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8/18/76

APPROVED
JUL 8 - 1976

THE WHITE HOUSE

ACTION

WASHINGTON

Last Day: July 14

July 7, 1976

Posted
7/9/76

MEMORANDUM FOR

THE PRESIDENT

FROM:

JIM CANNON

SUBJECT:

H.R. 13899 - Delaying effective date of certain rules of criminal and judicial procedure

archived
7/9/76

Attached for your consideration is H.R. 13899, sponsored by Representative Hungate and six others. The enrolled bill would delay from August 1, 1976 to August 1, 1977 the effective date of proposed Supreme Court amendments to the Federal Rules of Criminal Procedure and would delay the effective date of the Supreme Court's proposed rules regarding certain habeas corpus cases until 30 days after the final adjournment of the 94th Congress.

A discussion of the provisions of the enrolled bill is provided in OMB's enrolled bill report at Tab A.

OMB, Max Friedersdorf, Counsel's Office (Lazarus) and I recommend approval of the enrolled bill.

RECOMMENDATION

That you sign H.R. 13899 at Tab B.





EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUL 6 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill H.R. 13899 - Delaying effective date
of certain rules of criminal and judicial procedure
Sponsor - Rep. Hungate (D) Missouri and 6 others

Last Day for Action

July 14, 1976 - Wednesday

Purpose

To delay the effective date of proposed Supreme Court amendments to the Federal Rules of Criminal Procedure and to rules of procedure governing habeas corpus cases.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	No objection
Administrative Office of the United States Courts	No objection

Discussion

Under the Rules Enabling Acts, the United States Supreme Court is authorized to promulgate rules of practice and procedure governing the conduct of criminal and civil cases in the Federal Courts. Under these statutes, rules promulgated by the Supreme Court take effect ninety days after they have been reported to Congress unless the Congress, by specific Act, rejects or modifies them.

On April 26, 1976, the Supreme Court promulgated eight amendments to the existing Federal Rules of Criminal Procedure, an additional Rule of Criminal Procedure, and complete revisions of two rules of procedure in cases involving writs of habeas corpus. Absent Congressional action to the contrary, these amendments and rules would take effect on August 1, 1976.

The enrolled bill would delay the effective date of the Supreme Court's proposed changes to the Federal Rules of Criminal Procedure until August 1, 1977, unless Congress approves or modifies these rules at an earlier date. The proposed rules covered in this legislation are:

- Rule 6(e) - would authorize disclosure of information before a grand jury not only to the prosecution but also to such other government personnel as are necessary to assist the prosecution.
- Rule 23 - would authorize the right to stipulate that a trial may proceed with less than twelve jurors and require that requests for specific findings of fact be made before a general finding of fact in a trial without a jury.
- Rule 24 - would reduce the number of peremptory challenges to the jury in criminal cases and also permit courts to grant additional peremptory challenges in certain situations.
- Rule 40.1 - a new rule, relating to removal to a Federal court of a criminal case pending in a State court, which would change current law by providing that the filing of a petition for removal (a) must normally be done within 10 days after arraignment and (b) does not prevent the State court prosecution from proceeding, but only stays the entry of judgment of conviction.
- Rule 41(c) (2) - would authorize the issuance of search and seizure warrants through "sworn oral testimony" transmitted by telephone by the law enforcement officer to the magistrate or judge.

The enrolled bill would also delay the effective date of the Supreme Court's proposed rules regarding certain habeas corpus cases until thirty days after the final adjournment of the 94th Congress. Specifically, 28 U.S.C. 2254 and 2255, which prescribe the general form of the petition for the writ of habeas corpus in Federal and State cases, respectively, involving persons in court-ordered custody, would be rewritten.

The reports of the House and Senate Committees on the Judiciary state that the reason for delaying the effective date is that additional time is required for Congressional review of the Supreme Court's proposals.

