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

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To: **Hon. David F. Levi, Chair**
Standing Committee on Rules of Practice and Procedure

From: **Hon. Susan C. Bucklew, Chair**
Advisory Committee on Federal Rules of Criminal Procedure

Subject: **Report of the Advisory Committee on Criminal Rules**

Date: **May 20, 2006**

I. Introduction

The Advisory Committee on Federal Rules of Criminal Procedure ("the Committee") met on April 3-4, 2006 in Washington, D.C. and took action on a number of proposed amendments to the Rules of Criminal Procedure. The Draft Minutes of that meeting are attached.

This report addresses a number of action items: approval of published Rules 11, 32, 35, 45, and 49.1 for transmission to the Judicial Conference; approval of proposed amendments to Rules 29 and 41 for publication and comment; and approval of the time computation template for eventual publication. In addition, the Committee has several information items to bring to the attention of the Standing Committee, most notably continued discussion of a draft amendment to Rule 16.

II. Action Items–Recommendations to Forward Amendments to the Judicial Conference

1. ACTION ITEM–Rule 11. Pleas; Proposed Amendment Regarding Advice to Defendant Under Advisory Sentencing Guidelines.

This amendment is part of a package of proposals required to bring the rules into conformity with the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provisions of the federal sentencing statute that make the Guidelines mandatory violate the Sixth Amendment right to jury trial. With these provisions excised, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines

ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." 543 U.S. at 222. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

There were many public comments received on this and the other *Booker* amendments. The Sentencing Commission stated that the amendment tracked the approach the Commission believes to be implicit in *Booker*, but it suggested that the word "calculate" be replaced with "determine and calculate." Other comments suggested that the amendment gave the Guidelines greater prominence than warranted under *Booker*, insufficiently emphasizing the remaining sentencing factors set forth in 18 U.S.C. § 3553(a). There was extensive discussion of the public comments and an additional concern, raised at the meeting, that the amendment might be read as requiring a complete guideline calculation in every case. That would be inconsistent with cases such as *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005). *Crosby* recognized that the district courts would "normally" have to determine the applicable guideline range. *Id.* at 111. However, in some cases the court may conclude that it is unnecessary to resolve a particular guideline issue because statutory factors under 3553(a) require a variance that moots the guideline issue. *Id.* at 112.

The Committee agreed that the function of the rule is to advise a defendant who is pleading guilty of the manner in which the court will determine the defendant's sentence. The published language captures the approach taken by most courts after *Booker*. There was, however, agreement that it would be useful to make it clear in the Note that the rule was not intended to be inconsistent with *Crosby*.

After considering other proposals, the Committee voted 9 to 3 to forward the amendment to the Standing Committee as published with the addition of a reference to *Crosby* in the Committee Note in order to avoid any possible confusion. Here, and in the other *Booker* amendments, the Committee also agreed to delete from the Committee Note a reference to the Fifth Amendment requirement of proof beyond a reasonable doubt from the description of *Booker*.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 11 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM–Rule 32, Sentencing and Judgment; Proposed Amendment Regarding Notice to Defendant Under Advisory Sentencing Guidelines.

These amendments adapt two subdivisions of the Rule 32 to *United States v. Booker*, 543 U.S. 220 (2005), which directs courts to consider not only information relevant to the Sentencing Guidelines, but also information relevant to the statutory factors listed in 18 U.S.C. § 3553(a). The Committee is proposing amendments only to subdivisions (d) and (h), which govern presentence reports and notice of possible departures. As noted below, the Committee has withdrawn the

proposed amendment to subdivision (k) because of legislative activity that occurred after the approval of the amendments for publication and comment.

Subdivision (d). Subdivision (d) of the rule establishes the requirements for presentence reports. It already requires that the report include the applicable Guidelines and information relevant to the guideline calculations. The amendment adds the requirement that the report include information relevant to the statutory criteria under § 3553(a). However, in light of the difficulty that the probation office may have in determining the scope of the information that would be relevant to the broad statutory criteria under § 3553(a), the proposed amendment requires that information relevant to the statutory criteria be included only when required by the court.

The Committee received critical comments from the Federal Public Defenders and the National Association of Criminal Defense Lawyers who saw the published amendment as improperly giving primacy to the Guidelines in the sentencing process. They also urged that the rule address individually each of the sentencing factors under 3553(a) and that the rule be revised to require the probation office to collect all information relevant to each of the statutory factors. Additionally, they suggested that the title of the heading should be amended to refer to the "advisory" character of the Guidelines.

The Committee agreed that the heading should be revised to refer to the Guidelines as "advisory," and with that change it approved the amendment as published. The Committee felt the published language accurately reflects the approach most courts are taking after *Booker*, and it avoids placing an open-ended and unmanageable obligation on the probation office.

In the Committee Note accompanying the amendment to this subdivision and subdivision (h), the Committee also deleted the Fifth Amendment from the description of the *Booker* decision.

Subdivision (h). This amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Currently, it requires notice that the court is considering departing from the Guidelines on the basis of factors not identified in the presentence report or pleadings. The proposed amendment states that the court must provide this notice when it is considering either a departure or a non-guideline sentence based upon the factors in 18 U.S.C. § 3553(a) on the basis of a ground not identified in the presentence report or prehearing submissions. The amendment refers to departures and "non-guidelines" sentences. In the aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have constituted departures under the mandatory guideline regime, but are now permissible because the Guidelines are advisory (including the terms "'non-Guidelines sentence" and "variance"). As stated in the Committee Note, the amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

The public comments to the published draft revealed several ambiguities in the language. The language was interpreted by some as overly broad (requiring notice whenever the court intends

to rely on a non-guideline factor) and by others as too narrow (requiring no notice when a factor has been identified for one purpose, but the parties are unaware that the court is considering it for a wholly different purpose). Given the potential for misinterpretation, the Committee agreed that a modification of the published language was needed, and it unanimously accepted the alternative language proposed by the Sentencing Commission.

Subdivision (k). The Standing Committee also approved the publication of a proposed amendment to subdivision (k) intended to standardize the collection of data regarding post-*Booker* sentencing by requiring all courts to enter their judgments, including the statement of reasons, on forms prescribed by the Judicial Conference. This provision, which provoked considerable controversy, was withdrawn by the Committee in light of the enactment of § 735 of the USA Patriot Improvement and Reauthorization Act, which amended 28 U.S.C. § 994(w). The amended statute requires the chief judge of each district to provide the Sentencing Commission with an explanation of each sentence including "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee withdrew its request for an amendment to the Criminal Rules, and the Advisory Committee concluded that an amendment to subdivision (k) was no longer necessary.

Recommendation–The Advisory Committee recommends that the proposed amendments to Rule 32(d) and (h), as modified after public comment, be approved and forwarded to the Judicial Conference.

3. ACTION ITEM–Rule 35, Correcting or Reducing Sentence; Proposed Amendment Regarding Elimination of Reference to Mandatory Sentencing Guidelines.

This amendment conforms Rule 35(b)(1)(B) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), holding that the Guidelines are advisory, rather than mandatory. The rule currently states that the court may reduce a sentence if "reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." Although the Guidelines do not currently include provisions governing the correction of sentences under Rule 35, the amendment removes the rule's language that seems, on its face, to be inconsistent with the decision in *Booker*.

Both the Sentencing Commission and the National Association of Criminal Defense Lawyers (NACDL) suggested changes in either the amendment or the note. After discussion, the Committee decided not to alter the amendment. In essence, the proposed changes introduced additional issues that were not part of the amendment as published. NACDL suggested that given the advisory character of the Guidelines, it is no longer appropriate for the rule to require that the motion be made by the government, since powerful evidence of cooperation should be considered under 18 U.S.C. § 3553(a) even in the absence of such a motion. The language of the rule, however, was enacted by Congress. Even if the Committee had the authority to delete this requirement under the Rules Enabling Act, it could not do so without publishing such an amendment for public comment. The

Sentencing Commission raised the question whether the *Booker* remedial opinion is applicable to the post-sentencing context. It suggested that the Committee Note be amended to address this issue. The Committee unanimously declined to introduce the new language to the Note, or otherwise to alter the rule as published for public comment. (The only exception was the agreement to eliminate the reference to the Fifth Amendment in the description of the *Booker* decision in this Note, as well as the notes accompanying the other *Booker* amendments.)

