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

TO THE COMMITTEE ON RULES OF PRACTICE AND PROCEDURE:

I have the honor of submitting herewith our Committee's final draft of proposed amendments of Rules 6, 45(d)(2), 52(a), 71A(h), 83; Supplementary Rules B(1), C(3), and E(4)(f) for Certain Admiralty and Maritime Claims; and an amendment to Official Form 18-A, with the recommendation that they be approved and presented to the Judicial Conference for action.

These proposed amendments represent the fruits of almost two years of thorough study in the course of which our Committee has had the benefit of the views of numerous judges, lawyers and other citizens, both by letter and at public hearings in Washington, D. C., and Los Angeles, California, in response to a wide distribution of earlier drafts for criticism and comment.

The proposed changes may be summarized as follows:

Rule 6: The amendment would alleviate some of the hardship experienced under the present provision's allowance of inadequate time for response to motions because of its inclusion of Saturdays, Sundays and legal holidays when the period for response is more than 7 days and because of its failure to allow for weather or other conditions causing the office of the clerk to be inaccessible. The period has been increased from 7 to 11 days and is extended when the clerk's office is inaccessible on the last day of the period. The Birthday of Martin Luther King, Jr., which becomes a legal holiday on the third Monday of January 1986, has also been added to the list of legal holidays mentioned in the rule.

Rule 45(d)(2): The amendment would eliminate anomalous situations occurring under the present provision, which requires a person who resides, is employed or transacts business in a county to travel from one end of the county to the other, but not across county lines, for the taking of a deposition whereas a non-resident may be required to attend either in the county where served or within 40 miles from the place of service. The amendment would

eliminate this discrimination by requiring any person, resident or non-resident, to attend within 100 miles from the place of service, residence, employment or business.

Rule 52(a): The amendment would resolve confusion and conflicts between circuits as to the standard for appellate review of cases based solely on documentary evidence by providing that such cases are to be governed by the "clearly erroneous" standard.

Rule 71A: Various provisions are proposed to insure that in government land condemnation proceedings the efficiency of the "commission" method of determining just compensation will be improved. The principal changes would permit the appointment of alternate commissioners to replace any commissioner who becomes unable to continue during trial and insure that qualified persons will be appointed to serve as commissioners.

Rule 83: The amendments would enhance the local rule-making process (1) by requiring public notice and an opportunity for comment before new local rules are adopted, (2) by authorizing the judicial council of a circuit to abrogate a local rule, and (3) by obligating judges and magistrates not to regulate practice before them (e.g., by "standing orders") inconsistently with federal or local rules. Copies of local rules would be furnished to the judicial council of the circuit and to the Administrative Office rather than to the Supreme Court.

Admiralty Rules B(1), C(3), and E(4)(f): These rules have been amended to insure compliance with principles of due process enunciated in a line of Supreme Court decisions beginning with Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and developed in Fuentes v. Shevin, 407 U.S. 67 (1972), in view of questions raised by some decisions holding the present provisions to be unconstitutional.

TECHNICAL CHANGES:

The following minor changes have been made in Admiralty Rule B(1) and Form 18-A, for which the Committee does not believe that the notice and comment procedure was necessary:

(1) The last sentence of Form 18-A (Notice to be enclosed with summons and compiaint served by mail) presently requires the person mailing the summons and complaint to acknowledge incorrectly, before the mailing, that the enclosed Notice and Acknowledgment "was served" before mailing. The language is therefore changed to read "will have been mailed."

(2) The word "manner" in the third line of the Acknowledgment, which is a typographical error, has been changed to "matter."

(3) The word "complaint" in Admiralty Rule B(1), line 6, has been changed to "process" in order to eliminate a requirement for additional review of the complaint and affidavit when a garnishee is added.

We believe that the attached amendments, if adopted, will serve to improve procedural efficiency in the administration of justice by our federal courts.

