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THE NEW FEDERAL RULES OF CRIMINAL PROCEDURE: II*

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INDICTMENT AND INFORMATION

The Grand Jury. In approximately half the States as well as in England use of the grand jury as an investigative body,⁷¹ and of grand jury indictment as a step in prosecution,⁷² has been largely abandoned. This old institution has, however, been retained in federal practice pretty much in the traditional common law form. The new Rules do not change this as, indeed, they could not in view of the constitutional guaranty that no federal prosecution for a "capital, or otherwise infamous" crime (in practice, any felony)⁷³ shall be had save on "presentment or indictment"⁷⁴ by a grand jury. The extensive use of federal grand juries for investigative purposes would, moreover, militate against any curtailment of their powers in this respect even if such action were within the Supreme Court's power to prescribe "rules of pleading, practice, and procedure." The place of grand juries in the

* A continuation of *The New Federal Rules of Criminal Procedure: I* (1946) 55 YALE L. J. 694.

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71. For a discussion of the investigative role of the grand jury, and of alternatives to its use, see Dession and Cohen, *The Inquisitorial Functions of Grand Juries* (1932) 41 YALE L. J. 687.

72. See Dession, *From Indictment to Information—Implications of the Shift* (1932) 42 YALE L. J. 163.

73. *Duke v. United States*, 301 U. S. 492 (1937); *United States v. Moreland*, 258 U. S. 433 (1922); *Ex parte Wilson*, 114 U. S. 417 (1885); *American Tobacco Co. v. United States*, 147 F. (2d) 93 (C. C. A. 6th, 1944), *aff'd*, 66 Sup. Ct. 1125 (U. S. 1946), (1945) 54 YALE L. J. 707.

74. U. S. CONST. AMEND. V. The "presentment"—as distinguished from an indictment—is nowhere mentioned or provided for in the Rules, being considered obsolete. See Committee Note to Rule 7 in FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944) 26.

The Rules are likewise silent on the related problem of grand jury "reports." The legal status and use of such reports generally in the United States, and at common law, are reviewed in Dession and Cohen, *The Inquisitorial Functions of Grand Juries* (1932) 41 YALE L. J. 687, 689.

federal apparatus of investigation—which includes legislative committees and administrative agencies similarly endowed with subpoena power, as well as prosecuting attorneys and police officers—is accordingly unaltered, and since most of the common federal offenses are felonies, the process of indictment will continue as a routine step in the initiation of most prosecutions.

Rule 6, however, does settle certain hitherto disputed points, and in several respects enhances the effectiveness of the grand jury by permitting greater flexibility in its use. As formerly, a grand jury consists of not less than 16 nor more than 23 members, 16 constituting a quorum.⁷⁵ Previous statutes relating to qualifications and exemptions of grand jurors are also undisturbed.⁷⁶ Subdivision (a) states that the court shall direct that a sufficient number of qualified persons be brought in to meet the requirement (a matter with respect to which there has been some diversity of practice)⁷⁷ and also provides a new flexibility with respect to the number of grand juries which may be convened at any given time. Formerly there could be no more than three functioning simultaneously in the Southern District of New York, no more than two at any given place of holding court in any other district containing a city or borough of at least 300,000 population, and elsewhere but one.⁷⁸ Under this restriction the government was constantly pressed, in some of the busier districts, to find sufficient grand jury time, while in others, grand juries met only infrequently and then had little business to transact. The Rule now provides that the court "shall order one or more grand juries to be summoned at such times as the public interest requires."

A similar flexibility with respect to the permissible period of service of a grand jury is effected by subdivision (g) of Rule 6:

"A grand jury shall serve until discharged by the court but no grand jury may serve more than 18 months. The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court. At any time for cause shown the court may ex-

75. Rule 6(a) substantially restates 36 STAT. 1165 (1911), 28 U. S. C. § 419 (1940).

76. See 36 STAT. 1164 (1911), 28 U. S. C. §§ 411-26 (1940), and the Committee Note to Rule 6(a).

77. See Address by Medalie, FEDERAL RULES OF CRIMINAL PROCEDURE WITH NOTES AND INSTITUTE PROCEEDINGS (1946) 151 (hereafter cited as NOTES AND INSTITUTE PROCEEDINGS): "in some places the marshal brings in 23 grand jurors; and in other places the court directs or the marshal brings in—it all depends on how it comes about—a greater number of persons from whom 23 will be selected. This gives the courts, the marshals, everybody else concerned, a definite indication that you can bring enough in, as is the practice in the Southern District of New York, to allow for absences, disabilities and everything else to take care of that, and from the group you select your 23."

78. 36 STAT. 1165 (1911), 28 U. S. C. § 421 (1940), as construed in *Morris v. United States*, 128 F. (2d) 912 (C. C. A. 5th, 1942); *United States v. Perlstein*, 39 F. Supp. 965 (D. N. J. 1941).

cuse a juror either temporarily or permanently, and in the latter event the court may impanel another person in place of the juror excused."

Previously a grand jury's term expired automatically with the close of the term of court unless continued by affirmative order;⁷⁹ and while continuance up to a maximum of 18 months was permissible, a grand jury so continued was confined to investigations commenced during the original term.⁸⁰ The change brings grand jury practice into adjustment with the realities of lengthy and involved investigations, and is in harmony with the general elimination, by Rule 45(c), of the term of court as a time limitation.⁸¹ Needless to say, grand juries will not be held for 18 months without real need.

Errors in the impaneling of a grand jury, including the disqualification of an individual juror, may be raised in either of two ways: by a challenge under Rule 6(b)(1), or, if the issue has not previously been determined upon challenge, by a motion under 6(b)(2) to dismiss the indictment.

The grounds for challenges and for a motion to dismiss are the same. Objection may be made to the whole array of jurors "on the ground that the grand jury was not selected, drawn, or summoned in accordance with law," or to individual jurors on the ground that they are not "legally qualified." An indictment will only be dismissed on the latter ground, however, if less than twelve jurors, after deducting the number not legally qualified, concurred in finding the indictment. Neither ground, it will be noted, is limited to bias. A grand jury may not be "selected, drawn or summoned in accordance with law" even though all of its members are quite unbiased. The qualifications of individual jurors, on the other hand, are still governed by state law, and while the state statutes vary widely, none is limited to the exclusion of bias alone. They seek also to insure that persons selected as jurors will be of sufficient intelligence, education and experience to be able to evaluate the evidence and understand the proceedings (requirements as to age, sanity, formal education, etc.), that they will be possessed of a measure of responsibility (requirements as to citizenship, residence, taxpaying, lack of criminal record, etc.), and that they will be in a position to contribute the necessary time without undue harassment or imposition (requirements that the juror shall not have served on any other jury within a stated time, that he shall not be engaged in certain professions and occupations, etc.).⁸²

79. 13 STAT. 500 (1865), 18 U. S. C. § 554 (1940).

80. See *United States v. Johnson*, 319 U. S. 503 (1942). Controversies of the technical nature therein presented should now be obviated.

81. This was done for the civil side of the courts by Rule 6(c), F. R. Crv. P.

82. See 36 STAT. 1165 (1911), 28 U. S. C. §§ 411-26 (1940), and the Committee Note to Rule 6(a).

The provision for challenges continues the previously established practice.⁸³ They may be made by either the government attorney or a defendant who has been held to answer, but not by a person who merely expects to be indicted. Although challenges must be made before the administration of the oath to the jurors, the Rule provides neither that defendants held for action by the grand jury shall be notified of the time and place of the impaneling nor that defendants in custody shall be brought to court to attend at the impaneling. A further difficulty in the way of interposing challenges in a busy district where several grand juries may be impaneled simultaneously has been suggested by the late Judge Medalie:

"Here is the difficulty that I see, and I don't know any way in which we can meet it. In this district, you can have three grand juries running at once, and in any district where you have more than one grand jury running at once in the same place, how can you tell which grand jury to object to, either by challenge to the array or a challenge to an individual juror for disqualification. . . . [t]o make a surer job of it, you ought to go out, if you are representing a defendant who has been held to answer, and challenge every grand jury that comes along."⁸⁴

Failure to challenge does not, however, constitute a waiver of any objection.

The wisdom of retaining any provision for challenging grand jurors has been questioned by some on the ground that grand juries do not determine guilt or innocence, and that "a trial on the question of partiality of the grand jury in advance of the trial of the indictment" will offer "abounding opportunities for pettifogging tactics."⁸⁵ However, challenges in most districts have been rather rare. The thought in perpetuating the possibility is that if a grand jury happens to be illegally constituted, it is better that the defect be discovered and remedied at the outset rather than invoked later to invalidate a whole series of otherwise well-founded indictments. The substantial question behind the elimination or retention of challenges would seem to be whether defects in the qualifications of a grand jury should afford a basis for dismissing an indictment.

The provision for testing the array and the qualifications of individual grand jurors after return of an indictment is in accord with the

83. *Agnew v. United States*, 165 U. S. 36 (1897); *Clawson v. United States*, 114 U. S. 477 (1885); *United States v. Gale*, 109 U. S. 65 (1883).

84. NOTES AND INSTITUTE PROCEEDINGS (1946) 151-2.

85. See, e.g., Assistant Attorney General Berge, *The Proposed Federal Rules of Criminal Procedure* (Paper prepared as Basis for Discussion at Judicial Conference of the Third Circuit, Sept. 24, 1943) 12-13.

former practice permitting this by motion to quash the indictment⁸³ or by plea in abatement.⁸⁷ The one change, that one now proceeds by motion to dismiss, is consistent with the general elimination by Rule 12 of pleas in abatement, demurrers, and motions to quash.

The importance which may be attached to compliance with the standards prescribed for the selection and qualification of grand jurors depends not only on one's conception of the role of the grand jury in law administration but also on one's position on a more fundamental issue of criminal policy which transcends the question at hand and cuts across most of the problems of criminal procedure: the much debated issue as to when violation of a procedural standard warrants reversal of an otherwise valid conviction. The debate flared up anew over the *McNabb* decision in the Supreme Court.⁸⁸ The states are split on the same broad issue as it arises in cases of illegal Search and Seizure,⁸³ and courts generally are confronted with this issue almost daily in the whole gamut of situations which call for decision whether an "error" committed in the course of successful prosecution of an apparently guilty defendant, and of which he complains, may be deemed "harmless."⁸⁹

We are, however, committed by the Constitution to grand jury participation in the accusatory process in all federal felony cases—save where a defendant voluntarily waives indictment. One may, like Raymond Moley and the members of the Wickersham Commission some years ago, regard this as a nuisance. Prosecutors understandably prefer to write their own tickets in all but the infrequent cases where an opportunity to delegate responsibility may be welcome. It is commonly argued that grand juries more often than not "rubberstamp" bills of indictment, and that on the rare occasions when they do "run away" they are likely to exercise poor judgment. Such contentions are not altogether unfounded in the experience of any prosecutor; it is true that grand juries in the urban communities of today hardly perform the same function as the old "grand inquest" of the rural English county, indicting on common knowledge, in the days before public prosecutors or highly organized police forces existed.⁹¹ Nevertheless, popular par-

86. *Carter v. Texas*, 177 U. S. 442, 444 (1900); *Smith v. Mississippi*, 162 U. S. 592, 593 (1896).

87. *Crowley v. United States*, 194 U. S. 461, 462 (1904); *Agnew v. United States*, 165 U. S. 36, 40 (1897); *Reynolds v. United States*, 98 U. S. 145, 146 (1878).

88. See Dession, *The New Federal Rules of Criminal Procedure: I* (1946) 55 YALE L. J. 695, 707-13.

89. The leading decisions are reviewed in *People v. Defore*, 242 N. Y. 13, 150 N. E. 585 (1926).

90. The appropriate scope of the doctrine of "harmless error" has recently been considered at great length in a series of cases originating in the Second Circuit. See *Bollenbach v. United States*, 326 U. S. 607 (1946); *Bihn v. United States*, 66 Sup. Ct. 1172 (U. S. 1946).

91. See Dession, *From Indictment to Information—Implications of the Shift* (1932) 42 YALE L. J. 163, 176-7.

ticipation through jury service in the process of administering the criminal law has a value in the accusatorial as well as in the adjudication stage. Judicial administration should not merely serve to decide cases, but also afford a demonstration of democratic justice; and if an indictment is merely an accusation, the fact remains, despite the legal presumption of innocence, that it carries considerable weight. For both of these reasons it was felt that slipshod methods in the impaneling of grand juries and the toleration of unqualified personnel can work sufficient harm to justify implementing the standards prescribed.

The appointment of a foreman for each grand jury has been customary practice⁹² and is continued by Rule 6(c). Appointment is by the court, and the foreman's duties are prescribed.⁹³ The Rule also makes a new provision for appointment by the court of a deputy foreman to act in the absence of the foreman.

Persons authorized to be present in the grand jury room are specifically enumerated in the next subdivision of Rule 6. No departure from former practice is involved,⁹⁴ but the provision should eliminate any uncertainty which might otherwise exist.⁹⁵

"Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting."

92. 36 STAT. 1165 (1911), 28 U. S. C. § 420 (1940) (Grand juror foreman).

93. Rule 6(e) provides: ". . . The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. . . ."

The foreman was charged by the statute cited in note 92 with the duty of administering oaths, and by 48 STAT. 649 (1934), 18 U. S. C. § 554a (1940), with keeping and filing the record of grand jurors concurring in an indictment. With respect to the latter see *United States v. Parker*, 103 F. (2d) 857, 860 (C. C. A. 3d, 1939), *cert. denied*, 307 U. S. 642 (1939). Indorsement of the indictment by the foreman has been customary practice, but his failure so to do has not been considered fatal. See *Frisbie v. United States*, 157 U. S. 160, 163-5 (1895).

94. 17 STAT. 198 (1872), 18 U. S. C. § 556 (1940) permitted stenographers and clerks assisting the United States attorney or other counsel for the government to be present before the Grand Jury during the taking of testimony. 34 STAT. 816 (1906), 5 U. S. C. § 310 (1940) dealt with the presence of attorneys for the Government other than the United States attorney. With the last clause of Rule 6(d) *cf.* *United States v. Wells*, 163 Fed. 313 (D. Idaho 1908); *United States v. Terry*, 39 Fed. 355 (N. D. Cal. 1889).

95. See Address by Medalie, NOTES AND INSTITUTE PROCEEDINGS (1946) 153:

"When I first heard of Federal criminal procedure, I found that it was the practice to try to get rid of indictments by proving that someone was in the grand jury who had no right to be there, and usually it was some deputy marshall or somebody else, some unauthorized person, and then the great to-do was how to get a person authorized. One of the ways to get a stenographer authorized in those days was to have him sworn in as Assistant United States Attorney. . . ."

The remedy for violation of this provision is a motion to dismiss the indictment.⁹⁶

The frequently troublesome problem of the secrecy of grand jury proceedings is dealt with in Rule 6(e), as follows:

"Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons."

With two important exceptions, this provision substantially restates the former policy and practice with respect to secrecy.⁹⁷ The first is the provision for disclosure, which is designed to save time and facilitate proof where a motion to dismiss an indictment is made in good faith on the ground of some impropriety in the conduct of a grand jury proceeding.⁹⁸ The second is the provision that no obligation of secrecy

96. *Id.* at 154.

