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An Open Letter on Reforming the Process of Revising the Federal Rules

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AN OPEN LETTER ON REFORMING THE PROCESS OF REVISING THE FEDERAL RULES

John B. Oakley*

September 7, 1993

Professor Thomas E. Baker
Chair, Subcommittee on Long Range Planning
Committee on Rules of Practice and Procedure
United States Judicial Conference

Dear Tom:

It is my intent in this letter to outline my personal, initial, and tentative reactions to your request for advice on how the Long Range Planning Subcommittee should proceed to implement the Standing Committee's charge that the subcommittee "undertake a thorough evaluation of the federal court rulemaking procedures," including a narrative description of existing procedures, a summary of the criticisms that have been expressed of those procedures, and a constructive assessment of those procedures, including proposals for their improvement.

What I write today I offer as the basis for dialog between us. Whether these preliminary thoughts are well informed or well focused enough to circulate to the other participants in the subcommittee's work is a judgment I leave to you. I am shooting from the hip, and I don't claim great skill or accuracy when firing without taking careful aim. But it seems that you have given me five targets at which to direct my attention: (1) the project in general, (2) the descriptive component, (3) the summary-of-criticism com-

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This letter was written at the request of Professor Thomas E. Baker, Professor of Law, Texas Tech University School of Law, and is reprinted here with his consent. The original text of the letter was sent to Professor Baker on September 7, 1993. This version incorporates minor editorial revisions and citation footnotes. As discussed more fully in the text of the letter, Professor Baker's subcommittee had been asked by the Standing Committee—the shorthand term for the Committee on Rules of Practice and Procedure—to review and evaluate the current federal rulemaking process. The subcommittee's report is scheduled to be considered by the Standing Committee at its June 1994 meeting.

ponent, (4) the norms that should figure in the evaluative part of the assessment component, and (5) potential reforms that you might recommend. I will blast away accordingly.

I. The Project in General

I agree completely and unreservedly that the time is right for the Standing Committee to undertake an internal review of its rulemaking procedures. It seems to me that we are on the brink of crisis, particularly with respect to the ever-changing Federal Rules of Civil Procedure, the body of rules that I know best. I perceive both endogenous and exogenous causes of stress.

From within, the rulemaking process seems to have become overused; undisciplined; unwieldy; unresponsive to the views of the bar and other key constituencies; unrepresentative even of opinion among the federal judiciary; and far removed in effect from the 1938 vision of a streamlined, uniform, non-substantive, consensus-of-educated-opinion set of procedures for getting to the merits of litigation with a minimum of fuss. Too many revisions representing the personal views of those with power over the rulemaking process are being promulgated too frequently, and with inadequate consensus, to the point where the Supreme Court has disclaimed institutional responsibility for the content of the 1993 amendments, submitting these amendments to Congress with one arm outstretched and the other arm held to its nose.[1]

From without, the process is breaking down from circumvention by Congress, which seems increasingly receptive to calls to bypass the rulemaking process by direct legislation. As this trend proceeds, and gains impetus from the strains identified above from within the rulemaking process, key constituencies and interest

1. *See* William H. Rehnquist, Communication from the Chief Justice of the United States Transmitting Amendments to the Federal Rules of Civil Procedure and Forms, Pursuant to 28 U.S.C. 2072, H.R. Doc. No. 74, 103d Cong., 1st Sess. (1993), *reprinted in* 113 S. Ct. 476 [hereinafter 1993 Amendments]. In his transmittal letter accompanying the submission of the amendments to the House of Representatives, Chief Justice Rehnquist declared: "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." *Id.*, 113 S. Ct. at 477. Justice White appended a separate statement noting that the Court had neither the time nor the recent trial court experience necessary to pass competent judgment on the merits of proposed changes to the federal rules. *Id.*, 113 S. Ct. at 575, 578. Justice White cautioned the bench, the bar, and Congress not to assume that the Court was duplicating the evaluative functions of the Standing Committee or the Judicial Conference when proposed changes come before the Court for transmittal. *Id.*, 113 S. Ct. at 580. Justice Scalia, joined by Justice Thomas and in part by Justice Souter, filed a statement dissenting from the Court's adoption of certain of the amendments. *Id.*, 113 S. Ct. at 581; *see also infra* note 4 (discussing Justice Scalia's dissenting statement).

groups will accelerate it by looking past the rulemaking process and bringing pressure to bear on Congress. There is a parallel here in the procedural arena to the trend of interests groups seeking to achieve their policy goals by asking Congress to federalize even more of the substantive law affecting day-to-day private legal relations.

