COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Minutes of February 28, 1977 Meeting

The Committee on Rules of Practice and Procedure met in the 6th Floor Conference Room of the Administrative Office of the United States Courts in Washington, D.C. The meeting convened at 10:00 a.m. on Monday, February 28, 1977. The following members were present during the meeting:

Roszel C. Thomsen, Chairman
Charles W. Joiner
A. Leo Levin
Francis N. Marshall
Carl McGowan
Frank J. Remington
Frank W. Wilson

Attorney General Bell and Mr. Richard E. Kyle were unavoidably absent. Others attending the session were, Judge J. Edward Lumbard, Chairman, and Professor Wayne LaFave, Reporter, of the Advisory Committee on Criminal Rules; Judge Bailey Aldrich, Chairman, and Professor Jo Desha Lucas, Reporter, of the Advisory Committee on Appellate Rules; and Mr. William E. Foley, Deputy Director of the Administrative Office.

Judge Thomsen reported that the Rule 23 Subcommittee of the Advisory Committee on Civil Rules is working on a questionnaire and a subcommittee on admiralty is preparing a report for their next meeting.

Judge Thomsen called attention to recent legislation: S. 181 introduced by Senator Kennedy to establish a United States Commission on Sentencing; H.R. 1182 introduced by Congressman Rodino which is similar to S. 181; and H.R. 3413 introduced by Congresswoman Holtzman to amend the Rules Enabling Acts. He noted that the Criminal Law Committee which has been working with the Criminal Rules Committee has a Subcommittee on Sentencing Legislation comprised of Judges Zirpoli, Robinson, and Harvey. In view of this proposed legislation, an article on Reform of the Rule-Making Process by Judge Weinstein and a letter from Professor Wright approving Judge Weinstein's suggestion that all local rules be approved by the Standing Committee, Judge Thomsen invited a discussion of the rule-making process later in the meeting.

Rule 35.1. Appeal of Sentence Other Than Death Sentence

Judge Lumbard summarized the background for consideration of the rule. In view of the general public concern on the subject of sentence review, the Chief Justice asked the Advisory Committee on Criminal Rules to look into the matter. An amendment providing for a panel in the district court to Rule 35 was suggested. Comments from the bench and bar indicated it should not be a district court matter and the result is proposed Rule 35.1 providing for appeal of sentences. This rule as approved by the Advisory Committee on Criminal Rules and the

Standing Committee was sent to the Judicial Conference last year and they were divided in their views. Therefore, it was sent back to the Committee with the request that it be recirculated to the bench and bar. As a result 80 comments were received and reviewed by the Advisory Committee. To meet criticism that the views of others were not sufficiently heard, 2-day hearings were held. Nine organizations were represented. Judge Lumbard added that representatives of the Judiciary Committees attended the hearings as well as the Advisory Committee meetings during the past three years. As a result the committee had a further meeting at which time a few revisions were made in the rule. Professor LaFave outlined these changes since the rule was presented to the Standing Committee last year as follows:

1. The time for petitioning was changed from 10 days to 30 days in view of criticism heard at the hearings that the time was too short.

2. Former subdivision (a)-Appeal from a Death Sentence, was deleted and a new subdivision (h) added to indicate this rule does not apply in death penalty cases as a result of criticism at the hearings indicating that the problems arising from appellate review of sentences are unique and should be dealt with by different standards.

3. The provision for government appeal which had been set aside at the last meeting was added with an explanation in the note that due to the substantive nature of this rule, it would need the specific adoption by the Congress rather than following the normal rule-making process.

Judge Thomsen pointed out that if a rule were adopted which did not provide for appeal by the government there would be little chance of getting a statute through which did provide for appeal by the government by itself. Judge Lumbard indicated that the clearest thing which resulted from the hearings and comments is that the government has a right to appeal.