97. The policy of secrecy is traditional, and violation of the required grand juror's oath of secrecy is both a contempt and a crime at common law. 4 BL. COMM. *126. Numerous state statutes likewise require such an oath. See COMMENTARIES to the A. L. I. CODE CRIM. PROC. (1931) §§ 126, 143-5. The matter was not dealt with by federal statute, but for forms of the grand juror's oath see 15 HUGHES, FEDERAL PRACTICE, JURISDICTION AND PROCEDURE (1932) §§ 16033-4; and Charge to Grand Jury, 30 Fed. Cas. 992, 995, No. 18,255 (C. C. Cal. 1872). The general policy is discussed in *United States v. Providence Tribune Co.*, 241 Fed. 524 (D. R. I. 1917). For the common interpretation, prior to the adoption of the present Rules, of the obligations of grand jurors in respect of secrecy see *United States v. Socony Vacuum Oil Co.*, 310 U. S. 150, 233-7 (1940); *Schmidt v. United States*, 115 F. (2d) 394 (C. C. A. 6th, 1940); *United States v. American Medical Association*, 26 F. Supp. 429 (D. D. C. 1939); *Metzler v. United States*, 64 F. (2d) 203 (C. C. A. 9th, 1933); *McKinney v. United States*, 199 Fed. 25 (C. C. A. 8th, 1912); *United States v. Farrington*, 5 Fed. 343 (N. D. N. Y. 1881); *cf. Atwell v. United States*, 162 Fed. 97 (C. C. A. 4th, 1908).

98. See Medalie, *supra* note 95, at 154:

"In other words, instead of this old business of chasing around trying to get affidavits and running into grand jurors, even after the indictment has been filed and everybody apprehended, the grand juror may speak about certain things, you may get a formal judicial proceeding immediately if you show it is your intention, in good faith, to make a motion to dismiss the indictment on the ground, for ex-

may be imposed upon any person except in accordance with this rule. The rather common practice of requiring witnesses before the grand jury to take an oath of secrecy is therefore no longer authorized,⁹⁹ such restriction being considered impractical and unfair.¹⁰⁰

The former requirement of twelve concurring votes for indictment and the usual formalities in connection with the return of an indictment are continued by Rule 6(f). It also specifically states that if the defendant has been held to answer and 12 jurors do not concur in finding an indictment, "the foreman shall so report to the court in writing forthwith"—the purpose being to insure prompt release of the defendant or exoneration of bail.

The Indictment and the Information. Use of an information in lieu of indictment, the form and contents of these pleadings, and the bill of particulars are dealt with in Rule 7 which alters the former practice in several respects.

An offense punishable by death must still be prosecuted by indictment. For offenses punishable by imprisonment for a term exceeding one year or at hard labor,¹⁰¹ the requirement of indictment is likewise

ample, that there was an unauthorized person present before the grand jury. That avoids doing the thing twice. . . ."

Compare 48 STAT. 649 (1934), 18 U. S. C. § 554a (1940) which forbids a grand juror to testify how he or any other juror has voted, in connection with an attack on an indictment on the ground that one or more unqualified persons were included in the grand jury.

99. At common law no oath of secrecy was administered to witnesses, but apparently any person present was considered bound to refrain from disclosure. 1 CHITTY, CRIMINAL LAW (5th Am. ed. 1847) 1317. There has been no federal statutory requirement, but in approximately 33 of the 85 district courts it has been the practice to swear witnesses to secrecy. See *Goodman v. United States*, 108 F. (2d) 516, 518-9 (C. C. A. 9th, 1939); *United States v. Amazon Industrial Chemical Corporation*, 55 F. (2d) 254, 260-4 (D. Md. 1931), and COMMITTEE NOTE TO Rule 7, FEDERAL RULES OF CRIMINAL PROCEDURE, PRELIMINARY DRAFT (1943) 26.

100. NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1945) 7; and see address by Medalie, NOTES AND INSTITUTE PROCEEDINGS (1946) 155:

"I know that some of the judges in some of the district courts have refused to administer such an oath, and have set themselves against punishment for contempt for breach of that oath, if taken. Others, however, have believed in that oath, and have enforced it by contempt orders. . . . It was impractical and unreal—a partner, an employee, a relative, a friend called on to testify will come back and tell the person concerning whom he testified, and it should be so."

101. See NOTES AND INSTITUTE PROCEEDINGS (1946) 15, (Note to Subdivision (a)), and see cases cited *supra* note 73. In thus defining the offenses which must be prosecuted by indictment the Rule follows the judicial interpretation of "infamous crime." The meaning of "hard labor" in this context was litigated in a recent anti-trust prosecution commenced by information, wherein it was decided that the term has to be understood in its historic context and not confused with the varieties of manual labor to which misdemeanants may today be put in the work camps and on the farms which are a part of the federal prison system. See *American Tobacco Co. v. United States*, 147 F. (2d) 93, 117 (C. C. A. 6th, 1944), *aff'd*, 66 Sup. Ct. 1125 (U. S. 1946); (1945) 54 YALE L. J. 707.

continued, but in such cases defendants may now waive the requirement. Misdemeanors may always be prosecuted on information, as formerly.

When an information is to be filed, it is no longer necessary that leave of court first be obtained. After *Albrecht v. United States*¹⁰² indicated that it was within the court's discretion to require or forego a showing of probable cause as a condition to granting leave, such showings were rarely required and obtaining leave tended to become largely *pro forma*. Federal prosecutions are instituted either in the name of the Attorney General or of a United States Attorney, and in either instance internal office regulations normally insure a rather thorough review of the merits of proceedings instituted. In some of the more complicated federal cases—such as those under the antitrust laws, which typically turn on inferences from great accumulations of circumstantial data—it is difficult to imagine the form which a preliminary showing of probable cause might take, unless it were to approximate a lengthy grand jury presentation. The new Rule places responsibility on the person in the best position to discharge it, the prosecuting attorney who is familiar with all the evidence in the case.

The provision in Rule 7(b) providing for waiver of indictment has long been recommended.¹⁰³ Under the former practice—and still in not a few of the states—a person unable to furnish bail may be held in jail for weeks and even months awaiting grand jury action, even though he is willing to plead guilty, and this time is not as a matter of law deductible from his sentence. The new rule, designed to eliminate such unnecessary incarceration, should result incidentally in a considerable saving of unproductive maintenance expense to the Government.¹⁰⁴

The nature and contents of an indictment or information are prescribed in Rule 7(c).¹⁰⁵ Simple and non-technical pleadings are con-

102. 273 U. S. 1 (1927).

103. See REP. OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES (1941) 9; Rep. Att'y Gen. (Mitchell) (1931) 2; *id.* (1932) 6; *id.* (Cummings) (1933) 1; *id.* (1936) 2; *id.* (1937) 11; *id.* (1938) 9; *id.* (Murphy) (1939) 7.

Rule 7(b) provides that "An offense which may be punished by imprisonment for a term exceeding one year or at hard labor may be prosecuted by information if the defendant, after he has been advised of the nature of the charge and of his rights, waives in open court prosecution by indictment."

104. That the constitutional guaranty of indictment by grand jury is waivable had previously been held in *United States v. Gill*, 55 F. (2d) 399, 403 (D. N. M. 1931).

105.

"(c) NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by

templated, as illustrated in the Appendix of Forms prepared by the Advisory Committee.¹⁰⁶ But since such pleadings were entirely sufficient before the adoption of the Rule, it may be assumed that prolixity up to a point will continue to be tolerated and that the Rule will not end the flow of republication by commercial annotators of trial court rulings on procedural points which have little significance beyond the particular case and serve chiefly to augment the work of law clerks and the costs of litigation. The draftsmen of a code can do little about that.

The Rule does not institute the "short form" type of pleading sanctioned in some of the states, which presupposes the furnishing of a bill of particulars to round out the minimum of information to which a defendant is entitled before being called upon to plead.¹⁰⁷ The pleading here contemplated would be complete in itself.

The requirement of citation in an indictment or information of the statute or regulation on which the prosecution is based follows a practice adopted by some district court judges in the past. It serves two purposes: to assist a defendant to find the provision of law which he is supposed to have violated; and, where the facts alleged by the Government suggest distinct violations of several different statutes or regulations, to tell him under which ones the Government seeks conviction.¹⁰⁸

There is a provision in subdivision (d) for striking surplusage from an indictment or information. This is nothing new, so far as informations are concerned, and recognizes that indictments also (like informations, indictments are drafted by the prosecuting attorneys rather than by the grand jurors) may contain argumentative characterizations of defendants, innuendo designed to prejudice the court and jury, or slippery definitions of overt acts such as: "Pursuant to and in furtherance of the aforementioned conspiracy the defendants did the following acts, *among others*: . . ." ¹⁰⁹ Indictments may not, however, be *amended*

which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

106. Rule 61 provides that "the forms contained in the Appendix of Forms are illustrative and not mandatory."

107. See, e.g., the New York provision discussed in *People v. Bogdanoff*, 254 N. Y. 16, 171 N. E. 890 (1930).

108. Although district judges have occasionally required the Government to specify, before trial, the statutes or regulations relied upon, such citations were not considered a necessary part of the indictment or information. A conviction might be sustained on the basis of a Statute or regulation other than that cited. See *Williams v. United States*, 168 U. S. 382, 389 (1897); *United States v. Hutcheson*, 312 U. S. 219, 229 (1941).

109. See Address by Medalie, NOTES AND INSTITUTE PROCEEDINGS (1946) 157-8:

"It used to be that once an indictment was found the grand jury being the sole

—which is to say that new allegations or a new theory of the case may not be introduced by the court.

The remaining subdivisions of Rule 7—(e) and (f) ¹¹⁰—continue the former practice with respect to amendment of an information ¹¹¹ and the furnishing of a bill of particulars.¹¹² A motion for a bill must be made “within ten days after arraignment” unless the court otherwise provides.

Joinder of Offenses and of Defendants. Rule 8, covering joinder, is designed to clarify an ambiguity in the statute which formerly governed ¹¹³ and to resolve a conflict which had arisen in practice. Otherwise, it substantially restates the law. The Rule reads:

“(a) *Joinder of Offenses.* Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

“(b) *Joinder of Defendants.* Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.”

Subdivision (a) involves no real change.¹¹⁴ The provision in subdivi-

author of an indictment, it and it only could make any alterations by a superseding indictment; but not even the judge had the power to put a pen to the indictment. If he did, you changed the indictment. It was no longer the indictment of the grand jury. The prosecution ended, as a matter of constitutional law. That was settled. There was a little chiseling on that, I understand, in one circuit.

“Honorable Learned Hand: ‘We didn’t let that bother us too much’.”

110. (e) *Amendment of Information.* The court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

(f) *Bill of Particulars.* The court for cause may direct the filing of a bill of particulars. A motion for a bill of particulars may be made only within ten days after arraignment or at such other time before or after arraignment as may be prescribed by rule or order. A bill of particulars may be amended at any time subject to such conditions as justice requires.

111. See *Muncy v. United States*, 289 Fed. 780 (C. C. A. 4th, 1923).

112. See NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1945) 10, Note to Subdivision (f).

113. 10 STAT. 162 (1853), 18 U. S. C. § 557 (1940).

114. 9 EDMUNDS, CYCLOPEDIA OF FEDERAL PROCEDURE (2d ed. 1943) 4116; *Welsh v. United States*, 267 Fed. 819 (C. C. A. 2d, 1920), *cert. denied*, 254 U. S. 637 (1920) (distinct offenses in separate counts, based on the “same act or transaction”); *Beard v. United States*, 82 F. (2d) 837 (App. D. C., 1936), *cert. denied*, 298 U. S. 655 (1936) (distinct offenses in separate counts based on “two or more acts or transactions connected together”); *Pointer v. United States*, 151 U. S. 396, 403 (distinct offenses in separate counts of the “same class”);

vision (b) that defendants may be joined in an indictment even though all are not charged in each count goes beyond the former practice in some circuits, in favor of that followed in the Seventh and perhaps a few others.¹¹⁵ Beyond this, subdivision (b) continues the practice which was usually followed despite lack of any federal statute providing generally for the joinder of defendants, as distinguished from offenses.

Warrant or Summons upon Indictment or Information. The issuance and execution or service of a warrant of arrest or summons at this stage of a proceeding are governed by Rule 9. Its provisions are substantially similar to those of Rule 4 governing the earlier issuance of such process upon the complaint.¹¹⁶ Two new features are, however, introduced at this stage.

An indictment affords a sufficient basis for the issuance of a warrant of arrest, as formerly. But where the proceeding is by information, the Fourth Amendment has been thought to require, as a basis for the issuance of a warrant, something more than the signature of the government attorney on the information.¹¹⁷ The Rule therefore provides that to support the issuance of a warrant, an information must be "supported by oath." Whether this oath must be on personal knowledge rather than on information and belief is not stated. In the latter alternative, there is the further question whether the sources of information and grounds for belief must be spelled out in the affidavit, or whether a general verification as for a bill in equity will suffice.

Several considerations suggest that a general verification may suffice. Before an information is filed, the case will have been studied by one or more attorneys for the government. Unlike the complaint, which under

Simpkins v. United States, 78 F. (2d) 594 (C. C. A. 4th, 1935) (distinct offenses in separate counts of the same "character").

The language "constituting parts of a common scheme or plan" is added by the Rule, having been suggested by a comparable provision in the law of New York and by several federal decisions. See New York Laws 1936, c. 328 § 1, N. Y. CODE CRIM. PROC. § 279 (1936), discussed in *Recent Statutes* (1937) 37 COL. L. REV. 1027, and (1937) 14 N. Y. U. L. Q. REV. 250; *People v. Luciano*, 277 N. Y. 348, 362, 12 N. E. (2d) 433, 437 (1938); *Stern v. United States*, 85 F. (2d) 394 (C. C. A. 7th, 1936), *cert. denied*, *Schweitzer v. United States*, 299 U. S. 576 (1936); *Powers v. United States*, 293 Fed. 964, 967 (C. C. A. 9th, 1923).

For a collection of federal precedents and a discussion of the common law practice, see COMMITTEE NOTE to Rule 8, FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944) 29-34.

115. See *Caringella v. United States*, 78 F. (2d) 563, 567 (C. C. A. 7th, 1935), and COMMITTEE NOTE to Rule 8, *id.* at 35-7.

116. See Dession, *The New Federal Rules of Criminal Procedure: I* (1946) 55 YALE L. J. 694, 705-6.

As therein stated, a summons is the accepted method for bringing a corporate defendant before the court. For an interesting discussion of what would happen if no one responded to the summons on behalf of the corporation, see NOTES AND INSTITUTE PROCEEDINGS (1946), 134-43.

117. See *Albrecht v. United States*, 273 U. S. 1, 5 (1927).

Rule 4 may be verified by anyone, the information must be signed by a government attorney. It may normally be assumed that the information would not have been filed in the absence of evidence at least sufficient to induce a grand jury to return an indictment. In the more complicated federal cases preparation of an affidavit going beyond a general verification would be an onerous task at best, and in some cases utterly impracticable. And, unlike Rule 4, Rule 9 does not speak in terms of "probable cause." The Fourth Amendment does, to be sure. But the showing appropriate to protect the interests of one to be arrested at the information stage of a proceeding need not necessarily be the same as at the complaint stage. The Fourth Amendment contains no rigid definition of "probable cause."

