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MEMORANDUM TO THE STANDING COMMITTEE

SUBJECT: *Legislative Report*

Nineteen bills were introduced in the 109th Congress that affect the Federal Rules of Practice, Procedure, and Evidence. A list of the relevant pending legislation is attached. Since the last Committee meeting, we have been focusing on the following bills.

Civil Rule 11

On January 26, 2005, Representative Lamar Smith (R-TX) introduced the "Lawsuit Abuse Reduction Act of 2005" (H.R. 420, 109th Cong., 1st Sess.). The legislation is similar to an earlier bill, which was passed by the House of Representatives during the last Congress in September 2004 (H.R. 4571, 108th Cong., 2nd Sess.). H.R. 420 would, among other things: (1) reinstate sanctions provisions deleted in 1993 from Civil Rule 11 and require a court to impose sanctions for every violation of the rule; (2) require a federal district court to suspend an attorney from the practice of law in that court for one year if the attorney had violated Rule 11 three or more times; and (3) alter the venue standards for filing tort actions in state and federal court. Two new provisions were approved on the floor of the House. The first provides enhanced sanctions for anyone who "influences, obstructs, or impedes, or attempts to influence, or obstruct, or impede" a pending federal court case through the willful and intentional destruction of documents that are "highly relevant" to the case. The second prohibits a judge from sealing a court record in a Rule 11 proceeding unless the judge specifically finds that the justification for sealing the record outweighs any interest in public health and safety. Both provisions are ambiguously worded.

Although ostensibly limited to a Rule 11 proceeding, the bill goes on to say that the "section applies to any record formally filed with the court." The provision bears some resemblance to "sealed settlement" legislation, which was introduced in past Congresses by Senator Herb Kohl ("Sunshine in Litigation Act of 2003," S. 817, 108th Cong., 1st Sess.). In fact, Representative Jerrold Nadler, the amendment's author, explained that the "amendment bans the concealment of unlawful conduct when the interests of public health and safety outweigh the interest of litigating parties in concealment. Very often in civil litigation, a company producing an unsafe product or an unsafe procedure will settle with the plaintiff. The settlement will

include a payment to the defendant, but will also include an agreement that the records will be sealed and no one will ever talk about it. That is the very condition that the defendant company puts on it . . . . When it comes to public health and safety, people must have access to information about an unsafe product . . . . Secrecy agreements should not be enforced unless they meet stringent standards to protect the public interest and public health." The House passed the bill on October 27, 2005, by a vote of 228-184. The Senate has not yet acted on the legislation.

Earlier this year, at the request of the Civil Rules Committee, the Federal Judicial Center conducted a survey of 400 district court judges on Civil Rule 11 and H.R. 4571. Seventy percent of the judges surveyed responded. Of the judges who responded, 87 percent preferred the current version of Rule 11, only 5 percent preferred the version of the rule in effect between 1983-1993, and 4 percent preferred the rule version as proposed by the legislation. (The survey is available on the Federal Rulemaking web site at <www.uscourts.gov/rules/newrules10.html>.) On May 17, 2005, Director Mecham sent letters, which enclosed the FJC report, to Chairman James Sensenbrenner and Chairman Arlen Specter, urging them to oppose H.R. 420.

Habeas Corpus

On May 19, 2005, Senator Jon Kyl (R-AZ) introduced the "Streamlined Procedures Act of 2005" (S. 1088, 109th Cong., 1st Sess.). A similar, but not identical, bill was introduced by Representative Dan Lungren on June 22, 2005 (H.R. 3035, 109th Cong., 1st Sess.). The bills generally limit federal habeas corpus review of state court convictions in capital and non-capital cases.

The Senate Judiciary Committee held hearings on S. 1088 on July 13-14, 2005. On July 28, 2005, the Committee adopted a substitute amendment offered by Senator Arlen Specter (R-PA). The substitute amendment deleted several provisions of the bill, as introduced, that had been of concern to some of the witnesses. On October 6, 2005, Senator Specter offered a second substitute amendment, which was approved by the Committee by a vote of 10-1. An amendment offered by Senator Feinstein was defeated along party lines by a vote of 8-10 that would have required the Judicial Conference to conduct a study of the handling of capital and non-capital habeas cases in the federal courts. The Senate Judiciary Committee held a hearing on the bill on November 16, 2005, at which Judge Howard McKibben testified on behalf of the Judicial Conference. There has been no further action on the legislation. Key provisions of the amended legislation include:

Unexhausted Claims. Federal courts would be required to dismiss unexhausted claims by state prisoners in habeas corpus proceedings with prejudice, unless the claim falls within specific, limited exceptions for review.

Limited Amendments. The number of times a prisoner may amend the application for writ of habeas corpus would be limited. Generally, an application could be amended once as a

matter of course before the earlier of either (a) the date when the answer is filed, or (b) the one-year limitation period described in subsection (d).

Procedurally Barred Claims. Federal habeas review of a claim that was found by a state court to be procedurally barred is limited. The legislation also limits review over any claim that the state court denied on its merits and on the ground that the claim was not properly raised under state procedural law.

Expedited Consideration of Habeas Petitions; Certification by Attorney General. The Attorney General may certify that state standards for appointing counsel satisfy the requirements under 28 U.S.C. §§ 2261 or 2265 for expedited consideration of habeas petitions. The Court of Appeals for the District of Columbia has exclusive jurisdiction to review the Attorney General's certification determination and must affirm it unless it is manifestly contrary to law and an abuse of discretion.

Victims' Rights. A crime victim in a federal habeas proceeding arising out of a state conviction is afforded the same rights as a crime victim in a federal criminal prosecution under amended 18 U.S.C. § 3771(b).

Appeals. Amended 28 U.S.C. § 2254 imposes time limits on a court of appeals to hear and decide an appeal from the district court in a habeas corpus proceeding. Among other things, a court of appeals must decide an appeal from an order granting or denying a writ of habeas corpus within 300 days after (a) the date when the answering brief is filed, or (b) if no answering brief is filed, the date when the answering brief would have been due.

At its September 2005 session, the Judicial Conference voted to oppose provisions of the legislation that would prevent the federal courts from reaching the merits of habeas corpus petitions, including the provisions on dismissing unexhausted claims, limiting review on procedurally barred claims, and prohibiting courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law (JCUS-SEP 05, pp. 24-26) (see attached). The legislation is also opposed by, among others, the American Bar Association, NAACP Legal Defense Fund, National Conference of Chief Justices, New York State Bar Association, two former directors of the FBI, and numerous current and former state and federal prosecutors.

Bankruptcy

On July 26, 2005, the House Judiciary Committee's Subcommittee on Commercial and Administrative Law held an oversight hearing on the "Implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005" (Pub. L. No. 109-8) (hereinafter "the Act"). Members of Congress had expressed concern over the implementation of the Act by the Judicial Conference and Executive Office for United States Trustees. Judge A. Thomas Small appeared on behalf of the Conference and testified on the substantial amount of work done by the Rules

Committees, other Judicial Conference Committees, and Administrative Office in implementing the Act. Judge Small reassured the subcommittee that despite the tremendous amount of work required under the Act, the judiciary would be able to implement it by the statutory deadlines. (See attached.)

In August 2005, the Bankruptcy Rules Committee approved Interim Rules and Official Forms that implement the Act. The Executive Committee on behalf of the Judicial Conference approved the Official Forms and the transmission of the Interim Rules, with a recommendation that the Interim Rules be adopted locally. The rules and forms were also sent to legal publishers and software companies in mid-August 2005, in time for implementation before the October 17 effective date. The Interim Rules and Official Forms were posted on the Federal Rulemaking Internet web site.

On August 18, 2005, Senator Grassley wrote to Chief Justice Rehnquist expressing concern that the Interim Bankruptcy Rules did not faithfully implement three provisions in the Act, which generally took effect on October 17, 2005. Specifically, the senator asserted that the Interim Rules: (1) would place an unfounded burden on creditors by requiring that motions to dismiss be filed "with particularity"; (2) do not require debtors to file a certificate showing they have completed the mandated education course; and (3) do not require the debtor's counsel to attest, under oath, to the accuracy of the debtor's schedules and statements. (See attached.) Secretary Mecham wrote to Senator Grassley on September 15, 2005, informing him of the work of the Rules Committees to implement the Act. Secretary Mecham also enclosed a memorandum from Professor Jeffrey Morris, which responded that the Interim Rules did, in fact, implement the Act's provisions. Secretary Mecham noted that the Rules Committees would be considering permanent changes to the Federal Rules of Bankruptcy Procedure based on the Interim Rules. The Committees would look at the intervening experiences with the Interim Rules and determine whether any adjustments were appropriate, including the modifications suggested by the senator. (See attached.)

The Interim Rules and Official Forms implementing the Act represented a major undertaking completed within a short period of time. Although the short time frame precluded a formal public-comment period, the bench and bar have been invited to comment on the Interim Rules and Official Forms after local court promulgation in anticipation of the Interim Rules becoming permanent. The number of comments raising problems or concerns with the Interim Rules has been gratifyingly small. At its September 29-30, 2005, meeting, the Bankruptcy Rules Advisory Committee reviewed the comments submitted on the Interim Rules and Official Forms and agreed that several issues raised by the comments required further clarification. The Committee approved amendments to four Interim Rules and three Official Forms. (The Advisory Committee also concurred with proposed revisions to several Director's Procedural Forms.) The Standing Committee approved the amendments and the Executive Committee acting on behalf of the Conference approved the revisions to the Official Forms on October 11, 2005. The amendments were distributed to the courts and posted on the rules web site.