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 35 be approved as published and forwarded to the Judicial Conference.

4. ACTION ITEM–Rule 45, Computing and Extending Time; Proposed Amendment Regarding Computation of Additional Time for Service.

This amendment has its origins in an amendment to Civil Rule 6 that clarifies the computation of the additional time provided when service is made by mail, leaving with the clerk of court, or electronic means under Civil Rule 5(b)(2)(B), (C), or (D). The amendment of the Civil Rule became effective on December 1, 2005. The proposed amendment to Rule 45 tracks the language of the civil rule.

The Committee received only one comment on the proposed amendment, which consisted of a statement of strong approval for the change. Without objection the Committee approved the amendment of Rule 45.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 45 be approved as published and forwarded to the Judicial Conference.

5. ACTION ITEM–Rule 49.1, Privacy Protections for Filings Made with the Court; Proposed Rule to Implement E-Government Act.

This new rule, which is based upon the common template developed by Professor Daniel Capra, implements the E-Government Act. It differs from the common provisions in several respects, including the partial redaction of an individual's home addresses (which reflects the special concerns of witnesses and victims in criminal cases) and an exemption from redaction for certain information needed for forfeitures. Rule 49.1 also deletes the template provisions relating to social security and immigration cases, which are exclusively civil. The proposed rule includes provisions regarding actions under 28 U.S.C. §§ 2254, 2255, and 2241. Although these actions are also technically civil, the Advisory Committee concluded it was appropriate to refer to them in Rule 49.1 because they are governed by procedural rules recently restyled by the Criminal Rules Committee.

The e-government rules, including Rule 49.1, generated extensive public comment. A subcommittee reviewed the public comments and considered the advice of Professor Capra and the reporters for the other committees prior to the Committee's April meeting.

Many of the public comments dealt with considerations common to all of the e-government rules, and the Committee sought to incorporate the common changes recommended by Professor Capra after consultation with all of the reporters. These included (1) using of the term "individual" rather than "person" throughout the rule, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the exemption from redaction for information necessary to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed.

The Committee also discussed the provisions for filing under seal and protective orders. The provisions, which were common to all of the e-government rules, were the topic of considerable commentary from the public and members of the Committee. The Committee ultimately endorsed a change in the provision on protective orders, and we understand that language may be adopted by the other advisory committees. The discussion focused on the difference between the standards for sealing and those for protective orders, which were not parallel in the amendment as published for comment. Protective orders were authorized only "[i]f necessary to protect private or sensitive information," while no similar restriction is placed on sealing. The Committee was satisfied with the explanation that the standard for sealing is well established, and there should be no effort to restate that standard in Rule 49.1. The Committee concluded, however, that the provision for protective orders should be modified to incorporate the more flexible standard for the issuance of protective orders set forth in Civil Rule 26(c), which employs the phrase "[f]or good cause shown." The Committee amended subdivision (d) to incorporate this language, and Professor Capra said that he would bring this change to the attention of the other advisory committees. After the Committee meeting all of the reporters agreed to recommend language based on this change to Rule 49.1, but to shorten the phrase to "cause shown." This phrasing is used elsewhere in the Criminal Rules, so we have conformed Rule 49.1 as well to "cause shown." (Note that this provision is now found in (e) due to the renumbering following the addition of a new subdivision (c) regarding immigration cases; the new subdivision is discussed below.)

Other issues addressed in the public comments and Committee discussion were specific to Rule 49.1 or bear most heavily on that rule.

Several issues related to information identifying individuals, particularly date of birth and social security number. After consultation with CACM staff and Professor Capra, the Committee was persuaded that the current rule reflects a careful balancing of interests, and it declined to make any changes. It thus rejected the request of background screeners, who urged that the public record in criminal cases should include full identifying information, such as date of birth, in order to aid private criminal records searches. It also rejected a suggestion from within the Committee that even the disclosure of the last four digits of an individual's social security number might create a danger

of breaches of privacy or identity theft. The Committee was informed that CACM had considered the privacy and security issues relating to social security numbers, and had based the rule permitting disclosure of the last four digits on the practice of the Social Security Administration.

Several issues concerned actions under 18 U.S.C. §§ 2254, 2255, and 2241, which as noted above are covered by both Civil Rule 5.2 and Criminal Rule 49.1.

CACM and the National Association of Criminal Defense Lawyers (NACDL) expressed concern that a categorical exemption from redaction for filings in proceedings under 18 U.S.C. §§ 2254, 2255, and 2241, was unnecessarily broad. The Committee's rationale for exempting these actions was its conclusion that, as a practical matter, the pro se plaintiffs who file such actions will not generally be aware of the redaction requirements. To meet the overbreadth objection, the Committee decided to restrict the exemption to filings by pro se plaintiffs in these actions. The Committee declined, however, to eliminate the exemption entirely. It rejected the suggestion that it would be sufficient merely to relax the application of the redaction requirements in the case of pro se filings. If the rule as a technical matter requires redaction in the case of pro se filings, there could be adverse legal consequences for pro se plaintiffs who failed to redact sensitive information. If a pro se filing under §§ 2254, 2255, and 2241 contains unredacted information that raises security concerns, the court can issue a protective order.

Subsequent to the Advisory Committee meeting, Professor Cooper raised an additional issue regarding actions under 18 U.S.C. § 2241 raising immigration claims. Without going into great detail, the issue that emerged concerned efforts under Civil Rule 5.2 to mesh the special considerations attendant to immigration cases (including limited remote access) with the considerations applicable to actions under §§ 2254, 2255, and 2241. All of the reporters agreed that it was important to apply the same standards to all 2241 cases involving immigration rights. Rather than import additional provisions into Rule 49.1 to deal with such cases, the reporters agreed that it would be preferable to deal with 2241 cases involving immigration rights exclusively under Civil Rule 5.2. Accordingly, subdivision (c) was added to provide that such cases are governed exclusively by Rule 5.2. Since this change was needed to prevent a potential conflict with some or all of the provisions in Rule 5.2 governing immigration claims, it seemed to fall well within the authority that the Committee agreed to give to Judge Bucklew and the reporter.

CACM objected to the categorical exemption from redaction in Rule 49.1(b)(8), (9), and (10), for charging documents, affidavits in support of charging documents, arrest or search warrants, and filings prepared before the filing of a criminal charge that is not part of a docketed case. In CACM's view, redaction of specific private or sensitive information should be sufficient. The Committee reviewed the reasons for its original decision to exempt these filings, particularly the importance of particularity and identification in documents such as arrest or search warrants. Also, the public has a right to know with some specificity who has been charged with a criminal offense or where a search was executed. After discussion, the Committee agreed without objection to retain the exemptions as published.

CACM also expressed strong concern that Rule 49.1 as published did not protect the confidentiality of a grand jury foreperson's name, because it exempts charging documents from the redaction requirement. Disclosure of a grand juror's name, CACM noted, was inconsistent with its policy of protecting the privacy of jurors. Although the published draft includes the CACM policy in the Committee Note, the policy would require sealing on a case by case basis, which CACM deemed insufficient. In discussing this issue, the Committee noted that the petit jury verdict forms present a similar issue, since they are also signed by the foreperson.

The Committee considered an amendment to the published rule that would have redacted the foreperson's name and substituted that person's initials. After extended discussion of the problems posed by requiring redaction, the Committee concluded that the rule should be recommended to the Judicial Conference as published, though the concerns raised by CACM may warrant further study. Several considerations weighed against requiring redaction at this time. Some of the concerns were practical in nature, given the importance of having an original signed version of the documents initiating a criminal prosecution and recording the verdict in the public record. Although it might be possible to have two versions of these documents, one signed and filed under seal and the other merely initialed and filed in the public record, it was unclear exactly how that would work. Moreover, that procedure had not been the subject of notice and public comment. Committee members also expressed concern about an anonymous system of justice. Under Rule 10(a)(1) the court must ensure that the defendant has a copy of the signed grand jury indictment at the time of arraignment. Rule 6(f) provides for the return of a grand jury indictment in open court, and there was support for the view that absent specific findings the public should be entitled to see any document filed in open court. Given the complexity of the issue, the Committee thought that it would be desirable to have a study to determine whether public disclosure of foreperson signatures has caused significant problems before proposing a new rule requiring redaction of every grand jury indictment and every petit jury verdict form.