We are not now seeking approval of proposed amendments of Rules 68 and 5 that were distributed in August 1983 for public comment because we have prepared a redraft of those proposals in response to public comments and now desire to obtain public reaction to our Committee's redraft. Although the earlier draft received substantial favorable support as a means of reducing litigation delay and expense, it was also opposed, mainly on the grounds that (1) it might violate the Rules Enabling Act, 28 U.S.C. §2072, by providing for shifting of attorneys' fees; (2) it might tend to weaken Congress' policy expressed in various statutes authorizing the award of attorneys' fees to prevailing parties in certain types of actions; and (3) it might inhibit the prosecution of civil litigation by impecunious and contingent-fee plaintiffs unable to finance down-side risks posed by an offer. We believe that our redraft, a copy of which will be forwarded to you shortly, with our request that it be distributed for public comment, meets these objections.

Respectfully submitted,

Walter R. Mansfield
Chairman, Advisory Committee on Civil Rules

July 18, 1984

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF CIVIL PROCEDURE*

RULE 6. TIME

(a) COMPUTATION. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not ~~a Saturday, a Sunday, or a legal holiday~~ one of the aforementioned days. When the period of time prescribed or allowed is less than ~~7~~ 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes New Year's Day, Birthday of Martin Luther King, Jr., Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day,

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*New matter is underscored; matter to be omitted is lined through.

Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

* * *

COMMITTEE NOTE

Rule 6(a) is amended to acknowledge that weather conditions or other events may render the clerk's office inaccessible one or more days. Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so. The amendment conforms to changes made in Federal Rule of Criminal Procedure 45(a), effective August 1, 1982.

The Rule also is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the current version of the Rule, parties bringing motions under rules with 10-day periods could have as few as 5 working days to prepare their motions. This hardship would be especially acute in the case of Rules 50(b) and (c)(2), 52(b), and 59(b), (d), and (e), which may not be enlarged at the discretion of the court. See Rule 6(b). If the exclusion of Saturdays, Sundays, and legal holidays will operate to cause excessive delay in urgent cases, the delay can be obviated by applying to the court to shorten the time. See Rule 6(b).

The Birthday of Martin Luther King, Jr., which becomes a legal holiday effective in 1986, has been added to the list of legal holidays enumerated in the Rule.

RULE 45. SUBPOENA

* * *

(d) SUBPOENA FOR TAKING DEPOSITIONS; PLACE OF EXAMINATION.

* * *

(2) A ~~resident of the district in which the deposition is to be taken may be required to attend an examination only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court.~~ A ~~nonresident of the district may be required to attend only in the~~

~~county wherein he is served with a subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.~~ A person to whom a subpoena for the taking of a desposition is directed may be required to attend at any place within 100 miles from the place where that person resides, is employed or transacts business in person, or is served, or at such other convenient place as is fixed by an order of court.

The clerk of the district in which the deposition is to be taken shall issue a subpoena requiring the attendance of the witness. The subpoena may be served in the same locations with reference to the place of deposition as those specified in subdivision (e) of this rule with reference to the place of a hearing or trial.

* * *

COMMITTEE NOTE

Present Rule 45(d)(2) has two sentences setting forth the territorial scope of deposition subpoenas. The first sentence is directed to depositions taken in the judicial district in which the deponent resides; the second sentence addresses situations in which the deponent is not a resident of the district in which the deposition is to take place. The Rule, as currently constituted, creates anomalous situations that often cause logistical problems in conducting litigation.

The first sentence of the present Rule states that a deponent may be required to attend only in the county wherein that person resides or is employed or transacts business in person, that is, where the person lives or works. Under this provision a deponent can be compelled, without court order, to travel from one end of that person's home county to the other, no matter how far that may be. The second sentence of the Rule is somewhat more flexible, stating that someone who does not reside in the district in which the deposition is to be taken can be required to attend in the county where the person is served with the subpoena, or within 40 miles from the place of service.

Under today's conditions there is no sound reason for distinguishing between residents of the district or county in which a deposition is to be taken and non-residents, and the Rule is amended to provide that any person may be subpoenaed to attend a deposition within a specified radius from that person's residence, place of business, or where the person was served. The 40-mile radius has been increased to 100 miles.

