SUPREME COURT OF THE UNITED STATES

No. 93–1340

UNITED STATES, PETITIONER *v.*
GARY MEZZANATTO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[January 18, 1995]

JUSTICE SOUTER, with whom Justice STEVENS joins, dissenting.

This case poses only one question: did Congress intend to create a personal right subject to waiver by its individual beneficiaries when it adopted Rule 410 of the Federal Rules of Evidence and Rule 11(e)(6) of the Federal Rules of Criminal Procedure, each Rule providing that statements made during plea discussions are inadmissible against the defendant except in two carefully described circumstances? The case raises no issue of policy to be settled by the courts, and if the generally applicable (and generally sound) judicial policy of respecting waivers of rights and privileges should conflict with a reading of the Rules as reasonably construed to accord with the intent of Congress, there is no doubt that congressional intent should prevail. Because the majority ruling is at odds with the intent of Congress and will render the Rules largely dead letters, I respectfully dissent.

At first glance, the question of waivability may seem short on substance, given the unconditional language of the two virtually identical Rules, unsoftened by any provision for waiver or allusion to that possibility:

> "Except as otherwise provided in this rule, evidence . . . is not . . . admissible against the defendant who . . . was a participant in . . . plea discussions [of] . . . any statement made in the

> course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty . . . [subject to two stated exceptions].” Fed. Rule Evid. 410.

Believers in plain meaning might be excused for thinking that the text answers the question. But history may have something to say about what is plain, and here history is not silent. If the Rules are assumed to create only a personal right of a defendant, the right arguably finds itself in the company of other personal rights, including constitutional ones, that have been accepted time out of mind as being freely waivable. See, *e.g.*, *Johnson* v. *Zerbst*, 304 U. S. 458, 465 (1938) (Sixth Amendment right to counsel may be waived). The possibility that the Rules in question here do create such a personal right must, indeed, be taken seriously if for no other reason than that the Rules of Evidence contain other bars to admissibility equally uncompromising on their face but nonetheless waivable beyond any question. See Fed. Rule Evid. 802 (hearsay); Fed. Rule Evid. 1002 (best evidence).

The majority comes down on the side of waivability through reliance on the general presumption in favor of recognizing waivers of rights, including evidentiary rights. To be sure, the majority recognizes that the presumption does not necessarily resolve the issue before us, and the majority opinion describes some counter-examples of rights that are insulated against waiver, at least when waiver is expressly prohibited or limited in terms that speak of waiver expressly. See *Crosby* v. *United States*, 506 U. S. ___ (1993); *Smith* v. *United States*, 360 U. S. 1 (1959). Still, the majority seems to assume that the express-waiver cases describe the only circumstances in which the recognition of waiver is foreclosed, and since the Rules in question here say nothing about “waiver” as such, the majority finds that fact really to be the end of the matter.

If there were nothing more to go on here, I, too, would join the majority in relying on the fall-back rule of permissible waiver. But there is more to go on. There is, indeed, good reason to believe that Congress rejected the general rule of waivability when it passed the Rules in issue here, and once the evidence of such congressional intent is squarely faced, we have no business but to respect it (or deflect it by applying some constitutionally mandated requirement of clear statement). There is, of course, no claim in this case that Congress should be hobbled by any clear statement rule, and the result is that we are bound to respect the intent that the Advisory Committee Notes to the congressionally enacted Rules reveal. See *Williamson* v. *United States*, 512 U. S. ___, ___-___ (1994) (slip op., at 4–6) (KENNEDY, J., concurring in judgment) (citing cases in which Advisory Committee Notes are taken as authoritative evidence of intent).

The fact underlying those Notes, and the fact of which all congressional and judicial action must take account in dealing with the possible evidentiary significance of plea discussions, is that the federal judicial system could not possibly litigate every civil and criminal case filed in the courts. The consequence of this is that plea-bargaining is an accepted feature of the criminal justice system, and, "[p]roperly administered, it is to be encouraged." *Santobello* v. *New York*, 404 U. S. 257, 260 (1971). Thus the Advisory Committee's Notes on Rule 410 explained that "[e]xclusion of offers to plead guilty or *nolo* has as its purpose the promotion of disposition of criminal cases by compromise." 28 U. S. C. App., p. 750. "As with compromise offers generally, . . . free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it." *Ibid.* The Advisory Committee's Notes on Rule 11(e)(6) drew the same conclusion about the purpose of that

Rule and summed up the object of both Rules as being "to permit the unrestrained candor which produces effective plea discussions between the attorney for the government and the attorney for the defendant or the defendant when acting pro se." 18 U. S. C. App., p. 745 (1979 Amendment) (internal quotation marks omitted).

These explanations show with reasonable clarity that Congress probably made two assumptions when it adopted the Rules: pleas and plea discussions are to be encouraged, and conditions of unrestrained candor are the most effective means of encouragement. The provisions protecting a defendant against use of statements made in his plea bargaining are thus meant to create something more than a personal right shielding an individual from his imprudence. Rather, the Rules are meant to serve the interest of the federal judicial system (whose resources are controlled by Congress), by creating the conditions understood by Congress to be effective in promoting reasonable plea agreements. Whether Congress was right or wrong that unrestrained candor is necessary to promote a reasonable number of plea agreements, Congress assumed that there was such a need and meant to satisfy it by these Rules. Since the zone of unrestrained candor is diminished whenever a defendant has to stop to think about the amount of trouble his openness may cause him if the plea negotiations fall through, Congress must have understood that the judicial system's interest in candid plea discussions would be threatened by recognizing waivers under Rules 410 and 11(e)(6). See ABA Standards for Criminal Justice 14–3.4, commentary (2d ed. 1980) (a rule contrary to the one adopted by Congress "would discourage plea negotiations and agreements, for defendants would have to be constantly concerned whether, in light of their plea negotiation activities, they could successfully defend on the merits if a plea ultimately was not

entered"). There is, indeed, no indication that Congress intended merely a regime of such limited openness as might happen to survive market forces sufficient to supplant a default rule of inadmissibility. Nor may Congress be presumed to have intended to permit waivers that would undermine the stated policy of its own Rules. *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 704 (1945) ("Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate").

