ADVISORY COMMITTEE ON CRIMINAL RULES

MINUTES

April 15-16, 2010
Chicago, Illinois

I. ATTENDANCE AND PRELIMINARY MATTERS

The Judicial Conference Advisory Committee on Criminal Rules (the "Committee") met in Chicago, Illinois, on April 15-16, 2010. The following members participated:

Judge Richard C. Tallman, Chair
Judge Morrison C. England, Jr.
Judge John F. Keenan
Judge David M. Lawson
Judge Donald W. Molloy
Judge James B. Zagel
Judge Timothy R. Rice
Justice Robert H. Edmunds, Jr.
Professor Andrew D. Leipold
Rachel Brill, Esquire
Leo P. Cunningham, Esquire
Hon. Lanny A. Breuer, Assistant Attorney General,
Criminal Division, Department of Justice (ex officio)
Professor Sara Sun Beale, Reporter
Professor Nancy King, Assistant Reporter

Thomas P. McNamara, Federal Public Defender of the Eastern District of North Carolina, was unable to attend due to illness.

Representing the Standing Committee were its chair, Judge Lee H. Rosenthal, and liaison member, Judge Reena Raggi. Supporting the Committee were:

Peter G. McCabe, Rules Committee Secretary and Administrative Office
Assistant Director for Judges Programs
John K. Rabiej, Chief of the Rules Committee Support Office at the
Administrative Office
James N. Ishida, Senior Attorney at the Administrative Office
Henry Wigglesworth, Attorney Advisor at the Administrative Office
Laural L. Hooper, Senior Research Associate, Federal Judicial Center

Also attending were two officials from the Department of Justice's Criminal Division - Jonathan J. Wroblewski, Director of the Office of Policy and Legislation, and Kathleen Felton,

Deputy Chief of the Appellate Section. Bruce Rifkin, Clerk of the United States District Court for the Western District of Washington, attended as a representative of the Clerks of Court.

A. Chair's Remarks, Introductions, and Administrative Announcements

Judge Tallman welcomed everyone to Northwestern University School of Law and particularly welcomed newly appointed Committee member Timothy R. Rice, U.S. Magistrate Judge for the Eastern District of Pennsylvania. Judge Tallman greeted several law students in attendance and briefly explained the role of the Committee.

B. Review and Approval of the Minutes

Following two revisions offered by Judge Tallman, a motion was made to approve the draft minutes of the October 2009 meeting as revised.

The Committee unanimously approved the revised minutes.

C. Status of Criminal Rules: Report of the Rules Committee Support Office

Mr. Rabiej reported that the Supreme Court had yet to act on the package of proposed rules amendments that had been approved by the Judicial Conference in September 2009 (listed below in Section II.A). Noting that the Supreme Court has until May 1, 2010, to act, Mr. Rabiej observed that we would soon find out the fate of these proposed amendments. (The Supreme Court subsequently approved the proposed amendments with the exception of the proposed amendments to Rule 15, which was recommitted to the Committee for further consideration.)

II. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference for transmittal to the Supreme Court

Mr. Rabiej reported that the following proposed amendments had been approved by the Judicial Conference at its September 2009 session and were pending before the Supreme Court:

1. Rule 12.3. Notice of Public Authority Defense. Proposed amendment implementing the Crime Victims' Rights Act.

2. Rule 15. Depositions. Proposed amendment authorizing a deposition outside the United States and outside the presence of the defendant in limited circumstances after the court makes case-specific findings.

3. Rule 21. Transfer for Trial. Proposed amendment implementing the Crime Victims' Rights Act.

4. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment clarifying the standard and burden of proof regarding the release or detention of a person on probation or supervised release.

B. Proposed Technology Amendments Published for Public Comment

The following proposed amendments were published for public comment in August 2009:

1. Rule 1. Scope: Definitions. Proposed amendment broadens the definition of telephone.

2. Rule 3. The Complaint. Proposed amendment allows complaint to be made by telephone or other reliable electronic means as provided by Rule 4.1.

3. Rule 4. Arrest Warrant or Summons on a Complaint. Proposed amendment adopting concept of "duplicate original," allowing submission of return by reliable electronic means, and authorizing issuance of arrest warrants by telephone or other reliable electronic means as provided by Rule 4.1.

