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WHAT NEXT IN FEDERAL CRIMINAL RULES?

WALTER E. HOFFMAN*

On July 11, 1958, Congress authorized the Judicial Conference of the United States to make a continuing study of the Federal Rules of Practice and Procedure. Implementing action was taken by the Judicial Conference on September 18, 1958. The Chief Justice of the United States Supreme Court announced the formation and personnel of the various committees on April 4, 1960. The basic studies, reports and recommendations are conducted by the advisory committees in their respective categories, following which they are forwarded to the Standing Committee on Rules of Practice and Procedure. In turn, the latter committee reports to the Judicial Conference. If approved, the Conference reports to the Supreme Court. The nation's highest court will then approve, modify or disapprove, and such changes as may be adopted are transmitted by the Supreme Court to Congress. Unless Congress acts adversely the rules automatically become law after ninety days.

The procedure thus followed contemplates interim submission of rules and a continuing study to keep abreast of inevitable changes in our social, economic and political lives. To date, various rule changes have become law since the formation of these committees. Perhaps

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2 The Standing Committee on Rules of Practice and Procedure is the parent body. Functioning under the Standing Committee are Advisory Committees on (a) Civil Rules, (b) Criminal Rules, (c) Admiralty Rules, (d) General Orders in Bankruptcy, and (e) Appellate Rules.

3 Amendments to Rules of Practice in Admiralty and Maritime Cases, adopted by Supreme Court on April 17, 1961; Amendments to Rules of Civil Procedure
because of the fact that modification of existing criminal rules are matters of considerable public interest involving the rights of society and individual freedom, the progress of the Advisory Committee on Criminal Rules may appear to be moving at less than the anticipated speed as only one preliminary draft of proposed amendments to certain rules has been circulated to the bench and bar for consideration and suggestions as of the commencement of 1964. No proposed change or addition has yet reached the stage of submission to the Standing Committee on Rules of Practice and Procedure.

The cautious approach to changes in the administration of criminal law is entirely justified. While the veto power is vested in the Standing Committee, the Judicial Conference, the Supreme Court and finally in the Congress of the United States, mature consideration of the many problems presented must rest with the advisory committee, where the spade work is done. Many hours of argument among members with divergent views precede the drafting of any rule change or addition. The personnel of the committee embraces defense lawyers, judges, former judges, former prosecutors and law professors who have lived with the problems of administration of justice in the field of criminal law for many years. One cannot expect unanimity at the initial stages of drafting. The committee is fortunate to have the valued services of a reporter and associate reporter who are highly trained in the field of criminal procedure. The tremendous volume of work in compiling information, considering suggestions, researching legal problems, drafting the initial changes, and preparing the agenda rests upon the reporter.

To forecast the final action of the advisory committee at this stage would be impossible; to say nothing of the ultimate action of the bodies through which the suggested changes must travel. The sole

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*The members of the Advisory Committee on Criminal Rules are: Honorable John C. Pickett, United States Circuit Judge for the Tenth Circuit (chairman); Joseph A. Ball, attorney, Long Beach, California; George R. Blue, attorney, New Orleans, Louisiana; Abe Fortas, attorney, Washington, D.C.; Sheldon Glueck, professor, Harvard Law School; Walter E. Hoffman, United States District Judge, Norfolk, Virginia; Thomas D. McBride, attorney, Philadelphia, Penna.; Maynard Pirsig, professor, University of Minnesota Law School; Frank J. Remington, professor, University of Wisconsin Law School; Honorable William F. Smith, United States Circuit Judge for the Third Circuit; and Lawrence E. Walsh, attorney, New York.

*The reporter is Edward L. Barrett, Jr., professor, University of California Law School; the associate reporter is Rex A. Collings, Jr., Professor, University of California Law School.
purpose of this review is to highlight the major questions which have been advanced for consideration. Of necessity, any discussion of minor modifications pertaining to technical phraseology must be avoided in the interest of space limitations. Moreover, even as to the issues exciting greater interest among defense counsel, law enforcement officers, judges and others, an exhaustive argument is prohibited.

With this in mind, the scope of this article will be limited to the areas of (1) the arrest, interrogation of the accused, proceedings before a commissioner, and the indictment or information, (2) pleas, preparation for trial, discovery processes and venue, and (3) the trial, sentence, probation and the special proceeding involving search and seizure. Taking these matters in order we first consider—

**THE PRE-ARRAIGNMENT STAGES**

While a minor drafting modification of Rule 4 relative to the issuance of a warrant upon a complaint is recommended, the basic requirements "of the essential facts constituting an offense" to establish probable cause remain as heretofore determined. It is Rule 5(a) dealing with proceedings before the commissioner which has consumed many hours of argument with numerous alternative drafts in an effort to bring about a satisfactory solution to the McNabb-Mallory problem. In the field of criminal procedure it is unlikely that any one judicial pronouncement has been more vigorously debated, severely criticized, or strenuously defended. Rule 5(a), as everyone knows, requires an officer making an arrest to take the arrested person "without unnecessary delay" before the nearest available commissioner or any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. Immediately, law enforcement officials pointedly suggest that literal compliance with this requirement destroys any effective interrogation of the suspected person, thereby undermining the entire system upon which law enforcement is predicated. Confessions, even though voluntary, taken from suspected individuals have been consistently rejected as evidence where there has been a violation of Rule 5(a). Patently, the purposes of the rule and the underlying considerations by the Supreme Court are twofold: to stifle "third degree" methods of obtaining confessions, and to bring the arrested person before a judicial officer as quickly as possible so that he may be advised of his constitutional rights and the

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*Giordenello v. United States, 357 U.S. 480 (1958).*  
*McNabb v. United States, 318 U.S. 332 (1943); Mallory v. United States, 354 U.S. 449 (1957); see also: Upshaw v. United States, 335 U.S. 410 (1948).*
issue of probable cause determined. Thus the conflict between society and individual rights is apparent, for it cannot be denied that many a guilty person is granted his freedom by reason of the exclusion of his voluntary confession—a fact that astounds the average citizen untrained in law.