James M. Frey
Assistant Director
for Legislative Reference

Enclosures

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: July 6

Time: 600pm

FOR ACTION:

Dick Parsons
Max Friedersdorf
Ken Lazarus

cc (for information): Jack Marsh
Jim Cavanaugh
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: July 7

Time: 600pm

SUBJECT:

H.R. 13899 - Delaying effective date of certain rules of criminal and judicial procedure

ACTION REQUESTED:

- For Necessary Action
- For Your Recommendations
- Prepare Agenda and Brief
- Draft Reply
- For Your Comments
- Draft Remarks

REMARKS:

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

K. R. COLE, JR.
For the President

Department of Justice
Washington, D.C. 20530

July 6, 1976

Honorable James T. Lynn
Director, Office of Management
and Budget
Washington, D.C. 20503

Dear Mr. Lynn:

Pursuant to your request, I have examined a facsimile of the enrolled bill H.R. 13899 "To delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court."

The Supreme Court, under the Rules Enabling Acts, on April 26, 1976, transmitted to Congress various proposed amendments to the Federal Rules of Criminal Procedure, as well as new Rules to govern proceedings in the nature of habeas corpus under 28 U.S.C. 2254 and 2255. The Court's proposed Rules all carried an effective date of August 1, 1976.

Congress enacted the present bill in order to give itself additional time to study the Rules, in light of certain criticism that has been expressed with respect to some of them. Under the bill, the proposed habeas corpus Rules would take effect thirty days following sine die adjournment of the current Congress. The proposed amendments to the Federal Rules of Criminal Procedure, with minor exceptions, would have their effective date delayed a full year, to August 1, 1977.

The Department of Justice favors the Rules changes promulgated by the Supreme Court and believes that the criticism that has been made of certain of the proposals (e.g., Rule 6(e) to permit the prosecutor to disclose matters occurring before the grand jury to "such other governmental personnel as are necessary to assist the attorneys for the government in the performance of their duties" and Rule 24, to reduce the number of peremptory juror challenges permitted to each side in criminal cases) to be

misguided. Nevertheless, the bill makes no substantive change in the Court's proposals, which still are due to take effect automatically on the given dates unless superseded by an Act of Congress, and the delay created by the bill cannot be said in itself to cause any serious problems as regards the operation of the federal criminal justice system.

Accordingly, the Department of Justice has no objection to Executive approval of this bill.

Sincerely,

A handwritten signature in cursive script, reading "Michael M. Uhlmann". The signature is written in dark ink and is positioned above the typed name and title.

Michael M. Uhlmann
Assistant Attorney General

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

SUPREME COURT BUILDING
WASHINGTON, D.C. 20544

ROWLAND F. KIRKS
DIRECTOR

WILLIAM E. FOLEY
DEPUTY DIRECTOR

July 1, 1976

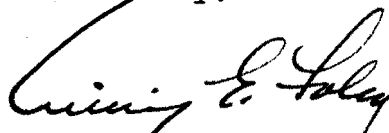
James M. Frey, Esquire
Assistant Director for Legislative
Reference
Office of Management and Budget
Washington, D. C.

Dear Mr. Frey:

Reference is made to your request, dated July 1, 1976, for our views and recommendations on enrolled bill H.R. 13899, "to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court."

Inasmuch as the ultimate authority for any changes in the federal rules of procedure is lodged in the Congress, no objection is interposed on behalf of the Judicial Conference of the United States to Executive approval of the proposed legislation.