In addition, the rulemaking process has been circumvented by congressional redelegation of rulemaking power from the Judicial Conference to local courts through Civil Justice Expense and Delay Reduction Plans that (apparently) may enact local rules of federal procedure that locally preempt the national rules.[2] This particular form of exogenous stress is reinforced by developments in the private market for legal services, where an accelerating excess of supply over demand is creating incentives for lawyers without a national practice to support the balkanization of federal procedure, since it creates a market for local counsel familiar with the idiosyncratic rules of practice in each of the ninety-four federal districts. This parochialization of practice is receiving added impetus from developments in the structures of the major national law firms, which by a wave of mergers and acquisitions are becoming "hub-and-spoke" networks with litigation departments in the major cities that send and receive cases to and from local branch offices in the headquarter cities of the various district courts.

In an amazing new twist, the Judicial Conference has recently endorsed the progressive deconstruction of the uniformity of the federal rules. Rather than hold in abeyance its untested but potentially promising program of mandatory disclosure of discoverable facts in the face of intense and well-reasoned opposition from the bar, the Conference has accepted the proposal of the Advisory Committee and the Standing Committee that opposition to mandatory disclosure be blunted by permitting individual districts to "opt out" from the most controversial provisions of proposed new Rule 26. Although discretion to override particular provisions of the federal rules has frequently and wisely been vested in individual judges in order to permit informed management of individual cases on their personal dockets, and occasionally the operation of the rules has been subject to systematic waiver by local rule, for

2. *See* Civil Justice Reform Act of 1990, § 103, 28 U.S.C.A. §§ 471-82 (1993); *see also* Carl Tobias, *Civil Justice Reform in the Fourth Circuit*, 50 WASH. & LEE L. REV. 89, 93 (1993) (noting that courts may be able to prescribe local rules inconsistent with federal rules); Carl Tobias, *Judicial Oversight of Civil Justice Reform*, 140 F.R.D. 49, 51-52 (1992) (observing that numerous federal districts have proposed modifications to their local rules that conflict with the federal rules). *See generally* Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L.J. 1393 (1992).

example, Rule 16(b), the "opt out" provisions of proposed new Rule 26 are likely to carry the systematic preemption of nationwide rules by local rules to new heights.[3] We are on the brink of an era of checkerboard federal procedure, with the ninety-four squares consisting of not just two colors, but a virtual rainbow of localized exceptions. The result would seem to be very much like federal practice under the Conformity Act. Judge Charles Clark must be spinning in his grave.

In short, the rulemaking process seems to have run amok and, in so doing, has lost sight of the reasons for adopting the federal rules in the first place. With Alicemarie Stotler newly appointed to chair the Standing Committee, it is an excellent time to take stock of recent history, current problems, and future reforms.

II. THE DESCRIPTIVE NARRATIVE

I think it is important that the descriptive narrative go beyond a handbook of nominal procedures and include a set of case studies of how proposed rule changes for the past decade have actually been generated. I would begin with the 1983 rule changes, since much of the bar felt sandbagged by the Rule 11 changes instituted in that year, and the reactive Rule 11 changes proposed for 1993 drew a stinging dissent from Justices Scalia and Thomas.[4] I would examine the entire intake mechanism, describing at least selectively the sorts of proposals for rule changes that were received, but not put into effect, and the reasoning behind the rejections. I would also examine the history of congressional intervention in the rulemaking process, perhaps carrying this part of the narrative back to the congressional battle over the privileges provisions of the Federal Rules of Evidence. In addition, I would describe the legislative history of the Civil Justice Reform Act of 1990 and its impact on the rulemaking process, including in this account the history of Senator Biden's fractious dealings with the Judicial Conference and its principal representative before the Senate Judicial Committee, Chief Judge Peckham (N.D. Cal.),[5] and the subsequent

3. Marcia Coyle & Marianne Lavelle, *Half of Districts Opt Out of New Civil Rules*, NAT'L L.J., Feb. 28, 1994, at 5; *District Courts Vary on Use of Prediscovery Amendments*, THIRD BRANCH (Administrative Office of the U.S. Cts., Wash., D.C.), Mar. 1994, at 9.