Finally, the Committee clarified the relationship between the CACM policy statement, which was included in the Committee Note as published, and the rule itself. At Professor Capra's suggestion, the Committee Note was revised to state more clearly that when the rule itself does not exempt the materials listed in the CACM policy statement from disclosure, privacy and law enforcement concerns are to be accommodated through the sealing and protective order provisions of the rule.

Professor Capra also asked the Committee to give the chair and reporter the authority to work with their counterparts on the other advisory committees to work out any last-minute wording issues and to bring all of the e-government rules into agreement as far as possible.

Recommendation–The Advisory Committee recommends that proposed Rule 49.1 be approved, as modified after public comment, and forwarded to the Judicial Conference.

IV. Action Items–Recommendations to Publish Amendments to the Rules

1. Rule 29, Motion for a Judgment of Acquittal; Proposed Amendment Concerning Deferral of Rulings.

At present, Rule 29 permits the court to grant a preverdict acquittal that is insulated from appellate review because of the Double Jeopardy Clause. By a narrow vote of 6-5 the Committee voted to recommend publication of an amendment to Rule 29 that would eliminate such unreviewable rulings. The current proposal has an unusually long history that this report will review briefly before turning to recent developments.

Background. For several years the Department of Justice has pressed for an amendment to Rule 29 on the ground that it is anomalous and highly undesirable to insulate erroneous preverdict acquittals from any appeal. This issue has been discussed at numerous meetings of the Advisory Committee, and was brought by the Department directly to the Standing Committee at the January 2005 meeting.

At present, the rule permits the court to grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

After extensive discussion at several meetings, the Advisory Committee voted in May 2004 to leave the rule as it is because of concerns that the proposed amendment would be problematic in cases involving multiple defendants or multiple counts, as well as cases in which the jury is unable to reach a verdict. At that point, the Advisory Committee was under the impression there had been only a very small number of problematic preverdict acquittals under the present rule.

Subsequently, the Department of Justice developed additional information based upon a survey of all United States Attorneys. This information was intended to show the frequency of preverdict acquittals, and selected case studies were presented to show the impact erroneous and unreviewable preverdict acquittals have had on the administration of justice. Deputy Attorney General Christopher Wray presented the new information at the January 2005 meeting of the Standing Committee and strongly advocated the adoption of an amendment to Rule 29 that would provide the government with some means to appeal erroneous acquittals. He stated that the Department would support either a rule requiring that all judgments of acquittal be deferred until the jury has returned a verdict, or a rule that would defer such a ruling unless the defendant waives the Double Jeopardy rights that would normally bar the government from appealing.

Following this presentation, the Standing Committee asked the Advisory Committee to draft an amendment to Rule 29 that would address the concerns raised by the Department of Justice, as well as those concerning hung juries and cases involving multiple counts and multiple defendants, and to advise the Standing Committee on the desirability of adopting such an amendment.

At its April 2005 meeting the Advisory Committee once again considered the desirability and feasibility of amending Rule 29. The Committee was presented with the additional materials prepared by the Department of Justice for the Standing Committee, and Assistant Attorney General Christopher Wray presented the Department's position. After extensive discussion, the Committee voted 8 to 3 in favor of some change to Rule 29. However, many issues were raised regarding the rough draft under consideration (which allowed a defendant to consent to a preverdict ruling if he also waived his Double Jeopardy rights). Committee members felt that substantial revisions in the proposed amendment would be necessary. The proposed amendment was redrafted and subsequent versions were presented and discussed at the Committee's meetings in October 2005 and April 2006.

The current proposal. The Committee considered but ultimately rejected the option of prohibiting preverdict acquittals, because they serve a number of important functions. They provide the trial court with a valuable case-management tool, especially in complex cases involving a large number of defendants and/or counts. In complex cases it is very helpful to be able to simplify the case by eliminating some defendant(s) or count(s) from the jury's consideration if there is no evidence that could support a conviction. Retaining the option of preverdict acquittals is also highly desirable from the defense perspective, since there are obvious costs to continued participation in the latter stages of what may be a lengthy and costly trial.

The amendment addresses the problem by retaining the option of preverdict acquittals, but allowing them only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. The amended rule seeks to protect both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and/or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts).

The 6-5 vote by the Committee reflects serious reservations regarding the merits of the proposed amendment, rather than concerns about the language or form of the amendment. Indeed the language of the amendment, which has been refined over the course of numerous meetings, was approved without objection by the Committee at the April 2006 meeting. The discussion at the Committee focused on the policy issues. Members of the Committee who opposed the amendment saw it as inconsistent with the public policy underlying the Double Jeopardy Clause and as unduly restricting the trial court's authority. They were not persuaded that erroneous preverdict acquittals have been a sufficient problem to warrant such a restriction of constitutional rights and judicial authority. Additionally, since the rule contemplates a government appeal from a preverdict acquittal, they expressed concern that government appeals could create new problems, complicating the

continuation of the trial of related counts or defendants, or possibly denying the district courts of jurisdiction to continue such trials.

After hearing the Department's presentation in January 2005 the Standing Committee asked the Advisory Committee to draft an amendment that would respond to the Department's concerns and to advise the Standing Committee on the desirability of adopting such an amendment. The attached proposal reflects a consensus on the best way to amend Rule 29 if preverdict acquittals are to be restricted to allow the government to challenge them on appeal. The Committee, however, is divided nearly evenly on the desirability of such an amendment at the present time.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 29 be published for public comment.

2. Rule 41, Search and Seizure; Proposed Amendment Authorizing Magistrate Judge to Issue Warrants for Property Outside of the United States.

This amendment was initiated by the Department of Justice. It responds to a problem that the Department has encountered when federal prosecutors work with the State Department Bureau of Diplomatic Security to investigate and prosecute cases involving corruption in United States embassies and consulates around the world. Many cases involved allegations that corrupt consular officials and/or foreign service nationals are selling U.S. visas to foreign individuals who may or may not qualify for a U.S. visa. These crimes take place overseas, and often the most important evidence is located in the offices or residences associated with the consulate or embassy. These problems have arisen in cases involving embassies and consulates in many countries and in American Samoa, a United States territory that is administered by the Department of the Interior but has no federal district court. Although these locations are within U.S. control, they are not located within any State or U.S. judicial district.

As currently written, Rule 41(b) does not provide magistrate judges with the authority to issue warrants for such locations. *See, e.g., United States v. Wharton*, 153 F. Supp. 2d 878, 882 (W.D. La. 2001) ("clearly, Rule 41 did not empower any United States District Court to issue a search warrant for the defendant's property when it was located at the United States Embassy in Port-au-Prince, Haiti.") Although the USA PATRIOT Act amended Rule 41(b) to provide magistrate judges with the authority to issue warrants outside the magistrate's district, this authority is applicable only in cases involving certain terrorism offenses. *See* Rule 41(b)(3).

The language of the proposed amendment was based upon Rule 41(b)(3), which was added by the USA PATRIOT Act, and upon the definition of the special maritime and territorial jurisdiction of the United States contained in 18 U.S.C. § 7, which includes U.S. consulates and embassies. The proposed amendment provides for jurisdiction in any district in which activities

related to the crime under investigation may have occurred, or in the District of Columbia, which is the default jurisdiction for venue under 18 U.S.C. § 3238.

A similar but broader amendment was approved in 1990 by the United States Judicial Conference, which recommended that the Supreme Court adopt the new rule. The Supreme Court declined to adopt the rule at that time, concluding that the matter required "further consideration." The 1990 proposal was broadly worded: it applied to property "lawfully subject to search and seizure by the United States." The current proposal, however, is limited to property within any of the following:

> (1) a territory, possession, or commonwealth of the United States;
>
> (2) the premises of a United States diplomatic or consular mission in a foreign state, and the buildings, parts of buildings, and land appurtenant or ancillary thereto, used for purposes of the mission, irrespective of ownership; or
>
> (3) residences, and the land appurtenant or ancillary thereto, owned or leased by the United States, and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

These are all locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control.

