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Doing Right By Charles Alan Wright

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*Reviewed by Carl Tobias***

TABLE OF CONTENTS

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* LAW OF FEDERAL COURTS xix, 929 (6th ed. St. Paul, Minn.). By Charles Alan Wright (The late Charles Alan Wright Chair in Federal Courts, University of Texas School of Law) and Mary Kay Kane (Chancellor, Dean and Distinguished Professor of Law, University of California, Hastings College of the Law).

** Williams Professor, University of Richmond School of Law. I wish to thank Christopher Bryant and Margaret Sanner for invaluable suggestions, Angeline Garbett and Genny Schloss for processing this piece, as well as Beckley Singleton, James E. Rogers, and Russell Williams for generous, continuing support. Errors that remain are mine alone.

INTRODUCTION

Few assignments are so complex and sensitive as developing the new edition of a classic legal text. This difficulty is magnified when five earlier iterations are in print, numerous experts on federal practice and procedure have perennially lauded the work as the field's leader, and its creator, Professor Charles Alan Wright, was a distinguished, revered scholar.[1] United States Supreme Court Justice Ruth Bader Ginsburg has proclaimed that if her "'see everyday' stand in chambers [comprised only ten books,] *Wright on Federal Courts* would be among them."[2] She characterized the volume's author as a "colossus . . . at the summit of our profession," and declared, "all who practice the lawyer's craft profit from his prodigious production."[3]

Dean Mary Kay Kane of Hastings College of the Law, who recently completed the daunting project of updating *Law of Federal Courts* for its Sixth Edition, recognizes those phenomena in her preface. The writer "assume[d] with humility the important task of ensuring [this text, which Wright] maintained for nearly forty years, continues his tradition of excellence," and hoped the attempt to "follow in his footsteps [would] meet his high standards."[4] Dean Kane's labors when updating and revising the work gave her the "opportunity to appreciate anew the genius that was Charles Alan Wright, whose sense of history, policy, and the ever-changing and shifting trends in the law provides such important insights into the law surrounding the federal courts."[5] The preface also observes that a number of significant developments have transpired since the Fifth Edition's release: Congress, the Supreme Court, and the Advisory Committees, which study the federal appellate, bankruptcy, civil, criminal, and evidentiary rules as well as formulate proposed amendments that the Justices review, have instituted much procedural change.[6] Dean Kane considers these actions and many others

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[1] *See, e.g.*, Richard D. Freer, *Gladly Wolde He Lerne and Gladly Teche*, 73 TEX. L. REV. 957, 958 (1995); J. Clifford Wallace, *The Law of Federal Courts*, 62 TEX. L. REV. 191, 195 (1983).

[2] Ruth Bader Ginsburg, *In Celebration of Charles Alan Wright*, 76 TEX. L. REV. 1581, 1582 (1998).

[3] *Accord* Carl Tobias, *Charles Alan Wright and the Fragmentation of Federal Practice and Procedure*, 19 YALE L. & POL'Y REV. 463, 463-64 (2001); *see* Ginsburg, *supra* note 2, at 1581, 1586; *see also infra* note 26 and accompanying text.

[4] CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS iii, v (6th ed. 2002).

[5] *See id.* at iii; *accord* Ginsburg, *supra* note 2, at 1582; Tobias, *supra* note 3. *See generally infra* note 26.

[6] *See* WRIGHT & KANE, *supra* note 4, at iii-iv; *see also* 28 U.S.C. §§ 2071-2075, 2077 (2004) (assigning Supreme Court duty to promulgate and amend procedural rules); Amendments

in this venerated title's newest edition.[7] Moreover, she reexamines those dimensions of federal court practice that have remained unchanged since the 1994 edition, addresses cases decided over the ensuing seven years that elaborate or alter prior opinions, and incorporates valuable new commentary.[8]

In the Sixth Edition of *Law of Federal Courts*, Dean Kane has realized her ambitious goals. She distills the essence of the five antecedents by striking a delicately calibrated balance, retaining the volume's best traditional aspects and felicitously implementing those modifications needed to treat emerging trends and evolving doctrine. These propositions, and the potential benefits the legal community might derive from a successful new edition, mean the latest rendition of *Law of Federal Courts*, which the West Group has now issued, deserves a detailed appraisal. This Review undertakes that effort. I first briefly scrutinize the text's historical background. Part Two delineates numerous contributions which the recent edition affords. I conclude with several recommendations for the future.

