

**SUMMARY OF THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE**

The Committee on Rules of Practice and Procedure recommends that the Judicial Conference:

Approve the proposed amendments to Criminal Rules 6 and 41 and transmit these changes to the Supreme Court for its consideration with a recommendation that they be adopted by the Court (and integrated with the changes approved by the Judicial Conference in October 2001) and transmitted to Congress in accordance with the law pp. 4-5

The remainder of the report is submitted for the record, and includes the following items for the information of the Conference:

- ▶ Cancellation of Advisory Committee Meetings p. 2
- ▶ Federal Rules of Appellate Procedure p. 2
- ▶ Federal Rules of Bankruptcy Procedure pp. 2-3
- ▶ Federal Rules of Civil Procedure p. 3
- ▶ Federal Rules of Criminal Procedure pp. 4-5
- ▶ Federal Rules of Evidence p. 5
- ▶ Rules Governing Attorney Conduct pp. 5-6
- ▶ Privacy and Access to Electronic Case Files p. 6
- ▶ Five-Year Jurisdictional Review p. 6
- ▶ Model Local Rules Project p. 6
- ▶ Long-Range Planning p. 7

NOTICE
NO RECOMMENDATION PRESENTED HEREIN REPRESENTS THE POLICY OF THE JUDICIAL CONFERENCE UNLESS APPROVED BY THE JUDICIAL CONFERENCE ITSELF.

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

**TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

The Committee on Rules of Practice and Procedure met on January 10-11, 2002. All the members attended except Judge Michael Boudin and David Bernick, who were ill.

Representing the advisory rules committees were: Judge Samuel A. Alito, chair, and Professor Patrick J. Schiltz, reporter, of the Advisory Committee on Appellate Rules; Judge A. Thomas Small, chair, and Professor Jeffrey W. Morris, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Richard H. Kyle, on behalf of Judge David F. Levi, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge Edward E. Carnes, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Judge Milton I. Shadur, chair, and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief of the Administrative Office's Rules Committee Support Office; James Ishida, attorney advisor in the Administrative Office; Joseph Cecil of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Joseph F. Spaniol, consultant to the Committee. In addition, several

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former committee chairs and members attended and participated in a wide-ranging panel discussion on the status and future of the rulemaking process, including Judge Patrick E. Higginbotham, Judge Will L. Garwood, Judge Paul V. Niemeyer, Judge Alicemarie H. Stotler, Judge Fern M. Smith, and Professor Geoffrey C. Hazard.

CANCELLATION OF ADVISORY COMMITTEE MEETINGS

The Advisory Committees on Appellate, Bankruptcy, Criminal, and Evidence Rules had each completed major rules revision projects at their spring 2001 meetings. The advisory committees were originally scheduled to meet in September and October 2001. But the heightened security concerns arising from the September 11, 2001, terrorist attacks outweighed the need for holding committee meetings, especially because the agendas for their respective fall meetings were relatively light. As a result, each of the meetings was canceled. Although not meeting, the Advisory Committees on Bankruptcy and Criminal Rules acted on several issues requiring immediate action, which are discussed below.

FEDERAL RULES OF APPELLATE PROCEDURE

The Advisory Committee on Appellate Rules presented no items for the Committee's action.

FEDERAL RULES OF BANKRUPTCY PROCEDURE

After the Judicial Conference adopted a policy governing access to public records in September 2001 (JCUS-SEP/OCT 01, pp. 48-50), the Committee on Court Administration and Case Management requested the Advisory Committee on Bankruptcy Rules to expedite consideration of proposed amendments limiting disclosure of social security numbers consistent with the Conference's actions. The advisory committee agreed to move expeditiously. It held

several telephone conferences, conducted a mail ballot, and forwarded its recommendations in time for the committee's January meeting.

Rules Approved for Publication and Comment

The advisory committee proposed amendments to Rule 1005 and revisions to several Official Forms with a recommendation that they be published for comment. The proposed amendments limit the disclosure of a person's social security number and account numbers to the last four digits on certain bankruptcy forms and filing papers.

The Committee approved the recommendations of the advisory committee to circulate the proposed rule amendments and revisions to Official Forms to the bench and bar for comment. The committee also decided to publish the amendments immediately, with a response deadline of April 15, 2002, to facilitate prompt action, consistent with the Judicial Conference policy.