The Committee was advised by the Department of Justice that the proposed amendment had been subject to extensive review by agencies such as the Department of State and the Office of Management and Budget. Its scope was deliberately kept narrow to avoid any thorny international issues. It addresses search warrants, not arrest warrants, since the latter may raise issues under extradition treaties.

The Department's presentation regarding the need for an amendment was persuasive. The Committee discussion focused on the means of providing the requested authority. One question was whether the Department should seek legislation rather than an amendment of the rules. Because the issues involved only forum, and not jurisdiction, the Department believed it was appropriate to come first to the Rules Committee. The magistrate judge member of the Committee expressed some concern that the proposal might unintentionally create a hierarchy or distinction among federal magistrate judges, by giving greater authority to the three magistrate judges seated in the District of Columbia. It was noted, however, that Congress has already created a functional distinction by vesting the District of Columbia with default jurisdiction over several categories of international and extraterritorial matters.

The Committee voted 10-1 to approve the amendment to Rule 41(b). Because no committee note had yet been prepared, the Committee agreed to consider and vote on the note by e-mail. On May 12, the draft note was circulated for comment. No member of the Committee requested changes

or a telephone conference, so the Committee was asked to vote on the Committee Note by e-mail. All members of the Committee approved the Note by e-mail.

Recommendation–The Advisory Committee recommends that the proposed amendment to Rule 41(b) be published for public comment.

3. Time-Computation Template

Judge Kravitz briefed the Committee on the time-computation template, which abolishes the "10 day rule" and adopts the "days are days" principle. He also described in more detail the principles governing the template, and the issues still under consideration by his subcommittee. He explained that the Time-Computation Subcommittee hoped that all of the advisory committees would approve the template at their spring meetings, paving the way for the template to be presented to the Standing Committee at its June meeting. Then each of the advisory committees could begin to adapt the template to their own deadlines.

Following that briefing, the Committee approved the time-computation template for eventual publication in tandem with proposed amendments to the relevant rules of procedure.

Recommendation–The Advisory Committee recommends that the proposed time-computation template be approved for later publication.

V. Information Items

Four subjects discussed at the April 2006 meeting will be major items on the Committee's future agenda, and may eventually reach the Standing Committee.

A. Information Item–Consideration of an Amendment to Rule 16 Concerning Disclosure of Exculpatory Evidence

Since October 2003, the Committee has been considering a proposal to codify and expand the Government's disclosure obligations regarding exculpatory and impeachment evidence favorable to the defense. The Department of Justice has consistently opposed the proposal, believing it to be unnecessary, and expressing particular concern about pretrial disclosure of the identity of prosecution witnesses. This proposal has been discussed at length by a subcommittee and at six meetings of the full Committee. At the Committee's April 2005 meeting, the Committee first voted 8 to 3 in favor of proceeding with an amendment to Rule 16 and then returned the matter to the subcommittee for additional work on the language of the proposed amendment.

While participating fully in efforts to draft the language of a proposed amendment, the Department of Justice also undertook efforts to develop a revision of the United States Attorneys'

Manual (USAM) regarding the government's disclosure obligations that might serve as an alternative to an amendment to Rule 16. The Department presented a first draft of a proposed revision to the Rule 16 subcommittee in early 2006, received comments, and submitted a revised draft for discussion at the Committee's April 2006 meeting.

The Committee discussed at length the draft amendment to the USAM and the Department's suggestion that it be could be adopted as an alternative to a rule change. Some of the comments were directed to the wording of the proposed revision of the USAM, which some committee members felt were vague, hortatory, and subject to many exceptions. It was also noted that there would be no way, under the proposal, to determine in a given case whether the government had made the broad disclosure envisioned by the hortatory language of the rule. Other comments addressed the question whether a revision of the USAM could be a satisfactory substitute for a rules change. More fundamentally, proponents of a rules change noted that the provisions of the USAM are not judicially enforceable, and they also stressed the importance of having a judge, rather than a prosecutor, determine whether disclosure of exculpatory or impeaching material is warranted in a given case.

On the other hand, Department of Justice stressed that an amendment to the USAM could encourage the early disclosure to the defense of exculpatory and impeachment evidence and promote prosecutorial uniformity and regularity nationwide. The exceptions to disclosure were necessary to protect witnesses and national security. The Department of Justice will vigorously oppose the proposed amendment to Rule 16 at the Standing Committee and beyond.

Some members felt that the Committee should welcome the proposed amendment of the USAM and afford it time to work, recognizing that an amendment to Rule 16 could be pursued, if necessary, at a later date. Others felt that the Committee should not lose the benefit of the three years of work that have gone into the proposed amendment, which they viewed as both vitally important and ready for submission to the Standing Committee. One member of the Committee noted that he would be prepared to support the proposal that a revision of the USAM serve as an alternative to a rule change, but only if the draft USAM amendment were revised to eliminate the materiality test and to provide notice in each case of the degree of disclosure afforded.

On a motion to table the proposed amendment to Rule 16 until the October 2006 meeting, the Committee's original vote was split 6 to 6. As chair, Judge Bucklew broke the tie, voting in favor of tabling the amendment. It was noted, however, that two key subcommittee members who had worked on the proposed amendment for three years would complete their terms and be unable to participate in the Committee's next meeting in October 2006. Accordingly, after further discussion, the Committee agreed to table the proposed Rule 16 amendment until a special session of the Committee could be convened on or before September 30, 2006.

B. Other Information Items.

The Committee now has under consideration several issues that are likely to yield proposals that will be brought to the Standing Committee.

1. A subcommittee is reviewing the provisions of Rule 41 dealing with search warrants for computerized and digital data.

2. A subcommittee is reviewing proposals from the Department of Justice for amendments to the rules governing criminal forfeiture.

3. A subcommittee is reviewing proposals by the Department of Justice to amend the rules of criminal procedure to restrict the use of ancient writs, and to amend the rules governing actions under Sections 2254 and 2255 by prescribing the time for motions for reconsideration in those actions.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 11. Pleas

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) ***Advising and Questioning the Defendant.*** Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range ~~apply the Sentencing Guidelines, and the~~

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*New material is underlined; matter to be omitted is lined through.

~~court's discretion to depart from those guidelines under some circumstances~~ and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

* * * * *

COMMITTEE NOTE

Subdivision (b)(1)(M). The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

The Committee intends the advice to defendants to describe the manner in which courts determine sentences. Ordinarily the court must calculate the applicable guideline range. However, as was true prior to *Booker*, it may in some cases be unnecessary to resolve a

particular guideline issue. *See United States v. Crosby*, 397 F.3d 103, 111-12 (2nd Cir. 2005).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment. Two changes were made to the Committee note. First, the reference to the Fifth Amendment was deleted from the description of the Supreme Court's decision in *Booker*. Second, the last paragraph of the Note was added to acknowledge cases such as *Crosby*, which recognize that there are situations in which calculations of certain guidelines issues is not required.

SUMMARY OF PUBLIC COMMENTS

Jon Sands (05-CR-009), on behalf of the Federal Public and Community Defenders, contends that the proposed advice to the defendant at the time of a plea misstates the effect of the *Booker* decision by "strongly indicat[ing] that the Guidelines are the primary sentencing principle," and thus not "provid[ing] meaningful or accurate information to defendants about the potential penalties they face." Instead, the court should either advise the defendant of all of the sentencing factors under 18 U.S.C. § 3553(a), or alternatively Rule 11(b)(1)(M) should be stricken.

In addition, Mr. Sands suggested the deletion from the Committee Note to Rule 11 and the other *Booker* rules of any

reference to the Fifth Amendment requirement of proof beyond a reasonable doubt, which he believes was not at issue in *Booker*.

