

## REPORTER'S NOTE

Rules of Evidence for United States Courts and Magistrates (together with related amendments to the Federal Rules of Civil Procedure\* and the Federal Rules of Criminal Procedure) were prescribed by order of the Court on November 20, 1972, pursuant to 18 U. S. C. §§ 3402, 3771, and 3772, and 28 U. S. C. §§ 2072 and 2075, and were reported to Congress at the beginning of its next regular session by THE CHIEF JUSTICE on January 4, 1973, and resubmitted on February 5, 1973.

The rules and amendments were to have become effective July 1, 1973, as provided in the Court's orders. However, by the Act of Mar. 30, 1973, Pub. L. 93-12, 87 Stat. 9, the foregoing rules and amendments are to have no force or effect except to the extent, and with such amendments, as may be expressly approved by Act of Congress.

MR. JUSTICE DOUGLAS filed a dissenting opinion, set forth below, to the Court's order of November 20, 1972.

MR. JUSTICE DOUGLAS, dissenting.

There are those who think that fashioning of rules of evidence is a task for the legislature, not for the judiciary. Wigmore thought the task was essentially a judicial one, 1 J. Wigmore, *Evidence* 251 *et seq.* (3d ed. 1940); and I share that view, leaving the problem for case-by-case development by the courts or by Congress.

But my concern with these Rules of Evidence is two-fold. First, I doubt if rules of evidence are within the purview of the statute under which we are authorized to submit proposed Rules to Congress. The Act provides

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\*A further amendment to Fed. Rule Civ. Proc. 43 was prescribed by the Court's order of December 18, 1972.

that the Supreme Court shall have the power "to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers." 28 U. S. C. § 2072.

I can find no legislative history that rules of evidence were to be included in "practice and procedure" as used in § 2072. The Committee Reports on the original Act throw no light on the question. H. R. Rep. No. 1829, 73d Cong., 2d Sess.; S. Rep. No. 1049, 73d Cong., 2d Sess. The words "practice and procedure" in the setting of the Act seem to me to exclude rules of evidence. They seem to me to be words of art that describe pretrial procedures, pleadings, and procedures for preserving objections and taking appeals.

Second, this Court does not write the Rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit. Those who write the Rules are members of a Committee named by the Judicial Conference. The members are eminent; but they are the sole judges of the merits of the proposed Rules, our approval being merely perfunctory. In other words, we are merely the conduit to Congress. Yet the public assumes that our imprimatur is on the Rules, as of course it is.

We are so far removed from the trial arena that we have no special insight, no meaningful oversight to contribute. The Rules of Evidence—if there are to be some—should be channeled through the Judicial Conference whose members are much more qualified than we to appraise their merits when applied in actual practice.

I also dissent, for reasons set forth by Mr. Justice Black and me on prior occasions, from the amendments to the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure. 374 U. S. 865; 368 U. S. 1012; 346 U. S. 946.