The second noteworthy feature of this Rule is the provision that "The amount of bail may be fixed by the court and endorsed on the warrant." Such procedure eliminates unnecessary delays between the arrest and the giving of bail and has in fact been the practice in some districts.¹¹⁸

ARRAIGNMENT AND PREPARATION FOR TRIAL

Arraignment. Rule 10 provides:

"Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

The last sentence is new, and supersedes that part of 18 U. S. C. § 562 which required that a copy be furnished the defendant several days before trial in treason and other capital cases, and 18 U. S. C. § 562a which required that in other cases a copy be furnished the defendant upon request, on condition that fees for the copy and the clerk's certificate might be taxed as costs.¹¹⁹ The Advisory Committee had recommended that defendants be furnished copies upon request, after being advised of their right to receive them;¹²⁰ but the Rule as adopted by the Court makes it mandatory.¹²¹

118. NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1945) 11.

119. Similar provision was made in England by the Indictments Act, 1915, Rule 13 (1). Compare A. L. I. CODE CRIM. PROC. (1930) § 201; N. Y. CODE CRIM. PROC. (1936) § 309.

120. FEDERAL RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE (1944) Rule 10.

121. There has been some discussion of the effect upon subsequent proceedings in the case of an omission to comply with this feature of the Rule. See address by Holtzoff, NOTES AND INSTITUTE PROCEEDINGS (1946) 125:

"In order to preclude the possibility of any question being raised subsequent to conviction because of alleged failure to comply with the new requirement, it may

It is refreshing to know that the picayune expense of making an extra carbon copy need no longer deter us from giving defendants the information they need.¹²² Perhaps, if the desired simplicity of pleading sought by the Rules materializes, defendants may even be in a position to understand the charges brought against them.

In other respects the Rule restates the familiar federal practice, which was not prescribed by statute, but based on common law procedure as evolved in the federal courts and in England.¹²³

Pleas. Rule 11¹²⁴ restates the former practice and retains, among other things, the plea of *nolo contendere*. While today "unknown in English procedure,"¹²⁵ that plea has long been established in federal practice as well as in that of many states.¹²⁶ Originally devised as a preliminary to reaching an "arrangement" with the court, and more recently utilized to settle criminal proceedings without prejudice to the pleader in other actions pending or prospective, the plea is now most familiar in situations such as the negotiation of an anti-trust consent

seem advisable to formulate a detailed local rule, prescribing the manner in which a copy of the indictment or information shall be delivered to the defendant, and the manner in which record of such delivery shall be preserved. . . . It may be well to prescribe that certificates of service shall be made and filed with the clerk as a part of the record of the case. It may be cogently argued that failure to comply with this requirement is a mere irregularity, not affecting the result, but it is best to take no chances."

122. Compare *United States v. Van Duzee*, 140 U. S. 169, 173 (1891): ". . . there is no propriety in forcing a copy upon him and charging the government with the expense."

123. See *Garland v. Washington*, 232 U. S. 642 (1914); *Johnson v. United States*, 225 U. S. 405 (1912). The *Garland* decision held that failure to comply with arraignment requirements was a mere irregularity not warranting reversal, if not raised before trial.

124. "A defendant may plead not guilty, guilty, or with the consent of the court, *nolo contendere*. 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. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty."

For the former practice see 4 STAT. 777 (1835), 18 U. S. C. § 564 (1940) (standing mute); *Hallinger v. Davis*, 146 U. S. 314, 318 (1892); *United States v. Beadon*, 49 F. (2d) 164, 167 (C. C. A. 2d, 1931), *cert. denied* 284 U. S. 625 (1931) (plea of not guilty to be entered for a corporation which fails to appear).

125. See FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944), Note to Rule 11, citing letter from Sir John Simon, former Attorney General of England, to Department of Justice, Aug. 20, 1926. But the plea was known at common law. See *Hudson v. United States*, 272 U. S. 451, 453 (1926): "But no example of its use in the English courts has been found since the case of *Queen v. Templeman*, decided in 1702, . . ."

126. The A. L. I. CODE CRIM. PROC. (1930) does not provide for this plea. See C. 9. However, it receives legislative recognition in 43 STAT. 1259 (1925), 18 U. S. C. § 724 (1940), and is accepted in *Hudson v. United States*, 272 U. S. 451 (1926). See also 5 LONGSDORF, CYCLOPEDIA OF FEDERAL PROCEDURE (1929) §§ 2095-101, 2459; 9 HUGHES, FEDERAL PRACTICE, JURISDICTION AND PROCEDURE (1931) § 7089; and DOBIE, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE (1928) 79-80.

decree.¹²⁷ As Arthur T. Vanderbilt has observed, there is a "rapidly increasing membership in the *nolo contendere* club and the *non vult* fraternity even in otherwise respectable grades of society."¹²⁸

Pleadings and Motions before Trial; Defenses and Objections. This particular phase of the procedure "gave the committee more trouble than any other rule in the book," and resulted in "a very drastic rule" which "should aid very materially in clearing away the underbrush in criminal prosecutions."¹²⁹ Until this Rule was adopted, federal practice required¹³⁰ that defendants raise defenses and objections as in the days of Blackstone:

"The plea of the prisoner . . . is either, 1. A plea to the jurisdiction; 2. A demurrer; 3. A plea in abatement; 4. A special plea in bar; or, 5. The general issue . . . or plea of not guilty. . . ." ¹³¹

There is no objection to tradition as such but, unfortunately, in any given federal circuit or state the reported decisions often leave the tradition unclear as it concerns particular defenses or objections.¹³² In that situation a defense attorney can either engage in exhaustive—and frequently inconclusive—research to determine how to entitle his defense or objection, or he can file his pleadings in quadruplicate, with each set differently entitled.¹³³ Rule 12¹³⁴ is designed to put an end to

127. See Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications* (1942) 51 YALE L. J. 1255; and *Foreword* (1940) 7 LAW & CONTEMP. PROB. 1.

128. NOTES AND INSTITUTE PROCEEDINGS (1946) 112.

129. See Youngquist, *id.*, at 162-3.

130. Many states still have this requirement. For proposals that state practice be similarly changed see REPORT OF THE COMMISSION ON THE ADMINISTRATION OF JUSTICE IN NEW YORK STATE (1939) §§ 282, 283; and A. L. I. CODE CRIM. PROC. (1930) § 209. DEL. REV. CODE (1935) § 5318 (c. 155, § 23) abolishes demurrers, pleas in abatement and pleas to the jurisdiction, and provides that objections theretofore raised by them shall be made by motion to quash.

131. BL. COMM. ** 326, 332.

132. See Cummings, THE THIRD GREAT ADVENTURE (1943) 29 A. B. A. J. 654, 655; Medalie, *Federal Rules of Criminal Proceedings* (1944) 4 LAWYERS GUILD REV. (3) 1, 4; and the tabulation of ways in which the raising of various defenses and objections has been permitted in the various circuits, in FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944) 51-60.

133. See, e.g., the defense pleas and motions filed in *State v. Hayes*, 127 Conn. 543, 18 A. (2d) 895 (1941), RECORD ON APPEAL, Vol. I.

134.

"(a) PLEADINGS AND MOTIONS. Pleadings in criminal proceedings shall be the indictment and the information, and the pleas of not guilty, guilty and *nolo contendere*. All other pleas, and demurrers and motions to quash are abolished, and defenses and objections raised before trial which heretofore could have been raised by one or more of them shall be raised only by motion to dismiss or to grant appropriate relief, as provided in these rules.

(b) THE MOTION RAISING DEFENSES AND OBJECTIONS.

(1) *Defenses and Objections Which May Be Raised.* Any defense or objection

this nonsense. Pleas in abatement, pleas in bar, demurrers and motions to quash are abolished.¹³⁵ Now one simply entitles his piece of paper a "motion," states what he has to state by way of defense or objection, and asks for what he wants. The Rule changes nothing with respect to what he may or may not get.

Certain defenses and objections must be raised before trial, while others may be raised at any time. In this respect there is no change from the former practice.¹³⁶ Those falling in the first group—defects in the institution of the prosecution or in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense)—must now be made in a single motion¹³⁷ including all such defenses and objections then available to the defendant, and the motion is to be made before plea unless the court permits it to be made within a reasonable time thereafter. In the latter event it is no longer necessary to withdraw the plea in order to make the motion.

The hearing and determination of motions are governed by subdivision (b)(4). Normally they are to be heard and determined before

which is capable of determination without the trial of the general issue may be raised before trial by motion.

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. An issue of fact shall be tried by a jury if a jury trial is required under the Constitution or an act of Congress. All other issues of fact shall be determined by the court with or without a jury or on affidavits or in such other manner as the court may direct.

(5) *Effect of Determination.* If a motion is determined adversely to the defendant he shall be permitted to plead if he had not previously pleaded. A plea previously entered shall stand. If the court grants a motion based on a defect in the institution of the prosecution or in the indictment or information, it may also order that the defendant be held in custody or that his bail be continued for a specified time pending the filing of a new indictment or information. Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations."

135. Rule 7(a) of the F. R. Civ. P. introduced a similar change.

136. The former decisions are reviewed in FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944), Committee Note to Rule 12, at 60-6.

137. Compare Rule 12(g), F. R. Civ. P.

trial, but if issues of fact which cannot conveniently then be tried are involved, the court may reserve the motion for trial with the general issue. The right to jury trial of an issue raised by motion is unaffected by the Rule, which merely incorporates the former law in this regard without specifically enumerating the issues so triable.¹³⁸ All others may be determined by the court "with or without a jury or on affidavits or in such other manner as the court may direct."¹³⁹

The effects of an adverse determination of a defendant's motion are unchanged by the Rule.¹⁴⁰ He may still plead if he has not already done so. Where the determination is in the defendant's favor, the court may order him held in custody or continue his bail for a specified time pending the filing of a new indictment or information. Statutory provisions permitting re-indictment in this situation, even though the statute of limitations has run in the meantime, are expressly preserved.¹⁴¹

Trial Together of Indictments or Informations. The former practice¹⁴² is substantially restated by Rule 13, which provides:

"The court may order two or more indictments or informations or both to be tried together if the offenses, and the defendants if there is more than one, could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information."

The words "tried together" are used in the Rule, although the statute formerly governing spoke of "consolidated" indictments, in order to avoid any possible confusion arising out of the various connotations of the latter term in civil practice.¹⁴³ The result of the last sentence of the Rule is that provisions governing peremptory challenges, the admission of evidence, verdicts and sentences which apply in the trial of a

138. See address by Youngquist, *NOTES AND INSTITUTE PROCEEDINGS* (1946) 164:

"but there was danger in trying to point out which of these objections were triable by jury and which were not. It is a very indefinite field, and it would hardly do to mislead the courts and to mislead counsel by saying that such and such an objection may be tried by the court without the jury, and then to have the Supreme Court later say that under the Constitution there was a right of trial by jury. . . ."

139. The methods which have been employed in determining defenses and objections raised by pleas in abatement and pleas in bar are reviewed in *FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT* (1944), Committee Note to Rule 12, at 66-8. Methods of trial of the issue of the present sanity of a defendant when raised before trial are discussed in Dession, *The Mentally Ill Offender in Federal Criminal Law Administration* (1944) 53 *YALE L. J.* 684.

140. See 17 *STAT.* 158 (1862), 18 *U. S. C.* § 561 (1940).

141. See 54 *STAT.* 747 (1940), 18 *U. S. C.* §§ 556a, 587-9 (1940).

142. See 10 *STAT.* 162 (1853), 18 *U. S. C.* § 557 (1940); and cases collected in *FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT* (1944), Committee Note to Rule 14, at 73-8.

143. *Id.* at 77.

single indictment or information apply likewise where indictments or informations are tried together.

Relief from Prejudicial Joinder. The former practice under which severance and other similar relief was a matter for the discretion of the court is continued by Rule 14.¹⁴⁴

Pre-Trial Procedure. No provision for pre-trial conferences such as that made in Rule 16 of the Rules of Civil Procedure is included in these Rules, as finally approved. The Advisory Committee recommended such a provision,¹⁴⁵ since the practice of utilizing pre-trial conference procedure on the criminal as well as the civil side had already begun to develop as a routine in some districts,¹⁴⁶ and since such conferences are in any event inevitable in lengthy and complex cases. Rule or no rule, there is of course no law precluding a request from the court that the parties appear to discuss the possibility of narrowing issues, eliminating uncontested issues of fact, and stipulating other practical arrangements to facilitate getting on with a proceeding.¹⁴⁷

The rule recommended by the Advisory Committee sought to avoid any element of compulsion of the defendant, having in mind the obvious differences between criminal and civil proceedings in respect of the relationship of the defendant to the court as well as to the adverse

144. "If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

For the former practice see 10 STAT. 162 (1853), 18 U. S. C. § 557 (1940); *Stilson v. United States*, 250 U. S. 583 (1919); *United States v. Ball*, 163 U. S. 662 (1896); FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944), Committee Note to Rule 13, at 69-73; A. L. I. CODE CRIM. PROC. (1930) § 312; Notes (1941) 131 A. L. R. 917, (1936) 104 A. L. R. 1519 (1931) 70 A. L. R. 1171.

145. See FEDERAL RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE (1944) Rule 15:

"*Pre-Trial Procedure.* At any time after the filing of the indictment or information the court may invite the attorneys to appear before it for a conference, at which the defendant shall have the right to be present, to consider

- (1) The simplification of the issues;
- (2) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
- (3) The number of expert witnesses or character witnesses or other witnesses who are to give testimony of a cumulative nature;
- (4) Such other matters as may aid in the disposition of the proceeding.

The court shall make an order which recites the agreements made by the parties as to any of the matters considered. All orders entered at the pre-trial conference control the subsequent course of the proceeding, unless modified at the trial to prevent manifest injustice. This rule shall not be invoked in case of any defendant who is not represented by counsel."

146. See Way, *New Technique Facilitates Criminal Trials* (1941) 25 J. AM. JUD. SOC. 120; Comment (1942) 26 J. AM. JUD. SOC. 106; ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1941) 77.

147. See 1 MOORE, FEDERAL PRACTICE (1938) 816.

party. Participation in the conference was to be upon "invitation" rather than by "direction"; the defendant was to have the right to be present in person; and the rule was not to be invoked in the case of any defendant not represented by counsel. But the proposal nevertheless encountered resistance. Some prosecuting attorneys took the position that it would encourage "fishing expeditions" by defendants, and some defense-minded critics feared that it might result in forcing concessions and stipulations to which a defendant would not otherwise agree. In any event, the Court rejected the proposal.

Notice of Alibi. There was considerable discussion in the Advisory Committee, and considerable difference of opinion, as to whether the Rules should include a requirement similar to that adopted in some of the states, that a defendant proposing to rely upon an alibi defense give notice thereof in advance.¹⁴⁸ The proposal was familiar. It had been promoted in practically all bar association committees concerned with criminal law reform between 1935 and 1938, and had been advanced by the Wickersham Commission in 1931 and the Attorney General's Conference on Crime as well as the American Bar Association in 1934.¹⁴⁹

It is true—and this is a peculiarity of criminal procedure—that relatively little affirmative pleading (or pre-trial disclosure) is required of a defendant. The plea of "not guilty" is quite noncommittal. But it should be equally apparent from Rule 7 (the Indictment and the Information)—read in the light of the tolerance generally accorded variances in the proof of government cases, Rule 15 (Depositions) and Rule 16 (Discovery and Inspection)¹⁵⁰—that the Government is likewise by no means completely deprived of the strategy of surprise.

So long as the procedure does not require disclosure by both parties in advance of trial of the names and addresses of their witnesses, and of the evidence upon which they propose to rely, surprise will continue to play a part in criminal proceedings. Unanticipated evidence of an alibi is no more surprising than any other variety of unanticipated evidence and, for that matter, alibi defenses are actually not very frequent in federal prosecutions. The possibility of a major shift in procedural attitudes to reduce the role of surprise and other irrational factors is well

148. Some fourteen states so require. See FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944), Committee Note to Rule 16, at §1, 84-9, and statutes therein mentioned. So does Scotland. See RENTON and BROWN, CRIMINAL PROCEDURE ACCORDING TO THE LAW OF SCOTLAND (2d ed., 1928). See also Millar, *The Modernization of Criminal Procedure* (1920) 11 J. AM. INST. CRIM. L. AND CRIMINOLOGY 345; KENNY, OUTLINE OF CRIMINAL LAW (15th ed. 1936) 534, 539.

149. NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE (1931) 47; PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON CRIME (1934) 453; A. B. A. REP. (1934) 129-30. See also REP. ATT'Y GEN. (Cummings) (1933) 1; *id.* (1936) 2; *id.* (1937) 11; *id.* (Murphy) (1938) 9; *id.* (1939) 7.

150. Discussed *infra* pp. 218-20.

worth considering, but to single out the unadvertised alibi defense as a special or major hazard to the administration of justice is to take one's jurisprudence from Hollywood and the pulps.

The net result of the Advisory Committee's deliberations was a draft rule requiring that defendants give advance notice of alibi defenses.¹⁵¹ As finally recommended, this rule would have required that the defendant take the initiative in starting the notice procedure. To some members of the Committee this feature, though shared by similar statutes enacted in eleven states, appeared impractical.¹⁵² The Court eliminated the proposed rule in its entirety.

Depositions. Rule 15¹⁵³ covers the taking of depositions and their

151. See FEDERAL RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE (1944), Rule 16.

152. See Letter Stating the Views of a Minority of the Committee Concerning Rule 16, Supplement, FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944), 239-41; cf. Reply Memorandum, Prepared by the Secretary of the Committee, Stating the Views of the Majority of the Committee Concerning Rule 16. *Id.* at 242-3.

153. The Rule provides:

(a) *When Taken.* If it appears that a prospective witness may be unable to attend or prevented from attending a trial or hearing, that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment or information may upon motion of a defendant and notice to the parties order that his testimony be taken by deposition and that any designated books, papers, documents or tangible objects, not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness.

(b) *Notice of Taking.* The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. On motion of a party upon whom the notice is served, the court for cause shown may extend or shorten the time.

(c) *Defendant's Counsel and Payment of Expenses.* If a defendant is without counsel the court shall advise him of his right and assign counsel to represent him unless the defendant elects to proceed without counsel or is able to obtain counsel. If it appears that a defendant at whose instance a deposition is to be taken cannot bear the expense thereof, the court may direct that the expenses of travel and subsistence of the defendant's attorney for attendance at the examination shall be paid by the government. In that event the marshal shall make payment accordingly.

(d) *How Taken.* A deposition shall be taken in the manner provided in civil actions. The court at the request of a defendant may direct that a deposition be taken on written interrogatories in the manner provided in civil actions.

(e) *Use.* At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: That the witness is dead; or that the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of

permissible use. Unlike the Civil Rules, which authorize examination of witnesses before trial as a normal routine, this Rule sanctions examination only of witnesses who "may be unable to attend or prevented from attending a trial or hearing," or who have been committed for failure to give bail. Also in contrast with civil procedure,¹⁵⁴ depositions may be taken only in the court's discretion. The assumption here is that they will be needed only in exceptional situations, since the ordinary witness subpoena in a federal criminal proceeding runs throughout the United States and not just within the district of issue or 100 miles from the place of trial as in a civil action.¹⁵⁵

As adopted by the Court, the Rule limits to the defense the right to take depositions.

The Advisory Committee had recommended that the government also be authorized to do so;¹⁵⁶ this would have been an innovation in federal practice.¹⁵⁷ The use of depositions by the government would have been subject to the defendant's constitutional "right of confrontation," to the usual limitations on the use of depositions written into the Rule, and to the further provision in subdivision (e) that depositions must be "otherwise admissible under the rules of evidence."

The recommendation was inspired by no desire to dispense with live witnesses who could be observed and cross-examined at the trial. The thought was simply that when it appeared in the preliminary stages of a proceeding that a material witness might later be unavailable, his deposition would in certain circumstances be useful. Just what uses the Constitution and the judiciary would permit—given a deposition

the witness by subpoena. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness. If only a part of a deposition is offered in evidence by a party, an adverse party may require him to offer all of it which is relevant to the part offered and any party may offer other parts.

(f) *Objections to Admissibility.* Objections to receiving in evidence a deposition or part thereof may be made as provided in civil actions.

154. See Rules 26(a) and 30, F. R. Crv. P.

155. Rule 17(e)(1), F. R. Crim. P. (1946). Compare Rule 45(e)(1), F. R. Crv. P.

156. As recommended by the Advisory Committee, the Rule would have authorized the taking of depositions on behalf of the government under the following circumstances: (1) If it appears that a witness may be unavailable for trial or hearing, that his testimony is material and that his deposition may be needed to prevent a failure of justice; (2) If a defendant is without counsel the court shall advise him of his right and appoint counsel to represent him at the taking of the deposition unless he otherwise elects or is able to obtain counsel; (3) The defendant shall be produced at government expense and be present at the taking of the deposition if in custody, and advised of his right to be present, with expenses prepaid by the government, if not in custody. See FEDERAL RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE (1944) Rule 17.

157. For a collection of state legislation permitting the taking of depositions by the prosecution under various circumstances see FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (1944) Note to Rule 17, at 92.

taken in the defendant's presence, as provided by the recommended rule—is a question which would have to be explored *de novo*. But it is not clear that the "right of confrontation" would preclude all use of depositions by the government, either *at* the trial or in preliminary and supplementary proceedings. After some early doubts, the familiar exceptions to the hearsay rule have become as accepted in criminal as in civil trials.¹⁵⁸ The Court's action in eliminating depositions on behalf of the government may have been prompted by a feeling that the government could better afford to lose a few cases than make even a gesture which might be interpreted as favoring trial on a paper record.¹⁵⁹

The authorization for taking depositions on behalf of the defense is not new,¹⁶⁰ but the Rule does contain several novel features. One is the provision in subdivision (c) for defendants who "cannot bear the expense"—not merely for "indigent" defendants, as the Committee Note suggests.¹⁶¹ The court is to assign counsel to represent a defendant in the taking of a deposition, if he so desires and is unable to obtain counsel; and the court may direct that the expenses of travel and subsistence of his attorney be paid by the government. The procedure for taking depositions and their permissible use, save for the exceptions noted, follow the practice familiar in civil proceedings.

The authorization in subdivision (a) for taking the deposition of a witness who has been committed pursuant to Rule 46 (b) for failure to give bail to appear to testify at a trial or hearing, is another new feature in the Rule. The purpose is to afford a method of relief for such a witness, if he so desires and the court approves in the particular case. Depositions so taken could be used for the same purposes and subject to the same limitations as other depositions, as prescribed by subdivision (e).

Discovery and Inspection. Rule 16¹⁶² is intended further to reduce

158. See, for example, *People v. Reese*, 258 N. Y. 89, 179 N. E. 307 (1932).

159. Compare SEN. DOC. NO. 1382, 74th Cong., 1st Sess. 1935 (An act to provide for taking of depositions in criminal proceedings) which passed the Senate on June 25, 1935 and was referred to the House on June 27. A companion House measure, H. R. 4531, was tabled by the House Judiciary Committee on March 5, 1935.

160. See 17 STAT. 89 (1872), 23 U. S. C. § 644 (1940), considered applicable to criminal proceedings in *Wong Yim v. United States*, 118 F. (2d) 667 (C. C. A. 9th, 1941), *cert. denied*, 313 U. S. 589 (1941); *Clymer v. United States*, 38 F. (2d) 581 (C. C. A. 10th, 1930); *United States v. Hofmann*, 24 F. Supp. 847 (S. D. N. Y. 1938); *United States v. Cameron*, 15 Fed. 794 (C. C. E. D. Mo. 1883). Cf. *Luxenberg v. United States*, 45 F. (2d) 497 (C. C. A. 4th, 1930), *cert. denied*, 283 U. S. 820 (1931).

161. NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1945), Rule 15, at 15.

162.

"Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process, upon a showing that the items sought may be material to

the role of surprise in criminal proceedings. The climate of opinion does not yet permit an advance¹⁶³ comparable to that achieved on the civil side in this respect, but the Rule should at least tend to allay prevailing doubts whether pre-trial discovery and inspection should be granted in criminal proceedings at all. Some of these doubts are reflected in the rather grudging Committee Note to the Rule.

"Whether under existing law discovery may be permitted in criminal cases is doubtful, *United States v. Rosenfeld*, 57 F. (2d) 74 (C. C. A. 2d)—*cert. den.*, 286 U. S. 556. The courts have, however, made orders granting to the defendant an opportunity to inspect impounded documents belonging to him, *United States v. B. Goedde and Co.*, 40 Fed. Supp. 523, 534 (E. D. Ill.). The rule is a restatement of this procedure. In addition, it permits the procedure to be invoked in cases of objects and documents obtained from others by seizure or by process, on the theory that such evidential matter would probably have been accessible to the defendant if it had not previously been seized by the prosecution. The entire matter is left within the discretion of the court."¹⁶⁴

It is true that motions for discovery and inspection have been unfamiliar to many criminal judges,¹⁶⁵ and when made, have more often than not been viewed as "fishing expeditions" and denied. The subject has been little treated in legal literature, but there are some interesting federal precedents.

Chief Justice Marshall, in the early case of *United States v. Burr*¹⁶⁶ ordered inspection by the defense before trial of a letter in the hands of the prosecution, on a showing that it might be material to the defense. To hold otherwise, he felt, would be "a serious blot on the page which records the judicial proceedings of this country." In *United States v. Rich*,¹⁶⁷ an Alaskan case, the court ordered that the defendant be per-

the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

163. See Chaplin, *Reform in Criminal Procedure* (1893) 7 HARV. L. REV. 189, 199: "The old theory was that a prosecution for crime was a contest between the injured person, or his relatives, and the accused. That theory has gradually yielded to the milder view that the contest is between the public and the accused. We ought now to be ready for the theory that a criminal prosecution is not a contest at all, but an investigation, conducted by the State, before a tribunal of its own appointment, with as great a desire to clear the defendant, if not guilty, as to convict him, if guilty."

164. NOTES AND INSTITUTE PROCEEDINGS (1946) 30.

165. As late as 1926, for example, the New York Court of Appeals found it necessary to examine the problem almost as a new question. *People ex rel. Lemon v. Supreme Court*, 245 N. Y. 24, 156 N. E. 84, 52 A. L. R. 200 (1927). The opinion by Cardozo, C. J., contains an extended review of the prior Anglo-American history.

166. *United States v. Burr*, 25 Fed. Cas. 30, No. 14,692d (C. C. D. Va. 1807); *United States v. Burr*, 25 Fed. Cas. 187, No. 14694 (C. C. D. Va. 1807).

167. 6 Alaska 670, 671 (1922).

mitted to inspect and photograph a piece of glass found near the scene of the crime and supposedly containing his fingerprints, and observed:

“. . . No unfair handicap is imposed on either party by allowing the other to have full knowledge of inanimate objects intended to be used in evidence. They are unchangeable, except by destruction or wilful alteration. . . . The evidence cannot be altered by defendant's prior knowledge, nor can its force be minimized if the theory of the prosecution be correct. . . .”

The discovery permitted by the Rule is subject to the court's discretion, and is limited to “books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process. . . .” These need not necessarily constitute evidence, but must be “material to the preparation” of the defense.

A witness' statement made voluntarily and in the possession of the prosecution is therefore not subject to inspection, not having been obtained “by seizure or by process.” Statements or confessions voluntarily made by co-defendants and accomplices fall in the same category. Provision for inspection of the minutes of testimony given by witnesses before a grand jury is made in Rule 6(e)¹⁶⁸ rather than this one, but the considerations governing inspection under either Rule are similar.

There is no provision in the Rules for advance disclosure by either party of the witnesses to be produced at the trial. However, a statute enacted in 1790 does provide that in treason and other capital cases an accused may have a list of the jury and of the witnesses to be produced at the trial.¹⁶⁹ In other than capital cases the defendant has no similar right, though in some instances lists of government witnesses have been ordered furnished as a matter of discretion,¹⁷⁰ and at least one district court has made provision for this by local rule.¹⁷¹ Unless the government's subpoenas are issued in blank, as now authorized by Rule 17(a), a defendant can, of course, obtain some notice of the witnesses to be produced against him by watching the praecipes filed with the clerk of court.

Subpoena. Rule 17, governing subpoenas issued by courts and commissioners, is substantially similar to Civil Rule 45(a).

168. See pp. 203-4 *supra*.

169. 1 STAT. 118 (1790), 18 U. S. C. § 562 (1940). *Cf.* the more generous practice in many of the States and in England. A. L. I. CODE CRIM. PROC. (1930) § 194; 11 & 12 Vict., c. 42, § 27 (1849). The federal statute does not include the names of additional witnesses who testified before the grand jury, or on the basis of whose testimony an information was filed. See *Knight v. Hudspeth*, 112 F. (2d) 137 (C. C. A. 10th, 1940), *cert. denied*, 311 U. S. 681 (1940).

170. *Spivey v. United States*, 109 F. (2d) 181 (C. C. A. 5th, 1940), *cert. denied*, 310 U. S. 631 (1940); *United States v. Aviles*, 222 Fed. 474 (S. D. Cal. 1915).

171. D. C. W. D. Wis., Rule 95. See *Balliet v. United States*, 129 Fed. 689 (C. C. A. 8th, 1904).

Subdivision (a) includes the new provision relating to subpoenas in blank:

"The clerk shall issue a subpoena, signed and sealed but otherwise in blank to a party requesting it, who shall fill in the blanks before it is served."

This Rule obviously does not favor a policy of enforced disclosure to the adverse party of the names of the witnesses to be called by either side.

The right of an indigent defendant to secure the attendance of witnesses at the expense of the government, formerly granted by statute,¹⁷² is preserved and extended by subdivision (b). The right was formerly limited to witnesses who were within the district or within one hundred miles of the place of trial, but this restriction has been eliminated. As formerly, the defendant must show by affidavit the substance of the testimony which he expects from the witness, that it is material, that he cannot safely go to trial without the witness, and that he is unable to pay the witness' fees.

With respect to subpoenas for the production of documents or objects—the *duces tecum*—subdivision (c) contains one new provision and otherwise restates the familiar practice. The new provision is this:

"The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

This provision invites an exception to the "normal" practice in the handling of documents produced in response to a subpoena *duces tecum*. Normally, "the books and other things called for would merely be brought into court at the time of the trial, let us say immediately before they are to be offered in evidence, . . ." ¹⁷³ The party calling for the documents, as well as the court, would then have had no prior opportunity to examine them. This normal practice makes sense in cases of no more than average complexity which can in any event be tried in from one to five days. The common law rules of procedure and of evidence were, of course, developed out of experience with such cases. Given but a few relevant documents (perhaps a contract or a few letters), it is perfectly feasible to call for them and see them for the first time in open court—and for judicial process to absorb the delay while the party who served the subpoena studies the document to determine whether the producing party has complied, and whether the

172. 9 STAT. 74 (1846), 28 U. S. C. § 656 (1940).

173. Address by Youngquist, NOTES AND INSTITUTE PROCEEDINGS (1946) 168.

document is to be used; or while the court, if there is an objection to production of a document, studies it to see whether it is relevant, material and non-privileged. In federal practice, however, one must also envisage trials which involve thousands of documents, and consume many months of trial. Most major anti-trust proceedings are of this description, as are various classes of cases arising under other industry-regulation statutes.