Discussion followed on how the proposed legislation on sentencing, namely S. 181 might affect a Rule 35.1 proposal sent to Congress by the Rules Committee. Judge Joiner explained that S. 181 would take discretion away from the judge and standards adopted by a sentencing commission would be followed. He also stated that if a judge did not follow the guidelines he would have to explain the reasons. He also noted that there is wide state support for the Kennedy bill. Judge Thomsen pointed out that this legislation falls within the jurisdiction of the Judicial Conference Committee on the Criminal Law of which a subcommittee has been appointed to study and be ready to report on its views toward the bill. There has been liaison between these two committees and the Criminal Law Committee has generally agreed to the proposals

set forth in Rule 35.1 by this committee. Judge Wilson concluded from this discussion that the Standing Committee members saw no reason to change their views toward proposed Rule 35.1 in view of the recent proposed legislation. Professor Levin, however, expressed concern that this legislation raises a question of the rule-making power of the Supreme Court and he suggested the addition of a provision at the end of the rule which provides for any later revision of the rule in the usual manner. Mr. Marshall agreed and moved that the committee approve the principles of proposed Rule 35.1 with a new subdivision specifying that after its adoption by the Congress it will be subject to the future rule-making power of the Supreme Court. Therefore Professor LaFave and Professor Levin drafted the following:

> (i) Effective Date. This rule shall apply to sentences imposed 30 days after its enactment.
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> (j) Rule-making Authority. The Supreme Court may amend or repeal this rule pursuant to 18 U.S.C. § 3772.

To make it more explicit, Judge Lumbard suggested adding, "not less than" to the 30 days in subdivision (i). Professor Levin preferred subdivision (j) to end with the phrase, "in accordance with the procedures provided in 18 U.S.C. § 3772." Mr. Marshall agreed and suggested the reference to the Supreme Court be changed to, "This rule may be amended," etc. He moved approval of new subdivisions (i) and (j) as amended and his motion carried.

Judge Aldrich reported that his Advisory Committee on Appellate Rules expresses no opinion on the substantive part of the rule but if legislation or Rule 35.1 is adopted they would oppose the timing of the appeal and they could foresee a bifurcation or duplication of records. He felt there should be provision for appeal as of right and not just a petition for leave to appeal a sentence. Judge Lumbard explained that in the majority of cases where a defendant has applied for leave to appeal, sentence is the only thing he can complain about because he had pleaded guilty and it is only a small number of cases where it goes forward after conviction following a trial when you have a question of a complication of issues, which could be handled by local rule. Judge Aldrich stated it is possible that by local rule the court of appeals could separate the matter of sentence appeal from the merits thereby creating two separate records, etc. Judge Lumbard then pointed out that these few cases are covered by the subdivision on the relationship to the appellate rules. Judge Joiner suggested expanding subdivision (g) by adding a reference to local rules which could provide for a combination of this process and of a meritorious appeal in cases where appropriate. Professor Lucas stated that the problem of timing is made more difficult when two different time limits are required. Judge Thomsen observed that the points made by each committee has merits. Professor Remington suggested going back to the 10-days time limit. After a brief discussion,

the members agreed that this change from 30 days to 10 days would be feasible. Therefore, Judge Wilson moved to amend lines 8 and 9 by changing "30" to "10." His motion was carried unanimously.

Professor Levin then raised a question of government appeal. He stated that if the sentence imposed is over one-third of the minimum but they are to run concurrently, can the government appeal on the grounds that the judge gave less than a third of what he could have given and do you add up the possible consecutive counts. The members agreed to include in the Advisory Committee Note that the sentence must be one-third of the longest possible sentence on any single count whether or not they run consecutively.

Since the Standing Committee decided to change the time for filing from 30 days to 10 days, Professor Lucas questioned the applicability of Appellate Rule 4(b) regarding an extension of time. He stated that since Rule 35.1 specifically provides that the petition "shall be filed" not less than 10 days, he would assume the appellate rule does not apply. If the committee members feel it should apply, he noted that subdivision (g) does not take care of this point. Seeing no reason that the power to extend the time should not apply, Professor LaFave suggested adding to the end of subdivision (d), the last sentence of Appellate Rule 4(b) as

follows:

> Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

Professor Levin was concerned that Appellate Rule 4(b) may be amended and Judge McGowan expressed his view that maintaining the time limit of 10 days would cut down on appeals, therefore, he moved to make no further change in subdivision (a). His motion carried.

