

AMENDMENTS TO THE FEDERAL RULES OF
CRIMINAL PROCEDURE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES

TRANSMITTING

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCE-
DURE THAT HAVE BEEN ADOPTED BY THE SUPREME COURT,
PURSUANT TO 28 U.S.C. 2072



NOVEMBER 12, 2014.—Referred to the Committee on the Judiciary and
ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 25, 2014.

Hon. JOHN A. BOEHNER,
Speaker of the House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I have the honor to submit to the Congress the amendments to the Federal Rules of Criminal Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the Reports of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 25, 2014

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Criminal Procedure be, and they hereby are, amended by including therein amendments to Criminal Rules 5, 6, 12, 34, and 58.

[See infra., pp. _____.]

2. That the foregoing amendments to the Federal Rules of Criminal Procedure shall take effect on December 1, 2014, and shall govern in all proceedings in criminal cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Criminal Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE

Rule 5. Initial Appearance

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(d) Procedure in a Felony Case.

- (1) *Advice.* If the defendant is charged with a felony, the judge must inform the defendant of the following:

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- (D) any right to a preliminary hearing;
- (E) the defendant's right not to make a statement, and that any statement made may be used against the defendant; and
- (F) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the

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defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

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Rule 6. The Grand Jury

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(e) Recording and Disclosing the Proceedings.

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(3) *Exceptions.*

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(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 3003), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An

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attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

* * * * *

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

- (1) *In General.* A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.
- (2) *Motions That May Be Made at Any Time.* A motion that the court lacks jurisdiction may be made at any time while the case is pending.
- (3) *Motions That Must Be Made Before Trial.* The following defenses, objections, and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

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- (A) a defect in instituting the prosecution,
 - including:
 - (i) improper venue;
 - (ii) preindictment delay;
 - (iii) a violation of the constitutional right to a speedy trial;
 - (iv) selective or vindictive prosecution; and
 - (v) an error in the grand-jury proceeding or preliminary hearing;
- (B) a defect in the indictment or information,
 - including:
 - (i) joining two or more offenses in the same count (duplicity);
 - (ii) charging the same offense in more than one count (multiplicity);
 - (iii) lack of specificity;
 - (iv) improper joinder; and

- (v) failure to state an offense;
- (C) suppression of evidence;
- (D) severance of charges or defendants under Rule 14; and
- (E) discovery under Rule 16.

(4) *Notice of the Government's Intent to Use Evidence.*

(A) *At the Government's Discretion.* At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request.* At the arraignment or as soon afterward as practicable, the defendant may, in order to

have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) *Setting the Deadline.* The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline.* At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of Not Making a Timely Motion*

Under Rule 12(b)(3). If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

- (d) Ruling on a Motion.** The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

- (e) [Reserved]**

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Rule 34. Arresting Judgment

(a) **In General.** Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense.

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Rule 58. Petty Offenses and Other Misdemeanors

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(b) Pretrial Procedure.

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(2) *Initial Appearance.* At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

- (F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense;
- (G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release; and

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(H) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

* * * * *



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

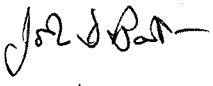
THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE JOHN D. BATES
Secretary

November 6, 2013
(REVISED April 2014)

MEMORANDUM

To: The Chief Justice of the United States and
Associate Justices of the Supreme Court

From: Judge John D. Bates 

RE: TRANSMITTAL OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF
CRIMINAL PROCEDURE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court proposed amendments to Rules 5, 6, 12, 34, and 58 of the Federal Rules of Criminal Procedure, which were approved by the Judicial Conference at its September 2013 and March 2014 sessions. The Judicial Conference recommends that the amendments be approved by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering these proposed amendments, I am transmitting: (i) a redline version of the amendments; (ii) an excerpt from the September 2013 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; (iii) an excerpt from the Addendum to the March 2014 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the Report of the Advisory Committee on the Federal Rules of Criminal Procedure.

Attachments

EXCERPT FROM THE SEPTEMBER 2013
REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Rules 5, 6, 12, 34, and 58, with a recommendation that they be approved and transmitted to the Judicial Conference.

Rules 12 and 34

Rule 12(b)(3) lists motions that must be made before trial. In 2006, the Department of Justice asked the advisory committee to consider amending Rule 12(b)(3)(B) to require defendants to raise before trial any objection that the indictment failed to state an offense. The current rule allows a motion raising failure to state an offense at any time, in part because such a failure was thought to be jurisdictional. The Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002), which held that "failure to state an offense" is not a jurisdictional defect, undercuts this rationale.