The only practicable solution, if such cases are to be tried before courts, is a subpoena practice which permits of a sifting in advance of trial of the documents actually to be offered in evidence. The court can hardly participate in the preliminary sifting, for the relevance and materiality of most such documents will be circumstantial, and under our system of adjudication the court is not supposed to know enough about the evidence before trial to have an informed judgment on the circumstantial relevance and materiality of any given bit of proof. Such practical considerations led the district court in the recent *American Tobacco* anti-trust case¹⁷⁴ to adopt the very practice since sanctioned by this Rule.

Service of a subpoena, under subdivision (d) of the Rule, may now be made not only by a marshal or his deputy but "by any other person who is not a party and who is not less than 18 years of age."¹⁷⁵ In the interest of getting public jobs done with timing and expedition, this is an excellent provision. Considering, however, that the marshalls operate on a fee system and that they are not without political influence in their localities, this new dispensation will probably not be overworked.

The provision in subdivision (d) that even where the subpoena is issued at the instance of the government, the person subpoenaed shall be tendered the fee for one day's attendance and the mileage allowed by law, is likewise new. Under the former practice a witness had to finance his own trip, and was reimbursed later. This was all right so long as the witness actually contrived to show up when needed, but the writer can recall instances in his own experience of key government witnesses who were literally without funds to travel and appear, and had to be tendered their mileage in advance. There is considerable question whether a subpoena in such a situation would otherwise be enforceable. Under the new Rule, however, the Department of Justice

174. See *American Tobacco Co. v. United States*, 147 F. (2d) 93 (C. C. A. 6th, 1944), *aff'd*, 66 Sup. Ct. 1125 (U. S. 1946), approving the district court's procedure in this respect.

175. For prior provisions with respect to persons authorized to serve process, see 48 STAT. 1008 (1934), 5 U. S. C. § 300a (1940); 36 STAT. 1167 (1935), 28 U. S. C. § 503 (1940); 30 STAT. 1237 (1899), 28 U. S. C. § 508 (1940); 29 STAT. 179 (1896), 46 STAT. 486 (1930), 49 STAT. 513 (1935), 28 U. S. C. § 574; 29 STAT. 182 (1896), 35 STAT. 640 (1909), 42 STAT. 615 (1922), 43 STAT. 1029 (1925), 28 U. S. C. § 582 (1940); 1 STAT. 87 (1789), 28 U. S. C. § 735 (1940).

appears to be experiencing real difficulty in finding a way to handle these complicated problems of finance.¹⁷⁶

Subpoenas in federal criminal cases run throughout the United States, as formerly,¹⁷⁷ under subdivision (e), and they may likewise be served abroad pursuant to the Act of July 3, 1926, prompted by the *Blackmer* situation.¹⁷⁸

The issuance of subpoenas for the taking of depositions is governed by subdivision (f), and substantially follows the civil practice.¹⁷⁹

Failure to obey a subpoena without adequate excuse—whether issued by a court or a commissioner—may be punished as a contempt under subdivision (g).¹⁸⁰

VENUE

District and Division. Rule 18 restates the former general requirement that a prosecution be had within the division of the district wherein the crime was committed.¹⁸¹ The term "prosecution" as here employed does not include the finding and return of an indictment, so that the common practice of impaneling one grand jury for the entire district and distributing the indictments among the divisions in which the offenses were committed may continue.¹⁸² The numerous statutes dealing with the venue of particular classes of offenses—*e.g.*, continuing offenses and offenses involving multiple transactions occurring in different districts—remain in full force.¹⁸³

Transfer within the District. Rule 19, providing that in a district consisting of two or more divisions arraignment may be had, a plea entered, trial conducted or sentence imposed in any division and at any time if the defendant consents, is likewise a restatement of former practice.¹⁸⁴

176. See 14 U. S. L. WEEK 2679 (U. S. 1946): "The Administrative Assistant to the Attorney General recently wrote to the Comptroller General of the United States, asking his 'comment or advice' as to the procedure to be followed by the Department of Justice under the last sentence of R. 17(d) of the Federal Rules of Criminal Procedure. . . . The Attorney General's office said: 'This requirement presents an almost unworkable procedure. It would require that each deputy United States marshal be authorized to carry several hundreds of dollars of cash at all times, . . .'"

177. 44 STAT. 835-6 (1926), 28 U. S. C. §§ 712-14 (1940).

178. See *Blackmer v. United States*, 284 U. S. 421 (1932).

179. See Rule 45(d), F. R. Crv. P.

180. A substantially similar provision is found in Civil Rule 45(f). With reference to commissioners, see *United States v. Beavers*, 125 Fed. 778 (S. D. N. Y. 1903); *In re Mason*, 43 Fed. 510 (D. Minn. 1890); *Ex parte Perkins*, 29 Fed. 900 (C. C. D. Ind. 1887); and 24 STAT. 635 (1887), 28 U. S. C. § 660 (1940).

181. 36 STAT. 1101 (1911), 28 U. S. C. § 114 (1940); U. S. CONST. Art. III, § 2 and AMEND. VI.

182. See *Salinger v. Loisel*, 265 U. S. 224, 237 (1924).

183. See statutes cited in NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1946) 18-20; *Armour Packing Co. v. United States*, 209 U. S. 56, 73-7; *United States v. Johnson*, 323 U. S. 273 (1944).

184. 36 STAT. 1101 (1911), 28 U. S. C. § 114 (1940).

Transfer from the District for Plea and Sentence. Rule 20¹⁸⁵ authorizes a new time- and trouble-saving procedure for the benefit of a defendant arrested in a district other than that in which the prosecution was instituted who desires to plead guilty and have sentence imposed in the district in which he is found. Adequate protection for the interests of the government as well as of the defendant without counsel is provided.

Transfer from the District or Division for Trial. Rule 21 authorizes a change of venue on motion of the defendant in two situations—if it appears “that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division,” or if it appears “that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged.”

Both of these provisions, innovations in federal practice, are designed to eliminate some real and some imagined abuses which have stirred considerable criticism in the past.¹⁸⁶ Change of venue on the ground of prejudice has long been familiar in the practice of many states. In some it is available on motion of the prosecution as well as of the defense. The federal Rule does not go so far since the defendant has a constitutional right to trial in the district in which the offense was committed.

The provision for change of venue in prosecutions of offenses committed in more than one division or district should prove helpful both to defendants and to the government as well. Its chief application will be found in anti-trust and other large-scale conspiracy cases. Typically, in such cases, the offense has been committed throughout the United

185.

“A defendant arrested in a district other than that in which the indictment or information is pending against him may state in writing, after receiving a copy of the indictment or information, that he wishes to plead guilty or *nolo contendere*, to waive trial in the district in which the indictment or information is pending and to consent to disposition of the case in the district in which he was arrested, subject to the approval of the United States attorney for each district. Upon receipt of the defendant's statement and of the written approval of the United States attorneys, the clerk of the court in which the indictment or information is pending shall transmit the papers in the proceeding or certified copies thereof to the clerk of the court for the district in which the defendant is held and the prosecution shall continue in that district. If after the proceeding has been transferred the defendant pleads not guilty, the clerk shall return the papers to the court in which the prosecution was commenced and the proceedings shall be restored to the docket of that court. The defendant's statement shall not be used against him unless he was represented by counsel when it was made.”

186. See Cummings, *The Third Great Adventure* (1943) 29 A. B. A. J. 654, 655; Medalie, *Federal Rules of Criminal Procedure* (1944) 4 LAWYERS GUILD REV. (3) 1, 5.

States, and the defendants' principal places of business are rarely all located in the same place. Under these circumstances it is perfectly possible for the government to "shop around" for an unduly favorable locality and judge. But there is another aspect of this situation which has received less mention. The government must select a venue somewhere. Frequently the choice is legitimately circumscribed by circumstances of which the public is unaware, such as grand jury and trial docket congestion in certain districts and the timing of trial terms of court. Any choice the government makes is likely to be criticized as unfair by the defense and all who sympathize with it. The new Rule permits charges of unfair venue to be litigated in court rather than exclusively in the press.

The statute providing for a change of judge on the ground of personal bias or prejudice¹⁸⁷ remains unaffected, as does the statute authorizing change of venue as a matter of right in a limited class of cases.¹⁸⁸

Time of Motion to transfer. Rule 22 provides that a motion to transfer may be made at or before arraignment or at such other time as the court or these Rules prescribe.

TRIAL

Trial by Jury or by the Court. The former law with respect to the cases in which a defendant is entitled to trial by jury, waiver of jury trial by the defendant with the approval of the court and consent of the government, and trial by a jury of less than twelve on stipulation with the approval of the court, is restated in Rule 23.¹⁸⁹ There is, however, one new feature—the requirement in subdivision (c) that the court shall, on request, make special findings of fact in a case tried without a jury.¹⁹⁰

187. 36 STAT. 1090 (1911), 28 U. S. C. § 25 (1940).

188. 47 STAT. 649 (1933), 49 STAT. 427 (1935); 53 STAT. 742 (1939), 18 U. S. C. § 338a (d)(mailing threatening communications); 48 STAT. 781 (1934), 53 STAT. 743 (1939), 18 U. S. C. § 408d (threatening communications in interstate commerce).

189. See U. S. CONST. Art. III, § 2, cl. 3, and AMEND. VI; *District of Columbia v. Clawans*, 300 U. S. 617 (1937) (petty offenses excepted); *Frankfurter and Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury* (1926) 39 HARV. L. REV. 917; cf. address by McLellan, NOTES AND INSTITUTE PROCEEDINGS (1946) 172: "Then I got interested in what was a petty crime. In the course of the careful investigation that I made upon that subject I learned that not a single member of the Supreme Court had ever served a day in jail, otherwise they could not have decided as they did in the *Clawans* case, . . . that an offense punishable by ninety days in jail is a petty offense." See also *Patton v. United States*, 281 U. S. 276 (1930) (jury of less than twelve on stipulation, and waiver); *Adams v. United States ex rel. McCann*, 317 U. S. 269 (1942) (waiver).

190. This has been the practice in Connecticut. See *State v. Frost*, 105 Conn. 326, 135 Atl. 446 (1926). Cf. McLellan, *supra* note 189, at 173: "I could have wished that the rule had given the judge a right in a criminal case to find the facts or not find them, as he himself thought was all right. We all know, don't we, that when we hear a criminal case tried we get convinced of the guilt of the defendant or we don't; and isn't it enough if we say guilty or

Trial jurors. The first subdivision of Rule 24, governing the examination of trial jurors,¹⁹¹ is similar to Civil Rule 47(a). As Judge McLellan has characterized it:

“. . . This rule really is a gem. It lets the judge do just as he pleases.”¹⁹²

No change in the law is involved, as the practice has in fact varied in the several districts.

The qualifications and method of selection of prospective jurors are not covered by these Rules.¹⁹³ The problem of method of selection is, of course, delicate. We favor public participation in judicial process as an ideal. But the prosecuting attorney wants to win most of his cases; indeed, his future depends on it. The judge wants an “intelligent and responsible” jury. The opportunity to serve on juries can be—to persons of uncertain income—a form of political patronage. The net result is that an agreed formula has yet to be arrived at. The recent decision of the Supreme Court in the *Thiel* case and the pending issue concerning “blue-ribbon juries,”¹⁹⁴ are of interest in this connection. The fact that the *Thiel* decision on jury composition came out of a civil proceeding is probably not a distinguishing feature. Mr. Justice Murphy said for the majority:

“The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. *Smith v. Texas*, 311 U. S. 128, 130, 61 S. Ct. 164, 165, 85 L. Ed. 83; *Glasser v. United States*, 315 U. S. 60, 85, 62 S. Ct. 457, 471, 86 L. Ed. 680. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials

not guilty, without going through the form of making special findings of facts designed by the judge—unconsciously of course—to support the conclusions at which he has arrived. . . .”

191.

“The court may permit the defendant or his attorney and the attorney for the government to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the defendant or his attorney and the attorney for the government to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions by the parties or their attorneys as it deems proper.”

192. McLellan, *supra* note 189, at 173.

193. See Dession, *The New Federal Rules of Criminal Procedure: I* (1946) 55 YALE L. J. 694, 704.

194. *Thiel v. Southern Pacific Co.*, 66 Sup. Ct. 984, 985-6 (U. S. 1946); *People v. Fay*, 296 N. Y. 510, 68 N. E. (2d) 453 (1946), *cert. granted sub. nom.* *Bove v. New York*, 67 Sup. Ct. 102 (U. S. 1946) (blue ribbon jury).

without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

The matter of peremptory challenges is dealt with in subdivision (b) which supersedes 28 U. S. C. § 424.¹⁹⁵ In capital cases the number of challenges is now equalized so that both the government and the defendant have twenty; in other felony cases the government has six and the defendant ten; and in misdemeanor cases each side has three. The Rule continues the former policy of treating multiple defendants as one for the purpose of reckoning challenges¹⁹⁶—a fiction which the writer would not defend even on the limited ground of expediency—with one concession contained in the last sentence of subdivision (b): "If there is more than one defendant, the court *may* allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly." (Italics supplied.)

This concession helps, but the fact remains that to permit joinder of defendants at all gives the prosecution an advantage justifiable only by reasons of expediency. Any lawyer who has participated in a trial of joint defendants knows that defendants in such cases are strategically handicapped. To allow a few more peremptory challenges might lengthen a three-month trial by three days, or a one-week trial by a day.

The former statute authorizing the impaneling of two alternate jurors in cases prosecuted on indictment¹⁹⁷ is superseded by subdivision (c), with two changes. The Rule no longer speaks only in terms of cases prosecuted on indictment but also allows for alternate jurors in cases prosecuted on information; and the maximum permissible number of alternates is increased from two to four.¹⁹⁸

195. 36 STAT. 1166 (1911).

196. Compare McLellan, *supra* note 189, at 174-5. "The next part of that rule treats of peremptory challenges. . . . There is one thing in it that comes down from the old law that for personal reasons and as a result of personal experience I don't like . . . it requires the defendants to exercise their peremptory challenges together, and I submit it is wrong that defendants should be deprived of their challenges if they can't agree upon which jurors are likely to be unfavorable to them."

197. 47 STAT. 380 (1932), 28 U. S. C. 417a (1940).

198. "The court may direct that not more than 4 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions,

Both changes were suggested by practical experiences of the sort encountered in *United States v. American Tobacco Company*,¹⁹⁹ an anti-trust case prosecuted on an information and to a jury. From the outset it was apparent to all concerned that the trial would consume at least three months, and on the basis of actuarial tables the odds were that of twelve middle-aged jurors, at least one would sustain a temporarily incapacitating illness in the course of that period. Relying on the notion that courts possess a residual power to make such procedural adjustments as may be necessary to make judicial process work, the government obtained the appointment of two alternates. The defendants took exception. As it turned out, both alternates had to be used well before the trial was over, and during the closing hours it was a matter of touch and go whether or not a non-existent third might be needed to avert a mistrial. The draftsmen of the statute had, of course, no such situation in mind, since informations were not commonly used in such cases until recent years. The Circuit Court of Appeals sustained the District Court's procedure in impaneling the alternate jurors, and the Supreme Court did not choose to disturb the result.²⁰⁰

Judge; Disability. Rule 25 provides for the situation in which the judge who presided at the trial is unable, by reason of absence, death, sickness or other disability, to attend to the proceedings after verdict or finding of guilt. Another judge may take over or, in his discretion, grant a new trial.²⁰¹

Evidence, Proof of Official Record, and Expert Witnesses. Rules 26-28, dealing with these evidential matters, have already been discussed.²⁰² The first contemplates a uniform system of evidence to be developed by the federal judiciary, with no requirement of conformity to state law. The second incorporates by reference Civil Rule 44. The third, recognizing the power of a court to appoint expert witnesses of its own selection, spells out a procedure to govern such appointments, and provides that "the court may determine the reasonable compensation of such a witness and direct its payment out of such funds as may be provided by

powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, and 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror."