FEDERAL RULES OF CIVIL PROCEDURE

The Advisory Committee on Civil Rules held two public hearings on the proposed amendments to Rules 23, 51, and 53 in San Francisco, California, and Washington, D.C. More than 40 witnesses testified at the hearings. The advisory committee will review all comments and statements submitted on the proposals at its May 2002 meeting.

The advisory committee also held a conference at the University of Chicago Law School on proposed amendments to Rule 23 (Class Actions). In addition to the published amendments, the conference addressed preliminary proposals dealing with overlapping and competing class actions filed in state courts. The conference was well attended and included about 70 judges, professors, and lawyers experienced in class action litigation.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules voted by mail ballot to act on recent legislation that required immediate attention. The advisory committee submitted proposed amendments to Rules 6 and 41 with a recommendation that they be approved and transmitted to the Judicial Conference. The amendments conform the rules to recent anti-terrorism legislation and were not circulated to the bench and bar in accordance with established procedures.

In September 2001, the Judicial Conference of the United States approved the restyled revision of all the Federal Rules of Criminal Procedure (JCUS-SEP/OCT 01, p. 70), which is now before the Supreme Court for its consideration. The comprehensive revision simplifies and clarifies the language of the rules. If approved by the Supreme Court by May 1, 2002, the amendments will take effect on December 1, 2002, unless Congress takes action otherwise.

Several weeks after the Judicial Conference submitted the comprehensive criminal rules' revision to the Supreme Court, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT ACT) amended two existing criminal rules. (Pub. L. No. 107-56.)

- Section 203 of the Act amends Rule 6 to permit sharing with specific law enforcement entities of grand-jury information involving terrorism. Under the Act, the government must notify the court of any disclosures and the identity of the department or agency to which the disclosure was made.
- Section 219 amends Rule 41 to permit a magistrate judge to issue a search warrant for property outside the district in cases involving terrorism.

Under the Rules Enabling Act, 28 U.S.C. § 2072(b), the comprehensive rules revision now pending in the Supreme Court could create supersession problems when the amendments take effect on December 1, 2002, because they have a later effective date. To avoid potential

confusion and possible supersession, the amendments made by the Act must be included in the package of rules pending in the Supreme Court.

But the amendments made by the Act are based on the two existing rules. They cannot be incorporated without change into the comprehensive rules' revision, which has been renumbered, reformatted, and modified to include standard conventions and definitions. Accordingly, the advisory committee has proposed modest, technical adjustments to the Act's amendments to conform them to the comprehensive revision. The proposed new amendments make no substantive changes to the statutory provisions and would be integrated into the comprehensive revision pending Supreme Court approval before transmission to Congress.

The Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Criminal Procedure are in Appendix A together with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 6 and 41 and transmit these changes to the Supreme Court for its consideration with a recommendation that they be adopted by the Court (and integrated with the changes approved by the Judicial Conference in October 2001) and transmitted to Congress in accordance with the law.

FEDERAL RULES OF EVIDENCE

The Advisory Committee on Evidence Rules presented no items for the Committee's action. The advisory committee is considering a few suggested rules changes and is continuing its review of the status of evidentiary privileges.

RULES GOVERNING ATTORNEY CONDUCT

The Committee's Subcommittee on Rules Governing Attorney Conduct continues to monitor legislative developments and discussions on the topic among the Department of Justice, state court representatives, and the American Bar Association. The committee was advised that

the Senate-passed anti-terrorism legislation included a provision requiring the Judicial Conference to make recommendations to Congress on federal rules governing conduct of federal prosecutors, but the provision was ultimately deleted from the legislation in conference.

PRIVACY AND ACCESS TO ELECTRONIC CASE FILES

The Committee was advised that the Judicial Conference had adopted the recommendations of the Committee on Court Administration and Case Management to allow public access to electronic filings in civil cases (except for social security and bankruptcy cases) and not in criminal cases. Members of that committee recognized that developing experience with the public-access policy may show a need to consider amending the rules, including the protective-order provisions of the civil discovery rules.

