission and future directions of the federal courts. The *Proposed Long Range Plan for the Federal Courts ( Plan)* is the first major product of this planning process. With regard to the federal rules, the *Plan* encourages significant participation by the bar in *1676 the rulemaking process, exclusive adherence to the Rules Enabling Act process, and greater uniformity in federal practice and procedure. [FN103]

As part of the long range planning process, the Standing Committee on Rules of Practice and Procedure has appointed a long range planning subcommittee to conduct a study of the rulemaking process and make recommendations for procedural improvements. In addition, the advisory committees have initiated their own long range planning efforts. The Advisory Committee on Bankruptcy Rules, for example, has a standing subcommittee on automation that has been active in evaluating the impact of technology and in considering changes to the bankruptcy rules to take advantage of the benefits of automation. [FN104]

Likewise, the bankruptcy, appellate, and civil advisory committees have proposed and circulated for public comment proposed rule amendments that would allow individual courts to permit attorneys to file, sign, and verify documents with the court electronically. [FN105] If approved through the Rules Enabling Act process, the amendments would take effect on December 1, 1996. [FN106]

### *B. Greater Participation by the Bar*

Despite substantial efforts to persuade attorneys to take the time to suggest improvements in the rules and comment on proposed amendments, the bar is

considerably less active than the committees would like. A handful of bar organizations and individuals respond regularly to requests for public comments by providing comprehensive, balanced analyses of proposed rules amendments. But most judges, lawyers, and professors simply do not respond to requests for comments, and those who do, generally oppose specific amendments on *1677 an ad hoc basis. [FN107] Accordingly, the public responses tend to be moderate in number and not necessarily representative of the bench and bar as a whole.

The *Proposed Long Range Plan for the Federal Courts* encourages an active partnership with the bar in the rulemaking process, both through membership of practicing attorneys on the rulemaking committees and greater participation by attorneys and bar associations in commenting on proposed amendments to the rules. [FN108] The *Plan* asks the rules committees to continue their outreach efforts in stimulating lawyers and bar associations to provide practical advice to the committees. [FN109]

As one of his many initiatives to improve judicial administration and service, Administrative Office Director L. Ralph Mecham established a Rules Committee Support Office in 1992 to provide legal and operational support to the Secretary and the rules committees and to provide a higher level of information services to the bar. To stimulate additional responses on rules issues by bar associations, individual lawyers, and academia, the mailing list for the rules is being expanded and rejuvenated. Every six months an additional 200 attorneys and 100 law professors selected at random will be added until an additional 2500 names are added. If no comments are received from addressees for three years, their names will be removed from the list and replaced with others.

The Standing Committee has also requested that the bar associations of each of the states designate an attorney as a point of contact to solicit and coordinate bar comments on proposed amendments. It is anticipated that the bar associations will encourage their members to discuss the rules and provide thoughtful and practical input *1678 to the advisory committees. It is also hoped that representatives of the bar will attend committee meetings and hearings.

In an effort to assess the practical operation of the rules, the Advisory Committee on Civil Rules scheduled two conferences in 1995 with members of the bar and academia to discuss class actions and the effectiveness of Rule 23 of the Federal Rules of Civil Procedure. In addition, members of the advisory committee will participate with attorneys and law professors in a conference to consider the strengths and weaknesses of the civil rules generally.

### *C. Frequency of Rule Changes*

The 1958 statute assigning rulemaking responsibilities to the Judicial Conference requires the Conference to conduct a "continuous study of the operation and effect

of the general rules of practice and procedure." [FN110] Contemporary commentators suggested that the rules committees should have ample staff, should engage in grassroots surveys, and should conduct hearings, regional meetings, and discussions with the bar to monitor the rules in practice. [FN111] More recently, Justice Scalia stated that it is essential to have constant reform of the federal rules to correct emerging problems. [FN112]

The requirement to conduct a continuous study of the operation and effect of the rules, however, does not compel the conclusion that amendments should be frequent. Nor does it imply that all perceived problems with the rules and all conflicts in case law should be rectified. To the contrary, one of the most persistent criticisms of the rules process is that there are simply too many amendments. [FN113]

Some amendments have been criticized as mere "tinkering" with the rules. [FN114] And it has been suggested that there should be no change*1679 in a rule "unless there is substantial need for the change." [FN115] One critic even has argued for a moratorium on procedural law reform. [FN116]

Too many minor changes to the rules can lead to uncertainty and confusion in the bench and bar. [FN117] Constant changes, moreover, tend to undermine the stability and prestige of the rules as a whole. The challenge, therefore, is to weigh the benefits of a proposed improvement in the rules against the inherent cost of introducing change and possible uncertainty.

Some rule amendments, even though minor, are necessary to implement recent legislation, [FN118] to conform to modern language usage, [FN119] to correct improper statutory cross-references, [FN120] and to coordinate with pending congressional action. [FN121] As a general rule, however, there is now a reluctance to make changes to the rules unless they can be shown to be necessary to correct a serious problem in practice. Although many suggestions for improvements in the rules are received from the bench and bar to clarify or reconcile case law among the circuits, the advisory committees have generally opted to allow case law interpreting the rules take its course. [FN122] *1680

In September 1994, for example, the Advisory Committee on the Rules of Evidence published its tentative decisions not to amend twenty- five evidence rules. [FN123] The committee announced its philosophy that an amendment to a rule should not be undertaken absent a showing either that it is not working well in practice or that it embodies an erroneous policy decision. [FN124] The advisory committee pointed out that any amendment in the rules of evidence "will create new uncertainties as to interpretation and unexpected problems in practical application." [FN125]

To avoid the appearance of piecemeal changes, the advisory committees have begun to use the device of deferring and "batching" miscellaneous rule changes into

a single package of amendments. One possible option for the advisory committees to consider in the future is to prescribe a set schedule for submitting non-urgent rules changes -- perhaps every three to five years. This approach, although appealing, is complicated by unpredictable congressional activity that increasingly tends to interrupt any schedules or planning efforts. The 103d Congress, for example, passed a comprehensive bankruptcy reform law that will require rules changes, [FN126] and the 104th Congress, as part of the Republican "Contract with America," is considering a number of changes both in civil litigation and criminal law. [FN127]

It has also been recommended widely that rules changes be predicated on a sounder empirical basis. [FN128] To that end, the advisory committees have been increasing their requests for assistance from the Federal Judicial Center to conduct research on litigation practices and the impact of the rules. The Federal Judicial Center conducted a major study of Rule 11 of the Federal Rules of Civil Procedure before the Advisory Committee on Civil Rules proceeded with the 1993 amendments to that rule. [FN129] The civil advisory committee *1681 also asked the Federal Judicial Center to conduct studies on the use and operation of protective orders under Rule 26(c), offers of settlement under Rule 68, consensual settlement of class actions under Rule 23, and the effect of mandatory disclosure under the 1993 amendments to Rule 26. The Advisory Committee on Criminal Rules considered the results of the Federal Judicial Center's study on cameras in the courtroom before approving amendments to Rule 53. [FN130]

### *D. Content, Organization, and Style of the Rules*

Simplicity and uniformity were central goals of the drafters of the federal rules. [FN131] There are complaints, however, that the rules are no longer simple and uniform, but have become cumbersome, lengthy, and unpredictable. [FN132]

Commentators suggest that fundamental changes are needed and that it is time to take a fresh look at the rules. [FN133] It has also been suggested that it is time to reconsider the trans-substantive character of the rules, so that different categories of cases could be governed by different rules. [FN134] Obviously, such sweeping changes would take considerable time to effectuate and would require major input from the bar and academia, empirical research, substantial committee deliberations, and public hearings. The civil and bankruptcy advisory committees have, as part of their long range planning efforts, begun *1682 to think about whether changes of such magnitude will eventually be necessary or desirable.