199. 39 F. Supp. 957 (E. D. Ky. 1941).

200. *American Tobacco Co. v. United States*, 147 F. (2d) 93 (C. C. A. 6th, 1944), *aff'd* 66 Sup. Ct. 1125 (U. S. 1946).

201. The provision is similar to Civil Rule 63. See also 31 STAT. 270 (1900), 28 U. S. C. 776 (1940) (Bill of exceptions; authentication; signing of by judge).

202. See Dession, *The New Federal Rules of Criminal Procedure: I* (1946) 55 YALE L. J. 694, 703-4.

law." Until recently there were no funds for this purpose, and those appropriated have been ludicrously inadequate. The procedure will probably not be invoked in many types of prosecutions. One may, however, expect to see it increasingly employed to secure psychiatric advice as to sentences in the considerable number of cases where such assistance is needed.

Motion for Acquittal. Under Rule 29 this newly christened motion takes the place of the former motion for a directed verdict, the change in language being designed to describe more simply and accurately what happens when the motion is granted. Neither the grounds for the motion nor the scope of matters which may be considered are in any way changed. To remove a doubt which had existed in a few districts, the Rule now expressly provides that a defendant shall not be deemed to have rested his case by virtue of having made the motion at the close of the government's evidence. When the motion is made at the close of all the evidence, the Rule expressly permits the court to reserve decision until after verdict.²⁰³ This is the procedure which was adopted by the district court in the *Madison Oil* case.²⁰⁴

Instructions. Rule 30 is patterned on Civil Rule 51, and provides:

"At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

However, the provision in the second sentence for furnishing the adverse party with copies of requests to charge is new. If a court errone-

203.

"RESERVATION OF DECISION ON MOTION. If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the motion is denied and the case is submitted to the jury, the motion may be renewed within 5 days after the jury is discharged and may include in the alternative a motion for a new trial. If a verdict of guilty is returned the court may on such motion set aside the verdict and order a new trial or enter judgment of acquittal. If no verdict is returned the court may order a new trial or enter judgment of acquittal."

204. *Ex parte* United States, 101 F. (2d) 870 (C. C. A. 7th, 1939), *aff'd by an equally divided court sub nom.* United States v. Stone, 308 U. S. 519 (1939).

ously omits to give a proper requested charge, the adverse party, now having notice of the situation, may desire to call the court's attention to the omission in order to avoid error.

Verdict. Rule 31, dealing with the return of the verdict, the procedure in cases of multiple defendants, conviction of a lesser offense, and the polling of the jury, is a simple restatement of the former law.²⁰⁵ Sealed verdicts are not mentioned, and the matter is thus left to the discretion of the district courts. Qualified verdicts in cases in which capital punishment may be imposed remain subject to the former statutes.²⁰⁶

JUDGMENT

The Rules governing proceeding after verdict or finding of guilty were promulgated by the Court on February 8, 1946.²⁰⁷ Since the enabling legislation²⁰⁸ on which these Rules depended did not require their submission to Congress, they were not included in the set of rules reported at the beginning of the regular session on January 3, 1945. They were, however, prepared together with the other Rules and in the same manner, and appeared as Rules 34-41 in the June, 1944 Report of the Advisory Committee. As promulgated by the Court, they are numbered 32-39.

Sentence and Judgment. Subdivision (a) of Rule 32 works no change in the law. It provides that sentence shall be imposed without unreasonable delay, that pending sentence the court may commit the defendant or continue or alter the bail, and that before imposing sentence the court shall afford the defendant an opportunity to make a statement in his own behalf and present any information in mitigation of punishment. There was, of course, no question under the former practice that where sentencing involved discretion—as it usually does—the court might subpoena witnesses or consider any other evidence bearing on the appropriate disposition of the case.²⁰⁹ To recall an example from state

205. See 17 STAT. 198 (1872), 18 U. S. C. § 566 (1940) (Verdicts; several joint defendants); 17 STAT. 198 (1872), 18 U. S. C. § 565 (1940) (Verdicts; less offense than charged); see *Mackett v. United States*, 90 F. (2d) 462, 465 (C. C. A. 7th, 1937) (poll of jury); *Bruce v. Chestnut Farms Chevy Chase Dairy*, 126 F. (2d) 224 (App. D. C. 1942) (Same).

206. See 47 STAT. 326 (1932), 48 STAT. 781 (1934), 18 U. S. C. § 408a (1940) (Kidnapped persons); 54 STAT. 255 (1940), 18 U. S. C. § 412a (1940) (wrecking trains); 35 STAT. 1152 (1909), 18 U. S. C. § 567 (1940) (Verdicts; qualified verdicts).

207. 327 U. S. 825 (1946).

208. See 47 STAT. 904 (1933), 18 U. S. C. § 688 (1940); 55 STAT. 779 (1941), 18 U. S. C. § 689 (Supp. 1946); and 56 STAT. 271 (1942), 18 U. S. C. § 682 (Supp. 1946).

209. See *United States v. Standard Oil Co. of Indiana*, 155 Fed. 305 (N. D. Ill. 1907), *rev'd* 167 Fed. 373 (C. C. A. 7th, 1908), *cert. denied* 212 U. S. 579 (1909). Failure to inquire whether defendants have any reason to suggest why sentence should not be imposed has usually been considered harmless error. See *United States v. Austin-Bagley Corp.*, 31 F. (2d) 229 (C. C. A. 2d, 1929); *Turner v. United States*, 66 Fed. 289 (C. C. A. 5th, 1895).

practice, the *Loeb-Leopold* proceeding in Illinois wherein alienists testified and Clarence Darrow made his successful plea for the defense was no trial, but merely a hearing on sentence.

Under subdivision (b) a judgment of conviction must set forth the plea, the verdict or findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment is to be entered accordingly.

Subdivision (c), dealing with the pre-sentence investigation, is new. It provides that the probation service of the court shall make an investigation and report before the imposition of sentence unless the court otherwise directs. Formerly such investigations and reports were made only when affirmatively requested by the court.²¹⁰ The Rule contemplates that the report will present an adequate social case history of the defendant, prescribes the contents generally, and further provides that the report shall not be submitted to the Court or otherwise disclosed prior to determination of guilt.²¹¹

This provision reflects the growing use of the pre-sentence report. The 1941 report of the Director of the Administrative Office of the United States Courts shows that during that year some 60% of all probationers received for supervision by United States probation officers had received pre-sentence investigation, and that a standard procedure for investigating and reporting was being developed.²¹² The total number of probation officers serving the United States District Courts had increased from eight in 1930 to 239 in 1941. But there was still a great disparity between the various districts with respect to the use of this facility. In one district in 1941 there were no pre-sentence investigations reported. In another, such investigations were reported for only 4.5% of those placed on probation. In others the percentage ran as high as 96, 98 and 99.

Withdrawal of a plea of guilty is governed by subdivision (d):

“A motion to withdraw a plea of guilty or of *nolo contendere* may

210. 46 STAT. 503 (1930), 18 U. S. C. § 727 (1940).

211. The Advisory Committee had recommended that the Rule also provide: “After determination of the question of guilt the report shall be available, upon such conditions as the court may impose, to the attorneys for the parties and to such other persons or agencies having a legitimate interest therein as the court may designate.” FEDERAL RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE (1944), 34. But this provision was deleted by the Court.

The deleted provision was prompted by two considerations: (1) The defense should have notice and an opportunity to controvert or explain false or misleading statements in a pre-sentence report, since the report may influence the Court's judgment. (2) Such reports constitute potentially valuable data for criminological research. For a discussion of the pros and cons of making such reports available, see NOTES AND INSTITUTE PROCEEDINGS (1946) 222-4.

212. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS (1941) 12.

be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."²¹³

Probation is left as it was by the provision in subdivision (e) that "after conviction of an offense not punishable by death or by life imprisonment, the defendant may be placed on probation as provided by law." Statutes governing suspension of the imposition or execution of sentence, and the placing of defendants on probation, therefore remain in effect.²¹⁴

New Trial. The chief new feature in Rule 33 is the provision extending to two years after final judgment, the time for making a motion for new trial on the ground of newly discovered evidence.²¹⁵ The time limit had been 60 days after final judgment, except in capital cases.²¹⁶ The Rule also provides that where an appeal is pending, the court may grant the motion only on remand of the case—a provision intended to change the former practice²¹⁷ pursuant to which a remand from the appellate court had to be secured before the motion for new trial was made in the trial court. The motion may now be made without securing a remand, but if the trial court decides to grant the motion, the remand must then be obtained prior to entry of the order granting the motion. The purpose is to eliminate the trouble of getting a remand in those cases wherein the trial court does not propose to grant a new trial. A motion for new trial based on any grounds other than newly discovered evidence²¹⁸ must be made within five days after verdict or

213. Compare former CRIMINAL APPEALS RULE II:

"(1) Motions after verdict or finding of guilt, or to withdraw a plea of guilty, shall be determined promptly. . . .

"(4) A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed. As amended May 31, 1938."

214. 43 STAT. 1259 (1925), 18 U. S. C. § 724 (1940).

215. Compare A. L. I. CODE CRIM. PROC. (1930) § 362 (motion for new trial for newly discovered evidence may be made within one year after verdict or at a later time if the court for good cause permits).

216. Rule II (3) of the former CRIMINAL APPEALS RULES.

217. Rule II (3) of the former CRIMINAL APPEALS RULES provided that the trial court might "entertain the motion only on remand of the case by the appellate court for that purpose," and that remand might be made "at any time before final judgment." See *Evans v. United States*, 122 F. (2d) 461 (C. C. A. 10th, 1941); *Flowers v. United States*, 86 F. (2d) 79 (C. C. A. 8th, 1936); and *Isgrig v. United States*, 109 F. (2d) 131, 134 (C. C. A. 4th, 1940) ("The case will be remanded, however, only if showing is made to the Appellate Court that the lower court would be justified in granting a new trial.").

218. Grounds for the motion are illustrated by *Berger v. United States*, 295 U. S. 78 (1935); *Mattox v. United States*, 146 U. S. 140 (1892); *Edwards v. United States*, 7 F. (2d) 357 (C. C. A. 8th, 1925); *Chadwick v. United States*, 141 Fed. 225 (C. C. A. 6th, 1905).

finding of guilt or within such further time as the court may fix during the five-day period.²¹⁹

As promulgated by the Court, this Rule differs in two important respects from the draft recommended by the Advisory Committee. First, the Committee had recommended that there be no time limitation where the motion is based on newly discovered evidence, having in mind that the motion is in any event addressed to the discretion of the court.²²⁰ Secondly, the Court deleted a provision that a motion for a new trial based "on the ground that the defendant has been deprived of a constitutional right may be made at any time before or after final judgment, . . ." ²²¹ Since such an issue may now be raised by habeas corpus without time limit,²²² the Committee's thought was that there would be some advantage in permitting the issue to be raised by motion in the district where the defendant was originally tried, since the judicial records—and, usually, persons who would have knowledge—are there. Habeas corpus proceedings must be instituted in the district where the petitioner is confined, and this is more often than not at some distance.

A major latent ambiguity in the Rule is to be regretted: its effect, if any, on the possible availability of relief against a conviction based on fundamental errors of fact unknown to the trial court at the time, by a motion in the nature of the common law writ of error *coram nobis*. The Rule does not deal specifically with that pattern of relief. A motion for new trial is historically distinguishable. But neither do any of the other Rules specifically recognize or exclude it. As a matter of functional classification it should have been covered here, as the Committee note to the Second Preliminary Draft of this Rule implicitly recognized:

"No express provision is made with respect either to providing for relief or to barring relief under the common law writ of error *coram nobis*. See *Robinson v. Johnston*, 118 F. 2d 998 (C. C. A. 9th, 1941), 130 F. 2d 202 (C. C. A. 9th, 1942), remanded on other grounds, 316 U. S. 649 (1942). See also *People v. Reid*, 195 Cal. 249

219. Rule II (2), former CRIMINAL APPEALS RULES, required that the motion be made within 3 days after verdict or finding of guilt.

There is, however, no time limitation on the court's consideration or reconsideration, of a motion seasonably made. *United States v. Smith*, 15 U. S. L. WEEK 2050 (C. C. A. 3d, 1946) (district court vacated judgment and granted new trial *after* affirmance by circuit court of appeals of judgment of correction and denial of motion for new trial).

220. *Mattox v. United States*, 146 U. S. 140 (1892); *United States v. Hartenfeld*, 113 F. (2d) 359 (C. C. A. 7th, 1940), *cert. denied*, 311 U. S. 647 (1940).

221. FEDERAL RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE (1944), Rule 35.

222. *Adams v. United States ex rel. McCann*, 317 U. S. 269 (1942) (right to counsel); *Johnson v. Zerbst*, 304 U. S. 458 (1938) (right to counsel); *Waley v. Johnston*, 316 U. S. 101 (1942) (coercion or inducements to enter plea of guilty); *Walker v. Johnson*, 312 U. S. 275 (1941) (same).

(1924). See generally *Lamb v. Florida*, 91 Fla. 396 (1926). Nothing in the rules limits existing power of the court to grant any type of relief from judgments or orders which is not expressly provided for in the rules."²²³

The ambiguity in the Rule is not inadvertent, but merely reflects lack of general agreement on an appropriate solution.²²⁴ The important thing is that the Rule should not be construed as in any way foreclosing the question.

That an issue so fundamental to a civilized procedural policy can remain so long unresolved may seem surprising. But the conflict of values in our culture which it reflects does exist. On the merits, this writer can suggest no sufficient reason why relief against erroneous criminal convictions—whether by writ of *coram nobis* or motion for new trial—should be barred by time limitations. There are, of course, the familiar counter-arguments of expediency: (1) Legal relationships between parties should be definitely settled, in the interest of forward-looking adjustment. The validity of this proposition is more apparent in civil litigation involving property rights than in criminal proceedings where the purpose and effect of a judgment of conviction are to remove the defendant—more or less—from the community milieu of living and adjustment. (2) Courts might be flooded with motions from the penitentiaries. And so they might. A similar possibility, however, has existed for some time with respect to petitions for *habeas corpus*, but the unmanageable flood of petitions anticipated after the decisions in the *Waley*²²⁵ and *Johnson*²²⁶ cases did not materialize. In any event a sifting procedure comparable to that devised for petitions for certiorari should be possible. (3) With the passage of time, proof may be dissipated, rendering review impracticable. This difficulty is not imaginary, since we are speaking of cases in which at least two years and frequently many more have elapsed. But automatically to bar judicial relief in all

223. FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (Feb. 1944), Note to Rule 35, p. 131. This is the final Committee Note on the subject, the ultimate edition being confined to notes to the rules which were submitted to Congress, and hence excluding Rules 32-39.

224. See, for example, Moore and Rogers, *Federal Relief From Civil Judgments* (1946) 55 YALE L. J. 623:

"Opinion varies sharply concerning the extent to which relief should be granted from a judgment. This divergence necessarily results from a clash of the two principles that litigation must terminate within a reasonable time, but that justice must be accorded the parties. . . ."

The article contains an enlightening discussion of the history of the writ of *coram nobis*. *Id.* at 669-74, 688. As indicated in n. 177, at p. 670-1, the Court has left open the question whether the substance of the writ is available in a federal criminal proceeding.