4. Justice Scalia, joined by Justice Thomas, observed that the proposed amendment would render Rule 11 "toothless," "eliminat[ing] a significant and necessary deterrent to frivolous litigation." 1993 AMENDMENTS, *supra* note 1, at 581.

5. When Senator Biden introduced the Civil Justice Reform Act, the reception from many judges was highly critical. Ann Pelham, *Judges Bristle at Biden's Civil Reform Plan; Package Ignores Criminal Caseload, Jurists Charge*, LEGAL TIMES, Mar. 5, 1990, at 1. One judge complained that the Senate Judiciary Committee was "out of touch with the real

spat between Senator Biden and Director Mecham of the Administrative Office of the United States Courts.[6]

III. THE SUMMARY OF CRITICISM

The summary of criticism should consist principally but not exclusively of a bibliographical compendium of the critical literature, including not only articles, reports, and commentary in the legal press, but also a survey of criticisms that may be found in interest group testimony before Congress and the related comments of key legislators. There are currently two formal rulemaking processes at work in parallel: the Judicial Conference through 28 U.S.C. § 2072 and local Civil Justice Expense and Delay Reduction Plans through 28 U.S.C. §§ 471-473. I would include both of these formal processes in the survey of criticism, along with the congressional practice of ad hoc rulemaking.

I would not rely solely on criticism that has been manifested in print. I would also hold hearings for the express purpose of allowing dissatisfied voices to be heard contemporaneously by the subcommittee as it carries out its mandate. I would try to get interested members of Congress and their staffs, as well as representatives of the Department of Justice and of state attorneys general, to join the various professional groups and interest groups who might respond to such a call for public criticism of the existing

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world." *Id.* Another said that upon reading the proposal, she "didn't know whether to laugh or cry." *Id.* Chief Judge Peckham expressed concern about "the detail of the bill." *Id.* At the Judicial Conference's request, the committee delayed action on the bill for four months to allow the judiciary to study the proposal and suggest changes. *Federal Courts: Sen. Biden Pledges More Federal Judges, Rejects Judiciary Criticism of Reform Bill*, DAILY REP. FOR EXECUTIVES (BNA), June 27, 1990, at A-8. The Judicial Conference eventually proposed its own voluntary 14-point plan. *Id.* Biden responded, "You judges seem to think that you make a recommendation, and that is the same as an order. . . . In this place, it is a recommendation. . . . Your recommendation is nothing more, nothing less than a recommendation." Ann Pelham, *Biden Takes Judiciary to Task*, LEGAL TIMES, July 2, 1990, at 7 [hereinafter Pelham, *Biden Takes Judiciary to Task*]. In its report on the Civil Justice Reform Act, the Senate Judiciary Committee, chaired by Senator Biden, complained that the Judicial Conference had misled the Judiciary Committee about the Conference's decision-making processes. S. REP. No. 416, 101st Cong., 2d Sess., pt. 1, at 4-5 (1990).

6. During an "entertaining" speech at the D.C. Circuit's 51st annual Judicial Conference (May 20-22, 1990), Director Mecham accused Senator Biden of using federal judgeship allotments to garner votes for the bill. Ann Pelham, *Circuit Conference: At Work and Play*, LEGAL TIMES, May 28, 1990, at 7. Mecham noted that Biden had short-changed Texas three federal judgeships that the Judicial Conference had requested, while guaranteeing that "[v]irtually every Republican on the Senate Judiciary Committee received an extra judgeship for his state." *Id.* Biden took personal offense to Mecham's comments and demanded an apology from the Judicial Conference. Pelham, *Biden Takes Judiciary to Task*, *supra* note 5. Mecham quickly sent Biden an apology averting a full airing of the dispute on the Senate floor. *Id.*

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process.