Apart from changes to substance, there are opportunities to improve the style, consistency, and readability of the rules. Under the leadership of Judge Robert E. Keeton, former chairman of the Standing Committee, efforts have been initiated to redraft the body of rules in clear and concise English -- without substantive change

-- following the best conventions of modern statutory revision and the advice of legal writing teachers. There are no present plans to adopt the revised version of the rules, but at an appropriate point in the future -- perhaps integrated with a major revision of the rules -- the "re-styled" language could be substituted for the present language.

The Standing Committee is now assisted by a legal writing consultant and a style subcommittee, and it will publish a guide to clear and simple rule drafting. [FN135] The consultant works with the advisory committees and their reporters to promote clear and consistent language in proposed rules amendments.

As part of its long range planning efforts, the committees could also consider eventual integration of all five sets of federal rules into one. The result, for example, might be the consolidation of similar provisions that now appear separately in each of the rules, such as the provisions dealing with computation of time, [FN136] courts' and clerks' offices, [FN137] and local rules. [FN138]

### *E. The Judiciary and Congress*

The success of the rulemaking process relies on a delicate balance of authority and continuing cooperation between the judicial and legislative branches of the government. The Rules Enabling Act of 1934, as reaffirmed by Congress in 1988, establishes a statutory structure under which the judiciary prescribes rules of procedure, practice, and evidence for the federal courts, after giving the bench, bar, and public a generous opportunity for input. Congress then retains the ultimate authority to accept, reject, amend, or defer proposed amendments to the rules. The process works exceedingly well when the procedures by which rules are crafted are credible and when mutual respect prevails between the two branches. *1683

The credibility of the rulemaking process was seriously questioned during the 1970s' controversy over the Federal Rules of Evidence. Complaints were made that proceedings before the rules committees had been closed and that changes had been made in the proposals without public notice or input. Complaints about the procedures, combined with concerns that the rulemakers had exceeded their authority and abridged substantive rights, led opponents to petition Congress to defer or reject the rules. [FN139]

The credibility of rulemaking procedures has been enhanced by its current openness and accessibility. [FN140] When proposed changes to the rules are now submitted to Congress, an extensive public record has been developed to support the changes, including careful consideration by expert advisory committees, public comments, public hearings, and four levels of review. Members of Congress can be assured that the changes received thorough consideration and that all interested parties had an opportunity to comment, both in writing and at hearings. By

comparison, it is extremely rare for any product of the legislative process to receive such objective consideration, public input, and expert review.

Congress has a legitimate interest in federal rule amendments because even procedurally neutral rules may affect substantive rights, may give a practical advantage to one type of litigant over another, and may require adjustment of comfortable habits and practices. [FN141] Persons and organizations displeased with proposed amendments, accordingly, are likely to exercise their political rights by encouraging Congress to reject or modify specific amendments. Congress, of course, is free under the Rules Enabling Act to make its own independent judgment on the merits of any proposal, but it should -- and normally does -- give considerable deference to rules amendments prescribed by the Supreme Court. [FN142]

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As the *Proposed Long Range Plan for the Federal Courts* points out, however, "[i]t is troubling . . . that bills are introduced in the Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act." [FN143] In the 103d Congress, for example, at least thirteen provisions were introduced to amend the federal rules without following the prescribed statutory procedures.

Most of the provisions dealt with matters of considerable political interest, such as victims' rights, [FN144] evidence in sexual assault and child molestation cases, [FN145] and other criminal law issues. [FN146] For some controversial social policy issues, it is inevitable -- or desirable -- to have policy established by the legislature. [FN147] By avoiding the Rules Enabling Act process entirely, however, Congress loses the benefit of the extensive record developed by the rules committees, including the public comments and professional review by judges, lawyers, and law professors. Moreover, recent experience shows that some legislation amending the rules may be enacted without any hearings at all, without public input, and without thoughtful review by the bench and bar.

Two examples from the 103d Congress illustrate contrasting ways in which Congress has dealt with controversial statutory amendments to the rules. In the Violent Crime Control and Law Enforcement Act of *1685 1994, [FN148] Federal Rule of Evidence 412 was completely revised and new Rules 413, 414, and 415 were added. The former received substantial public input and careful review by bench and bar. The latter did not.

The proposed revision of Rule 412, commonly known as the "rape shield" rule, was first included in comprehensive criminal legislation introduced in the Senate. [FN149] It was designed to extend to all criminal cases and all civil litigation the rule's long-standing prohibition against admitting evidence of a victim's past sexual behavior in a case where the defendant has been accused of a crime of sexual abuse. After the Senate bill was introduced, the judiciary committees of both the

House and the Senate asked the Judicial Conference to consider the merits of the proposed rule on an expedited basis. [FN150]

The Advisory Committee on the Rules of Evidence drafted a substantially improved version of the Senate rule, circulated it for public comment, and conducted a public hearing. [FN151] The carefully crafted, revised rule met with overwhelming public approval, [FN152] including approval from women's rights groups, [FN153] and was subsequently adopted by the advisory committee, the Standing Committee, and the Judicial Conference. [FN154] As a result, the House decided not to include a revision of Rule 412 in its version of the crime legislation and chose, instead, to let the rule drafted by the advisory committee take effect in accordance with the normal operation of the Rules Enabling Act. [FN155]

In contrast to the cooperation between Congress and the judiciary in Rule 412, new Federal Rules of Evidence 413, 414, and 415 were added as floor amendments to the Senate crime control bill without public*1686 comment or hearings and without communication with the rules committees. [FN156] The new rules will admit evidence of a defendant's past similar acts in a criminal or civil case involving a sexual assault or child molestation offense "for its bearing on any matter to which it is relevant." [FN157] The rules contain no reference to Federal Rule of Evidence 403, which allows a court to exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading of the jury, or needless delay. Neither do they reference the hearsay provisions of Article VIII of the Federal Rules of Evidence. Congressional conferees added a provision to the Senate version of the bill specifying that the new rules would take effect 150 days after enactment, unless the Judicial Conference within that period recommends against them or submits alternate recommendations, in which case the effective date of the rules will be delayed for an additional 150 days. [FN158]

As a practical matter, the only restraints on Congress are self-imposed. They include the existence of the Rules Enabling Act, which has codified a process of openness and inter-branch coordination; the ordinary respect that one branch of government owes the others; and the quality of the work product of the rulemaking process. Obviously, political and social policy imperatives may tempt legislators to bypass the objective and orderly process of the rulemakers in favor of quick and popular results. As the recent experience with Rule 412 shows, however, legislative objectives can be achieved -- with a substantially superior product and in a reasonable time -- *1687 through adherence at least to the spirit of the Rules Enabling Act.

On occasion, members of Congress work cooperatively with the rules committees, deferring legislative proposals in order to give the rules committees the opportunity to consider them as part of the rulemaking process. [FN159] Congress also has the option of requesting that the Judicial Conference study a particular subject and

report its findings and recommendations. The 1994 crime control legislation, for example, asked the Judicial Conference to evaluate and report on whether the Federal Rules of Evidence should be amended to guarantee that the confidentiality of communications between sexual assault victims and their therapists or counselors will be adequately protected in federal court proceedings. [FN160]

Recent experience, thus, suggests that a de facto dual track procedure might emerge to deal with rules amendments. On the one hand, the great majority of rules changes would continue to be handled through the Rules Enabling Act procedure. On the other hand, proposed changes with political implications might be referred by the judiciary committees of Congress to the rules committees of the Judicial Conference for consideration on an expedited basis.

