

THE NEW FEDERAL CRIMINAL RULES

FOREWORD

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THE federal courts have set the pace in the task of improving the administration of justice not only for most of the state courts, but, in some respects, for the federal administrative tribunals as well.¹ There are few, if any, judicial structures as free from complexity as the federal courts. In the work of attending to the business and administrative affairs of a judicial system, moreover, no state has an organization comparable to the Administrative Office of the United States Courts.² Furthermore, in the adaptation of relatively simple rules to the work of governing court procedures, few jurisdictions have achieved the simplicity and efficiency of the Federal Rules of Civil Procedure.

The work of the Advisory Committee of the United States Supreme Court on Federal Rules of Criminal Procedure is not, it will be seen, an isolated effort to improve procedure; on the contrary, it is an integral part of a broad program for simplicity and efficiency in all branches of judicial administration. The federal system of courts did not attain its present symmetry of district courts, circuit courts of appeals, and a Supreme Court without considerable experimentation. The Administrative Office of the United States Courts was born of turmoil.³ The act granting the rule-making power in civil cases to the Supreme Court was passed only after a crusade by the bar lasting thirty years.⁴ In contrast, the act conferring on the Court the rule-making power in criminal cases

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1. Pretrial practice, for example, which originated in the law courts, is being adapted to use in the federal administrative tribunals; see *FEDERAL REP. ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE* (1941) 64-68.

2. 53 STAT. 1223 (1939), 28 U. S. C. §§ 444-50 (1940).

3. See (1937) 23 A. B. A. J. 385, 387. The proposal for a "Proctor" was favored by 39,990 lawyers, opposed by 23,841, whereas the proposal to enlarge the Supreme Court was favored by 18,533, opposed by 51,156.

4. See *Supreme Court Adopts Rules for Civil Procedure in Federal District Courts* (1938) 24 A. B. A. J. 97.

up to verdict⁵ was passed without opposition, largely as a result of the example of the Civil Rules and of the Act of 1934 conferring on the Court rule-making power in criminal cases after verdict.⁶ The Supreme Court's broad rule-making powers now cover not only traditional civil and criminal proceedings but also such fields as bankruptcy and copyright cases.

Many lawyers conceive of procedure as static, but nothing could be further from fact. The Criminal Appeals Rules of 1934 were a noteworthy achievement in simplifying procedure; yet the treatment of exceptions in the Federal Rules of Civil Procedure of 1938⁷ seems definitely to be a step in advance of the Rules of 1934. The Civil Rules, in turn, now seem to be obsolescent with respect to such an important matter as the record on appeal when compared with the practice that has been adopted in the circuits on the Atlantic seaboard of printing merely the parts of the record to which counsel desire to call the reviewing court's attention.⁸ This process of continuous growth in matters of procedure has been recognized by the Supreme Court in designating the members of its Advisory Committee on Rules of Civil Procedure as a continuing committee.⁹

The Advisory Committee on Rules of Criminal Procedure commenced its work in February, 1941, and the members of the Committee are now considering the third tentative draft. The Committee has had invaluable assistance from committees appointed by the district judges on the recommendation of Chief Justice Hughes and similar committees of state and local bar associations. With the work of the Committee still in the formative state and not yet in shape to submit to the Supreme Court, it would be manifestly improper to discuss its contents in detail. But there is no impropriety and perhaps some advantage in directing attention to some of the considerations that have impressed the Committee as it has proceeded with its work.

The first impression concerns the enormous number of legal barnacles that encrust the subject of criminal procedure. Legal barnacles are not, however, a peculiarity of criminal procedure alone; they seem to thrive in all branches of adjective law.¹⁰ The first task in procedural reform

5. 54 STAT. 688, 18 U. S. C. § 687 (1940).

6. 47 STAT. 904 (1933), as amended, 48 STAT. 399 (1934), 18 U. S. C. § 688 (1940).

7. See Rules 46, 7(c).

8. Rule 10 of the Circuit Court of Appeals for the Fourth Circuit; Address of Claude M. Dean before the North Carolina Bar Association at Blowing Rock, N. C. (privately printed).

9. Order of the Supreme Court of the United States, Jan. 5, 1942, 86 L. Ed. (adv. op.) 364.

10. Compare ORFIELD, *CRIMINAL APPEALS IN AMERICA* (1939); POUND, *ORGANIZATION OF COURTS* (1940); POUND, *APPELLATE PROCEDURE IN CIVIL CASES* (1941).

is to distinguish between the essential and the adventitious and to eliminate the latter.

Essentially criminal procedure is, or at least seems to be, more simple than civil practice. Perhaps this impression is engendered by the fact that much of the pleading on the criminal side of the trial court and many of the motions are oral as distinguished from the formal written documents on the civil side.

These observations as to encrusting technicalities and essential simplicity apply as much to state courts as to the federal system. There are two peculiarities of criminal procedure in the federal courts, however, that immediately distinguish it from the corresponding practice in the state courts. The first distinction is to be found in the wide differences in the communities to be served by the federal courts. A set of rules may be very satisfactory in a large urban center where there is a considerable number of judges sitting the year round and yet be quite intolerable in a rural district where the terms of court last but a week or two once or twice a year. The generality of the Federal Rules of Criminal Procedure should be such as to encompass suitable practice in each type of community.

Then, too, there is a vast difference between the rather simple common law crimes under state law and most of their statutory crimes, on the one side, and the complicated federal statutory crimes, on the other. A set of rules that may be admirably adapted to the trial of issues ranging from assault and battery to murder may not be at all suited to the disposition of such involved proceedings as anti-trust or mail-fraud cases. A case that may take months or even years for trial is likely to require rules different from one that may be disposed of in half a day.

In drafting rules for criminal cases we must also take into account the fundamental difference in constitutional problems between criminal procedure and civil practice. Federal rules of criminal procedure must meet the test of a considerably larger number of constitutional provisions than do civil rules. Obviously, criminal procedure was much more in the minds of the draftsmen of the first ten amendments to the Federal Constitution than was civil practice. But today the constitutional provisions relating to civil litigation are much better known to laymen and lawyers alike than the constitutional safeguards designed to protect the accused in a criminal proceeding. In quiet times the constitutional safeguards of an accused seem relatively unimportant, but in times of crisis their significance is greatly enhanced, and the Government often feels hampered by them. At all times, however, they are indispensable to the accused; any set of rules of criminal procedure must conform to them in letter and in spirit. Fundamentally what is sought is what a

recent writer has called "the Right to a Fair Trial."¹¹ It is significant that even in England there should still be doubt as to just what a fair trial means.

In a world torn by international conflict, with national defense our primary responsibility at the moment, there may be lawyers as well as laymen who wonder why time and thought should now be devoted to the formulation of federal rules of criminal procedure. They should be reminded that these rules will expedite the prompt and efficient trial not only of ordinary criminals but of the many persons suspected of being saboteurs or enemy agents. But, even more important, they should be reminded that the international conflict is essentially a struggle between law and order on the one side and brute force on the other. Our type of civilization depends on "equal justice under law." The present international struggle is not merely political; on the contrary, our primary goal is the preservation of freedom in our own country and its restoration elsewhere. One has but to look back to the many criminal prosecutions arising in World War I to realize that in times of crisis there is always a tendency to disregard the individual's civil rights and liberties. In our zeal to achieve ultimate victory, we must not cast aside the very thing we are fighting for.

11. PENAL REFORM IN ENGLAND (1940) 75-91 (c. 5, "The Right to a Fair Trial").