The second sentence has been added to make Rule 45(d)(2) parallel Rule 45(e)(1) with regard to service of subpoenas for depositions, hearings, and trials. It also fills the gap in Rule 45(d)(2) for service of a subpoena outside the district for the taking of a deposition noted by the court in In re Guthrie, __F. 2d __ (4th Cir. 1984).

RULE 52. FINDINGS BY THE COURT

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and

conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

* * *

COMMITTEE NOTE

Rule 52(a) has been amended (1) to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the court, (2) to eliminate the disparity between the standard of review as literally stated in Rule 52(a) and the practice of some courts of appeals, and (3) to promote nationwide uniformity. See Note, Rule52(a): Appellate Review of Findings of Fact Based on Documentary or Undisputed Evidence, 49 Va. L. Rev. 506, 536 (1963).

Some courts of appeal have stated that when a trial court's findings do not rest on demeanor evidence and evaluation of a witness' credibility, there is no reason to defer to the trial court's findings and the appellate court more readily can find them to be clearly erroneous. See, e.g., Marcum v. United States, 621 F.2d 142, 144-45 (5th Cir. 1980). Others go further, holding that appellate review may be had without application of the "clearly erroneous" test since the appellate court is in as good a position as the trial court to review a purely documentary record. See, e.g., Atari, Inc. v. North American Philips Consumer Electronics Corp., 672 F.2d 607, 614 (7th Cir.), cert. denied, 459 U.S. 880 (1982); Lydle v. United States, 635 F.2d 763, 765, n. 1 (6th Cir. 1981); Swanson v. Baker Indus., Inc., 615 F.2d 479, 483 (8th Cir. 1980); Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979), cert. denied, 445 U.S. 946 (1980); Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979); John R. Thompson Co. v. United States, 477 F.2d 164, 167 (7th Cir. 1973).

A third group has adopted the view that the "clearly erroneous" rule applies in all nonjury cases even when findings are based solely on documentary evidence or on inferences from undisputed facts. See, e.g., Maxwell v. Sumner, 673 F.2d 1031, 1036 (9th Cir.), cert. denied, 459 U. S. 976 (1982); United States v. Texas Education Agency, 647 F.2d 504, 506-07 (5th Cir. 1981), cert. denied, 454 U. S. 1143 (1982); Constructora Maza, Inc. v. Banco de Ponce, 616 F.2d 573, 576 (1st Cir. 1980); In re Sierra Trading Corp., 482 F.2d 333, 337 (10th Cir. 1973); Case v. Morrisette, 475 F.2d 1300, 1306-07 (D.C. Cir. 1973).

The commentators also disagree as to the proper interpretation of the Rule. Compare Wright, The Doubtful Omniscience of Appellate Courts, 41 Minn. L. Rev. 751, 769-70 (1957) (language and intent of Rule support view that "clearly erroneous" test should apply to all forms of evidence), and 9

C. Wright & A. Miller, Federal Practice and Procedure: Civil §2587, at 740 (1971) (language of the Rule is clear), with 5A J. Moore, Federal Practice ¶52.04, 2687-88 (2d ed. 1982) (Rule as written supports broader review of findings based on non-demeanor testimony).

The Supreme Court has not clearly resolved the issue. See, Bose Corporation v. Consumers Union of United States, Inc., ___ L. Ed. __, 52 U.S.L.W. 4513, 4517 (May 1, 1984); Pullman Standard v. Swint, 456 U.S. 273, 293 (1982); United States v. General Motors Corp., 384 U.S. 127, 141 n. 16 (1966); United States v. United States Gypsum Co., 333 U.S. 364, 394-96 (1948).

The principal argument advanced in favor of a more searching appellate review of findings by the district court based solely on documentary evidence is that the rationale of Rule 52(a) does not apply when the findings do not rest on the trial court's assessment of credibility of the witnesses but on an evaluation of documentary proof and the drawing of inferences from it, thus eliminating the need for any special deference to the trial court's findings. These considerations are outweighed by the public interest in the stability and judicial economy that would be promoted by recognizing that the trial court, not the appellate tribunal, should be the finder of the facts. To permit courts of appeals to share more actively in the fact-finding function would tend to undermine the legitimacy of the district courts in the eyes of litigants, multiply appeals by encouraging appellate retrial of some factual issues, and needlessly reallocate judicial authority.