FIVE-YEAR JURISDICTIONAL REVIEW

The Committee conducted a jurisdictional review and concluded that the Committee should continue. The Committee was advised that the five advisory rules committees reviewed their jurisdiction. Each advisory committee also concluded that it should continue.

MODEL LOCAL RULES PROJECT

The Committee was presented with a nearly completed report on the local rules project prepared by Professor Mary P. Squiers. The report summarizes the results of a comprehensive review of all local rules of court governing civil cases. It notes a rising trend in the number of local rules, which now approaches 6,000 rules, excluding thousands more subparts. The report identifies individual rules that are potentially inconsistent or duplicative of national rules or federal law. The Committee will continue to review the study and begin planning the most effective way to distribute the report's recommendations to individual district courts and circuit judicial councils for their consideration.

LONG-RANGE PLANNING

In accordance with the long-range planning materials provided, the Committee identified several upcoming or possible events that may affect the work of the rules committees. The Committee authorized its chair to communicate its conclusions to Judge Charles R. Butler, the long-range planning coordinator for the Executive Committee.

Respectfully Submitted,



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Michael Boudin
Frank W. Bullock, Jr.
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Appendix A — Proposed Amendments to the Federal Rules of Criminal Procedure

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

Agenda F-18 (Appendix A)
Rules
March 2002

ANTHONY J. SCIRICA
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

SAMUEL A. ALITO, JR.
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CIVIL RULES

EDWARD E. CARNES
CRIMINAL RULES

MILTON I. SHADUR
EVIDENCE RULES

TO: Hon. Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Ed Carnes, Chair
Advisory Committee on Federal Rules of Criminal Procedure

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: December 3, 2001

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure was originally scheduled to meet on October 29-30, 2001, in Santa Fe, New Mexico. Because of the events of September 11, 2001, the meeting was cancelled.

Nonetheless, the Committee has considered amendments to Rule 6, Grand Jury, and Rule 41, Search Warrants, as a result of Congressional amendments to those rules as a part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (Pub. L. No. 107-56). As noted in the following discussion, the Committee recommends amendments to those two rules in order to avoid problems with the Supersession Clause of the Rules Enabling Act.

The proposed amendments closely conform to the statutory language and no substantive changes are intended. The Committee decided to retain the language of the statutory amendments throughout the draft, unless the format or definitional terms adopted in the comprehensively restyled rules dictated otherwise. The Committee concluded that a deviation from the statutory language, particularly without the benefit of public comment, would be unwise.

II. Action Items.

A. In General

On October 26, 2001, President Bush signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The Act amended two rules of Criminal Procedure:

- Section 203 of the Act amended Rule 6 to permit sharing grand-jury information associated with terrorism with specific law enforcement entities. The government must notify the court of any disclosures and the identity of the department or agency to which the disclosure was made.
- Section 219 amended Rule 41 to permit a magistrate judge to issue a search warrant for property outside the district in cases involving terrorism.

Those amendments took effect immediately and are not affected by the Sunset Provisions in Section 224 of the Act. The pertinent portions of the Act are attached to this report.

B. The Need to “Restyle” the Congressional Amendments; Avoiding the Supersession Problem.

Under the Rules Enabling Act, 28 U.S.C. § 2072(b), the pending “style” changes to the Criminal Rules—which have been approved by the Judicial Conference and will presumably be approved by the Supreme Court next Spring—could create supersession problems when the restyled rules take effect on December 1, 2002, because they will have a later effective date than the Act. The Committee believes that it needs to incorporate the changes the recent legislation mandates for Rules 6 and 41, before the Supreme Court adopts the restylized rules, in order to avoid any confusion and possible supersession problems.

To implement these changes in a timely manner and avoid supersession problems, the Chair asked the Rule 6 Subcommittee and Rule 41 Subcommittee to consider style changes to the Congressional language that would conform that language to the global “style” changes to the Criminal Rules. Those subcommittees considered a draft prepared by the Reporter and the Chair. In addition, the Standing Committee’s Style Subcommittee provided suggested changes. A revised draft was then submitted to the full Committee for its consideration.