225. *Waley v. Johnston*, 316 U. S. 101 (1942).

226. *Johnson v. Zerbst*, 304 U. S. 458 (1938).

these cases merely because determination of the facts will be impracticable in some is a rather large compromise.²²⁷

Arrest of Judgment. The grounds for arrest of judgment are unchanged by Rule 34.²²⁸ But, in contrast with the three-day time limitation prescribed by Rule II (2) of the former Criminal Appeals Rules, the motion may now be made within five days after determination of guilt or within such further time as the court may fix during the five-day period.

Correction or Reduction of Sentence. Rule 35 provides that an illegal sentence may, as formerly, be corrected at any time;²²⁹ and that a sentence may be reduced within 60 days after it is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for certiorari. Formerly the court might reduce a sentence at any time during the term.

Some such provision was necessary by reason of the general abolition in Rule 45 (e) of the term of court as a time limitation. The advantage of this change has recently been under discussion.²³⁰ In any event this

227. Compare the discussion of this Rule in NOTES AND INSTITUTE PROCEEDINGS (1946) 229-30:

"HONORABLE JAMES V. BENNETT: . . . I don't know quite how they arrived at the term of two years. It is not infrequent for one in my business to find out that people—few people—really are innocent and get into the penitentiary, and they can't get the case up or get it to attention until some time more than two years. Of course, in those cases, if they can be brought up, sometimes they are taken care of by executive clemency.

"HONORABLE ALEXANDER HOLTZOFF: Our Committee in its final report included no time limit on the motion for a new trial on the ground of newly discovered evidence. We thought that the sound judgment of the district judge was sufficient protection against frivolous and ill-founded motions, and actual meritorious motions for a new trial on the ground of newly discovered evidence are rare, and in those few cases a time limit was not necessary. However, there was considerable opposition to having no time limit, and the Supreme Court put the two year time limit in its final action on the Rules."

228. See *Sutton v. U. S.*, 15 U. S. L. WEEK 2245 (C. C. A. 5th, 1946) (construing the new Rule); *Mulloney v. United States*, 79 F. (2d) 566, 584 (C. C. A. 1st, 1935); *Towe v. United States*, 238 Fed. 557, 558 (C. C. A. 4th, 1916); *United States v. Marrin*, 159 Fed. 767, 763 (E. D. Pa. 1908), *aff'd* 167 Fed. 951 (C. C. A. 3d, 1909).

229. See 5 LONGSDORF, CYCLOPEDIA OF FEDERAL PROCEDURE (1929) § 2468.

230. See NOTES AND INSTITUTE PROCEEDINGS (1946) 225, 228-9:

"HONORABLE JOHN C. KNOX: Isn't that unfortunate? Suppose, for example, that you impose a sentence and then tell the man that if he makes restitution that you will lighten the sentence somewhat, and he is not able to make the restitution within the period of 60 days. Is the court then powerless?"

...
 "MR. BARRON: Judge Knox's query as to the restitution matter, I think, can in a measure be met by use of the power of probation. I think it has been done in many districts. A defendant who is convicted of larceny or embezzlement and is a

Rule, as well as Rule 32 dealing with sentence and judgment, would have to be revised should Congress eventually sanction the method of sentencing proposed in 1942 in the *Report to The Judicial Conference of the Committee on Punishment for Crime* and in the accompanying Federal Corrections Bill.²³¹ That bill contemplated a sentencing procedure of three stages in cases where the court proposed in any event to impose sentence of more than a year: imposition of an "original sentence"; a recommendation, after study and observation of the defendant, by the Division on Adult Corrections of the Proposed Board of Corrections; and then imposition of a "definite sentence." The proposed Act would not have reduced the final authority of the courts in the imposition of sentence, but it was nevertheless effectively opposed by many district judges.

Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may, under Rule 36, be corrected by the court at any time and after such notice as the court may order. So far as clerical mistakes are concerned, this is no change.²³² Errors "arising from oversight or omission" could formerly be corrected during the term, at least where the effect was not to increase the penalty.²³³

first offender, with some prospect of making restitution, perhaps can be dealt with as fairly and efficiently under the probation power, don't you think, Judge Knox?

"HONORABLE JOHN C. KNOX: Imprisonment is sometimes a powerful persuasion.

"MR. BARRON: Can't you do it by imposing a sentence for the maximum term?"

"HONORABLE JOHN C. KNOX: It can be done in some cases.

"MR. BARRON: Then in those sentences—when I was in the Department, there was a habit of imposing sentences, by some judges, that struck me as rather unfortunate. The sentence was definite, the probation was definite, but the condition was most indefinite that the defendant make restitution, without setting any time or incorporating in the probation order the conditions and time; so apparently the defendant had until the last day of his probation period to make restitution.

"HONORABLE JAMES V. BENNETT: I think that is a very healthy rule to limit the court in its change of sentence to sixty days after the sentence was imposed. In the first place, it protects the judge from continual importunities while the man is in the institution. There is a rule to the effect that if the counsel for the defendant files a petition for a reduction of sentence and that petition is not acted upon, the judge can act on it any time, regardless of the expiration of the term of court, and that has resulted in a good deal of importunities to the judge. It amounts sometimes to a sort of bench parole, whereby the judge retains the authority to reduce the sentence after the man has been committed. That is practiced to a considerable extent; and it seems to me it is a good thing to have this rule and have it disposed of. Such instances as Judge Knox recites can be taken care of through probation, executive clemency or some other means."

231. H. R. No. 2140, 78th Cong., 1st Sess. (1943). Comment (1944) 53 YALE L. J. 773.

232. See *Rupinski v. United States*, 4 F. (2d) 17, 18 (C. C. A. 6th, 1925); 5 LONGSDORF, CYCLOPEDIA OF FEDERAL PROCEDURE (1929) § 2468.

233. See *United States v. Benz*, 282 U. S. 304, 308 (1931); *Ex parte Lange*, 18 Wall. 163, 167 (U. S. 1873).

APPEAL

Taking Appeal; and Petition for Writ of Certiorari. The procedure for taking an appeal is considerably simplified by Rule 37, which governs direct appeals to the Supreme Court, appeals to the circuit courts of appeal, and petitions for certiorari.

Petitions for allowance of appeal, citations and assignments of error are abolished by subdivision (a)(1), dealing with the Notice of Appeal.²³⁴ The requirement of former Criminal Appeals Rule III that the notice contain "a succinct statement of the grounds of appeal" is likewise omitted.

A further simplification along the same lines is effected by Rule 39 (b)(1) which prescribes that the rules and practice governing the preparation and form of the record on appeal in civil actions shall apply in criminal appeals as well. For appeals to the circuit courts of appeals, this provision eliminates the necessity for a bill of exceptions.²³⁵ For direct appeals to the Supreme Court, it involves the application of so much of Civil Rule 72 as relates to the preparation and certification of the record on appeal, and likewise of the pertinent provision of the Revised Rules of the Supreme Court which Civil Rule 72 itself incorporates by reference.²³⁶ Abolition of the bill of exceptions was recommended by the Committee with the thought that sufficient timely information as to the grounds of an appeal is afforded by the appellant's brief, and that to require a bill of exceptions is merely to subject parties and counsel to unnecessary paper work.²³⁷

234.

"a) TAKING APPEAL. (1) *Notice of Appeal.* An appeal permitted by law from a district court to the Supreme Court or to a circuit court of appeals is taken by filing with the clerk of the district court a notice of appeal in duplicate. Petitions for allowance of appeal, citations and assignments of error in cases governed by these rules are abolished. The notice of appeal shall set forth the title of the case, the name and address of the appellant and of appellant's attorney, a general statement of the offense, a concise statement of the judgment or order, giving its date and any sentence imposed, the place of confinement if the defendant is in custody and a statement that the appellant appeals from the judgment or order. If the appeal is directly to the Supreme Court, the notice shall be accompanied by a jurisdictional statement as prescribed by the rules of the Supreme Court. The notice of appeal shall be signed by the appellant or appellant's attorney, or by the clerk if the notice is prepared by the clerk as provided in paragraph (2) of this subdivision. The duplicate notice of appeal and a statement of the docket entries shall be forwarded immediately by the clerk of the district court to the clerk of the appellate court. Notification of the filing of the notice of appeal shall be given by the clerk by mailing copies thereof to adverse parties, but his failure so to do does not affect the validity of the appeal."

235. Rules 75 and 76, F. R. Crv. P.

236. *Id.* Rule 72. See REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES (1939), as amended, Rules 8 and 10.

237. Compare A. L. I. CODE CRIM. PROC. (1930), § 435.

The time for taking an appeal is increased by subdivision (a)(2) of Rule 37 from five²³⁸ to ten days.²³⁹ Appeals by the government must, as formerly, be taken within 30 days after entry of the judgment or order appealed from.²⁴⁰ The reasons for limiting a defendant to ten days, or for not having a uniform time period for all appeals, remain unclear.²⁴¹ The same subdivision does, however, contain a new provision designed to protect the interests of the defendant without counsel in this regard:

“ . . . When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. . . . ”

The balance of this Rule deals with certiorari. Subdivision (b)(1) provides that a petition should be made as prescribed in the Supreme Court's rules,²⁴² and so works no change in that respect. The time within which the petition may be made is, however, altered by subdivision (b)(2), as follows:

“Petition for writ of certiorari may be made within 30 days after entry of the judgment or *within such further time not exceeding 30 days as the Court or a justice thereof for cause shown may fix within the 30-day period following judgment. . . .*”²⁴³

The italicized provision is new. It is designed to eliminate the difficulty which sometimes arose by reason of the construction of former Criminal Appeals Rule 11 to deprive the court of all power to grant extensions.²⁴⁴

Stay of Execution, and Relief Pending Review. Here some important changes are wrought by Rule 38.

The stay is governed by subdivision (a). As previously, an appeal

238. See Rule III, CRIMINAL APPEALS RULES (1934), 292 U. S. 661, 662.

239.

“(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . . ”

240. 56 STAT. 271-2 (1942), 18 U. S. C. § 682 (Supp. 1946). As to the time of appealing from appealable orders, see *United States ex rel. Coy v. United States*, 316 U. S. 342 (1942).

241. Compare the recommendation of the circuit court judges that the time periods for all appeals to the circuit courts in civil cases be made uniform and not to exceed 30 days. REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT COURT JUDGES (1941) 13.

242. See REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES (1939), as amended, Rules 38 and 39; and Rule 11, CRIMINAL APPEALS RULES, 292 U. S. 661, 664 (1934), as amended Feb. 15, 1943, 318 U. S. 807.

243. Italics supplied.

244. See ROBERTSON AND KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES (1936) §§ 381, 386.

automatically stays a sentence of death.²⁴⁵ With respect to sentences of imprisonment, however, sentence is now stayed only when the defendant affirmatively elects not to enter on the service of his sentence. With respect to sentences to pay a fine or a fine and costs, the Rule substantially restates the former law,²⁴⁶ as follows:

"A sentence to pay a fine or a fine and costs, if an appeal is taken, may be stayed by the district court or by the circuit court of appeals upon such terms as the court deems proper. The court may require the defendant pending appeal to deposit the whole or any part of the fine and costs in the registry of the district court, or to give bond for the payment thereof, or to submit to an examination of assets, and it may make any appropriate order to restrain the defendant from dissipating his assets."

An order placing a defendant on probation is still automatically stayed if an appeal is taken.

Applications for bail or other relief—*e.g.*, an extension of time for docketing the record on appeal—pending review, are governed by subdivisions (b) and (c). The first provides that admission to bail upon appeal or certiorari shall be as provided in these rules—*e.g.*, Rule 46.²⁴⁷ The second incorporates a recommendation made by the Judicial Conference of Senior Circuit Judges in 1941,²⁴⁸ to the effect that where application is made to an appellate court or judge for bail pending review or other relief which might have been granted by the district court, the application shall be on notice and shall recite the facts concerning all prior applications for the same relief.

Supervision of Appeal. Supervision in the appellate court is governed by Rule 39. Subdivision (a) substantially restates the former practice,²⁴⁹ as follows:

"The supervision and control of the proceedings on appeal shall be in the appellate court from the time the notice of appeal is filed with its clerk, except as otherwise provided in these rules. The appellate court may at any time entertain a motion to dismiss the appeal, or for directions to the district court, or by any judge in relation to the prosecution of the appeal, including any order fixing or denying bail."

Subdivision (b)(1), as previously mentioned,²⁵⁰ governs the prepara-

245. See Rule 5, CRIMINAL APPEALS RULES, 292 U. S. 661, 663 (1934), as amended 311 U. S. 731 (1940).

246. *Ibid.*

247. Discussed *infra* pp. 248-51.

248. See REPORT OF THE JUDICIAL CONFERENCE OF SENIOR CIRCUIT JUDGES (1941) 8-9. This rule had recently been adopted in the 1st, 3rd, 4th and 10th circuits. See FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (Feb., 1944).

249. See Rule 4, CRIMINAL APPEALS RULES of 1934, 292 U. S. 661 (1934).

250. See p. 237 *supra*.

tion and form of the record on appeal. Printing of the record on appeal is governed by Subdivision (b)(2). Given a trial of substantial duration, this item can run into many thousands of dollars. Laymen are often surprised that it should be necessary to publish a large book or series of books in order to have a case reviewed by an appellate court. Unfortunately there is no positive correlation between ability to pay such printing bills and the merits of an appeal. The new Rule, however, does permit the circuit court of appeals to "dispense with the printing of the record on appeal and review the proceedings on the typewritten record."²⁵¹

The period for docketing the appeal and filing the record with the appellate Court is set at 40 days from the date of the notice of appeal, but it is also provided, by subdivision (c), that this time may be ex-

251. This Rule may at least encourage courts to permit review upon a typewritten record even though the case is not one *in forma pauperis* governed by 42 STAT. 666 (1922), 28 U. S. C. § 832 (1940). Compare the local rules of court cited in FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (Feb., 1944), Note to Rule 41 (b)(2), 145.

The first preliminary draft circulated by the Advisory Committee included the following provision, following the practice adopted in the 3rd and several other circuits:

Printing. It shall not be necessary to print the record on appeal except that the appellant shall print, as an appendix to his brief, the judgment appealed from, any opinion or charge of the court, and such other parts of the record material to the questions presented as the appellant desires the court to read. The brief of the appellee shall contain as an appendix such parts of the record as the appellee desires the court to read which have not been printed in the appellant's brief. The appellant may set forth in an appendix to a reply brief such additional parts of the record as he desires the court to read in view of the parts printed by the appellee. If the appellate court is of opinion that the appellant has failed to print so much of the record as will adequately present the questions raised by him, it may impose as costs against him the expense incurred by appellee in printing the omitted matter. The assessment of costs may be enforced only by the process used for the enforcement of a judgment in a civil action. In specific cases the appellate court may order additional parts or the whole of the record to be printed."