The proposal evolved substantially between 2006 and publication in 2011. In particular, the advisory committee decided to address other features of Rule 12's treatment of pretrial motions in general, as well as what standard courts should apply when a defendant fails to raise a "failure to state an offense" claim before trial. The advisory committee's undertaking to amend Rule 12 sparked extensive discussion, within both the advisory committee and the Committee.

The advisory committee submitted three separate amendment proposals to the Committee, and the last proposal was published in 2011.

The advisory committee received 47 pages of public comments. As a result of those comments, as well as its own further review, the advisory committee made revisions, none of which requires republication. The revised proposed amendments to Rule 12 would effect the original request by the Justice Department, clarify other aspects of the rule, and take into account public comments. A conforming amendment to Rule 34 would omit language requiring a court to arrest judgment if “the indictment or information does not charge an offense.”

Rules 5 and 58

In 2010, the Department of Justice, at the urging of the State Department, proposed amendments to Rules 5 and 58, the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively, to provide for notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations as well as various bilateral treaties.

The proposed amendments were circulated to the bench, bar, and public for comment in August 2010. Following publication, the proposed amendments were approved by the Committee and the Judicial Conference in 2011, and subsequently transmitted to the Supreme Court.

The amendments submitted to the Court in 2011 included not only a change to Rule 5(d) and Rule 58 providing for consular notice, but also a change to Rule 5(c) to clarify where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition treaty. In April 2012, the Court approved and transmitted to Congress

only the proposed amendment to Rule 5(c). It then recommitted the remainder of the proposed amendments to the advisory committee for further consideration.

The advisory committee subsequently identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically, as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties—specifically, criminal defendants—of the right to demand compliance with treaty provisions.

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any suggestion of individual rights or remedies. The revised Committee Note emphasizes that the proposed rules do not themselves create any such rights or remedies. The revised proposals were published in August 2012.

Upon review of the comments it received as well as its own further consideration, the advisory committee made slight changes to the proposed amendments, none of which requires further publication. First, the introductory phrase of Rules 5(d)(1) and 58(b)(2) would provide for the specified advice to be given to *all* defendants. As published, the rule provided for consular notification to be given “if the defendant is held in custody and is not a United States citizen.” The change was made in response to comments that suggested that the language as published could be construed to require the arraigning judicial officer to ascertain a defendant’s citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry would parallel an amendment to Rule 11(b)(1)(O) currently pending before Congress, which provides for all defendants to be given notice at sentencing of

possible immigration consequences without specific inquiry into their nationality or status in the United States.

In addition, those who provided comments disagreed as to when a defendant was “in custody” or “detained.” Providing notice to all defendants at their initial appearance would not only avoid the need to resolve this question, but also avoid the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. While the advisory committee is mindful of the need to avoid adding unnecessary notice requirements, it concluded, as now stated in the proposed Committee Note, that “the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant’s citizenship.”

Second, at the suggestion of the Committee’s reporter, the advisory committee removed from the published Committee Note a reference to the Code of Federal Regulations, which might become outdated if the regulation were revised.

Rule 6

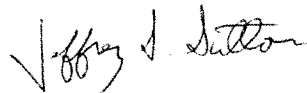
As of May 20, 2013, chapter 15 of title 50, United States Code, was reorganized into four new chapters. As a result, the statutory reference in Criminal Rule 6(e)(3)(D) to the section of the Code defining counterintelligence—50 U.S.C. § 401a—is no longer correct because section 401a is recodified as 50 U.S.C. § 3003. The proposed amendment to Rule 6 would correct the citation. Because the amendment is technical, publication for public comment is unnecessary.

The Committee concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rules 5, 6, 12, 34, and 58, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey S. Sutton". The signature is written in a cursive, flowing style.

Jeffrey S. Sutton, Chair

James M. Cole
Dean C. Colson
Roy T. Englert, Jr.
Gregory G. Garre
Neil M. Gorsuch
Marilyn L. Huff
Wallace B. Jefferson

David F. Levi
Patrick J. Schiltz
Larry A. Thompson
Richard C. Wesley
Diane P. Wood
Jack Zouhary

**EXCERPT FROM THE MARCH 2014
ADDENDUM TO THE REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Committee on Rules of Practice and Procedure asks the Judicial Conference to modify the rules package that it approved on September 17, 2013, specifically the amendment to Criminal Rule 12(c).