To wrestle with this major problem which is repeatedly before Congress in the form of bills to permit the receipt of otherwise voluntary confessions irrespective of the delay in bringing the accused before a judicial officer, the committee has considered many alternatives, among them being an attempt to define the word "arrest"; the fixing of a stated period wherein interrogation will be permitted; a special rule for the District of Columbia where the issue is acute; a definition of "unnecessary delay" or its counterpart "necessary delay"; authorized detention for limited periods during further investigation of other suspected persons such as in conspiracy matters; requiring regular 24-hour availability of commissioners; shifting the duty of interrogation to a judicial officer after advising the accused of his rights; returning the arrested person to police custody for brief periods of interrogation following his appearance before the commissioner; an obligation imposed upon the arresting officer that he immediately provide a reasonable opportunity to the accused for the purpose of communicating with relatives, counsel, or friends. For reasons too numerous to discuss there are valid objections to these suggested alternatives and to many others advanced by advocates of varying views.

The principal difficulty lies in striking a balance between proper and necessary inquiry and interrogation on the one hand, and the protection of constitutional rights on the other hand. Congress has patiently awaited the recommendations of the advisory committee, but it manifestly appears that the problem cannot be resolved by any rea-

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8While the problem is nationwide, the District of Columbia, controlled by federal law under a metropolitan police force, is in a unique situation. Agents of the Federal Bureau of Investigation, thoroughly trained as they are, seldom run into difficulties. Other law enforcement agencies do encounter the confession issue in a number of cases.

9See Goldsmith v. United States, 277 F.2d 335 (D.C. Cir. 1960), cert. denied, 364 U.S. 863 (1960) where, by a divided court, the procedure adopted by the municipal court judge in remanding the defendants to the custody of the police and deputy marshal for three hours to obtain further evidence, confronting the defendants with the complainant, and for the purpose of having defendants re-enact the offense, was upheld. Cf. Mitchell v. United States, 316 F.2d 354 (D.C. Cir. 1963), where magistrate delivered defendant to police for six hours of interrogation and there was doubt whether defendant was advised that he need not answer any questions. Conviction reversed.
sonable modification of Rule 5(a) and the ultimate decision must rest with the lawmakers in determining what policy to follow. It should be noted that McNabb was decided prior to the adoption of Rule 5(a) and the question may not be finally resolved even if Congress enacts a statute permitting the introduction of a voluntary admission or voluntary confession notwithstanding the provisions of Rule 5.

A study of the history following McNabb and Mallory does not lead to the belief that all voluntary admissions and confessions obtained during the process of inquiry are inadmissible. The admission of exculpatory statements made immediately following arrest;\textsuperscript{10} incriminating admission made while en route to police headquarters or to a judicial officer;\textsuperscript{11} statements given promptly upon the commencement of interrogation, either upon arriving at headquarters or following a period of no inquiry, have consistently been upheld.\textsuperscript{12} A statement taken in violation of Rule 5(a) may sometimes be used in cross-examination or rebuttal of a defendant who elects to testify.\textsuperscript{15} The word "arrest" of course does not connote the formal statement that "you are under arrest."\textsuperscript{14} Following this to a logical conclusion, when a person is suspected of having committed a crime and is deprived of his "liberty of movement," he is then under "arrest." But inquiry of a suspected person where the "liberty of movement" has not been unduly restricted has not prevented the introduction of a voluntary confession despite an intermittent interrogation over a period of hours.\textsuperscript{15} The freedom of movement and spontaneity of the declaration are potent factors in determining the admissibility of a voluntary confession obtained during any interrogation of a suspect, but certainly the Supreme Court has not forbidden law enforcement officers from

\textsuperscript{10} Metoyer v. United States, 250 F.2d 30 (D.C. Cir. 1957); but see Starr v. United States, 264 F.2d 377 (D.C. Cir. 1958), holding that introduction of exculpatory statement solely to show sanity violated Mallory principle.

\textsuperscript{11} Perry v. United States, 253 F.2d 387 (D.C. Cir. 1957); United States v. Mitchell, 322 U.S. 65 (1944).

\textsuperscript{12} Mallory v. United States, 259 F.2d 796, 801 (D.C. Cir. 1958), statement made during five minutes of questioning following 12 hours of no interrogation while defendant was recovering from intoxication.

\textsuperscript{13} Tate v. United States, 283 F.2d 377, (D.C. Cir. 1960), holding that while an inculpatory statement taken in violation of the Mallory rule remains inadmissible, if the defendant goes beyond a mere denial of complicity and relates a set of facts at variance with his inadmissible statement, the prosecution may rebut this testimony without per se introducing the inculpatory statement.

