

MINUTES OF THE FEBRUARY 1964 MEETING OF THE  
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

The meeting of the Committee on Rules of Practice and Procedure convened in the Supreme Court Building on February 12, 1964, at 10:15 a. m.

The following members were present during the session:

Albert B. Maris, Chairman  
George H. Boldt  
Peyton Ford  
Mason Ladd  
James Wm. Moore  
Bernard G. Segal  
J. Skelly Wright

Honorable J. Lee Rankin was not able to attend due to other public business.

Others attending were Hon. E. Barrett Prettyman and Professor Bernard J. Ward, Chairman and Reporter, respectively, of the Advisory Committee on Appellate Rules; Professor Edward L. Barrett, Jr., Reporter of the Advisory Committee on Criminal Rules; Director, Warren Olney III, Deputy Director, Will Shafroth and Constance R. Green of the Administrative Office, and Ada E. Beckman, Law Clerk to Judge Maris.

The Committee expressed its sorrow at the passing of Hon. Charles E. Clark, a member of the Committee and a distinguished scholar in the field of procedural reform. Judge Clark's death is a loss to the entire rules program. His knowledge and judgment in the field of our work and his enthusiasm for improved judicial procedure were unexcelled. He will be sorely missed from the deliberations of the Committee.

Consideration of Preliminary Draft of Rules of Procedure for the United States Courts of Appeals

Judge Maris stated that he had requested that the Appellate Rules Committee submit their draft to the standing Committee prior to publication since their proposals, when finally perfected, will constitute a new set of Federal rules.

Judge Prettyman explained that this draft of appellate rules had been formulated as a complete unit, covering all appellate procedures beginning with the notice of appeal. He expressed the hope that in their final form the rules would include all of the rules contained in the draft, rather than promulgating some provisions as amendments to existing district court rules. Judge Maris stated that the problem of the ultimate adoption of the appellate rules was still under consideration, and it would be hard to predict at this time the ultimate method of their adoption.

Professor Ward explained to the Committee the features of the draft which differed substantially from the present practice in the circuits: He stated that the Committee had included provisions for added time for cross appeals, and for extension of time for filing the notice of appeal in cases in which the judge is satisfied that the failure to file was the result of excusable neglect. The Committee has provided in the draft that any method of duplicating or printing which produces a clear black image will be acceptable, and Professor Ward also explained the Committee's provisions for compiling and printing the appendix to the briefs.

Professor Moore stated that he felt the standing Committee's role was limited in considering the Appellate Committee's draft in a preliminary way. He felt that the draft was excellent, and that the standing Committee should authorize publication of the draft for circulation to the bench and bar for comments and suggestions. Mr. Segal agreed, and moved that the standing Committee authorize the printing and distribution of the draft. This motion was carried. There was some discussion of the length of the period for comment, and the Committee agreed to set April 1, 1965, as the closing date for comments on the Appellate draft.

Consideration of Question of Best Method of Securing Ultimate Adoption of the Appellate Rules

Judge Maris stated that the Appellate Rules Committee has recommended that legislation be sought to give full appellate rulemaking authority to the Supreme Court, and called the Committee's attention to a draft bill which would accomplish that objective. The bill would extend the Court's present civil rulemaking power to procedure in the courts of appeals on appeals from the district courts and on the review of agency orders. In addition it would extend the Court's rulemaking power to bankruptcy proceedings. Professor Moore suggested that the phrase "bankruptcy cases" be amended to read "bankruptcy proceedings" in the text of the bill. Judge Boldt moved that the Committee approve the text of the draft bill, as amended, and recommend that the Judicial Conference approve the bill and forward it to Congress for enactment. This motion was carried.

The question of partial promulgation of the appellate rules as amendments to existing civil and criminal rules, in the event that the legislation is not enacted, was deferred for the time being.