In 2006, the Department of Justice requested that the Advisory Committee on Criminal Rules consider amending Rule 12(b)(3)(B) to require defendants to raise before trial any objection that the indictment failed to state an offense. The rule currently in effect allows a motion raising failure to state an offense at any time, in part because such a failure was thought to be jurisdictional. The Supreme Court’s decision in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002), which held that “failure to state an offense” is not a jurisdictional defect, undercuts this rationale.

The proposal evolved substantially between 2006 and publication in 2011, with the advisory committee ultimately deciding to address other features of Rule 12’s treatment of pretrial motions in general. The proposed amendments were published for public comment in 2011.

The advisory committee received 47 pages of public comments. As a result of those comments, as well as its own further review, the advisory committee made revisions, none of which required republication. In the end, the revised proposed amendments to Rule 12 presented

to the Judicial Conference and approved on September 17, 2013, effected the original request by the Justice Department, clarified other aspects of the rule, and took into account public comments received.

In September 2013, the proposed amendments to Rule 12 were transmitted to the Supreme Court as part of a larger rules package. In December, the Court identified four concerns with respect to the Criminal Rule 12 proposal, one related to the committee note, three related to subdivision (c)(3).

With regard to the committee note, the second sentence of the committee note for Rule 12(b)(3) says “reasonably available” rather than “then reasonably available,” as the text of the rule says. The advisory committee unanimously agreed to change this part of the committee note to say “then reasonably available.” The standing committee unanimously approved this change.

The Court asked three questions with respect to subdivision 12(c)(3): (1) to whom is prejudice relevant – the government, the defendant, both?; (2) how does one show prejudice pre-trial?; and (3) why use good cause alone as the test in subdivision (c)(3)(A) and prejudice alone as the test in subdivision (c)(3)(B), and does this anomaly create unintended consequences?

The advisory committee has answers to the first two questions: the prejudice is to the defendant, and lack of notice and failure of the grand jury to charge the defendant properly all could apply before a criminal trial.

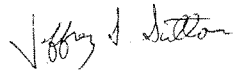
With regard to the third question, the advisory committee agrees that the anomaly of mentioning cause in subdivision (c)(3)(A) and prejudice in subdivision (c)(3)(B) does indeed create an unintended implication. The absence of prejudice in (c)(3)(A) suggests it does not apply there, and the absence of good cause in (c)(3)(B) suggests it does not apply there. The

advisory committee did not intend the first negative implication, but did intend the second. As a result, the advisory committee unanimously agreed to change the proposed amendment to subdivision (c)(3) to apply a good cause standard to *all* late-filed non-jurisdictional motions. The standing committee unanimously approved this change.

Recommendation: That the Judicial Conference approve the proposed amendments to Criminal Rule 12, and transmit them to the Supreme Court for consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jeffrey S. Sutton". The signature is written in a cursive, flowing style.

Jeffrey S. Sutton, Chair

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JEFFREY S. SUTTON
CHAIR

JONATHAN C. ROSE
SECRETARY

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BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable Reena Raggi, Chair
Advisory Committee on Federal Rules of Criminal Procedure

Date: May 8, 2013 (revised June 2013)

Re: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Advisory Committee”) met on April 25, 2013, in Durham, North Carolina, and took action on a number of proposals. The Draft Minutes are attached. (Tab D).

This report presents three action items for Standing Committee consideration:

- (1) approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34;
- (2) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification); and
- (3) approval to transmit to the Judicial Conference a technical and conforming amendment to Rule 6.¹

II. Action Items — Recommendations to Transmit Amendments to the Judicial Conference

1. ACTION ITEM — Rules 12 and 34

The Advisory Committee recommends approval of amendments to Rules 12 and 34. To facilitate consideration of this proposal, the following materials are attached:

- Tab B.1 – 2013 Submitted Rule 12 Amendment
- Tab B.2 – Blackline comparison of Current and Submitted Rule 12
- Tab B.3 – Blackline comparison of Current and Submitted Rule 34
- Tab B.4 – Reporters' 2013 Memorandum to Advisory Committee on Development of Rule 12 Amendment
- Tab B.5 – 2011 Published Amendment Proposal

The proposed amendments originate in a 2006 request from the Department of Justice that “failure to state an offense” be deleted from current Rule 12(b)(3) as a defect that can be raised “at any time,” in light of the Supreme Court’s decision in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002), holding that “failure to state an offense” is not a jurisdictional defect.