\textsuperscript{14} In Henry v. United States, 361 U.S. 98 (1959), it was held that the arrest took place when the federal agents stopped an automobile and restricted the liberty of movement of the two men who were suspects.

\textsuperscript{15} United States v. Vita, 294 F.2d 524 (2d Cir. 1961), cert. denied, 369 U.S. 823 (1962).
investigating crimes and any mandate prohibiting all questioning of suspects would paralyze the enforcement of our criminal laws. What the Supreme Court has condemned is the failure to comply with Rule 5(a) and the deprivation of liberty of movement—not the length of the interrogation unless it touches upon the voluntariness of the statement. Congress, in its wisdom, could perhaps strike a happy compromise by providing that all admissions or confessions obtained from any person interrogated by law enforcement officers after any detention of liberty are presumptively involuntary, thereby imposing upon the prosecution the duty to overcome such presumption or, as an alternative, provide for “booking” for investigation during the brief period after first advising the person of his constitutional rights.

Faced with this dilemma the advisory committee has, up to this date, made no suggested change in Rule 5(a). What the legislative branch of our government may see fit to do is another matter.

The remaining portions of Rule 5 deal with the duties of the commissioner and the nature of the preliminary examinations. In large metropolitan areas where a grand jury is continuously in session, the commissioner functions as a bail official and frequently the hearing is continued to be immediately followed by a grand jury indictment. Aside from these metropolitan areas the commissioner's duties are (or should be) of utmost importance. He is the first judicial officer before whom the accused is brought. Under existing Rule 5(b) the commissioner is required to advise the defendant "of his right to retain counsel." The defendant's right to request the "assignment of counsel" has been limited to proceedings in the district court. Rule 44 is a mandate to the district judge imposing the duty of advising the defendant of his right to counsel, and to assign counsel unless (1) the defendant elects to proceed without counsel or (2) he is able to obtain counsel. Should the assignment of counsel now be made at the commissioner level to assure justice to the poor as well as the rich?

For many years attorneys have graciously accepted, as a part of their professional duty, the obligation of defending indigents accused of crime. The vast majority of state court appointments result in the allowance of some compensation. However, in the federal courts there is no provision to reimburse the attorney for his expenses, to say nothing of any compensation. Since 1937 varying proposals have been in-

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16Coppola v. United States, 365 U.S. 762 (1961), where the interrogation by federal agents took place while the accused was in state custody.

17In Chicago, and perhaps in one or two other places, the commissioner appoints counsel for the defendant at the stage of the preliminary examination.
introduced in Congress to provide a public defender system in federal criminal cases. For one reason or another there have been objections preventing passage of any bill by the House and Senate. In April, 1961, Attorney General Robert F. Kennedy appointed the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, generally referred to as the Allen Committee, bearing the name of its chairman. The net result of this committee's activities was the Criminal Justice Act of 1963. The late President Kennedy emphasized the importance of its passage in a message to the Senate on March 8, 1963. Two bills, one from the House and one from the Senate, passed the respective bodies prior to adjournment of the 1st Session of the 88th Congress. The measures are bi-partisan and have strong endorsements. Perhaps by the time this review is published Congress will have acted. While there are differences of opinion as to the merits of the public defender system (as eliminated from the House bill) and the optional plan as suggested in the Criminal Justice Act passed by the Senate, the disagreement is not substantial and should be resolved.

Whatever may be the final draft of any such legislation, assignment of counsel at the level of preliminary examination is generally conceded to be necessary. For this reason, as well as for a better administration of criminal justice, the advisory committee is recommending (1) a modification of Rule 5(b) to the end that the commissioner will also be required to inform the defendant "of his right to request the assignment of counsel" and (2) corresponding changes in Rule 44 to implement the assignment procedure before a commissioner.

There has been some agitation for a modification of Rule 8 so as to require the compulsory joinder of offenses and to authorize separate trials on separate counts. Interlocked with this problem is the situation involving the same or similar conduct constituting a violation of more than one criminal statute which has given rise to a state of confusion in apparent conflicting interpretations. The whole

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28The chairman, Francis A. Allen, was, at the time of his appointment, a professor of law at the University of Chicago Law School. He now occupies the same position at the University of Michigan Law School.

29In President Kennedy's State of the Union Address on January 14, 1963, he said that "the right to competent counsel must be assured to every man accused of crime in federal court, regardless of his means."


area of multiple crimes, double jeopardy, concurrent and consecutive sentences, and consecutive trials is increasingly a live one in federal criminal jurisdiction but to attempt a rule encompassing all possible situations would be fraught with danger and, in addition, the matter should probably be resolved legislatively or judicially. Certainly Congress should be encouraged to examine the overall problem for the purpose of making it clear when double punishment is intended, and resolving the issue of how separate offenses are to be tried in those situations in which double punishment is not intended, or, as an alternative, to specify the punishment to be imposed upon a finding of guilty.

The Arraignment and Pre-Trial Procedures

The multitude of questions presented by the arraignment and plea under Rules 10 and 11 furnish the most frequent basis for attack in the popular post-conviction remedy available to federal prisoners. In the event of a not guilty plea there are no appreciable difficulties but whenever a plea of guilty results in a sentence of imprisonment, the prisoner is always ready to attack the court procedure and his own attorney, whether court-appointed or privately employed. Aided by the "jail-house lawyers" who must enjoy a lucrative practice, the Federal Rules of Criminal Procedure are carefully studied with the end in view of picking up some technicality which will result in the sentence being vacated, a new trial ordered, and a likely dismissal of the action due to the death or disappearance of witnesses after a period of years. Numerous appellate decisions have lent encouragement to these prisoners and, after all, what have they to lose?