### *F. National Uniformity and Local Rules*

Local court rules have been criticized by Congress and commentators as a threat to the goal of uniform, simple rules of federal practice and *1688 a serious trap for lawyers. [FN161] Criticism has also been directed at the sheer number of local rules, which makes it difficult for lawyers to practice effectively in more than one jurisdiction. [FN162] It has been argued, too, that some local rules are inconsistent with the national rules. [FN163]

The 1988 amendments to the Rules Enabling Act were designed in part to restrict the use of local rules. They set forth procedural requirements for courts to follow in adopting rules and provide an oversight mechanism to ensure their consistency with each other and with national rules. [FN164] Nevertheless, there are more than 5000 local rules regulating civil procedure alone, not including standing orders and other local procedural requirements. [FN165]

The Standing Committee established a Local Rules Project in 1985 to review the local rules of the district courts and the rules of the courts of appeals. [FN166] The project's analysis of the rules and internal operating procedures of the courts of appeals led the Advisory Committee on Appellate Rules to propose various amendments to the Federal Rules of Appellate Procedure that substitute a single, national rule for local variations. [FN167] The Local Rules Project has also informed the district courts of problems with their local rules, including inconsistencies with national rules or statutes, and it has devised a uniform numbering system for local civil rules keyed to the numbering of the national rules. Through voluntary cooperation with the courts and the circuit judicial councils, progress is being made toward reducing the number of local rules and improving their content. [FN168]

Federal rule amendments are pending in the Supreme Court that would require local court rules to conform to any uniform numbering system *1689 that the Judicial Conference may prescribe, thereby making it easier for an increasingly

national bar to locate a local rule that applies to a particular procedural issue. [FN169] The amendments would also provide that no local rule imposing a requirement of form may be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement. [FN170] Finally, the rules would prohibit a court from imposing sanctions or other disadvantages for noncompliance with any requirement not set forth in federal law, federal rule, or local court rule, unless the alleged violator has been furnished with actual notice of the requirement in the particular case. [FN171]

The Civil Justice Reform Act of 1990 has been seen as an even greater threat to uniformity of federal practice. [FN172] The Act encourages each court to experiment and innovate procedurally, taking into account the assessments and recommendations of an advisory group of local lawyers and litigants. [FN173] It requires the courts to consider six case management "principles and guidelines" prescribed in the statute and authorizes them to include in their plan an additional five "techniques" of litigation management and cost and delay reduction. [FN174] The principles, guidelines, and techniques set forth in the Act, if adopted by a district court, have been claimed to supersede certain provisions of the Federal Rules of Civil Procedure. [FN175]

Some commentators argue that the Civil Justice Reform Act has resulted in much greater "balkanization" [FN176] of civil practice and procedure among the ninety-four district courts. In addition, the December 1, 1992 amendments to Federal Rule of Civil Procedure 26,dealing *1690 with pretrial disclosure and discovery, authorize the district courts individually to "opt out" of its provisions, thereby adding further variations to practice among the district courts. [FN177]

The Civil Justice Reform Act, however, contemplates a possible return to greater national uniformity following a review of the results of its mandated pilot programs. The Judicial Conference will consider the results of a comprehensive empirical study assessing the extent to which costs and delays will have been reduced as a result of the Act's pilot programs and experimentation. [FN178] The Conference must submit a report to Congress by December 31, 1996, recommending whether the Act's principles and guidelines should be made mandatory and incorporated in the federal rules. The Conference is further required to "initiate" appropriate changes to the federal rules to implement any changes recommended. [FN179]

Can greater national uniformity in federal practice and procedure be achieved? Probably so -- but not before the period of experimentation and evaluation required by the Civil Justice Reform Act has been concluded. *The Proposed Long Range Plan for the Federal Courts* recognizes that some local rules are appropriate to account for differing local conditions and to allow experimentation with new procedures. [FN180] It declares, however, that the long term emphasis of the courts should be on promoting nationally uniform rules of practice and procedure. [FN181] To this end, the Plan calls for the Judicial Conference and the circuit

judicial councils to exercise their statutory authority [FN182] to review local rules and reduce the number of *1691 local rules and standing orders. [FN183]

## CONCLUSION

The organizational structure and the procedural approach of the rulemaking process are largely accepted as fundamentally sound by Congress, the bench, and the bar. Nevertheless, specific procedural aspects of the process have been criticized in recent years. In response, the process has been reexamined and periodically renewed as part of: (1) the Judicial Conference's "fresh look" at the process in the 1980s; (2) the five-year review of rulemaking by Congress that culminated in the 1988 amendments to the Rules Enabling Act; and (3) the judiciary's ongoing long range planning efforts.

Enormous progress has been made toward opening the rulemaking process and to stimulating participation by the bench, bar, academia, and the public. All activities of the rules committees are documented and readily accessible. Several important opportunities and challenges, however, remain to be addressed by the rules committees. The most common complaints are that the rules are not as simple, well written, and predictable as they once were and that federal practice is far less uniform than it should be. Moreover, Congress on occasion does not adhere to the time-tested and orderly process established by the Rules Enabling Act.

The newly approved *Long Range Plan for the Federal Courts* recognizes these problems and calls upon the judiciary to place greater emphasis on adopting rules that promote simplicity in procedure, fairness in administration, and the just, speedy, and inexpensive determination of litigation. It also calls for adherence to the Rules Enabling Act process, greater uniformity in federal practice, fewer local rules, and greater participation by the bar in the rulemaking process. The recommendations of the *Plan*, together with ongoing scrutiny by the bench, bar, academia, Congress, and the public, will ensure the continuing renewal of the federal rulemaking process.

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[FN1]. 28 U.S.C. s 331 (1988).

[FN2]. Rules Enabling Act: Hearings on H.R. 4144 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on the Judiciary, 98th Cong., 1st & 2d Sess. 12 (1983 & 1984) [hereinafter 1983-84 Hearings] (statement of Judge Edward Thaxter Gignoux, Judicial Conference of the United States). The success of the Federal Rules of Civil Procedure has been described as "quite phenomenal." Charles A. Wright, Law of Federal Courts s 62, at 429 (5th ed. 1994); see also Geoffrey C. Hazard, Jr., Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure, 137 U. Pa. L. Rev. 2237, 2237 (1989) (describing Rules as "a major triumph of law reform"); Jack B. Weinstein, After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?, 137 U. Pa. L. Rev. 1901, 1905-07 (1989) (describing Rules as a "great success" and cautioning against utilizing Rules to erect barriers to courts).

[FN3]. Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure , s 1005 (2d ed. 1987). See, e.g., H.R. Rep. No. 889, 100th Cong., 2d Sess. 27 (1988); Howard Lesnick, The Federal Rule-Making Process: A Time for Re-examination, 61 A.B.A. J. 579, 579 (1975).

[FN4]. The term "federal rules" is used to collectively describe the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, the Federal Rules of Bankruptcy Procedure, the Federal Rules of Appellate Procedure, the Federal Rules of Evidence, the Rules Governing Section 2254 Cases in the United States District Courts, and the Rules Governing Proceedings in the United States District Courts Under Section 2255 of Title 28, United States Code.

[FN5]. Committee on Long Range Planning, Judicial Conference of the U.S., Proposed Long Range Plan for the Federal Courts recommendation 30, at 54 (2d prtg. 1995) [hereinafter 1995 Proposed Long Range Plan ]; see also infra note 7.

[FN6]. 1995 Proposed Long Range Plan , supra note 5, at 54; see also infra note 7.

[FN7]. 60 Fed. Reg. 30,317 (1995). The Judicial Conference's Long Range

Planning Committee prepared the Plan following consultation with the other Conference committees, wide distribution within and outside the judiciary, and public comments and hearings.

[FN8]. See, e.g., Winifred R. Brown, Federal Judicial Ctr., Federal Rulemaking: Problems and Possibilities (1981); Warren E. Burger, The State of the Federal Judiciary, 1979, 65 A.B.A. J. 358, 360 (1979); Symposium: The Rule-Making Function and the Judicial Conference of the United States, 21 F.R.D. 117 (1957) [hereinafter Symposium].

