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ARE THE 2011 CHANGES TO FEDERAL RULES OF EVIDENCE 413-415 INVALID? THE RULES ENABLING ACT AND THE DRAFTERS' DEFINITION OF "STYLISTIC"

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On December 1, 2011, a set of purportedly stylistic changes to the Federal Rules of Evidence went into effect.¹ This article sets forth arguments that the 2011 changes to Rules 413, 414, and 415 of the Federal Rules of Evidence are invalid. Part I describes the three rules and their history. Part II raises and addresses three questions about the validity of the 2011 changes to these three rules, concluding that: (1) when Congress excluded the judicial branch from the process of adopting these rules in 1994, that exclusion was not permanent, so as to preclude the Supreme Court from amending the rules; (2) the 2011 changes are actually substantive, rather than "stylistic," as the drafters of the 2011 changes define that term; and (3) the 2011 changes to Rules 413 - 415 enlarge substantive rights and thereby violate the Rules Enabling Act. Part III recommends a solution.

I. THE TEXT, ADOPTION, AND INTERPRETATION OF FEDERAL RULES OF EVIDENCE 413, 414, AND 415

The three rules that are the subject of this article address the admissibility, in sex offense trials, of evidence of other sex offenses committed by the accused. Rule 413 addresses the admissibility, in a criminal trial for sexual assault, of evidence that the defendant has committed another offense or offenses of sexual assault.² Rule 414 addresses the admissibility, in a criminal trial for child molestation, of evidence that the defendant has committed another offense or offenses of child mo-

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1. U.S. COURTS, Supreme Court Approved Rules Amendments, (April 26, 2011), <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PendingRules/SupremeCourt042611.aspx> (last visited Feb. 20, 2012).

2. FED. R. EVID. 413.

lestation.³ Rule 415 addresses the admissibility, in a civil trial within the scope of that rule, of either type of evidence.⁴

When the Federal Rules of Evidence were initially adopted in 1975, no special rules regarding the admissibility of other offenses of sexual assault or child molestation were proposed or included.⁵ In fact, the rules as originally adopted incorporated the common law's⁶ general prohibition against using evidence of any prior offense to prove propensity, a prohibition that courts have applied with consistency both before and after adoption of the Federal Rules of Evidence in 1975.⁷

3. FED. R. EVID. 414.

4. FED. R. EVID. 415.

5. See Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (as originally enacted); See also *United States v. Roberts*, 88 F.3d 872, 876 (10th Cir. 1996) (per curiam) (explaining that Rule 413's recent addition to the Federal Rules "provides a specific admissibility standard in sexual assault cases, replacing Fed. R. Evid. 404(b)'s general criteria."); David P. Leonard, *The Federal Rules of Evidence and the Political Process*, 22 *FORDHAM URB. L.J.* 305, 305 (Winter 1995) (surveying "Congress's boldest move to date" in proposing Rules 413-415 and how they are in contrast to the traditional treatment of character evidence); Jeffrey G. Pickett, *The Presumption of Innocence Imperiled: The New Federal Rules of Evidence 413-415 and the Use of Other Sexual-Offense Evidence in Washington*, 70 *WASH. L. REV.* 883, 883 (July 1995) (examining the arguments for and against the proposed rules and concluding that they are "too broad to fairly govern the use of such potentially prejudicial evidence."); Debra Sherman Tedeschi, Comment, *Federal Rule of Evidence 413: Redistributing "The Credibility Quotient"*, 57 *U. PITT. L. REV.* 107, 126 (Fall 1995) (examining the issue of admitting similar offense evidence in the criminal trials of defendants charged with sexual assault and concluding that Rule 413 "should be viewed as a balancing of the interests of women victims against those of defendants.");

6. See FED. R. EVID. 404 advisory committee's notes ("[T]he criminal rule [against admitting character evidence] is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence."); See also *Michelson v. United States*, 335 U.S. 469, 489 (1948) (Rutledge, J., dissenting) (discussing the common law tradition of "excluding the Government from showing the defendant's bad general character or reputation."); *Wynne v. Renico*, 606 F.3d 867, 873 (6th Cir. 2010) ("Rule 404(b) was born of the common law in an effort to protect parties from wrongful inferences derived from character evidence."); *United States v. Rogers*, 587 F.3d 816, 818 (7th Cir. 2009) (explaining that Rule 413 "altered the longstanding ban on propensity evidence in criminal trials so that, in trials for sexual assault, similar conduct is admissible . . ."); *United States v. Lucas*, 357 F.3d 599, 611 (6th Cir. 2004) (Rosen, J., concurring) ("Rule 404(b)'s basic rule of exclusion—that evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith—has its source in the common law."); *United States v. Johnson*, 27 F.3d 1186, 1191 (6th Cir. 1994) (discussing Rule 404(b) and explaining that it "merely codified the common law" rule against admitting evidence of other acts "to prove intent unless the defendant places intent in issue or intent is not inferable from proof of the criminal act itself."); *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982) (explaining that Rule 404(b) "codifies the common law doctrine forbidding the prosecution from asking the jury to infer from the fact that the defendant has committed a bad act in the past, that he has a bad character and therefore is more likely to have committed the bad act now charged."); *Coulston v. United States*, 51 F.2d 178, 180 (10th Cir. 1931) ("The inference [that a person who has committed one crime is apt to commit another] is so slight, the unfairness to the defendant so manifest . . . and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible.");

7. See, e.g., *Spencer v. Texas*, 385 U.S. 554, 574 (1967) (examining relevant case law and finding that such "suggest[s] that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause."); *Michelson*, 335 U.S. at 475

Rules 413-415, as adopted by Congress in 1994 over the strenuous objection of the federal judiciary,⁸ specifically provided that evidence of other offenses of sexual assault and child molestation were admissible to prove propensity.⁹ In fact, the 1994 rules (effective in 1996) allowed the admission of such evidence not only to prove propensity, but for its bearing on any matter as to which it was relevant.¹⁰

(“The State may not show defendant’s prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime.”); *United States v. Clark*, 377 F. App’x 451 (6th Cir. 2010) (holding evidence that shooting victim had been convicted of violent felonies was not admissible, in a prosecution for felon in possession of a firearm, to show the victim had a propensity for violence); *United States v. Klebig*, 600 F.3d 700, 722 (7th Cir. 2009) (reversing defendant’s conviction because, *inter alia*, the government improperly introduced character evidence without which “the prosecution’s case . . . would have been considerably weaker.”); *United States v. Farmer*, 583 F.3d 131 (2d Cir. 2009) (holding it was error for the government to elicit testimony of the defendant’s nickname “Murder,” in a trial for murder as it violated Rule 404 because identity was not at issue, the nickname had no legitimate relationship to the crimes charged, and the nickname was strongly suggestive of a criminal disposition); *United States v. Woody*, 250 F. App’x 867, 885 (10th Cir. 2007) (*per curiam*) (reversing Defendant Henry’s conviction of second-degree murder because “the district court’s erroneous admission of evidence showing [defendant]’s general propensity toward violent behavior placed the underlying fairness of the entire trial in doubt.”); *Washington v. Hofbauer*, 228 F.3d 689, 699 (6th Cir. 2000) (reversing a district court decision denying habeas corpus to defendant in part because the prosecutor improperly emphasized evidence of the defendant’s bad character in contrast to the “fundamental rule of evidence [providing] that a defendant’s ‘bad character’ cannot be used to argue that the defendant committed the crime for which he is being tried, or had the propensity to commit that crime.”).

8. See Judicial Conference of the United States, *Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases*, 159 F.R.D. 51, 52-53 (1995) (urging Congress to reconsider the adoption of the rules, noting that “the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence”; that “[t]he overwhelming majority of judges, lawyers, law professors, and legal organizations who responded [by public comment] opposed [the new rules]”; and that “[i]t is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees. . . . Indeed, the only supporters of the Rules were representatives of the Department of Justice.”).

9. See FED. R. EVID. 413-415; Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37 (showing Rules 413-415 as originally adopted).

10. See *United States v. Holy Bull*, 613 F.3d 871, 873 (8th Cir. 2010) (“After the adoption of Rule [] . . . 414, in sexual assault and child molestation cases, evidence that the defendant committed a prior similar offense ‘may be considered for its bearing on any matter to which it is relevant,’”) (quoting Fed. R. Evid. 414(a)); *Rogers*, 587 F.3d at 821 (7th Cir. 2009) (“Rule 413 alters [the] general prohibition [against the use of prior conduct to establish propensity] by permitting the admission of a prior offense of sexual assault ‘for its bearing on any matter to which it is relevant’”) (quoting Fed. R. Evid. 413(a)); *United States v. Sioux*, 362 F.3d 1241, 1244 n. 4 (9th Cir. 2004) (“Rule 415(a) . . . renders the evidentiary standards established by Rules 413 and 414 operative in civil cases”); *United States v. Gabe*, 237 F.3d 954, 959 (8th Cir. 2001) (explaining that since the adoption of Rule 414 “evidence that the defendant committed a prior similar offense ‘may be considered for its bearing on any matter to which it is relevant,’ including the defendant’s propensity to commit such offenses.”) (quoting Fed. R. Evid. 413(a) 414(a)); *United States v. Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998) (stating that the requirement of relevance is applicable to all evidence pursuant to Rule 402 and that “[u]nder Rule 413 . . . evidence of a defendant’s other sexual assaults may be admitted ‘for its bearing on any matter to which it is relevant.’”) (quoting Fed. R. Evid. 413) (italics included).

From the time of its effective date in 1996 until the change in 2011, Rule 413 provided:

In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.¹¹

The parallel rule for child molestation, Rule 414, provided the following from the time of its effective date in 1996 until the change in 2011:

In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant. This rule shall not be construed to limit the admission or consideration of evidence under any other rule.¹²

The rule applicable to civil cases, also effective from 1996 until 2011, provided the following:

In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.¹³

These three rules flew in the face of the general ban against using prior crimes or bad acts to prove propensity.¹⁴ For that reason, the Judicial Conference of the United States,¹⁵ adopting the recommendation of its Advisory Committee on Evidence Rules¹⁶ in submitting the report provided for in Public Law No. 103-322,¹⁷ opposed adoption of the three rules and urged Congress to reconsider the rules.¹⁸ The opposition expressed by the Advisory Committee on Evidence Rules

11. FED. R. EVID. 413 (1996).

12. FED. R. EVID. 414 (1996).

13. FED. R. EVID. 415 (1996).

14. See *Infra* at notes 103, 123.

15. Judicial Conference of the United States, *supra* note 8.

16. See Memorandum from Hon. Ralph K. Winter, Chair, Advisory Comm. on Evidence Rules, to Hon. Alicemarie H. Stotler, Chair, and Members of the Standing Committee on Rules of Practice and Procedure, available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/EV11-1994.pdf> (Nov. 22, 1994) (last accessed Jan. 21, 2012) ("[W]e are concerned that the enacted rules may work to diminish significantly the policies established by long standing rules and case law guarding against undue prejudice to persons accused in criminal cases and parties in civil cases.").

17. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(d), 108 Stat. 1796, 2137 (providing that the version laid out by Congress in this law would become effective regardless of the recommendations by the Judicial Conference).

18. See Memorandum from Hon. Ralph K. Winter to Hon. Alicemarie H. Stotler, *supra* note 16.

was shared by the Judicial Conference's Advisory Committees on Rules of Civil and Criminal Procedure¹⁹ and its Standing Committee.²⁰ The Judicial Conference's Advisory Committee on Evidence Rules expressed five concerns about the proposed rules: first, that the considerations which motivated those rules were already addressed by Rule 404(b), which allows evidence of prior bad acts when offered for a purpose other than proving propensity;²¹ second, that the rules were not supported by empirical evidence—almost certainly an expression of doubt regarding the view (on which Congress apparently relied in adopting these three rules in 1994) that sex offenders have a higher rate of recidivism than other offenders;²² third, that the rules would “diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice, [thus creating] the danger of convicting a criminal defendant for past . . . behavior or for being a bad person[;]”²³ fourth, that time-consuming trials within a trial might result because the three

19. See Judicial Conference of the United States, *supra* note 8, at 52-53. (“[T]he Judicial Conference’s Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules reviewed the rules at separate meetings in October 1994.” Both advisory committees “unanimously, except for representatives of the Department of Justice . . . opposed the new rules.”); Minutes, Advisory Committee on Civil Rules, 24 (Oct. 20-21, 1994), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/CV10-1994.pdf> (last accessed Jan. 21, 2012) (“Substantial discomfort was expressed with the substance of the Congressional provisions.”); Minutes, Advisory Committee on Federal Rules of Criminal Rules of Procedure (Oct. 6-7, 1994), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/cr10-6.htm> (last accessed Jan. 21, 2012) (“[T]he Committee . . . noted its deep concern over the last minute addition of key evidence rules which will in effect drastically change the rules governing the admissibility of other offense, or extrinsic act, evidence — a controversial and complicated topic in its own right. There was a general consensus that the Congress should be apprised of that concern and the need for initial input from the Judicial Conference before such rules are promulgated.”).

20. See Judicial Conference of the United States, *supra* note 8, at 53. (“After the advisory committees reported, the Standing Committee unanimously, again except for the representative of the Department of Justice, agreed with the view of the advisory committees.”); Minutes, Committee on Rules of Practice and Procedure, 13 (Jan. 11-13, 1995), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST01-1995.pdf> (last accessed Jan. 21, 2012) (noting that the Committee would express its opposition to the new rules to Congress and that if Congress wished to proceed the Committee would encourage Congress to substitute “corrected and improved language drafted by the Advisory Committee on the Rules of Evidence.”).

21. See Judicial Conference of the United States, *supra* note 8, at 53. See also Minutes, Advisory Committee on Evidence Rules (Oct. 17-18, 1994), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ev10-17.htm> (last visited Jan. 21, 2012).

22. *Id.*; See Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 578 (1997) (“Advocates of Rule 413 also unabashedly and without proof suggest that rapists are more likely than other criminals to repeat their acts. The evidence that we have is to the contrary. A 1989 Bureau of Justice Statistics recidivism study found that only 7.7% of released rapists were rearrested for rape. In contrast, 33.5% of released larcenists were rearrested for larceny; 31.9% of released burglars were rearrested for burglary; and 24.8% of drug offenders were rearrested for drug offenses. Only homicide had a lower recidivism rate than rape.”) (footnotes omitted).

23. Judicial Conference of the United States, *supra* note 8, at 53.

rules do not require that there be a conviction in order for evidence of the other offense to be offered;²⁴ and fifth, that Congress's stark "is admissible" language appeared to free prosecutors (and parties offering evidence of other offenses in civil cases) from the strictures of such provisions as Rule 403, which requires the trial judge to weigh the probative value of evidence against the danger of unfair prejudice.²⁵

Because of these concerns, the Judicial Conference's Advisory Committee on Rules of Evidence voted to oppose Congress's three new rules, and that vote was nearly unanimous. The only dissenting votes were from the representatives of the nation's law-enforcement agency, the Department of Justice.²⁶ The Judicial Conference's Advisory Committees on civil and criminal procedure opposed the three proposed rules with the same level of near unanimity. The rules became law, nevertheless. The act²⁷ by which Congress adopted them did not allow any effectual report or input from the judiciary—the branch which ordinarily has the authority, pursuant to the Rules Enabling Act,²⁸ to proscribe rules of procedure and evidence, which then become law in the absence of action by Congress.

The language of these rules as enacted by Congress in 1994 appears absolute. Each provides that the evidence "is admissible."²⁹ In recommending that Congress not adopt the rules, the Advisory Committee on Rules of Evidence noted that the absolutist language could be interpreted as precluding even a weighing of unfair prejudice against probative value.³⁰ The concern was valid; indeed, the language of the rules does not appear to leave room within which a trial court can act to exclude even that evidence which is plainly inadmissible, such as a hearsay statement not within any exception, asserting that the defendant committed another offense of sexual assault or child molestation.³¹ In fact, this absolutist language has not resulted in the automatic admission that it appears to require. It has resulted, however, in a lack of consistency. The United States Courts of Appeal have not been entirely uniform in interpreting and applying these rules. There appear to be significant differences among the circuits on at least three important questions: first, what constitutes "evidence that the defendant committed any other [sexual assault or child moles-

24. Minutes, Advisory Committee on Evidence Rules, *supra* note 21.

25. *Id.*

26. Judicial Conference of the United States, *supra* note 8, at 52.

27. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(c), 108 Stat. 1796, 2137 (recommendations made by the Judicial Conference exempt from the Rules Enabling Act).

28. U.S.C. § 2071 (2006).

29. FED. R. EVID. 413-415.

30. See Judicial Conference of the United States, *supra* note 8, at 56.

31. See FED. R. EVID. 609 (governing the use of evidence of prior convictions).

tation]?[;]" second, how is Federal Rule of Evidence 403 to be applied to evidence within the sweep of one of these three rules?; and third, what degree of similarity is required between the charged act and the other offense in order for the other offense to be admissible?

The first question—what constitutes “evidence that the defendant committed any other [offense]?”—requires determining the meaning of “other offense” referred to in each of the three rules respectively. There are two different interpretations among the circuits. The Eighth Circuit has held that the defendant need not have been charged and that nothing is required beyond evidence sufficient to support a reasonable jury in finding by a preponderance of the evidence that the defendant in fact committed the other act.³² The Seventh Circuit rule is different; it provides that the defendant must actually have been charged with the prior act and that a verbal assertion by a witness is not enough.³³

The second question on which the circuit courts of appeal differ is how Rule 403’s weighing of probative value and unfair prejudice should be conducted with regard to evidence offered pursuant to Rules 413, 414, and 415. It is well settled that the “is admissible” language in the pre-2011 rules does not preclude the court’s analysis of the evidence pursuant to Rule 403.³⁴ There is less agreement, how-

32. *United States v. Contentos*, 651 F.3d 809 (8th Cir. 2011) (holding no abuse of discretion in allowing uncharged incident of sexual abuse in trial for sexual exploitation and possession of child pornography); *See* FED. R. EVID. 104(a) (conditional relevance); *Huddleston v. United States*, 485 U.S. 681 (1988) (stating the fact on which relevance is conditioned is adequately established if there is sufficient evidence for a reasonably jury to find by a preponderance of the evidence that the fact exists).

33. *United States v. Courtright*, 632 F.3d 363 (7th Cir. 2011) (holding evidence of defendant’s prior conviction for aggravated sexual abuse not admissible under Rule 413 because although defendant had been verbally accused of sexual assault during the course of investigation into his child pornography offenses, he was not charged with an offense of sexual assault) *as amended on denial of reh’g and reh’g en banc* (Apr. 12, 2011), *cert. denied*, 132 S. Ct. 296 (U.S. 2011); *But see* *United States v. Price*, No. 09-30107, 2011 WL 3859700 (C.D. Ill. Sept. 1, 2011) (granting in part the Government’s motion to reconsider the admission of other acts of child molestation explaining that an accusation of uncharged molestation is admissible under Rule 414).

34. *See* *Martinez v. Cui*, 608 F.3d 54, 60 (1st Cir. 2010) (“We agree with the conclusion, universal among the courts of appeals, that nothing in Rule 415 removes evidence admissible under that rule from Rule 403 scrutiny.”); *United States v. Carino*, 368 F. App’x 929, 930 (11th Cir. 2010) (“Evidence admissible under Rule 414 must also meet the requirements of other provisions of the Federal Rules of Evidence, including Rule 403.”); *United States v. Kelly*, 510 F.3d 433, 437 (4th Cir. 2007) (“[A]s is true of all admissible evidence, evidence admitted under Rule 414 is subject to Rule 403’s balancing test.”); *United States v. Hawpetoss*, 478 F.3d 820, 824 (7th Cir. 2007) (“We already have held that the admissibility of evidence under Rule 413 does not ‘displace the court’s authority pursuant to Rule 403 to exclude evidence of a prior assault if its probative value is substantially outweighed by the danger of unfair prejudice.’”) (quoting *United States v. Julian*, 427 F.3d 471, 487 (7th Cir. 2005)); *United States v. Guidry*, 456 F.3d 493, 503 (5th Cir. 2006) (“A district court must apply the Rule 403 balancing test when considering the admission of evidence under Rule 413”); *United States v. Seymour*, 468 F.3d 378, 385 (6th Cir. 2006) (“Rule 403, which balances the probative value of relevant evidence against the ‘dan-

ever, as to whether and how Rules 413, 414 and 415 change the analysis under Rule 403. Specifically, the circuit courts of appeal differ on whether the trial court may consider the propensity nature of the evidence as unfair prejudice for purposes of the Rule 403 weighing. The Seventh Circuit, for example, has held, “[b]ecause Rule 413 identifies this propensity evidence as proper, the chance that the jury will rely on that inference can no longer be labeled as ‘unfair’ for purposes of the Rule 403 analysis.”³⁵ The Eighth Circuit has taken a position similar to that of the Seventh Circuit, holding that Rules 413 and 414 are subject to the Rule 403 analysis, but that “Rule 403 must be applied in this context in a manner that permits Rules 413 and 414 to have their intended effect, namely, to permit the jury to consider a defendant’s prior bad acts in the area of sexual abuse or child molestation for the purpose of showing propensity.”³⁶ In a different decision, the Eighth Circuit stated this rule even more strongly, holding, “the inflammatory potential inherent in the sexual nature of prior sexual offenses cannot be considered in evaluating the admissibility of evidence under Rule 413.”³⁷

Not all of the circuit courts of appeal, however, have expressly removed the propensity nature of Rule 413-15 evidence from the unfair-prejudice side of the Rule 403 scales. The Courts of Appeal for the

ger of unfair prejudice, confusion of the issues, or misleading the jury,” applies to evidence that would be otherwise admissible under [the Rules].”); *Johnson v. Elk Lake Sch. Dist.*, 283 F.3d 138, 155 (3d Cir. 2002) (“It appears from the legislative history of Rules 413-15, however, that despite the seemingly absolutist tone of the ‘is admissible’ language, Congress did not intend for the admission of past sexual offense evidence to be mandatory; rather, Congress contemplated that Rule 403 would apply to Rules 413-15.”); *United States v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (“[W]e have recently held that the balancing test of Rule 403 continues to apply to [Rules 413-415], and that district judges retain the discretion to exclude evidence that is far more prejudicial than probative.”); *United States v. Mound*, 149 F.3d 799, 800 (8th Cir. 1998) (“In considering evidence offered under Rules 413, 414, and 415, a trial court must still apply Rule 403, though in such a way as ‘to allow [the new rules their] intended effect.’”) (alteration in original) (quoting *United States v. LeCompte*, 131 F.3d 767, 769 (8th Cir. 1997); *United States v. Guardia*, 135 F.3d 1326, 1329 (10th Cir. 1998) (“[T]he Rule 403 balancing test applies to evidence submitted under Rule 413.”); *United States v. Larson*, 112 F.3d 600, 604-05 (2d Cir. 1997) (“We view Rule 403 analysis in connection with evidence offered under Rule 414 to be consistent with Congress’s intent as reflected in the legislative history [of the Rules].”).