Prior to 1946 when the Federal Rules of Criminal Procedure became effective, the matters of arraignment, advising the defendant of his rights, assigning counsel, and taking the defendant's plea, were substantially the function of the clerk. While the clerk still performs some of these duties, the judge can no longer rely upon these pro forma activities, especially where the clerk or deputy clerk is inexperienced or uninformed as to the details and importance of the rules. In most instances the judge has become a mechanical robot in handling pleas of guilty. Prior to arraignment he must ascertain whether the defendant desires the services of an attorney. If the answer is in the affirmative, he then interrogates the defendant as to his financial ability to engage his own counsel. If the defendant declines the services of

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an attorney, the court must inquire into the age and education of the accused, and may determine that counsel must be appointed in any event as a plea of guilty taken from any defendant under the age of majority with only a limited education is, at best, a hazardous undertaking in light of many appellate court decisions. In a great number of federal courts the foregoing activities are scheduled on pre-arraignment days whenever the accused is in custody. Indeed, under the proposed changes in Rule 46 a special provision places upon the judges the responsibility for supervising the detention of defendants (and witnesses). With the modifications in Rules 5(b) and 44 relating to the appointment of counsel at the commissioner level, together with more liberality in fixing the place of trial under Rule 18 and suitable provisions for more expeditious proceedings under Rule 20, detention of persons awaiting trial will be reduced to a minimum, and should essentially be confined to those pleading not guilty who, for obvious reasons, cannot be considered eligible for bail under Rule 46 or are otherwise unable to post bond for their release from custody.

Returning to the arraignment, it should be noted that, once again, it is the court’s obligation to see to it that a defendant is handed a copy of the indictment or information before being called upon to plead. When represented by counsel it is common practice for the actual reading of the indictment or information to be waived, but whenever the defendant is without the services of an attorney it would again be dangerous to permit such a waiver in light of the pronouncements that such waiver must be an “intelligent one” with full understanding of what is being waived. The language of Rule 11 giving rise to more serious consequences is that the court “may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.” Decisions interpreting the foregoing quotation are legion. The “voluntary” plea calls for freedom from force, threats, promises and persuasions.23 what formerly was deemed sufficient when the clerk inquired of a defendant, “Do you understand the nature of the charge?” is no longer adequate. The words “nature of the charge” have been held to require advice to the defendant as to the range of allowable punishment which can be imposed in the event of the acceptance of the plea.24 If the defendant is of a suitable

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23Aiken v. United States, 296 F.2d 604 (4th Cir. 1961); Smith v. United States, 295 F.2d 99 (D.C. Cir. 1961); United States v. Lester, 247 F.2d 496 (2d Cir. 1957).
24Von Moltke v. Gillies, 332 U.S. 708 (1948); Aiken v. United States, 296 F.2d 604 (4th Cir. 1961); United States v. Lester, 247 F.2d 496 (2d Cir. 1957); Gannon v. United States, 208 F.2d 772 (6th Cir. 1953).
age for commitment under the Federal Youth Corrections Act, he must be warned of possible confinement for the maximum period of six years, which may exceed the maximum term of imprisonment if sentenced as an adult.\textsuperscript{28} And it is not enough for a court to assume that the defendant may be placed upon probation as a subsequent revocation of probation may then bring about an attack upon either the voluntariness of the plea or lack of understanding of the nature of the charge.

As the Supreme Court has said that the court "must investigate as long and as thoroughly as the circumstances of the case before him demand"\textsuperscript{26} it is apparent that a non-delegable duty has been cast upon the court—one that prevents haste and efforts to dispose of guilty pleas through ministerial acts of the clerk. The advisory committee is, therefore, recommending a revision of Rule \textsuperscript{11} requiring the court to address the defendant \textit{personally}, even though he is represented by counsel, and to propound sufficient inquiries to satisfy the court that the plea is voluntary and that the defendant understands the nature of the charge. Since existing Rule \textsuperscript{11} made no such requirement in accepting a plea of \textit{nolo contendere}, the same requirement will be imposed for this plea prior to its acceptance.

A further suggested modification of Rule \textsuperscript{11} will place an added responsibility upon the court to inquire into the factual basis of the charge in situations involving a plea of guilty (but not \textit{nolo contendere}). If, upon inquiry, the court determines that the defendant did not in fact commit the crime charged, there is a provision for setting aside the guilty plea and entering a plea of not guilty.

Diverse practices exist throughout the United States in handling guilty pleas. True, the submission of the plea of guilty carries with it the legal significance that the defendant's conduct falls within the charge. Some federal courts hear no evidence or summarization of what transpired. Others permit the United States Attorney to read excerpts from his file, or listen to the testimony of a government agent, all following the acceptance of the guilty plea. In rare instances, but too numerous for comfort, an inquiry develops that the defendant has committed no federal crime. With the "bootlegger" caught at the still, it is not unusual for this defendant to say, "I \textit{pleads} guilty to being near the still," which, standing alone, is no crime. The advisory committee feels that a more uniform practice of making a brief in-

\textsuperscript{28}Pilkington v. United States, 315 F.2d 204 (4th Cir. 1963). Cf. Cunningham v. United States, 256 F.2d 467 (5th Cir. 1958).