After the Standing Committee meeting but before the presentation of this rule to the Judicial Conference, Judge Aldrich called Judge Thomsen persuading him to add the last sentence of Appellate Rule 4(b) together with an advisory note to the effect that the intent of the rule is to make the filing time of both proceedings coincide. Judge Thomsen contacted the committee members and they agreed with Judge Aldrich.

(e) Procedure Upon Granting Petition. Judge Joiner asked why the Criminal Rules committee did not include the stated purposes of sentencing as a listed factor for review by the court. Judge Thomsen felt these other considerations are implied, but Professor Levin pointed out that they might be considered inclusive. Professor Remington suggested an addition to the note that these three factors are not a limitation. Judge Thomsen pointed out that this should be clear in the

rule and suggested adding,"among others" on line 53. Mr. Marshall then moved to approve subdivision (e) with the addition of "among other considerations," after "having regard" on line 53. His motion carried.

Mr. Marshall pointed out that the term "the respondent" used in subdivision (a) and subdivision (d) is not clear. He felt it could mean either party. Therefore, he moved to change it to "opposing party" and the members agreed.

Mr. Marshall also called attention to a possible overlap between Rule 35.1 and Rule 35. He asked if there should be a provision in Rule 35.1 for a stay of duplicate proceedings under Rule 35. Judge Joiner expressed his view that there could not be a change in the time periods at this time because Rule 35.1 is not effective.

Discussion followed on whether Rule 35.1 should be forwarded by the Judicial Conference to the Supreme Court for promulgation and transmission to the Congress to be effective in due course or whether the rule should be sent by the Judicial Conference directly to the Congress as proposed legislation. Judge McGowan pointed out that it is not appropriate for the Supreme Court to promulgate and forward to Congress provisions such as those contained in Rule 35.1. Professor Levin expressed concern that a precedent would be set if the rule were sent to Congress. He stated that the Supreme Court should at least have the opportunity to consider the rule in case they wanted to give contrary advice.

Mr. Foley replied that if the Supreme Court feels that the rule portion should go through the normal process they will convey this to the Judicial Conference. Professor Remington reminded the members that rule-making is a product of the delegation of authority by the Congress. Judge Thomsen pointed out that this is a special situation where there should not be a rule for appeal by a defendant unless there is a corresponding provision for an appeal by the government. Therefore a part of this must go to the Congress as a proposed statute which is a function of the Judicial Conference and not a function of the Supreme Court. If this goes to the Supreme Court they will be divided with respect to some of the provisions.

Professor Remington expressed his view through experience with S.1 that if appellate review of sentence is created by Congress through a statute there would be hesitation to amend any provisions in the future than if appellate review were created by a rule containing the elements of subdivision (g). Therefore he recommended forwarding a proposed sentence review rule to the Congress for enactment. The members unanimously agreed to submit proposed Rule 35.1 to Congress.

Rule 35. Correction or Reduction of Sentence

Mr. Marshall expressed his concern that there is an overlap of motions filed under this rule and under 28 U.S.C. § 2255. Judge Joiner was worried that the change in subdivision (b) allowing a sentence of incarceration to a sentence of probation goes beyond the power granted the rules by Congress, that is, the 6 months split sentence time limit under the statute. For these reasons and the fact that proposed Rule 35.1 has not been approved by Congress, Judge Wilson moved to remand Rule 35 to the Criminal Rules Committee and his motion carried.

Rule 43. Presence of the Defendant

Judge Wilson felt there was an ambiguity in subdivision (a). He questioned how a defendant could be absent at the time of plea or arraignment which this seemed to imply. After a brief discussion Professor LaFave suggested leaving (a) as written and deleting "have a right to" because the exception clause is already contained in subdivision (c). The members agreed to the suggestion and approved the rule for transmittal to the Judicial Conference at a later time when other rules are ready.

