

**TO: Hon. Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure**

**FROM: Ed Carnes, Chair
Advisory Committee on Federal Rules of Criminal Procedure**

SUBJECT: Report of the Advisory Committee on Criminal Rules

DATE: December 3, 2001

I. Introduction

The Advisory Committee on the Rules of Criminal Procedure was originally scheduled to meet on October 29-30, 2001, in Santa Fe, New Mexico. Because of the events of September 11, 2001, the meeting was cancelled.

Nonetheless, the Committee has considered amendments to Rule 6, Grand Jury, and Rule 41, Search Warrants, as a result of Congressional amendments to those rules as a part of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001 (Pub. L. No. 107-56). As noted in the following discussion, the Committee recommends amendments to those two rules in order to avoid problems with the Supersession Clause of the Rules Enabling Act.

The proposed amendments closely conform to the statutory language and no substantive changes are intended. The Committee decided to retain the language of the statutory amendments throughout the draft, unless the format or definitional terms adopted in the comprehensively restyled rules dictated otherwise. The Committee concluded that a deviation from the statutory language, particularly without the benefit of public comment, would be unwise.

II. Action Items.

A. In General

On October 26, 2001, President Bush signed the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001. The Act amended two rules of Criminal Procedure:

- Section 203 of the Act amended Rule 6 to permit sharing grand-jury information associated with terrorism with specific law enforcement entities. The government must notify the court of any disclosures and the identity of the department or agency to which the disclosure was made.
- Section 219 amended Rule 41 to permit a magistrate judge to issue a search warrant for property outside the district in cases involving terrorism.

Those amendments took effect immediately and are not affected by the Sunset Provisions in Section 224 of the Act. The pertinent portions of the Act are attached to this report.

B. The Need to “Restyle” the Congressional Amendments; Avoiding the Supersession Problem.

Under the Rules Enabling Act, 28 U.S.C. § 2072(b), the pending “style” changes to the Criminal Rules—which have been approved by the Judicial Conference and will presumably be approved by the Supreme Court next Spring—could create supersession problems when the restyled rules take effect on December 1, 2002, because they will have a later effective date than the Act. The Committee believes that it needs to incorporate the changes the recent legislation mandates for Rules 6 and 41, before the Supreme Court adopts the restylized rules, in order to avoid any confusion and possible supersession problems.

To implement these changes in a timely manner and avoid supersession problems, the Chair asked the Rule 6 Subcommittee and Rule 41 Subcommittee to consider style changes to the Congressional language that would conform that language to the global “style” changes to the Criminal Rules. Those subcommittees considered a draft prepared by the Reporter and the Chair. In addition, the Standing Committee’s Style Subcommittee provided suggested changes. A revised draft was then submitted to the full Committee for its consideration.

In accordance with established procedures, the Committee recommends that the Standing Committee not publish the proposed changes for publication and comment by the public, because the changes will simply conform the rules to recent legislation. Instead, the Committee recommends that the Standing Committee forward the proposed changes to Rules 6 and 41 to the Judicial Conference, which in turn can forward them to the Supreme Court with a recommendation that they be approved and included in the May 2002 package of the restyled rules. Hopefully, the revised Rules 6 and 41 and accompanying Committee Notes can be blended in with the existing “style” package.

The proposed drafts, *infra*, include some restructuring and renumbering of the legislative amendments to fit within the approved style package versions of Rules 6 and 41, already approved by the Judicial Conference.

C. Amendments to Rule 6—Grand Jury.

The amendments to Rule 6 permit the government to share certain grand jury information involving intelligence information with other federal officials. *See* Section 203 of the Act.

Although the Act itself does not say so explicitly, the Committee has assumed that Congress meant that an attorney for the government would do the disclosing that Rule 6 authorizes to other officials. For that reason, the new provision adopted by Congress was inserted as a new paragraph (D) to follow the existing paragraph (C) that relates to attorneys for the government disclosing information to other grand juries.

It is not clear in the legislative amendment to Rule 6 whether the attorney for the government is to provide notice of such disclosures to the court that convened the grand jury or to some other court. In the end, the Committee believed that it is better to include language that explicitly indicates that the report is to be made to the court in the district where the grand jury was convened. That tracks language already approved in Rule 6.

The Rule 6 Subcommittee generally proposed that the Committee follow the legislative language as closely as possible, even if it was not entirely clear what Congress meant by a particular term or phrase. Thus, the Committee did not adopt all of the style changes recommended by the Style Subcommittee.

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D. Rule 41—Search Warrant.

The amendment to Rule 41 permits magistrate judges to issue search warrants for property or persons outside their districts if the investigation involves terrorist activities within that district. *See* Section 219 of the Act, attached.

Although it is not explicitly stated in the legislative amendment, the Committee has assumed that the amendment to Rule 41 does not permit magistrate judges to issue warrants to be executed outside the United States. It simply extends the magistrate's authority to other districts.

To be consistent with other provisions in Rule 41, the Committee has recommended that the amendment include reference to the fact that magistrate judges must otherwise have the authority to issue search warrants in their district, and thus be consistent with the restyled version of Rule 41.

Finally, to be consistent with the recently restyled version of Rule 41, the Committee dropped the word "search" from the amendment because the only type of warrant covered in that rule is a search warrant.

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