SUPREME COURT OF THE UNITED STATES

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

[April 22, 1993]

Statement of JUSTICE WHITE. 28 U. S. C. §2072 empowers the Supreme Court to prescribe general rules of practice and procedure and rules of evidence for cases in the federal courts, including proceedings before magistrates and courts of appeals.[1] But the Court does not itself draft and initially propose these rules. Section 2073 directs the Judicial Conference to prescribe the procedures for proposing the rules mentioned in §2072. The Conference is authorized to appoint committees to propose such rules. These rules advisory committees are to be made up of members of the professional bar and trial and appellate judges. The Conference is also to appoint a standing committee on rules of practice and evidence to review the recommendations of the advisory committees and to recommend to the Conference such rules and amendments to those rules "as may be necessary to maintain consistency and otherwise promote the interest of justice." §2073(b). Any rules approved by the Conference are transmitted to the Supreme Court, which in turn transmits any rules "prescribed" pursuant to §2072 to the Congress. Except as provided in §2074(b), such rules become effective at a specified time unless Congress otherwise provides.

The members of the advisory and standing committees are carefully named by THE CHIEF JUSTICE, and I am

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[1]Section 2075 vests a similar power in the Court with respect to rules for the bankruptcy courts.

quite sure that these experienced judges and lawyers take their work very seriously. It is also quite evident that neither the standing committee nor the Judicial Conference merely rubber stamps the proposals recommended to it. It is not at all rare that advisory committee proposals are returned to the originating committee for further study.

During my 31 years on the Court, the number of advisory committees has grown as necessitated by statutory changes. During that time, by my count at least, on some 64 occasions we have "prescribed" and transmitted to Congress a new set of rules or amendments to certain rules. Some of the transmissions have been minor, but many of them have been extensive. Over this time, Justices Black and Douglas, either together or separately, dissented 13 times on the ground that it was inappropriate for the Court to pass on the merits of the rules before it.[2] Aside from those two Justices, Justices Powell, Stewart and then-Justice REHNQUIST dissented on one occasion and JUSTICE O'CONNOR on another as to the substance of proposed rules. 446 U. S. 995, 997 (1980) (Powell, J., dissenting); 461 U. S. 1117, 1119 (1983) (O'CONNOR, J., dissenting). Only once in my memory did the Court refuse to transmit some of the rule changes proposed by the Judicial Conference. 500 U. S. ___ (1991).

That the Justices have hardly ever refused to transmit the rules submitted by the Judicial Conference and the fact that, aside from Justices Black and Douglas, it has been quite rare for any Justice to dissent from transmitting any such rule,

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[2]421 U. S. 1019, 1022 (1975) (Douglas, J., dissenting); 416 U. S. 1001, 1003 (1974) (Douglas, J., dissenting); 411 U. S. 989, 992 (1973) (Douglas, J., dissenting); 409 U. S. 1132 (1972) (Douglas, J., dissenting); 406 U. S. 979, 981 (1972) (Douglas, J., dissenting); 401 U. S. 1017, 1019 (1971) (Black and Douglas, JJ., dissenting); 400 U. S. 1029, 1031 (1971) (Black, J., with whom Douglas, J., joins, dissenting); 398 U. S. 977, 979 (1970) (Black and Douglas, JJ., dissenting); 395 U. S. 989, 990 (1969) (Black, J., not voting); 383 U. S. 1087, 1089 (1966) (Black, J., dissenting); *ibid*. (Douglas, J., dissenting); 383 U. S. 1029, 1032 (1966) (Black, J., dissenting); 374 U. S. 861, 865 (1963) (Black and Douglas, JJ., dissenting).

suggest that a sizable majority of the 21 Justices who sat during this period concluded that Congress intended them to have a rather limited role in the rulemaking process. The vast majority (including myself) obviously have not explicitly subscribed to the Black-Douglas view that many of the rules proposed dealt with substantive matters that the Constitution reserved to Congress and that in any event were prohibited by §2072's injunction against abridging, enlarging or modifying substantive rights.