The Advisory Committee’s efforts to effect such an amendment sparked extensive discussion within the Advisory Committee and between the Advisory and Standing Committees regarding various aspects of Rule 12. This resulted in three separate amendment proposals being presented to the Standing Committee, the third of which was approved for publication in August 2011. *See* Tab B.5. In response to the thoughtful public comments received and upon its own further review, the Advisory Committee has revised its third proposal for amendment further. These revisions will not require republication. A detailed chronology of the amendment’s evolution, including the public comments received and changes made following publication, is contained in the Reporters’ 2013 Memorandum to the Advisory Committee, a copy of which is attached. *See* Tab B.4.²

¹In response to legislative action that occurred after its April meeting, the Advisory Committee approved this amendment by email vote.

²After publication, the Advisory Committee made the following six changes to the published amendment of Rule 12:

The Advisory Committee now presents to the Standing Committee proposed amendments to Rules 12 and 34 that effect the original deletion requested by the Justice Department, clarify other aspects of the rules, and take into account public comments. See Tab B.1, B.2. The submitted proposals have the unanimous approval of the Advisory Committee.

The substantive features of the submitted amendment to Rule 12 (which also restyle these rules) can be summarized as follows:

- (1) By contrast to current Rule 12(b)(1), which starts with an unexplained cross-reference to Rule 47 (discussing form, content, and timing of motions), submitted Rule 12(b)(1) achieves greater clarity by stating the rule's general purpose—the filing of pretrial motions (relocated from current rule 12(b))—before cross-referencing Rule 47.
- (2) Submitted Rule 12(b)(2) identifies motions that may be made at any time separately from Rule 12(b)(3), which identifies motions that must be made before trial. This provides greater clarity—visually as well as textually—than current Rule 12(b)(3), which identifies motions that may be made at any time only in an ellipsis exception to otherwise mandatory motions alleging defects in the indictment or information.
- (3) Submitted Rule 12(b)(2) recognizes lack of jurisdiction as the only motion that may be made “at any time while the case is pending,” thus effecting the Justice Department’s request not to accord that status to failure to state an offense.

-
- (1) restored language that had been removed from 12(b)(2) as to purpose of rule, and relocated it to (b)(1);
 - (2) deleted double jeopardy claims from the proposed list of 12(b)(3) claims that must be raised before trial;
 - (3) deleted statute of limitations from the proposed list of 12(b)(3) claims that must be raised before trial;
 - (4) added 12(c)(2) making explicit district courts’ authority to extend or reset deadline for pretrial motions;
 - (5) deleted language referencing Rule 52; and
 - (6) deleted proposed new language requiring showing of “cause and prejudice” and restored current “good cause” as standard for hearing late filed motions.

The third and sixth changes, made by the Advisory Committee at its April meeting, are not covered in the Reporter’s March 2013 memo, but are explained in the draft minutes of the April meeting.

The Advisory Committee also made several changes to the published Committee Note. The revised Note reflects the changes to the rule’s text and states explicitly that the rule does not change statutory deadlines under provisions such as the Jury Selection and Service Act. See Tab B.1, B.2. Finally, in response to the suggestion of a member of the Standing Committee made after the April meeting, the Advisory Committee approved by email vote an addition to the Committee Note stating expressly that the district court has broad discretion not only to extend and reset, but also to decline to extend or reset the deadline in 12(c)(2).

- (4) Submitted Rule 12(b)(3) provides clearer notice with respect to motions that must be made before trial.
- (a) At the start, it clarifies that its motion mandate is dependent on two conditions:
- i. the basis for the motion must be reasonably available before trial, and
 - ii. the motion must be capable of resolution before trial.

This ensures that motions are raised pretrial when warranted while safeguarding against a rigid filing requirement that could be unfair to defendants.

- (b) Submitted Rule 12(b)(3)(A)-(B) provides more specific notice of the motions that must be filed pretrial if the just referenced twin conditions are satisfied. While the general categories of “defect[s] in instituting the prosecution” (current Rule 12(b)(3)(A)) and “defect[s] in the indictment or information” (current Rule 12(b)(3)(B)) are retained, they are now clarified with illustrative non-exhaustive lists.