§ 2255 RULE 11. Time for Appeal

Professor LaFave stated that the additional sentence was added to clarify an ambiguity created by a reference in the Advisory Committee Notes to the § 2255 rules that this is a continuation of a criminal case. The members approved the amendment for transmission to the Judicial Conference at the next appropriate time.

Report of the Advisory Committee on Criminal Rules Concerning H.R. 408 (formerly H.R. 14666)

Mr. Marshall raised some objections (which he submitted in writing) to the Criminal Rules Committee's draft of proposed Rule 12.3 and suggested the members compare § 782 of the California Evidence Code. Professor Remington pointed out that this Code would not fit in the federal system because of the Speedy Trial Act. Professor Levin expressed his view that the bill raises a question of constitutionality. Judge McGowan is of the view that there is such a small occurrence of this type of case in the federal courts because of its limited nature of jurisdiction that it does not warrant legislative intervention to amend the Federal Rules of Evidence. Professor Remington indicated that this report should be available as a response to a request for comment because if something is going to be done with regard to the in camera procedures it should be done through the regular rule-making process. Professor LaFave stated that his report indicated

the issue is particularly well-suited for resolution by Congress through the usual legislative process, which is how he interpreted the views of the Criminal Rules Committee. Professor Levin indicated that he is not persuaded that the rule of evidence is more a substantive matter involving policy. He suggested an alternative report which would tactfully indicate that (1) there is inherent power of the court to do so and the judges are being advised of this, (2) in terms of formalizing this procedure, they feel it is best done by rule, and (3) a draft of a rule regarding in camera examination is being worked on. As far as the evidence bill is concerned, Professor Levin stated he would recommend reporting that they are mindful and sensitive to the considerations over the country which have led to the substantial number of acts which have recently been passed protecting the rights of complainants in rape cases. With respect to the situation in the federal courts the committee notes that the current rule would give discretion to the courts and we would expect federal judges in the very few cases which would come up would be mindful of the need to protect the interests of complainants, at least to the extent of the proposed legislation. Also, with respect to formalizing the rule, it should go through the normal process. He further stated that the committee could mention in the report that there is intertwined with the evidenciary question, substantive concern for the administration of the law in rape cases particularly the need to protect the complainant.

Since the request for comment on H.R. 14666 came from the 94th Congress which has passed, Judge Thomsen suggested they await another referral from Congress on H.R. 408, and when this takes place they will refer the request to the Advisory Committee on Criminal Rules. The members agreed. Professor Levin added that an article appearing in the Third Branch regarding the study of this subject by the Advisory Committee might be appropriate when necessary.

The Rule-Making Process and H.R. 3413

Judge Wilson pointed out that there are indications even by the introduction of the bill itself that there is more motive in Congress to change the rule-making power of the Supreme Court than there has ever been in the past. He feels that part of the problem is that there is no established procedure for making rules--it is done by tradition. Therefore, each committee is functioning in different ways. Judge Thomsen expressed his view that there should be a study to consider the whole aspect of rule-making as well as the points raised by Judge Weinstein and Professor Wright. Judge McGowan pointed out that the process by which the committee makes rules is the same as set out in the administrative procedures act. He also stated his view that it is not necessary to have the rules considered by the Supreme Court. Judge Wilson opposed this view stating that he could not foresee Congress delegating the power of rule-making to the Judicial Conference since it is a

body over which Congress has no control. It was noted that Congress does confirm the appointment of judges who in turn could be members of the Judicial Conference. Judge Joiner suggested it would be appropriate for someone to (1) prepare a history of the rule-making process as background; (2) collect suggestions for improvement which have been made; and (3) write a report containing recommendations for the continuance or revision of this process. Judge Thomsen agreed stating the appointment of a reporter might be helpful and he would discuss this matter with the Chief Justice.

The meeting adjourned at 4:30 p.m.