COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION

The District of Columbia Bar

BRIEF SUMMARY OF THE COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE ON PROPOSED LEGISLATION MODIFYING FEDERAL RULES

The Section on Courts, Lawyers and the Administration of Justice, including its Committee on Court Rules, urges the Senate Judiciary Committee, through a letter to its chairman, generally to defer to the process created by the Rules Enabling Act when considering legislation that would have the effect of changing the federal rules of procedure and evidence. Congress now has before it legislation that would, directly or indirectly, amend numerous federal rules.

The Section does not take a position on any specific legislative proposal. However, the Section states that Congress generally benefits from basing its judgments about changes in court rules on the kind of record developed in the Rules Enabling Act process and that Congress should not bypass this process except in extraordinary circumstances and for compelling reasons. Because this process leads up to an opportunity for Congress to approve, reject, or amend proposed rules, there is nothing lost and great deal to be gained by utilizing the Rules Enabling Act. This structure affords Congress the ability to exercise its plenary legislative power, but after the full and deliberate consideration of proposed rules by judges, attorneys, and interested members of the public.

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION

The District of Columbia Bar

July 27, 1995

The Honorable Strom Thurmond
Chairman, Committee on the Judiciary
United States Senate
SR-217 Russell Senate Office Building
Washington, D.C. 20510-4001

Re: **Deference to Rules Enabling Act Process**

Dear Mr. Chairman:

The Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar, and its Committee on Court Rules and Legislation, urge your Committee generally to defer to the process created by the Rules Enabling Act when considering legislation that would have the effect of changing the federal rules of procedure and evidence. The Congress now has before it legislation that would, directly or indirectly, amend Federal Rule of Evidence 702 (admission of expert testimony) and numerous Rules of Civil Procedure, including Rule 11 (sanctions for groundless litigation), Rule 23.1 (stockholder derivative actions), Rule 53 (appointment of masters to aid courts in administering decrees), Rule 60 (standard for modifying final injunctions), and Rule 68 (standards for award of attorney fees based on offer of judgment in diversity cases).

The District of Columbia Bar is the integrated bar for the District of Columbia. Among the Bar's sections is the Section on Courts, Lawyers and the Administration of Justice. The Section has a standing Committee on Court Rules, whose responsibilities include serving as a clearinghouse for comments on proposed changes to court rules. Comments submitted by the Section represent only its views, and not those of the D.C. Bar or of its Board of Governors.

The Committee on Long Range Planning of the Judicial Conference of the United States has recommended that new and revised rules of procedure and evidence "should be developed *exclusively* in accordance with the time-tested and orderly process established by the Rules Enabling Act." *Proposed Long Range Plan for the Federal Courts* 54 (March 1995) (emphasis added). We would not go as far as that Committee. We do believe, however, that Congress generally benefits from basing its judgments about changes in court rules on the kind of record developed in the Rules Enabling Act process and that Congress should not bypass the Rules Enabling Act process except in extraordinary circumstances and for compelling reasons.

Under the Rules Enabling Act, 28 U.S.C. §§ 2071-77, proposed rules are considered first by advisory committees composed of judges and lawyers, then by the Standing Committee of the Judicial Conference, next by the Supreme Court of the United States, and finally by Congress. Ample opportunities for public comment are built into the process. Recent changes have made the rule-making process more open and better informed.

Adherence to the Rules Enabling Act provides important practical advantages, which is why Congress created this process in the first place. The established rule-making process allows for a thorough exchange of the often conflicting views of judges and members of the practicing bar. The bar itself is not monolithic; attorneys come from diverse backgrounds and represent clients with diverse interests. The opportunity for public hearings and comment means that citizens, as well as judges and lawyers, have a role in making rules. The outcome of this process is designed to produce rules that are both neutral and fair.

This process also improves the chances that changes in rules will have the desired effect on practice. In general, the more input into the process from those who must actually administer and operate within new rules, the easier it will be to fashion rules that accomplish their intended purpose. Since the desirability of rule changes depends in large measure on how they will be implemented in practice, it is important for Congress to be fully aware of the experiences and expectations of those who must apply the rules on a daily basis.

Since this rule-making process leads up to an opportunity for Congress to approve, reject, or amend proposed rules, there is nothing lost and great deal to be gained by utilizing the Rules Enabling Act. This structure affords Congress the ability to exercise its plenary legislative power, but after the full and deliberate consideration of proposed rules by judges, attorneys, and interested members of the

public. We agree with the assessment of Judicial Conference's Committee on Long Range Planning: "It is troubling, therefore, that bills are introduced in Congress to amend federal rules directly by statute, bypassing the orderly and objective process established by the Rules Enabling Act." *Proposed Long Range Plan for the Federal Courts* 54 (March 1995).

Furthermore, our tri-partite constitutional structure provides additional reasons for deferring to the Rules Enabling Act process. The Rules Enabling Act creates a process for sharing power between the judicial and legislative branches. Although Congress determines the substantive law that the courts apply to the cases before them, an independent judiciary must have some ability to regulate its procedures. Excessive or unnecessary interference in the process of adjudication could diminish the judiciary's constitutional role as a check on the other branches of government. We believe that in the Rules Enabling Act, Congress struck the appropriate balance between the judicial and legislative branches.

Sincerely yours,

Anthony C. Epstein.

Anthony C. Epstein
Carol A. Fortine
Cochairs