35. *United States v. Rogers*, 587 F.3d 816, 822 (7th Cir. 2009) (explaining defendant’s prior conviction and prior conduct were relevant, but it was unclear whether district court properly determined defendant’s prior conviction and prior conduct were unfairly prejudicial); *See also United States v. Loughry*, 660 F.3d 965, 969-970 (7th Cir. 2011) (stating that Congress has determined that it is not improper to draw the propensity inference to evidence covered by Rule 414).

36. *United States v. Benais*, 460 F.3d 1059, 1063 (8th Cir. 2006) (holding probative value of witness’s testimony that defendant raped her on same day as charged offense was not substantially outweighed by danger of unfair prejudice).

37. *United States v. Med. Horn*, 447 F.3d 620, 623 (8th Cir. 2006) (holding admission of testimony about uncharged incidents of sexual assault of minors was warranted); *See United States v. McKinney*, 345 F. App’x 206 (8th Cir. 2009) (explaining Rule 414 evidence is subject to 403, but the fact that Rule 414 evidence suggests propensity does not mean it violates Rule 403).

First, Second, Third, Fourth, Ninth and Tenth Circuits, when addressing the Rule 403 weighing of evidence admitted pursuant to Rules 413-415, have not stated that the propensity nature of the evidence is “off limits” in weighing unfair prejudice. The Third Circuit, for example, has held that in some “archetypical”³⁸ cases, the evidence should be admitted, but where the other act is proven with less specificity and is insufficiently similar to the charged act, then Rule 403 may require exclusion.³⁹ The First Circuit has expressly held that the Rules do not change the 403 balancing test.⁴⁰ The Tenth Circuit has held that even in cases involving evidence offered pursuant to Rule 413 or 414, “propensity evidence is certainly suspect because of the risk that the jury will convict the defendant on the basis of uncharged behavior,”⁴¹ and that “while Rule 413 removes the per se exclusion of character evidence, courts should continue to consider the traditional reasons for the prohibition of character evidence as ‘risks of prejudice’ weighing against admission.”⁴²

In a separate but related line of cases, the Tenth Circuit, while still not removing propensity from the unfair-prejudice side of the Rule 403 scale, has provided a more extensive discussion of factors that should be considered in determining the extent to which the evidence presents the danger of unfair prejudice. The Tenth Circuit specified that the Rule 403 weighing in such cases should not be restrained. For example, in one of its earliest rulings on any of these three rules, the Tenth Circuit held that courts should not exclude the evidence simply because character evidence has traditionally been too prejudicial for admission, nor should courts perform a restrained Rule 403 analysis based on the belief that Rule 413 embodies a legislative judgment that propensity evidence regarding sexual assaults is never too prejudicial or confusing and should generally be admitted.⁴³ The Tenth Circuit declared that both extremes should be avoided in evaluating the evidence.⁴⁴ In what might be considered a significant departure from Congress’s “is admissible” language, the Tenth Circuit applied not just

38. *Johnson*, 283 F.3d at 155-56.

39. *Id.* at 156. (noting that Rule 403 is, at its core, a discretionary rule which gives the trial court significant latitude to exclude evidence).

40. *Martinez v. Cui*, 608 F.3d 54, 60 (1st Cir. 2010) (“We reject these approaches and have no reason to adopt special rules constraining district courts’ usual exercise of discretion under Rule 403 when considering evidence under Rule 415 . . .”) (citations omitted).

41. *United States v. Castillo*, 188 F.3d 519, No. 98-2191 (10th Cir. 1999) (holding that the district court fully properly applied the Rule 403 balancing test and did not abuse its discretion by determining that the evidence was not unfairly prejudicial). (citation omitted).

42. *United States v. Guardia*, 135 F.3d 1326, 1330 (10th Cir. 1998).

43. *Id.* at 1331 (“When balancing Rule 413 evidence under 403 . . . the district court should not alter its normal process of weighing the probative value of the evidence against the danger of unfair prejudice.”)

44. *Id.*

one set of factors, but three separate sets of factors in conducting the Rule 403 weighing. The first set includes factors to be considered in conducting the Rule 403 balancing test: “1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence.”⁴⁵

The second set of factors is used to analyze the “probative dangers” of admitting the evidence; it includes: ” 1) how likely is it such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct.”⁴⁶

The third list of factors to be considered in applying Rule 403 to evidence offered pursuant to Rules 413, 414 and 415 is to guide courts in assessing the probative nature of the evidence and includes the following: “(1) the similarity of the prior acts and the charged acts, (2) the time lapse between the other acts and the charged acts, (3) the frequency of the prior acts, (4) the occurrence of intervening events, and (5) the need for evidence beyond the defendant’s and alleged victim’s testimony.”⁴⁷

The Tenth Circuit’s twelve-factor test leads to the third question on which there is disagreement among the circuits, because the disagreement arises from one of the Tenth Circuit’s factors: the similarity between the charged offense and the other offense. The more similar they are, the more likely evidence of the other act(s) will be admitted. Often, the similarity is so great that the courts rely not only on Rule

45. *United States v. Mann*, 193 F.3d 1172, 1174 (10th Cir. 1999).

46. *Id.* (holding that the admission of evidence of uncharged acts of child molestation under Rule 414 was not an abuse of discretion) (citing *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998)). The unusual phrase “probative dangers” primarily appears in 10th Circuit cases. *See Enjady*, 134 F.3d at 1433 *opinion clarified*, No. 96-2285, 1998 WL 133994 (10th Cir. Mar. 25, 1998) (holding probative value of witness testimony concerning prior sexual abuse by defendant was not substantially outweighed by the potential for unfair prejudice) (citing Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 Am. Crim. L. Rev. 57, 59 (1995)); *See also United States v. Velarde*, 88 F. App’x 339, 343 (10th Cir. 2004); *United States v. Sandoval*, 410 F. Supp. 2d 1071, 1076 (D.N.M. 2005) (allowing the prosecution to admit evidence of other child molestation offenses under Rule 414 in prosecution for similar subsequent offense, but requiring the court to give a limiting instruction to the jury to minimize the risk involved of unfair prejudice); *United States v. Allison*, 414 F.2d 407, 411 (9th Cir. 1969) (“The exercise of this discretion necessarily requires a ‘balancing of intangibles— probative values against probative dangers.’”) (citation omitted); *United States v. Burch*, 490 F.2d 1300, 1303 (8th Cir. 1974) (“This balancing of intangibles— probative values against probative dangers—is so much a matter where wise judges in particular situations may differ that a leeway of discretion is generally recognized.”) (citations omitted).

47. *Guardia*, 135 F.3d at 1330 (10th Cir. 1998) (court must avoid temptation to exclude Rule 413 evidence merely because character evidence has traditionally been excluded . . . as well as a temptation to perform a restrained Rule 403 analysis).

413, 414 or 415, but also on Rule 404(b), which (1) specifies that evidence offered for a reason other than proving propensity is not excluded by Rule 404(a)'s prohibition of propensity evidence, and (2) lists "modus operandi" as one example of the permissible uses of evidence of prior crimes or bad acts.⁴⁸

Court rulings which admit evidence by invoking both the "modus operandi" phrase in 404(b), and Rule 413 or 414, seem to eliminate the force Congress intended these rules to have. If all Congress intended to do by enacting Rules 413 and 414 was to make "modus operandi" evidence admissible, then Congress might have saved the legislative resources expended in enacting these rules, because no new rule was needed to establish that Rule 404(a) does not ban evidence used to prove "modus operandi."⁴⁹ Certainly the similarity requirement is neither express nor implied in Rule 413, 414, or 415. It appears to be judicially-created in response to three new evidence rules that the courts found objectionable.

Congress enacted three very straightforward statutes providing that evidence of a prior offense of sexual assault *is admissible* in a criminal sexual assault trial and that evidence of a prior offense of child molestation *is admissible* in a criminal child molestation trial, and that a prior offense of either type *is admissible* in a civil trial involving either.⁵⁰ Instead of applying those laws as written,⁵¹ some courts have created a decision-making rubric with as many factors as Hercules had tasks. As a result, even before the 2011 changes to these three rules, evidence of prior sexual offenses was not as admissible as Congress's unequivocal language seemed to make it. Perhaps the twelve-factor analysis is the judiciary's method of reining in three rules which it, through the Judicial Conference, vehemently opposed. What the Judicial Conference could not persuade Congress to do during the enactment process, jurists have done themselves, with the twelve-factor test that creates enough room for almost any judge to admit or exclude evidence of any particular other offense of sexual assault or child molestation. These conflicting interpretations call into question the advisability of making stylistic changes to these three rules—changes which will add another opportunity for inconsistency. That potential for further inconsistency results from the difference between the old

48. FED. R. EVID. 404(b).

49. *Id.*

50. FED. R. EVID. 413-415 (1996).

51. John Matson, Note, *Huskers Jump on Congress's Fumble: Nebraska Rules of Evidence 413-415 Correct the Facial Deficiencies of Federal Rules of Evidence 413-415*, 45 CREIGHTON L. REV. 277, 293-307 (describing the hostility with which the legal community received Congress's 1994 version of Rules 413-415 and noting the "Federal Rules 413-415 do not, on their face, require 403 balancing").

language on which courts could not agree, and the new language, which presents a new set of words to be interpreted.