The National Association of Criminal Defense Lawyers (05-CR-20) agrees that Rule 11 must be amended in light of *Booker*, but NACDL but argues that the change "does more than is required, and thus more than is appropriate." Instead of any reference to the guidelines, departures, and other sentencing factors, the rule should revert to its pre-guideline form and merely require the court to advise the defendant of the maximum penalty, whether any penalty is mandatory, and that the actual sentence cannot be predicted or promised. No more should be attempted. The proposed language is "misleading" and it "inappropriately" singles out the guidelines range and possible departures as factors the court must consider, "plainly implying these are of greater importance" than other factors under 18 U.S.C. § 3553(a), which are treated as an "afterthought." This seems to "inappropriately take sides in a developing controversy over the role the Guidelines should and do play in a post-*Booker* sentencing system." NACDL argues that this is substantive--not procedural--issue.

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) notes that the proposed amendment "tracks the three-step approach to sentencing that the Commission believes is implicit in *Booker*," and suggests changing the word "calculate" to "determine and calculate" to "better reflect the careful and multi-faceted factual and legal determinations made by a sentencing judge before arriving at the applicable sentencing range."

Rule 32. Sentence and Judgment

* * * * *

(d) Presentence Report.

(1) ***Applying the Advisory Sentencing Guidelines.*** The presentence report must:

(A) identify all applicable guidelines and policy statements of the Sentencing Commission;

(B) calculate the defendant's offense level and criminal history category;

(C) state the resulting sentencing range and kinds of sentences available;

(D) identify any factor relevant to:

(i) the appropriate kind of sentence, or

(ii) the appropriate sentence within the applicable sentencing range; and

(E) identify any basis for departing from the applicable sentencing range.

(2) ***Additional Information.*** The presentence report must also contain the following information:

(A) the defendant's history and characteristics, including:

(i) any prior criminal record;

(ii) the defendant's financial condition; and

(iii) any circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in correctional treatment;

(B) verified information, stated in a nonargumentative style, that assesses the financial, social, psychological, and medical impact on any individual against whom the offense has been committed;

(C) when appropriate, the nature and extent of nonprison programs and resources available to the defendant;

(D) when the law provides for restitution, information sufficient for a restitution order;

(E) if the court orders a study under 18 U.S.C. § 3552(b), any resulting report and recommendation; and

(F) any other information that the court requires, including information relevant to the factors under 18 U.S.C. § 3553(a).

* * * * *

(h) Notice of ~~Possible Departure From Sentencing Guidelines~~Intent to Consider Other Sentencing Factors. Notice of ~~Possible Departure From Sentencing Guidelines~~Intent to Consider Other Sentencing Factors. Before the court may ~~depart from the applicable sentencing range~~ rely on a ground not identified for departure or a non-guideline sentence either in the presentence report or in a party's prehearing

submission, the court must give the parties reasonable notice that it is contemplating either departing from the applicable guideline range or imposing a non-guideline sentence ~~such a departure~~. The notice must specify any ground not earlier identified for departing or imposing a non-guideline sentence on which the court is contemplating imposing such a sentence ~~a departure~~.

* * * * *

COMMITTEE NOTE

Subdivision (d). The amendment conforms Rule 32(d) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Amended subdivision (d)(2)(F) makes clear that the court can instruct the probation office to gather and include in the presentence report any information relevant to the factors articulated in § 3553(a). The rule contemplates that a request can be made either by the court as a whole requiring information

affecting all cases or a class of cases, or by an individual judge in a particular case.

Subdivision (h). The amendment conforms Rule 32(h) to the Supreme Court's decision in *United States v. Booker*, 125 S. Ct. 738 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial and the Fifth Amendment requirement of proof beyond a reasonable doubt. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 757. The purpose of Rule 32(h) is to avoid unfair surprise to the parties in the sentencing process. Accordingly, the required notice that the court is considering factors not identified in the presentence report or in the submission of the parties that could yield a sentence outside the guideline range should identify factors that might lead to either a guideline departure or a sentence based on factors under 18 U.S.C. § 3553(a).

The amendment refers to a "non-guideline" sentence to designate a sentence not based exclusively on the guidelines. In the immediate aftermath of *Booker*, the lower courts have used different labels to refer to sentences based on considerations that would not have warranted departures under the mandatory guideline regime, but are now permissible because the guidelines are advisory. *Compare United States v. Crosby*, 397 F.3d 103, 111 n. 9 (2d Cir. 2005) (referring to "non-Guidelines" sentence), *with United States v. Wilson*, 350 F. Supp.2d 910, 911 (D. Utah 2005) (suggesting the term

"variance"). This amendment is intended to apply to such sentences, regardless of the terminology used by the sentencing court.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

The Committee revised the text of subdivisions (d) and (h) in response to public comments and withdrew subdivision (k) because of new legislation that preempted it. In subdivision (d), the Committee revised the title to include the word "Advisory" in order better to reflect the guidelines' role under the *Booker* decision. In subdivision (h), the Committee responded to numerous comments that exposed ambiguity in the published rule. The Committee adopted the Sentencing Commission's suggested revision to clarify the scope of the requirement that the sentencing court give notice to the parties when it intends to rely on grounds not identified in either the presentence report or the parties' submissions.

Subdivision (k), which would have required that courts use a specified judgment and statement of reasons form, was withdrawn because of the passage of § 735 of the USA Patriot Improvement and Reauthorization Act. This legislation amended 28 U.S.C. § 994(w) to impose a statutory requirement that sentencing information for each case be provided on "the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission." The Criminal Law Committee, which had previously requested that the uniform collection of sentencing information be addressed by an amendment to the rules, withdrew that request in light of the enactment of the statutory requirement.

Finally, here--as in the other *Booker* rules--the Committee deleted the reference in the Committee Note to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

SUMMARY OF PUBLIC COMMENTS ON RULE 32

Comments regarding subdivision (d)

Jon Sands (05-CR-009), on behalf of the Federal Public and Community Defenders, contends that the amendment to Rule 32(d)(2)(F) should require Probation Officers to collect all information relevant to each of the sentencing factors under 18 U.S.C. § 3553(a). He recommends that these factors be enumerated in Rule 32(d), and that Rule 32(f)(1) be amended to facilitate the collection. Finally, he recommends that the heading of subparagraph (d)(1) be amended to read "Calculating the Advisory Sentencing Guidelines."

The National Association of Criminal Defense Lawyers (05-CR-020) states that the amendment does not go far enough in responding to *Booker*, which "commands a fundamental change ... with respect to the information the court must consider in determining the sentence, and the importance of that information." The structure of the current rule "reflects the primacy the guidelines had prior to *Booker*," and by retaining that structure the amendment "will misleadingly convey and wrongly encourage the continued primacy of the guidelines...." The rule should be revised to address individually all of the factors specified under 18 U.S.C. § 3553(a). The terminology of the rule also requires or encourages special consideration of the guidelines. Alternative terminology might include referring to a sentence outside the guideline range as an "individualized sentence."

Comments regarding subdivision (h)

Chief U.S. Probation Officer Tony Garoppolo (05-CR-002) reads the proposed amendment to Rule 32(h) broadly, and objects that it "effectively gives primacy to the sentencing guidelines as a factor for the Court to consider in sentencing; he also notes that the term "departure" is outdated in light of the *Booker* decision and suggests the use of the phrase "non-guidelines sentence."

The Honorable Stewart Dalzell (05-CR-006) reads the amendment to Rule 32(h) broadly and expresses "strong opposition" on the ground that *Booker* requires the courts to consider all of the factors under 18 U.S.C. § 3553(a) in every case. In his view the amendment would delay the consideration of these factors and require a second sentencing hearing in most cases.

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) supports the goal of the amendment, but expresses concern that the proposed language "may be overly broad and not fully comport with the spirit and intent of Rule 32(h)." The Commission suggests the modification of the language to clarify that the notice requirement applies only when the court contemplates a sentence based upon a ground "not earlier identified for departing or imposing a non-guideline sentence...."

The National Association of Criminal Defense Lawyers (05-CR-020) objects that the amendment "perpetuates the primacy of the guidelines" and "wrongly limits the circumstances in which notice is required." References to "departing" and "non-guideline sentence" should be eliminated. It would be preferable to refer to "Guideline" and "individualized" sentences.

Comments regarding subdivision (k)

Because the amendment to subdivision (k) has been withdrawn, these comments have been omitted.