Sincerely,



William E. Foley
Deputy Director

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: July 6

Time: 600pm

FOR ACTION:

Dick Parsons
Max Friedersdorf
Ken Lazarus

cc (for information):

Jack Marsh
Jim Cavanaugh
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: July 7

Time: 600pm

SUBJECT:

H.R. 13899 - Delaying effective date of certain rules
of criminal and judicial procedure

ACTION REQUESTED:

_____ For Necessary Action

_____ For Your Recommendations

_____ Prepare Agenda and Brief

_____ Draft Reply

_____ For Your Comments

_____ Draft Remarks

REMARKS:

Approval. RB

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

James M. Cannon
For the President

THE WHITE HOUSE

WASHINGTON

July 8, 1976

MEMORANDUM FOR: JIM CAVANAUGH *mb.*
FROM: MAX L. FRIEDERSDORF
SUBJECT: **X** H. R. 13899 - Delaying effective date of certain
rules of criminal and judicial procedure

The Office of Legislative Affairs concurs with the agencies
that the subject bill be signed.

Attachments

To -
Cavanaugh
7-6-76
6:00 P.M.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

JUL 6 1976

MEMORANDUM FOR THE PRESIDENT

**Subject: Enrolled Bill H.R. 13899 - Delaying effective date
of certain rules of criminal and judicial procedure
Sponsor - Rep. Hungate (D) Missouri and 6 others**

Last Day for Action

July 14, 1976 - Wednesday

Purpose

To delay the effective date of proposed Supreme Court amendments to the Federal Rules of Criminal Procedure and to rules of procedure governing habeas corpus cases.

Agency Recommendations

Office of Management and Budget

Approval

Department of Justice
Administrative Office of the
United States Courts

No objection

No objection

Discussion

Under the Rules Enabling Acts, the United States Supreme Court is authorized to promulgate rules of practice and procedure governing the conduct of criminal and civil cases in the Federal Courts. Under these statutes, rules promulgated by the Supreme Court take effect ninety days after they have been reported to Congress unless the Congress, by specific Act, rejects or modifies them.

On April 26, 1976, the Supreme Court promulgated eight amendments to the existing Federal Rules of Criminal Procedure, an additional Rule of Criminal Procedure, and complete revisions of two rules of procedure in cases involving writs of habeas corpus. Absent Congressional action to the contrary, these amendments and rules would take effect on August 1, 1976.

The enrolled bill would delay the effective date of the Supreme Court's proposed changes to the Federal Rules of Criminal Procedure until August 1, 1977, unless Congress approves or modifies these rules at an earlier date. The proposed rules covered in this legislation are:

- Rule 6(e) - would authorize disclosure of information before a grand jury not only to the prosecution but also to such other government personnel as are necessary to assist the prosecution.
- Rule 23 - would authorize the right to stipulate that a trial may proceed with less than twelve jurors and require that requests for specific findings of fact be made before a general finding of fact in a trial without a jury.
- Rule 24 - would reduce the number of peremptory challenges to the jury in criminal cases and also permit courts to grant additional peremptory challenges in certain situations.
- Rule 40.1 - a new rule, relating to removal to a Federal court of a criminal case pending in a State court, which would change current law by providing that the filing of a petition for removal (a) must normally be done within 10 days after arraignment and (b) does not prevent the State court prosecution from proceeding, but only stays the entry of judgment of conviction.
- Rule 41(c)(2) - would authorize the issuance of search and seizure warrants through "sworn oral testimony" transmitted by telephone by the law enforcement officer to the magistrate or judge.

The enrolled bill would also delay the effective date of the Supreme Court's proposed rules regarding certain habeas corpus cases until thirty days after the final adjournment of the 94th Congress. Specifically, 28 U.S.C. 2254 and 2255, which prescribe the general form of the petition for the writ of habeas corpus in Federal and State cases, respectively, involving persons in court-ordered custody, would be rewritten.

The reports of the House and Senate Committees on the Judiciary state that the reason for delaying the effective date is that additional time is required for Congressional review of the Supreme Court's proposals.

((Signed) James M. Frey

Assistant Director
for Legislative Reference

Enclosures

DELAYING THE EFFECTIVE DATE FOR CERTAIN
AMENDMENTS TO RULES OF CRIMINAL PROCEDURE
AND CERTAIN OTHER RULES

JUNE 1, 1976.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. HUNGATE, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany H.R. 13899]

The Committee on the Judiciary, to whom was referred the bill (H.R. 13899) to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of this legislation is to give Congress an adequate amount of time to review recently-promulgated amendments to the Federal Rules of Criminal Procedure and rules of procedure for cases and proceedings under section 2254 and 2255 of title 18, U.S. Code, by postponing their effective date for one year, from August 1, 1976, to August 1, 1977.