Approximately fifteen years after the effective date of Rules 413-415, the 2011 changes went into effect.⁵² The following section raises

52. The amendment process is chartered in the "Procedures for the Judicial Conference's Committee on Rules of Practice and Procedure and Its Advisory Rules Committees." Administrative Office of the United States Courts, *Guide to Judiciary Policy*, Vol. 1, § 440 (Oct. 12, 2011) available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures_for_Rules_Cmtes.pdf (last accessed Jan. 17, 2012). The entire process from amendment suggestion to amendment enactment can be summarized in seven steps. Thomas F. Hogan, *The Federal Rules of Practice and Procedure*, A Summary for the Bench and Bar, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess/SummaryBenchBar.aspx> (last accessed Jan. 17, 2012). First, submitted suggestions and recommendations are referred to the appropriate advisory committee by the Standing Committee Secretary. A reporter assigned to the specific advisory committee drafts the rule changes. After studying the operation and effect of the draft rules, the advisory committee meets to consider whether the proposed rules should be submitted to the Standing Committee with the recommendation of publication. After discussion, the proposed amendment is voted upon at a committee meeting. If the vote results in a recommendation of amendment, the advisory committee submits a written report to the Standing Committee explaining the reasons for the change and requesting their approval to publish the proposed rule for public comment. Second, if the Standing Committee approves of publication for public comment, the Secretary of the Standing Committee engages in a wide publication process which includes circulating the proposed change to the bench, bar, and public. The proposed amendment is also sent to members of a mailing list of more than ten thousand people and organizations, including legal publications, law schools, and fifty-three state bar associations. After notice is published in the *Federal Register*, the public comment period begins and continues for at least six months unless a shorter period is approved by the Standing Committee. Recorded public hearings on the proposed change must be provided by the advisory committee unless otherwise approved by the Standing Committee, or if too few witnesses request to testify. Third, at the end of the public comment period, the advisory committee reporter is required to prepare a report summarizing the received written comments and testimony, aggregating them if the number is very large. The advisory committee then reviews the proposed change in light of the public comments and testimony. If substantial changes to the amendment result, the committee may but is not required to republish the proposed rule for an additional public comment period. A final report is then generated by the committee to transmit to the Standing Committee. The report includes the comments received, any changes made since the original publication, and any competing considerations. Fourth, the Standing Committee may accept, reject, modify, or return the proposed changes with its own recommendations. Upon acceptance, the Committee is required to transmit a report to the Judicial Conference. The report includes recommendations by the Committee, explanations of any changes it made, and the advisory committee report. Fifth, the Judicial Conference considers proposed amendments to the rules each year at the September session. The amendments are transmitted to the Supreme Court if approved. Sixth, The Supreme Court has the authority to prescribe the federal rules, subject to a statutory waiting period. Proposed amendments must be submitted to Congress by May 1 of the year in which the amendment is to take effect. Finally, the proposed amendments are subject to congressional review. The Congress has a statutory period of at least 7 months to act on any rules prescribed by the Supreme Court. The proposed amendments to the rules take effect as a matter of law on December 1 if the Congress does not enact legislation to reject, modify, or defer the rules.

The birth of the stylistic overhaul of the Federal Rules can be traced to the early 1990s when Standing Committee Chair Judge Robert Keeton and Committee member Professor Charles Alan Wright envisioned consistent style amongst the rules; See Memorandum from Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules, to Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure, at 2, available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Style%20Resources/Overview_EV_Report.pdf (May 10, 2010) (last accessed Jan. 17, 2011) (A Style Subcommittee was formed within the Standing Committee, and

and addresses three questions which are likely to be litigated regarding those changes.

II. IS THE VALIDITY OF THE SUPREME COURT'S 2011 CHANGES TO RULES 413-415 SUBJECT TO SERIOUS CHALLENGE?

Three likely challenges to the 2011 changes to Rules 413-415 are that Congress, in 1994, precluded future judicial revision of those rules, that the changes are not stylistic, and that the changes violate the Rules Enabling Act. An analysis of applicable law indicates that the first challenge will likely fail, but the latter two will likely succeed.

A. *Although Congress Excluded the Judicial Branch from Any Effectual Role in the Adoption of Rules 413-415, That Exclusion Does Not Permanently Preclude the Supreme Court from Amending These Three Rules.*

The Rules Enabling Act provides for the Supreme Court of the United States to proscribe rules of procedure and evidence for the federal courts.⁵³ The culmination of the process created by the Rules Enabling Act is that the Supreme Court, by May 1 of any year, may

Professor Wright was appointed as Chair by Judge Keeton). Stylized amendments were made effective to the Appellate Rules in 1998, Criminal Procedure in 2002, and Civil Procedure in 2007; See FED. R. EVID. 101 advisory committee's note. In Fall 2007, the Advisory Committee on Evidence Rules began its stylistic overhaul utilizing a process that was "substantially" the same as the restyling of the other federal rules: Hinkle at 3. 1) A draft, 2) comments by the reporter, 3) response by the drafter and changes where necessary, 4) expedited review by the Advisory Committee and redraft by drafter if necessary, 5) review by the Style Subcommittee of the Standing Committee, 6) review by the Advisory Committee, and 7) review by the Standing Committee to determine whether to release the restyled rules for public comment. *Id.* The three year process was intended to "to clarify, simplify, and modernize expression, without changing the substantive meaning of the Evidence Rules." See Report of the Judicial Conference Committee on Rules of Practice and Procedure to the Chief Justice of the United States and Members of the Judicial Conference of the United States 29, <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2010/2010-09Standing%20Committee%20Report%20to%20the%20Judicial%20Conference%20September%202010.pdf> (Sept. 2010) [hereinafter *Standing Committee Report*] (last accessed Jan. 17, 2012). In June 2009, the Standing Committee approved the rule amendments for publication and the public comment period soon followed. Hinkle, at 4. In April 2010, the Advisory Committee on Evidence Rules reviewed the public comments and approved of the amendments. *Id.* In May 2010, the Advisory Committee recommended that the Standing Committee approve the rules. *Id.* at 6. In September 2010, the Standing Committee approved the proposed amendments recommended that the Judicial Conference do the same. Comm. Rules on Practice and Procedure at 30. The Judicial Conference approved, and transmitted the proposed rules to the Supreme Court of the United States. Report to the Judicial Conference. The Supreme Court approved in April 2011. Administrative Office of the United States Courts, Supreme Court Approved Rules Amendments, <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/PendingRules/SupremeCourt042611.aspx> (last visited Jan 15, 2011).

53. 28 U.S.C.A. § 2072 (West 2011) (explaining that Congress specified in REA that these rules should not enlarge, abridge or modify substantive rights. There has been a raging debate as to whether the evidence rules may be substantive, but that debate is beyond the scope of this article, and the arguments in this article apply regardless of whether 413-415 are procedural or substantive. The arguments are that, whether procedural or substantive, these 2011 changes are

submit to Congress any new rules it has prescribed, and those rules will go into effect on December 1 of that same year, in the absence of action by Congress to prohibit them from going into effect as submitted by the Supreme Court.⁵⁴ The Supreme Court transmitted to Congress the set of restyled rules which the Judicial Conference of the United States had unanimously recommended to the Supreme Court in a report dated September, 2010.⁵⁵ The Judicial Conference's report included Rules 413-415.

In its report, dated September 2010, the Judicial Conference of the United States unanimously recommended to the Supreme Court a set of restyled rules, which included 413-415.⁵⁶ Those rules apparently became law on December 1, 2011, because Congress did nothing by that date to prevent them from becoming law.

The process was very different, however, when Congress adopted the original versions of these three rules in 1994—not only different, but apparently unique. While Congress has not hesitated to exercise its power to act on and change rules submitted to it by the Supreme Court, there does not appear to be any occurrence, other than the 1994 passage of Rules 413-415, in which Congress has pre-emptively excluded the judiciary from the rule-making process.⁵⁷ Congress did exclude the judiciary from the process of adopting these three rules in 1994, by passing a law providing that any recommendations by the Judicial Conference with regard to these three rules would become law only if those recommendations were the same as the version of those rules already enacted by Congress.⁵⁸

In the public law by which it enacted these three rules in 1994, Congress specifically provided that the report from the Judicial Confer-

invalid because the court did not have the power to change rules that are exempted from the REA; and the changes do not fit the drafter's own definition of stylistic.).

54. 28 U.S.C.A. § 2074 (West 2011).

55. Committee Rules on Practice and Procedure, *Report of the Judicial Conference Committee on Rules of Practice and Procedure*, USCOURTS.GOV, 30 (Sept. 2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2010/2010-09Standing%20Committee%20Report%20to%20the%20Judicial%20Conference%20September%202010.pdf> (last visited Jan. 17, 2012). [hereinafter *Standing Committee Report*.]

56. *Federal Evidence Review*, FederalEvidence.com, 13 (2012), <http://federalevidence.com/downloads/rule.of.evidence.pdf>.

57. See Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (showing that after the Supreme Court first submitted proposed Rules of Evidence to Congress, rejected those rules and adopted its own Federal Rules of Evidence instead); see also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37 (enacting rules 413-415 of the Federal Rules of Evidence by Congress).

58. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(d)(1), 108 Stat. 1796, 2137 (showing that a search of the Public Laws for statutes addressing the applicability of the Rules Enabling Act to a particular law does not yield any public law exempted from the Rules Enabling Act other than the one by which Congress enacted Rules 413-415).

ence would become law only if consistent with the rules as drafted by Congress.⁵⁹ In that same public law, Congress further provided that if the report of the Judicial Conference was inconsistent with the rules as drafted by Congress, then the version of the rules drafted by Congress would become law on December 1, 1996, absent further action by Congress.⁶⁰ By exempting the Judicial Conference's report from the Rules Enabling Act, Congress eliminated the judiciary from the process of adopting these three rules because the judiciary disagreed with these three rules, and Congress wanted them to become law regardless. The text of the public law by which Congress adopted these three rules and excluded the judicial branch from the process is as follows:

(a) The Federal Rules of Evidence are amended by adding after Rule 412 the following new rules:

Rule 413. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code;

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(4).

Rule 414. Evidence of Similar Crimes in Child Molestation Cases

59. *Id.*

60. *See id.* at § 320935(d)(2).

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved—

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant's body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)–(5).

Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(b) Implementation.—The amendments made by subsection (a) shall become effective pursuant to subsection (d).

(c) Recommendations by Judicial Conference.—Not later than 150 days after the date of enactment of this Act [Sept. 13, 1994], the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. *The Rules Enabling Act* [28 U.S.C. 2072] shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

(d) Congressional Action—

(1) If the recommendations described in subsection (c) are the same as the amendment made by subsection (a), then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a), the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.