\textsuperscript{26}Von Moltke v. Gillies, 332 U.S. 708, 723-724 (1948).
quiry into the factual basis of the charge will tend to prevent post-
conviction attacks upon sentences which, in past years, either have
been successful or have required extensive hearings. The inquiry re-
quired is not to be restricted by rules of evidence and probably re-
quires no more information than is already in the presentence report
or the file of the attorney for the government. Whether the suggested
change, inquiring into the factual basis of the charge, is adopted or
rejected, it is likely that many federal courts will continue this al-
ready existing practice.

DISCOVERY

With the advent of liberal discovery processes in civil and ad-
miralty cases, it is only natural that there are many advocates of like
procedures in criminal matters. In an address before the Judicial
Conference of the District of Columbia Circuit on May 9, 1963, Mr.
Justice Brennan traced the history of discovery in criminal cases pre-
vailing in England, France and the Soviet Union. He pointed to the
liberal discovery permitted in the Nuremberg trials, and the ruling of
Chief Justice Marshall in the celebrated trial of Aaron Burr when de-
fense counsel was granted pre-trial inspection of a letter addressed
to the President of the United States which was in the possession of
the United States Attorney. Mr. Justice Brennan,27 an advocate of
discovery in criminal proceedings, suggests that there are four prin-
cipal arguments against liberal discovery in criminal cases, they being
briefly stated as follows:

(1) Discovery will not lead to honest fact-finding but, on the con-
trary, to perjury and the suppression of evidence.

(2) Advance information as to the names of prosecution witnesses
will result in attempted bribes, efforts to frighten witnesses or, of more
serious consequences, the removal of material witnesses either through
acts of violence or by creating a natural reluctance on the part of the
witness to come forward with information during the investigation
of a crime.

(3) The natural disadvantage to the prosecution in permitting
discovery as a "one-way street" because of the defendant's constitution-
al protection against self-incrimination.

(4) The favorable English experience with broad discovery af-
ffords no guide for the United States because of the great disparity in
crime statistics of the two nations and, in light of the increasing rate of

crimes of violence in our nation, the safeguards which now protect
the criminal defendant should not be expanded.

Cogent though these objections may be, they are not entirely meri-
torious. It is not true that the danger of perjured testimony exists in all
cases, civil, admiralty, bankruptcy and criminal? The argument that
the witnesses may be silenced if their names are disclosed prior to trial
is, of course, a substantial one as there are many instances where this
has occurred. But if this practice has existed without the aid of broad
discovery, does it necessarily follow that it will increase merely because
names may be ordered disclosed prior to trial? Certainly the hardened
criminal is generally aware of the witnesses who will be used against
him. Moreover, even the most ardent advocates of liberal discovery
are agreed that judicial discretion should be exercised as a safeguard
in particular cases. The right of a defendant to discover the names of
government witnesses would never be without an equivalent right
of judicial discretion. With respect to the argument that liberal dis-
cover is a “one-way street” we have, of course, a troublesome constitu-
tional question. Does the privilege against self-incrimination repre-
sent a barrier to the prosecution’s discovery of the accused? For exam-
ple, California, Ohio and New York have rejected constitutional ob-
jections to notice of alibi statutes. Notice of alibi statutes or rules
exist in fourteen jurisdictions. While we cannot predict what the
United States Supreme Court may say in the event of a “two-way street”
discovery rule, we do know that Mr. Justice Brennan, a known sup-
porter of individual constitutional rights, made these comments in
his address noted above:

“Beneficial results are claimed for statutes which require
an accused to give the prosecution pretrial notice of an alibi or
insanity defense. Among them is that they not only prevent
surprise at the trial but that they also aid more effective prepara-
tion by the prosecution for trial, and indeed they do. But what
justifies our being so sure then that according criminal discovery
to the accused will benefit only the accused at the expense of the
prosecution?”

With the foregoing in mind, the advisory committee has consid-
ered—and is now studying—the possibilities of “two-way street” dis-
cover. Admittedly there are complications with respect to particular
type cases such as conspiracy and the like. A new rule providing for

28Jones v. Superior Court, 58 Cal. 2d 56, 22 Cal. Rptr. 879, 372 P.2d 919
(1962); State v. Thayer, 124 Ohio St. 1, 176 N.E. 656 (1931); People v. Schade, 161
29Brennan, supra note 27, at 58.
a notice of alibi has been circulated to the bench and bar. Whenever
the prosecution suspects that the defendant intends to rely upon the
defense of alibi, the attorney for the government may demand that
the defendant serve a notice of alibi, the demand stating the time
and place the prosecution proposes to establish where the defendant
participated in or committed the crime. If the defendant fails to
serve his notice of alibi, he is then precluded from introducing evi-
dence at the trial (other than his own testimony) tending to show
the defense of alibi. Such a rule may well have a salutary effect for the
defendant as well as the prosecution. If the alibi is determined to be
valid by appropriate investigation prior to trial, it will probably re-
sult in the dismissal of the action without trial. If it turns out to be
false, then the government should be permitted to show the falsity
of the witness who is willing to perjure himself.