[FN9]. See 1995 Proposed Long Range Plan , supra note 5, at 54.

[FN10]. See, e.g., Wright & Miller , supra note 3, s 1001; see generally Joseph R. Biden, Jr., Congress and the Courts: Our Mutual Obligation, 46 Stan. L. Rev. 1285 (1994); Stephen B. Burbank, The Rules Enabling Act of 1934, 130 U. Pa. L. Rev. 1015 (1982); A. Leo Levin & Anthony G. Amsterdam, Legislative Control over Judicial Rule-Making: A Problem in Constitutional Revision, 107 U. Pa. L. Rev. 291 (1958); Linda S. Mullenix, The Counter- Reformation in Procedural Justice, 77 Minn. L. Rev. 375 (1992) [hereinafter Mullenix, Counter-Reformation]; Linda S. Mullenix, Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers, 77 Minn. L. Rev. 1283 (1993); Roscoe Pound, The Rule-Making Power of the Courts, 12 A.B.A. J. 599 (1926); John H. Wigmore, All Legislative Rules for Judiciary Procedure Are Void Constitutionally, 23 Ill. L. Rev. 276 (1928).
The Supreme Court recognizes the ultimate power of Congress to regulate the practice and procedure of federal courts and has declared that Congress may exercise that power by delegating it to the judiciary to make rules not inconsistent with the Constitution or federal statutes. See Hanna v. Plumer, 380 U.S. 460, 472-74 (1965); Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941).
Judge Weinstein points out that rulemaking falls within an area where activities of the legislative and judicial branches merge and that historically there has been a "practical accommodation" between the two branches. Jack B. Weinstein, Reform of Federal Court Rulemaking Procedures, 76 Colum. L. Rev. 905, 916, 922 (1976). Judge Weinstein's law review article is an abbreviated version of his book. See Jack B. Weinstein, Reform of Court Rule-Making Procedures (1977).

[FN11]. Act of June 19, 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. ss 331,2071-77 (1988 & Supp. V 1993)); see also Hanna, 380 U.S. at 472-74.

[FN12]. 28 U.S.C. s 331 (1988 & Supp. V 1993). While the 1934 Act applied

explicitly only to civil actions at law, the Court had long-standing rulemaking authority over equity and admiralty practice. See, e.g., Act of May 8, 1792, ch. XXXVI, 1 Stat. 275.

[FN13]. Order of June 3, 1935, Appointment of Committee to Draft Unified System of Equity and Law Rules, 295 U.S. 774, 774-75 (1935) (ordering committee "to prepare and submit to the Court a draft of a unified system of rules").

[FN14]. Final Report of the Advisory Committee on Rules for Civil Procedure , at V (Nov. 4, 1937).

[FN15]. Fed. R. Civ. P. 86(a).

[FN16]. Act of June 29, 1940, ch. 445, 54 Stat. 688. This Act was superseded by the Rules Enabling Act amendments of 1988 and is now incorporated in 28 U.S.C. s 2072(a) (1988). The Court had been given authority in 1933 to prescribe rules for criminal proceedings after verdict. Act of Feb. 24, 1933, ch. 119, 47 Stat. 904.

[FN17]. Report of the Advisory Committee on Federal Rules of Criminal Procedure (1944).

[FN18]. Fed. R. Crim. P. 59.

[FN19]. Act of July 11, 1958, Pub. L. No. 85-513, 72 Stat. 356 (codified at 28 U.S.C. s 331 (1988 & Supp. V 1993)).

[FN20]. Id. s 331.

[FN21]. 28 U.S.C. ss 2072, 2073.

[FN22]. Judicial Conference of the U.S. , Reports of the Proceedings of the Judicial Conference of the United States 6-7 (1958).

[FN23]. Id.; see also Albert B. Maris, Federal Procedural Rule-Making: The Program of the Judicial Conference, 47 A.B.A. J. 772, 772 (1961).

[FN24]. 383 U.S. 1029 (1966).

[FN25]. 389 U.S. 1063 (1968).

[FN26]. 411 U.S. 989 (1973). Statutory authority to promulgate bankruptcy rules was provided in 1964. Act of Oct. 3, 1964, Pub. L. No. 88- 623, s 1, 78 Stat. 1001 (codified as amended at 28 U.S.C. s 2075 (1988)).

[FN27]. Act of Sept. 28, 1976, Pub. L. No. 94-426, s 1, 90 Stat. 1334 (codified as amended at 28 U.S.C. s 2254, 2255 (1988 & Supp. V 1993)).

[FN28]. Fed. R. Crim. P. 58. This rule was added in 1990 and essentially restated the prior misdemeanor rules.

[FN29]. Between 1937 and 1972, the Supreme Court transmitted new rules or rules amendments to Congress on 14 occasions.

[FN30]. Order of Nov. 20, 1972, 56 F.R.D. 183, 184 (S. Ct. 1972).

[FN31]. See H.R. Rep. No. 422, 99th Cong., 1st Sess., 12-14, 20-21 (1985); Dissent of Justice Douglas to submission of the proposed Federal Rules of Evidence, 409 U.S. 1132 (1973); see also Charles A. Wright, Book Review of Jack B. Weinstein, Reform of Court Rule-Making Procedures, 9 St. Mary's L.J. 652, 653-54 (1978) [hereinafter Wright, Book Review].

[FN32]. Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926 (codified at 40 U.S.C. s 472 (1988)).

[FN33]. See Fed. R. Evid. 501.

[FN34]. 28 U.S.C. s 2074(b) (1988).

[FN35]. Id.

[FN36]. A list of the instances of congressional intervention is set forth in H.R. Rep. No. 422, supra note 31, at 8-9. Most recently, in 1994, Congress took the unprecedented step of enacting revised Federal Rule of Evidence 412 that had been approved by the Judicial Conference, enacting portions of the Conference proposal that had been withheld by the Supreme Court. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, s 40141, 108 Stat. 1796, 1918 (codified in scattered sections of 42 U.S.C.).

[FN37]. See Weinstein , supra note 10, at 316-17; Lesnick, supra note 3, at 580-81.

[FN38]. William L. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A. J . 1203, 1207 (1975).

[FN39]. Burger, supra note 8, at 360.

[FN40]. Id. The functions of the Federal Judicial Center are set forth generally at 28 U.S.C. s 620.

[FN41]. See Brown , supra note 8.

[FN42]. See Brown , supra note 8.

[FN43]. See Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983).

[FN44]. See, e.g., H.R. Rep. No. 889, 100th Cong., 2d Sess. 27 (1988) (describing subcommittee's review of rulemaking process from 1983 to 1988).

[FN45]. See 1983-84 Hearings, supra note 2; Rules Enabling Act of 1985: Hearings on H.R. 2633 and H.R. 3550 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 99th Cong., 1st Sess. (1985) [hereinafter 1985 Hearings].

[FN46]. See H.R. Rep. No. 889, supra note 44, at 3-4. Congress eventually enacted the bill. See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642, 4649 (1988) (codified as amended at 28 U.S.C. ss 2071-2075 (1988 & Supp. V 1993)).

[FN47]. 28 U.S.C. s 2073(a)(2)(b); see also H.R. Rep. No. 889, supra note 44, at 3.

[FN48]. See H.R. Rep. No. 889, supra note 44, at 3.

[FN49]. 1985 Hearings, supra note 45, at 248 (statement of Judge Edward Thaxter Gignoux).

[FN50]. See 28 U.S.C. s 2073(a)(2).

[FN51]. Id. s 2072(b).

[FN52]. See H.R. Rep. No. 889, supra note 44, at 28.

[FN53]. 462 U.S. 919 (1983).