RULE 71A. CONDEMNATION OF PROPERTY

* * *

(h) TRIAL. If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix,

unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it.

In the event that a commission is appointed the court may direct that not more than two additional persons serve as alternate commissioners to hear the case and replace commissioners who, prior to the time when a decision is filed, are found by the court to be unable or disqualified to perform their duties. An alternate who does not replace a regular commissioner shall be discharged after the commission renders its final decision. Before appointing the members of the commission and alternates the court shall advise the parties of the identity and qualifications of each prospective commissioner and alternate and may permit the parties to examine each such designee. The parties shall not be permitted or required by the court to suggest nominess. Each party shall have the right to object for valid cause to the appointment of any person as a commissioner or alternate. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report

shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court.

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COMMITTEE NOTE

Rule 71A(h) provides that except when Congress has provided otherwise, the issue of just compensation in a condemnation case may be tried by a jury if one of the parties so demands, unless the court in its discretion orders the issue determined by a commission of three persons. In 1980, the Comptroller General of the United States in a Report to Congress recommended that use of the commission procedure should be encouraged in order to improve and expedite the trial of condemnation cases. The Report noted that long delays were being caused in many districts by such factors as crowded dockets, the precedence given criminal cases, the low priority accorded condemnation matters, and the high turnover of Assistant United States Attorneys. The Report concluded that revising Rule 71A to make the use of the commission procedure more attractive might alleviate the situation.

Accordingly, Rule 71A(h) is being amended in a number of respects designed to assure the quality and utility of a Rule 71A commission. First, the amended Rule will give the court discretion to appoint, in addition to the three members of a commission, up to two additional persons as alternate commissioners who would hear the case and be avaliable, at any time up to the filing of the decision by the three-member commission, to replace any commissioner who becomes unable or disqualified to continue. Prior to replacing a commissioner an alternate would not be present at, or participate in, the commission's deliberations.

The discretion to appoint alternate commissioners can be particularly useful in protracted cases, avoiding expensive retrials that have been required in some cases because of the death or disability of a commissioner. Second, the amended Rule requires the court, before appointment, to advise the parties of the identity and qualifications of each prospective commissioner and alternate. The court may then authorize the examination of prospective appointees by the parties and each party has the right to challenge for cause. The objective is to insure that unbiased and competent commissioners are appointed.

The amended Rule does not prescribe a qualification standard for appointment to a commission, although it is understood that only persons

possessing background and ability to appraise real estate valuation testimony and to award fair and just compensation on the basis thereof would be appointed. In most situations the chairperson should be a lawyer and all members should have some background qualifying them to weigh proof of value in the real estate field and, when possible, in the particular real estate market embracing the land in question.

The amended Rule should give litigants greater confidence in the commission procedure by affording them certain rights to participate in the appointment of commission members that are roughly comparable to the practice with regard to jury selection. This is accomplished by giving the court permission to allow the parties to examine prospective comissioners and by recognizing the right of each party to object to the appointment of any person for cause.

RULE 83. RULES BY DISTRICT COURTS

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the ~~Supreme Court of the United States~~ judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district ~~courts~~ judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

COMMITTEE NOTE

Rule 83, which has not been amended since the Federal Rules were promulgated in 1938, permits each district to adopt local rules not inconsistent with the Federal Rules by a majority of the judges. The only other requirement is that copies be furnished to the Supreme Court.

The widespread adoption of local rules and the modest procedural prerequisites for their promulgation have led many commentators to question the soundness of the process as well as the validity of some rules. See 12 Wright & Miller, Federal Practice and Procedure: Civil §3152, at 217 (1973); Caballero, Is There an Over-Exercise of Local Rule-Making Powers by the United States District Courts?, 24 Fed. Bar News 325 (1977). Although the desirability of local rules for promoting uniform practice within a district is widely accepted, several commentators also have suggested reforms to increase the quality, simplicity, and uniformity of the local rules. See, Note, Rule 83 and the Local Federal Rules, 67 Colum. L. Rev. 1251 (1967), and Comment, The Local Rules of Civil Procedure in the Federal District Courts--A Survey, 1966 Duke L.J. 1011.