Hearsay Exception

On March 14, 2005, Representative Randy Forbes introduced the "Gang Deterrence and Community Protection Act of 2005" (H.R. 1279, 109th Cong., 1st Sess.). Senator Dianne Feinstein introduced similar legislation—the Gang Prevention and Effective Deterrence Act of 2005—on January 25, 2005 (S. 155, 109th Cong., 1st Sess.). H.R. 1279 expands federal jurisdiction over juvenile cases. It also amends Evidence Rule 804(b)(6) by codifying the rulings in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000) and *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002), which admitted statements of unavailable witnesses against co-conspirators under Rule 804(b)(6) upon a finding that the co-conspirators "acquiesced in the wrongdoing that . . .procure[d] the unavailability of the declarant as witness." The House passed H.R. 1279 on May 11, 2005, by a vote of 279-144. On June 28, 2005, Secretary Mecham wrote to Chairman Specter, requesting, among other things, that the provision amending Evidence Rule 804(b)(6) be removed from the legislation, noting that the legislation was unnecessary and potentially confusing. (See attached.) No further action has been taken on S. 155.

USA PATRIOT Act

On July 11, 2005, Representative Sensenbrenner introduced the "USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005" (H.R. 3199, 109th Cong., 1st Sess.). On July 13, 2005, Senator Specter introduced similar, but not identical, legislation in "USA PATRIOT Improvement and Reauthorization Act of 2005" (S. 1389, 109th Cong., 1st Sess.). Section 231 of H.R. 3199 would amend Criminal Rule 24(c) by increasing the number of alternate jurors a court may empanel in death penalty cases from 6 to 9 and the number of peremptory challenges each side is allotted to 4 in cases where the court empanels 7-9 alternate jurors. There are no comparable provisions in the Senate bill. On July 21, 2005, the House passed H.R. 3199 by a vote of 257-171. On July 29, 2005, the Senate passed H.R. 3199 by amending the bill and substituting S. 1389. The Senate requested a conference on July 29, 2005, to reconcile the legislation. (A major sticking point has been the extension of the "sunsets" of several provisions of the PATRIOT Act that are set to expire at the end of the year.) On December 8, 2005, a compromise agreement was reached on the legislation; however, it is not known at this time whether the provision amending Criminal Rule 24(c) is part of the revised bill. Congress is expected to vote on the legislation sometime this week, but its fate in the Senate is uncertain at this time.

Other Developments of Interest

Cameras in the Courtroom. On November 9, 2005, the Senate Judiciary Committee held a hearing on the use of cameras in the courtroom. The Committee also considered several related bills that would: (1) amend title 28, United States Code, "[t]o permit the televising of Supreme Court proceedings," S. 1768, 109th Cong., 1st Sess.; and (2) allow the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings over which he or she presides. ("Sunshine in the Courtroom Act of 2005," S. 829, 109th Cong., 1st Sess.)

On November 9, 2005, the House passed the "Secure Access to Justice and Court Protection Act of 2005" (H.R. 1751, 109th Cong., 1st Sess.). Section 22 of the bill is similar to S. 829, which would allow the presiding judge of a federal appellate or district court to permit the photographing, recording, or televising of court proceedings. (The legislation also has a sunset provision that rescinds the authority of a district court judge three years after enactment of the Act.) In addition, H.R. 1751 authorizes the Judicial Conference to promulgate advisory guidelines in the use of electronic media in the courtroom. There has been no further action on the legislation.

The Judicial Conference generally opposes cameras in the courtroom (*see, e.g.,* JCUS-SEP 94, p. 46; JCUS-SEP 99, p. 48), but has authorized each court of appeals to decide for itself whether to permit the taking of photographs and allow radio and television coverage of oral argument. (JCUS-MAR 96, p. 17.) The Second and Ninth Circuits allow broadcast coverage of their proceedings, upon approval of the presiding panel.

Grand Jury. The Senate Judiciary Committee was scheduled to hold a hearing on November 16, 2005, on grand jury reform. Judge Susan Bucklew was scheduled to testify on the Judicial Conference's opposition to legislation amending Criminal Rule 6 to permit counsel to accompany a witness in a grand jury proceeding, but the hearing was postponed.

James N. Ishida

Attachments

LEGISLATION AFFECTING THE FEDERAL RULES OF PRACTICE AND PROCEDURE[1]
109th Congress

SENATE BILLS

- S. 5 - *Class Action Fairness Act of 2005*
  - Introduced by: Grassley
  - Date Introduced: 1/25/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/25/05). Senate Judiciary Committee reported bill favorably without amendment (2/3/05). Passed Senate by vote of 72-26 (2/10/05). Passed House by vote of 279-149 (2/17/05). Signed by President (2/18/05) (Pub. L. No. 109-2).
  - Related Bills: H.R. 516
  - Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, review and approval of proposed settlements (protection against loss by class members and prohibition against discrimination based on geographic location), and notification of proposed settlement to appropriate state and federal officials.
— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a subject of a foreign state.

A district court may decline to exercise jurisdiction where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the class action was

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[1]The Congress has authorized the federal judiciary to prescribe the rules of practice, procedure, and evidence for the federal courts, subject to the ultimate legislative right of the Congress to reject, modify, or defer any of the rules. The authority and procedures for promulgating rules are set forth in the Rules Enabling Act. 28 U.S.C. §§ 2071-2077.

brought in a forum with sufficient nexus with the plaintiff class members, (e) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (f) whether, during the three-year period preceding the filing of the class action, one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

— Section 4 also provides that a district court may not exercise jurisdiction over any class action as provided above where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state in which the action was filed, (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of all members of all proposed plaintiff classes in the aggregate is less than 100. Section 4 adds additional grounds for excluding class actions from federal jurisdiction: (1) more than 2/3 of the members of all proposed plaintiff classes in the aggregate are citizens of the State in which the action was filed; (2) at least one defendant is a party from whom plaintiffs seek "significant relief," whose conduct forms a "significant basis" for plaintiffs' claims, and who is a citizen of the State where the action was originally filed; (3) the principal injuries resulting from the alleged conduct occurred in the State where the action was originally filed; and (4) a class action "asserting the same or similar factual allegations against any of the defendants on behalf of the same or other persons" was filed during the three-year period preceding the filing of the class action.

— Section 5 provides for removal of interstate class actions to a United States district court and for review of orders remanding class actions to State courts. Section 5 also provides that the court of appeals may consider an appeal from a district court's remand order. If the court of appeals accepts the appeal, the court must render a decision within 60 days after the appeal was filed, unless an extension of time is granted. (An extension of time may be granted for no more than 10 days.)

— Section 6 directs the Judicial Conference of the United States to submit reports to the Senate and House Judiciary Committees on class action settlements. In these reports, the Judicial Conference shall include the following: (1) recommendations on the "best practices" that courts can use to ensure that settlements are fair; (2) recommendations to ensure that the fees and expenses awarded to counsel in connection with a settlement appropriately reflect the time, risk, expense, and risk that counsel devoted to the litigation; (3) recommendations to ensure that class members are the primary beneficiaries of settlement; (4) the actions that the Judicial Conference will take to implement its recommendations.

— Section 7 states that the amendments to Civil Rule 23, which were approved by the Supreme Court on March 27, 2003, would take effect on the date of enactment or December 1, 2003, whichever occurred first.

- S. 155 - *Gang Prevention and Effective Deterrence Act of 2005*
  - Introduced by: Feinstein
  - Date Introduced: 1/25/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (1/25/05). Considered by Judiciary Committee (7/28/05).
  - Related Bills: H.R. 1279
  - Key Provisions:

    — Section 206 amends **Evidence Rule 804(b)(6)** to admit a statement offered against a party who conspired in a wrongdoing that resulted in the unavailability of the declarant.

- S. 256 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*
  - Introduced by: Grassley
  - Date Introduced: 2/1/05
  - Status: Referred to the Senate Committee on the Judiciary (2/1/05). Judiciary Committee reported favorably with amendments (2/17/05). Passed Senate by vote of 74-25 (3/10/05). Referred to House Committees on the Judiciary and Financial Services (3/15/05). House Judiciary Committee held mark-up session and ordered bill reported by vote of 22-13 (3/16/05). House Report 109-31 filed (4/8/05). Committee on Financial Services discharged (4/8/05). Passed House by a vote of 302 - 126 (4/14/05). Signed by the President (4/20/05) (Pub. L. No. 109-8).
  - Related Bills: H.R. 685
  - Key Provisions:

    — Section 221 amends **11 U.S.C. § 110** by inserting a new provision that allows the Supreme Court to promulgate rules under the Rules Enabling Act or the Judicial Conference to prescribe guidelines that establish a maximum allowable fee chargeable by a bankruptcy petition preparer.

    — Section 315 states that within 180 days after the bill is enacted, the Director of the Administrative Office of the U.S. Courts shall establish procedures for safeguarding the confidentiality of any tax information required to be provided under this section. Section 315 also directs the Director to prepare and submit a report to Congress on, among other things, the effectiveness of said procedures.

    — Section 319 expresses the sense of Congress that **Bankruptcy Rule 9011** should be amended to require the debtor or debtor's attorney to verify that information contained in all documents submitted to the court or trustee be (a) well grounded in law and (b) warranted by existing law or a good-faith argument for extension, modification, or reversal of existing law.

    — Section 419 directs the Judicial Conference, after consultation with the Executive Office of the United States Trustee, to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** that require Chapter 11 debtors to disclose certain information by filing and serving periodic financial reports. The required information shall include the value, operations, and profitability of any closely held corporation, partnership, or any other entity in which the debtor holds

a substantial or controlling interest.

— Section 433 directs the Judicial Conference to, within a reasonable time after the date of enactment, propose new **Bankruptcy Forms** on disclosure statements and plans of reorganization for small businesses.

— Section 434 adds **new section 308 to 11 U.S.C. chapter 3** (debtor reporting requirements). Section 434 also stipulates that the effective date "shall take effect 60 days after the date on which rules are prescribed under section 2075 of title 28, United States Code, to establish forms to be used to comply with section 308 of title 11, United States Code, as added by subsection (a)."