ANALYSIS

Statutes known as the "Rules Enabling Acts,"¹ authorize the Supreme Court to promulgate rules of "pleading, practice and procedure." The Court, however, must transmit these rules (or amendments to such rules) by May 1. Any rules or amendments so transmitted cannot take effect until 90 days after transmittal. When they become effective, they nullify any law that conflicts with them.

Acting pursuant to these statutes, the Supreme Court, on April 26, 1976, promulgated some rules of pleading, practice and procedure. These consisted of, first, certain amendments to the Federal Rules of

¹ See 18 U.S.C. §§ 3771-72; 28 U.S.C. § 2027.

Criminal Procedure and, second, rules of procedure to govern cases and proceedings under sections 2254 and 2255 of title 18, United States Code. Absent Congressional action to the contrary, these amendments and rules will take effect on August 1, 1976.

The recently-promulgated amendments to the Federal Rules of Criminal Procedure add a new rule, 40.1, and make changes in existing Rules 6(e), 6(f), 23(b), 23(c), 24(b), 41(a), 41(c), and 50(b). These amendments affect procedure concerning grand juries, trials by juries of less than 12, preemptory challenges to jurors, issuance of search warrants, and removal of a criminal case from a state to a federal court.

The rules governing cases and proceedings brought under sections 2254 and 2255 of title 28, United States Code, are brand new.² In addition to the rules, the Supreme Court also promulgated model forms for use in connection with these cases and proceedings.

H.R. 13899 will delay the effective date of these rules and amendments for one year, until August 1, 1977. It is similar to other legislation enacted into law during the 93d Congress. Public Law 93-12 postponed indefinitely the effective date of the Federal Rules of Evidence.³ Public Law 93-361 postponed for one year the effective date of certain amendments to the Federal Rules of Criminal Procedure promulgated by the Supreme Court on April 22, 1974.⁴

The Rules Enabling Acts contemplate that Congress will study what the Supreme Court transmits to it. In order for Congress to carry out its responsibility in an informed and conscientious manner, additional time to study what the Supreme Court has transmitted is required. H.R. 13899 will provide Congress with a realistic amount of time in which to conduct a thorough study and review of the amendments and new rules transmitted by the Supreme Court.

COST

Pursuant to clause 7, rule XIII of the Rules of the House of Representatives, the committee estimates that no new cost to the United States is entailed by H.R. 13899.

NEW BUDGET AUTHORITY

H.R. 13899 creates no new budget authority.

STATEMENT OF THE BUDGET COMMITTEE

No statement on this legislation has been received from the House Committee on the Budget.

² Section 2254 applies to someone held in custody pursuant to the order of a state court and provides that such a person may apply for a writ of habeas corpus "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

Section 2255 applies to someone held in custody pursuant to the order of a federal court and provides that such a person may, by motion, seek release "upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack."

³ See House Report No. 93-52, 93d Cong., 1st Sess. (1973).

⁴ See House Report No. 93-1144, 93d Cong., 2d Sess. (1974). The Congress acted upon the Supreme Court's proposals within the additional time, approving some as promulgated, disapproving some in their entirety, and modifying some. Public Law 94-64.

STATEMENT OF THE COMMITTEE ON GOVERNMENT OPERATIONS

No statement on this legislation has been received from the House Committee on Government Operations.

INFLATION IMPACT STATEMENT

This legislation will have no foreseeable inflationary impact on prices or costs in the operation of the national economy.

OVERSIGHT

The committee makes no oversight findings.