With equal force it may be well to initiate proceedings requiring a
notice of insanity, mental incompetency, or mental disease. The
wealthy defendant is able to secure the services of psychiatrists, with-
out knowledge of the prosecution and, on the day of trial, the gov-
ernment is met with the defense of incompetency. Since our federal
system requires proof of mental competency beyond a reasonable
doubt, a rule of this nature would at least make available to the prose-
cution the services of a court-appointed psychiatrist under Rule 28
or, in the alternative, a procedure for study in a qualified hospital in
advance of trial. Once again, such a rule would promote the interests
of the defendant in many instances, and may result in a dismissal of
cases where the mental competency is doubtful.

The committee has suggested that depositions may be taken at the
instance of the government of a witness under certain conditions,
providing for the presence of the defendant at said deposition; the
expense of travel and subsistence of the defendant and his attorney
would be paid by the government. As Rule 15 now reads, the right to
take a deposition in a criminal case rests solely with a defendant. Ap-
proximately twenty-two jurisdictions now provide for depositions to be
taken by the prosecution under varying conditions. The constitu-
tionality of such a provision, while not free from doubt, has been up-
held.30

The right of a defendant to inspect, copy or photograph designated
books, papers, documents or tangible objects has been heretofore lim-
ited under Rule 16 to those matters obtained from or belonging to the
defendant, or obtained from others by seizure or by process. In actual

30See 5 Wigmore, Evidence, § 1298 n.4.
practice we know that the federal courts and the attorneys for the government have liberalized this rule. Depending upon the standing and reputation of defense counsel, it is not uncommon for a United States Attorney to reveal the contents of his entire file to the attorney for the defendant. The reason is obvious for, if the government has an “air-tight” case, the result will probably be a guilty plea.

Suggested Rule 16 specifically provides that there is no right to inspect statements or reports made by government witnesses or prospective government witnesses to agents of the government, except as provided in 18 U.S.C. § 3500, generally referred to as the Jencks Act. Congress has legislated on this subject and the committee has no desire to dictate a policy contrary to our legislative body.

The committee feels—and the Department of Justice concurs—that Rule 16 should be broadened to permit the inspection of any written or recorded statement or confession made by the defendant to an agent of the government. Such a practice is essentially in line with the more modern thinking of the courts. Also recommended is the right to inspect the results or reports of any physical or mental examination and any scientific tests or experiments which may be produced by the prosecution at the trial for proving the indictment or information, if within the custody or control of the government. There is every likelihood that Rule 16 will be substantially broadened as heretofore indicated.

There will, in all probability, be safeguards by way of protective orders in granting or denying discovery motions, As the Department of Justice points out, a victim's bloodstained shirt may bear the bloodstains of two different aggressors, one being the defendant and the other still a fugitive. Disclosure of the report of the blood test may jeopardize the chances of apprehending and prosecuting the fugitive. In internal security cases it may be necessary to excise portions of the defendant's confession having no bearing on the crime but containing information vital to national security. The district courts should have discretion to deal with these peculiar problems.

Sharp disagreement is expected on the matter of disclosure of names of witnesses. Certainly the defendant could not constitutionally be required to divulge the names and addresses of his witnesses in advance of trial. The constitutionality of such a rule may possibly be upheld under a proviso that if the defendant desires to avail himself of any rule requiring the disclosure of prosecution witnesses, then, as a condition to such disclosure, the court may require the defendant to name his witnesses. The Justice Department vigorously argues
against disclosure because of the potential of severe anti-social con-sequences which are destructive of the integrity of the judicial system. Threats, intimidation, physical brutality, organized criminal activity, danger to informants, all point to the cogency of the observation of Mr. Justice Clark who said, "Dead men tell no tales."31 The Department of Justice argues that the manpower and cost of maintaining protective custody of an informant would be prohibitive and, of even greater importance, the informant's usefulness to the government would be terminated when his name is revealed. These informants work in particular areas for brief periods and are then transferred to other locations. If a defendant pleads guilty, there is no need to disclose the informant's name and his usefulness will at least con-tinue until he is required to appear and testify. Witness intimida-tion in civil rights cases under 18 U.S.C. § 242, economic pressure in securities fraud prosecutions, the Landrum-Griffin Act, and crim-inal anti-trust prosecutions—all generally requiring long periods of time awaiting trial—pointedly suggest that, even armed with the safe-guard of a protective order, the requirement of disclosure of names of witnesses is too great a risk and the benefits to be derived therefrom are too slight. The main difficulty with a protective order is that, when the court is called upon to act, there is little probability that such dangers are apparent. On balance, the objections of the Depart-ment of Justice seem to be meritorious. Whether the committee will recommend any such disclosure remains to be seen.

At the preliminary stages of consideration by the committee there was some discussion relating to a proposal permitting discovery depositions of prospective witnesses similar to the practice now pre-vailing in civil and admiralty cases. This was first advanced as a "one-way street" available only to the defendant; thereafter it was explored as a "two-way street" making the defendant and his witnesses amen-able to discovery, if the defendant elected to resort to discovery of any prosecution witness; the theory being that the defendant would thereby waive his privilege of self-incrimination. Such a procedure raises serious constitutional questions as it is well settled that a waiver of the privilege must occur in the same proceeding in which it is sought to be invoked.32 Whether a discovery deposition in a pending criminal matter would be considered as a "same proceeding" in the

32Marcello v. United States, 196 F.2d 437 (5th Cir. 1952); Poretto v. United States, 196 F.2d 392 (5th Cir. 1952); In re Neff, 206 F.2d 149 (3rd Cir. 1953); Cf. Counselman v. Hitchcock, 142 U.S. 547 (1892); Brown v. Walker, 161 U.S. 591 (1896).
event a defendant made damaging admissions and the prosecution endeavored to introduce such admissions at the trial would, at least, be debatable. But of even greater importance would be the prolongation of criminal trials for indefinite periods, the magnitude of the expense involved, the obvious abuses which would creep into such a system, the necessity for disclosure of names and addresses of witnesses, and the difficulty of properly administering such a procedure in the event the witness fails to disclose certain facts to which he thereafter testifies. It is not reasonably foreseeable that any discovery depositions will be permitted in criminal cases.