— Section 435 directs the Judicial Conference to propose amendments to the **Bankruptcy Rules** and **Bankruptcy Forms** to assist small business debtors in complying with the new uniform national reporting requirements.

— Section 601 amends **chapter 6 of 28 U.S.C.,** directing (1) the clerk of each district court (or clerk of the bankruptcy court if certified pursuant to section 156(b) of this title) to compile bankruptcy statistics pertaining to consumer credit debtors seeking relief under Chapters 7, 11, and 13; (2) the Director of the Administrative Office of the U.S. Courts to compile such statistics and make them available to the public; and (3) the Director of the Administrative Office of the U.S. Courts to prepare and submit to Congress an annual report concerning the statistics collected. This report is due no later than July 1, 2008.

— Section 604 expresses the sense of Congress that (1) it should be the national policy of the United States that all public data maintained by the bankruptcy clerks in electronic form should be available to the public and released in usable electronic form subject to privacy concerns and safeguards as developed by Congress and the Judicial Conference.

— Section 716 expresses the sense of Congress that the Judicial Conference should, as soon as practicable after the bill is enacted, propose amendments to the **Bankruptcy Rules** regarding an objection to the confirmation plan filed by a governmental unit and objections to a claim for a tax filed under Chapter 13.

— Section 1232 amends **28 U.S.C. § 2075** to insert: "The bankruptcy rules promulgated under this section shall prescribe a form for the statement required under section 707(b)(2)(C) of title 11 and may provide general rules on the content of such statement."

— Section 1233 amends **28 U.S.C. § 158** to provide for direct appeals of certain bankruptcy matters to the circuit courts of appeals.

[SA #26 amends 11 U.S.C. § 107 restricts public access to certain sensitive information of the debtor.]

- S. 737 - *Security and Freedom Enhancement Act of 2005*
  - Introduced by: Craig
  - Date Introduced: 4/6/05
  - Status: Referred to the Senate Committee on the Judiciary (4/6/05).

- Related Bills: None
- Key Provisions:

  — Section 3 amends **18 U.S.C. § 3103** by requiring that notice be given to the subject of the search warrant within 7 days after execution of the warrant.

- S. 852 - *Fairness in Asbestos Injury Resolution Act of 2005*
  - Introduced by: Specter
  - Date Introduced: 4/19/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (4/19/05). Senate Judiciary Committee held mark-up sessions (4/28/05, 5/11/05, 5/12/05, 5/19/05); Senate Judiciary Committee reported bill favorably by a vote of 13-5 (5/26/05). Placed on legislative calendar (6/16/05). Report No. 109-97 filed (6/30/05). Senate Judiciary Committee held hearing (11/17/05).
  - Related Bills: H.R. 1957.
  - Key Provisions:

    — Section 302 provides that a claimant may petition for judicial review of the administrator's decision awarding or denying compensation under the Act. Exclusive jurisdiction rests in the circuit court where the claimant resides at the time the final order is issued. The circuit court must review the decision on an expedited basis.

    — Section 403 provides that the Act supersedes federal and state law insofar as these laws may relate to any asbestos claim filed under the Act. Section 403 also states that, except as provided, the remedies set forth shall be the exclusive remedy for any asbestos claim.

- S. 1088 - *Streamline Procedures Act of 2005*
  - Introduced by: Kyl
  - Date Introduced: 5/19/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (5/19/05). Committee hearing held (7/13/05). Committee consideration and mark-up sessions held (7/14/05, 7/28/05, 10/6/05, 11/16/05).
  - Related Bills: H.R. 3035
  - Key Provisions:

    — Section 2 amends **28 U.S.C. § 2254** to require federal courts to dismiss unexhausted claims with prejudice, unless the claim falls within limited exceptions for review.

    — Section 3 amends **28 U.S.C. § 2244** to limit amendments to a pending petition for writ of habeas corpus.

    — Section 4 amends **28 U.S.C. § 2254** to limit federal habeas review of a claim that was found by a state court to be barred procedurally or denied on the merits and on the ground that the claim was not properly raised under state procedural law.

    — Section 7 amends **28 U.S.C. § 2254** to impose time limits for a court of appeal

to hear and decide an appeal in a habeas corpus proceeding from the district court — Section 11 amends **18 U.S.C. § 3771(b)** to provide that a victim of a crime in a habeas corpus proceeding be afforded the same rights as provided victims of crimes in federal criminal prosecutions under 18 U.S.C. § 3771(b).

- S. 1348 - *Sunshine in Litigation Act of 2005*
  - Introduced by: Kohl
  - Date Introduced: 6/30/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (6/30/05).
  - Related Bills: None.
  - Key Provisions:

    — Section 2 amends **28 U.S.C. Chapter 111** by inserting a new section 1660. New section 1660 provides that a court shall not enter an order pursuant to Civil Rule 26(c) that (1) restricts the disclosure of information through discovery, (2) approves a settlement agreement that would limit the disclosure of such agreement, or (3) restricts access to court records in a civil case unless the court conducts a balancing test that weighs the litigants' privacy interests against the public's interest in health and safety.

    — Section 3 states that the Act takes effect 30 days after enactment or applies only to orders entered in civil actions or agreements entered into on or after the effective date.

- S. 1739 - *To amend the material witness statute to strengthen procedural safeguards, and for other purposes*
  - Introduced by: Leahy
  - Date Introduced: 9/21/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (9/21/05).
  - Related Bills: None
  - Key Provisions:

    — Section 1 amends **Criminal Rule 46(h)** by deleting the reporting requirement in Rule 46(h)(2). The legislation sets forth new reporting requirements under the bill.

- S. 1874 - *Alien Tort Statute Reform Act*
  - Introduced by: Feinstein
  - Date Introduced: 10/17/05
  - Status: Read twice and referred to the Senate Committee on the Judiciary (10/17/05).
  - Related Bills: None
  - Key Provisions:

    — Section 2 amends 28 U.S.C. § 1350 by, among other things, vesting district courts with original jurisdiction over a civil action brought by an alien asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading. Section 2 may also affect **Civil Rule 9** by requiring that the complaint state

specifically facts describing each alleged tort, reasons why the action may be brought under the section, and facts showing the defendant had specific intent to commit the alleged tort.

HOUSE BILLS

- H.R. 420 - *Lawsuit Abuse Reduction Act of 2005*
  - Introduced by: Smith
  - Date Introduced: 1/26/05
  - Status: Referred to the House Judiciary Committee (1/26/05). Referred to House Subcommittee on Courts, the Internet, and Intellectual Property (3/2/05). Subcommittee discharged (5/20/05). House Judiciary Committee held markup session and reported bill, as amended, favorably by a vote of 19-11 (5/26/05). House Report No. 109-123 filed (6/14/05). House passed by a vote of 228-184 (10/27/05).
  - Related Bills: None
  - Key Provisions:

— Section 2 amends **Civil Rule 11** by requiring the court to impose an appropriate sanction upon attorneys, law firms, or parties who violate provisions of the rule.

— Section 3 would make **Civil Rule 11** applicable to state cases affecting interstate commerce.

— Section 4 generally provides that a personal injury claim filed either in state or federal court may be filed only in the state or federal district where (1) the person bringing the claim (a) resides at the time of filing, or (b) resided at the time of the alleged injury; (2) the alleged injury or circumstances giving rise to the personal injury claim occurred; or (3) the defendant's principal place of business is located.

— Section 6 amends Civil Rule 11 by requiring a federal district court to suspend an attorney from the practice of law in that court for one year if the attorney has violated Rule 11 three or more times.

— Section 7 creates a rebuttable presumption that Rule 11 has been violated when a party litigates—in any forum—an issue previously litigated and lost on the merits on 3 consecutive prior occasions.

— Section 8 provides for enhanced sanctions for anyone who "influences, obstructs, or impedes, or attempts to influence, or obstruct, or impede" a pending federal court case through the willful and intentional destruction of documents in the case. If the party is an attorney, the attorney shall also be held in contempt of court.

— Section 9 states that a court may not seal a Rule 11 proceeding unless the court finds that the justification for sealing outweighs any interest in public health and safety.

- H.R. 516 - *Class Action Fairness Act of 2005*
  - Introduced by: Goodlatte
  - Date Introduced: 2/2/05
  - Status: Referred to the House Committee on the Judiciary (2/2/05).
  - Related Bills: S. 5

- Key Provisions:

— Section 3 amends **Part V of title 28, U.S.C.**, to include a new chapter on Consumer Class Action Bill of Rights and Improved Procedures for Interstate Class Actions. The new chapter includes provisions on judicial review and approval of noncash settlements, prohibition on the payment of bounties, and review and approval of proposed settlements (protection against loss by class members and against discrimination based on geographic location).

— Section 4 amends **section 1332 of title 28, U.S.C.**, to give district courts original jurisdiction of any civil action in which the amount in controversy exceeds $5 million, exclusive of interest and costs, and is a class action in which (1) any plaintiff class member is a citizen of a state different from any defendant, (2) any plaintiff class member is a foreign state or subject of a foreign state and any defendant is a citizen of a state, or (3) any plaintiff class member is a citizen of a state and any defendant is a foreign state or a citizen or subject of a foreign state.

A district court may decline to exercise jurisdiction where more than 1/3 but less than 2/3 of the plaintiff class members and the primary defendants are citizens of the state in which the action was originally filed. In reaching its decision, the district court may rely on the following considerations: (a) whether the claims asserted involve matters of national or interstate interest, (b) whether the claims asserted will be governed by laws of the state in which the action was originally filed or by the laws of other states, (c) whether the case was pleaded in such a manner so as to avoid federal jurisdiction, (d) whether the number of citizens in the plaintiff class who are citizens of the state where the action was filed is substantially larger than the number of citizens from any other state, and the citizenship of the other members is dispersed among a substantial number of states, and (e) whether one or more claims asserting the same or similar factual allegations were filed on behalf of the same or other persons against any of the defendants.

