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Reform of Court Rule-Making Procedures.

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BOOK REVIEW

REFORM OF COURT RULE-MAKING PROCEDURES. By Jack B. Weinstein.¹
Columbus: Ohio State University Press, 1977. Pp. xiv, 216. \$12.00.

Reviewed by Charles Alan Wright²

The rulemaking³ process by which rules of procedure are adopted for the federal courts is in serious trouble. From 1934, when Congress first authorized the Supreme Court to make rules of civil procedure, until 1972 the rulemaking process seemed to work well. There was little discussion of the process itself, and what there was viewed the process with favor.⁴ In that period Congress never exercised its power to disapprove rules that had been promulgated by the Supreme Court.⁵ The products of the process, the rules themselves, were highly regarded. Although it may smack of hyperbole to say that the Federal Rules of Civil Procedure were "one of the greatest contributions to the free and unhampered administration of law and justice ever struck off by any group of men since the dawn of civilized law,"⁶ praise for the Civil Rules was nearly universal and they have been widely copied in the states. The Federal Rules of Criminal Procedure, though less widely copied, were also well thought of, and the Federal Rules of Appellate Procedure, adopted in 1968, were an excellent piece of work, although they very quickly became almost meaningless as courts of appeals, reeling under a sharp increase in caseload, adopted many local rules altering procedure on appeal.⁷

This pleasant situation has now changed dramatically. Judge Weinstein's book is the latest contribution to a literature that has grown up in

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3. As the title of his book indicates, Judge Weinstein hyphenates the key word in the title. I think that the compound has now become sufficiently familiar that it is preferable to write it as one word. This process often occurs with the passage of time. Thus Civil Rule 16, adopted in 1938, is entitled in part "Pre-Trial Procedure" while Criminal Rule 17.1, adopted in 1966, is entitled "Pretrial Conference."

4. Clark, *The Role of the Supreme Court in Federal Rule-Making*, 46 J. AM. JUD. Soc'y 250 (1963); Maris, *Federal Procedural Rule-Making: The Program of the Judicial Conference*, 47 A.B.A.J. 772 (1961); Wright, *Rule 56(e): A Case Study on the Need for Amending the Federal Rules*, 69 HARV. L. REV. 839 (1956); Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 VAND. L. REV. 521 (1954).

5. C. WRIGHT, *THE HANDBOOK OF THE LAW OF FEDERAL COURTS* § 62 (3d ed. 1976).

6. Carey, *In Favor of Uniformity*, 18 TEMP. L.Q. 145, 146 (1943).

7. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* §§ 3945, 3993 (1977).

the last few years critical of the rulemaking process.⁸ The furor over the Federal Rules of Evidence went not only to the content of those rules as they had been approved by the Court but also to the process by which they had been developed. Congress, so long quiescent about rules, has delayed and modified almost every set of rules and amendments transmitted to it by the Supreme Court since it first took that course when it received the proposed Evidence Rules in 1972. Only the various sets of Bankruptcy Rules emerged unscathed,⁹ probably because of their esoteric subject matter. William L. Hungate, who until his retirement last year was a highly-respected senior member of the House Judiciary Committee and played a major role in connection with both the Evidence Rules and amendments to the Criminal Rules, has written that "few are entirely satisfied with the present process."¹⁰ There are pending in the present Congress several bills by Representative Elizabeth Holtzman that would significantly change the rulemaking process.¹¹

What went wrong? I doubt if anyone knows, but since I was for many years a part of the rulemaking machinery,¹² I have thought about this and offer my speculations. There is, I think, much force in Professor Clinton's suggestion that "the advisory committees of the Judicial Conference and the Supreme Court itself have recently and gradually been pushing the rulemaking process into controversial, uncharted areas of law and thus have been affecting the rights of litigants in a fashion more likely to create the kind of pressure from the public and the legal profession that generates congressional response."¹³

Rules of evidence are in some instances merely housekeeping matters, as is generally true of the civil rules, but many rules of evidence are closely associated with substantive rights or are deliberately adopted to effectuate some extrinsic policy.¹⁴ Insofar as they may affect the balance between

8. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15 (1977); Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975); Lesnick, *The Federal Rule-Making Process: Time for Re-examination*, 61 A.B.A.J. 579 (1975).

9. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 51 n.228 (1977).

10. Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 A.B.A.J. 1203, 1207 (1975).

11. H.R. 341, 95th Cong., 1st Sess. (1977); H.R. 7461, 95th Cong., 1st Sess. (1977).

12. From 1964 until my term expired in 1976 I was a member of the Standing Committee. Prior to that from 1961 to 1964 I was a member of the Advisory Committee on Civil Rules. From 1952 to 1955 I was assistant to Judge Charles E. Clark in his role as Reporter for the Civil Rules Committee.

13. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 52 (1977).

14. C. WRIGHT, *THE HANDBOOK OF THE LAW OF FEDERAL COURTS* § 93 (3rd ed. 1976); Weinstein, *The Uniformity-Conformity Dilemma Facing Draftsmen of Federal Rules of Evidence*, 69 COLUM. L. REV. 353 (1969); Degnan, *The Law of Federal Evidence Reform*, 76 HARV. L. REV. 275 (1962).

prosecution and defense in criminal cases, they are politically very sensitive. The Evidence Rules, as approved by the Supreme Court, represented policy judgments on matters of those kinds that were inevitably controversial. The decision to incorporate in those rules a complete set of rules of privilege was an unnecessary disregard of considerations of federalism,¹⁵ and the choices of what privileges to recognize were highly debatable and subject to powerful criticism.¹⁶

The other rules proposals that have come under fire in Congress since 1972 have been amendments to the Criminal Rules and the new sets of rules, also the product of the Advisory Committee on Criminal Rules, for habeas corpus and section 2255 cases. Crime and criminal litigation have always stirred emotions that are not aroused by civil litigation, and Congress has never shown as much deference to the Supreme Court on criminal procedure as it had, until 1972, on civil procedure.¹⁷

Ten years ago I had argued that reformers ought not to propose changes, even in matters that are clearly procedural, if these changes will have important side effects on substantive rights and that changes of that kind should come, not from the rulemaking machinery, but from the people's elected representatives in Congress.¹⁸ The line that I was trying to draw is a hazy one, but, at least with the wisdom of hindsight, it seems clear that the line was crossed in some of the provisions of the proposed Evidence Rules and in some of the proposals for amendments of the Criminal Rules.

Despite all these invitations to challenge, the Evidence Rules and the Criminal Rules amendments that followed might have gone into effect routinely, as all previous rules proposals had. After all, the 1966 amendments to Civil Rule 23 made a major substantive change. Businesses must now defend, and often pay millions to settle, class actions based on many small individual claims that no litigant could have afforded to bring to court until rule 23(b)(3) made it possible for him to sue not only for himself but also as champion of thousands of others. Yet it aroused no interest whatever in Congress.

The Evidence Rules were the victim of a terrible accident of timing.

15. Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 571-74 (1967).

16. Congress must be credited too, for it rescued the Committee from the product of an unfortunate hubris which had caused it unduly to restrict and diminish privileges. Not only was the Committee wrong, especially in doing away with the privilege for interspousal confidences, but it preempted matters of substance which are for the democratic process to resolve.

1 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* iv (1977).

17. 1 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE: CRIMINAL* § 4, at 17 (1969).

18. Wright, *Procedural Reform: Its Limitations and Its Future*, 1 GA. L. REV. 563, 569-71 (1967). In the book under review, Judge Weinstein does not challenge the making of rules with substantive effect but argues that they should be scrutinized more carefully by Congress than rules with purely technical or procedural effect. J. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* 94 (1977).