Some of us, however, have silently shared Justice Black's and Justice Douglas' suggestion that the enabling statutes be amended

> "to place the responsibility upon the Judicial Conference rather than upon this Court. Since the statute was first enacted in 1934, 48 Stat. 1064, the Judicial Conference has been enlarged and improved and is now very active in its surveillance of the work of the federal courts and in recommending appropriate legislation to Congress. The present rules produced under 28 U. S. C. §2072 are not prepared by us but by Committees of the Judicial Conference designated by THE CHIEF JUSTICE, and before coming to us they are approved by the Judicial Conference pursuant to 28 U. S. C. §331. The Committees and the Conference are composed of able and distinguished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power. If the rule-making for Federal District Courts is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be

declared invalid." 374 U. S. 865, 869–870 (1963) (footnote omitted).

Despite the repeated protestations of both or one of those Justices, Congress did not eliminate our participation in the rulemaking process. Indeed, our statutory role was continued as the coverage of §2072 was extended to the rules of evidence and to proceedings before magistrates. Congress clearly continued to direct us to "prescribe" specified rules. But most of us concluded that for at least two reasons Congress could not have intended us to provide another layer of review equivalent to that of the standing committee and the Judicial Conference. First, to perform such a function would take an inordinate amount of time, the expenditure of which would be inconsistent with the demands of a growing caseload. Second, some us, and I remain of this view, were quite sure that the Judicial Conference and its committees, "being in large part judges of the lower courts and attorneys who are using the Rules day in and day out, are in a far better position to make a practical judgment upon their utility or inutility than we." 383 U. S. 1089, 1090 (1966) (Douglas, J., dissenting).

I did my share of litigating when in practice and once served on the Advisory Committee for the Civil Rules, but the trial practice is a dynamic profession, and the longer one is away from it the less likely it is that he or she should presume to second-guess the careful work of the active professionals manning the rulemaking committees, work that the Judicial Conference has approved. At the very least, we should not perform a *de novo* review and should defer to the Judicial Conference and its committees
as long as they have some rational basis for their proposed amendments.

Hence, as I have seen the Court's role over the years, it is to transmit the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity. If it has not, such a fact, or even such a claim, about a body so open to public inspection would inevitably surface. This has been my practice, even though on several occasions, based perhaps on out-of-date conceptions, I had

serious questions about the wisdom of particular proposals to amend certain rules.

In connection with the proposed rule changes now before us, there is no suggestion that the rulemaking process has failed to function properly. No doubt the proposed changes do not please everyone, as letters I have received indicate. But I assume that such opposing views have been before the committees and have been rejected on the merits. That is enough for me.

Justice Douglas thought that the Court should be taken out of the rulemaking process entirely, but as long as Congress insisted on our "prescribing" rules, he refused to be a mere conduit and would dissent to forwarding rule changes with which he disagreed. I note that JUSTICE SCALIA seems to follow that example. But I also note that as time went on, Justice Douglas confessed to insufficient familiarity with the context in which new rules would operate to pass judgment on their merits.[3]

In conclusion, I suggest that it would be a mistake for the bench, the bar, or the Congress to assume that we are duplicating the function performed by the standing committee or the Judicial Conference with respect to changes in the various rules which come to us for transmittal. As I have

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[3]In dissenting from the order transmitting the Chapter XIII Bankruptcy Rules, Justice Douglas, among other things said: "Forty years ago I had perhaps some expertise in the field; and I know enough about history, our Constitution, and our decisions to oppose the adoption of Rule 920. But for most of these Rules I do not have sufficient insight and experience to know whether the are desirable or undesirable. I must, therefore, disassociate myself from them." 411 U. S. 992, 994 (1973).

With respect to Amendments to the Rules of Criminal Procedure forwarded by the Court a year later, the following statement was appended to the Court's order, 416 U. S. 1003 (1974): "MR. JUSTICE DOUGLAS is opposed to the Court's being a mere conduit of Rules to Congress since the Court has had no hand in drafting them and has no competence to design them in keeping with the titles and spirit of the Constitution."

said, over the years our role has been a much more limited one.