COMMITTEE VOTE

H.R. 13899 was reported out of Committee on Tuesday, May 25, 1976, by voice vote. Twenty-one Members of the Committee were present.

○

DELAYING THE EFFECTIVE DATE FOR CERTAIN
AMENDMENTS TO RULES OF CRIMINAL PROCEDURE
AND OTHER RULES

JUNE 25 (legislative day, JUNE 18), 1976.—Ordered to be printed

Mr. HRUSKA (for Mr. BURDICK), from the Committee on the
Judiciary, submitted the following

REPORT

[To accompany H.R. 13899]

The Committee on the Judiciary to which was referred H.R. 13899, an act to delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court, having considered the same, reports favorably thereon with an amendment and recommends that the act do pass as amended.

AMENDMENT

The committee proposes one amendment to the act as follows:

(1) Strike all after the enacting clause and insert in lieu thereof the following:

That, notwithstanding the provisions of sections 3771 and 3772 of title 18 of the United States Code, the amendments to Rules 6(e), 23, 24, 40.1 and 41(c) (2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, and which were transmitted to the Congress on or about April 26, 1976, shall not take effect until August 1, 1977, or until and to the extent approved by Act of Congress, whichever is earlier. The remainder of the proposed amendments to the Federal Rules of Criminal Procedure shall become effective August 1, 1976, pursuant to law.

Sec. 2. That, notwithstanding the provisions of section 2072 of title 28 of the United States Code, the rules and forms governing section 2254 cases in the United States district courts and the rules and forms governing section 2255 proceedings in the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, and which are transmitted to the Congress on or about April 26, 1976, shall not take effect until 30 days after the adjournment sine die of the 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier.

PURPOSE OF AMENDMENT

The purpose of the amendment proposed by the Committee is to delay the effective date of only those specific amendments to the criminal rules set forth in the body of the bill until August 1, 1977, and to delay the effective date of the proposed rules governing habeas corpus cases under section 2254 and proceedings under section 2255 of title 28 U.S. Code until 30 days after the adjournment *sine die* of the 94th Congress. The amendments to the Rules of Criminal Procedure not specifically mentioned will become effective August 1, 1976.

PURPOSE OF THE ACT

The purpose of this legislation is to give Congress an adequate length of time to review the proposed amendments to criminal procedure rules 6(e), 23, 24, 40.1 and 41(c)(2), and the new proposed rules for section 2254 and section 2255 proceedings, by postponing their effective date.

STATEMENT

Under the Rules Enabling Acts (18 U.S.C., sections 3771 and 3772 and section 2072 of title 28 U.S. Code), the Supreme Court of the United States is authorized to promulgate rules of practice and procedure governing the conduct of criminal and civil cases in the Federal Courts. In carrying out this authority, the Supreme Court has used various "Advisory Committees" composed of members of the bench and bar to draft rules which are then considered by the Judicial Conference of the United States which, in turn, reports them to the Supreme Court of the United States which then reports the proposed rules to the Congress. Under these statutes the rules become effective 90 days after they have been reported to the Congress unless the Congress, by specific act, rejects or modifies them.

Acting pursuant to these statutes, the Supreme Court, on April 26, 1976, promulgated some rules of pleading, practice and procedure. These consisted of, first, certain amendments to the Federal Rules of Criminal Procedure and, second, rules of procedure to govern cases and proceedings under sections 2254 and 2255 of title 28, U.S. Code. Absent Congressional action to the contrary, these amendments and rules will take effect August 1, 1976.