These provisions do not apply in any civil action where (a) 2/3 or more of the plaintiff class and the primary defendants are citizens of the state where the action was originally filed; (b) the primary defendants are states, state officials, or other governmental entities; or (c) the number of proposed plaintiff class members is less than 100.

— Section 5 provides for removal of interstate class actions to a federal district court and for review of orders remanding class actions to state courts.

— Section 6 amends **section 1292(a) of title 28, U.S.C.**, to allow appellate review of orders granting or denying class certification under Civil Rule 23. Section 6 also provides that discovery will be stayed pending the outcome of the appeal.

- H.R. 685 - *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*
  - Introduced by: Sensenbrenner
  - Date Introduced: 2/9/05

• Status: Referred to the House Committees on the Judiciary and Financial Services (2/9/05). Referred to the House Subcommittee on Commercial and Administrative Law (4/4/05). Referred to the House Subcommittee on Financial Institutions and Consumer Credit (5/13/05).
• Related Bills: S. 256

- H.R. 1038 - *Multidistrict Litigation Restoration Act of 2005*
  • Introduced by: Sensenbrenner
  • Date Introduced: 3/2/05
  • Status: Referred to the House Committee on the Judiciary (3/2/05). Referred to the House Subcommittee on Courts, the Internet, and Intellectual Property (3/2/05). Subcommittee held mark-up session and forwarded to full committee (3/3/05). Judiciary Committee held mark-up session and ordered reported by voice vote (3/9/05). H. Rprt. 109-24 filed (3/17/05). Passed by House (4/19/05). Referred to Senate Judiciary (4/20/05).
  • Related Bills: None.
  • Key Provisions:
    — Section 2 amends **28 U.S.C. § 1407** to permit the transferee court in a multidistrict-litigation case to retain jurisdiction over the case for trial. The transferee court may also retain jurisdiction to determine compensatory damages.

- H.R. 1279 - *Gang Deterrence and Community Protection Act of 2005*
  • Introduced by: Forbes
  • Date Introduced: 3/14/05
  • Status: Referred to the House Committee on the Judiciary (3/14/05). Referred to House Subcommittee on Crime, Terrorism, and Homeland Security (4/5/05). Subcommittee held mark-up session and forwarded to full committee by vote of 5-3 (4/12/05). Committee held mark-up session and ordered reported by vote of 16-11 (4/20/05). House Report No. 109-74 filed (5/5/05). House passed by vote of 279-144 (5/11/05). Received in Senate and referred to Committee on the Judiciary (5/12/05).
  • Related Bills: S. 155
  • Key Provisions:
    — Section 113 amends **Evidence Rule 804(b)(6)** by codifying the ruling in *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000), which permits admission of statements of a murdered witness to be introduced against the defendant who caused the unavailability of the witness and members of the conspiracy if such actions were foreseeable by conspirators.

- H.R. 3035 - *Streamline Procedures Act of 2005*
  • Introduced by: Lungren
  • Date Introduced: 6/22/05
  • Status: Referred to the House Committee on the Judiciary (6/22/05). Referred to Subcommittee on Crime, Terrorism, and Homeland Security (6/27/05). Subcommittee

hearing held (6/30/05 and 11/10/05).
• Related Bills: S. 1088
• Key Provisions:
— Section 2 amends **28 U.S.C. § 2254** to clarify when the applicant has exhausted state-court remedies.
— Section 3 amends **28 U.S.C. § 2244** to clarify when an application for writ of habeas corpus may be amended.
— Section 4 amends **28 U.S.C. § 2254** to clarify the grounds when a federal court may consider claims found by a state court to be barred procedurally.
— Section 8 amends **28 U.S.C. § 2254** by establishing time limits for reviewing and deciding an application for writ of habeas corpus.

- H.R. 3060 - *Terrorist Death Penalty Enhancement Act of 2005*
•Introduced by: Carter
• Date Introduced: 6/24/05
• Status: Referred to House Committee on the Judiciary (6/24/05). Referred to the Subcommittee on Crime, Terrorism and Homeland Security (6/27/05). Subcommittee held hearing (6/30/05).
• Related Bills: H.R. 1763
• Key Provision:
— Section 301 amends **Criminal Rule 24(c)** to permit the court to empanel up to 9 alternate jurors, and to allow each side an additional 4 peremptory challenges when 7-9 alternate jurors are empaneled.

- H.R. 3199 - *USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005*
•Introduced by: Sensenbrenner
• Date Introduced: 7/11/05
• Status: Referred to House Committee on the Judiciary and Intelligence (7/11/05). Judiciary Committee held mark-up session and ordered reported by vote of 23-14 (7/13/05). Judiciary and Intelligence Committee Report No. 109-174 filed (7/18/05). House passed by vote of 257-171 (7/21/05). Passed Senate with an amendment (substituted text of S. 1389) (7/29/05). Senate requests conference (7/29/05). House appointed conferees (11/9/05). House Report No. 109-333 filed (12/8/05).
• Related Bills: S. 1266, S. 1389.
• Key Provision:
— Section 231 amends **Criminal Rule 24(c)** to permit the court to empanel up to 9 alternate jurors, and to allow each side an additional 4 peremptory challenges when 7-9 alternate jurors are empaneled.
[Section deleted in compromise legislation.]

- H.R. 3433 - *Parent-Child Privilege Act of 2005*
• Introduced by: Andrews
• Date Introduced: 7/26/05

- Status: Referred to House Committee on the Judiciary (7/26/05).
- Related Bills: None.
- Key Provision:

  — Section 2 amends **Article V of the Federal Rules of Evidence** by establishing a parent-child privilege. Under proposed new Evidence Rule 502(b), neither a parent nor a child shall be compelled to give adverse testimony against the other in a civil or criminal proceeding. Section 2 also provides that neither a parent nor a child shall be compelled to disclose any confidential communication made between that parent and child.

SENATE RESOLUTIONS

- S.J. Res.

HOUSE RESOLUTIONS

- H.J. Res.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 20, 2005

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All of the following matters requiring the expenditure of funds were approved by the Judicial Conference subject to the availability of funds, and subject to whatever priorities the Conference might establish for the use of available resources.

****

At its September 20, 2005 session, the Judicial Conference of the United States:

Executive Committee

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2005.

Committee on the Administration of the Bankruptcy System

Approved with respect to certain bankruptcy judgeships the fixing and transfer of official duty stations and designation of additional places of holding court requested by the circuit judicial councils and recommended by the Director.

Agreed to the deletion of Section 6.03(e) of the Regulations of the Director Implementing the Retirement and Survivors' Annuities for Bankruptcy Judges and Magistrates Act of 1988.

Approved adoption of the Director's Interim Guidance Regarding Tax Information Under 11 U.S.C. § 521.

Committee on the Budget

Approved the Budget Committee's budget request for fiscal year 2007, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

Endorsed revisions to the sample interim voucher orders contained in Appendices E and F of the CJA Guidelines to reduce the suggested one-third of compensation withholding amount to 20 percent.

Approved amendments to paragraphs 2.22B(4) and 6.02F of the CJA Guidelines to help ensure that the case-budgeting process does not delay the furnishing of necessary representational services.

Committee on Federal-State Jurisdiction

Recommitted for further consideration a recommendation with respect to legislation that would eliminate federal court jurisdiction to hear certain constitutional claims.

Agreed to seek legislation to—

a. Amend section 1441(a) of title 28, United States Code, to provide that if the plaintiff has filed a declaration in state court, as part of or in addition to the initial pleading, to the effect that the plaintiff will neither seek nor accept an award of damages or entry of other relief exceeding the amount specified in section 1332(a) of this title, the case shall not be removed on the basis of the jurisdiction conferred in section 1332(a) of this title so long as the plaintiff abides by the declaration and it remains binding under state practice; and

b. Amend section 1447 of title 28, United States Code, to (1) provide that within 30 days after the filing of a notice of removal of a civil action in which the district court's removal jurisdiction rests solely on original jurisdiction under section 1332(a) of title 28, the plaintiff may file a declaration with the district court to the effect that the plaintiff will neither seek nor accept an award of damages or entry of other relief exceeding the amount specified in section 1332(a), and (2) authorize the district court, upon the filing of such a declaration, to remand the action to state court or retain the case in the interest of justice.

With regard to habeas corpus legislation, agreed to—

a. Express support for the elimination of any unwarranted delay in the fair resolution of habeas corpus petitions filed by state prisoners in the federal courts;

b. Urge that, before Congress considers additional amendments to habeas corpus procedures, analysis be undertaken to evaluate whether there is any unwarranted delay occurring in the application of current law in resolving habeas corpus petitions filed in federal courts by state prisoners and, if so, the causes for such delay;

c. Express opposition to legislation regarding federal habeas corpus petitions filed by state prisoners that has the potential to (1) undermine the traditional role of the federal courts to hear and decide the merits of claims arising under the Constitution; (2) impede the ability of the federal and state courts to conduct an orderly review

of constitutional claims, with appropriate deference to state-court proceedings; and (3) prevent the federal courts from reaching the merits of habeas corpus petitions by adding procedural requirements that may complicate the resolution of these cases and lead to protracted litigation, including the following sections of the proposed "Streamlined Procedures Act of 2005" in the 109th Congress (H.R. 3035 as introduced and S. 1088 as amended in July 2005):

Section 2 of H.R. 3035 and S. 1088 (mixed petitions);
Section 4 of H.R. 3035 and S. 1088 (procedurally defaulted claims);
Section 5 of H.R. 3035 and S. 1088 (tolling of limitation period);
Section 6 of H.R. 3035 (harmless errors in sentencing); and
Section 9(a) of H.R. 3035 (federal review of capital cases under chapter 154 of title 28, United States Code);

d. Express opposition to section 3 (amendments to petitions) of H.R. 3035 and S. 1088 that would prohibit the federal courts from considering modifications to existing claims or the addition of new claims that meet the requirements of current law;

e. Express opposition to section 7 of H.R. 3035 and section 6 of S. 1088 that would make the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) applicable to cases pending prior to its enactment, and section 14 of H.R. 3035 and S. 1088 that would make the proposed Streamlined Procedures Act applicable to pending cases; and

f. Express opposition to the provision in section 11 of H.R. 3035 and section 10 of S. 1088 that would amend 21 U.S.C. § 848(q) to require an application for investigative, expert, or other services in connection with challenges to a capital sentence involving state or federal prisoners to be decided by a judge other than the judge presiding over the habeas corpus proceeding.