PRE-TRIAL AND THE TIME AND PLACE OF TRIAL

The existing rules make no provision for pre-trial conferences. Such conferences are now being utilized in many federal courts even in the absence of an appropriate rule. Much can be accomplished by the court and counsel in shortening the trial and narrowing the issues, especially in protracted cases. No sensible jurist would enter upon the trial of a criminal anti-trust case without the benefit of one or more extensive pre-trial conferences. Undoubtedly the committee will attempt to formulate a simple rule to establish a legal basis for what is now being done.

The time and place of trial and related proceedings as now stated in Rules 18, 19, 20, 21 and 22 is the subject of proposed amendments. Many states have statutory divisions set forth in particular districts. Other divisions are provided for by local rules. Where there are numerous divisions, some of which are widely scattered, there have been unnecessary delays in bringing a defendant to trial or, even more extreme, delays in appointing counsel and advising a defendant of his constitutional rights. The Supreme Court has held that there is no constitutional right to trial within a division where the offense was committed.33 It is proposed that Rule 18 be amended to eliminate the requirement that the prosecution be in a division in which the offense was committed, and that the trial and related proceedings be at a place within the district as may be fixed by the court with due regard to the convenience of the defendant and his witnesses. The language of present Rule 19 permitting proceedings in another division "if the defendant consents" would likewise be stricken. This will enable judges visiting certain divisions at brief and infrequent inter-

vals to cause a defendant (particularly one in custody) to be brought before the court in another division, at which time the defendant may be advised of his rights, counsel may be appointed, the time and place of trial may be fixed, questions relating to release on bail may be discussed and, in general, the entire administration of criminal justice may be expedited. While there are some objections to this procedure by defense counsel in the larger states, it is believed that the advantages far outweigh the disadvantages.

The revision of Rule 18 eliminating division venue requires corresponding changes in Rule 21. Appropriate contemplated amendments to Rule 21 will now permit a transfer to another district upon motion of defendant for prejudice, the district selected to be within the discretion of the court. A further change is suggested in Rule 21(b) to meet the situation arising where one of several offenses charged was committed in more than one district, thereby permitting on motion of defendant (1) a severance of a particular offense with a transfer, (2) a transfer of all or part of the offenses charged, or (3) a refusal to transfer any of the offenses.34

Existing Rule 20 has been very beneficial in the administration of criminal law and procedure. It contemplates that whenever a defendant wishes to plead guilty or nolo contendere, he may waive trial in the district in which the indictment or information is pending and consent to the disposition of the case in another district. The procedure is particularly helpful in cases involving fugitives or crimes such as interstate transportation of a stolen motor vehicle. The defendant is frequently arrested in states far removed from the place of crime. The delays and expense of transfer are avoided where the defendant intends to plead guilty. Despite the effectiveness of Rule 20, it still causes unnecessary delays where a defendant is arrested prior to the return of an indictment or the filing of an information. Moreover, there is no provision for handling juveniles arrested in a district other than that in which he is alleged to have committed the crime. As revised, Rule 20 will resolve the situations in which (1) an indictment or information is pending, (2) an indictment or information is not pending, and (3) invoking a juvenile delinquency proceeding in the district in which the juvenile is arrested or held; all of the foregoing being under the assumption that the defendant wishes to plead guilty or nolo contendere. These changes will greatly assist in term-

34The problems are demonstrated in United States v. Choate, 276 F.2d 724 (5th Cir. 1960).
ating matters which must now await indictment or information in distant states.

THE TRIAL AND SUBSEQUENT PROCEEDINGS

A trial balloon was presented to the bench and bar in an effort to reduce the number of peremptory challenges now available in the selection of petit jurors.\textsuperscript{35} The committee felt that in the average criminal case the number of challenges brought about a waste of jury effort with the attendant expense and loss of individual time on the part of the jurors. Almost without exception the bar opposed the reduction in the number of challenges. If any change is to be made in the number of challenges, Congress will have to act. The legislative branch of our government has, of course, specified the number of challenges in capital cases. An acceptable recommendation is to be found with respect to the number of alternate jurors and the committee, by reason of experience in protracted criminal cases, has suggested increasing the permissible number from four to six and, in addition, has provided for an alternate juror to be seated when a regular juror becomes or is "found to be unable or disqualified" to perform his duties, thereby taking care of the situation where it is first discovered during the trial that a juror was unable or disqualified at the time he was sworn. The right to substitute an alternate juror after the jury has retired to deliberate, or otherwise permit alternate jurors to participate in deliberations or listen to same, raises serious constitutional objections and past experience does not indicate that advocating such a modification is worth the risk.