(e) Application.—The amendments made by subsection (a) shall apply to proceedings commenced on or after the effective date of such amendments [July 9, 1995], including all trials commenced on or after the effective date of such amendments.⁶¹

The report of the Judicial Conference did differ from Congress's three rules. In that report, the Judicial Conference, unanimous with the exception of the representatives from the Department of Justice,⁶² strongly urged Congress not to enact the three rules, for the reasons described, *supra*, in the section on the history of the rules.⁶³ Because it differed from the rules as drafted by Congress, the report of the Judicial Conference had no effect, and Congress's version of the three rules became law in 1996.⁶⁴

This history makes clear that Congress, in 1994, pre-emptively rejected the input of the Judicial Conference regarding these three rules.

61. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37.

62. Judicial Conference of the United States, *supra* note 8, at 52-53; *see also American Bar Association Criminal Justice Section Report to the House of Delegates*, 22 FORDHAM URB. L.J. 343, 347 (1995) (discussing the American Bar Association's opposition to Rules 413-415 and noting that "it is disturbing that the only support for propensity rules within either of the two Advisory Committees of the Judicial Conference came from the Department of Justice representative.").

63. *See supra* text accompanying notes at 18-22.

64. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2135-37.

The report of the Judicial Conference was the only opportunity Congress allowed the judicial branch to comment on Congress's version of the rules. Even that opportunity was hollow and meaningless, because Congress had already provided that if the judiciary's input via the Judicial Conference differed from these three rules as already enacted by Congress, then the judicial branch's actions would not have the effect they ordinarily would have had pursuant to the Rules Enabling Act; i.e., the report would not become law in the absence of action by Congress. The only way to accomplish that feat was to essentially exempt these three rules from the Rules Enabling Act, and that is what Congress appears to have done. Public Law 103-322 quoted in full above, is the act by which Congress amended the Federal Rules of Evidence to include Rules 413-415, Congress provided, "[t]he Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section."⁶⁵

If the Judicial Conference lacked the power to change Congress's version of Rules 413-415 in 2011, that lack of power did not result merely from the fact that Congress enacted its own version of Rules 413-415 into law. The Rules Enabling Act gives Congress the "last word" in all rulemaking by the Supreme Court, by providing that the rules prescribed by the Supreme Court become law in the absence of action by Congress.⁶⁶ Indeed, when the Rules of Evidence were initially adopted in 1975, Congress rejected the Supreme Court's attempt to make evidence rules. Instead, Congress enacted the Federal Rules of Evidence.⁶⁷ What is different about Rules 413-415 is that Congress did not merely adopt or modify rules prescribed by the Supreme Court. Congress *pre-emptively* denied the judiciary even that role which it usually has pursuant to the Rules Enabling Act: the power to submit rules to Congress which would become law in the absence of action by Congress. With regard to Rules 413-415, Congress acted first to draft the three rules, required the Judicial Conference to submit a report regarding the admissibility of other offenses of sexual assault or child molestation, and expressly provided that this input from the Judicial Conference would not have the usual effect of input from the judiciary—becoming law in the absence of Congressional action—unless the Judicial Conference's report was identical to the three rules as passed by Congress. There does not appear to be another occasion on which Congress pre-emptively eliminated the judiciary's usual role provided for in the Rules Enabling Act.

65. *Id.* at § 320935(c).

66. See 28 U.S.C. § 2074 (2011).

67. Compare H.R. Rep. No. 93-560 (1973) (the original Federal Rules of Evidence as transmitted to Congress by the Supreme Court), with Federal Rules of Evidence, Pub. L. No. 93-595, 88 Stat. 1926 (1975) (the Federal Rules of Evidence as amended by Congress and enacted).

Did Congress intend to exempt from the Rules Enabling Act *only* the Judicial Conference's report specifically called for by Subsection 320935(c) of Public Law 103-322, the subsection which provided for a report from the Judicial Conference as part of the process by which Rules 413-415 were adopted? In other words, is it possible that the only thing Congress intended to exempt from the Rules Enabling Act was the specific, individual report it required the Judicial Conference to submit as part of the adoption process for these three rules in 1994, and that Congress intended to allow for later amendments to these three rules by the Supreme Court (a process which would necessarily include reports from the Judicial Conference)? At first blush, the answer would appear to be no. If the judiciary had begun its amendment process for these three rules pursuant to the Rules Enabling Act immediately after they went into effect in 1996, then even with the six-month public comment period provided for in the Judicial Conference's procedures,⁶⁸ the Supreme Court's amendments could have been before Congress—set to become law absent action by Congress—less than a year from the original effective date of Congress's Rules 413-415. Such an action, however, would almost certainly have been recognized as an attempt to thwart Congress's decision to exclude the judiciary from the process of enacting these three rules. If the Supreme Court and Judicial Conference had begun their amendment process a week or a month or six months after the rules had originally become law by a process that eliminated the role the judiciary would ordinarily have had pursuant to the Rules Enabling Act,⁶⁹ the effort to circumvent the will of Congress would have been transparent.

In light of the 2011 stylistic changes, the question becomes: does the passage of 16 years change anything? Given that 16 years had elapsed since the effective date of Congress's three rules, could the Supreme Court adopt the report of the Judicial Conference and submit to the Congress a version of these three rules that differed from the language enacted by Congress in 1994? Can the Supreme Court invoke the Rules Enabling Act as its authority for the amendment process, when Congress provided at the time these rules were adopted that the report of the Judicial Conference regarding these three rules was exempt from the Rules Enabling Act and would have no effect unless the Judicial Conference's recommendations were identical to Rules 413-415 as adopted by Congress?

68. Procedures for the Judicial Conference's Committee on Rules and Procedure and Its Advisory Rules Committees, USCOURTS.GOV, http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Procedures_for_Rules_Cmtes.pdf (last revised Oct. 12, 2011).

69. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(c), 108 Stat. 1796, 2137.

Congress, in 1994, could simply have included the language, “Rules 413-415 are forever exempt from the Rules Enabling Act.” Congress did not do so. The question then becomes, what exactly did Congress exempt from the Rules Enabling Act when Congress enacted Rules 413-415 in 1994? Congress provided that the Rules Enabling Act shall not apply *to the recommendations made by the Judicial Conference pursuant to this section*.⁷⁰ A tempting argument in support of the validity of the 2011 changes is Congress’s 1994 statement that the Rules Enabling Act would not apply to the recommendations which the Judicial Conference would make “pursuant to this section.” The argument would be that the only thing exempted from the Rules Enabling Act was the report referred to in Section 320935, Subpart (c) as amended by Pub. L. 104–208, div. A, title I, §101(a), [title I, §120], Sept. 30, 1996, 110 Stat. 3009, 3009–25. That Subsection provided:

Not later than 150 days after the date of enactment of this Act [Sept. 13, 1994], the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant’s prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. *The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section*.⁷¹

The argument in favor of the validity of the 2011 changes to these three rules is that Congress did not exempt the rules themselves from the provisions of the Rules Enabling Act, nor any report later submitted by the Judicial Conference in the process of amending or changing those three rules. Instead, Congress exempted only the specific report that the Judicial Conference was to submit to Congress during the process by which those three rules became law—the report which the Judicial Conference was required to submit “not later than 150 days after enactment of this Act [on September 13, 1994].”⁷²

This argument is negated, however, by the very language of the Public Law through which Congress enacted Rules 413-415. To what does the Rules Enabling Act not apply? It does not apply to “the recommendations made by the Judicial Conference pursuant to this section.”⁷³ The part of Public Law 103–322 which specifically provides for a report by the Judicial Conference during the process of originally adopting Rules 413-415 (within 150 days of September 13, 1994) is not

70. FED. R. EVID. 413.

71. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(c), 108 Stat. 1796, 2137.

72. FED. R. EVID. 413.

73. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 § 320935(d), 108 Stat. 1796, 2137.

a section; it is a subsection. Congress refers to the language allowing for a report by the Judicial Conference during the original adoption process and unmistakably refers to it as “subsection c.”⁷⁴ Congress could have, but did not, provide that the Rules Enabling Act did not apply to the recommendations made by the Judicial Conference “pursuant to subsection (c),” thus precluding the judicial branch’s involvement only during the initial adoption of the rules in 1994. Instead, Congress provided that the recommendations of the Judicial Conference to which the Rules Enabling Act does not apply are not merely those made during the adoption process pursuant to *subsection* (c) of Public Law 103-322, Section 320935 (the report the Judiciary Conference made during the adoption process), but the recommendations of the Judicial Conference court makes pursuant to “this section.”⁷⁵ “This section” cannot mean a subsection, but can only mean the section within which the exemption from the Rules Enabling Act appears, Section 320935 of Public Law 103-322. That section, which is entitled “Admissibility of Evidence of Similar Crimes in Sex Offense Cases,”⁷⁶ is covered, in its entirety, by Congress’s exclusion of Judicial Conference reports from the Rules Enabling Act. The section includes the following:

- Subsection (a), which is the actual enactment and the text of Federal Rules of Evidence 413-415,
- Subsection (b), regarding the implementation of the new rules,
- Subsection (c), providing for a report from the Judicial Conference and providing that “The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section,”
- Subsection (d), providing that the report by the Judicial Conference shall become effective only if it is the same as the new rules set forth in Subsection (a) and that if the Judicial Conference fails to make a report or makes a report different from the rules set forth in Subsection, then Congress’s version becomes law, and
- Subsection (e), regarding the effective date of the new rules.⁷⁷

Because Congress provided that the Rules Enabling Act does not apply to the recommendations made by the Judicial Conference “pursuant to this *section*,”⁷⁸ the argument that the exemption from the Rules Enabling Act applied only to the Judicial Conference’s report made pursuant to *Subsection* (c) fails.

74. *Id.* at § 320935(c).

75. *Id.* (emphasis added).

76. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935(a), 108 Stat. 1796, 2137.

77. *Id.* at § 320935(a-e).

78. *Id.* (emphasis added).

Moreover, because Congress provided that the “Rules Enabling Act shall not apply to recommendations made by the Judicial Conference pursuant to [Public Law 103-322, Section 320935],”⁷⁹ and because Section 320935 contains Rules 413-415, a stronger argument is that Congress has made the Rules Enabling Act inapplicable to any report of the Judicial Conference regarding those three rules. The Supreme Court cannot, under existing procedures, transmit rules of procedure and evidence to Congress pursuant to the Rules Enabling Act without first receiving and acting on recommendations of the Judicial Conference.⁸⁰ It might appear, then, that Congress has reserved to itself the exclusive power to amend these three rules.⁸¹

The best analysis of this question, however, is that the Judicial Conference’s recommendations to the Supreme Court which resulted in the 2011 changes to these three rules were not made “pursuant to” Public Law 103-322, Section 320935. The statute providing generally for the Judicial Conference to make recommendations regarding the Federal Rules of Evidence is not Public Law 103-322, Section 320935, or even the Rules Enabling Act. Rather, the statute providing for recommendations from the Judicial Conference to the Supreme Court regarding rules of evidence and procedure is 28 U.S.C.A. 331, which provides:

The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law.⁸²

An argument can be made that Public Law 103-322, Section 320935 permanently prevents the Supreme Court from ever amending these three rules (by exempting the Judicial Conference’s recommendations regarding these three rules from the Rules Enabling Act). That issue, however, is resolved with relative ease because: (1) it is the Supreme

79. *Id.*

80. Note 83, *infra*.

81. See *Standing Committee Report*, *supra* note 59 at 30 (recommending that the Judicial Conference approve restyling proposals and transmit them to the Supreme Court).