The amended Rule attempts, without impairing the procedural validity of existing local rules, to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them. Although some district courts apparently consult the local bar before promulgating rules, many do not, which has led to criticism of a process that has district judges consulting only with each other. See 12 *Wright & Miller, supra, §3152, at 217; Blair, The New Local Rules for* Federal Practice in Iowa, 23 Drake L. Rev. 517 (1974). The new language subjects local rulemaking to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation. It attempts to assure that the expert advice of practitioners and scholars is made available to the district court before local rules are promulgated. See Weinstein, Reform of Court Rule-Making Procedures 84-87, 127-37, 151 (1977).

The amended Rule does not detail the procedure for giving notice and an opportunity to be heard since conditions vary from district to district. Thus, there is no explicit requirement for a public hearing, although a district may consider that procedure appropriate in all or some rulemaking situations. See generally, Weinstein, supra, at 117-37, 151. The new Rule does not foreclose any other form of consultation. For example, it can be accomplished through the mechanism of an "Advisory Committee" similar to that employed by the Supreme Court in connection with the Federal Rules themselves.

The amended Rule provides that a local rule will take effect upon the date specified by the district court and will remain in effect unless amended by the district court or abrogated by the judicial council. The effectiveness of a local rule should not be deferred until approved by the judicial council because that might unduly delay promulgation of a local rule that should become effective immediately, especially since some councils do not meet frequently. Similarly, it was thought that to delay a local rule's effectiveness for a fixed period of time would be arbitrary and that to require the judicial council to abrogate a local rule within a specified time would be inconsistent with its power under 28 U.S.C. §332 (1976) to nullify a local rule at any time. The expectation is that the judicial council will examine all local rules, including those currently in effect, with an eye toward determining whether they are valid and consistent with the Federal Rules, promote inter-district uniformity and efficiency, and do not undermine the basic objectives of the Federal Rules.

The amended Rule requires copies of local rules to be sent upon their promulgation to the judicial council and the Administrative Office of the United States Courts rather than to the Supreme Court. The Supreme Court was the appropriate filing place in 1938, when Rule 83 originally was promulgated, but the establishment of the Administrative Office makes it a more logical place to develop a centralized file of local rules. This procedure is consistent with both the Criminal and the Appellate Rules. See Fed. R. Crim. P. 57(a); Fed. R. App. P. 47. The Administrative Office also will be able to provide improved utilization of the file because of its recent development of a Local Rules Index.

The practice pursued by some judges of issuing standing orders has been controversial, particularly among members of the practicing bar. The last sentence in Rule 83 has been amended to make certain that standing orders are not inconsistent with the Federal Rules or any local district court rules. Beyond that, it is hoped that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders.

PROPOSED AMENDMENTS TO THE SUPPLEMENTAL RULES FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS

Committee's Explanatory Statement

Since their promulgation in 1966, the Supplemental Rules for Certain Admiralty and Maritime Claims have preserved the special procedures of arrest and attachment unique to admiralty law. In recent years, however, these Rules have been challenged as violating the principles of procedural due process enunciated in the United States Supreme Court's decision in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and later developed in Fuentes v. Shevin, 407 U. S. 67 (1972); Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975). These Supreme Court decisions provide five basic criteria for a constitutional seizure of property: (1) effective notice to persons having interests in the property seized, (2) judicial review prior to attachment, (3) avoidance of conclusory allegations in the complaint, (4) security posted by the plaintiff to protect the owner of the property under attachment, and (5) a meaningful and timely hearing after attachment.

