SUPREME COURT OF THE UNITED STATES

TUESDAY, APRIL 29, 1980

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Rules 4, 5, 26, 28, 30, 32, 33, 34, 37 and 45 as hereinafter set forth:

[See *infra,* pp. 1003–1011.]

2. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on August 1, 1980, and shall govern all civil proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That subsection (e) of Rule 37 of the Federal Rules of Civil Procedure is hereby abrogated, effective August 1, 1980.

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

MR. JUSTICE POWELL, with whom MR. JUSTICE STEWART and MR. JUSTICE REHNQUIST join, filed a dissenting statement.

I dissent from the Court's adoption of the amendments to Federal Rules of Civil Procedure 26, 33, 34, and 37—the cluster of Rules authorizing and regulating discovery generally, interrogatories, production of documents, and sanctions for failure to make discovery. These amendments are not inherently objectionable. Indeed, they represent the culmination of several years' work by the Judicial Conference's distinguished and conscientious Standing Committee on Rules of Practice and Procedure and Advisory Committee on Civil Rules.[1] But the changes embodied in the amendments fall

[1] This Court's role in the rulemaking process is largely formalistic. Standing and advisory committees of the Judicial Conference make the

short of those needed to accomplish reforms in civil litigation that are long overdue.

The American Bar Association proposed significant and substantial reforms.[2] Although the Standing Committee initially favored most of these proposals, it ultimately rejected them in large part. The ABA now accedes to the Standing Committee's amendments because they make some improvements, but the most recent report of the ABA Section of Litigation makes clear that the "serious and widespread abuse of discovery" will remain largely uncontrolled.[3] There are wide differences of opinion within the profession as to the need for reform. The bench and the bar are familiar with the existing Rules, and it often is said that the bar has a vested interest in maintaining the status quo. I imply no criticism of the bar or the Standing Committee when I suggest that the present recommendations reflect a compromise as well as the difficulty of framing satisfactory discovery Rules. But whatever considerations may have prompted the Committee's final decision, I doubt that many judges or lawyers familiar with the proposed amendments believe they will have an appreciable effect on the acute problems associated with discovery. The Court's adoption of these inadequate changes could postpone effective reform for another decade.

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initial studies, invite comments on their drafts, and prepare the Rules. Both the Judicial Conference and this Court necessarily rely upon the careful work of these committees. Congress should bear in mind that our approval of proposed Rules is more a certification that they are the products of proper procedures than a considered judgment on the merits of the proposals themselves. See generally 409 U. S. 1132, 1133 (1972) (Douglas, J., dissenting from adoption of Federal Rules of Evidence); 383 U. S. 1032 (1966) (Black, J., dissenting from adoption of amendment to civil rules); 374 U. S. 865, 869-870 (1963) (statement of Black and Douglas, JJ., upon adoption of amendments to Federal Rules of Civil Procedure).

[2] American Bar Association, Report of the Section of Litigation Special Committee for the Study of Discovery Abuse (App. Draft 1977).

[3] ABA Section of Litigation, Second Report of the Special Committee for the Study of Discovery Abuse, 5 (1980).

When the Federal Rules first appeared in 1938, the discovery provisions properly were viewed as a constructive improvement. But experience under the discovery Rules demonstrates that "not infrequently [they have been] exploited to the disadvantage of justice." *Herbert* v. *Lando,* 441 U. S. 153, 179 (1979) (POWELL, J., concurring). Properly limited and controlled discovery is necessary in most civil litigation. The present Rules, however, invite discovery of such scope and duration that district judges often cannot keep the practice within reasonable bounds.[4] Even in a relatively simple case, discovery through depositions, interrogatories, and demands for documents may take weeks. In complex litigation, discovery can continue for years. One must doubt whether empirical evidence would demonstrate that untrammeled discovery actually contributes to the just resolution of disputes. If there is disagreement about that, there is none whatever about the effect of discovery practices upon the average citizen's ability to afford legal remedies.

Delay and excessive expense now characterize a large percentage of all civil litigation. The problems arise in significant part, as every judge and litigator knows, from abuse of the discovery procedures available under the Rules.[5] Indeed,

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[4] MR. JUSTICE WHITE, writing for the Court, recently reminded the federal courts that "the discovery provisions . . . are subject to the injunction of Rule 1 that they 'be construed to secure the just, *speedy,* and *inexpensive* determination of every action.'" *Herbert* v. *Lando,* 441 U. S. 153, 177 (1979).

In his most recent Annual Report on the State of the Judiciary, THE CHIEF JUSTICE declared that "[t]he responsibility for control [of pretrial processes] rests on both judges and lawyers. Where existing rules and statutes permit abuse, they must be changed. Where the power lies with judges to prevent or correct abuse and misuse of the system, judges must act." Address to American Bar Association Mid-Year Meeting 6 (Feb. 3, 1980).

[5] Writing from his wide experience as a judge, practicing lawyer, and Attorney General, Griffin B. Bell advised the Standing Committee that "the scope of discovery is far too broad and that excessive discovery has significantly contributed to the delays, complexity and high cost of civil

the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, led by THE CHIEF JUSTICE,[6] identified "abuse in the use of discovery [as] a major concern" within our legal system.[7] Lawyers devote an enormous number of "chargeable hours" to the practice of discovery. We may assume that discovery usually is conducted in good faith. Yet all too often, discovery practices enable the party with greater financial resources to prevail by exhausting the resources of a weaker opponent. The mere threat of delay or unbearable expense denies justice to many actual or prospective litigants. Persons or businesses of comparatively limited means settle unjust claims and relinquish just claims simply because they cannot afford to litigate.[8] Litigation costs have become intolerable, and they cast a lengthening shadow over the basic fairness of our legal system.

I reiterate that I do not dissent because the modest amendments recommended by the Judicial Conference are undesirable. I simply believe that Congress' acceptance of these tinkering changes will delay for years the adoption of genuinely effective reforms. The process of change, as experience teaches, is tortuous and contentious. Favorable congressional action on these amendments will create complacency and encourage inertia. Meanwhile, the discovery Rules will continue

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litigation in the federal courts." Letter to The Honorable Roszel C. Thomsen, Chairman of the Committee on Rules of Practice and Procedure of the Judicial Conference 1 (June 27, 1978).

[6] THE CHIEF JUSTICE's keynote address to this distinguished assembly, popularly known as the Pound Conference, recognized that discovery processes "are being misused and overused." See Burger, Agenda for 2000 A. D.—A Need for Systematic Anticipation, 70 F. R. D. 83, 95 (1976).

[7] See Erickson, The Pound Conference Recommendations: A Blueprint for the Justice System in the Twenty-first Century, 76 F. R. D. 277, 288 (1978); ABA, Report of Pound Conference Follow-up Task Force, 74 F. R. D. 159, 171, 191–192 (1976).

[8] "The principal function of procedural rules," as Mr. Justice Black observed in another context, "should be to serve as useful guides to help, not hinder, persons who have a legal right to bring their problems before the courts." 346 U. S. 946 (1954) (separate statement upon adoption of revised Supreme Court Rules).

to deny justice to those least able to bear the burdens of delay, escalating legal fees, and rising court costs.

The amendments to Rules 26, 33, 34, and 37 recommended by the Judicial Conference should be rejected, and the Conference should be directed to initiate a thorough re-examination of the discovery Rules that have become so central to the conduct of modern civil litigation.