82. 28 U.S.C.A. § 331 (2011) (explaining the Rules Enabling Act was amended in 1988 to provide specifically for the Supreme Court to prescribe rules of evidence, in addition to rules of practice and procedure. The omission of the word “evidence” from Section 331 appears to be a simple oversight, and the Judicial Conference’s role in recommending rules of evidence, as well as rules of practice and procedure, pursuant to Section 331 is not in doubt despite the omission of the word “evidence.”).

Court, rather than the Judicial Conference, that makes recommendations for changes to the Federal Rules of Evidence, and (2) the recommendations of the Judicial Conference regarding the Federal Rules of Evidence are made, not pursuant to the Rules Enabling Act (from which the original report of the Judicial Conference was exempted), but pursuant to 28 U.S.C.A. 331. Congress's reason for requiring a report directly from the Judicial Conference to Congress, rather than the usual route from the Judicial Conference to the Supreme Court and from the Supreme Court to Congress, was likely a desire to avoid direct conflict with the Supreme Court with regard to these three rules, while still giving at least the appearance of seeking input from the judiciary.

B. Under the Definition of "Stylistic" Used by the Drafters of the Purportedly Stylistic Changes, the 2011 Changes to Rules 413-415 are Not Merely Stylistic

In proposing the purportedly stylistic changes that became effective December 1, 2011, the Judicial Conference's Advisory Committee on Evidence used a definition of "stylistic" which included, inter alia, the following:

The restyled rules are intended to constitute non-substantive changes. The Advisory Committee is trying to avoid any styling changes that would result in substantive changes. The committee adopted the following "working principle" in restyling the rules:

"A change is 'substantive' if

Under the existing practice in any circuit, it could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of a certain piece of evidence) . . . or . . .

It changes the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision).⁸³

Before the 2011 changes, courts considering evidence of another offense of sexual assault or child molestation did not automatically admit such evidence. They recognized that such automatic admission could violate the defendant's due process rights to a fair trial. Additionally, they recognized that proper application of Rule 403's balancing test would always solve any due process concerns, because no evidence prejudicial enough to violate the defendant's due process rights would survive the weighing under Rule 403. Finally, it is impor-

83. FED. R. EVID. 101 advisory committee's note (describing stylistic changes).

tant to understand why these changes are not merely stylistic. Many courts interpreting Rules 413-415 recognized that in applying Rule 403's balancing test, they should not place the propensity nature of Rule 413-415 evidence on the unfair-prejudice side of the scales. In doing so the language of the three rules—as they existed before the 2011 changes—reflected the clear intent of Congress that the propensity nature of evidence of other offenses of sexual assault or child molestation, while it might be prejudicial in the sense that it would influence the jury, was not unfairly prejudicial. Congress's manifest intent was to make such evidence admissible and eligible to be considered regarding any matter as to which it was relevant, including—perhaps especially—propensity. The courts specifically held that the clear intent of Congress to allow admission of this evidence to prove propensity must be honored.⁸⁴ The purportedly stylistic changes to these three rules eliminate the “is admissible” language and thus eliminate one of the strongest indicators of Congress's clear intent. The rules now reflect the intent of the Judicial Conference, and so the 2011 changes, with a passing nod in the Advisory Committee notes to a speech in the Senate,⁸⁵ otherwise consign Congress's clear intent to the dust-bin of history. A court deciding admissibility pursuant to Rules 413, 414 or 415 will no longer find within those rules the “is admissible” language that made Congress's intent so clear and caused the courts to honor that intent to the fullest extent possible given the constraints of Rule 403. After the 2011 changes, the intent reflected in the language of the rule will be the intent of the Judicial Conference and the Supreme Court that the “court may admit” the evidence. As a result, courts may no longer feel compelled to honor the clear intent of Congress that the propensity nature of the evidence places no weight on the unfair-prejudice side of the scale.

The effect of eliminating Congress's stark “is admissible” language is demonstrated by the words of Justice Ginsburg, dissenting with three other justices from the decision in *Cormell v. Texas*.⁸⁶ Offering imagined evidence rules as examples in a dissent regarding ex post facto laws, she wrote:

Consider, for example, a rule providing that evidence of a rape victim's sexual relations with persons other than the accused is admissible to prove consent, or a rule providing that evidence of a sexual assault defendant's prior sexual offenses is inadmissible to show a pro-

84. U.S. v. LeMay, 260 F.3d 1018 (2001).

85. Fed. R. Evid. 413 advisory committee's note.

86. *Carmell v. Texas*, 529 U.S. 513, 563 (2000) (Ginsburg, J., dissenting) (holding that an amendment to a Texas statute authorizing the conviction of certain sexual offenses based on the testimony of the victim alone, which was not previously permitted, altered the legal rules of evidence, required less evidence to obtain conviction, and was an ex post facto law).

pensity to commit that type of crime. A statute repealing either of the above rules would ‘always run in the prosecution’s favor . . . [by] mak[ing] it easier to convict the accused.’”⁸⁷ Yet no one (until today) has suggested that such a statute would be *ex post facto* as applied to offenses committed before its enactment.⁸⁸

In the same way, repeal (even by a purportedly stylistic change) of a statute providing that evidence of other offenses of sexual assault and child molestation “is admissible,” always runs in the defense’s favor. So, the purportedly stylistic changes to Rules 413-415 do not meet the drafters’ own definition of “stylistic,” because they make it more difficult to admit evidence of other offenses of sexual assault or child molestation. The starting point for consideration of such evidence is no longer Congress’s statement that it “is admissible,” but the Judicial Conference’s statement that the “court may admit” it.

A second reason that the three new rules fail the drafters’ own definition of “stylistic” is that they change the structure of a rule so as to alter the way in which courts and litigants have thought about, and argued about, questions of admissibility.⁸⁹ Effective December 1, 2011, the prosecution (or the party seeking to prove sexual assault or child molestation in a civil case) can no longer quote language from a rule to the effect that such evidence “is admissible.” Before the purportedly stylistic changes to Rules 413-415, prosecutors could and in fact did make arguments such as the following:

“Under Rule 414, in a criminal case in which the defendant is accused of a child molestation offense, evidence of another child molestation offense is admissible to the extent it is relevant.”⁹⁰

“Like its companion rule, Fed. R. Evid. 413 (Evidence of Similar Crimes in Sexual Assault Cases), Rule 414 creates an exception to the general prohibition against ‘propensity evidence’ found in Fed. R. Evid. 404(b) . . . As their Congressional sponsors recognized, Federal Rules of Evidence 413-415, enacted as part of the Violent Crime Control and Law Enforcement Act of 1994 . . . were enacted specifically to ‘supersede in sex offense cases the restrictive aspects of Federal Rule of Evidence 404(b)’ and to recognize that ‘evidence admissible pursuant to the proposed rules is typically relevant and probative, and that

87. *Id.* at 546 (majority opinion).

88. *Id.* at 563 (Ginsburg, J., dissenting).

89. FED. R. EVID. 101 advisory committee’s note; Memorandum from Robert L. Hinkle, Chair, Advisory Comm. on Evidence Rules, to Lee H. Rosenthal, Chair, Standing Comm. on Rules of Practice and Procedure, 4 http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Style%20Resources/Overview_EV_Report.pdf (May 10, 2010) [hereinafter *Advisory Committee on Evidence Rules Report*] (last accessed Jan. 17, 2011) (explaining the differences between a “stylistic” change and a “substantive” change).

90. Brief for Appellee United States of America at 5, *United States v. Fritz*, 2011 WL 5966947 (3d Cir. filed Aug. 31, 2011) (No. 09-4238), 2011 WL 4047497, at *2 (defendant on trial for possession of child pornography and transportation of child pornography).

its probative value is normally not outweighed by any risk of prejudice or other adverse effects.”⁹¹

“Congress intended Rule 414 evidence to be presumptively and liberally admitted. This is true notwithstanding ‘substantial lapses of time’ between the charged and prior acts of child molestation. Following Rule 414’s enactment, Senator Robert Dole, one of the Rule’s sponsors, explained the purpose and justification for the Rule: ‘The presumption is that the evidence admissible pursuant to these rules is typically relevant and probative, and that its probative value is not outweighed by any risk of prejudice.’”⁹²

“Unlike ‘prior bad acts’ evidence in general, the presumption regarding evidence of other sexual assaults in cases such as this one is in favor of admissibility. . . . The fact that evidence of other sexual assaults makes it easier to prove the charged conduct—the point that apparently bothered the district court—is the precise reason Congress enacted Rule 413, and not a permissible basis to exclude evidence otherwise admissible under Rule 413. Rule 413 was adopted to allow admission of evidence of other sexual assaults in order to demonstrate a defendant’s propensity to commit sexual offenses and that he acted in conformity with his propensity when he engaged in the charged conduct.”⁹³

[A liberal] interpretation of Rule 413 is consistent with its legislative history, which makes clear Congress’ intent that the Rule be construed liberally. [That legislative history includes the statement that.] ‘[T]he practical efficacy of these rules [413-415] will depend on faithful execution by judges of the will of Congress in adopting this critical reform. To implement the legislative intent, the courts must liberally construe these rules to provide the basis for a fully informed decision of sexual assault and child molestation cases, including assessment of the defendant’s propensities and questions of probability in light of the defendant’s past conduct.’”⁹⁴ . . . “Furthermore, both the legislative history and the unambiguous language of the Rule itself establish that these sexual assault offenses are precisely the type of evidence Congress intended federal courts to admit under Rule 413.”⁹⁵

91. Brief of Plaintiff –Appellee United States of America at 27, *United States v. Loughry*, 660 F.3d 965 (7th Cir. filed Mar. 31, 2011) (No. 10-2967), WL 2452268, at *9 (citing remarks of principal House sponsor, Rep. Susan Molinari, 140 Cong. Rec. H8991-92 (1994)).

92. Brief for Appellee at 13, *United States v. Kelly*, 510 F.3d 433 (4th Cir. filed Feb. 16, 2007) (No. 06-5173), 2007 WL 627066 at *7 (admissibility of prior conviction for rape of twelve year-old).

93. Brief of the United States at 32, *United States v. Fitzgerald*, 80 F. App’x 857 (4th Cir. filed Mar. 13, 2003) (No. 02-4978), 2003 WL 25655534 at *14 (government’s appeal from district court’s exclusion of evidence of other act of sexual assault).