The committee has reviewed the proposed rules of procedure to govern cases and proceedings under sections 2254 and 2255 of title 28, U.S. Code. These rules prescribe the general form of the petition which must be used: require the petitioner to state grounds for relief reasonably known by him at the time of his petition, and require payment of a filing fee unless he is given leave to proceed *in forma pauperis*. (Section 2255 petitioners need not pay a fee since the proceedings are a continuation of the original proceedings). A petition is first given preliminary consideration and if on its face it is insufficient it is summarily dismissed. If not so dismissed, the court requires the respondent to answer the petition, including in its answer the full procedural history in the case, any appeals or any post conviction proceedings had in the state court. After respondent answers the court

may direct that the record be expanded, including preparation of transcripts not then available. After all the documentary evidence has been assembled the court makes a determination as to whether an evidentiary hearing is required. If none is required the court makes a determination based upon the documentary record. If an evidentiary hearing is held counsel will be appointed under the Criminal Justice Act, if the petition is not represented by his own counsel.

Attached to the rules governing sections 2254 and 2255 proceedings are a model form of a petition for writ of habeas corpus, a model form of an affidavit in support of a request to proceed *in forma pauperis* and a model form for the petitioner's response to a notification from the court under the proposed Rule 9 that his petition is not timely or is repetitive in nature.

In Fiscal Year, 14,260 petitions were filed in district courts by state prisoners and 5,047 petitions under section 2255 were filed by federal prisoners. The total of 19,307 prisoner petitions presents a formidable workload for the district courts. At the present time, many of these petitions are handwritten and many courts have liberally interpreted ordinary letters as a petition for relief under sections 2254 and 2255. The committee believes that the proposed rules prescribing the practice, procedure and forms to be used in these prisoner matters are designed to facilitate the work of the court and will further the interest of justice in the consideration of such matters.

However, various members of the committee have reservations about various parts of the rules: for example, whether the three-day period for respondents response or the five days for commencement of the evidentiary hearing required by existing law should be changed to times to be fixed in the discretion of the court; whether the rebuttable presumption that a five-year delay in filing a petition has prejudiced the respondent; whether proposed rule 9 gives a *res judicata* effect to state post conviction proceedings; or other specific provisions which it is unnecessary to mention at this time.

The committee has also studied and considered the eight amendments proposed to existing rules of criminal procedure and to the new rule (40.1) as proposed by the Supreme Court. The amendment proposed to rule 6(e) would permit disclosure of matter occurring before the grand jury not only to the "attorneys for the government" but also to such other government personnel as are necessary to assist the attorneys for the government in the performance of their duties. Because members of the committee have reservations about the scope of the personnel included in this rule, as amended, the committee feels that additional time for study for this proposed amendment is required.

Rule 23 Amendments would clarify the right to stipulate that, if a juror is excused after trial commences, the trial may proceed with less than 12 jurors. The Amendment to Rule 23(c) would require that in a trial without jury a request for special findings of fact must be made before the court makes its general finding of fact. A member of the committee expressed reservations about these amendments with reference to the government's right of appeal and the effect of a pre-trial stipulation to proceed with less than 12 jurors.

The proposed amendment to rule 24 would reduce the number of peremptory challenges to the jury panel in criminal cases as follows:

Death cases—Reduces from 20 to 12, peremptory challenges for each side.

Felony cases—Reduces from 6 peremptories for the United States and 10 for the defendant to 5 peremptories for each side.

Misdemeanor cases—Reduces from 3 to 2 peremptories for each side.

While it is true that an amendment to rule 24 would also permit the court for good cause shown to grant additional peremptories upon the request of a party contained in a motion filed in at least one week in advance of the trial, various members of the committee had reservations about the necessity of, or policy reasons for, this reduction in the number of peremptories. For example, the reduction from 3 to 2 peremptories in misdemeanor cases would seem to fall within the familiar legal term "de minimus". Therefore, the committee has concluded that it needs more time to consider the proposed amendments to rule 24.

The proposed new rule 40.1 relates to the removal to a federal court of a criminal prosecution pending in the state court. At the present time, the petition for removal can be filed in the federal court at any time before trial. Under the proposed rule, the petition for removal must be filed within 10 days after the arraignment in the state court, unless for good cause shown, an additional time for filing the petition is granted. The proposed rule would also change the present law which provides that a petition for removal automatically stays the state prosecution until the petition is decided by the federal court. Under the proposed rule, the filing of the petition does *not* prevent the state court prosecution from proceeding, but only stays the entry of the judgment of conviction. Several members of the committee have expressed reservations about such changes, contending that the latter change may be a change in substance rather than in procedure. The committee has concluded that it needs more time to study the new proposed rule 40.1.