I. HISTORY OF LAW OF FEDERAL COURTS

Law of Federal Courts' origins and development warrant comparatively limited examination here for a number of reasons. One is that the Sixth Edition preface furnishes some applicable information,[9] such as a reprint of Charles Alan Wright's preface to the 1963 inaugural edition.[10] Another is that considerable relevant history has been published elsewhere.[11]

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to Federal Rules of Civil Procedure, 150 F.R.D. 331 (1993) (prescribing Advisory Committees' procedures); Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1015-27 (1982). *See generally* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 502-15 (1986). For analysis of the relationship between Congress and the Court in developing procedure, see generally Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996); Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795 (1991).

[7] *See* WRIGHT & KANE, *supra* note 4, at iv.

[8] *See id.* These conventions which Dean Kane follows respect the venerable traditions that Professor Wright had practiced throughout his lengthy, distinguished career.

[9] *Id.* at iii-v.

[10] *Id.* at vii-viii. For reviews of this edition, see Gordon Gooch, *Federal Courts*, 42 TEX. L. REV. 764 (1964); Fleming James, Jr., *Federal Courts*, 78 HARV. L. REV. 1296 (1965).

[11] *See* Freer, *supra* note 1 (reviewing fifth edition); Wallace, *supra* note 1 (reviewing fourth edition). *See generally* John P. Frank, *An Essential Guide: Wright's* Law of Federal Courts, 46 HASTINGS L.J. 285 (1994) (reviewing fifth edition).

Perhaps most intriguing is how Wright's conceptualization of the work evolved. For example, the first edition preface advises that he wrote the book for law students, whose needs are "so far different from those of the lawyer and the judge." Wright directs lawyers and judges to the multivolume treatise, for which the renowned scholar was the senior author throughout his lengthy career.[12] The 1963 text is also "more concerned with why the law is as it is, and whether existing doctrine works as satisfactorily as it should," while the fifty-four-volume compendium "endeavors to state accurately and completely what the law is."[13] However, attorneys and "judges discovered and embraced the new book as avidly as law students did."[14] Thus, the Second Edition preface reconfirms that Wright had written for students but frankly acknowledges that he underestimated the needs of bar and bench. Observing how much the profession's members "remain students throughout our lives,"[15] Wright graciously expressed gratitude for the text's warm reception.[16] With publication of the 1976 Third, the 1983 Fourth, and the 1994 Fifth Editions, the work became indispensable to counsel and judges as well as to law students.[17]

II. CONTRIBUTIONS OF THE SIXTH EDITION

The Sixth Edition will substantially improve comprehension of federal practice and procedure. Dean Kane provides incisive treatment of many recent developments in the sprawling discipline that constitutes federal courts. Moreover, she astutely retains the preceding editions' finest dimensions and wisely modifies or augments those parameters that

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[12] WRIGHT & KANE, *supra* note 4, at vii; *see also* Freer, *supra* note 1, at 957 n.2. *See generally* CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE (2002); *infra* note 26 and accompanying text.

[13] WRIGHT & KANE, *supra* note 4, at vii; *see also* Wallace, *supra* note 1, at 191 (restating ideas in Wright's preface). *See generally* Mary M. Schroeder & John P. Frank, *Grading the Gurus on Jurisdiction*, 61 TEX. L. REV. 203 (1982) (reviewing 13-20 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE, Jurisdiction and Related Matters).

[14] Freer, *supra* note 1, at 958; *accord* Schroeder & Frank, *supra* note 13, at 204 (declaring that book would be valuable for federal practitioner or judge); Wallace, *supra* note 1, at 191 (avowing that book is also useful for lawyers and judges).