Several commentators have found the Supplemental Rules lacking on some or all five grounds. E.g., Batiza & Partridge, The Constitutional Challenge to Martime Seizures, 26 Loy. L. Rev. 203 (1980); Morse, The Conflict Between the Supreme Court Admiralty Rules and Sniadach-Fuentes: A Collision Course?, 3 Fla. St. U.L. Rev. 1 (1975). The federal courts have varied in their disposition of challenges to the Supplemental Rules. The Fourth and Fifth Circuits have affirmed the constitutionality of Rule C. Amstar Corp. v. S/S Alexandros T., 664 F.2d 904 (4th Cir. 1981); Merchants National Bank of Mobile v. The Dredge General G. L. Gillespie, 663 F.2d 1338 (5th Cir. 1981), cert. dismised, 456 U.S. 966 (1982). However, a district court in the Ninth Circuit found Rule C unconstitutional. Alyeska Pipeline Service Co. v. The Vessel Bay Ridge, 509 F. Supp. 1115 (D. Alaska 1981), appeal dismissed, 703 F.2d 381 (9th Cir. 1983). Rule B(1) has received similar inconsistent treatment. The Ninth and Eleventh Circuits have upheld its constitutionality. Polar Shipping, Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982); Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S. A. de Navegacion, 732 F.2d 1543 (11th Cir. 1984). On the other hand, a Washington district court has found it to be constitutionally deficient. Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd., 450 F. Supp. 447 (W.D. Wash. 1978). The constitutionality of both rules was questioned in Techem Chem Co. v. M/T Choyo Maru, 416 F. Supp. 960 (D. Md. 1976). Thus, there is uncertainty as to whether the current rules prescribe constitutionally sound procedures for guidance of courts and counsel. See generally Note, Due Process in Admiralty Arrest and Attachment, 56 Tex. L. Rev. 1091 (1978).

Due to the controversy and uncertainty that have surrounded the Supplemental Rules, local admiralty bars and the Maritime Law Association of the United States have sought to strengthen the constitutionality of maritime arrest and attachment by encourgaging promulgation of local admiralty rules providing for prompt post-seizure hearings. Some districts also adopted rules calling for judicial scrutiny of applications for arrest or attachment. Nonetheless, the result has been a lack of uniformity and continued concern over the constitutionality of the existing practice. The amendments that follow are intended to provide rules that meet the requirements prescribed by the Supreme Court and to develop uniformity in the admiralty practice.

RULE B. ATTACHMENT AND GARNISHMENT: SPECIAL PROVISIONS

(1) WHEN AVAILABLE; COMPLAINT, AFFIDAVIT, JUDICIAL AUTHORIZATION, AND PROCESS. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the ~~complaint~~ process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by an affidavit signed by the plaintiff or his attorney that, to the affiant's knowledge, or to the best of his information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. ~~When a verified complaint is supported by such an affidavit the clerk shall forthwith issue a summons and process of attachment and garnishment.~~ Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent

circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

* * *

COMMITTEE NOTE

Rule B(1) has been amended to provide for judical scrutiny before the issuance of any attachment or garnishment process. Its purpose is to eliminate doubts as to whether the Rule is consistent with the principles of procedural due process enunciated by the Supreme Court in Sniadach v. Family Finance Corp., 395 U. S. 337 (1969); and later developed in Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975). Such doubts were raised in Grand Bahama Petroleum Co. v. Canadian Transportation Agencies, Ltd., 450 F. Supp. 447 (W.D. Wash. 1978); and Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 552 F. Supp. 771 (S.D. Ga. 1982), which was reversed, 732 F.2d 1543 (11th Cir. 1984). But compare Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982), in which a majority of the panel upheld the constitutionality of Rule B because of the unique commercial context in which it is invoked. The practice described in Rule B(1) has been adopted in some districts by local rule. E.g., N.D. Calif. Local Rule 603.3; W.D. Wash. Local Admiralty Rule 15(d).

The rule envisions that the order will issue when the plaintiff makes a prima facie showing that he has a maritime claim against the defendant in the amount sued for and the defendant is not present in the district. A simple order with conclusory findings is contemplated. The reference to review by the "court" is broad enough to embrace review by a magistrate as well as by a district judge.