4. Rule 4.1. Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means. Proposed amendment provides a comprehensive procedure for issuance of complaints, warrants, or summons by telephone or other reliable electronic means.

5. Rule 9. Arrest Warrant or Summons. Proposed amendment authorizing issuance of a warrant or summons by telephone or other reliable electronic means as provided by Rule 4.1.

6. Rule 32.1. Revoking or Modifying Probation or Supervised Release. Proposed amendment permitting a defendant to participate by video teleconferencing.

7. Rule 40. Arrest for Failing to Appear in Another District or for Violating Conditions of Release Set in Another District. Proposed amendment authorizing use of video teleconferencing.

8. Rule 41. Search and Seizure. Proposed amendment authorizing requests for warrants to be made by telephone or other reliable electronic means as provided by Rule 4.1, and return of warrants and inventories by reliable electronic means.

9. Rule 43. Defendant's Presence. Proposed amendment cross-referencing Rule 32.1 provision for participation in revocation proceedings by video teleconference

and permitting a defendant to participate in misdemeanor proceedings by video teleconference.

10. Rule 49. Serving and Filing Papers. Proposed amendment authorizing papers to be filed, signed, and verified by electronic means.

Many comments had been submitted on the proposed amendments. The Committee reviewed the comments and made changes to the proposed amendments based upon the comments. The most extensive changes were made to new Rule 4.1, the central part of the Committee's effort to engraft new technology to the procedures previously set forth in current Rule 41. The Committee approved the following changes to Rule 4.1:

(1) Subdivision (a). The published rule referred to the action of a magistrate judge as "deciding whether to approve a complaint." In response to the Federal Magistrate Judges Association's comment that a judge does not "approve" a complaint, the Committee amended the rule to refer to the judge as "reviewing a complaint or deciding whether to issue a warrant or summons."

(2) Subdivision (b)(2)(A) and (B). The Federal Magistrate Judges Association recommended revision of subdivisions (b)(2) and (3), and the Committee's style consultant recommended additional clarifying changes. The Committee combined these two subdivisions into subdivision (b)(2)(A) and (B). The change was to clarify the procedures applicable when the applicant does no more than attest to the contents of a written affidavit and those applicable when additional testimony or exhibits are presented. (Subsequent subdivisions were renumbered because of the merger of (b)(2) and (3).)

(3) Subdivision (b)(5). This subdivision (previously published as (b)(6)) deals with modification of a complaint, warrant, or summons. In response to a comment from the National Association of Criminal Defense Lawyers, the Committee added language requiring a judge who directs an applicant to modify a duplicate original to file the modified original. This change was intended to ensure that a complete record was preserved.

(4) Subdivision (b)(6). The Committee eliminated the introductory language "If the judge decides to approve the complaint, or . . . ." As noted by the Federal Magistrate Judges Association, a judge does not "approve" a complaint. Accordingly, the Committee revised the rule to refer only to the steps necessary to issue a warrant or summons, which is the action taken by the judicial officer. In subdivision (b)(6)(A) the Committee amended the requirement that the judge "sign the original" to "sign the original documents." This phrase is broad enough to encompass the current practice of the judge signing the complaint forms. In subdivision (b)(6)(B), the reference to the "face" of a document was deleted as superfluous and anachronistic, and the action was clarified to be the entry of the date and time of "the approval of a warrant or summons." Finally, as recommended by the National Association of Criminal

Defense Lawyers, subdivision (b)(6)(C) was revised to require that the judge direct the applicant not only to sign the duplicate original with the judge's name, but also to note the date and time.

The Committee determined that these changes were not substantive in nature and did not require republication. Nevertheless, due to the extensive redrafting, the Committee thought it advisable to recirculate Rule 4.1 to the commentators. Following the meeting, the Committee emailed the revised version of Rule 4.1 to the commentators and requested that they provide any feedback by May 14, 2010.

In addition, the Committee made minor modifications to the following technology-related rules:

Rule 1. Noting that defining a telephone as a "form of communication" was awkward, the Committee revised the definition to "any technology for transmitting communication."

