SUPREME COURT OF THE UNITED STATES

MONDAY, FEBRUARY 28, 1966

ORDERED:

1. That the Rules of Civil Procedure for the United States District Courts be, and they hereby are, amended by including therein Rules 23.1, 23.2, 44.1 and 65.1, Supplemental Rules A, B, C, D, E and F for Certain Admiralty and Maritime Claims, and amendments to Rules 1, 4, 8, 9, 12, 13, 14, 15, 17, 18, 19, 20, 23, 24, 26, 38, 41, 42, 43, 44, 47, 53, 59, 65, 68, 73, 74, 75, 81 and 82, and to Forms 2 and 15, as hereinafter set forth:

[See *infra,* pp. 1039–1085.]

2. That the foregoing amendments and additions to the Rules of Civil Procedure shall take effect on July 1, 1966, and shall govern all proceedings in actions brought thereafter and also in all further proceedings in actions then pending, except to the extent that in the opinion of the Court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

3. That the Chief Justice be, and he hereby is, authorized to transmit to the Congress the foregoing amendments and additions to the Rules of Civil Procedure in accordance with the provisions of Title 28, U. S. C., §§ 2072 and 2073.

4. That: (a) subdivision (c) of Rule 6 of the Rules of Civil Procedure for the United States District Courts promulgated by this Court on December 20, 1937, effective September 16, 1938; (b) Rule 2 of the Rules for Practice and Procedure under section 25 of An Act To amend and consolidate the Acts respecting copyright, approved March 4, 1909, promulgated by this Court on June 1, 1909, effective July 1, 1909;* and (c) the Rules

*[REPORTER'S NOTE: For earlier publication of the Copyright Rules and the amendment thereto, see 214 U. S. 533 and 307 U. S. 652.]

of Practice in Admiralty and Maritime Cases, promulgated by this Court on December 6, 1920, effective March 7, 1921, as revised, amended and supplemented, be, and they hereby are, rescinded, effective July 1, 1966.

MR. JUSTICE BLACK, dissenting.

The Amendments to the Federal Rules of Civil and Criminal* Procedure today transmitted to the Congress are the work of very capable advisory committees. Those committees, not the Court, wrote the rules. Whether by this transmittal the individual members of the Court who voted to transmit the rules intended to express approval of the varied policy decisions the rules embody I am not sure. I am reasonably certain, however, that the Court's transmittal does not carry with it a decision that the amended rules are all constitutional. For such a decision would be the equivalent of an advisory opinion which, I assume the Court would unanimously agree, we are without constitutional power to give. And I agree with my Brother DOUGLAS that some of the proposed criminal rules go to the very border line if they do not actually transgress the constitutional right of a defendant not to be compelled to be a witness against himself. This phase of the criminal rules in itself so infects the whole collection of proposals that, without mentioning other objections, I am opposed to transmittal of the proposed amendments to the criminal rules.

I am likewise opposed to transmittal of the proposed revision of the civil rules. In the first place I think the provisions of 28 U. S. C. § 2072 (1964 ed.), under which these rules are transmitted and the corresponding section, 18 U. S. C. § 3771 (1964 ed.), relating to the criminal rules, both of which provide for giving transmitted rules the effect of law as though they had been properly enacted by Congress are unconstitutional for reasons I

*For the amendments to the Federal Rules of Criminal Procedure, to which this dissent also applies, see *post*, p. 1095.

have previously stated.[1] And in prior dissents I have stated some of the basic reasons for my objections to repeated rules revisions [2] that tend to upset established meanings and need not repeat those grounds of objection here. The confusion created by the adoption of the present rules, over my objection, has been partially dispelled by judicial interpretations of them by this Court and other courts. New rules and extensive amendments to present rules will mean renewed confusion resulting in new challenges and new reversals and prejudicial "pretrial" dismissals of cases before a trial on the merits for failure of lawyers to understand and comply with new rules of uncertain meaning. Despite my continuing objection to the old rules, it seems to me that since they have at least gained some degree of certainty it would be wiser to "bear those ills we have than fly to others we know not of," unless, of course, we are reasonably sure that the proposed reforms of the old rules are badly needed. But I am not. The new proposals, at least some of them, have, as I view them, objectionable possibilities that cause me to believe our judicial system could get along much better without them.

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[1] In a statement accompanying a previous transmittal of the civil rules, MR. JUSTICE DOUGLAS and I said:

"MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are opposed to the submission of these rules to the Congress under a statute which permits them to 'take effect' and to repeal 'all laws in conflict with such rules' without requiring any affirmative consideration, action, or approval of the rules by Congress or by the President. We believe that while some of the Rules of Civil Procedure are simply housekeeping details, many determine matters so substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress and approved by the President. The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate, and the President, not by the mere failure of Congress to reject proposals of an outside agency. . . ." (Footnotes omitted.) 374 U. S. 865–866.

[2] 346 U. S. 946, 374 U. S. 865. And see 368 U. S. 1011 and 1012.