In holding such hearings, I would emphasize that the subject of inquiry is the rulemaking process: What you want to hear is criticism of that process, not of the particular rules that it has or has not put in place. This will not be an easy line to defend, since beyond the academy, dissatisfaction with a process is generally secondary to dissatisfaction with the outcome of the process. But by making process the focus up front, you can more easily cut off testimony that wanders too far into the merits of particular rules that the process has put forward.

IV. Evaluative Norms

Evaluation is inescapably normative. What norms should you bring to the evaluative part of your assessment of the current state of the rulemaking process? Obviously my suggested norms will reflect my sense of the need for the project in general. Five norms came to mind. The first three relate both to the rulemaking process and to the rules it has produced. The final two furnish additional criteria for evaluation of the rules that the process has produced.

I begin with my version of the familiar cluster of procedural norms specified in Rule 1—"just, speedy, and inexpensive determination,"[7] which I argue should be collapsed into the two competing norms of efficiency and fairness. After I defend this reasoning and elaborate the norms of efficiency and fairness that it produces, I propose consensus as an additional norm by which to judge both the rulemaking process and the rules that result from it. I conclude with two additional norms, simplicity and uniformity, that I would apply in evaluating the success of the rulemaking process by reference to the rules it has produced.

A. Rule 1 and the Tension Between Efficiency and Justice

Every year I begin my civil procedure course (which we teach at the beginning of the first year) by asking my new law students to bring to the first class (and turn in for my review) a statement of the ideal goals and structure of a system of civil procedure. Invariably, most students come up with a set of goals that looks remarkably like Rule 1's mantra of "just, speedy, and inexpensive

7. Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.").

determination of every action," despite the fact that virtually none of them have a prior familiarity with Rule 1. Clearly Rule 1's goals are rooted in common sense. But it doesn't take much philosophical acumen to point out that, as guidance to rulemakers, litigators, and judges, Rule 1 is not particularly helpful. It begs the most important questions.[8]

A close look at Rule 1 reveals that it specifies not three norms, but four. "Determination" is itself a norm. The goal of civil procedure is not merely to process disputes in a just, speedy, and inexpensive manner, but to determine them, which I interpret as producing a final and enforceable decision that puts an end to the matter. We can conceive of a system—indeed, we may be experiencing one—that is so preoccupied with reaching a just result in some actions that it loses the capability to process the whole flow of disputes within its jurisdiction, leading as a practical matter to a lack of access to the public system for civil dispute resolution for those whose cases are destined never to get to the front of the queue. Rule 1 seems to reject such a system of backlog and delay by calling not only for the "determination" of "every" action, but also for that determination to be "speedy" and "inexpensive." But that is not all that Rule 1 calls for. It demands also that determinations be "just."

Obviously, we could move cases through the system with unparalleled speed and lack of expense if we equipped judges with a two-faced coin. On one side of the coin we could put "plaintiff wins" and, on the other side, "defendant wins." If speedy and inexpensive determination were all that we cared about, we would decide civil disputes by a toss of such a coin. The sticking point, of course, is the concept of justice. Coin-tossing is a just way to settle one kind of dispute, where the disputants vie for something that neither has a right to and both can't have, because the randomness of the outcome rules out favoritism by the judge. Who wins or loses is determined by the fall of the coin, not the mind of the

8. The statutory rulemaking criteria of 28 U.S.C. § 331 are no less elaborative of the crucial problem of what counts as "just." The Judicial Conference is there instructed to recommend "[s]uch changes in and additions to [the federal rules] as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay." Other than by adding the norm of simplicity, these criteria merely echo those of Rule 1. Fairness and justice may not be the same thing, but § 331 gives no clue about how they might differ. Why would the administration of the federal rules be "unfair" unless it affected the justice of the determination of a case or increased the expense and time it took to reach a just determination? Eliminating "unjustifiable expense and delay" is indeed a desideratum independent of the justice or fairness of the outcome of a case, but it is merely the flip side of Rule 1's affirmative desiderata of "speedy and inexpensive" adjudication.

judge. That makes coin-tossing a good way to start a football game, but a bad way to resolve disputes about what rights the parties have under the civil law. Arguments about rights cannot be resolved without resort to reason, and the fall of a coin—at least since the demise of trial by ordeal—is not thought to reflect any rational evaluation of the merits of the parties' conflicting claims of right. Without a system of rights and at least a rough expectation that rights will be enforced in court, human society would collapse into unpredictable, unprincipled chaos. Every conflict of human interest not resolved by force would require a judicial coin toss, since there would be no standards for resolving conflicts except by the toss of a coin.