It bears emphasizing that I would not suggest that there is only one reasonable balance possible between society's interest in encouraging compromise (which Congress thought to be served most effectively by refusing to recognize waivers of rights under these Rules) and society's interest in providing a vigorous adversary system when cases are tried (which may be served by recognizing waivers). The majority may be right that a better balance could have been struck than the one Congress intended. The majority may also be correct as a matter of policy that enough pleas will result even if parties are allowed to make their own rule of admissibility by agreement, with prosecutors refusing to talk without a defendant's waiver (unless such refusal overloads the system beyond its capacity for trials) and defendants refusing to waive (unless they are desperate enough to forgo their option to be tried without fear of compromising statements if the plea negotiations fail). But whether the majority is right or wrong on either score is beside the point; the policy it endorses is not the policy that Congress intended when it enacted the Rules. See *Touche Ross & Co.* v. *Redington*, 442 U. S. 560, 578 (1979) ("The ultimate question is one of congressional intent, not one of whether this Court thinks that it can improve upon

the statutory scheme that Congress enacted into law").

The unlikelihood that Congress intended the modest default rule that the majority sees in Rules 11(e)(6) and 410 looms all the larger when the consequences of the majority position are pursued. The first consequence is that the Rules will probably not even function as default rules, for there is little chance that they will be applied at all. Already, standard forms indicate that many federal prosecutors routinely require waiver of Rules 410 and 11(e)(6) rights before a prosecutor is willing to enter into plea discussions. Pet. for Cert. 10–11. See also *United States* v. *Stevens*, 935 F. 2d 1380, 1396 (CA3 1991) ("Plea agreements . . . commonly contain a provision stating that proffer information that is disclosed during the course of plea negotiations is . . . admissible for purposes of impeachment"). As the Government conceded during oral argument, defendants are generally in no position to challenge demands for these waivers, and the use of waiver provisions as contracts of adhesion has become accepted practice.[1] Today's decision can only speed the heretofore illegitimate process by which the exception has been swallowing the Rules. See, *e.g.*, *Guidry* v. *Sheet Metal Workers Nat. Pension Fund*, 493

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[1]The argument that the plea-bargaining system still works even though waiver has become the accepted practice does not answer the question whether Congress intended to permit a waiver rule. The Court's obligation is to interpret criminal procedure and evidentiary rules according to congressional intent. If the Government believes that the better rule is different from what is currently the law, the Government can petition Congress to change it. See *TVA* v. *Hill*, 437 U. S. 153, 194 (1978) ("Our individual appraisal of the wisdom or unwisdom of a particular course consciously selected by the Congress is to be put aside in the process of interpreting a statute").

U. S. 365, 377 (1990) (no exception should be made by Court because it would be too difficult to "carve out an exception that would not swallow the rule"); *United States* v. *Powell*, 469 U. S. 57, 68 (1984) (respondent's suggested exception to the *Dunn* rule "threatens to swallow the rule"). See also 23 C. Wright & K. Graham, Federal Practice and Procedure 121–122, n. 7.3 (1994 pocket part) ("It would seem strange if the prosecutor could undermine the judicial policy, now endorsed by Congress, of encouraging plea bargaining by announcing a policy that his office will only plea bargain with defendants who `waive' the benefits of Rule 410"). Accordingly, it is probably only a matter of time until the Rules are dead letters.

The second consequence likely to emerge from today's decision is the practical certainty that the waiver demanded will in time come to function as a waiver of trial itself. It is true that many (if not all) of the waiver forms now employed go only to admissibility for impeachment.[2] But although the erosion of the Rules has begun with this trickle, the majority's reasoning will provide no principled limit to it. The Rules draw no distinction between use of a statement for impeachment and use in the Government's case in chief. If objection can be waived for impeachment use, it can be waived for use as affirmative evidence, and if the government can

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[2]Waiver for impeachment use, however, has been applied broadly. For example, plea statements have been used to impeach a defendant's witnesses even where the defendant has chosen not to testify. See *United States* v. *Dortch*, 5 F. 3d 1056, 1069 (CA7 1993), cert. pending *sub nom. Suess* v. *United States*, No. 93–7218 ("[J]ust as the defendant must choose whether to protect the proffer statements by not taking the stand, the defendant must choose whether to protect the proffer by carefully determining which lines of questioning to pursue with different witnesses").

effectively demand waiver in the former instance, there is no reason to believe it will not do so just as successfully in the latter. When it does, there is nothing this Court will legitimately be able to do about it. The Court is construing a congressional Rule on the theory that Congress meant to permit its waiver. Once that point is passed, as it is today, there is no legitimate limit on admissibility of a defendant's plea negotiation statements beyond what the Constitution may independently impose or the traffic may bear. Just what the traffic may bear is an open question, but what cannot be denied is that the majority opinion sanctions a demand for waiver of such scope that a defendant who gives it will be unable even to acknowledge his desire to negotiate a guilty plea without furnishing admissible evidence against himself then and there. In such cases, the possibility of trial if no agreement is reached will be reduced to fantasy. The only defendant who will not damage himself by even the most restrained candor will be the one so desperate that he might as well walk into court and enter a naked guilty plea. It defies reason to think that Congress intended to invite such a result, when it adopted a Rule said to promote candid discussion in the interest of encouraging compromise.