[FN54]. See H.R. Rep. No. 889, supra note 44, at 28; see also H.R. Rep. No. 422, supra note 31, at 16-17. In Chadha, the Court held that the one-house veto provision of the Immigration and Naturalization Act, under which either the House or the Senate could by resolution invalidate an executive branch decision to allow a deportable alien to remain in the United States, was unconstitutional because Article I of the Constitution requires all legislation to be passed by both the House and the Senate and either signed by the President or repassed by both the House and the Senate over the President's veto. See INS v. Chadha, 462 U.S. 919, 956-59 (1983).

[FN55]. See H.R. Rep. No. 889, supra note 44, at 3.

[FN56]. Judicial Improvements and Access to Justice Act, Pub. L. No. 100- 702, 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. ss 2071- 2075 (1988 & Supp. V 1993)).

[FN57]. See H.R. Rep. No. 422, supra note 31, at 14-15, 17; see also Daniel R. Coquillette et al., The Role of Local Rules, 75 A.B.A. J. 62, 64- 65 (1989); Stephen N. Subrin, Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns, 137 U. Pa. L. Rev. 1999, 2018-26 (1989).

[FN58]. Fed. R. Civ. P. 83; Fed. R. Crim. P. 57 .

[FN59]. See H.R. Rep. No. 889, supra note 44, at 28-29.

[FN60]. 28 U.S.C. s 2071(b) (1988).

[FN61]. Id. s 2077(b) (Supp. V 1993).

[FN62]. Id. ss 331, 2071(c) (1988).

[FN63]. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. ss 471-482 (Supp. V 1993)). The impetus for the Rules Enabling Act amendments of 1988 came from the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. See supra notes 44-56 and accompanying text. The driving force behind the Civil Justice Reform Act was the Senate Judiciary Committee and its chairman, Senator Joseph R. Biden, Jr. See, e.g., 136 Cong. Rec. S. 407, S. 414 (daily ed. Jan. 25, 1990)

(statement of Sen. Biden).

[FN64]. 28 U.S.C. ss 471, 472 (Supp. V 1993); see Part III, infra; see also Carl Tobias, Improving the 1988 and 1990 Judicial Improvements Acts, 46 Stan. L. Rev. 1589 (1994) (discussing inconsistencies between 1988 and 1990 statutes).

[FN65]. The 1988 amendments to the Rules Enabling Act codified the committee structure established by the Conference in 1958. See 28 U.S.C. s 2073(a), (b) (1988).

[FN66]. Id. s 331.

[FN67]. The Advisory Committee on the Rules of Evidence was discharged in 1975 and reestablished in 1993. Judicial Conference of the U.S., Reports of the Proceedings of the Judicial Conference of the United States 80 (1992) [[hereinafter 1992 Judicial Conference Reports ].

[FN68]. See H.R. Rep. No. 422, supra note 31, at 24; American Bar Association, Policy on the Rules Enabling Act, reprinted in 1983-84 Hearings, supra note 2, at 46, 51; Lesnick, supra note 3, at 581.

[FN69]. The American Bar Association, for example, has proposed that "practicing lawyers" comprise a majority of the rules committees. Resolution of the ABA House of Delegates, Aug. 9-10, 1994.

[FN70]. See, e.g., 1985 Hearings, supra note 45, at 64 (statement of the American Bar Association).

[FN71]. Judicial Conference of the U.S., Reports of Proceedings of the Judicial Conference of the United States 60 (1987) [hereinafter 1987 Judicial Conference Reports ] (establishing current membership policies). It has been suggested that the terms of office of committee chairs and members, once viewed as too long in the rules context, now might not be long enough. See 1995 Proposed Long Range Plan , supra note 5, recommendation 46, at 73.

[FN72]. See 1987 Judicial Conference Reports , supra note 71, at 60.

[FN73]. See 1987 Judicial Conference Reports , supra note 71, at 60.

[FN74]. See Lesnick, supra note 3, at 580; see also 1985 Hearings, supra note 45, at 57, 70-71 (statement of Professor Paul F. Rothstein, American Bar

Association); 1983-84 Hearings, supra note 2, at 87 (statement of Rep. Kastenmeier); id. at 43-44 (statement of James F. Holderman, American Bar Association).

[FN75]. See Rules of Civil Procedure, Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, 98 F.R.D. 337, 347 (1983). The statement, however, did not include a requirement of open committee meetings.

[FN76]. See 28 U.S.C. s 2073(a)(1) (1988).

[FN77]. Administrative Office of the U.S. Courts, The Federal Rules of Practice and Procedure: A Summary for Bench and Bar (1993).

[FN78]. See 1983-84 Hearings, supra note 2, at 46 (statement of the American Bar Association's Criminal Justice Section); id. at 36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group).

[FN79]. See 1985 Hearings, supra note 45, at 47 (statement of Professor Paul F. Rothstein, American Bar Association).

[FN80]. Congress enacted the new evidence rules as part of the Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935.

[FN81]. For example, the Advisory Committee on Criminal Rules deferred action on proposed amendments to Criminal Rules 10 and 43 in response to generally negative written comments and public testimony. The proposed amendments would have permitted the use of video conferencing in arraignments and in other pretrial sessions when the accused was not present in the courtroom. H.R. Doc. No. 65, 104th Cong., 1st Sess. 15-16 (1995).

[FN82]. See Lesnick, supra note 3, at 580.

[FN83]. See Wright, supra note 31, at 656.

[FN84]. See, e.g., 1983-84 Hearings, supra note 2, at 44 (statement of James F. Holderman, American Bar Association); Lesnick, supra note 3, at 580.

[FN85]. See, e.g., 1983-84 Hearings, supra note 2, at 34-36 (statement of Alan B. Morrison, Director, Public Citizen, Litigation Group) (describing process as "secretive"); id. at 125-28 (statement of Richard M. Schmidt, Jr., General

Counsel, American Society of Newspaper Editors).

[FN86]. 28 U.S.C. s 2073(c) (1988). The authority has been exercised rarely.

[FN87]. The April 1994 meeting of the Advisory Committee on Criminal Rules, which included a discussion of cameras in the courtroom, was televised on C-SPAN.

[FN88]. 1983-84 Hearings, supra note 2, at 34, 35 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group).

[FN89]. See Brown, supra note 8, at 23, 27; cf. 1983-84 Hearings, supra note 2, at 36-39 (statement of Alan B. Morrison, Director Public Citizen Litigation Group) (noting that filed comments were not widely read).

[FN90]. This report is commonly known as the "Gap" report. See supra Part II.D (discussing process of "Gap" report).

[FN91]. See 28 U.S.C. ss 2074, 2075 (1988 & Supp. V 1993).

[FN92]. See id. The effective date of the Federal Rules of Bankruptcy Procedure (and other procedural requirements) were made consistent with the other federal rules by the Bankruptcy Reform Act of 1994. See Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, s 104(e), (f), 1994 U.S.C.C.A.N. (108 Stat.) 4106. Previously, the effective date had been 90 days after the Chief Justice reported the changes to Congress, i.e., about August 1. See 28 U.S.C. s 2075 (1988).

[FN93]. See 28 U.S.C. ss 2074, 2075 (1988 & Supp. V 1993).

[FN94]. See Weinstein , supra note 10, at 96-104, 147-49; see also Amendments to Rules of Civil Procedure for the U.S. District Courts, 374 U.S. 861, 869-70 (1963) (statement of Justices Black and Douglas) (opposing submission of proposed amendments to the Federal Rules of Civil Procedure); Reporter's Note on Order of Nov. 20, 1972, 409 U.S. 1132, 1133 (1963) (Douglas, J., dissenting) (arguing that Court is "mere conduit" to Congress and its approval of rules amendments is only perfunctory).