Rules 32.1 and 43(a). The Committee voted to withdraw the proposed rule allowing a defendant to request that he or she be permitted to participate by video teleconference in a proceeding to revoke or modify probation or supervised release. The proposed cross reference in Rule 43(a) was also withdrawn.

Rule 40. The Committee voted to revise the proposed amendment to track the language of Rule 5.

Rules 3, 4, 6, 9, 41, 43(b)(2), and 49 were approved by the Committee as published.

III. CONTINUING AGENDA ITEMS

A. Rule 16 (Discovery and Inspection)

Before beginning the discussion of Rule 16, Judge Tallman welcomed the Honorable Emmet Sullivan, United States District Judge for the District of Columbia. Judge Sullivan presided over the trial of former Senator Ted Stevens and had written the Committee a letter in April 2009 requesting that the Committee consider amending Rule 16 to require disclosure of all exculpatory and potentially impeaching evidence. Judge Tallman invited Judge Sullivan to attend the meeting in Chicago and Judge Sullivan accepted.

Judge Tallman reported on the Rule 16 Subcommittee's recent actions. On February 1, 2010, the Subcommittee held a consultative session on Rule 16 in Houston, Texas. Judge Tallman noted that the session brought together representatives from all parts of the criminal justice system to engage in a full and frank exchange.

The Rule 16 Subcommittee also met by telephone conference call on March 8, 2010. During the call, the Subcommittee commented on and revised questions contained in a draft

survey designed by the Federal Judicial Center and also discussed ongoing efforts at the Department of Justice to better address the discovery obligations of prosecutors.

Assistant Attorney General Lanny Breuer offered an update on the Department's efforts. He said that the Deputy Attorney General had issued new guidelines and 5,000 federal prosecutors had completed training courses on how to meet their disclosure obligations. General Breuer further noted that the Department was in the process of developing training curricula and creating a deskbook to provide guidance to prosecutors. General Breuer said that he has traveled around the country and spoken to many dedicated federal prosecutors who expressed a sincere desire to "do the right thing" in meeting their disclosure obligations.

General Breuer introduced Andrew Goldsmith, who was appointed to the Department's newly created position of National Criminal Discovery Coordinator. Mr. Goldsmith was a prosecutor for 27 years and is recognized as an expert on the policies and procedures governing electronically stored information. Mr. Goldsmith said that in his new capacity, he operates out of the Deputy Attorney General's Office, which gives him broad authority. His responsibilities include reviewing the discovery plans of all 94 U.S. Attorney Offices, overseeing the creation of a "bluebook" on discovery practices written by experts, designing training for law enforcement agents and for paralegals, developing a discovery "bootcamp" for new prosecutors, and consulting with judges and members of the defense bar to absorb all points of view on the issue of criminal discovery.

Members asked Mr. Goldsmith questions. One asked whether any of the Department's training initiatives would be available to law enforcement agents outside the Department. Mr. Goldsmith replied that such training is currently available only as time permits but would eventually be part of a "second wave" of efforts. Professor Beale asked whether any efforts were being made to encourage discovery-related dialogue between agents and managers, a "feedback loop," with the goal of eventually making discovery obligations "part of the culture." Mr. Goldsmith replied that such a practice had not been explicitly encouraged but that agents and prosecutors are now sensitized to this issue.

General Breuer commented that the issues raised by the Committee and the discovery-related tasks facing the Department, particularly when dealing with other agencies, constituted "profound challenges." In order to meet those challenges, General Breuer favored a "friendly" as opposed to an "adversarial" approach. The Department is also attempting to improve the use of technology to better manage discovery information in its cases.

Judge Tallman thanked General Breuer and Mr. Goldsmith for their presentations and for the careful, thoughtful, and deliberative process that the Department had undertaken to accomplish change. Judge Tallman said it was reassuring that this issue was getting the attention of the highest levels of the Department.

Judge Tallman introduced United States District Judge Emmet Sullivan, who had previously written in support of amending Rule 16. Judge Sullivan thanked Judge Tallman for his leadership on the Rule 16 issue. He said that his own interest in amending Rule 16 grew out of the Stevens case but that his concern, and the concern of prosecutors too, transcended any one case and amounted to seeking justice. Judge Sullivan applauded the Department's efforts to improve the administration of justice by training prosecutors and offering guidance on discovery. But he wondered whether these efforts are sufficient. He observed that Administrations change and questioned how much weight *Brady* issues will be given in the future when new leaders take over the Department. He noted that the *Brady* issue resurfaces every few years and seems a perennial problem.