Submitted Rule 12(b)(3)(A) thus lists as defects in instituting the prosecution that must be raised before trial:

- i. improper venue,
- ii. preindictment delay,
- iii. violation of the constitutional right to a speedy trial,
- iv. selective or vindictive prosecution, and
- v. error in grand jury or preliminary hearing proceedings.

Submitted Rule 12(b)(3)(B) lists as defects in the indictment or information that must be raised before trial the following:

- i. duplicity,
- ii. multiplicity,
- iii. lack of specificity,
- iv. improper joinder, and
- v. failure to state an offense.

The noted inclusion of failure to state an offense in Rule 12(b)(3)(B) completes the amendment originally sought by the Department of Justice.

The submitted rule does not include double jeopardy or statute of limitations challenges among required pretrial motions in light of concerns raised in public comments. The Advisory Committee is of

the view that subjecting such motions to a rule mandate is premature, requiring further consideration as to the appropriate standards for review for untimely filings.

- (c) Submitted Rule 12(b)(3)(C)-(E) duplicates the current rule in continuing to require that motions to suppress evidence, to sever charges or defendants, and to seek Rule 16 discovery must be made before trial.
- (5) Submitted Rule 12(c) identifies both the deadlines for filing motions and the consequences of missing those deadlines. Grouping these two subjects together in one section is a visual improvement over the current rule, which discusses deadlines in (c) and consequences in later provision (e). More specifically,
 - (a) Submitted Rule 12(c)(1) tracks the current rule’s language in recognizing the discretion afforded district courts to set motion deadlines. Nevertheless, it now adds a default deadline—the start of trial—if the district court fails to set a motion deadline. This affords defendants the maximum time to make mandatory pretrial motions, but it forecloses an argument that, because the district court did not set a motion deadline, a defendant need not comply with the rule’s mandate to file certain motions before trial.
 - (b) Submitted Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoid subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.
 - (c)

* * * * *

The amended rule, like the current one, continues to make no reference to Rule 52 (providing for plain error review of defaulted claims), thereby permitting the Courts of Appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal.
 - (d) Insofar as the submitted amendment, at Rule 12(b)(3)(B), would now require a defendant to raise a claim of failure to state an offense before trial, submitted Rule 12(c)(3)(B) provides that the standard of review when such a claim is untimely is not “good cause” (i.e., cause and prejudice) but simply “prejudice.” The Advisory Committee thinks this standard provides a sufficient incentive for a defendant to raise such a claim before trial, while also recognizing the fundamental nature of this particular claim and closely

approximating current law, which permits review without a showing of “cause.”

A conforming amendment to Rule 34 that omits language requiring a court to arrest judgment if “the indictment or information does not charge an offense,” is also presented for approval.

Recommendation: The Advisory Committee recommends that amendments to Rules 12 and 34 be transmitted to the Judicial Conference as amended following publication.

2. ACTION ITEM — Rules 5 and 58

The Advisory Committee recommends approval of its second proposal to amend Rules 5 and 58 to provide for advice concerning consular notification, as amended following publication. To facilitate review of this proposal, the following materials are attached:

- Tab C.1 – 2013 Submitted Rules 5 and 58
- Tab C.2 – Blackline comparison of Current and Submitted Rules 5 and 58
- Tab C.3 – 2012 Published Rules 5 and 58
- Tab C.4 – Amendment Proposal Returned from Supreme Court

In 2010, the Justice Department, at the urging of the State Department, proposed amendments to Rules 5 and 58 (the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively) to provide notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations (“Vienna Convention”), as well as various bilateral treaties.

The first proposed amendments responding to this request were published for public comment and subsequently approved by the Advisory Committee, the Standing Committee, and the Judicial Conference. In April 2012, however, the Supreme Court returned the amendments to the Advisory Committee for further consideration. See Tab C.4.