Committee on Information Technology

Approved the fiscal year 2006 update to the *Long Range Plan for Information Technology in the Federal Judiciary*.

With regard to information technology security and privacy—

a. Approved the Committee on Information Technology report entitled "Judiciary Network Security and Privacy" and adopted its recommendations; and

b. Directed the Committee to coordinate implementation of the recommendations.

U.S. House of Representatives
Committee on the Judiciary

STATEMENT OF JUDGE A. THOMAS SMALL
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I am A. Thomas Small, judge of the United States Bankruptcy Court for the Eastern District of North Carolina. I appear today on behalf of the Judicial Conference of the United States, the policy-making arm of the federal courts, to report on the actions taken by the federal judiciary to implement the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [the "Act"], particularly the development of necessary new rules and forms. I serve as the bankruptcy judge representative to the Judicial Conference and am the immediate-past chair of the Advisory Committee on Bankruptcy Rules, having served in that capacity from 2000 to 2004. The present committee chair, Judge Thomas S. Zilly, is unable to attend because of pressing court business.

I appreciate this opportunity to share with you details of the hard work that the Judicial Conference and its committees have done so far in reviewing, understanding, and implementing this massive and complicated legislation within such a brief period of time. The Act exceeds 500 pages in length and affects virtually every aspect of bankruptcy cases. Among other things, it introduces the concept of a means test as a requirement of eligibility for chapter 7 relief, adds an entirely new chapter to the Code (chapter 15 governing cross border insolvencies), and creates new categories of debtors and cases (small business cases and health care businesses). The provisions of the Act generally take effect on October 17, 2005. Implementing the legislation on a timely basis presents a tremendous challenge for the judiciary.

I will address the actions taken by the Advisory Committee on Bankruptcy Rules [the "Advisory Committee" or "committee"] to develop rules and forms implementing the Act, which I understand is one of the subcommittee's principal concerns. Later, I will briefly discuss the measures taken by other Judicial Conference committees and the Administrative Office of the United States Courts to implement the Act generally.

On April 21, 2005, (one day after the Act's enactment) the Advisory Committee held an organizational meeting here in Washington to devise a plan to carry out the Act's rules-related provisions. The Advisory Committee represents a wide spectrum of views and consists of 16 members appointed by the Chief Justice, who are well experienced and expert in bankruptcy law. The committee includes six article III judges, four bankruptcy judges, three private-sector attorneys, two law professors, and an official from the Department of Justice. In addition, the Director of the Executive Office for the United States Trustees and a bankruptcy clerk of court regularly attend and participate in the committee's meetings. The committee has been working closely and very productively with the Executive Office for the United States Trustees to develop the means testing form, a primary component of the Act. At the organizational meeting, the committee's chair tasked three subcommittees to address the business, consumer, and forms issues arising from the Act. Later, the chair tasked three additional subcommittees to address the Act's provisions on cross-border insolvencies, health care, and direct appeal provisions.

The Consumer Subcommittee met separately on May 6 and June 14; the Business Subcommittee met on May 5 and June 13; and the Forms Subcommittee met on May 6 and June 15. All the subcommittees have also conducted lengthy conference calls, usually lasting more than three hours. Their work product has been reviewed by a

style subcommittee for clarity and consistency. The full Advisory Committee is holding a public meeting in Washington on August 3-4, 2005. At the meeting, the committee will consider approximately forty new or amended rules and changes to virtually all the Official Forms.

The groundwork for much of the Advisory Committee's work had been prepared and considered by the committee at its meetings in 2001 and 2002, when earlier versions of the Act appeared to be nearing passage in Congress. The committee worked on amendments to about thirty rules and changes to about twenty forms. Many of these earlier proposals remain largely unchanged or slightly refined and are part of the package now under consideration. Along with the committee's more recent consideration of the rules and forms, these records provide a rich source of information for anyone interested in the development of the rules and forms.

In accordance with established Judicial Conference procedures, all rules-related records are available to the public on request. Consistent with these procedures, the drafts of rules and forms considered by the committee at its earlier meetings, as well as all current draft rules and forms, have been and continue to be available to the public on request. The public may obtain a copy of any draft rule or form simply by contacting the Administrative Office. Likewise, all meetings of the full Advisory Committee are open to the public. Minutes of each meeting of the full Advisory Committee are posted on the judiciary's internet web site.

At the Advisory Committee's April organizational meeting, it was decided that a two-track process would be necessary to implement the Act because its impending effective date did not provide sufficient time to proceed under the regular rulemaking process, which ordinarily takes three years. The first track was to: (1) identify which rules-related provisions in the Act require an immediate response; and (2) develop interim rules and forms addressing these time-sensitive provisions well before the October 17 deadline so that the courts have adequate time to implement them. The second track will be to monitor the courts' experiences with the interim rules and forms, simultaneously proceeding with the regular rulemaking process and inviting public comment beginning in August 2006 on converting the interim rules to permanent federal rules. At the same time, the committee would also publish for comment additional proposed rule amendments not included as part of the time-sensitive interim rules package.

Under the first track, interim rules will be circulated in mid-August 2005 to the courts with a recommendation that they be adopted without change as part of a standing or general order. The Advisory Committee considered, but rejected, recommending model local rules implementing the Act because many of the model local rules would necessarily conflict with existing federal Bankruptcy Rules, which are based on pre-Act law. Local rules cannot be inconsistent with the federal rules. Any amendment of local rules will have to await amendment of the federal rules through the regular rulemaking process, which cannot be accomplished in time to meet the Act's effective date. The committee concluded that the best vehicle to accomplish the Act's objectives was to develop interim rules and urge the courts to adopt them, while simultaneously monitoring the courts' experiences and working on permanent changes to the federal rules. The same process was followed on three separate occasions in the past when the Bankruptcy Code was amended in 1978, 1986, and 1994, and interim rules contemporaneous with the Act's effective date were issued. On each occasion, the courts uniformly adopted the committee's interim rules recommendations. I am confident that the courts will continue this tradition and adopt the interim rules now under consideration.

As a practical matter, the courts' discretion in adopting the amended and new rules is limited, because many of the Act's rules-related provisions will be implemented by amended or new Official Forms, which work in tandem with the interim rules and often are based on them. Unlike the recommended interim rules, however, the Judicial Conference itself authorizes the Official Forms, which courts must "observe" under Bankruptcy Rule 9009. Thus, courts will have a real incentive to adopt the

recommended interim rules in order to facilitate compliance with the mandatory Official Forms.

Courts will require several weeks to train staff and make appropriate arrangements to implement the interim rules and forms. Major modifications must be made to the Case Management/Electronic Case Filing software, which has now been deployed in virtually all the bankruptcy courts. The judiciary must quickly accomplish many other time-consuming and burdensome tasks, which I later describe, all of which require significant lead time. In addition, legal publishing firms require at least 60 days to make appropriate software changes and arrangements to mass-produce amended or new Official Forms. To meet these demands, the Advisory Committee has been working on an expedited timetable that expects the interim rules and forms to be completed and circulated to the courts by mid-August 2005. Achieving this ambitious goal has imposed enormous burdens not only on the Advisory Committee, but on the Committee on Rules of Practice and Procedure [the "Standing Committee"] and the Judicial Conference, all of which must review and approve these actions. Then the ninety bankruptcy courts and their administrative staff will have to adopt all the changes in their local systems. Carrying out this legislation has severely strained the judiciary, which is already under enormous pressure to cope with its day-to-day responsibilities in the administration of justice. Nevertheless, the judiciary is committed to fully and faithfully execute the Act's provisions.

Recommending interim rules and authorizing Official Forms without going through the regular Rules Enabling Act rulemaking process is an unavoidable expedient compelled by the Act's fast-approaching effective date. To meet the Act's deadline, the Advisory Committee has devoted substantial time and effort in developing interim rules and forms that faithfully implement the Act. It has worked closely with the Executive Office for the United States Trustees. It has consulted with experts who participated in the legislation, who at times disagreed among themselves over the meaning of particular provisions in the Act, making the committee's job all the more difficult. It has reached out to many corners of the bar for assistance. It has relied on its members' varied experiences, including members who represent creditors and others who represent debtors in their private practice. All these efforts have been undertaken in an open fashion to ensure that the process remains transparent, a hallmark of the rulemaking process.

The Advisory Committee's work product is outstanding. But the committee recognizes the inherent limitations of its abbreviated review process. Any shortfalls in the committee's work will be identified and corrected beginning in August 2006, when the interim rules and the amended and new Official Forms will undergo the exacting scrutiny of the regular rulemaking process. The Rules Enabling Act rulemaking process is a painstaking and time-consuming process that ensures that the best possible rules are promulgated. Permanent changes to the Federal Rules of Bankruptcy Procedure and forms to implement the Act will take place during the second track in accordance with the rulemaking process as described below.