Judge Sullivan submitted that a permanent solution is warranted. He suggested that the Committee reconsider amending Rule 16 as proposed in 2007 to require full disclosure of all evidence favorable to the defendant. He said that the concerns raised by the Department could be addressed by a prudent judge. He asserted that the government should not make unilateral judgments as to what it should turn over to the defendant. He quoted from the dissenting opinion in *United States v. Bagley*, 473 U.S. 667 (1985), in which Justice Marshall argued that the right announced in *Brady*, to be effective, must be integrated into "the harsh, daily reality"of the criminal justice system. *Id.* at 696. To integrate such a right, Justice Marshall concluded, a prosecutor must be required to "divulge all evidence that reasonably appears favorable to the defendant, erring on the side of disclosure." *Id.* at 699. Noting that Justice Marshall's words were written twenty-five years ago, Judge Sullivan said it was high time that the Committee offer an amendment to Rule 16 that fully incorporates the principles announced in *Brady*.

Judge Tallman thanked Judge Sullivan for his eloquent words advocating an amendment to Rule 16.

Turning to the survey designed by the Federal Judicial Center (FJC) to collect better information about disclosure practices, Judge Tallman said that several analytical issues needed to be resolved. First, the survey had originally targeted only those districts where a broad discovery policy was already in effect. However, Judge Tallman observed that in order to assess whether an amendment is necessary, the Committee first needs to define the scope of the problem of non-disclosure. He said that he therefore favored enlarging the scope of the survey from the initial small group of districts to all 94 federal districts. Second, Judge Tallman expressed concern about the length of the survey and noted that if the survey was too long, the response rate would drop.

Judge Tallman introduced Laural Hooper of the FJC, who addressed these two questions. Regarding how many districts should be surveyed, Ms. Hooper said that she favored a broad sampling to capture a wider, more representative spectrum of responses. Regarding the second issue, she noted that generally if a survey takes more than 15 minutes to complete, the response rate drops. The FJC typically tries to get a response rate of 65-70% on this type of survey. Ms. Hooper also observed that the American Bar Association would be sending out a similar survey

that would be competing for attention, in a sense, against the Committee's survey. Judge Rosenthal added that the Committee needed to be respectful of the respondents' time and keep the survey as brief as possible.

In response to a member's question as to who would be receiving the survey, Ms. Hooper replied that the respondents would include three groups: district judges, prosecutors, and defense counsel who practice in federal court. After a brief discussion, Judge Tallman said that the sense of the Committee appeared to be in favor of a broader survey encompassing all 94 districts. Ms. Hooper stated that she would transmit to Judge Tallman and Professor Beale a revised, shorter version of the survey within a few weeks. Following their review, the survey would be vetted by the full Committee before being disseminated.

B. Rule 12 (Pleadings and Pretrial Motions)

Judge England, Chair of the Rule 12 Subcommittee, gave an overview of the Committee's consideration of whether to amend Rule 12. In April 2009, the Committee voted to send to the Standing Committee an amendment to Rule 12 that attempted to conform the rule to the Supreme Court's ruling in *United States v. Cotton*, 535 U.S. 625 (2002). The proposed amendment would have required defendants to raise a claim that an indictment fails to state an offense before trial, but would have provided relief in certain narrow circumstances when defendants fail to do so. In particular, the amendment provided for relief if the failure to raise the claim was for good cause or prejudiced a substantial right of the defendant. However, the Standing Committee declined to publish the proposed amendment and remanded it to the Committee to consider the implications of using the term "forfeiture" instead of "waiver" in the relief provision.

Judge England reported that the Rule 12 Subcommittee had voted in January 2010 to move forward with drafting a revised amendment. However, as the Subcommittee worked on redrafting the amendment, new concerns arose and the scope of the project continued to grow. Judge England expressed concern that the project now appears to require a complete rewrite of Rule 12.