At its April 2012 meeting, the Advisory Committee identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties—specifically, criminal defendants—of rights to demand compliance with treaty provisions.³

³Insofar as Article 36 of the Vienna Convention provides for signatory nations to advise detained foreign nationals of other signatory nations of an opportunity to contact their home country’s consulate, litigation has not yet resolved whether such a provision gives rise to any individual rights or remedies. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) (holding that suppression of evidence was not appropriate remedy for failure to advise foreign national of ability to have consulate notified of arrest and detention regardless of whether Vienna Convention conferred any individual rights). Thus, the Advisory Committee concluded that the remand of the amendment proposal from the Supreme Court could be understood to suggest that the rule may have gotten ahead of settled law

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any attending suggestion of individual rights or remedies. Indeed, the Committee Note emphasizes that the proposed rules do not themselves create any such rights or remedies. The Standing Committee approved publication of the redrafted amendments in June 2012. See Tab C.3.

Upon review of received public comments, as well as its own further consideration, the Advisory Committee has made the following changes to the proposed amendments, none of which requires further publication. See Tab C.1-C.2.

(1) The introductory phrase of Submitted Rules 5(d)(1) and 58(b)(2), now provides for the specified advice to be given to all defendants, by contrast to the published rule, which had provided for consular notification to be given “if the defendant is held in custody and is not a United States citizen.” See Tab C.3.

The change was made at the suggestion of the Federal Magistrate Judges Association (“FMJA”) and the National Association of Criminal Defense Attorneys. The FMJA, in particular, observed that the quoted language could be construed to require the arraigning judicial officer to ascertain a defendant’s citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry parallels Rule 11(b)(1)(O) (which the Supreme Court has now transmitted to Congress), which provides for all defendants to be given notice at sentencing of possible immigration consequences without specific inquiry into their nationality or status in the United States.

As for the “in custody” requirement, interested parties disagreed as to when a defendant was “in custody” or “detained.” Providing notice to all defendants at their initial appearance not only avoids the need to resolve this question, it avoids the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. Thus, while the Advisory Committee is mindful of the need to avoid adding unnecessary notice requirements to rules governing initial appearances, sentences, etc., it concludes, as now stated in the proposed Committee Note, that “the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant’s citizenship.”

(2) At Professor Coquillette’s recommendation, the published Committee Note deletes a reference to the Code of Federal Regulations, which might become outdated if the regulation were revised.

Recommendation: The Advisory Committee recommends that the amendments to Rules 5 and 58 be transmitted to the Judicial Conference as amended following publication.

on this matter.

3. ACTION ITEM — Rule 6

The recent reorganization of Chapter 15 of title 50 of the United States Code (effective May 20, 2013) requires a conforming change in Rule 6. The statutory reference in Rule 6(e)(3)(D) to “50 U.S.C. § 401a” as the Code section defining counterintelligence is no longer correct. Section 401a has been reclassified as 50 U.S.C. § 3003. The Advisory Committee recommends that Rule 6 be amended to reflect the correct citation. This technical and conforming amendment does not require publication.

Recommendation: The Advisory Committee recommends that the technical and conforming amendment to Rule 6 be transmitted to the Judicial Conference.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL
RULES OF CRIMINAL PROCEDURE*

1 Rule 5. Initial Appearance

2 * * * * *

3 (d) Procedure in a Felony Case.

4 (1) *Advice.* If the defendant is charged with a felony,
5 the judge must inform the defendant of the
6 following:

7 * * * * *

8 (D) any right to a preliminary hearing;~~and~~

9 (E) the defendant's right not to make a statement,
10 and that any statement made may be used
11 against the defendant;~~and~~

12 (F) that a defendant who is not a United States
13 citizen may request that an attorney for the

* New material is underlined; matter to be omitted is lined through.

14 government or a federal law enforcement
15 official notify a consular officer from the
16 defendant's country of nationality that the
17 defendant has been arrested — but that even
18 without the defendant's request, a treaty or
19 other international agreement may require
20 consular notification.

21 * * * * *

Committee Note

Rule 5(d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given “without delay,” and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S.

treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

Changes Made After Publication and Comment

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at their initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

1 **Rule 6. The Grand Jury**

2 * * * * *

3 **(e) Recording and Disclosing the Proceedings.**

4 * * * * *

5 **(3) Exceptions.**

6 * * * * *

7 (D) An attorney for the government may
8 disclose any grand-jury matter involving
9 foreign intelligence, counterintelligence (as
10 defined in 50 U.S.C. § 401a~~3003~~), or
11 foreign intelligence information (as defined
12 in Rule 6(e)(3)(D)(iii)) to any federal law
13 enforcement, intelligence, protective,
14 immigration, national defense, or national
15 security official to assist the official
16 receiving the information in the

17 performance of that official's duties. An
18 attorney for the government may also
19 disclose any grand-jury matter involving,
20 within the United States or elsewhere, a
21 threat of attack or other grave hostile acts of
22 a foreign power or its agent, a threat of
23 domestic or international sabotage or
24 terrorism, or clandestine intelligence
25 gathering activities by an intelligence
26 service or network of a foreign power or by
27 its agent, to any appropriate federal, state,
28 state subdivision, Indian tribal, or foreign
29 government official, for the purpose of
30 preventing or responding to such threat or
31 activities.