[15] CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS ix (2d ed. 1970). *See generally* J. Braxton Craven, Jr., *Handbook of the Law of Federal Courts*, 49 N.C. L. REV. 229 (1970) (reviewing second edition).

[16] WRIGHT, *supra* note 15, at ix. This humility was Wright's convention. *See* Freer, *supra* note 1, at 971.

[17] *See* Freer, *supra* note 1, at 958 (outlining popularity of Wright's work and arguing that it "remains the single most useful volume in federal jurisdiction and procedure"). *See generally* Wallace, *supra* note 1 (agreeing with Freer and reviewing fourth edition).

change might enhance.

The book meticulously updates activities of the judiciary, lawmakers, and the rule revision entities. Dean Kane explores Supreme Court decisions that refine its abstention and state sovereign immunity jurisprudence and assesses a plethora of lower court determinations, particularly opinions that interpret new legislation related to discrete procedural areas. For instance, the author evaluates Congress' passage, as well as judges' interpretation, of the 1995 and 1998 private securities litigation reform legislation[18] and the 1996 Antiterrorism and Effective Death Penalty Act.[19]

Dean Kane correspondingly emphasizes important revisions to rules, such as civil rule 23's 1998 amendment, which permits discretionary review of class-certification decisions.[20] She analyzes the provision for appellate scrutiny and the evolution of criteria that will guide judicial discretion to entertain appeals.[21] Dean Kane also considers the major 2000 civil rules revisions concerning discovery.[22] She treats the changes in automatic disclosure, highlighting revocation of the 1993 amendment's specific authorization for all ninety-four district courts to

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[18] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified as amended in scattered subsections of 15 U.S.C. §§ 77-78 (2004)); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998) (codified as amended in scattered subsections of 15 U.S.C. §§ 77-78 (2004)); *see also* WRIGHT & KANE, *supra* note 4, at 523-34. For further analysis of these laws, see generally David M. Levine & Adam C. Pritchard, *The Securities Litigation Uniform Standards Act of 1998: The Sun Sets on California's Blue Sky Laws*, 54 BUS. LAW. 1 (1998); *Symposium on the Private Securities Litigation Reform Act of 1995*, 51 BUS. LAW. 975 (1996).

[19] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 18 U.S.C., 28 U.S.C., and 42 U.S.C. (2004)); *see also* WRIGHT & KANE, *supra* note 4, at 355-69. *See generally* Jordan Steiker, *Habeas Exceptionalism*, 78 TEX. L. REV. 1703 (2000) (analyzing effects of AEDPA on jurisdictional issues); Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1 (1997) (arguing that AEDPA illustrates problems in statutory design and interpretation).

[20] *See* Amendments to Federal Rules of Civil Procedure, 177 F.R.D. 530 (1998) (implementing FED. R. CIV. P. 23(f)).

[21] *See* WRIGHT & KANE, *supra* note 4, at 750 n.42, 764-65; *see also* FED. R. CIV. P. 23(f). *See generally* Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1794 n.3 (2002) (detailing history of recent amendments to Federal Rules of Civil Procedure, especially Rule 23).

[22] *See* WRIGHT & KANE, *supra* note 4, at 584, 590, 612; *see also* Amendments to the Federal Rules of Civil Procedure, 192 F.R.D. 340 (2000) (amending FED. R. CIV. P. 26 & 37, among others). *See generally* John Beckerman, *Confronting Civil Discovery's Fatal Flaw*, 84 MINN. L. REV. 505 (2000) (concluding that ordinary amendments have not remedied discovery rules' fundamental flaws); Carl Tobias, *The 2000 Federal Civil Rules Amendments*, 38 SAN DIEGO L. REV. 875 (2001) (detailing important aspects of 2000 amendments).

reject or modify the federal disclosure rule[23] and examines the revisions that narrow the scope of discovery and impose presumptive limitations on depositions.[24]