94. Brief for Appellee at 29, *United States v. Breitweiser*, 357 F.3d 1249 (11th Cir. filed Feb. 21, 2003) (No. 02-15095), 2003 WL 23525765 at *13 (quoting 140 Cong. Rec. H8992 (1994) (remarks of Rep. Molinari)).

95. *Breitweiser*, 2003 WL 23525765, at *15.

The 2011 changes to Federal Rules of Evidence 413-415 make it more difficult for prosecutors and parties in civil cases to have evidence of other offenses of sexual assault and child molestation admitted into evidence. They also change the structure of the rules (from “is admissible” to “the court may admit”) and thereby change the ways in which parties will argue these issues. If the changes are outside the drafters’ definition of “stylistic” (as they appear to be), that fact alone does not render them invalid pursuant to the Rules Enabling Act. To be invalid pursuant to the Rules Enabling Act, the changes would have to abridge, enlarge or modify substantive rights, which the following section argues they do.⁹⁶

C. *The 2011 Changes to Federal Rules of Evidence 413-415 Enlarge Substantive Rights and Therefore Violate the Rules Enabling Act.*

- i. By Enacting Rules 413-415 in 1994, Congress Significantly Diminished Protections That Had Provided Safeguards Against Undue Prejudice.

When Congress proposed Federal Rules of Evidence 413 - 415, the Judicial Conference of the United States strenuously objected.⁹⁷ One issue about which the Judicial Conference expressed particular alarm was that the rules would “significantly *diminish* the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice, [thus creating] the danger of convicting a criminal defendant for past . . . behavior or for being a bad person.”⁹⁸ Federal Rule of Evidence 404 generally prohibits evidence of prior crimes or bad acts.⁹⁹ Rules 413-415 constituted such a drastic change from that general prohibition that the Judicial Conference expressed serious misgivings about them, especially the concern that Congress’s adoption of the three rules would deprive some individuals of Rule 404’s long-standing protections from the unfairness that could

96. 28 U.S.C. § 2072(b) (2006).

97. *Id.* at 54.

98. *Id.* at 53. Courts agreed with the alarm expressed by the Advisory Committee, holding that Rules 413 and 414 would be unconstitutional if not for the saving influence of Federal Rule of Evidence 403, which requires the trial court to balance the probative value of evidence against the danger of unfair prejudice. *See also* U.S. v. Enjady, 134 F.3d 1427, 1433 (10th Cir. 1998) (conviction for aggravated sexual abuse). *See also* U.S. v. Castillo, 140 F.3d 874, 883 (10th Cir. 1988) (“application of Rule 403, however, should always result in the exclusion of evidence that has such a prejudicial effect [that it violates the defendant’s fundamental right to a fair trial]”). *See also* U.S. v. LeMay, 260 F.3d 1018, 1026 (9th Cir. 2001) (right to a fair trial is safeguarded as long as Rule 403 is in place to make sure “potentially devastating evidence of little probative value will not reach the jury”). *See also* Matson, *supra* note 54.

99. FED. R. EVID. 404.

result from admission of evidence of other crimes or bad acts.¹⁰⁰ The Judicial Conference's statement expressly identified its concern about Congress's three new rules: Congress was diminishing protections previously provided to the accused in criminal cases and parties in civil cases, and Congress was thereby creating the risk of undue prejudice.¹⁰¹

- ii. If Congress's 1994 Version of These Rules "Significantly Diminish[ed]" Protections Against Undue Prejudice, Then Increasing Those Protections Enlarges Substantive Rights and Thereby Violates the Rules Enabling Act.

Given the fact—recognized by the Advisory Committee—that Congress's 1994 version of these rules would "significantly *diminish*" the rights of the accused in a criminal case or a party in a civil case, then the converse is unavoidably true: changing the wording of the rules as the Supreme Court did in 2011 to avoid that danger of undue prejudice would necessarily *enlarge* the rights that Congress's 1994 rules had, in the words of the Advisory Committee, "diminished."¹⁰² The danger about which the Judicial Conference was concerned in 1994 was a serious one—the danger that the accused in a criminal case or a party in a civil case might experience undue prejudice as a result of Congress's diminishing of those protections.¹⁰³ As a result of the 2011 changes, the three rules no longer provide that the evidence "is admissible." They now provide that the court "may admit" the evidence. This change solves the Judicial Conference's concern about undue prejudice resulting from Congress's significant diminishing of the protections. Because the 2011 changes to Rules 413-415 "enlarge [a] substantive right," they violate the Rules Enabling Act, which expressly prohibits rules which abridge, enlarge or modify any substantive right."¹⁰⁴

100. Report of Judicial Conference, quoted in annotations to Rule 413 in Title 28 of the United States Code Annotated.

101. *Id.*

102. The fact that the 2011 changes enlarged substantive rights is also apparent in the decisions interpreting Congress's 1994 rules and holding that applying those rules as written might violate due process.

103. Report of Judicial Conference, quoted in annotations to Rule 413 in Title 28 of United States Code Annotated.

104. 28 U.S.C. § 2072(b) (2006).

- iii. The 2011 Changes to Rules 413-415 Violate the Rules Enabling Act Even If Those Changes Are Consistent with Pre-2011 Judicial Interpretation of The Three Rules.

The U.S. Supreme Court has not interpreted or applied Federal Rules of Evidence 413-415.¹⁰⁵ Several U.S. Courts of Appeal have. After Congress provided for the apparently mandatory admission of other offenses of sexual assault and child molestation, the U.S. Circuit Courts of Appeal concluded that automatically admitting evidence offered pursuant to Rules 413-415 would raise concerns about the accused's due process rights to a fair trial.¹⁰⁶ The courts could have declared the rules unconstitutional. What they did instead was to read into the rules a requirement which does not appear in the text: that the evidence be subjected to the weighing process of Rule 403.¹⁰⁷ The 2011 changes to Rules 413-415, which take evidence of other offenses of sexual assault and child molestation out of the category "is admissible" and place it in the category of evidence which the court "may admit," are essentially the codification of court opinions requiring the application of Rule 403 to evidence offered pursuant to Rules 413-415.

The fact that courts had already restored some of the protections that Congress had "significantly diminished" in 1994 does alter the fact that the 2011 changes to these three rules violate the Rules Enabling Act. It simply means that the court rulings using Rule 403 to restore those protections *also* violate the Rules Enabling Act. The United States Supreme Court held in 2011 that the Rules Enabling Act "forbids interpreting [court rules] to 'abridge, enlarge or modify any substantive right.'"¹⁰⁸ The pre-2011 lower federal court decisions

105. See *Carnell v. Texas*, 529 U.S. 513, 563 n. 7 (2000) (Ginsburg, J. dissenting), (referencing Rule 413(a) as "providing that evidence of the defendant's commission of another offense of sexual assault is admissible in sexual assault cases notwithstanding Rule 404(b)'s general prohibition on the introduction of prior bad acts evidence to show action in conformity therewith." *Id.* (internal quotation marks omitted)). The Supreme Court's only other reference to one of the three rules came in *Spencer v. Kemna*, a parole revocation case in which the Court held that the possibility that evidence of parole revocation could be used in the future against petitioner pursuant to Rule 413 was too remote to satisfy Article III's standing requirement.).

106. *U.S. v. Seymour*, 468 F.3d 378, 384-85 (6th Cir. 2006) (noting the need to interpret Rules 413 and 414 in light of Rule 403; *U.S. v. Enjady*, 134 F.3d 1427 (10th Cir. 1998) (because Rule 403's balancing test applies to evidence offered pursuant to Rule 413, there is no facial invalidity, on due process grounds, to Rule 413); *U.S. v. LeMay*, 260 F.3d 1018, 1026 (9th Cir. 2001) (as long as Rule 403 is applicable, Rules 413 and 414 do not deprive the accused of a fair trial); *U.S. v. Mound*, 149 F.3d 799, 800-802 (8th Cir. 1998) (Rules 413 and 414 pass constitutional muster as long as Rule 403's balancing test is applied).

107. See *F.R.D. R. EVID. 609(a)(1)(A)* (evidence of certain prior convictions, when offered to impeach, "must be admitted, subject to Rule 403, in a civil case, or in a criminal case in which the witness is not a defendant").

108. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (holding that the lower court's interpretation of Federal Rule of Civil Procedure 23 would violate the Rules Enabling

construing these three rules cannot save the 2011 changes, because those decisions themselves violate the Rules Enabling Act.

- iv. Even If the Courts Could Have Struck Down Rules 413-415 on Constitutional Grounds, That Does Not Alter the Fact That the 2011 Changes Violate the Rules Enabling Act.

The conclusion that the 2011 changes to Rules 413-415 violate the Rules Enabling Act raises another question: does it really matter if the 2011 changes enlarge substantive rights, given that the courts could have accomplished the same effect by declaring the rules unconstitutional? The answer is yes, it does matter. Amending a rule of evidence is not an adequate substitute for judicial review. Rulemaking lacks several crucial features of judicial review. Judicial review occurs in the context of a case and controversy, that is, an actual dispute between adversaries; rulemaking does not. Judicial review is performed by the court acting as court; rulemaking is accomplished through a process involving academics, practitioners and members of the public, in addition to judges. Judicial review is a grave matter. Rulemaking, especially rulemaking to accomplish stylistic changes, is of less import. The 2011 changes to Rules 413-415 enlarge substantive rights; therefore, they violate the Rules Enabling Act.

III. A PROPOSED SOLUTION

The 2011 changes to these rules suffer from two flaws: First, they do not seem to satisfy the drafters' own definition of stylistic. Second, they enlarge substantive rights and thus violate the Rules Enabling Act. Given this state of affairs, it becomes necessary to look for a solution.

If the 2011 changes to Federal Rules of Evidence 413-415 are, as this article asserts, not merely stylistic, they are not the first purportedly stylistic changes to court rules which have had an effect that is more than stylistic. James J. Duane has written about a change to Federal Rule of Civil Procedure 6, which was intended to be stylistic only, but which has apparently given three additional days (not available before the purportedly stylistic change) to a defendant "who serves his answer by mail and then wishes to (1) amend that answer as a matter of course. . . , (2) demand a trial by jury. . . , or (3) implead a third-party defendant without leave of court. . . ."¹⁰⁹ After describing

Act because it would preclude an employer from litigating any statutory defense it might have to each individual claim of employment discrimination) (citation omitted).