[FN95]. H.R. 4144, 98th Cong., 1st Sess. (1983).

[FN96]. Letter from Warren E. Burger, Chief Justice of the United States, to Chairman Robert W. Kastenmeier, reprinted in 1983-84 Hearings, supra note 2,

at 195. The Conference of Chief Justices of the States also opposed elimination of a role for the Supreme Court, arguing that "the rule-making power is an inherent power necessary to the functioning of the judicial branch of government and ... should be vested only in the Supreme Court itself." Letter of March 6, 1984 from Connecticut Chief Justice John A. Speziale to Robert W. Chairman Kastenmeier, reprinted in 1983-84 Hearings, supra note 2, at 231.

[FN97]. In voting to prescribe the 1993 amendments to the Federal Rules of Civil Procedure, Justice White stated that the Court should defer to the Judicial Conference and its committees if they have a rational basis for the proposed amendments to the rules. Justice White saw the Court's role as limited to transmitting the Judicial Conference's recommendations without change and without careful study, as long as the rules committee system has acted with integrity. See Communication from the Chief Justice, the Supreme Court of the United States, Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. s 2072, 113 S. Ct. 476, 575, 578-79 (1992) [hereinafter Amendments to the Federal Rules of Civil Procedure] (statement of Justice White).

[FN98]. Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States to the U.S. Congress, 500 U.S. 964 (1991) (transmitting amendments to Federal Rules of Criminal Procedure).

[FN99]. Amendments to the Federal Rules of Civil Procedure, supra note 97, at 478 (granting order approving amendments to Federal Rules of Civil Procedure).

[FN100]. Amendments to the Federal Rules of Civil Procedure, supra note 97, at 581-87 (Scalia, Thomas, Souter, J.J., dissenting).

[FN101]. Communication from the Chief Justice, the Supreme Court of the United States, Transmitting an Amendment to the Federal Rules of Evidence as Adopted by the Court, Pursuant to 28 U.S.C. s 2076, 114 S. Ct. 682, 684- 85 (1994) [hereinafter Communication from the Chief Justice] (noting in letter to John F. Gerry, Chair of the Executive Committee of the Judicial Conference, that Court withheld Rule 412); see infra notes 148-58 and accompanying text.

[FN102]. See Letter of Transmittal from William H. Rehnquist, Chief Justice of the United States, to Thomas S. Foley, Speaker of the U.S. House of Representatives (Apr. 22, 1993), reprinted in Amendments to the Federal Rules of Civil Procedure, supra note 97, at 477.

[FN103]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30, at 54.

[FN104]. As a result of the subcommittee's efforts, Rule 9036 of the Federal Rules of Bankruptcy Procedure took effect on August 1, 1993, authorizing the bankruptcy courts, or their designees, to send required notices by electronic means, rather than by mail, with the consent of the recipients. Fed. R. Bankr. P. 9036. The rule is designed to expedite cases and reduce costs to litigants and the courts by allowing creditors to receive information on meetings of creditors, discharges, and other events by electronic transmission on their own computer terminals. Id. advisory committee's note.

[FN105]. See Fed. R. App. P. 25(a)(2)(D) (proposed amendments); Fed. R. Bankr. P. 5005(a)(2) (proposed amendments); Fed.R.Civ.P. 5(e) (proposed amendments), in Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., Request for Comment on Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure, 156 F.R.D. 339, 15, 113 (1994) [hereinafter Proposed Amendments].

[FN106]. See 28 U.S.C. s 2074(a) (1988 & Supp. V 1993).

[FN107]. Professor Hazard has suggested that most members of the bar and the public have little that is worth saying about procedural rules and do not take advantage of the abundant opportunity they have to provide input. Geoffrey C. Hazard, Jr., Undemocratic Legislation, 87 Yale L.J. 1284, 1291 (1978) (reviewing Weinstein , supra note 10).

[FN108]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 54-55.

[FN109]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 54-55. In proposing the 1958 legislation that required the Judicial Conference to conduct a "continuous study of the operation and effect of the [federal] rules," it was contemplated that the bar would have an active and important part in formulating the rules. "[E]very member of the bar [[should have] an ample opportunity to set forth his views, have them debated, and have them decided." Symposium, supra note 8, at 125 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit). "What ... lawyers expect and have a right to expect is an opportunity to state [their] view and assurances they will be given consideration." Id. at 120 (remarks of Thomas Scanlon, President of the

Seventh Circuit Bar Association, former Chairman of the Committee on Civil Procedure of the Indiana Bar Association); see also id. at 118 (statement of Chief Justice Earl Warren) (agreeing with Chief Judge Biggs that bar will have active and important part in formulation of rules).

[FN110]. 28 U.S.C. s 331 (1988 & Supp. V 1993).

[FN111]. See Symposium, supra note 8, at 123-24 (statement of Chief Judge John Biggs, Jr., former Chief Judge of the Third Circuit); id. at 131-32 (statement of Professor James W. Moore). The vision of activist committees with permanent monitoring capabilities, however, never came to pass. In fact, for many years Congress included a strict limit on funding for the rules committees in the judiciary's annual appropriations.

[FN112]. Amendments to the Federal Rules of Civil Procedure, supra note 97, at 581, 586-87 (Scalia, Thomas, Souter, J.J., dissenting).

[FN113]. See Wright , supra note 2, at 435. Professor Wright noted that the criminal rules "have been amended so frequently that even scholars in the field find it difficult to follow the constant changes or to be certain what a particular rule provided at a particular time." Id. Likewise, he pointed out his difficulty in knowing what appellate rules were in effect at a given time, because four different sets of amendments to the Federal Rules of Appellate Procedure had recently been adopted or were proceeding to adoption. Charles A. Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev. Litig. 1, 9 (1994) [hereinafter Wright, Foreword].

[FN114]. Order Prescribing Amendments to the Federal Rules of Civil Procedure, 446 U.S. 995, 1000 (1980) (Powell, J., dissenting); see also Michael E. Tigar, Pretrial Case Management Under the Amended Rules: Too Many Words for a Good Idea, 14 Rev. Litig. 137, 138 (1994) (arguing that there has been such "tinkering and fiddling" with Federal Rules of Civil Procedure that rulemakers are defeating primary objective of a "just, speedy, and inexpensive determination of every action").

[FN115]. See John P. Frank, The Rules of Civil Procedure -- Agenda for Reform, 137 U. Pa. L. Rev. 1883, 1884-85 (1989).

[FN116]. See Stephen B. Burbank, Ignorance and Procedural Law Reform: A Call for a Moratorium, 59 Brook. L. Rev. 841 (1993).

[FN117]. See Frank, supra note 115, at 1884-85.

[FN118]. Congress, for example, enacted comprehensive bankruptcy reform legislation in 1984, 1986, and 1994, effecting both substantive and procedural changes, including establishment of a new court system, expansion of the U.S. trustee system, addition of Chapter 12 for family farmers, inclusion of numerous commercial and consumer bankruptcy changes, and addition of new procedural requirements. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333; Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3088; Bankruptcy Reform Act of 1994, supra note 92. The first two statutes required extensive changes in the Federal Rules of Bankruptcy Procedure, which took effect in 1987 and 1991. H.R. Doc. No. 54, 100th Cong., 1st Sess. 152 (1987); H.R. Doc. No. 80, 102d Cong., 1st Sess. 170 (1991). Rules changes to accommodate the 1994 legislation are presently under consideration by the Advisory Committee on Bankruptcy Rules.

[FN119]. Each set of federal rules was amended in the mid-1980s to eliminate gender-specific language.

[FN120]. For example, the Judicial Conference in September 1994 approved an unpublished amendment to Fed. R. Crim. P. 49(e) to delete a reference to an abrogated section of the U.S. Code. Judicial Conference of the U.S., Reports of the Proceedings of the Judicial Conference of the United States 67 (1994) [[hereinafter 1994 Judicial Conference Reports ].