Rule 35. Correcting or Reducing a Sentence

* * * * *

(b) Reducing a Sentence for Substantial Assistance.

(1) ***In General.*** Upon the government's motion made within one year of sentencing, the court may reduce a sentence if: the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person.

~~(A) the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person; and~~

~~(B) reducing the sentence accords with the Sentencing Commission's guidelines and policy statements.~~

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COMMITTEE NOTE

Subdivision (b)(1). The amendment conforms Rule 35(b)(1) to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). In *Booker* the Court held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id.* at 245-46. Subdivision (b)(1)(B) has been deleted because it treats the guidelines as mandatory.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No changes were made to the text of the proposed amendment as released for public comment, but one change was made in the Committee Note. Here--as in the other *Booker* rules--the Committee deleted the reference to the Fifth Amendment from the description of the Supreme Court's decision in *Booker*.

SUMMARY OF PUBLIC COMMENTS ON RULE 35

Judith Sheon on behalf of the U.S. Sentencing Commission (050CR-017) recognizes that the purpose of the amendment is to

delete a reference to the mandatory application of the Guidelines post *Booker*, but it believes that the amended rule "should reflect the continued requirement that courts consult and consider guidelines and policy statements before making any such sentence reduction." The Commission also notes that there is a "substantial legal question" whether the *Booker* remedial opinion is applicable in the post-sentencing context. The Commission supports an addition to the Committee Note to clarify that "the changes were not intended to enlarge the bases of what a court may consider before imposing a post-sentence reduction."

The National Association of Criminal Defense Lawyers (05-CR-020) states that the proposed amendment is "largely right." However, now that the guidelines are not mandatory, "it is no longer appropriate that the rule require that the motion be made by an attorney for the government." As a policy matter, a sincere effort at cooperation may be "powerful evidence of rehabilitation" that should be considered under 18 U.S.C. § 3553(a) even in the absence of a government motion.

Rule 45. Computing and Extending Time

* * * * *

(c) Additional Time After Certain Kinds of Service. ~~When these rules permit or require~~ Whenever a party must or may ~~to~~ act within a specified period after ~~a notice or a paper has been served on that party~~ service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), ©, or (D), 3 days are added after ~~to~~ the period would otherwise expire under subdivision (a) ~~if service occurs in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(B), ©, or (D)~~.

COMMITTEE NOTE

Subdivision (c). Rule 45(c) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. This amendment parallels the change in Federal Rule of Civil Procedure 6(e). Three days are added after the prescribed period otherwise expires under Rule 45(a). Intermediate Saturdays, Sundays, and legal holidays are included in

counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day that the rule would otherwise expire under Rule 45(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 45(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 45(a) the period expires on Tuesday. Three days are then added — Wednesday, Thursday, and Friday as the third and final day to act unless that is a legal holiday. If the prescribed period ends on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 45(c) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 45(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 45(c) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

No change was made in the rule as published for public comment.

SUMMARY OF PUBLIC COMMENTS ON RULE 45

The National Association of Criminal Defense Lawyers (05-CR-020) thanked the Committee for the clarification of a rule that had "occasionally vexed and confused the most dedicated practitioner."

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 49.1. Privacy Protection For Filings Made with the Court

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains a social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, or the home address of an individual, a party or non-party making the filing may include only:

(1) the last four digits of a social-security number and taxpayer-identification number;

(2) the year of the individual's birth;

(3) a minor's initials;

(4) the last four digits of a financial-account number; and

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*New material is underlined; matter to be omitted is lined through.

(5) the city and state of a home address.

(b) Exemptions from the Redaction Requirement. The redaction requirement does not apply to the following:

(1) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;

(2) the record of an administrative or agency proceeding;

(3) the official record of a state-court proceeding;

(4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;

(5) a filing covered by Rule 49.1(d);

(6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255;

(7) a court filing that is related to a criminal matter or investigation and that is prepared before the filing of

a criminal charge or is not filed as part of any docketed criminal case;

(8) an arrest or search warrant; and

(9) a charging document and an affidavit filed in support of any charging document.

(c) Immigration Cases. A filing in an action brought under 28 U.S.C. § 2241 that relates to the petitioner's immigration rights is governed by Federal Rule of Civil Procedure 5.2.

(d) Filings Made Under Seal. The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

(e) Protective Orders. For good cause, the court may by order in a case:

(1) require redaction of additional information; or

(2) limit or prohibit a non-party's remote electronic access to a document filed with the court.

(f) Option for Additional Unredacted Filing Under Seal. A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

(g) Option for Filing a Reference List. A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

(h) Waiver of Protection of Identifiers. A party waives the protection of Rule 49.1 (a) as to the party's own

information by filing it without redaction and not under seal.

COMMITTEE NOTE

The rule is adopted in compliance with section 205(c)(3) of the E-Government Act of 2002, Public Law No. 107-347. Section 205(c)(3) requires the Supreme Court to prescribe rules "to protect privacy and security concerns relating to electronic filing of documents and the public availability . . . of documents filed electronically." The rule goes further than the E-Government Act in regulating paper filings even when they are not converted to electronic form. But the number of filings that remain in paper form is certain to diminish over time. Most districts scan paper filings into the electronic case file, where they become available to the public in the same way as documents initially filed in electronic form. It is electronic availability, not the form of the initial filing, that raises the privacy and security concerns addressed in the E-Government Act.

The rule is derived from and implements the policy adopted by the Judicial Conference in September 2001 to address the privacy concerns resulting from public access to electronic case files. *See* http://www.privacy.uscourts.gov/Policy.htm. The Judicial Conference policy is that documents in case files generally should be made available electronically to the same extent they are available at the courthouse, provided that certain "personal data identifiers" are not included in the public file.

While providing for the public filing of some information, such as the last four digits of an account number, the rule does not intend to establish a presumption that this information never could or should be protected. For example, it may well be necessary in

individual cases to prevent remote access by nonparties to any part of an account number or social security number. It may also be necessary to protect information not covered by the redaction requirement — such as driver's license numbers and alien registration numbers — in a particular case. In such cases, protection may be sought under subdivision (d) or (e). Moreover, the Rule does not affect the protection available under other rules, such as Criminal Rule 16(d) and Civil Rules 16 and 26(c), or under other sources of protective authority.

Parties must remember that any personal information not otherwise protected by sealing or redaction will be made available over the internet. Counsel should notify clients of this fact so that an informed decision may be made on what information is to be included in a document filed with the court.

The clerk is not required to review documents filed with the court for compliance with this rule. The responsibility to redact filings rests with counsel and the party or nonparty making the filing.

Subdivision (e) provides that the court can order in a particular case more extensive redaction than otherwise required by the Rule, where necessary to protect against disclosure to nonparties of sensitive or private information. Nothing in this subdivision is intended to affect the limitations on sealing that are otherwise applicable to the court.

Subdivision (f) allows a person who makes a redacted filing to file an unredacted document under seal. This provision is derived from section 205(c)(3)(iv) of the E-Government Act. Subdivision (g) allows the option to file a register of redacted information. This provision is derived from section 205(c)(3)(v) of the E-Government Act, as amended in 2004.

In accordance with the E-Government Act, subdivision (f) of the rule refers to "redacted" information. The term "redacted" is intended to govern a filing that is prepared with abbreviated identifiers in the first instance, as well as a filing in which a personal identifier is edited after its preparation.

Subdivision (h) allows a person to waive the protections of the rule as to that person's own personal information by filing it unsealed and in unredacted form. One may wish to waive the protection if it is determined that the costs of redaction outweigh the benefits to privacy. If a person files an unredacted identifier by mistake, that person may seek relief from the court.

Trial exhibits are subject to the redaction requirements of Rule 49.1 to the extent they are filed with the court. Trial exhibits that are not initially filed with the court must be redacted in accordance with the rule if and when they are filed as part of an appeal or for other reasons.

