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Book Reviews: Reform of Court Rule-Making Procedures

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BOOK REVIEWS

REFORM OF COURT RULE-MAKING PROCEDURES. By Jack B. Weinstein.* Ohio State University Press, Columbus, Ohio. 1977, Pp. 216. Reviewed by Julius Isaacson.†

As the title of this well-annotated and indexed book suggests, its author, Jack B. Weinstein, is not content with present rule-making procedures of this nation's courts. His book first traces the historical development of present day practices and then offers suggestions for their improvement. Though disenchanted with the current rule-making process, Judge Weinstein balances his concerns by calling particular attention to the advantages of sound judicial rules, which until now have allowed courts to meet growing administrative pressures. He particularly notes the efficiencies that have been achieved in the face of our nation's increasing resort to the courtroom for resolution of complex, modern problems and the flexibility of the courts in accommodating an increasing caseload. Good rules, he observes, eliminate or reduce research time, procedural uncertainty, and appeals and reversals on non-substantive points.

In a chapter on development of national rule-making power, Judge Weinstein, who for six years by appointment of Chief Justice Warren served on the Advisory Committee on the Federal Rules of Evidence, traces the evolution of rule-making power from early English experience when the King used courts to expand his control over nobility. He recounts, for example, the origin of the writ of certiorari as the King's prerogative to review records of his courts, and then details subsequent development leading to independence for these common law and equity courts. Judge Weinstein does not envision serious obstacles to further reform in this country as there are no constitutional, theoretical, or historical barriers to change. In fact, as he carefully observes, the federal rule-making power is not an inherent judicial power but is a power granted by Congress under specific limitations.

Judge Weinstein is troubled principally by the undemocratic way rule-making power has come to be exercised. In contrast, he holds up the legislative enactment process where there are hearings and debates, and the public is invited to present its views before a bill is enacted into law. Yet, as Judge Weinstein points out, all of these procedures are entirely lacking in the court rule-making process in which judges get together, decide on rules and then announce them as *faits accomplis*. He describes this as the "impenetrability" of the court's rule-making process (p. 101). In Judge Weinstein's opinion, there are now clear signals that changes

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are needed in the way rules for courts are developed. He argues that ideology has succumbed to practicality and that both courts and legislatures must assume an active role in the rule-making process.

Judge Weinstein defines court rule-making as the curious phenomenon where courts control court procedure and related matters by rules promulgated by the court and adds that such rule-making is being exercised increasingly at national, state, and local levels, the process presenting substantial advantages and serious dangers. Believing that we are now at a crucial juncture, he devotes the entirety of chapter four to his primary thrust, that is, methods of achieving national rule-making reform. The author first discusses congressional power to delegate and modify terms of delegation, making reference to an early Supreme Court case[1] where for the first time the Court's rule-making powers were reviewed and upheld as a proper legislative delegation. This is followed by an interesting analysis of the 1941 *Sibbach v. Wilson & Co.*[2] case where the Court, faced with the question of the validity of certain Federal Rules of Civil Procedure, held that Congress has undoubted power to regulate the practice and procedure of federal courts either directly or by delegation to the courts. The author then sets forth practical objections to this unrestrained exercise of delegated rule-making power by the Supreme Court and follows with proposals for modification of the national rule-making process itself. One proposal calls for the reinvolvement of the legislative branch in order to restore some of the checks and balances originally established in our democratic system. Judge Weinstein also supports three recommendations made by Professor Howard Lesnick, professor of law at the University of Pennsylvania Law School: judicial conference procedures should be more open and should be published; the composition of the advisory committees should be more representative; and the assignment of the rule-promulgating role to the Supreme Court, being unwise and inappropriate, should be reexamined. The latter recommendation is grounded in the author's belief that it is improper for a body instrumental in the adoption of rules to be empowered to pass upon the validity and constitutionality of those same rules. The author is also critical of the individual federal courts which have had rule-making power from their inception and where judges, almost without exception, merely consult with one another in promulgating local rules. The bar, law schools, and the citizenry are given no opportunity to comment on proposed drafts of these local rules. Since rules having a great impact on the public are involved (e.g., jury size, sentencing policy, class action policy, media access, bar admissions), democratization of the rule-making process here too is a necessity (p. 119).

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1. Wayman v. Southard, 23 U.S. 1 (1825).
2. 312 U.S. 1 (1941).

In the close of this interesting text, Judge Weinstein summarizes his own recommendations for change in the national rule-making process: that the Supreme Court should not adopt any rules for any court except itself; that Congress should continue to have the power to reject any rule or amendment promulgated by the Court; that Congress should refrain from redrafting details of a rule; that the United States Judicial Conference should take the place of the Supreme Court as the national rule-making authority and that the Standing Committee should widely publicize the proposals of its advisory committee and hold public hearings before recommending adoption to the Judicial Conference. The author makes these valuable recommendations to answer and eliminate justifiable criticism of the local rule-making and guideline-making process.

The bench, bar, and general public should be deeply indebted to Judge Weinstein for writing this book. Eventually his suggestions for the reform of court rule-making procedures will be adopted or will stimulate necessary change from which all will benefit. His book is in harmony with the present, enlightened view that the public's right to know extends to the rule-making power of the judiciary now exercised in their inner chambers.