Officials from the Department agreed that the scope of the project had grown from the initial concept of merely harmonizing Rule 12 with *Cotton*. Ms. Felton observed that part of the difficulty of amending the rule is that there is considerable confusion in the case law interpreting the meaning of "forfeiture" and "waiver" in Rule 12. The Subcommittee's attempt to surgically fix the rule invariably implicated other parts of the rule and created more concerns.

Discussion ensued about whether it is appropriate for the Committee to resolve conflicts among the circuits over interpretation of the rules, or leave such resolution to the Supreme Court. Judge Rosenthal said that if the circuit conflicts are due to inherent ambiguity in the rule, then it would be appropriate for the Committee to attempt to resolve the confusion by clarifying the rule.

Judge Tallman concluded the discussion by recommitting the matter to the Rule 12 Subcommittee for further consideration.

C. Rule 37 (Indicative rulings)

Professor Catherine Struve, Reporter to the Advisory Committee on Appellate Rules, joined the discussion on indicative rulings via telephone.

At the October meeting, the Committee approved a new Criminal Rule 37 permitting "indicative rulings" that would parallel Appellate Rule 12.1 and Civil Rule 62.1, both of which went into effect on December 1, 2009. These rules are designed to facilitate remands to the district court to enable the court to consider motions after appeals have been docketed and the district court no longer has jurisdiction. The only issue before the Committee now is whether to amend the Committee Note following the proposed new Rule. (The Note is found on pages 306-08 of the agenda book.)

Judge Tallman initiated the discussion by noting that he had asked a Ninth Circuit Staff Attorney, Susan Gelmis, to address the merits of a new rule permitting indicative rulings. Ms. Gelmis concluded in a written memo (page 309 of agenda book) that a new criminal rule would be beneficial. Her reasoning supported his view that the Committee should go forward with proposing a new rule that facilitated the issuance of indicative rulings.

Professor Beale agreed with Judge Tallman that the new rule was needed, and she turned the discussion towards the language of the proposed Committee Note, particularly the sentence that states that the rule "does not apply to motions under 28 U.S.C. § 2255." The rationale behind this sentence was to deter prisoners from filing § 2255 motions while their appeal was pending. Professor Beale also noted that the Committee Note on page 307 of the agenda book inadvertently omitted language that had been approved by the Committee at the October meeting. The omitted language can be found on page 11 of the agenda book, and describes three situations where the new rule was likely to be invoked.

A member pointed out that the language excluding § 2255 motions from the rule's operation was unlikely to be noticed by a prisoner, as it is buried in the Note. Professor Struve agreed and added that the sentence is also inconsistent with the law of at least one circuit.

Judge Tallman moved to amend the Committee Note by deleting the sentence in bold on page 307 that excludes § 2255 motions and inserting in its place the following:

> The procedure formalized by Appellate Rule 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v.*

Cronic, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c).

The motion was approved unanimously by voice vote.

D. Procedures Concerning Crime Victims

Professor Beale reported that the Administrative Office had issued its fifth annual report on the rights of crime victims as required by the Justice for All Act of 2004, 18 U.S.C. § 3771. The report did not raise any concerns that would prompt consideration of changes to the rules. However, the Committee continued to monitor the status of crime victims' rights given the importance of the matter. Justice Edmunds, Chair of the Subcommittee on the Crime Victims' Rights Act, concurred.

Judge Molloy recounted an episode from *United States v. W.R. Grace*, a criminal environmental case that he presided over, that illustrated a possible need for a future rules amendment. In *Grace*, the prosecutor filed a mandamus action on behalf of 37 crime victims with whom the prosecutor had not actually spoken. Judge Molloy suspected that this was done strategically to delay the proceedings and suggested that perhaps in the future the Committee might consider an amendment requiring prosecutors to certify that they had spoken to any crime victims they claim to represent.

A member described a "procedural anomaly" that he encountered while representing a crime victim in a case before the District of Columbia District Court. Because the crime victim was not a party, the court's electronic filing system did not allow the member to file a motion asserting the crime victim's rights. The member questioned whether there are unintended barriers to crime victims inherent in the structure of a court's electronic filing system.