The new provision recognizes that in some situations, such as when the judge is unavailable and the ship is about to depart from the jurisdiction, it will be impracticable, if not impossible, to secure the judicial review contemplated by Rule B(1). When "exigent circumstances" exist, the rule enables the plaintiff to secure the issuance of the summons and process of attachment and garnishment, subject to a later showing that the necessary circumstances actually existed. This provision is intended to provide a safety valve without undermining the requirement of pre-attachment scrutiny. Thus, every effort to secure judicial review, including conducting a hearing by telephone, should be pursued before resorting to the exigent-circumstances procedure.

Rule B(1) also has been amended so that the garnishee shall be named in the "process" rather than in the "complaint." This should solve the problem presented in Filia Compania Naviera, S.A. v. Petroship, S.A., 1983 A.M.C. 1 (S.D.N.Y. 1982), and eliminate any need for an additional judicial review of the complaint and affidavit when a garnishee is added.

RULE C. ACTION IN REM: SPECIAL PROVISIONS

* * *

(3) JUDICIAL AUTHORIZATION AND PROCESS. Except in actions by the United States for forfeitures for federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant ~~Upon the filing of the complaint the clerk shall forthwith issue a warrant~~ for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant and deliver it to the marshal for service. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process

enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or his attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for forfeitures for federal statutory violations the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

* * *

COMMITTEE NOTE

Rule C(3) has been amended to provide for judicial scrutiny before the issuance of any warrant of arrest. Its purpose is to eliminate any doubt as to the rule's constitutionality under the Sniadach line of cases. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969); Fuentes v. Shevin, 407 U.S. 67 (1972); Mitchell v. W. T. Grant Co., 416 U. S. 600 (1974); and North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975). This was thought desirable even though both the Fourth and the Fifth Circuits have upheld the existing rule. Amstar Corp. v. S/S Alexandros T., 664 F.2d 904 (4th Cir. 1981); Merchants National Bank of Mobile v. The Dredge General G. L. Gillespie, 663 F.2d 1338 (5th Cir. 1981), cert. dismissed, 456 U. S. 966 (1982). A contrary view was taken by Judge Tate in the Merchants National Bank case and by the district court in Alyeska Pipeline Service Co. v. The Vessel Bay Ridge, 509 F. Supp. 1115 (D. Alaska 1981), appeal dismissed, 703 F.2d 381 (9th Cir. 1983).

The rule envisions that the order will issue upon a prima facie showing that the plaintiff has an action in rem against the defendant in the amount sued for and that the property is within the district. A simple order with conclusory findings is contemplated. The reference to review by the "court" is broad enough to embrace a magistrate as well as a district judge.

The new provision recognizes that in some situations, such as when a judge is unavailable and the vessel is about to depart from the jurisdiction, it will be impracticable, if not impossible, to secure the judicial review contemplated by Rule C(3). When "exigent circumstances" exist, the rule enables the plaintiff to secure the issuance of the summons and warrant of arrest, subject to a later showing that the necessary circumstances actually existed. This provision is intended to provide a safety valve without undermining the requirement of pre-arrest scrutiny. Thus, every effort to secure judicial review, including conducting a hearing by telephone, should be pursued before invoking the exigent-circumstances procedure.

The foregoing requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations. In such actions a prompt hearing is not constitutionally required, United States v. Eight Thousand Eight Hundred and Fifty Dollars, 103 S.Ct. 2005 (1983); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), and could prejudice the government in its prosecution of the claimants as defendants in parallel criminal proceedings since the forfeiture hearing could be misused by the defendants to obtain by way of civil discovery information to which they would not otherwise be entitled and subject the government and the courts to the unnecessary burden and expense of two hearings rather than one.

RULE E. ACTIONS IN REM AND QUASI IN REM: GENERAL PROVISIONS

* * *

(4) EXECUTION OF PROCESS; MARSHAL'S RETURN; CUSTODY OF PROPERTY; PROCEDURES FOR RELEASE.

* * *

(f) PROCEDURE FOR RELEASE FROM ARREST OR ATTACHMENT. Whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules. This subdivision shall have no application to suits for seamen's wages when process is issued upon a

certification of sufficient cause filed pursuant to Title 46, U.S.C. §§603 and 604 or to actions by the United States for forfeitures for violation of any statute of the United States.