The Judicial Conference Committee on Court Administration and Case Management has issued "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files" (March 2004). This document sets out limitations on remote electronic access to certain sensitive materials in criminal cases. It provides in part as follows:

The following documents shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:

- unexecuted summonses or warrants of any kind (*e.g.*, search warrants, arrest warrants);
- pretrial bail or presentence investigation reports;

- statements of reasons in the judgment of conviction;
- juvenile records;
- documents containing identifying information about jurors or potential jurors;
- financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
- ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
- sealed documents (*e.g.*, motions for downward departure for substantial assistance, plea agreements indicating cooperation).

To the extent that the Rule does not exempt these materials from disclosure, the privacy and law enforcement concerns implicated by the above documents in criminal cases can be accommodated under the rule through the sealing provision of subdivision (d) or a protective order provision of subdivision (e).

CHANGES MADE TO PROPOSED AMENDMENT RELEASED FOR PUBLIC COMMENT

Numerous changes were made in the rule after publication in response to the public comments as well as continued consultation among the reporters and chairs of the advisory committees as each committee reviewed its own rule.

A number of revisions were made in all of the e-government rules. These include: (1) using of the term "individual" rather than "person" where possible, (2) clarifying that the responsibility for redaction lies with the person making the filing, (3) rewording the

exemption from redaction for information necessary to identify property subject to forfeiture, so that it is clearly applicable in ancillary proceedings related to forfeiture, and (4) rewording the exemption from redaction for judicial decisions that were not subject to redaction when originally filed. Additionally, some changes of a technical or stylistic nature (involving matters such as hyphenation and the use of "a" or "the") were made to achieve clarity as well as consistency among the various e-government rules.

Two changes were made to the provisions concerning actions under §§ 2241, 2254, and 2255, which the published rule exempted from the redaction requirement. First, in response to criticism that the original exemption was unduly broad, the Committee limited the exemption to pro se filings in these actions. Second, a new subdivision (c) was added to provide that all actions under § 2241 in which immigration claims were made would be governed exclusively by Civil Rule 5.2. This change (which was made after the Advisory Committee meeting) was deemed necessary to ensure consistency in the treatment of redaction and public access to records in immigration cases. The addition of the new subdivision required renumbering of the subdivisions designated as (c) to (g) at the time of publication.

The provision governing protective orders was revised to employ the flexible "cause shown" standard that governs protective orders under the Federal Rules of Civil Procedure.

Finally, language was added to the Note clarifying the impact of the CACM policy that is reprinted in the Note: if the materials enumerated in the CACM policy are not exempt from disclosure under the rule, the sealing and protective order provisions of the rule are applicable.

SUMMARY OF PUBLIC COMMENTS

Bruce Berg (05-CR-001), who represents the pre-employment screening industry, requests that the rule be amended to require that individual's full date of birth and social security number be made part of the public record to facilitate background checks.

Mike Sankey (05-CR-002) presented written testimony and appeared in person to supplement his testimony on behalf of the National Association of Professional Background Screeners, in support of listing the full date of birth for adults in order to assist in criminal history searches for employers.

Jack E. Horsley (05-CR-006) suggests that the employee number of a person who is state or federal employee be exempt from redaction.

Mark Golden (05-CR-010), writing on behalf of the National Court Reporters Association, applauds the advisory committees' efforts to address the privacy and security issues and proposes that language be added to make clear that the duty to redact information in filings rests solely with the parties.

The Honorable John R. Tunheim, on behalf of CACM (05-CR-011), expressed concern about several points. (1) The language in all e-rules referring to the record of a court "whose decision is being reviewed" may cause problems in bankruptcy. (2) Rule 49.1's list of exemptions from redaction is unnecessarily broad, because it would be sufficient to redact personal identifiers from habeas filings, a filing in relation to a criminal matter or investigation that is prepared before the filing of a criminal charge or that is not filed as part of any docketed criminal case, arrest or search warrants, and charging documents or affidavits in support thereof. (3) If the Rule

does not require redaction of the grand jury foreperson's name, CACM opposes the rule. (4) The relationship between the CACM guidance and the new rule is not clear.

The Honorable William G. Young (05-CR-012) suggests that the portion of the Criminal (and Civil) Committee Note concerning trial exhibits is ambiguous because it is unclear when they are "filed with the court" and hence subject to redaction. He also believes that allowing the filing of an unredacted document under seal is unwise, though he recognized that it is based in haec verba on the E-Government Act. Finally, he raises several issues regarding the redaction required by CACM's guidelines. Will redaction of residential street addresses from jury lists raise any constitutional concerns? Who will do that redaction? Are the CACM guidelines for transcript preparation so complex that they will unduly delay appellate proceedings?

Peter A. Winn (05-CR-014) believes the rules successfully balance the right of public access to court records against the need to prevent the misuse of sensitive personal and commercial information and implement the congressional directive to make court records available online; however, he recommends the use of the PACER system to create an intermediate system of courthouse only access, rather than achieving such intermediate access by protective orders.

Gregory A. Beck, Public Citizen Litigation Group (05-CR-15) expresses concern that allowing the court to order that a filing be made under seal without redaction will be interpreted--notwithstanding the committee note--to expand the authority to seal and thereby restrict public access to court records. He proposes that provision authorizing the filing of unredacted documents under seal be stricken from each of the e-government rules or limited by the phrase "as authorized by law."

Chris Jay Hoofnagle on behalf of the Electronic Privacy Information Center (05-CR-016) supports revisions to protect personal information by (1) minimization of the collection of personal information in court records, (2) further limiting access at the courthouse, (3) limitations on disclosure only for permitted uses, (4) reduction in unique identifiers, including the redaction of all digits of Social Security numbers, home addresses, telephone numbers, and mother's maiden names, (5) limitation on bulk downloads for commercial solicitations or profiling.

Peter D. Keisler on behalf of the Department of Justice (05-CR-018) recommends a clarification of the forfeiture exemption from redaction by reordering the clauses to make clear that parties may litigate regarding specific property without redaction in ancillary proceedings as well as in the main forfeiture proceeding.

The Reporters Committee for Freedom of the Press (05-CR-019) emphasizes the press's strong interest in the accessibility of all types of information in court records; it (1) opposes the redaction of years of birth and minors names from the right of public access, (2) proposes that the court have authority to unseal redacted information in the public interest, and (3) requests clarification of the standard for sealing filings and entering protective orders.

National Association of Criminal Defense Lawyers (05-CR-020) recommends that the exemption of habeas corpus and 2255 actions from the redaction requirements be replaced with a provision encourages–but does not require–pro se litigants to comply with the redaction requirements in all their filings, or in their habeas and 2255 filings.

PROPOSED AMENDMENT TO THE FEDERAL RULES OF CRIMINAL PROCEDURE*

Rule 29. Motion for a Judgment of Acquittal

(a) Time for a Motion.

(1) *Before Submission to the Jury.* After the government closes its evidence or after the close of all the evidence, ~~the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.~~ a defendant may move for a judgment of acquittal on any offense. The court may invite the motion.

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*New material is underlined; matter to be omitted is lined through.

(2) ***After a Guilty Verdict or a Jury's Discharge.*** A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later. A defendant may make the motion even without having made it before the court submitted the case to the jury.

(b) **Ruling on a Motion Made Before Verdict**. If a defendant moves for a judgment of acquittal before the jury reaches a verdict (or after the court discharges the jury before verdict), the following procedures apply:

(1) ***Denying Motion or Reserving Decision.*** The court may deny the motion or may reserve decision on the motion until after a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved. The court must set aside a guilty verdict and enter a

judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.

(2) ***Granting Motion; Waiver.*** The court may not grant the motion before the jury returns a verdict (or before the verdict in any retrial in the case of discharge) unless:

(A) the court informs the defendant personally in open court and determines that the defendant understands that:

(i) the court can grant the motion before the verdict only if the defendant agrees that the government can appeal that ruling; and

(ii) if that ruling is reversed, the defendant could be retried; and

(B) the defendant in open court personally waives the right to prevent the government from appealing a judgment of acquittal (and retrying

the defendant on the offense) for any offense for which the court grants a judgment of acquittal before the verdict.

(c) Ruling on a Motion Made After Verdict. If a defendant moves for a judgment of acquittal after the jury has returned a guilty verdict, the court must set aside the verdict and enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction.