Judge Tallman said that the Committee has an obligation to improve any procedures that hinder crime victims from asserting their rights, but asked whether this particular issue would more properly be considered by the Committee on Court Administration and Case Management ("CACM"). Mr. Rifkin noted that in the Western District of Washington, a non-party may be granted permission to file on an ad hoc basis. Judge Sullivan said that he sits on the D.C. District Court's electronic filing committee and he would follow up on the issue of granting non-parties the ability to file.

Judge Rosenthal said that she would work with Judge Tallman to draft a letter to the Chair of CACM raising this issue. She further noted that this would serve as a good example of how the Committee is committed to carrying out the mandate of the Crime Victims' Rights Act. She remarked that this requires constant diligence on our part.

IV. NEW PROPOSALS

A. Rules 5 and 58 (Initial Appearance)

General Breuer addressed the Department's proposal to amend Rules 5 and 58. As set forth in his memo on page 322 of the agenda book, the proposed amendments are designed to better equip federal courts to handle aspects of the international extradition process and to ensure that the treaty obligations of the United States are fulfilled.

1. Amendment to Rule 5(c) – Initial Appearance of Extradited Defendant

The first proposal is to amend Rule 5(c) by adding a new paragraph (4) clarifying where an extradited defendant must first appear. (The proposed amendment is on page 324 of the agenda book.) General Breuer said that confusion currently exists over whether the first appearance should be in the judicial district where the defendant first arrives or in the district where charges are pending. General Breuer suggested that since the defendant has already been informed of the charges that are pending before being extradited, requiring a first appearance immediately in the district of arrival is unnecessary and merely causes delay.

A member asked whether the defendant would be without counsel during the period between the defendant's arrival in the United States and the defendant's first appearance in the district where charges are pending. If so, could there be any adverse consequences, *i.e.*, improper interrogation?

General Breuer responded that typically there would be no incentive to interrogate a defendant in that situation because an investigation had already been completed prior to the defendant's extradition. Further, Judge Tallman pointed out that the defendant would be in the custody of the U.S. Marshals Service during the entire period in which he is being transported back to the jurisdiction requesting his extradition.

A judge member suggested that if there were a concern about the defendant languishing in the district of arrival while awaiting transport to the district where charges are pending, such a concern could be addressed by simply adding a time limit to the proposed amendment. A member pointed out that a time limit on first appearances is already contained in Rule 5(a)(1)(A), which requires that after arrest, a defendant must be brought "without unnecessary delay" before a judicial officer.

Judge Tallman reminded the members that at this juncture, the Committee was merely considering whether to recommend to the Standing Committee that the proposed amendment to Rule 5 be published for comment. Issues such as whether there should be a time limit in the amendment or whether it implicated the defendant's right to counsel would presumably be addressed, if warranted, by commentators. Viewed in that light, Judge Tallman moved that the proposed amendment be forwarded to the Standing Committee with the recommendation that it be published for comment.

The motion was approved unanimously by voice vote.

Judge Tallman directed Professor Beale to draft a proposed Committee Note to accompany the proposed amendment to Rule 5(c) and to circulate the Note by email to members after the meeting.

2. Amendment to Rule 5(d)(1) and Rule 58(b)(2)(H) – Consular Notification

General Breuer turned to the second proposed amendment, which would ensure that the United States fulfills its obligations under the Vienna Convention on Consular Relations. Article 36 of the Convention provides that detained foreign nationals must be advised of the opportunity to contact the consulate of their home country. The proposed amendments to Rules 5 and 58 (set forth on pages 326 and 327 of the agenda book) are designed to meet that obligation. The amendment to Rule 5 requires notification in felony cases and for petty offenses under Rule 58.

General Breuer explained that under the government's view, the Vienna Convention does not create an enforceable right in favor of an individual, and that the amendments therefore do not use the word "must" in describing the duty to notify. Rather, the amendments provide that upon a defendant's request, the government "will" notify the appropriate consular officer. Noting this intentional difference, Judge Tallman directed that when the amendment is transmitted to the style consultant, the word "will" should not be changed because it reflects a substantive choice.

Ms. Felton offered an identical modification to each amendment. She asked that the phrase "or other international agreement" be inserted before the period at the end of Rule 5(d)(1)(F) and the end of Rule 58(b)(2)(H). Judge Tallman moved that the proposed amendments, with Ms. Felton's modification, be forwarded to the Standing Committee with the recommendation that they be published for comment.