The momentum given the proposed revision of the old rules by this Court's transmittal makes it practically certain that Congress, just as has this Court, will permit the rules to take effect exactly as they were written by the Advisory Committee on Rules. Nevertheless, I am including here a memorandum I submitted to the Court expressing objections to the Committee's proposals and suggesting changes should they be transmitted. These suggestions chiefly center around rules that grant broad discretion to trial judges with reference to class suits, pretrial procedures, and dismissal of cases with prejudice. Cases coming before the federal courts over the years now filling nearly 40 volumes of Federal Rules Decisions show an accumulation of grievances by lawyers and litigants about the way many trial judges exercise their almost unlimited discretionary powers to use pretrial procedures to dismiss cases without trials. In fact, many of these cases indicate a belief of many judges and legal commentators that the cause of justice is best served in the long run not by trials on the merits but by summary dismissals based on out-of-court affidavits, pretrial depositions, and other pretrial techniques. My belief is that open-court trials on the merits where litigants have the right to prove their case or defense best comport with due process of law.

The proposed rules revisions, instead of introducing changes designed to prevent the continued abuse of pretrial power to dismiss cases summarily without trials, move in the opposite direction. Of course, each such dismissal results in removal of one more case from our congested court dockets, but that factor should not weigh more heavily in our system of justice than assuring a full-fledged due process trial of every bona fide lawsuit brought to vindicate an honest, substantial claim. It is to protect this ancient right of a person to have his case tried rather than summarily thrown out of court that I

suggested to the Court that it recommend changes in the Committee's proposals of the nature set out in the following memorandum.

"Dear Brethren:

"I have gone over all the proposed amendments carefully and while there are probably some good suggestions, it is my belief that the bad results that can come from the adoption of these amendments predominate over any good they can bring about. I particularly think that every member of the Court should examine with great care the amendments relating to class suits. It seems to me that they place too much power in the hands of the trial judges and that the rules might almost as well simply provide that 'class suits can be maintained either for or against particular groups whenever in the discretion of a judge he thinks it is wise.' The power given to the judge to dismiss such suits or to divide them up into groups at will subjects members of classes to dangers that could not follow from carefully prescribed legal standards enacted to control class suits.

"In addition, the rules as amended, in my judgment, greatly aggravate the evil of vesting judges with practically uncontrolled power to dismiss with prejudice cases brought by plaintiffs or defenses interposed by defendants. The power to dismiss a plaintiff's case or to render judgments by default against defendants can work great harm to both parties. There are many inherent urges in existence which may subconsciously incline a judge towards disposing of the cases before him without having to go through the burden of a trial. Mr. Chief Justice White, before he became Chief Justice, wrote an opinion in the case of *Hovey* v. *Elliott,* 167 U. S. 409, which pointed out grave constitutional questions raised by attempting to punish the parties by depriving them of the right to try their law suits or to defend against law suits brought against them by others.

"Rule 41 entitled 'Dismissal of Actions' points up the great power of judges to dismiss actions and provides an automatic method under which a dismissal must be construed as a dismissal 'with prejudice' unless the judge specifically states otherwise. For that reason I suggest to the Conference that if the Rules are accepted, including that one, the last sentence of Rule 41 (b) be amended so as to provide that a simple order of dismissal by a judge instead of operating 'as an adjudication upon the merits,' as the amended rule reads, shall provide that such a dismissal 'does not operate as an adjudication upon the merits.'

"As a further guarantee against oppressive dismissals I suggest the addition of the following as subdivision (c) of Rule 41.

> " 'No plaintiff's case shall be dismissed or defendant's right to defend be cut off because of the neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, until and unless such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency, and not then unless the parties themselves do or fail to do something on their own part that can legally justify dismissal of the plaintiff's case or of the defendant's defense.'

"This proposed amendment is suggested in order to protect litigants, both plaintiffs and defendants, against being thrown out of court as a penalty for their lawyer's neglect or misconduct. The necessity for such a rule is shown, I think, by the dismissal of the plaintiff's case in *Link* v. *Wabash R. Co.*, 370 U. S. 626. The usual argument against this suggestion is that a party to a law suit hires his lawyer and should therefore be responsible for everything his lawyer does in the conduct of his case. This may be a good argument with reference to affluent litigants who not only know the best lawyers but are able

to hire them. It is a wholly unrealistic argument, however, to make with reference to individual persons who do not know the ability of various lawyers or who are not financially able to hire those at the top of the bar and who are compelled to rely on the assumption that a lawyer licensed by the State is competent. It seems to me to be an uncivilized practice to punish clients by throwing their cases out of court because of their lawyers' conduct. It may be supportable by good, sound, formal logic but I think has no support whatever in a procedural system supposed to work as far as humanly possible to the end of obtaining equal and exact justice.

"H. L. B."

For all the reasons stated above and in my previous objections to the transmittals of rules I dissent from the transmittals here.