Consideration of Method of Arranging Draft of Appellate Rules for Public Circulation

Judge Maris stated that since the appellate draft will overlap the subject matter of certain of the present civil and criminal rules and the civil-admiralty unification proposals, it was important to make clear to the public that all of the advisory committees have agreed on the proposals made in these overlapping areas. He presented the proposals of Professor Ward for indicating the substance of the Appellate Proposals as appendices to the civil and criminal drafts, in the form of amendments to the existing civil and criminal rules, and read Professor Kaplan's and Professor Currie's comments on this question. After a full discussion, it was the consensus of the standing Committee that it should not attempt to recast the proposals of the Appellate Committee in the form of amendments to the existing civil and criminal rules and to include those as appendices to the civil and criminal pamphlets, but merely to call attention in the transmittal letter, and perhaps by some further notation, to the fact that the Appellate Rules Committee has approved, with the concurrence of the other committees involved, a draft of proposed appellate rules which would involve changes in some of the criminal and civil rules, and that this draft has been published and is available and should be consulted to see the changes

proposed. If and when the appellate rules go into effect, appropriate amendments of or substitutes for the civil and criminal rules affected will be made.

Progress Reports from Advisory Committees

Judge Maris made the following report with respect to the work of the Advisory Committees on Admiralty, Civil, Bankruptcy and Criminal Rules:

Admiralty and Civil. Judge Maris stated that he had received a letter from Judge Pope, Chairman of the Admiralty Committee, authorizing the publication by the standing Committee of the Admiralty Committee's proposals for the unification of the admiralty and civil rules. The proposals of the Admiralty Committee have been approved by the Civil Rules Committee. The Civil Rules Committee has formulated a set of amendments to the civil rules not directly involved in the unification of civil and admiralty rules, and these amendments have been approved by the Admiralty Committee. Both the proposals for unification and the other civil amendments will be ready for distribution in the Spring.

Bankruptcy. The Bankruptcy Committee is continuing its work on the General Orders and Official Forms in bankruptcy proceedings, but has no proposals ready for publication at this time. Judge Maris reported that legislation designed to give the Supreme Court rulemaking power with respect to bankruptcy proceedings has been passed by the House of Representatives, but has not yet been passed by the Senate. The substance of

this legislation has also been incorporated in the draft bill approved by the standing Committee earlier in the day.

Criminal. Judge Maris stated that the Criminal Rules Committee has revised some of the proposals published in its December 1962 pamphlet as a result of the comments and suggestions received, and, in addition, has formulated some new proposals for amendment of other Criminal Rules. The Committee requested that the proposals presented in December 1962, as revised, and its new proposals, be circulated to the bench and bar in one pamphlet, so that all of the proposals of the Committee will be available in one document. This request was approved, and the Second Preliminary Draft of Criminal Rules should be distributed in April.

Evidence. No appointments have yet been made of the personnel of this Committee.

#### Consideration of Manner of Printing Civil and Admiralty Proposals

The Committee considered whether to publish the civil-admiralty unification proposals and the other civil proposals as one pamphlet, suitably divided, or as two separate pamphlets. Judge Maris stated that there was some problem involved in the presentation of both proposals in one pamphlet, as they are the work product of two committees. Mr. Segal moved, after a brief discussion, that one pamphlet be issued which would include both the civil-admiralty unification proposals and the other civil rules proposals, and that the pamphlet be suitably divided between the two sections. This motion was carried.

Consideration of Rules Proposals by Judicial Conferences, Bar Associations, Etc.

Judge Maris stated that Professor Ward had suggested that the chief judges of the circuits be requested to include the proposals of the rules committees on the agendas of their conferences, and to encourage consideration of the proposals by appropriate committees in the circuits. The Committee authorized Judge Maris to make such a suggestion to the chief judges of the circuits.

Judge Maris informed the Committee that our staff member, Constance R. Green, was leaving the Administrative Office at the end of the month because her husband has been assigned by his employer to a project in Florida. The members of the Committee expressed their gratitude for the highly efficient, cheerful and intelligent service which Mrs. Green has rendered to the whole rules program as a member of our staff, and their very best wishes for her health and happiness in the future.

As there was no further business, the meeting was adjourned at 3:00 p.m.

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A BILL

To amend section 2072 of title 28, United States Code, with respect to the scope of the Federal Rules of Civil Procedure

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the catch-line and first paragraph of section 2072 of title 28 of the United States Code is amended so as to read as follows:

"§ 2072. Rules of Civil Procedure

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and bankruptcy cases, and appeals therein, and in proceedings to review or enforce orders of administrative agencies, boards, commissions, and officers."

Sec. 2. Section 2073 of title 28 of the United States Code is repealed.

Sec. 3. Item 2072 in the analysis of Chapter 131 of title 28 of the United States Code, appearing immediately preceding section 2071 thereof, is amended so as to read as follows: "§ 2072. Rules of Civil Procedure." and item 2073 is stricken from such analysis.