[FN121]. See infra Part III.E (discussing relationship between judiciary and Congress).

[FN122]. To the contrary, in 1992 the Advisory Committee on Civil Rules proposed a general revision of the summary judgment rule, Fed. R. Civ. P. 56, that would have codified case law. The proposal, however, was rejected by the Judicial Conference. 1992 Judicial Conference Reports , supra note 67, at 82.

[FN123]. Proposed Amendments, supra note 105, at 484.

[FN124]. Proposed Amendments, supra note 105, at 484.

[FN125]. Proposed Amendments, supra note 105, at 484.

[FN126]. Bankruptcy Reform Act of 1994, supra note 92.

[FN127]. See Common Sense Legal Reform Act, H.R. 10, 104th Cong., 1st Sess. (1995); Taking Back Our Streets Act, H.R. 3, 104th Cong., 1st Sess. (1995).

[FN128]. The 1993 amendments to the Federal Rules of Civil Procedure, for example, were criticized for being promulgated without awaiting the results of the empirical studies carried out under the Civil Justice Reform Act of 1990. See Amendments to the Federal Rules of Civil Procedure, supra note 97, at 585-86 (Scalia, Thomas, Souter, J.J., dissenting); see also Burbank, supra note 116, at 844-46; Linda S. Mullenix, Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking, 46 Stan. L. Rev. 1393, 1396 (1994).

[FN129]. See Elizabeth C. Wiggins et al., The F.J.C. Study of Rule 11, F.J.C. Directions 3 (Nov. 1991) (summarizing results of three separate analyses of Rule 11 activity in cases filed in five federal district courts); see also Fed. R. Civ. P. 11 advisory committee's note 1993 (listing various empirical studies that committee considered).

[FN130]. Fed. R. Crim. P. 53. The advisory committee and the Standing Committee proposed an amendment to Fed. R. Crim. P. 53 that would have removed the rule's absolute prohibition on cameras in the courtroom in criminal cases, but the proposal was rejected by the Judicial Conference. 1994 Judicial Conference Reports , supra note 120, at 67.

[FN131]. See Burbank, supra note 10, at 1042-98; Lauren Robel, Fractured Procedure: The Civil Justice Reform Act of 1990, 46 Stan. L. Rev. 1447, 1449, 1483 (1994).

[FN132]. See Stephen B. Burbank, The Transformation of American Civil Procedure: The Example of Rule 11, 137 U. Pa. L. Rev. 1925, 1941 (1989) [[hereinafter Burbank, Transformation]; Frank, supra note 115, at 1884-85.

[FN133]. See generally Frank, supra note 115, at 1884-85.

[FN134]. See Judith Resnik, Failing Faith: Adjudicatory Procedure in Decline, 53 U. Chi. L. Rev. 494, 547 (1986) (arguing that trans-substantive premise of rules has proved "unworkable"); Mark C. Weber, The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases, 14 Rev. Litig. 113, 114-15 (1994) (suggesting need for special rules for small cases). Compare Paul D. Carrington,

Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Body of Non-Trans-Substantive Rules of Civil Procedure, 137 U. Pa. L. Rev. 2067, 2067 (1989) (arguing that rules must be applied trans-substantively, and that process is not competent to develop process of rules to be applicable to only one subject area) with Burbank, Transformation, supra note 132, at 1934-35 (arguing that legislative history does not support trans-substantive application of rules). The Civil Justice Reform Act requires the district courts to consider systems to separate civil cases into different "tracks," with different pretrial requirements based on the degree of a case's complexity, the time the case requires for trial preparation, and the resources it will require. 28 U.S.C. s 473(a) (Supp. V 1993).

[FN135]. Bryan A. Garner, Guidelines for Drafting and Editing Court Rules (forthcoming 1995).

[FN136]. See Fed. R. Bankr. P. 9006; Fed. R. Civ. P. 6; Fed. R. Crim. P. 45.

[FN137]. See Fed. R. App. P. 45; Fed. R. Bankr. P. 5001; Fed. R. Civ. P. 77; Fed. R. Crim. P. 56.

[FN138]. See Fed. R. App. P. 47; Fed. R. Bankr. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57.

[FN139]. Representative Kastenmeier suggested that "as a result of the shadowy nature of the rulemaking process, a number of proposed rules changes" were rejected by Congress in the 1970s and early 1980s. 1983-84 Hearings, supra note 2, at 154 (statement of Rep. Kastenmeir from Congressional Record of Oct. 18, 1983).

[FN140]. Professor Wright suggests, however, "that the rulemaking process worked far better when it was carried on in private." Wright, Foreword, supra note 113, at 2-3 n.6.

[FN141]. It has been suggested that some amendments pushed "the rulemaking process into controversial uncharted areas of law and this has been affecting the rights of litigants in a fashion more likely to create the kind of pressure from the public and the legal profession that generates congressional response." Robert N. Clinton, Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts, 63 Iowa L. Rev. 15, 52 (1977). Any amendments, for example, that are seen as affecting the balance between the prosecution and the defense in criminal cases are likely to generate a congressional response.

[FN142]. William L. Hungate, Changes in the Federal Rules of Criminal Procedure, 61 A.B.A. J. 1203, 1207 (1975). Hungate states:
The result of [the judiciary's rulemaking] procedure is that any change proposed by the Supreme Court has received careful consideration by a number of able people. This does not mean that we in Congress should forgo our responsibility to make an independent judgment on the merit of any proposal. It does mean, however, that we should accord a healthy respect to any amendment proposed by the Supreme Court.
Id. Judge Weinstein suggests that Congress should confine itself "to the review of substantial principles," rather than "details of rules." Weinstein , supra note 10, at 963.

[FN143]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 54.

[FN144]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 230101 (dealing with victim's right of allocution in sentencing).

[FN145]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

[FN146]. Legislation, however, has also been introduced as a service to particular constituents. Newly enacted Federal Rule of Bankruptcy Procedure 7004(h), for example, requires that service of process on an insured depository institution in certain matters be made by certified mail, rather than first class mail. Bankruptcy Reform Act of 1994, supra note 36, s 114. The judiciary objected to the amendment on the grounds that it violated the Rules Enabling Act, was unnecessary, and added expense to the administration of estates. 1994 Judicial Conference Reports , supra note 120, at 14.

[FN147]. Judge Weinstein has suggested that: "If a matter becomes important enough for detailed congressional intervention, legislation is probably desirable, with formal participation by both houses and the President." Weinstein , supra note 10, at 940. It has also been suggested that rulemakers should not propose changes, even in matters of procedure, if the changes will have important effects on substantive rights. Wright, Book Review, supra note 31, at 654.

[FN148]. Pub. L. No. 103-322, 108 Stat. 1796 (codified in scattered sections of 42 U.S.C.).

[FN149]. Violence Against Women Act, S. 15, 102d Cong., 1st Sess. s E (1991).

[FN150]. H.R. Doc. No. 250, 103d Cong., 2d Sess. 5 (1994).

[FN151]. Id.

[FN152]. Id.

[FN153]. Id.

[FN154]. Id.

[FN155]. The Supreme Court later withheld approval of the portion of the rule approved by the Judicial Conference that extended its reach to civil cases. Members of the Court were concerned that the proposed rule might violate the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right," and might encroach on the rights of defendants in sexual harassment cases because it might be inconsistent with Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). Letter from William H. Rehnquist, Chief Justice of the United States, to Judge John F. Gerry, Chairman of the Judicial Conference's Executive Committee (Apr. 29, 1994), reprinted in Communication from the Chief Justice, supra note 101, at 684.
Congressional conferees, however, restored the portion of the rule deleted by the Supreme Court, and Congress proceeded to enact revised Rule 412 in the form approved by the Judicial Conference. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 40141.