In accordance with established procedures, the Committee recommends that the Standing Committee not publish the proposed changes for publication and comment by the public, because the changes will simply conform the rules to recent legislation. Instead, the Committee recommends that the Standing Committee forward the proposed changes to Rules 6 and 41 to the Judicial Conference, which in turn can forward them to the Supreme Court with a recommendation that they be approved and included in the May 2002 package of the restyled rules. Hopefully, the revised Rules 6 and 41 and accompanying Committee Notes can be blended in with the existing "style" package.

The proposed drafts, *infra*, include some restructuring and renumbering of the legislative amendments to fit within the approved style package versions of Rules 6 and 41, already approved by the Judicial Conference.

C. Amendments to Rule 6—Grand Jury.

The amendments to Rule 6 permit the government to share certain grand jury information involving intelligence information with other federal officials. *See* Section 203 of the Act.

Although the Act itself does not say so explicitly, the Committee has assumed that Congress meant that an attorney for the government would do the disclosing that Rule 6 authorizes to other officials. For that reason, the new provision adopted by Congress was inserted as a new paragraph (D) to follow the existing paragraph (C) that relates to attorneys for the government disclosing information to other grand juries.

It is not clear in the legislative amendment to Rule 6 whether the attorney for the government is to provide notice of such disclosures to the court that convened the grand jury or to some other court. In the end, the Committee believed that it is better to include language that explicitly indicates that the report is to be made to the court in the district where the grand jury was convened. That tracks language already approved in Rule 6.

The Rule 6 Subcommittee generally proposed that the Committee follow the legislative language as closely as possible, even if it was not entirely clear what Congress meant by a particular term or phrase. Thus, the Committee did not adopt all of the style changes recommended by the Style Subcommittee.

The proposed amendments are at Appendix A to this memo.

Recommendation: The Advisory Committee recommends that the Standing Committee approve the proposed amendments to Rule 6 and forward them, without public comment, to the Judicial Conference for approval.

D. Rule 41—Search Warrant.

The amendment to Rule 41 permits magistrate judges to issue search warrants for property or persons outside their districts if the investigation involves terrorist activities within that district. See Section 219 of the Act, attached.

Although it is not explicitly stated in the legislative amendment, the Committee has assumed that the amendment to Rule 41 does not permit magistrate judges to issue warrants to be executed outside the United States. It simply extends the magistrate's authority to other districts.

To be consistent with other provisions in Rule 41, the Committee has recommended that the amendment include reference to the fact that magistrate judges must otherwise have the authority to issue search warrants in their district, and thus be consistent with the restyled version of Rule 41.

Finally, to be consistent with the recently restyled version of Rule 41, the Committee dropped the word "search" from the amendment because the only type of warrant covered in that rule is a search warrant.

Recommendation: The Advisory Committee recommends that the Standing Committee approve the proposed amendments to Rule 41 and forward them, without public comment, to the Judicial Conference for approval.

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**PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE***

Rule 6. The Grand Jury

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2

(e) Recording and Disclosing the Proceedings.

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4

(3) Exceptions.

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(D) An attorney for the government may disclose

7

any grand-jury matter involving foreign

8

intelligence, counterintelligence (as defined

9

in 50 U.S.C. § 401a), or foreign intelligence

10

information (as defined in 6(e)(3)(D)(iii)) to

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any federal law enforcement, intelligence,

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protective, immigration, national defense, or

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national security official to assist the official

* New material is underlined; matter to be omitted is lined through. Text of rules based on amendments approved by Judicial Conference in September 2001.

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FEDERAL RULES OF CRIMINAL PROCEDURE

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receiving the information in the performance of that

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official's duties.

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(i) Any federal official who receives information

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under Rule 6(e)(3)(D) may use the information

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only as necessary in the conduct of that person's

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official duties subject to any limitations on the

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unauthorized disclosure of such information.

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(ii) Within a reasonable time after disclosure is

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made under Rule 6(e)(3)(D), an attorney for the

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government must file, under seal, a notice with

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the court in the district where the grand jury

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convened stating that such information was

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disclosed and the departments, agencies, or

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entities to which the disclosure was made.