The motion was approved unanimously by voice vote.

3. Advisory Committee Note

The Committee turned to the Committee Note following the proposed amendments on pages 327-28 of the agenda book. Discussion centered on the last sentence of the Note, which states: "Nothing in these amendments shall be construed as creating any individual justiciable right, authorizing any delay in the investigation or prosecution because of a request for consular assistance, or any basis for the suppression of evidence, dismissal of charges, reversal of judgment, or any other remedy."

A member expressed concern that the sentence amounted to a substantive comment that no remedy existed for the failure to adhere to the notification requirements contained in the rules and that the proper place for such a disclaimer would be in the rules themselves. Discussion ensued over whether, notwithstanding this disclaimer, the proposed amendments in fact created some sort of enforceable right. A judge member predicted that judges will rarely fail to advise defendants of their right to consular notification because the notification will simply be added to the judges' checklist of things that they must cover when addressing a defendant.

A member proposed deleting the last sentence of the Committee Note and substituting the following: "This Rule does not address what remedy, if any, a defendant may have for failure to comply with Rule 5(d)(F) and Rule 58(b)(2)(H)." The proposed modification was withdrawn after Judge Tallman offered the following substitute amendment: "These amendments do not address those questions." A member moved that the substitute amendment be adopted.

The motion was approved unanimously by voice vote.

Ms. Felton moved that after the second sentence of the Committee Note, the following sentence be inserted: "Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it."

The motion was approved unanimously by voice vote.

Judge Tallman said he would present the amendments, as modified, to the Standing Committee in June with the recommendation that they be published for comment.

B. Rule 32 (Technical and Conforming Amendment)

Professor Beale explained that the style consultant, Professor Joseph Kimble, had suggested a technical amendment to Rule 32(d)(2). The amendment, set forth on page 334 of the agenda book, switched the order of two provisions and corrected a lack of parallelism in one of the two provisions.

The Committee voted unanimously to approve the amendment and forward it to the Standing Committee.

Mr. Rabiej noted that because the amendment does not affect the substance of Rule 32, it does not need to be published for comment. However, the amendment does require a brief Committee Note explaining that it is merely a technical amendment. Professor Beale agreed to draft a Note to accompany the amendment.

C. Proposal to Amend Multiple Provisions of 18 U.S.C. § 3060(b)

Professor Beale explained that a disparity had been identified between the statute and the rule that address the time period for a preliminary hearing when a defendant is released from custody. The statute, 18 U.S.C. § 3060(b)(2), requires that the hearing be held within 20 days. Federal Rule of Criminal Procedure 5(c), however, prescribes 21 days. Professor Beale suggested that the Committee recommend that the statute be changed to 21 days to remedy this inconsistency and to conform to the general principle underlying the time-computation project that time periods be stated in multiples of seven. It was so moved.

The Committee voted unanimously to recommend the statutory change and forward it to the Standing Committee.

Judge Tallman reported that the Chief Justice had publicly acknowledged and expressed his appreciation for the extensive and highly productive efforts of Judge Rosenthal and the rules committees to complete the time-computation project, including both rules and corresponding statutory changes.

D. Proposal to Amend Multiple Provisions of the Rules Governing Section 2254 Cases

Professor Beale summarized correspondence from Ms. Sharon Bush Ellison, suggesting numerous changes to the Rules Governing Section 2254 Cases. After discussion of the changes, a member moved that the Committee decline to adopt the suggestions.

The Committee voted unanimously to decline to adopt the suggested changes to the Rules Governing Section 2254 Cases.

E. Rule 11 – Immigration Consequences of Guilty Plea

Judge Tallman raised a matter that was not on the agenda. The recent Supreme Court decision in *Padilla v. Kentucky*, __U.S.__ (No. 08-651; March 31, 2010), held that defense counsel has a duty to inform a defendant whether a guilty plea carries a risk of deportation. *Padilla* thus highlights the importance of informing a defendant of the immigration consequences of a guilty plea.