Once we start to think about what sort of dispute resolution process will produce a "just" determination in "every" action, it becomes apparent that "justice for all" is an abstract norm that includes, but is not limited to, speedy and inexpensive determinations. The process of determination must be speedy and inexpensive enough to make the dispute resolution system accessible to all who need it, but not so speedy and inexpensive that the process becomes blind to which party deserves to prevail. In the particular case, the just result will be one reasonably likely to be the right result. While the likelihood of reaching the right result might be maximized if society stood still and devoted all of its resources to the fullest possible examination of the facts and law pertaining to a particular dispute, such a perfectionistic approach to justice in the particular case is ruled out by the demand for justice, not just in one case, but in every case. To be faithful to Rule 1's goal of a "just . . . determination in every action," the procedures for decision in any given case must be speedy and inexpensive enough for the system to work overall, while still producing a substantial probability that the result reached in the particular case is the right result—the result that would be reached if indeed society devoted all of its resources to resolving just that one dispute.

It seems to me that procedural justice is, thus, Janus-faced and requires resolution of competing ideals that I shall call "efficiency" and "fairness." These may not be the best terms, and they are surely not entirely free of the normative ambiguity that I find within the norm of "justice" in the procedural context, but I think they will do.

By efficiency, I have in mind social efficiency. A civil procedure system that sought to maximize efficiency in this sense would be tuned to produce the highest output of right decisions per unit of social cost. Such an efficiency-maximized system would not be

insensitive to wrong decisions—probable rates of error would be factored into the calculation of net output, but it would tolerate whatever number of wrong decisions would lead to the highest number of right decisions per unit of social cost.

By fairness, I have in mind the claims of individual litigants to the right decision in their case. Fairness to individuals argues for procedural protections that guard against wrong decisions, even when that makes the process of decision more inefficient in the aggregate.

In sum, Rule 1's norm of "just" decisions calls for a compromise between arguments of fairness and arguments of efficiency in the application of the federal rules, but gives little guidance for how this compromise is to be effectuated. The rest of Rule 1 adds little. "Speedy" and "inexpensive" are two sides of the same coin, since in our economy time is money. The fact that Rule 1 speaks of a just determination in every case, not just the one before a judge at any given moment, is more a reminder of the tension between efficiency and fairness than a criterion for resolving it. It should therefore be no surprise that the history of federal civil procedure under the federal rules has featured a continuous but infrequently elaborated tension between the primacy of fairness (arguing for subordination of procedural rules in favor of reaching "the merits" of the parties' dispute under the substantive law and conditioning the finality of determination on liberal opportunities for amendment of pleadings, reconsideration by the trial court, and appellate review) and the primacy of efficiency (arguing for rigorous enforcement of procedural rules to narrow the range of the parties' dispute, to expedite decision, and to limit the opportunity for, and scope of, appellate review).

B. Norms Applicable Both to the Rulemaking Process and to the Rules that Process Produces

1. Efficiency. The application of the norm of efficiency to the rulemaking process requires an assessment of how costly it is to initiate consideration of a rule change and for that proposal to proceed to implementation by the Judicial Conference. That assessment is itself rather complicated, requiring, for instance, consideration of the social cost of the process in terms of how much more time the rulemakers would have spent adjudicating cases, representing clients, or teaching students and conducting research had they not been involved in the rulemaking process. But this assessment is further complicated because it is interactive with assessment of the efficiency of rules the process produces, since a con-