[L]ate 1972 was an unpropitious a time for the Rules to have gone up to the Hill as could be imagined. As the Watergate scandal began to unravel, the notion of expanded privileges of secrecy for government and elimination of privileges for citizens seemed less attractive. The concessions to the Justice Department, which had seemed like such smart politics the year before, now became a liability as the prestige of that agency was tarnished by new revelations. Finally, and perhaps the most significant factor, Congress was preparing to assert its prerogatives, to refute the claim that it was the impotent branch by taking on the President on the issues of impoundment and the conduct of the Viet Nam War. What better way to tune-up for that bout than to take on the Supreme Court in a non-title fight?¹⁹

To the factors listed in the quotation, I would add one other. At a time when the press was working hard in Congress to repair the blow it felt it had been dealt by *Branzburg v. Hayes*²⁰ and to obtain passage of a law that would give journalists a privilege not to disclose their confidential sources, the privilege rules that the Court had approved did not include any privilege of that kind and would have barred judicial development of such a privilege. The dreary work of procedural reform does not often attract the attention of the press, but once the press discovered that the Court-proposed rules went in the opposite direction from what it wanted for itself, every arguable defect in the rules, every scrap of controversy about them, became fair game for reporters and editorial writers and ensured that Congress would take a close look at what was happening.

Congress first delayed the effective date of the Evidence Rules and in late 1974 adopted, as positive legislation, Rules of Evidence that differ in many ways from what the Supreme Court had approved. The deletion of the detailed rules of privilege and the decision to honor state privileges on elements of a claim or defense on which state law provides the rule for decision²¹ seems to me a great improvement, but except for that Congress accomplished very little.²² In the course of the congressional hearings on the Evidence Rules, however, outsiders were given a unique glimpse into the way in which the rulemaking process worked.

19. 21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5006, at 104-05 (1977).

20. 408 U.S. 665 (1972).

21. FED. R. EVID. 501.

22. What was accomplished by the Congressional intervention? In terms of the substance of the rules as finally enacted, the answer is 'not much.' . . . For the most part, Congress accepted the basic assumptions of the Advisory Committee and the notion that the primary purpose of the Rules was to achieve uniformity, not to reform the law of evidence. While some of the drafting changes may represent improvement, these are outweighed by some horrible excrescences upon the Supreme Court draft.

21 C. WRIGHT & K. GRAHAM, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 5006, at 108-09 (1977).

For a less charitable assessment of what Congress did, see Copeland, *Who's Making the Rules Around Here Anyway?* 62 A.B.A.J. 663 (1976).

It came out, for example, that while preliminary drafts of rules are widely circulated in the profession, and comments on them carefully considered by the advisory committee, there was no effective way for the profession to comment on the changes the committee makes in light of the professional reaction when it sends its final draft on to the Judicial Conference and the Supreme Court. Indeed, until the Evidence Rules were in process, the final drafts had been regarded as confidential documents to which outsiders were denied access.

The hearings on the Evidence Rules also disclosed how influential the Justice Department and a key Senator had been in the final stages of the drafting process, and how many changes had been made to mollify criticisms from those sources. This gave added ammunition to those who were already denouncing the rulemaking committees as unrepresentative and elitist. Drafting procedural rules is a difficult technical task, best performed by skilled professionals, rather than by a committee as carefully balanced as were delegations to the 1972 Democratic Convention. But this is true only so long as the rules are addressed to strictly technical questions of procedure. If rules are going to have a substantive effect on sensitive issues of social policy, then it does become important that those who draft the rules represent a cross-section of views on these policy matters. A better solution would be to leave changes of that kind to Congress, which is far more representative than the most carefully balanced committee.

The controversy about the Evidence Rules opened the floodgates. Congress has similarly delayed and modified the subsequent amendments to the Criminal Rules as well as the rules for habeas corpus and section 2255 cases. Although the controversial nature of the subject matter might have invited scrutiny by Congress in any event, I think Congress is now quite skeptical about how rules are made, and that even the largely innocuous set of proposed amendments to the Appellate Rules that have recently been circulated²³ will get a hard look from Congress before they are permitted to take effect.

Judge Weinstein's book is, therefore, a timely contribution on an important subject.²⁴ It is not likely to become bedside reading for the average lawyer, who is more interested in the end product than in the process by which rules are produced. It should be required reading for the members of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, for it seems quite plain that the

23. COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE (April 1977).

24. A condensed version of the book was published as Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976). The recommended changes with which the book ends are separately published as Weinstein, *Reform of the Federal Rule-making Process*, 63 A.B.A.J. 47 (1977). As those titles indicate, apparently Judge Weinstein is quite flexible on whether to use a hyphen in "rulemaking." See note 3 *supra*.

time has come when there are going to be changes in the process. Unless the Standing Committee and the Judicial Conference itself take the initiative in proposing changes in the statutes authorizing rulemaking, they will soon find themselves operating under reforms imposed on them by Congress. In the nature of things Congress is less informed about how rulemaking works and what effect particular changes would have than are those who have participated in the process at first hand.