109. James J. Duane, *The Federal Rule of Civil Procedure that Was Changed by Accident: A Lesson in the Perils of Stylistic Revision*, 62 S.C. L. REV. 41, 53 (2010).

this unintentional change, Duane refers to “the prediction of one critic that ‘the restyled rules will engender litigation over whether to adhere to the current meaning of the current rule in light of the Advisory Committee Notes or instead to follow the plain language of the restyled rule.’”¹¹⁰ Duane applies standard principles of statutory construction to the new version of Federal Rules of Civil Procedure 6 in an effort to determine the appropriate path.¹¹¹ He asks and answers standard questions of statutory construction, including the following: Is the rule plain and unambiguous? What is the legislative history, and what is the intent of the drafters? Does a literal reading of the rule lead to absurd results?¹¹²

The questions which Duane asked about the Federal Rules of Civil Procedure can also be asked about Federal Rules of Evidence 413-415. The new versions of Rules 413-415 are less plain and more ambiguous than Congress’s versions enacted in 1994. Although courts interpreted Congress’s three rules less strictly than the text might have indicated, that text was clear: the evidence “is admissible, [and] ‘may be considered’ for its bearing on any matter to which it is relevant.”¹¹³ What is less plain, and more ambiguous, is what the rules say after the stylistic changes: “the court may admit” the evidence. Among the questions arguably left unanswered by this language are the following: 1) If the evidence is relevant and does not violate Rule 403, does the court nevertheless have discretion to exclude it after the 2011 changes, or must the court honor Congress’s 1994 intent and admit the evidence? 2) In considering whether the evidence violates Rule 403, can the propensity nature of the evidence be viewed as unfair prejudice arising from the evidence, even though many courts interpreting Congress’s version of the rules answered that question “no”? 3) It has always been true that “the court may admit” evidence of other crimes, including sexual assault and child molestation. Such evidence has always been admissible, subject to Rule 403, if offered to prove something other than propensity, including the examples listed in Rule 404(b) such as motive, intent, plan, and modus operandi.¹¹⁴ Such evidence has always been admissible, under the appropriate circumstances and if the court makes the appropriate findings, to impeach. Are the new versions of these three rules now redundant, given that it has always been true that “the court may admit” such evidence?

110. *Id.* at 53-54 (quoting Edward A. Hartnett, *Against (Mere) Restyling*, 82 NOTRE DAME L. REV. 155, 178 (2006)).

111. *Id.* at 53.

112. *Id.* at 54-62.

113. See FED. R. EVID. 413-414 (“The evidence may be considered on any matter to which is relevant.”); FED. R. EVID. 415 (“The evidence may be considered as provided in Rules 413 and 414.”).

114. FED. R. EVID. 404(b).

Duane's other questions of statutory construction address whether applying the statute as written leads to absurd results, and what can be learned regarding the intent of the drafters and the legislative history.¹¹⁵ With regard to Rules 413-415, the legislative history has been disjoined from the wording of the rules. The legislative history in Congress does not explain the words in the current version of the rules, because Congress did not write the current version of the rules. The only intent of which we are aware on the part of the drafters of the 2011 version is that they intended the changes to be stylistic only—an intent which the rules do not appear to have accomplished.¹¹⁶

Another hallmark of statutory construction is that the construction applied should not lead to absurd results. If the 2011 versions of the three rules are read in a vacuum, they do not lead to absurd results. If, however, they are viewed in the context of Congress's version of the rules, Congress's legislative history, and the court decisions interpreting Congress's version of those rules, the result of the new rules, though not absurdity, is certainly inconsistency.

Duane predicts that the flaw in the new Federal Rules of Civil Procedure 6, with its accidental change in the law, will eventually be remedied by a revision to the rule.¹¹⁷ Such a solution is unlikely to be applied in the case of Federal Rules of Evidence 413-415. The changes to the three evidence rules do not accidentally alter the due date for a particular pleading or act. They make it less likely that evidence of other offenses of sexual assault and child molestation will be admitted. Unlike the stylistic change to Federal Rules of Civil Procedure 6, these changes are not a technical drafting accident. They are unlikely to be remedied by a simple revision that eliminates the unintended effect.

Rather, Rules 413-415 have, from their inception, been the subject of criticism and controversy.¹¹⁸ Many commentators believe the origi-

115. Duane, *supra* note 109, at 62.

116. See FED. R. EVID. 101 advisory committee's note ("These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility."); *Advisory Committee on Evidence Rules Report*, *supra* note 89, at 3-4 (discussing style change versus substantive change and explaining that "The note for each . . . rule reiterates that the changes have been made as part of the restyling project, that the changes are stylistic only, and that there is no intent to change any ruling on evidence admissibility."); *Standing Committee Report*, *supra* note 55, at 29 (noting that "the intent was to clarify, simplify, and modernize expression, without changing the substantive meaning of the Evidence Rules."); Minutes, Advisory Committee on Evidence Rules (Nov. 16, 2007), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/EV11-2007-min.pdf> (last visited Jan. 22, 2012) (discussing the principles for determining a "substantive change").

117. Duane, *supra* note 109, at 64.

118. See Leonard, *supra* note 5, at 342 (discussing how Congress's political will to be "tough on crime" influenced it to propose the Rules which controversially reversed longstanding evidentiary policy to the dissent of the legal community); Pickett, *supra* note 5, at 884 (asserting that the Rules are based on prejudicial and unsupported views about the source and nature of

nal version adopted by Congress was an invalid rejection of the important general principle that an accused should be convicted or acquitted on the basis of evidence regarding the incident with which he is charged—not on the basis of propensity to commit the crime.¹¹⁹

Fortunately, for purposes of finding a solution, the questionable applicability of the term “stylistic” is not the only flaw in the 2011 version of Rules 413-415. The second flaw may provide a solution to both flaws. The 2011 changes to Rules 413 - 415 violate the Rules Enabling Act. The solution, then, requires a decision as to what should occur when the Rules Enabling Act has been violated. These restyled rules apparently became law on December 1, 2011, because Congress, although given the “last word” on such rules by the Rules Enabling Act, did not take action. Does Congress’s inaction end the analysis, leaving the 2011 versions of Rules 413-415 as law? No, because a rule “found to be *ultra vires* the Act of which it is a creature . . . is void.”¹²⁰ If this article is correct in asserting that the 2011 changes to these three rules enlarged substantive rights which Congress had diminished in 1994, then the 2011 version of these three rules violates the Rules Enabling Act. The Supreme Court has been steadfast in its reluctance to find court rules to be in violation of the Rules Enabling Act; in fact, the Supreme Court recently noted that it has never held a court rule

sex offenses and that they undermine the presumption of innocence traditionally accorded criminal defendants); Jennifer Dukarski, *The Sexual Predator's Scarlet Letter Under the Federal Rules of Evidence 413, 414, and 415: The Moral Implication of the Stigma Created and the Attempt to Balance by Weighing for Prejudice*, 87 U. DET. MERCY L. REV. 271 (2010) (reviewing the stigma attached to sex offenders and discussing how the Rules emphasize a moral dilemma in the U.S. and permit evidence that essentially equates to “once a sex offender, always a sex offender”); Mark A. Sheft, *Federal Rule of Evidence 413: A Dangerous New Frontier*, 33 AM. CRIM. L. REV. 57 (1995) (examining evidentiary rules governing admissibility of uncharged conduct and arguing that Rule 413 is unconstitutional as violating a defendant’s due process and equal protection rights); James J. Duane, *The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea*, 157 F.R.D. 95 (1994) (arguing that the rules are unnecessary, unjustified, bad law and concluding with a recommendation that the Judicial Conference take a stand against their implementation); Margaret C. Livnah, *Branding the Sexual Predator: Constitutional Ramifications of Federal Rules of Evidence 413 Through 415*, 44 CLEV. ST. L. REV. 169, 172 (1996) (examining the history of the Rules, the inconsistent interpretation among the federal courts, and the constitutional consequences of their use); Joelle Anne Moreno, “Whoever Fights Monsters Should See to It That in the Process She Does Not Become A Monster”: Hunting the Sexual Predator with Silver Bullets-Federal Rules of Evidence 413-415-and A Stake Through the Heart-Kansas v. Hendricks, 49 FLA. L. REV. 505, 514 (1997) (discussing the origin of the Rules, arguing that the justifications underlying them are unfounded and examining the inconsistent first interpretations of the Rules by the federal courts); Michael S. Ellis, *The Politics Behind Federal Rules of Evidence 413, 414, and 415*, 38 SANTA CLARA L. REV. 961, 962, 972 (1998) (examining the political and substantive weaknesses of the Rules, their suspicious history, and their conflict with traditional character evidence rules and proposing drastic amendment or repeal).

119. See Leonard, *supra* note 5, at 337; Pickett, *supra* note 5, at 899-902; Dukarski *supra* note 118, at 287-91; Sheft, *supra* note 118, at 69-76; Duane, *supra* note 118, at 105-106; Livnah *supra* note 118, at 180; Moreno *supra* note 118, at 519; Ellis *supra* note 118, at 978-80.

120. Walko Corp. v. Burger Chef Systems, Inc., 554 F.2d 1165, 1169 at n. 29 (D.C. Cir. 1977).

to be invalid as a violation of the Rules Enabling Act.¹²¹ Those Supreme Court decisions, however, involved challenges to Federal Rules of Civil Procedure, originally adopted by the Supreme Court pursuant to the Rules Enabling Act. Congress enacted the Federal Rules of Evidence in 1975, and while those rules have been amended on occasion by the Supreme Court, their origins are undeniably traced to the legislative branch. Thus, a Supreme Court change to a Federal Rule of Evidence may, by virtue of its status as an evidence rule modifying a congressional enactment, be more likely to transgress the boundaries of the Rules Enabling Act than would a Federal Rule of Civil Procedure, which is a creature of court rulemaking.

Although the rarity of violations of the Rules Enabling Act has resulted in a scarcity of remedies, there is authority for the proposition that the failure on the part of Congress to take action against a proposed rule during the window of opportunity provided in the Rules Enabling Act gives that rule the status of a regulation, rather than a legislative enactment.¹²² There is also authority for the proposition that a court rule—even one prescribed by the Supreme Court—is ultra vires the Rules Enabling Act—and thus of no force and effect—if it would abridge, enlarge, or modify a substantive right.¹²³ Thus, the 2011 changes to Rules 413-415 are void as ultra vires the Rules Enabling Act and should be recognized as such by any court in which a proper challenge is raised, or by Congress, which has the power to reinstate its 1994 versions of these three rules in place of the Supreme Court's ultra vires 2011 versions.

IV. CONCLUSION

The 2011 stylistic changes to Federal Rules 413-415 are not merely stylistic. In fact, they enlarge the substantive rights of parties in a way that violates the Rules Enabling Act. Therefore, the 2011 changes to these three rules are void. Congress's 1994 enactment of those three rules should be recognized, whether by a court considering a proper challenge or by Congress exercising its legislative authority, as still being in effect, subject, as all statutes are, to judicial review.

121. *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.* 130 S. Ct. 1431, 1442 (2010).

122. See *Walko*, 554 F.2d at 1168 at n. 29.

123. *McKinney v. Bayer Corporation*, 744 F. Supp. 2d 733 (N.D. Ohio 2010) (F.R.C.P. 23 held ultra vires Rules Enabling Act); *Government of the Virgin Islands v. Durant*, 2008 WL 410119 (2008) (rule of Superior Court of Virgin Islands, because it was substantive, was ultra vires the U.S. statute authorizing it, and therefore void).