* * *

COMMITTEE NOTE

Rule E(4)(f) makes available the type of prompt post-seizure hearing in proceedings under Supplemental Rules B and C that the Supreme Court has called for in a number of cases arising in other contexts. See North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975); Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974). Although post-attachment and post-arrest hearings always have been available on motion, an explicit statement emphasizing promptness and elaborating the procedure has been lacking in the Supplemental Rules. Rule E(4)(f) is designed to satisfy the constitutional requirement of due process by guaranteeing to the shipowner a prompt post-seizure hearing at which he can attack the complaint, the arrest, the security demanded, or any other alleged deficiency in the proceedings. The amendment also is intended to eliminate the previously disparate treatment under local rules of defendants whose property has been seized pursuant to Supplemental Rules B and C.

The new Rule E(4)(f) is based on a proposal by the Maritime Law Association of the United States and on local admiralty rules in the Eastern, Northern, and Southern Districts of New York. E.D.N.Y. Local Rule 13; N.D.N.Y. Local Rule 13; S.D.N.Y. Local Rule 12. Similar provisions have been adopted by other maritime districts. E.g., N.D. Calif. Local Rule 603.4; W.D. La. Local Admiralty Rule 21. Rule E(4)(f) will provide uniformity in practice and reduce constitutional uncertainties.

Rule E(4)(f) is triggered by the defendant or any other person with an interest in the property seized. Upon an oral or written application similar to that used in seeking a temporary restraining order, see Rule 65(b), the court is required to hold a hearing as promptly as possible to determine whether to allow the arrest or attachment to stand. The plaintiff has the burden of showing why the seizure should not be vacated. The hearing also may determine the amount of security to be granted or the propriety of imposing counter-security to protect the defendant from an improper seizure.

The foregoing requirements for prior court review or proof of exigent circumstances do not apply to actions by the United States for forfeitures for federal statutory violations. In such actions a prompt hearing is not

constitutionally required, United States v. Eight Thousand Eight Hundred and Fifty Dollars, 103 S.Ct. 2005 (1983); Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), and could prejudice the government in its prosecution of the claimants as defendants in parallel criminal proceedings since the forfeiture hearing could be misused by the defendants to obtain by way of civil discovery information to which they would not otherwise be entitled and subject the government and the courts to the unnecessary burden and expense of two hearings rather than one.

Form 18-A.

NOTICE AND ACKNOWLEDGMENT FOR SERVICE BY MAIL

United States District Court for the Southern District of New York

Civil Action, File Number_____

A. B., Plaintiff	)	Notice and Acknowledgment of Receipt of Summons and Compiaint
v.	)	
C. D., Defendant	)	

NOTICE

To: (insert the name and address of the person to be served.)

The enclosed summons and complaint are served pursuant to Rule 4(c)(2)(C)(ii) of the Federal Rules of Civil Procedure.

You must complete the acknowledgment part of this form and return one copy of the completed form to the sender within 20 days.

You must sign and date the acknowledgment. If you are served on behalf of a corporation, unincorporated association (including a partnership), or other entity, you must indicate under your signature your relationship to that entity. If you are served on behalf of another person and you are authorized to receive process, you must indicate under your signature your authority.

If you do not complete and return the form to the sender within 20 days, you (or the party on whose behalf you are being served) may be required to pay any expenses incurred in serving a summons and complaint in any other manner permitted by law.

If you do complete and return this form, you (or the party on whose behalf you are being served) must answer the complaint within 20 days. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

I declare, under penalty of perjury, that this Notice and Acknowledgment of Receipt of Summons and Complaint was will have been mailed on (insert date).

_____
Signature

_____
Date of Signature

ACKNOWLEDGMENT OF RECEIPT OF
SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the summons and of the complaint in the above-captioned ~~manner~~ matter at (insert address).

_____
Signature

_____
Relationship to Entity/
Authority to Receive Service of Process

_____
Date of Signature