Numerous additional virtues suffuse Dean Kane's efforts. In particular, she documents and elucidates Congress' burgeoning procedural activity, a phenomenon Wright had earlier detected and adumbrated.[25] Surveying legislative adoption and judicial enforcement of procedures, she also illuminates the abstruse, sensitive interplay between the branches. Dean Kane facilitates research by maintaining her predecessor's tradition of including copious references to the multivolume treatise, an opus that Dean Kane now authors with other luminaries.[26] Moreover, she preserves the trenchant analysis and elegant phrasing that graced Wright's scholarship across four decades. In short, Dean Kane successfully perpetuates *Law of Federal Courts'* sterling reputation, which Wright's careful, diligent work sustained throughout his tenure.[27]

III. SUGGESTIONS FOR THE FUTURE

The foregoing assessment, especially the multifarious ways in which Dean Kane advances procedural knowledge, reveals the considerable difficulty of finding much to criticize in the Sixth Edition of *Law of Federal Courts*. Nonetheless, I can proffer several recommendations that might enhance this outstanding text, although these suggestions are comparatively minor or rather technical.

The arena of civil justice reform is illustrative. Dean Kane retains essentially intact the supplemental material appended to the Fifth Edition that treated passage and effectuation of the 1990 Civil Justice Reform Act (CJRA).[28] She could have addressed more thoroughly certain

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[23] *See* WRIGHT & KANE, *supra* note 4, at 612; *see also* 192 F.R.D. at 385 (removing subsections of FED. R. CIV. P. 26 that authorized local discovery rules).

[24] *See* WRIGHT & KANE, *supra* note 4, at 584, 590, 618-19; *see also* 192 F.R.D. at 388-90, 394-96 (amending subsections of FED. R. CIV. P. 26). *See generally* A. Morgan Cloud, *The 2000 Amendments to the Federal Discovery Rules and the Future of Adversarial Pretrial Litigation*, 74 TEMP. L. REV. 27 (2001) (concluding that 2000 amendments favor judicial management of pretrial litigation over attorney autonomy); sources cited *supra* note 22.

[25] *See* WRIGHT & KANE, *supra* note 4, at iii-iv, 355-57, 361, 366-69.

[26] *See id.* , at iv. It is "by far the most-cited treatise in the United States Reports; it has been called the procedural Bible for federal judges and practitioners." Ginsburg, *supra* note 2, at 1583.

[27] *See supra* note 4 and accompanying text.

[28] *See* WRIGHT & KANE, *supra* note 4, at 438-42; *see also* 28 U.S.C. §§ 471-78 (2004). *See generally* Lauren K. Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN.

subsequent developments. Perhaps most relevant is Congress' clear provision for the statute's 2000 expiration.[29] This legislation comprises a lone section in an arcane Federal Courts Improvement Act. To appreciate its import, however, readers must comprehend lawmakers' equally obscure action three years earlier as well as the terse CJRA legislative history.[30] Statutory implementation, in particular the effectiveness of measures that district courts applied, may also deserve greater exploration.[31]

Dean Kane might concomitantly have emphasized Congress' increasing procedural activities and some of their disadvantages. For example, the CJRA and the legislative tendency to impose new strictures, such as those included in the securities litigation reform acts, have further balkanized an already fractured practice. Civil process is now more Byzantine than at any time since Congress promulgated the original Federal Rules sixty-five years ago.[32] Professor Wright eloquently articulated this concern during his career.[33] Dean Kane could also have urged revitalization of the commands prescribed by the 1988 Judicial Improvements and Access to Justice Act and corresponding federal rules, through which Congress and the Supreme Court sought to rectify

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L. REV. 1447 (1994).

[29] *See* Pub. L. No. 106-518, § 206, 114 Stat. 2410, 2414 (2000) (codified as amended at 28 U.S.C. § 471 note (2004)). *See generally* Carl Tobias, *The Expiration of the Civil Justice Reform Act of 1990*, 59 WASH. & LEE L. REV. 541 (2002).