The Rules Enabling Act rulemaking process is set out in 28 U.S.C. §§ 2071-2077. In accordance with the regular process, the Advisory Committee will review the experiences of the bench and bar with the interim rules and forms with a view toward proposing permanent amendments to the Federal Rules of Bankruptcy Procedure and recommending any additional appropriate revisions to the Official Forms. At its spring 2006 meeting, the committee is expected to approve and transmit the interim rules as proposed amendments to the federal rules, with or without appropriate revisions, to the Standing Committee at its June 2006 meeting with a recommendation that it approve publishing them for public comment. In addition, the committee will request that the package include an opportunity for the public to comment on the forms authorized in 2005. If approved, the interim rules and forms will then be published in August 2006 for a six-month period. Hearings will be scheduled at which the public can testify on timely request.

The Advisory Committee's reporter will summarize all comments and statements

submitted on the proposed rules and forms. The committee will meet in spring 2007 and consider any changes to the proposed rules and forms in light of the public comment. If approved, the committee will transmit the proposed rules and forms to the Standing Committee in June 2007 with a recommendation that they be approved and submitted to the Judicial Conference at its September 2007 session. If approved by the Standing Committee and the Conference, the proposed rules will then be submitted to the Supreme Court for its consideration. Changes to the Official Forms, however, do not have to be approved by the Court and will take effect on a date designated by the Conference. The Court has until May 1, 2008, to prescribe the rules and transmit them to Congress. The rules then would take effect on December 1, 2008, unless Congress acts otherwise.

At each stage of the rulemaking process, the proposed rule amendments and forms will be subjected to exacting scrutiny. Participation of the bench, bar, and public in the rules process ensures that the procedural rules implementing the Act will be the best that we can conceive. The rules committees have completed a remarkable amount of first-rate work, yet much remains to be done. These accomplishments are all the more impressive because they represent the work of volunteers, many of whom incur substantial monetary sacrifices in terms of lost income and all of whom sacrifice enormous amounts of time for the public good.

I have alluded in earlier parts of my statement to many other projects that the judiciary has undertaken to implement the Act. I now turn to address some of these important matters.

Members of the judiciary, including members of several Judicial Conference committees, judges, clerks, and staff at the Administrative Office of United States Courts [the "AO"] and the Federal Judicial Center [the "FJC"], have worked tirelessly to implement the Act by its general effective date. This work involves a cross-section of disciplines within the judiciary that require expertise in such areas as rules and forms, clerk's office procedures, bankruptcy administration, budget and accounting, information technology, statistics, training, human resources, and judicial education.

Information on the Act was quickly transmitted to the courts and clerks as soon as the law was enacted. Thereafter, judges, clerks, and other members of the judiciary were kept informed of issues that arise from the changes to the Bankruptcy Code, and given reports of progress on the judiciary's implementation of the Act. In addition to memoranda to the courts, the AO and the FJC have established web sites where information and analyses of the Act are posted for review and study by members of the judiciary. In order to implement the Act in an orderly, methodical, and coordinated fashion, Director Mecham determined that the AO's Office of Judges Programs would coordinate the multi-faceted implementation work.

Implementing the new law has required substantial on-going coordination with the Executive Office for the United States Trustees and meetings or exchanges with other such agencies as the Internal Revenue Service, the Department of Health and Human Services, and the Census Bureau. Additionally, the AO has called upon many individuals and groups for assistance, including members of the Judicial Conference, article III and bankruptcy judges, clerks of court, and deputy clerks. Ad hoc working groups were created, new Judicial Conference subcommittees were formed, and a special advisory group of judges and clerks was called upon to help develop new policies and procedures for bankruptcy clerks' offices.

The implementation process is progressing according to projected time tables. At this point, we expect to meet all deadlines, although it will be a struggle to do so. It is not possible to provide a detailed recitation of all of the work in progress in this short testimony, but I can provide you an overview of some of the other major initiatives beyond the rules process.

Changes in Operating Procedures

Significant changes to the courts' operating procedures are underway. First, careful

analyses of the Act to determine all the changes required in the courts' operating procedures were conducted. Thereafter, revised practices and procedures were developed to meet the requirements of the Act. Once a broad outline of the requirements and revised procedures were in place, significant changes were initiated to reprogram the judiciary's Case Management/Electronic Case Filing system. Additionally, the judiciary is developing guidelines and procedures to address various new procedures added by the Act, such as allowing in forma pauperis chapter 7 filings, handling copies of debtor-tax returns filed with the court, and instituting procedures for nationwide noticing for creditors.

Training

The FJC and the AO have planned and begun training for bankruptcy judges, bankruptcy clerks and bankruptcy administrators, and court staff, including case administrators in the clerks' offices who will use the revised CM/ECF system. Training occurs nationally at specifically designated seminars, at conferences, and via the "FJTN," the FJC's closed-circuit television broadcast channel. Many other groups have reached out to the AO for assistance or participation in their training plans.
Bankruptcy Administrator Program

The AO is working directly with the six bankruptcy administrator offices in the states of Alabama and North Carolina to prepare them to assume all the new duties and responsibilities required of them under the Act. First, careful analysis of the Act was conducted to pinpoint all the new duties, whether they are explicitly imposed on bankruptcy administrators by the Act or are needed to maintain parallel treatment with new duties imposed on United States trustees. The bankruptcy administrator offices must be educated as to the changes in the law, changes in the courts' operating procedures, and changes to the bankruptcy administrators' own duties and responsibilities, such as overseeing means testing and small business chapter 11 cases certifying consumer credit counseling and financial management courses, and taking on new audit and reporting responsibilities. The AO is in contact with each bankruptcy administrator office, and an inclusive seminar is planned for them well before the effective date of the Act. In addition, current bankruptcy administrator procedures and manuals will have to be revised substantially, and changes will have to be made to their automated case management systems.

Statistics

Major changes will be needed in the judiciary's statistical systems, both to adjust to the many changes in the bankruptcy system required in the Act generally and to comply with section 601 of the Act, which requires the AO to gather information and produce a whole new set of reports on consumer debtor cases. The AO has worked hand in hand with the Executive Office for the United States Trustees and with bankruptcy clerks to redesign the data input forms, reprogram the case management systems, design extraction programs, and build a whole new enterprise data system capable of receiving and processing the data.
Additional Judgeships

Authorization of additional bankruptcy judgeships by the Act was effective upon enactment. The Judicial Conference has notified all affected circuits, including those that did not receive the bankruptcy judgeships recommended by the Conference to Congress in early 2005. Some circuits have begun the appointment process, advertising their new vacancies and receiving applications for the positions. The AO is working to identify adequate space and facilities for these new judges and chambers staff.

We share a common interest in ensuring that the bankruptcy system as a whole is prepared on October 17, 2005, when most of the provisions of the Act are effective. The amount of work required of the judiciary to implement the Act is immense and costly, especially considering the short time frame available to accomplish the extensive revisions required of the existing systems. The work to date has been

impressive and remarkable, and we are confident that the deadlines will be met.
Thank you.

05-BR-101

United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

August 18, 2005

Chief Justice William H. Rehnquist
United States Supreme Court Building
One First Street, NE
Washington, DC 20543

Dear Chief Justice Rehnquist:

As the principal sponsor of the newly-enacted bankruptcy reform law (Pub. Law 109-8), I am writing to express my concern over certain rules which have been proposed by the Judicial Conference to implement this legislation. In my opinion, the Judicial Conference will play a critical role in ensuring that Public Law 109-8 is implemented in a manner that is fully consistent with Congressional intent. The Rules Enabling Act specifically envisions Congressional involvement with the judicial rule-making process. Accordingly, I am communicating these views in that spirit.

First, I am concerned that the proposed rules would require that creditor motions to dismiss be filed "with particularity". This would impose an unnecessary burden on creditors that has no statutory basis in the new bankruptcy law. A fair reading of the statute and its legislative history clearly indicates that Congress wanted to encourage creditor motions, not unduly hamper them, by removing the prior law's absolute bar to section 707(b) creditor motions. In fact, Congress has already statutorily imposed restrictions on such motions in the new bankruptcy law. *See* Public Law 109-8, Section 102(a); 119 Stat. 30-31 (providing for sanctions for abusive creditor motions under section 707(b)). Creating a new, non-statutory hurdle for creditor motions is unwarranted and clearly contrary to Congress' intent in regulating motions practice under section 707(b).

I am also concerned that the proposed rules do not require debtors to file a certificate that they have completed the pre-discharge education course mandated under the new bankruptcy law, thereby creating a possible loophole for dishonest debtors to evade this important educational requirement. *See* Public Law 109-8, Section 106; 119 Stat. 37. This educational requirement is necessary for the public good because debtors need to learn about sound financial management. Reliance on mere assurances from debtors is not

sufficient to ensure that the educational requirement will serve the purpose that Congress intended, because past experience demonstrates that debtor statements are often unreliable. Thus, by failing to require proof of education as a condition for receiving a discharge, the Judicial Conference would significantly weaken this important component of the new law.

Finally, I am deeply troubled that the proposed bankruptcy rules and forms do not require debtor's counsel to attest, under oath, to the accuracy of a debtor's schedules and statements. Congress deliberately chose to impose new responsibilities on debtor's counsel in consumer cases to deal with fraudulent filings and to maintain the integrity of the entire bankruptcy system. *See* Public Law 109-8, Section 102(a); 119 Stat. 30 (the new law provides that "[t]he signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect"). The absence of any rule specifying how counsel should comply with their new responsibilities is, in my judgment, a serious and substantial oversight that must be corrected.

I understand that Interim Rules and Official Forms may be adopted this month. I believe that the defects that I have outlined above should be corrected before adoption of the Interim Rules in order to appropriately implement the new bankruptcy law.

Thank you for considering my concerns.