servative and time-consuming process of rulemaking may be less costly than fast-track rulemaking that taxes the litigation system with constant need for retraining and a high rate of error attributable to unfamiliarity with as-yet unconstrued new rules, unless it can be shown that the long-run efficiency gains of new rules are consistently high. The inefficiency of rapid changing of the rules might argue either for keeping the rulemaking process inefficient and thus resistant to change, or for adopting some form of staging process by which rule changes are limited, absent exceptional circumstances, to a prescribed schedule of once every so many years. Moreover, since the Judicial Conference does not have monopoly power in the rulemaking market, the relative efficiency of an inert or volatile rulemaking process within the Conference will be determined in part by the efficiency or inefficiency of the rules likely to be produced by direct congressional action, or by congressional delegation of local rulemaking power to individual district courts, should rulemaking by the Conference be too conservative.

2. Fairness. As applied to the rulemaking process, the norm of fairness calls not only for receptivity to proposals for change by those not vested with rulemaking power, but also for access to the process of implementing a proposed rule change by those whose interests most likely are to be affected by the change. How seriously is public comment encouraged and facilitated and is this a *pro forma* gesture, or is there evidence that adverse public comment makes a difference in the progression of a proposal into a rule change? As applied to the rules that the process produces, the norm of fairness requires evaluation of whether changes in the rules promote or retard the likelihood that individual cases will come to the right result, whether by adjudication or *pro tanto* by settlement, in relation to the efficiency gains or losses that result from such changes. Is the rulemaking system biased in favor of ratcheting up efficiency at the expense of fairness, or vice versa?

3. Consensus. As applied to the rulemaking process, the norm of consensus overlaps, but does not duplicate, the norm of fairness. If the process is sufficiently open to public input to be fairly representative of, or at least sensitive to, the interests affected, is the process genuinely constrained by concern for consensus in such changes in the rules as the process produces? Consensus should not be too strong a norm, since it favors the status quo, but it serves as a check against utopian reform by policymakers who are unduly detached from the arena of litigation to which the rules are directed.

C. Norms Applicable to the Rules Produced by the Rulemaking Process

1. Simplicity. This norm, statutorily specified in 28 U.S.C. § 331, serves the interests of both efficiency and fairness. Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and, hence, unfair application.

2. Uniformity. This norm is no longer uncontroversial. The intent of the rulemaking process set in place by the 1934 Rules Enabling Act was to achieve a system of federal civil procedure that was not only trans-substantive, but, with minor local variations, uniform in application in all federal district courts. In my view, geographical uniformity is more important than trans-substantive application of the federal rules, since deviations from trans-substantive uniformity can be provided for by express provisions and exceptions within the rules, but geographical disuniformity promotes forum-shopping, increases the risk of inadvertent mistake, and thereby increases both inefficiency and potential unfairness. Thus, I would apply this norm to determine whether the rules of litigation in federal court under the current rulemaking process remain essentially similar nationwide. In other words, is each district court's procedure sufficiently distinct that special aptitude in local procedure is essential to competent representation in that court? The greater the disuniformity in federal procedure, the greater the risk of unfairness in the application of local rules absent the inefficiency of costly inquiry into the idiosyncracies of local practice or the prophylactic measure of retention of local counsel.

V. Potential Reforms

I think it would be counterproductive for your subcommittee to undertake the contemplated assessment with a set of potential reforms already in mind. Although your report to the Standing Committee ought to specify such reforms as you think fit to remedy the problems you have identified, I would segregate the generation of that report into two phases, postponing any consideration of possible reforms until after the completion of the assessment phase.

As an outsider to the subcommittee's project, I don't think I'm under any such constraint to withhold recommendations for reform until the assessment of the status quo is completed. While I approach the topic of reform tentatively, and with an open mind to how my understanding of the existing rulemaking process might be revised in light of your assessment, I think it would be useful to

outline a few reforms that, on my present state of knowledge, seem worthy of discussion.

1. Makeup of the Advisory Committee or drafting committee. There needs to be far greater representation of the practicing bar, with attention paid to the nature of practice—private or public sector, plaintiff or defense—with experience across the spectrum of major fields of federal practice. There should be some academic membership by scholars who will bring breadth of technical expertise to the committee; some academics may have valuable litigative experience as well, but they should not be counted as representatives of the practicing bar. There should be a representative of the Attorney General, designated as such, who should also not be counted as a representative of the practicing bar. Among the judicial members, there should be diversity of background in pre-judicial legal experience. It is worth considering whether the American Bar Association ought to be able to designate its own representative to the committee.