Jack Weinstein is uniquely qualified to offer wise advice on how rulemaking should be reformed. His experience as law professor, practitioner, judge, and procedural reformer lets him approach his topic from the point of view of every branch of the profession. For fifteen years he was Professor of Law at Columbia and he is the author of a leading casebook on civil procedure.²⁵ He spent two years as county attorney of a large suburban county and he has been a judge of the Eastern District of New York for ten years. He played a large role in the drafting of the major reform of procedure in the New York state courts that took effect in 1963. He was a member of the federal Advisory Committee on Rules of Evidence throughout its existence. He is the senior author of multi-volume treatises on New York procedure and on the federal Evidence Rules.²⁶

After a detailed history of procedural rulemaking, the book examines closely the present process and criticisms that have been made of it. Some criticisms Weinstein finds to be sound, and he suggests changes to meet them. Other criticisms, and other proposals for change, he rejects, and carefully explains why. He does not confine his attention to rules to be adopted nationally, but includes an especially valuable chapter on local court rules.²⁷ Despite the defects in the national rulemaking process that the recent furor has brought to light, I continue to think that on the whole it is a sound process that produces excellent results. Use by lower courts of their local rulemaking power, however, is for the most part an unmitigated disaster. I have tried to point out elsewhere — in the more restrained language appropriate for a treatise — why this is so.²⁸ Weinstein makes an overwhelming demonstration that local rules are commonly adopted on a haphazard basis, without careful study or consultation with the bar, that many local rules have been adopted that are of doubtful validity or even constitutionality, and that it is awkward and difficult to challenge these local rules. Weinstein also exposes how often important procedural changes are accomplished by directive and “guidelines” from the Judicial

25. M. ROSENBERG, J. WEINSTEIN, H. SMIT & H. KORN, *ELEMENTS OF CIVIL PROCEDURE* (3d ed. 1976).

26. J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* (1976); J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* (1963).

27. J. WEINSTEIN, *REFORM OF COURT RULE-MAKING PROCEDURES* 117-45 (1977).

28. 12 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 3152, at 217-18 (1973).

Council or from a Circuit Council.²⁹ These are often not available except to the judges, even though they set policy on major matters.

The book concludes with eight proposed changes in the national rule-making process and five for the process by which local rules and guidelines are made. In addition, Weinstein recommends that all documents in the rulemaking process be made available to the public and that the Judicial Conference and its committees be allowed a reasonable time to suggest whether and what kind of changes in rulemaking procedures are desirable and that Congress should take the initiative only if the courts fail to act.

If Weinstein's suggested changes in rulemaking were adopted as a package, the valid criticisms of the present machinery would be met and the net result would be a significant improvement. I do not mean to say that I endorse every detail in the Weinstein package. The proposal that the Standing Committee be required to hold a public hearing on all proposed rule changes³⁰ seems a clear mistake. Public hearings are generally a terrible waste of time, particularly on the purely procedural questions to which I think rulemaking should be confined. In any event, if there are to be public hearings — and though I would not require them in all cases I think there are circumstances in which they could be useful — they should be before the appropriate advisory committee, since it bears the primary responsibility for the formulation of rules, rather than before the Standing Committee, which acts primarily as a final check after a rule has gone through several drafts and been fully considered by the profession. There are other matters on which I presently find Weinstein persuasive, but would like to hear and assess the views of others.

Judge Weinstein ends his book by saying: "Since we are not dealing with demonstrable mathematical formulas but in judgments based upon personal experience and history, I recognize that others who have my respect will differ with me. If they do, I hope that they will speak out so that the matter can be thoroughly debated."³¹ I share his hope — and feel that this thoughtful and soft-spoken examination of the problem will provide the focus for the constructive debate that will spur the Standing Committee and the Judicial Conference to act before Congress acts on its own.

29. J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES 136-40 (1977).

30. *Id.* at 114, 150.

31. *Id.* at 153.