Sincerely,

Chuck Grassley

Charles E. Grassley
United States Senator

CC: Thomas S. Zilly (Senior Judge)
United States District Court for the Western District of Washington
700 Stewart Street
Suite 15229
Seattle, WA 98101

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

September 15, 2005

Honorable Charles E. Grassley
United States Senate
135 Hart Senate Office Building
Washington DC 20510-6276

Dear Senator Grassley:

Your August 18, 2005, letter to Chief Justice William H. Rehnquist, raising concerns about the judiciary's implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, was referred to me for response on behalf of the Judicial Conference of the United States. I appreciate the opportunity to share with you some of the details of the hard work undertaken by the Judicial Conference and the rules committees to implement this massive and complex legislation within a brief period of time.

Since the Act's enactment, the Advisory Committee on Bankruptcy Rules has been engaged in an intensive effort to determine the necessary changes in the rules and forms to implement the Act by the effective date, October 17. The general effective date of 180 days after enactment has not provided sufficient time to promulgate National Rules and Official Forms under the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. This is normally a three-year process. The Committee concluded that the best vehicle to accomplish the Act's objectives was to develop interim rules that could be adopted by October 17 and urge the courts to adopt them, while simultaneously monitoring the courts' experiences and working on permanent changes to the Federal Rules of Bankruptcy Procedure. Because the Interim Rules have not undergone the exacting scrutiny of the Rules Enabling Act rulemaking process, the Committee concluded that it should recommend at this time only those rules and forms absolutely necessary to implement specific provisions of the Act. The Committee intends to publish more extensive proposed National Rules in response to the Act no later than August 2006 with final adoption and an effective date of December 1, 2008. These rules will be more extensive than the Interim Rules and will reflect the intervening experience of the courts in applying the Act. The Committee will also have the benefit of additional time to study the Act and to hear from interested persons concerning the proposed rules.

The Advisory Committee completed its work on the Interim Rules and Official Forms in early August 2005 and requested the Committee on Rules of Practice and Procedure and later the

Executive Committee of the Judicial Conference to act on the recommendations now to provide timely notice so that the courts may prepare for the changes and so that the legal publishing firms would have sufficient time to print and make available the amended and new rules and Official Forms. On August 11, 2005, the Executive Committee, on behalf of the Judicial Conference, approved the amended and new Official Forms and authorized distribution of the Interim Rules and Official Forms to the courts to facilitate uniformity of practice until the Federal Rules of Bankruptcy Procedure are amended.

The Interim Rules are drafted so that they can be adopted by general order. The Advisory Committee expects that most courts will adopt the Interim Rules, which will provide uniform procedures for implementing the Act and at the same time supply a valuable base of experience for its ongoing work. The same process was followed on three separate occasions in the past when the Bankruptcy Code was amended in 1978, 1986, and 1994, and interim rules contemporaneous with the Acts' effective dates were issued. On each occasion, the courts uniformly adopted the Committee's interim rules recommendations. Unlike the Interim Rules, which courts are urged to adopt, the amended and new Official Forms must be observed and used with alterations as may be appropriate under Bankruptcy Rule 9009. The Interim Rules and Official Forms were transmitted to the courts on August 24, 2005. They can be found at <www.uscourts.gov/rules>.

The Advisory Committee worked closely with the Executive Office for the United States trustees in developing the Interim Rules and amended and new Official Forms. It consulted with experts who participated in the legislation, who at times disagreed among themselves over the meaning of particular provisions in the Act, making the Committee's job all the more difficult. It reached out to many corners of the bar for assistance. It relied on its members' varied experiences, including members who represent creditors and others who represent debtors in their private practice. All these efforts were undertaken in an open fashion to ensure that the process remained transparent, a hallmark of the rulemaking process. The Committee's accomplishments are all the more impressive because they represent the work of volunteers, many of whom have made substantial sacrifices to see this massive work completed in a short period of time.

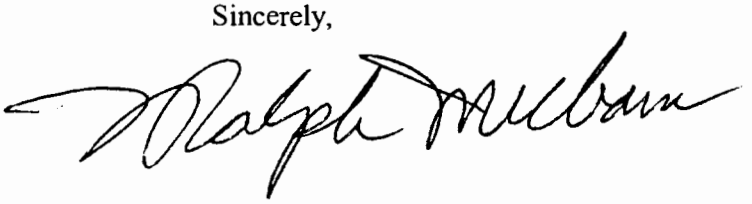
The Advisory Committee has received several comments and suggestions, including your comments, about the Interim Rules and Official Forms, which it will consider as part of its ongoing review at its upcoming meetings. In the meantime, the Bankruptcy Rules Committee's reporter, Professor Jeffrey Morris, was asked to review your concerns. The substance of his reply is attached to this letter.

The Advisory Committee recognizes the inherent limitations of its abbreviated review process. Recommending Interim Rules and authorizing Official Forms without going through the regular Rules Enabling Act rulemaking process is an unavoidable expedient compelled by the

Act's fast-approaching effective date. But it is anticipated that any shortfalls in the Committee's work will be identified and corrected when the Interim Rules and the amended and new Official Forms undergo the exacting scrutiny of the regular rulemaking process, when permanent changes to the rules will be considered.

The Advisory Committee thanks you for your comments, which it will consider during the formal rulemaking process. If you or your staff have any questions on these matters, please contact Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure, at (202) 502-1800.

Sincerely,



Secretary, Judicial Conference
of the United States

Enclosure

cc: Justice John Paul Stevens
Honorable David F. Levi
Honorable Thomas S. Zilly
Honorable Arlen Specter
Honorable Patrick J. Leahy
Honorable Orrin Hatch

MEMORANDUM TO JUDGE THOMAS S. ZILLY

SUBJECT: Reply to Senator Grassley's Letter

FROM: Professor Jeffrey W. Morris

Motions Under § 707(b)(1) and (3)

The Advisory Committee carefully considered the pleading standard for a creditor's motion to dismiss. It concluded that a creditor's motion to dismiss under § 707(b)(1) and (3) should be stated with particularity to: (1) comply with Bankruptcy Rule 9013, which requires that every "motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought;" and (2) facilitate consideration of the motion, which otherwise would be subject to a responsive motion for a more definite statement — delaying the proceeding.

The Act dramatically changed § 707(b) of the Code. Previously, a chapter 7 case could be dismissed only for "substantial abuse," and there was a presumption against dismissal. Under the Act, the presumption is removed, and a case can be dismissed on proof of "abuse." Also, creditors are now authorized to bring motions to dismiss. Of course, most dismissed cases will be dismissed for failing the means test under § 707(b)(2). If the debtor's projected income after expenses exceeds a stated amount, the case will either be dismissed, or converted to chapter 13.

For cases surviving the means test, the Act provides only that the case can be dismissed or converted if the court "finds that the granting of relief would be an abuse of the provisions of" chapter 7. In making that determination, the court must consider "(A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances...." These grounds, unlike the very specific standards of the means test, are quite general. Congress seems to have selected these general standards to provide the courts with an opportunity to address these matters on a case-by-case basis. The United States trustees and creditors might allege as abusive a wide range of actions, transactions, and conduct under the Act's general standard. A rule that would allow these parties in interest to simply plead in the most general terms that the filing of a particular case is an abuse would not inform the debtor or other interested parties of the nature of the movant's objection. This would delay proceedings because a generic motion that simply states that the debtor's petition constitutes an abuse of chapter 7 would likely be met with a motion for a more definite statement of the grounds for the requested relief.

Moreover, by authorizing creditors to move for dismissal, the Act makes the creditors' actions subject to existing Bankruptcy Rule 9013. That rule has provided since 1987 that any "motion shall state with particularity the grounds therefor, and shall set forth the relief or order sought." Restating this standard in Interim Rule 1017(e)(1), which sets the deadline for filing these motions, serves to remind creditors that a motion to dismiss could theoretically be denied simply for failure to include sufficient information in the motion. If this requirement were not

expressly included in the Interim Rule, it would still apply to motions to dismiss under § 707(b), but creditors might not be as aware of the requirement.

Consequently, Interim Rule 1017(e)(1) requires that the motion state with particularity the circumstances that warrant the case's dismissal. The Advisory Committee does not believe that this requirement places an undue burden on creditors and will not deter them from raising appropriate motions under the Code.

Completion of Personal Financial Management Courses

Interim Rule 1007(b)(7) provides that "In a chapter 7 or chapter 13 case, an individual debtor shall file a statement regarding completion of a course in personal financial management, prepared as prescribed by the appropriate Official Form." The rule requires a *statement* of completion of a course in personal financial management, as opposed to a *certificate* of completion that is required under another section dealing with completion of prepetition credit counseling. The distinction is based on the plain language of the Act, which explicitly uses the different terms.

A comparison of the prepetition credit counseling obligation to the personal financial management educational obligation set out in the Act demonstrates why the Advisory Committee did not require the filing of a certificate from the education provider but did require the filing of a credit counseling certificate. Section 109(h)(1) requires the debtor to receive credit counseling prior to filing a voluntary bankruptcy petition. Section 521(b)(1) implements that eligibility limitation of § 109(h)(1) by requiring the debtor to file "a certificate from the approved nonprofit budget and credit counseling agency." Sections 727(a)(11) and 1328(g)(1) require the debtor to complete the personal financial management course, but there is no counterpart to § 521(b)(1) (debtor must file a credit counseling certificate) requiring the debtor to file a certificate relating to the personal financial management course. Thus, the Committee concluded that Congress considered these two matters as distinct, and the Interim Rules follow that Congressional determination.

Consumer Debtors' Attorney Certifications

In accordance with long established procedures, the Bankruptcy Rules are not amended to repeat the Code's provisions, but are amended to supplement the Code, when appropriate. An Interim Rule requiring the debtor's counsel to attest, under oath, to the accuracy of a debtor's schedules and statements is unnecessary, because the Code fully addresses this matter.

Section 707(b)(4)(D) provides that "the signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect." This provision is self-executing in that the attorney's signature on the petition (as required by Official Form 1) "shall constitute a

certification...." There's nothing more, or less, that a rule could say. The duty to conduct an appropriate investigation is placed on the attorney with no need for a rule.