To study the question of whether these consequences should be added to the list of matters about which a judge must inform a defendant when taking a guilty plea under Rule 11, Judge Tallman appointed Judge Rice to chair a Rule 11 Subcommittee. Judge Tallman also appointed the following members to the subcommittee: Judge Lawson, Judge Molloy, Professor Leipold, Leo Cunningham, and a representative of the Department of Justice. Judge Tallman further asked the newly formed subcommittee to consider whether, as an interim measure, the Committee should ask the Federal Judicial Center to amend the Judges' Benchbook by adding the risk of deportation to the list of collateral consequences that a judge must address when taking a guilty plea from a defendant.

Judge Rice said he would convene a meeting of the Rule 11 Subcommittee via conference call to discuss these issues and would report to the full Committee at its fall meeting.

V. RULES AND PROJECTS PENDING BEFORE CONGRESS, JUDICIAL CONFERENCE, STANDING COMMITTEE, OR OTHER ADVISORY COMMITTEES

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure

Judge Tallman noted that Mr. Rabiej had earlier reported on this topic.

B. Update on Work of the Sealing Subcommittee

Judge Zagel reported that the Standing Committee's Sealing Subcommittee had concluded its deliberations, which included reviewing an extensive study by the FJC examining all civil cases filed in federal court–district and appellate–in 2006. He reported that the subcommittee had found very few cases that had been improperly sealed.

Judge Zagel further reported that the biggest problem appears to be cases that remain sealed after the need for sealing has been obviated. The subcommittee is likely to recommend a change in the courts' electronic filing system to prompt a periodic review of sealed cases, in the hopes of remedying the problem. Professor Richard Marcus is drafting the final report which should be ready for the subcommittee's review in the near future.

C. Update on Work of the Privacy Subcommittee

Judge Raggi reported on the activities of the Standing Committee's Privacy Subcommittee. She noted that both the FJC and the Administrative Office had examined the issue of social security numbers occasionally appearing in court documents that are publicly available over the internet. The results of those studies showed that the problem is not widespread but needed to be addressed.

In addition to these statistical studies, the subcommittee held a mini-conference in early April 2010 at Fordham University Law School, organized by Professor Dan Capra, to examine privacy-related issues from all perspectives. Judge Raggi said the conference was a tremendous success because of the great variety of viewpoints presented.

Judge Raggi said that the subcommittee's next step would be the drafting of its report, which she expected to be ready in time for the Standing Committee's meeting in January 2011. She added that two main issues to be addressed would be plea agreements and juror privacy. However, Judge Raggi cautioned that due to the multiplicity of different approaches to resolving these problem areas, the subcommittee's report would not offer any magical "one-size-fits-all" solution. Instead, she expects that the report will describe many of the approaches that seem to be working.

Judge Rosenthal applauded the work of the subcommittee and noted that the Fordham mini-conference featured many informed speakers from across the privacy spectrum.

D. Rule 45(c)

Professor Beale explained that Criminal Rule 45(c) currently mirrors Civil Rule 5(b) in adding three days to the time period in which a party must act after service of process is effected in certain ways. Judge Rosenthal reported that at its meeting in October 2009, the Advisory Committee on Civil Rules considered amending Rule 5(b) to delete the three-day provision and eliminate the disparity between different types of service. However, the Civil Rules Committee decided against amending the rule at this time. The Civil Rules Committee further decided to solicit the views of the other advisory committees on parallel rules, such as Rule 45(c).

A member stated that he saw no pressing need to amend Rule 45 at this point but that the issue should be monitored. Accordingly, he moved to table the issue until the next meeting of the Committee.

The motion was approved unanimously by voice vote.

VI. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

Judge Tallman noted that Mr. Rifkin would retire in September 2010 from his position as District Executive/Clerk of Court for the Western District of Washington and that this would therefore be his last meeting. Observing that he had known Mr. Rifkin for over thirty years, Judge Tallman thanked him for his exemplary service to the judiciary and wished him well in his retirement.

Judge Tallman proposed several dates for the next meeting of the Committee. After a brief discussion, the Committee decided that the fall meeting would take place on Monday and Tuesday, September 27-28, 2010, in Boston, Massachusetts. By subsequent email notification, the date of the spring meeting was set for Monday and Tuesday, April 11-12, 2011.

Judge Tallman thanked all the members and guests for attending and adjourned the meeting.

Respectfully submitted,

Henry Wigglesworth
Attorney Advisor