[30] *See* Pub. L. No. 105-53, § 2, 111 Stat. 1173 (1997) (codified as amended at 28 U.S.C. § 471 note (2004)); *see also* Carl Tobias, *Did the Civil Justice Reform Act of 1990 Actually Expire?*, 31 U. MICH. J.L. REFORM 887, 894 (1998) (describing unclear language and legislative history of 1997 Act). *See generally* Patrick Longan, *Congress, the Federal Courts and the Long Range Plan*, 46 AM. U. L. REV. 625, 665 (1997) (explaining CJRA's statutory requirements and assessing issue of expiration); Robel, *supra* note 28, at 1464-72 (describing interpretations and requirements of CJRA).

[31] *See, e.g.*, John Burritt McArthur, *Inter-Branch Politics and the Judicial Resistance to Federal Civil Justice Reform*, 33 U.S.F. L. REV. 551 (1999) (detailing CJRA's ineffectiveness); Carl Tobias, *Civil Justice Reform Sunset*, 1998 U. ILL. L. REV. 547, 566-69 (1998) (describing courts' implementation of CJRA's mandates and statute's efficacy). The perception of inefficacy may explain the limited analysis that Dean Kane accords these developments.

[32] *See, e.g.*, Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 377 (1992) (describing potential effect of local rule reform and convoluted nature of civil process); sources cited *supra* notes 28-31. *See generally supra* note 18 and accompanying text.

[33] *See generally* Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 10 (1994) (criticizing 1993 amendments to Federal Rules of Civil Procedure). *See* Comment, *The Local Rules of Civil Procedure in the Federal District Courts — A Survey*, 1966 DUKE L.J. 1011, 1012 n.6 (1966) (citing Letter from Professor Charles Alan Wright to *Duke Law Journal*, Nov. 16, 1965, criticizing authority of district court judges to adopt local standards as "soft underbelly" of federal procedure).

or ameliorate escalating fragmentation.[34] These mandates require that the Judicial Conference, the Circuit Judicial Councils, and the ninety-four districts scrutinize local provisos for consistency and redundancy with federal rules and statutes, to eliminate or alter those measures that the entities find inconsistent or repetitive.[35]

Finally, notwithstanding Dean Kane's allusion in the preface to many procedural developments that have happened since Professor Wright published the 1994 Fifth Edition, certain phenomena receive somewhat laconic treatment.[36] Most crucial is the brief evaluation afforded the Court's profound expansion of state sovereign immunity.[37] Dean Kane also accords the securities litigation legislation relatively terse assessment, but given the statutes' recent adoption, it may be premature to consider thoroughly their impact.[38]

CONCLUSION

Dean Mary Kay Kane has discharged with consummate skill the enormous responsibility of guaranteeing that *Law of Federal Courts'* Sixth Edition preserves Professor Charles Alan Wright's four-decade commitment to excellence. Her deft, careful treatment of this daunting assignment honors that tradition and represents a fitting testament to the enduring legacy of this prodigious scholar, who was a colossus in the legal profession.

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[34] *See, e.g.*, 28 U.S.C. §§ 332(d)(4), 2071 (2004) (detailing federal judicial rulemaking process); FED. R. CIV. P. 83 (requiring district courts to abrogate or modify conflicting and redundant local civil rules); FED. R. CRIM. P. 57 (imposing same requirements in context of local criminal rules).

[35] *See* Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 561-66 (2002) (identifying bodies that review local rules for consistency and duplication and duties imposed upon such entities). The Supreme Court has revoked authority for district courts to adopt local provisos that reject or modify federal discovery rules, a change that should foster consistency. *See supra* note 23 and accompanying text.

[36] *See supra* notes 6-7, 18-19 and accompanying text.

[37] *See* WRIGHT & KANE, *supra* note 4, at 295 n.6. Leading cases are *Alden v. Maine*, 527 U.S. 706 (1999) (invalidating provision of Fair Labor Standards Act purporting to authorize private actions against states in state courts without their consent) and *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (holding that Congress may only abrogate state sovereign immunity under very narrow circumstances). *See generally* JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002).

[38] *See* WRIGHT & KANE, *supra* note 4, at iii.