[FN156]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935 (dealing with admissibility of evidence of similar crimes in sex offense cases).

[FN157]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935.

[FN158]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36, s 320935. The evidence, civil, and criminal advisory committees met and considered the new rules during the 150-day statutory period. The Advisory Committee on the Rules of Evidence also solicited public comment on the rules, sending the rules to 900 evidence professors and 40 women's rights organizations. The overwhelming majority of judges, lawyers, law professors, and organizations

responding stated their opposition to the rules, principally on the grounds that they contained numerous drafting problems apparently not intended by their authors and would permit the admission of unfairly prejudicial evidence. The committee received 84 responses, representing 112 individuals and 16 organizations. Of the total responses, 100 individuals and organizations were opposed, 10 were supportive, and 18 either were neutral or recommended modifications. Law professors were opposed to the new rules by 56 to 3.
The Judicial Conference formally asked Congress to reconsider its decision to adopt the new rules, thereby delaying their effective date for another 150 days. Alternatively, the Conference recommended that Congress enact substitute language prepared by the Advisory Committee on the Rules of Evidence that would not change the substance of the congressional enactment but would clarify drafting ambiguities and eliminate possible constitutional infirmities. Judicial Conference of the U.S. , Report of the Judicial Conference of the United States on the Admission of Character Evidence in Certain Sexual Misconduct Cases (1995).

[FN159]. In August 1993, Senator Herb Kohl introduced S. 1404, the Sunshine in Litigation Act. The bill proposed amending Rule 26(c) of the Federal Rules of Civil Procedure to require that federal judges make particularized findings before issuing protective orders to ensure that public health and safety would not be jeopardized. S. 1404, 103d Cong, 1st Sess. (1993). No action was taken on Senator Kohl's legislation while the Advisory Committee on Civil Rules reviewed the results of a Federal Judicial Center study on protective orders. The advisory committee completed its work within the Rules Enabling Act process and transmitted proposed amendments to Rule 26(c) to the Judicial Conference for consideration at its March 1995 session. Judicial Conference of the U.S., 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 6-8 (1995). Assuming approval by the Conference, the amendments would be submitted to the Supreme Court with a recommendation that they be approved and transmitted to Congress.

[FN160]. Violent Crime Control and Law Enforcement Act of 1994, supra note 36 s 40153(c) A similar approach has been followed by Congress on other occasions, when it has asked the Judicial Conference to report on such matters as the future of the federal defender program. See Civil Justice Reform Act of 1990, Pub. L. No. 101-650, s 318, 104 Stat. 5089; Judicial Conference of the U.S., Report of the Judicial Conference of the United States on the Federal Defender Program (1993). Also, Congress has asked the Judicial Conference to report on the impact of drug activity on the federal courts. See Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, s 6159(b), 102 Stat. 4312;

Judicial Conference of the U.S. , Report of the Judicial Conference of the United States to the Congress -- Impact of Drug Related Criminal Activity on the Federal Judiciary (1989).

[FN161]. See H.R. Rep. No. 422 , supra note 31, at 14-15; Wright , supra note 2, at 431-32; John P. Frank, Local Rules, 137 U. Pa. L. Rev. 2059 (1989); Subrin, supra note 57, at 2018, 2021. But see Steven Flanders, Local Rules in Federal District Courts: Usurpation, Legislation, or Information?, 14 Loy. L.A. L. Rev. 213, 216 (1981) (arguing that local courts' rulemaking has been "well-reasoned and beneficial").

[FN162]. See Coquillette et al., supra note 57, at 62; Subrin, supra note 57, at 2018-26.

[FN163]. See H. Rep. No. 422 , supra note 31, at 15; Coquillette et al., supra note 57, at 62.

[FN164]. See supra Part I.

[FN165]. Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., Local Rules Project, Part I , at 1 (1988).

[FN166]. The Local Rules Project is under the direction of the Standing Committee's Reporter, Professor Daniel R. Coquillette of the Boston College Law School. The project director is Mary P. Squiers, Esquire.

[FN167]. See Fed. R. App. P. 28 advisory committee's note to 1993 amendment; Report of Advisory Committee on Appellate Rules to the Standing Committee, Dec. 1, 1992, 144 F.R.D. 459 (1992) [hereinafter Appellate Rules].

[FN168]. There is evidence, for example, that many courts are conducting thorough reviews of the content and numbering of their local rules. In addition, many courts and local rules committees have solicited assistance from the Local Rules Project's director, Mary P. Squiers, on how to re-number the rules and how to draft particular rules more precisely and coherently.

[FN169]. H.R. Doc. No. 67, 104th Cong., 1st Sess. 3 (1995) (Bankruptcy Rule 9029); H.R. Doc. No. 66, 104th Cong., 1st Sess. 5 (1995) (Appellate Rule 47); H.R. Doc. No. 65, 104th Cong., 1st Sess. 7 (1995) (Criminal Rule 57); H.R. Doc. No. 64, 104th Cong., 1st Sess. 6 (1995) (Civil Rule 83).

[FN170]. See supra note 169.

[FN171]. Fed. R. App. P. 47; Fed. R. Bankr. P. 9029; Fed. R. Civ. P. 83; Fed. R. Crim. P. 57. The amendments were approved by the Judicial Conference on September 24, 1994 and transmitted to the Supreme Court on November 2, 1994. See 1994 Judicial Conference Reports , supra note 120, at 66-67.

[FN172]. See Wright, supra note 2, at 436.

[FN173]. 28 U.S.C. ss 471-473, 478 (Supp. V 1993).

[FN174]. Id. s 473(a), (b). The Act emphasizes strong judicial case management efforts, separate procedural tracks for different categories of civil cases, and increased use of alternate dispute resolution techniques.

[FN175]. See S. Rep. No. 101-416, 101st Cong., 2d Sess. 10-11 (1990). Professor Mullenix argues that the Civil Justice Reform Act effectively repealed the Rules Enabling Act and rendered impotent the federal rulemaking process that has traditionally relied on careful study to achieve simple and uniform national rules. Mullenix, supra note 10, at 379-80. The contrary view is well expressed in Robel, supra note 131, at 1448, 1464-70, 1473.

[FN176]. See Carl Tobias, Civil Justice Reform and the Balkanization of Federal Civil Procedure, 24 Ariz. St. L.J. 1393 (1992); Article, Federal Discovery News , Dec. 1994, at 4-7.

[FN177]. Fed. R. Civ. P. 26; see Randall Samborn, Districts' Discovery Rules Differ, Nat'l L.J. , Nov. 14, 1994, at A1; Wright, Foreword, supra note 113, at 10-11.

[FN178]. The Administrative Office has contracted with the RAND Corporation to conduct the statutorily required study. See generally Terence Dunworth & James S. Kakalik, Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990, 46 Stan. L. Rev. 1301 (1994).

[FN179]. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, sec. 105, 104 Stat. 5089, amended by the Judicial Amendments Act of 1994, s 4, 1994 U.S.C.C.A.N (108 Stat.) 4343.

[FN180]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

[FN181]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.

[FN182]. 28 U.S.C. ss 331, 2071(c) (1988 & Supp. V 1995). In March 1994, the Judicial Conference was asked for the first time to exercise this statutory oversight authority when five state attorneys general requested that the Judicial Conference modify or abrogate Local Rule 22 of the Ninth Circuit -- regarding the processing of capital cases -- asserting that the local rule was inconsistent with federal law. The request has been considered by the Advisory Committee on Appellate Rules and the Standing Committee and is still pending. Judicial Conference of the U.S., 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 21-22 (Sept. 1994).

[FN183]. 1995 Proposed Long Range Plan , supra note 5, recommendation 30 commentary, at 55.