32 * * * * *

Committee Note

Rule 6(e)(3)(D). This technical and conforming amendment updates a citation affected by the editorial reclassification of chapter 15 of title 50, United States Code. The amendment replaces the citation to 50 U.S.C. § 401a with a citation to 50 U.S.C. § 3003. No substantive change is intended.

1 **Rule 12. Pleadings and Pretrial Motions**

2 * * * *

3 **(b) Pretrial Motions.**

4 **(1) *In General.*** A party may raise by pretrial motion
5 any defense, objection, or request that the court
6 can determine without a trial on the
7 merits. Rule 47 applies to a pretrial motion.

8 **(2) ~~*Motions That May Be Made Before Trial.*~~** ~~A~~
9 ~~party may raise by pretrial motion any defense,~~
10 ~~objection, or request that the court can determine~~
11 ~~without a trial of the general issue.~~ ***Motions That***
12 ***May Be Made at Any Time.*** A motion that the
13 court lacks jurisdiction may be made at any time
14 while the case is pending.

15 **(3) *Motions That Must Be Made Before Trial.*** The
16 following defenses, objections, and requests must

17 be raised by pretrial motion before trial if the
18 basis for the motion is then reasonably available
19 and the motion can be determined without a trial
20 on the merits:
21 (A) ~~a motion alleging~~ a defect in instituting the
22 prosecution; including:
23 (i) improper venue;
24 (ii) preindictment delay;
25 (iii) a violation of the constitutional right to
26 a speedy trial;
27 (iv) selective or vindictive prosecution; and
28 (v) an error in the grand-jury proceeding
29 or preliminary hearing;
30 (B) ~~a motion alleging~~ a defect in the indictment
31 or information, including:

- 32 (i) joining two or more offenses in the
33 same count (duplicity);
34 (ii) charging the same offense in more than
35 one count (multiplicity);
36 (iii) lack of specificity;
37 (iv) improper joinder; and
38 (v) failure to state an offense;
39 ~~—but at any time while the case is pending,~~
40 ~~the court may hear a claim that the~~
41 ~~indictment or information fails to invoke the~~
42 ~~court's jurisdiction or to state an offense;~~
43 (C) ~~a motion to suppression of evidence;~~
44 (D) ~~a Rule 14 motion to severseverance~~
45 of charges or defendants under Rule 14;
46 and

47 (E) ~~a Rule 16 motion for discovery under~~
48 Rule 16.

49 (4) *Notice of the Government's Intent to Use*
50 *Evidence.*

51 (A) *At the Government's Discretion.* At the
52 arraignment or as soon afterward as
53 practicable, the government may notify the
54 defendant of its intent to use specified
55 evidence at trial in order to afford the
56 defendant an opportunity to object before
57 trial under Rule 12(b)(3)(C).

58 (B) *At the Defendant's Request.* At the
59 arraignment or as soon afterward as
60 practicable, the defendant may, in order to
61 have an opportunity to move to suppress
62 evidence under Rule 12(b)(3)(C), request

63 notice of the government's intent to use (in
64 its evidence-in-chief at trial) any evidence
65 that the defendant may be entitled to
66 discover under Rule 16.

67 (c) ~~Motion-Deadline.~~ Deadline for a Pretrial Motion;
68 Consequences of Not Making a Timely Motion.

69 (1) Setting the Deadline. The court may, at the
70 arraignment or as soon afterward as practicable,
71 set a deadline for the parties to make pretrial
72 motions and may also schedule a motion
73 hearing. If the court does not set one, the
74 deadline is the start of trial.

75 (2) Extending or Resetting the Deadline. At any
76 time before trial, the court may extend or reset
77 the deadline for pretrial motions.