It would also be both impossible and unwise to establish by rule the actions that debtors' attorneys must take in conducting inquiries about their clients' assets. The extent of an investigation should vary according to the amount of the debtor's assets and liabilities, the presence or absence of questionable prepetition actions by the debtor, whether the debtor has sought bankruptcy relief in the past, and so on. The variables are infinite, and the Advisory Committee concluded that the courts will have to address the issue of the propriety of the nature and extent of an attorney's obligations under § 707(b)(4)(D) on a case-by-case basis. Over time, a body of law will develop that will help to set the parameters of that obligation, but it is not possible to set those limits in the absence of specific cases that present the issue. Furthermore, the Committee attempted to avoid adopting rules that would establish standards of behavior or require compliance with obligations that are not clearly set out in the statute. This was a deliberate choice so that the Committee would not be resolving matters in a manner that Congress might believe is inconsistent with its intention in enacting the Act.

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

LEONIDAS RALPH MECHAM
Secretary

June 28, 2005

Honorable Arlen Specter
Chairman
Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Dear Mr. Chairman:

I am writing to provide the views of the Judicial Conference of the United States with regard to S. 155, the "Gang Prevention and Effective Deterrence Act of 2005" and H.R. 1279, the "Gang Deterrence and Community Protection Act of 2005," as passed by the House of Representatives on May 11, 2005.

Both bills would amend title 18, United States Code, to allow a significant increase in the prosecution of members of criminal street gangs and facilitate the prosecution of juvenile members. These bills would also authorize appropriations for the hiring of federal prosecutors to prosecute gangs.

In particular, section 301 of S. 155 and section 115 of H.R. 1279 would amend 18 U.S.C. § 5032 to allow a juvenile who is prosecuted for one of the specified crimes of violence or firearms offenses to "be prosecuted and convicted as an adult for any other offense which is properly joined under the Federal Rules of Criminal Procedure, and may also be convicted as an adult of any lesser included offense." Given that joinder of offenses is liberally allowed under the Rules, and that these sections of the bill further provide that the determination of the Attorney General to proceed against a juvenile as an adult is an exercise of unreviewable prosecutorial discretion, this provision could result in the federal prosecution of juveniles for myriad offenses if they are also prosecuted for a felony crime of violence or a firearms offense.

As you know, the primary responsibility for prosecuting juveniles has traditionally been reserved for the states. The federal criminal justice system has little experience and few resources to deal with more than the small number of juveniles who currently are in the federal system. The Judicial Conference has maintained a long-standing position that federal criminal prosecutions should be limited to those offenses that cannot or should not be prosecuted in state courts.[1] At its September 1997 meeting, after similar legislation had been proposed by Congress, the Judicial Conference affirmed that this policy is particularly applicable to the prosecution of juveniles.[2]

In his *Year-End Report on the Federal Judiciary* (Dec. 30, 1993) the Chief Justice discussed the federalization provisions in a previous omnibus crime bill, specifically noting the juvenile provisions:

> Recent actions on a crime bill also reflect a natural response to growing concerns about crime. Unfortunately proposed legislative responses have expanded – unwisely in my view – the role of the federal courts in the administration of criminal justice. The federal courts have an important role to play in the war against crime, but I urge Congress to review carefully the impact on the federal courts, and on the traditional balance between state and federal jurisdiction, before adopting the more expansive proposals in the crime bill. Serious consideration should be given to the state courts in handling their traditional jurisdiction, rather than sweeping many newly created crimes, *such as those involving juveniles*, and handgun murders, into a federal court system that is ill-equipped to deal with those problems and will increasingly lack the resources in this era of austerity. (emphasis added)

Juvenile defendants present unique problems with which the federal judicial system is not prepared to deal. When prosecuted as juveniles, the many procedural safeguards built into the juvenile statutes make these cases difficult to prosecute and adjudicate. Furthermore, whether prosecuted as juveniles or as adults, juveniles present unique behavioral and adjustment problems that must be addressed by probation and pretrial services officers. There are few federal probation officers who have training or experience to handle difficult juvenile offenders. Further, we would note that juvenile

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[1] Recommendation 2, *Long Range Plan for the Federal Courts*, 1995.

[2] JCUS-SEP 97, p. 65.

offenders require different and perhaps more extensive correctional and rehabilitative programs than adults and there is not a single federal correctional facility available to meet these needs. Thus, in the event this legislation goes forward, the Conference urges that sufficient appropriations be authorized to provide necessary training, rehabilitative, and correctional programs.

The Conference recognizes that the federal judiciary fulfills an important role in the adjudication of offenses committed by juveniles when the unique resources of the federal government can be effectively and efficiently utilized. Such offenses include juvenile criminal activity with substantial multi-state or international aspects or involving complex enterprises most effectively prosecuted using federal resources or expertise. However, the states should continue their traditional role of prosecuting the vast majority of juvenile cases in which there is no significant interstate or national interest. Any expansion of the federal role in this area should be carefully considered in light of this appropriate allocation of responsibilities.

H.R. 1279 also includes a variety of new mandatory minimum sentencing provisions. Since 1953, the Judicial Conference has maintained opposition to mandatory minimum sentences.[3] The reason is manifest: mandatory minimums require the sentencing court to impose the same sentence on offenders when sound policy and common sense call for reasonable differences in punishment. Mandatory minimums undermine the Sentencing Guideline regime Congress so carefully established in the Sentencing Reform Act of 1984 by preventing the rational development of guidelines that reduce unwarranted disparity and provide proportionality and fairness.[4] Mandatory minimums also destroy honesty in sentencing by encouraging "charge and fact" plea bargains. In fact, the U.S. Sentencing Commission has documented that mandatory minimums have the opposite of their intended effect.[5] Far from fostering certainty in

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[3] JCUS-SEP 53, p. 28.

[4] Although the Sentencing Guidelines are advisory in light of the Supreme Court's recent decision in *United States v. Booker*, ___ U.S. ___, 125 S. Ct. 738 (2005), sentencing courts still must consider the Guidelines in determining an appropriate sentence, which on appeal would be subject to review for "reasonableness" in consideration of the Guidelines and other factors set forth in 18 U.S.C. § 3553(a).

[5] *See* U.S. Sentencing Commission, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (August 1991). *See also Federal Mandatory*

punishment, mandatory minimums result in unwarranted sentencing disparity by treating dissimilar offenders in a similar manner, although these offenders can be quite different with respect to the seriousness of their conduct or their danger to society.

Both S. 155 and H.R. 1279 contain provisions affecting the admissibility of certain statements that would otherwise be determined under the Federal Rules of Evidence. In 1997 the Supreme Court amended Federal Rule of Evidence 804 by adding subdivision (b)(6) to provide that a party forfeits the right to object on hearsay grounds to the admission of a "statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Subdivision (b)(6) was intended to deprive a party from deriving a benefit from causing the unavailability of a witness to testify. Section 206 of S. 155 and section 113 of H.R. 1279 each would amend Rule 804(b)(6), using different wording, to make clear that statements of an unavailable witness can also be admitted against members of a conspiracy if the wrongdoing causing the witness's unavailability was reasonably foreseeable as a necessary or natural consequence of the ongoing conspiracy.

Sections 206 and 113 would implement the rulings in two recent cases[6] which admitted statements of unavailable witnesses against co-conspirators under Rule 804(b)(6) upon a finding that the co-conspirators "acquiesced in the wrongdoing that . . . procure[d] the unavailability of the declarant as a witness." Although courts have construed Rule 804(b)(6) to admit such statements against co-conspirators consistently with the pending legislation, the draft wording in the pending legislation raises questions regarding the scope of the Constitution's Confrontation Clause, which is undergoing reassessment in light of the Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004). As drafted, the language of both § 206 and § 113 may permit more or fewer statements of unavailable witnesses to be admitted than may be permitted under the evolving case law. Drafting language to address these concerns is precisely the work the rulemaking process is best suited to accomplish. Moreover, because the courts are construing Rule 804(b)(6) consistently with the pending legislation, there is no apparent urgency in taking immediate action.

Minimum Sentencing: Hearing Before the Subcommittee on Crime and Criminal Justice of the House Judiciary Committee, 103d Cong., 1st Sess. 64-80 (1995) (statement of Judge William W. Wilkins, Jr., Chairman, U.S. Sentencing Commission).

[6] *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000); *United States v. Thompson*, 286 F.3d 950 (7th Cir. 2002).

Under the Rules Enabling Act, proposed amendments to the federal rules are presented by the Supreme Court to Congress for approval only after being subjected to extensive scrutiny by the public, bench, and bar. As envisioned by Congress, the Rules Enabling Act rulemaking process offers a systematic review of rule proposals that is designed to identify potential problems, suggest improvements, unearth lurking ambiguities, and eliminate possible inconsistencies. The rulemaking process is laborious, but the painstaking process reduces the potential for satellite litigation over unforeseen consequences or unclear provisions. It also ensures that all persons, including the public, who may be affected by a rule change have had an opportunity to express their views on it. We urge that you defer taking action on this proposal and allow the judiciary's rulemaking process an opportunity to review and address this issue in accordance with the Rules Enabling Act.

Accordingly, we respectfully request that the expansion of the federal criminal justice system over juvenile offenders be seriously reconsidered and that the mandatory minimum sentencing provisions and provisions that would amend the Federal Rules of Evidence be removed from the bill.

We appreciate the opportunity to comment on this significant legislation. If you have any questions, please have your staff contact Daniel Cunningham, Office of Legislative Affairs, at (202) 502-1700.

Sincerely,

Leonidas Ralph Mecham
Secretary

cc: Honorable Patrick J. Leahy
Ranking Minority Member
Members, Senate Committee on the Judiciary