Rule 25 authorizes another judge to act after verdict or finding of guilt in the event of the trial judge's absence from the district, death, sickness or other disability. Since the present wording limits the power of substitution to proceedings after verdict or a finding of guilt, there should be some authority to provide for the services of a substitute judge prior to the above specified times in the event of death or prolonged illness of the presiding jurist. Especially is this true in jury cases where the jury is the final arbiter of the credibility of witnesses. In the celebrated German-American Bund case, a mistrial was declared after testimony had been taken for seven and one-half months when the trial judge died in 1944. In the Second Circuit long criminal jury cases

\textsuperscript{35}Rule 24 now provides for 6 peremptory challenges on the part of the government and 10 such challenges for the defendant or defendants jointly. The suggested change cut this number in half, but provided that the court could allow additional challenges to the extent stated in the existing rule.
trials are not uncommon. Since Rule 25 now provides discretion for granting a new trial, it would seem that, despite some doubts as to constitutionality, a change should be made to take care of this unusual situation in jury trials.

Since questions of evidence are now before another committee considering the possible adoption of uniform rules of evidence for the federal courts, it is unlikely that any modification of existing Rule 26 may be expected pending a comprehensive study of the report from this committee. Undeniably this will be a controversial issue when it arises.

Minor changes as to motions for judgment of acquittal, objections to jury instructions, motions for a new trial and in arrest of judgment, and correcting a sentence imposed in an illegal manner (as distinguished from correcting an illegal sentence) are technical in nature and, while suggested changes raise some problems in draftsmanship, the spirit of the proposed amendments is not essentially undermined.

A major dispute has arisen on the disclosure of the contents of presentence reports under Rule 32(c)(2). Trial judges are, almost without exception, opposed to any requirement of disclosure. Defense attorneys favor disclosure—some even to the extent of revealing sources of confidential information. State courts have adopted varied practices. Many federal judges comment upon portions of the report prior to pronouncing sentence and, in the discretion of the court, copies of the report have been made available to the defendant or his counsel. The Supreme Court has affirmatively held that it is not a denial of due process of law for a court, in imposing sentence, to rely on a report of a presentence investigation without disclosing such report to the defendant or giving him an opportunity to rebut it. There are valid arguments pro and con, the review of which would be the subject of a separate article. In weighing the merits, while federal judges should be encouraged to give a summarization of the report without revealing, directly or indirectly, confidential sources of information, any mandatory disclosure may tend to destroy the probation system.

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36 The United Dye securities fraud trial ended on February 4, 1963, after eleven months and five days. Many other cases could be cited as examples for the necessity of substituting a trial judge under emergency conditions, as well as the need for increasing the number of alternate jurors.
37 The Committee on Rules of Practice and Procedure.
40 The recently formulated Judicial Conference Committee on the Administration of the Probation System voted unanimously against compulsory disclosure.
Of course, if Congress should see fit to grant appellate review of sentences—a matter strongly advocated by many—disclosure would be inevitable.

While it is unlikely that any district judge would revoke a defendant's probation except after a hearing at which the defendant is present and apprised of the grounds on which such action is proposed, a provision is suggested for the appropriate modification of Rule 32 requiring this action. Not specifically stated is the question of the right to counsel at a revocation hearing but in the light of existing Rule 44 providing for the right to counsel "at every stage of the proceeding" it is certainly the better part of wisdom for a district judge to appoint counsel unless the probationer elects to proceed without counsel or is able to obtain his own attorney.

Drastic modifications of the bail provisions under Rule 46 have met with almost universal acceptance. The policy is, and should be, against unnecessary detention awaiting trial. In summary, the modifications will permit the release of defendants under conditions which are substantially equivalent to the bail bond premium now being paid, but this amount so deposited will be returned to the defendant or depositor upon the defendant's appearance. The bail-jumping statute, 18 U.S.C. § 3146, has made possible a modern approach to unnecessary detention, and the new rule directs that the defendant's attention be called to the penalties imposed by this statute in the event of wilful failure to appear. It is believed that this opportunity for freedom pending trial will result in sound economics and the end result will be that only those who deserve to remain in jail will be without remedy. With the requirement of continuing supervision over the detention of defendants pending trial, there is no sound reason to believe that courts should be unduly criticized in future years on the subject of unnecessary detention.

This review has not attempted to touch upon literally hundreds of related matters. For example: (1) Should Rule 41 (search and seizure) be enlarged to permit pre-trial motions to suppress confessions? (2) Should the minutes of a grand jury be revealed on pre-trial motion of a defendant or, as presently provided, where "particularized need" exists? (3) Should it be compulsory to have a court reporter, stenographer, or a mechanical recording device at all sessions of a grand jury and, if so, should it be mandatory that these proceedings be

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Should the government be permitted to appeal from an adverse ruling suppressing evidence under Rule 41, and should a defendant be accorded the privilege of an interlocutory appeal where suppression is denied? These and many other problems arise, some of which are major and others minor. They cannot be resolved overnight and Congress has prudently provided for a continuing study of the rules.

Just as the problems are unending, so also the conflicts will persist with one group advocating the rights of the individual and the other defending the rights of society in an effort to combat crime. The solution is not readily available. As Dr. Samuel Johnson said approximately 200 years ago, "The danger of unbounded liberty and the danger of bounding it have produced a problem in the science of government which human understanding seems hitherto unable to solve." The words could well have been uttered on January 1, 1964.

42 By way of dictum, United States v. Giampa, 290 F.2d 85, 85 (2d Cir. 1961), states that such a transcript must be available at the trial, but no precedent is cited which requires a transcript in every case.