78 **(3) Consequences of Not Making a Timely Motion**

79 Under Rule 12(b)(3). If a party does not meet
80 the deadline for making a Rule 12(b)(3) motion,
81 the motion is untimely. But a court may consider
82 the defense, objection, or request if the party
83 shows good cause.

84 **(d) Ruling on a Motion.** The court must decide every
85 pretrial motion before trial unless it finds good cause
86 to defer a ruling. The court must not defer ruling on a
87 pretrial motion if the deferral will adversely affect a
88 party's right to appeal. When factual issues are
89 involved in deciding a motion, the court must state its
90 essential findings on the record.

91 **(e) ~~[Reserved] Waiver of a Defense, Objection, or~~**
92 **~~Request.~~** A party waives any Rule 12(b)(3) defense,
93 ~~objection, or request not raised by the deadline the~~

94 ~~court sets under Rule 12(c) or by any extension the~~
 95 ~~court provides. For good cause, the court may grant~~
 96 ~~relief from the waiver.~~

97 * * * * *

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that “any defense, objection, or request that the court can determine without trial of the general issue” may be raised by motion before trial, has been relocated here. The more modern phrase “trial on the merits” is substituted for the more archaic phrase “trial of the general issue.” No change in meaning is intended.

Rule 12(b)(2). As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is “then reasonably available” and the motion must be one that the court can determine “without trial on the merits.” The types of claims subject to Rule 12(b)(3) generally will

be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The “then reasonably available” language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined “without a trial on the merits” need be raised by motion before trial. Just as in (b)(1), the more modern phrase “trial on the merits” is substituted for the more archaic phrase “trial of the general issue.” No change in meaning is intended.

The rule’s command that motions alleging “a defect in instituting the prosecution” and “errors in the indictment or information” must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the “indictment or information fails . . . to state an offense.” This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme

Court abandoned any jurisdictional justification for the exception in *United States v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), “[i]nsofar as it held that a defective indictment deprives a court of jurisdiction”).

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language “or by any extension the court provides,” which anticipates that a district court has broad discretion to extend, reset, or decline to extend or reset, the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule’s mention of it to a more logical place – after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. No change in meaning is intended.

New paragraph (c)(3) governs the review of untimely claims, previously addressed in Rule 12(e). Rule 12(e) provided that a party “waives” a defense not raised within the time set under Rule 12(c). Although the term waiver in

the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term “waiver” in new paragraph (c)(3).

New paragraph 12(c)(3) retains the existing standard for untimely claims. The party seeking relief must show “good cause” for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case.

Rule 12(e). The effect of failure to raise issues by a pretrial motion has been relocated from (e) to (c)(3).

Changes Made After Publication and Comment

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule’s treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts’ authority to rule on pretrial motions. The references to “double jeopardy” and “statute of limitations” were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2)

was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3), the current language "good cause" was retained for all claims and subparagraph (c)(3)(B) was omitted. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

1 **Rule 34. Arresting Judgment**

2 (a) **In General.** Upon the defendant's motion or on its
3 own, the court must arrest judgment if the court does
4 not have jurisdiction of the charged offense, if:
5 ~~(1) the indictment or information does not charge an~~
6 ~~offense; or~~
7 ~~(2) the court does not have jurisdiction of the~~
8 ~~charged offense.~~
9 * * * * *

Committee Note

Rule 34(a). This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

Changes Made After Publication and Comment

No changes were made after publication and comment.

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **(b) Pretrial Procedure.**

4 * * * * *

5 **(2) *Initial Appearance.*** At the defendant's initial
6 appearance on a petty offense or other
7 misdemeanor charge, the magistrate judge must
8 inform the defendant of the following:

9 * * * * *

10 (F) the right to a jury trial before either a
11 magistrate judge or a district judge – unless
12 the charge is a petty offense; ~~and~~
13 (G) any right to a preliminary hearing under
14 Rule 5.1, and the general circumstances, if
15 any, under which the defendant may secure
16 pretrial release; and

17 (H) that a defendant who is not a United States
18 citizen may request that an attorney for the
19 government or a federal law enforcement
20 official notify a consular officer from the
21 defendant's country of nationality that the
22 defendant has been arrested — but that even
23 without the defendant's request, a treaty or
24 other international agreement may require
25 consular notification.

26 * * * * *

Committee Note

Rule 58(b)(2)(H). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given “without delay,” and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

Changes Made After Publication and Comment

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at the initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's

citizenship. A conforming change was made to the Committee Note.