The proposed amendment to rule 41(c)(2) would change the practice and procedure for the issuance of search and seizure warrants. At the present time a search warrant will issue if the judge or magistrate is satisfied that there is probable cause which will justify the search or seizure of the specified person, place or thing. The judge or magistrate may orally examine the affiant under oath. Under the proposed amendment the issuance of a search warrant is expressly authorized to be handled by oral communication "by telephone or other appropriate means" between the law enforcement agent and the magistrate or judge. The rule would permit "sworn oral testimony" to be transmitted by telephone to the magistrate who is required to record and later transcribe such testimony. The law enforcement agent is permitted to read to the magistrate the contents of the warrant including the descriptions of the place, person or thing over the telephone. The magistrate or judge, if satisfied that probable cause exists, is permitted to authorize the law enforcement officer to sign the magistrate's name to the warrant. While the Advisory Committee indicates that the telephone procedure is intended to be used in emergency situations, the first sentence of the amendment would authorize such procedure "when the circumstances make it reasonable to do so". Several members of the

committee have expressed reservations concerning the propriety of this rule. The committee has concluded that it needs more time in which to consider the proposed amendment to rule 41(c)(2).

In considering the proposed rules, the committee's efforts have been hampered by the fact that the notes and comments of the Advisory Committee were not made available to the committee in sufficient quantity so that they could be read and studied by the members of the committee.

COST

The enactment of H.R. 13899, as amended, will not directly involve any additional cost to the United States, although hearings will have to be held.

SECTIONAL ANALYSIS

Section 1 of the bill delays until August 1, 1977, the effective date of the proposed amendments to rules 6(e), 23, 24, 40.1 and 41(c)(2) of the Federal Rules of Criminal Procedure, unless the Congress approves or modifies such rules at an earlier date.

Section 2 of the bill delays until 30 days after the adjournment *sine die* of the 94th Congress the effective date of the proposed rules governing section 2254 and section 2255 proceedings, unless the Congress approves or modifies such rules at an earlier date.

CHANGES IN EXISTING LAW

The act makes no changes in the statutes of the United States as codified.

RECOMMENDATION

The committee recommends that H.R. 13899, as amended, do pass.

○

Ninety-fourth Congress of the United States of America

AT THE SECOND SESSION

*Begun and held at the City of Washington on Monday, the nineteenth day of January,
one thousand nine hundred and seventy-six*

An Act

To delay the effective date of certain proposed amendments to the Federal Rules of Criminal Procedure and certain other rules promulgated by the United States Supreme Court.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, notwithstanding the provisions of sections 3771 and 3772 of title 18 of the United States Code, the amendments to rules 6(e), 23, 24, 40.1 and 41(c)(2) of the Rules of Criminal Procedure for the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, and which were transmitted to the Congress on or about April 26, 1976, shall not take effect until August 1, 1977, or until and to the extent approved by Act of Congress, whichever is earlier. The remainder of the proposed amendments to the Federal Rules of Criminal Procedure shall become effective August 1, 1976, pursuant to law.

Sec. 2. That, notwithstanding the provisions of section 2072 of title 28 of the United States Code, the rules and forms governing section 2254 cases in the United States district courts and the rules and forms governing section 2255 proceedings in the United States district courts which are embraced by the order entered by the United States Supreme Court on April 26, 1976, and which were transmitted to the Congress on or about April 26, 1976, shall not take effect until thirty days after the adjournment sine die of the 94th Congress, or until and to the extent approved by Act of Congress, whichever is earlier.

Speaker of the House of Representatives.

*Vice President of the United States and
President of the Senate.*