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(iii) As used in Rule 6(e)(3)(D), the term "foreign

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intelligence information" means:

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30 (a) information, whether or not it concerns a
31 United States person, that relates to the
32 ability of the United States to protect
33 against —

34 ● actual or potential attack or other
35 grave hostile acts of a foreign power
36 or its agent;

37 ● sabotage or international terrorism
38 by a foreign power or its agent; or

39 ● clandestine intelligence activities by
40 an intelligence service or network of
41 a foreign power or by its agent; or

42 (b) information, whether or not it concerns a
43 United States person, with respect to a
44 foreign power or foreign territory that
45 relates to —

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- 46 ● the national defense or the security
47 of the United States; or
48 ● the conduct of the foreign affairs of
49 the United States.

50 ~~(D)~~(E) The court may authorize disclosure — at a time,
51 in a manner, and subject to any other conditions
52 that it directs — of a grand-jury matter:

53 (i) preliminary to or in connection with a judicial
54 proceeding;

55 * * * * *

56 ~~(E)~~(F) A petition to disclose a grand-jury matter under
57 Rule ~~6(e)(3)(D)(i)~~ 6(e)(3)(E)(i) must be filed in
58 the district where the grand jury convened.
59 Unless the hearing is ex parte — as it may be
60 when the government is the petitioner — the
61 petitioner must serve the petition on, and the

FEDERAL RULES OF CRIMINAL PROCEDURE 5

62 court must afford a reasonable opportunity to
63 appear and be heard to:

- 64 (i) an attorney for the government;
65 (ii) the parties to the judicial proceeding; and
66 (iii) any other person whom the court may
67 designate.

68 ~~(F)~~(G) If the petition to disclose arises out of a judicial
69 proceeding in another district, the petitioned
70 court must transfer the petition to the other
71 court unless the petitioned court can reasonably
72 determine whether disclosure is proper. If the
73 petitioned court decides to transfer, it must send
74 to the transferee court the material sought to be
75 disclosed, if feasible, and a written evaluation
76 of the need for continued grand-jury secrecy.
77 The transferee court must afford those persons

6 FEDERAL RULES OF CRIMINAL PROCEDURE

78 identified in Rule ~~6(e)(3)(E)~~ 6(e)(3)(F) a
79 reasonable opportunity to appear and be heard.

80 * * * * *

COMMITTEE NOTE

To be inserted in the existing Note for Rule 6:

Rule 6(e)(3)(D) is new and reflects changes made to Rule 6 in the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The new provision permits an attorney for the government to disclose grand-jury matters involving foreign intelligence or counterintelligence to other Federal officials, in order to assist those officials in performing their duties. Under Rule 6(e)(3)(D)(i), the federal official receiving the information may only use the information as necessary and may be otherwise limited in making further disclosures. Any disclosures made under this provision must be reported under seal, within a reasonable time, to the court. The term "foreign intelligence information" is defined in Rule 6(e)(3)(D)(iii).

[The Committee Notes for all subsequent sections in Rule 6 will have to be redesignated]

Rule 41. Search and Seizure

* * * * *

1
2 **(b) Authority to Issue a Warrant.** At the request of a
3 federal law enforcement officer or an attorney for the
4 government:

5 **(1)** a magistrate judge with authority in the district —
6 or if none is reasonably available, a judge of a state
7 court of record in the district — has authority to
8 issue a warrant to search for and seize a person or
9 property located within the district; and

10 **(2)** a magistrate judge with authority in the district has
11 authority to issue a warrant for a person or property
12 outside the district if the person or property is
13 located within the district when the warrant is
14 issued but might move or be moved outside the
15 district before the warrant is executed; and

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16 (3) a magistrate judge — in an investigation of
17 domestic terrorism or international terrorism (as
18 defined in 18 U.S.C. § 2331) — having authority
19 in any district in which activities related to the
20 terrorism may have occurred, may issue a warrant
21 for a person or property within or outside that
22 district.

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* * * * *

COMMITTEE NOTE

To be inserted in the existing Note to Rule 41:

Rule 41(b)(3) is a new provision that incorporates a congressional amendment to Rule 41 as a part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The provision explicitly addresses the authority of a magistrate judge to issue a search warrant in an investigation of domestic or international terrorism. As long as the magistrate judge has authority in a district where activities related to terrorism may have occurred, the magistrate judge may issue a warrant for persons or property not only within the district, but outside the district as well.