~~**(b) Reserving Decision.** The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.~~

~~**(c) After Jury Verdict or Discharge.**~~

~~(1) ***Time for a Motion.*** A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.~~

~~(2) ***Ruling on the Motion.*** If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.~~

~~(3) ***No Prior Motion Required.*** A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.~~

COMMITTEE NOTE

Subdivisions (a), (b), and (c). The purpose of the amendment is to allow the government to seek appellate review of any judgment of acquittal. At present, the rule permits the court to

grant acquittals under circumstances where Double Jeopardy will preclude appellate review. If the court grants a Rule 29 acquittal before the jury returns a verdict, appellate review is not permitted because Double Jeopardy would prohibit a retrial. If, however, the court defers its ruling until the jury has reached a verdict, and then grants a motion for judgment of acquittal, appellate review is available, because the jury's verdict can be reinstated if the acquittal is reversed on appeal.

The amendment permits preverdict acquittals, but only when accompanied by a waiver by the defendant that permits the government to appeal and – if the appeal is successful – on remand to try its case against the defendant. Recognizing that Rule 29 issues frequently arise in cases involving multiple counts and or multiple defendants, the amendment permits any defendant to move for a judgment of acquittal on any count (or counts). Following the usage in other rules, the amendment uses the terms "offense" and "offenses," rather than count or counts.

The amended rule protects both a defendant's interest in holding the government to its burden of proof and the government's interest in appealing erroneous judgments of acquittal, while ensuring that the court will only have to consider the motion once. Although the change has required some reorganization of the subdivisions, no substantive change is intended other than the limitation on preverdict rulings and the new waiver provision.

Subdivision (a). Amended Rule 29(a), which states the times at which a motion for judgment of acquittal may be made, combines provisions formerly in subdivisions (a) and (c)(1). No change is intended except that the court may not grant the motion before verdict without a waiver by the defendant.

The amended rule omits the statement in Rule 29(a) that: "If the defendant moves for judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so." The Committee concluded that this language was no longer necessary. It referred to a practice in some courts, no longer followed, of requiring a defendant to "reserve" the right to present a defense when making a Rule 29 motion. There is no reason to require such a reservation under the amended rule.

Subdivision (b). Amended Rule 29(b) sets forth the procedures for motions for a judgment of acquittal made before the jury reaches a verdict or is discharged without reaching a verdict. (There is, of course, no need to rule if a not guilty verdict is returned.) Prior to verdict, the Rule authorizes the court to deny the motion or reserve decision, but the court may not grant the motion absent a defendant's waiver of Double Jeopardy rights. *See Carlisle v. United States*, 517 U.S. 416, 420-33 (1996) (holding that trial court did not have authority to grant an untimely motion for judgment of acquittal under Rule 29).

Accordingly, if the defendant moves for a judgment of acquittal at the close of the government's evidence or the close of all the evidence, in the absence of a waiver the court has two options: it may deny the motion or proceed with trial, submit the case to the jury, and reserve its decision until after a guilty verdict is returned. As under the prior Rule, if the defendant made the motion at the close of the government's evidence, the court must grant the motion if the evidence presented in the government's case is insufficient, *see Jackson v. Virginia*, 443 U.S. 307 (1979), even if evidence in the whole trial is sufficient. If the government successfully appeals, the guilty verdict can be reinstated. This general rule requiring the court to defer its ruling applies equally to motions for judgments of acquittal made in bench trials. *Cf. United States v. Morrison*, 429

U.S. 1 (1976) (holding that Double Jeopardy does not preclude appeal from judgment of acquittal entered after guilty verdict in bench trial, because verdict can be reinstated upon remand).

Similarly, if the defendant moves for a judgment of acquittal after the jury is discharged and the government wishes to retry the case, absent a waiver the court has two options. It may deny the motion, or it may reserve decision, proceed with the retrial, submit the case to the new jury, and rule on the reserved motion if there is a guilty verdict after the retrial. *See Richardson v. United States*, 468 U.S. 317, 324 (1984) ("a retrial following a 'hung jury' does not violate the Double Jeopardy Clause"). After the second trial, the court must grant the motion if the evidence presented at the first trial was insufficient when the motion was made, even if the evidence in the retrial was sufficient. This procedure permits the government to appeal, because the verdict at the second trial can be reinstated if the appellate court rules that the judgment of acquittal was erroneous.

The court may grant a Rule 29 motion for acquittal before verdict only as provided in subdivision (b)(2), the waiver provision. Under amended Rule 29(b)(2), the court may rule on the motion for judgment of acquittal before the verdict with regard to some or all of the counts, after first advising the defendant in open court of the requirement of the Rule and the protections of the Double Jeopardy Clause, and after the defendant waives those protections on the record. Although the focus of the rule is on the waiver of the defendant's Double Jeopardy rights, the rule does not refer explicitly to Double Jeopardy. Instead, it puts the waiver in terms a lay defendant can most readily understand: the defendant's waiver allows the government to appeal a judgment of acquittal, and to retry him if that appeal is successful.

As with any constitutional right, the waiver of Double Jeopardy rights must be knowing, intelligent, and voluntary. *See generally Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *United States v. Morgan*, 51 F.3d 1105, 1110 (2d Cir. 1995) ("the act of waiver must be shown to have been done with awareness of its consequences"). Although there are cases holding that a defendant's action or inaction can waive Double Jeopardy, the Committee believed that it was appropriate for the Rule to require waiver both under the rule and explicitly on the record. *See United States v. Hudson*, 14 F.3d 536, 539 (10th Cir. 1994) (when consent order did not specifically waive Double Jeopardy rights, no waiver occurred); *Morgan*, 51 F.3d at 1110 (civil settlement with government did not waive Double Jeopardy defense when settlement agreement was not explicit, even if individual was aware of ongoing criminal investigation). For a case holding that a defendant may waive his Double Jeopardy rights to allow the government to appeal, see *United States v. Kington*, 801 F.2d 733 (5th Cir. 1986), *appeal after remand*, *United States v. Kington*, 835 F.2d 106 (5th Cir. 1988).

Before the court may accept a waiver, it must address the defendant in open court, as required by subdivision (b)(2). A general model for this procedure is found in Rule 11(b), which provides for a plea colloquy that is intended to insure that the defendant is knowingly, voluntarily, and intelligently waiving a number of constitutional rights.

Subdivision (c). The amended subdivision applies to cases in which the court rules on a motion made after a guilty verdict. This was covered by subdivision (c)(2) prior to the amendment. The amended rule restates the applicable standard, using the same terminology as former subdivision (a)(1). No change is intended.

Rule 41. Search and Seizure

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

* * * * *

(5) a magistrate judge having authority in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, may issue a warrant for property that is located outside the jurisdiction of any State or district, but within any of the following:

(A) a territory, possession, or commonwealth of the United States;

(B) the premises of a United States diplomatic or consular mission in a foreign state, and the buildings, parts of buildings, and land appurtenant or ancillary thereto, used for

purposes of the mission, irrespective of ownership; or

(C) residences, and the land appurtenant or ancillary thereto, owned or leased by the United States, and used by United States personnel assigned to United States diplomatic or consular missions in foreign states.

COMMITTEE NOTE

Subdivision (b)(5). Rule 41(b)(5) authorizes a magistrate judge to issue a search warrant for property located within certain delineated parts of United States jurisdiction that are outside of any State or any federal judicial district. The locations covered by the rule include United States territories, possessions, and commonwealths not within a federal judicial district as well as certain premises associated with United States diplomatic and consular missions. These are locations in which the United States has a legally cognizable interest or in which it exerts lawful authority and control. Under the rule, a warrant may be issued by a magistrate judge in any district in which activities related to the crime under investigation may have occurred, or in the District of Columbia, which serves as the default district for venue under 18 U.S.C. § 3238.

Rule 41(b)(5) provides the authority to issue warrants for the seizure of property in the designated locations when law enforcement officials are required or find it desirable to obtain such warrants. The Committee takes no position on the question whether the Constitution requires a warrant for searches covered by the rule, or whether any international agreements, treaties, or laws of a foreign nation might be applicable. The rule does not address warrants for persons, which could be viewed as inconsistent with extradition requirements.