2. Relationship of the Standing Committee or oversight committee to the drafting committee. I agree with Paul Carrington that drafting should be left to the drafting committee.[9] Proposed rules that are unacceptable as drafted should be referred by the oversight committee back to the drafting committee. There should be an extended period of public comment before the oversight committee considers proposals submitted to it by the drafting committee.

3. Role of the Supreme Court. I think the Supreme Court should remain the institution to which rulemaking power is delegated. The expectation should be that the Court will play only a limited supervisory function. The legitimating role of that function, however, is important to retain. The vesting of ultimate authority in the Supreme Court would be of especial importance if, as I propose below, new rules were to be sent to the Supreme Court only at specified intervals, such as every five or seven years,

9. *See* Memorandum from Paul D. Carrington, Chadwick Professor of Law, Duke University School of Law, to Thomas E. Baker, Chair, Subcommittee on Long-Range Planning (Jan. 20, 1993) (on file with the *Montana Law Review*). Professor Carrington served as the Reporter to the Standing Committee from 1985 to 1992. Subsequent to sending my letter to Professor Baker, I have moderated my opposition to drafting by the Standing Committee after correspondence on the subject with Professor Charles Alan Wright. I accept Professor Wright's contention that the Standing Committee should have an independent power to revise drafts of proposed amendments to the federal rules submitted to it by the drafting committees, provided (as Professor Wright agrees) that this power is exercised with restraint. In the normal course of events, any substantial dissatisfaction with the language proposed by a drafting committee should result in reference of the matter back to the drafting committee with instructions from the Standing Committee.

subject to exception only upon a Supreme Court finding of genuinely exigent circumstances or the need for merely technical correction of a drafting error in a rule already in place.

4. Structure of the oversight committee and the role of the Judicial Conference. I would consider transferring the role of the present Standing Committee to a newly constituted oversight committee set up outside the Judicial Conference. The composition of the Judicial Conference is quite odd for a body performing, with respect to the rulemaking process, a quasi-legislative task. The district judges who are members of the Conference are arguably representative of their colleagues within a particular circuit, but the chief judges of the circuits sit in the Conference only by virtue of their seniority. If we assume that the Supreme Court is likely to continue to accept rather uncritically such rules as are duly proposed to it, the power of proposal should be vested in a body specifically suited to the task.

For illustrative purposes, a tentative scheme for selecting the members of such an independent committee—let's call it the Federal Rules Committee—might look like this. The size of the committee would be determined by the number of circuits, presently thirteen. All members would be Article III judges in regular active service. The first eight members would be appointed by the Associate Justices of the Supreme Court, the Justices acting in order of seniority, subject to the constraint that each appointee must be from a circuit for which the appointing Justice is circuit justice. The remaining members (five under present conditions, more if additional circuits are created) would be appointed by the Chief Justice, subject to the constraints that no member of the committee may be from the same circuit as another member and that no more than nine members may be circuit judges. The Chief Justice would also designate the chair of the committee. Members would serve six-year terms, staggered as in the Senate, and would be replaced (or could, if eligible, be reappointed) at the earlier of the expiration of their terms, retirement or resignation from regular active service, or the swearing-in of a successor to the Justice who appointed them. (I have not addressed how a reassignment of circuit Justice responsibilities might affect membership.)

I would continue to leave the appointment of the Advisory Committees or drafting committees in the hands of the Chief Justice, subject as outlined above to specified quotas of non-judicial members designed to assure diversity of viewpoint.

5. Periodic rulemaking. I would limit proposed rule changes of an ordinary, evolutionary nature to a stipulated interval, such as

every five or seven years, while permitting mere technical corrections or emergency measures to be made whenever the Supreme Court deemed them truly necessary. If the ordinary interval for revisiting the rules were longer than five years, I would extend the terms of the members of my proposed Federal Rules Committee to the length of that interval plus one year.

Sincerely yours,

John B. Oakley