FEDERAL RULES OF CRIMINAL PROCEDURE, PRELIMINARY DRAFT (1943) 160; *cf.*, *Additional Statement by Messrs. Dession, Glueck, Orfield, and Wechsler, id.* at 258:

"... We think the rule recommended by the Committee desirable in so far as it simplifies the mechanics of preparing the record on appeal and, in some cases at least, effects a distribution of cost. We think the rule undesirable in so far as it produces for the appellate court a record broken into two parts which may be lacking in internal continuity. A discontinuous record necessarily detracts from the validity of the picture, inevitably imperfect at best, of what actually happened below. This is especially unfortunate in criminal cases where the plain error rule has, in our view, a peculiarly important place. We might, nevertheless, subordinate the vice of the discontinuous record to the virtue of the appendix form, were it not in our judgment possible to achieve the virtue without the vice. This result would be attained by a rule providing that the appellant and the appellee shall in turn designate the portions of the record upon which they rely, with the portions printed in continuous form in a single book and an apportionment of the cost. We believe that if the rule is to lay down a uniform practice, this should be the practice proposed."

tended by the district court, the appellate court or, if the appellate court is not in session, any judge thereof for cause shown. With respect to such extensions, existing rules of the circuit courts of appeals presumably stand.²⁵² These time provisions differ from those set by the former Criminal Appeals Rules.²⁵³

Subdivision (d) re-enacts former Criminal Appeals Rule X,²⁵⁴ covering the setting of the appeal for argument. The date selected is still to be at least 30 days after the record is filed but as soon thereafter as the calendar permits. The calendar preference for criminal cases is also retained. In view of the discretion these provisions confer on the appellate court, existing rules of the circuit courts of appeals are presumably unaffected.²⁵⁵

SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Commitment to Another District; Removal. The former procedure²⁵⁶ for removal of a federal offender from the district in which he was arrested to the district of trial is completely revamped by Rule 40. The function of removal procedure—like interstate and international extradition—is to protect an accused from an unwarranted removal to a distant district. There is no quarrel with that. But the former procedure, as prescribed by statute and interpreted by the courts, in certain situations created difficulties which appeared unnecessary and irrational in terms of the objective.

Requirement of any removal proceedings at all became a bit ridiculous where a defendant was to be removed merely across the line between two adjoining districts—as from Brooklyn to Manhattan, or from Alexandria, Virginia, to the District of Columbia. Cases are on record in which such removals have required months and even years.²⁵⁷

Another source of unwarranted delay has been the occasional prac-

252. The existing rules are cited in FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (Feb., 1944). Note to Rule 41(c), 145-6.

253. *Id.* at 146:

"The time for filing the record and docketing the appeal in the circuit court of appeals is governed by the Criminal Appeals Rules, Rule 8 (Record on Appeal Without Bill of Exceptions) and Rule 9 (Bill of Exceptions), which require that an appeal without bill of exceptions must be prepared 'within a time stated' by the trial judge and forwarded 'promptly' to the appellate court, where the case is to be 'at once set for argument,' and in other cases that the bill of exceptions be submitted to the trial judge for settlement within 30 days, unless an extension is granted, and then settled 'as promptly as possible' and transmitted 'forthwith' to the appellate court."

254. 292 U. S. 661, 665 (1934).

255. Rules of the circuit courts of appeals are cited in FEDERAL RULES OF CRIMINAL PROCEDURE, SECOND PRELIMINARY DRAFT (Feb., 1944), Note to Rule 41(d), 146-7.

256. Removal was governed by 29 STAT. 184 (1896), 18 U. S. C. § 591 (1940).

257. See address by Holtzoff, NOTES AND INSTITUTE PROCEEDINGS (1946) 131; and Medalie, *id.* at 273.

tice of retrying the issue of probable cause in a removal proceeding even though the defendant has been indicted by a grand jury in the demanding district.²⁵⁸ Probable cause is of course in issue in such proceedings, and where the demand is based merely on a complaint, there is no reason why the government should not be required to adduce proof of reasonable cause as well as of identity before obtaining removal to a distant district. Where a defendant has been indicted, however, feeling has grown that no retrial of probable cause should be required.

Rule 40 divides all cases in which the accused is arrested in a district other than that in which the prosecution was instituted into two groups: those in which the place of arrest is either in another district of the same state or, if in another state, then less than 100 miles from the place where the prosecution is pending; and cases in which the arrest occurs in another state at a place more than 100 miles from the place where the prosecution is pending.

For the first group of cases removal proceedings are no longer necessary.²⁵⁹ The defendant's right to the usual preliminary hearing upon

258. For decisions dealing with the scope of a removal hearing, and the issues properly to be considered, see *United States ex rel. Kassin v. Mulligan*, 295 U. S. 396 (1935); *Fettters v. United States ex rel. Cunningham*, 283 U. S. 638 (1931); *Morse v. United States*, 267 U. S. 80 (1925); *Rodman v. Pothier*, 264 U. S. 399 (1924); *Henry v. Henkel*, 235 U. S. 219 (1914); *Tinsley v. Treat*, 205 U. S. 20 (1907); *Beavers v. Henkel*, 194 U. S. 73 (1904).

259. The mode of measuring 100 miles may present some question. See NOTES AND INSTITUTE PROCEEDINGS (1946) 143-5:

"FRED STRINE: . . . I believe some authorities hold that 100 miles would be measured by straight line; others hold that it would be the usual distance by rail. I have heard both views expressed in the Department by different people. . . .

"HONORABLE ALEXANDER HOLTZOFF: Of course, this is a new rule, and there are no precedents for it. . . . I recall this, however, that there are other statutes and rules of procedure where distances are mentioned, and my recollection is . . . that the distance is measured by the usual customarily traveled route, the shortest customarily traveled, and not as the crow flies. I am quite sure we didn't intend the latter, because if you measure 100 miles as the crow flies, you would introduce a much longer distance than we ever had in mind. . . .

"NATHAN APRIL: How about the way that the airplane flies?

"HONORABLE ALEXANDER HOLTZOFF: I don't know.

"FRANK PARKER: Mr. Strine, may I point out that whether it was 100 miles or not, in the past the Comptroller General issued to the United States Attorney's office and also the marshal a compilation, as I recall prepared by the War Department, which gives you the mileage which will be allowed, for instance, from New York to Philadelphia—which as I recall is considered to be less than a hundred miles, to wit, ninety miles. I imagine the practice will grow up for everyone to consult the book. . . .

"HONORABLE ALEXANDER HOLTZOFF: With all due deference to the Comptroller General, his rules are not binding on the Federal courts.

"FRED STRINE: I think in the case of Philadelphia it will probably give rise to situations where, if a warrant were issued, you could arrest a man in downtown New York and take him back. It would be within the ninety miles. Further up town you would have to have a removal hearing even though he is in the same city."

arrest is unaffected, but the commissioner or magistrate, if he holds the defendant, will now bind him over to the district court in which the prosecution is pending.

For the second group of cases removal proceedings are still necessary. The evidence the government must produce at the removal hearing will depend on whether the demand is based on an indictment, an information, or a complaint. Given an indictment, proof of identity together with a certified copy of the indictment will suffice. Otherwise proof of probable cause to believe the defendant guilty of the offense charged must also be produced.²⁶⁰

The Rule provides that removal hearings shall be held before a United States commissioner or federal judge, but changes the former practice²⁶¹ in that it permits discharge of a prisoner only by a judge. As formerly, only a judge may issue a warrant of removal.

The provisions in the Rule concerning release on bail in the district of arrest and in the district of trial restate the former practice, as does the provision permitting a defendant to waive a removal hearing.²⁶² The statutory denial of appeal from a final order in a habeas corpus proceeding brought to test the validity of a warrant of removal²⁶³ is likewise unaffected by the Rule.

Search and Seizure. The former practice in respect of search warrants and searches and seizures is substantially restated in Rule 41, with one minor change. The Rule does not supersede the numerous statutes governing searches in aid of the enforcement of specific federal statutes,²⁶⁴ but expressly does supersede the general statutory provisions with regard to searches and seizures.²⁶⁵ The minor change is the provision in subdivision (e) that a motion for the return or suppression of evidence must be made in the district court. Formerly the motion could also be entertained by a commissioner, subject to review by the district court.

Criminal Contempt. Rule 42 was included by reason of the Act of

260. Compare the discussion of proof of probable cause in connection with an information *supra* pp. 0000.

261. See authorities cited *supra*, notes 256 and 258.

262. *United States v. Yarborough*, 122 Fed. 293 (W. D. Va. 1903); *Unversagt v. Benn*, 5 F. (2d) 492 (C. C. A. 9th, 1925), *cert. denied*, 269 U. S. 566 (1925).

263. 52 STAT. 1232 (1938), 28 U. S. C. § 463 (1940).

264. These are cited in NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (March, 1945) 33-34.

265. 40 STAT. 228-9 (1917), 18 U. S. C. §§ 611-6, 620-1, 623-6 (1940); see *Conyer v. United States*, 80 F. (2d) 292 (C. C. A. 6th, 1935) (to the same effect as subdivision (b) of the Rule); *Dumbra v. United States*, 268 U. S. 435 (1925) (to the same effect as subdivision (c) of the Rule); *Weeks v. United States*, 232 U. S. 383 (1914); *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920), *Agnello v. United States*, 269 U. S. 20 (1925), *Gould v. United States*, 255 U. S. 298 (1921) (motion to suppress or compel the return of evidence obtained by an illegal search and seizure).

November 21, 1941,²⁶⁶ which extended the rule-making power of the Supreme Court to proceedings to punish for criminal contempt. The Rule²⁶⁷ does not substantially alter the former law with respect to when a defendant is entitled to notice and hearing,²⁶⁸ nor does it enlarge or diminish the former right to jury trial.²⁶⁹

With respect to summary punishment for contempt, subdivision (a) does, however, clarify the law by limiting the situations in which summary punishment is permissible to those where the judge "certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court."²⁷⁰

In all others²⁷¹ the defendant is entitled to notice and hearing, and, in the special cases covered by the Norris-La Guardia and Clayton Acts, to a jury trial. Pursuant to a suggestion made in the *McCann* case,²⁷² the notice requirement is made more specific in subdivision (b), with a view to diminishing the frequent confusion between criminal and civil contempt proceedings.²⁷³ The Rule requires that the notice "shall

266. 55 STAT. 779 (1941), 18 U. S. C. § 689 (Supp., 1946).

267. "(a) SUMMARY DISPOSITION. A criminal contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) DISPOSITION UPON NOTICE AND HEARING. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. He is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment."

268. See 38 STAT. 738 (1914), 28 U. S. C. §§ 386-90 (a) (1940); 47 STAT. 72 (1932), 29 U. S. C. § 111 (1940); *Camarota v. United States*, 111 F. (2d) 243 (C. C. A. 3d, 1940); *McCann v. New York Stock Exchange*, 80 F. (2d) 211 (C. C. A. 2d, 1935); *Conley v. United States*, 59 F. (2d) 929 (C. C. A. 8th, 1932); *O'Connell v. United States*, 40 F. (2d) 201 (C. C. A. 2d, 1930), *cert. dismissed* 296 U. S. 667 (1935); *Savin, Petitioner*, 131 U. S. 267 (1889).

269. The defendant is entitled to a trial by jury if the proceeding is one to which 47 STAT. 72 (1932), 29 U. S. C. § 111 (1940) (Norris-LaGuardia Act), or 38 STAT. 738 (1914), 28 U. S. C. § 387 (1940) (Clayton Act) are applicable.

270. Compare *Cooke v. United States*, 267 U. S. 517, 534 (1925); *Ex parte Terry*, 128 U. S. 289 (1888).

271. The Rules do not, of course, affect the substantive question as to what varieties of behavior constitute criminal contempt. Numerous federal statutes defining specific types of criminal contempt are cited in NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (March, 1945) 35-7.

272. *McCann v. New York Stock Exchange*, 80 F. (2d) 211 (C. C. A. 2d, 1935).

273. See *Nye v. United States*, 313 U. S. 33, 42-3 (1941).

state the time and place of hearing, allowing a reasonable time for the preparation of the defense, *and shall state the essential facts constituting the criminal contempt charged and describe it as such.*"²⁷⁴

The further provision for cases prosecuted on notice and hearing that "if the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent" is prompted by the common experience that uncommonly prejudiced individuals almost invariably consider themselves impartial.²⁷⁵

GENERAL PROVISIONS

Presence of the Defendant. At certain stages in a criminal proceeding a defendant has no right to be present. At others he has the right, but may waive it. There are also situations in which the validity of the proceeding depends on his presence. But on several aspects of this problem the law has been unclear. Rule 43 is intended to deal with the defendant's presence generally.

As formerly, a defendant in a federal criminal proceeding is entitled to be present at arraignment, at every stage of the trial²⁷⁶ including the impanelling of the jury²⁷⁷ and the return of the verdict, and at the imposition of sentence.²⁷⁸ In the stages not mentioned—*e.g.*, an application for a warrant, a grand jury proceeding, and appellate proceedings generally—the Rule confers no right of presence.²⁷⁹ In other than capital cases the trial may continue to and including the return of

274. Italics supplied.

275. Compare the observations of Chief Justice Taft in *Cooke v. United States*, 267 U. S. 517, 539 (1925), and 47 Stat. 73 (1932), 29 U. S. C. 112 (1940).

276. U. S. CONST. AMEND. V, VI; *Diaz v. United States*, 223 U. S. 442, 455 (1912). See *Kanner v. United States*, 34 F. (2d) 863 (C. C. A. 7th, 1929) (defendant's right to be present at jury view of premises waivable); but *cf.* *Snyder v. Massachusetts*, 291 U. S. 97 (1934) (refusal by state court to permit defendant's presence at jury view of premises not a denial of due process); *Shields v. United States*, 273 U. S. 583 (1927) (defendant entitled to be present when court gives supplemental instructions or otherwise communicates with jury); *Ah Fook Chang v. United States*, 91 F. (2d) 805 (C. C. A. 9th, 1937) (same); *Fina v. United States*, 46 F. (2d) 643 (C. C. A. 10th, 1931) (same).

277. *Lewis v. United States*, 146 U. S. 370 (1892) (defendant entitled to be present during trial of challenges to prospective jurors); *Hopt v. Utah*, 110 U. S. 574 (1884) (same, due process).

278. See *Price v. Zerbst*, 268 Fed. 72 (N. D. Ga. 1920).

279. No departure from former practice is here involved. *Dorodell v. United States*, 221 U. S. 375 (1911) (correction of the record by appellate court); *Schwab v. Berggren*, 143 U. S. 442 (1892) (affirmance of conviction by appellate court); *United States ex rel. Coleman v. Cox*, 47 F. (2d) 988 (C. C. A. 5th, 1931) (motion for speedy trial and demurrer passed on); *United States v. Lynch*, 132 F. (2d) 111 (C. C. A. 3rd, 1942) (hearings on motions made prior to or after trial); *United States v. Johnson*, 129 F. (2d) 954 (C. C. A. 3rd, 1942), *aff'd* 318 U. S. 189 (1943) (argument by counsel on a question of law in absence of the jury).

the verdict if the defendant voluntarily absents himself after the trial has commenced in his presence.²⁸⁰ A corporation may appear by counsel at all stages of a criminal proceeding for all purposes.²⁸¹

The provision that in misdemeanor prosecutions the court may, with the written consent of the defendant, permit arraignment, plea, trial and imposition of sentence in the defendant's absence, sanctions a practice employed in the past. It remains discretionary with the court, being appropriate chiefly in cases of *mala prohibita*, or where for other reasons the hardship or expense involved in a personal appearance would be excessive.

The last sentence of the Rule expressly provides that the defendant's presence is not required at a "reduction of sentence" under Rule 35. This provision was designed to avoid any supposed necessity to bring a defendant to court from a distant institution when the proposed revision of his sentence is actually to his advantage. The language employed may prove inartistic, since a reduction of sentence can under some circumstances work against the interests of a defendant. It may result in loss of eligibility to parole, in loss of credit on his sentence for good behavior,²⁸² or transfer from a relatively agreeable federal institution with a regime calculated for his benefit to a disagreeable and debilitating county jail. To avoid prejudice to defendants in such cases, "reduction of sentence" will have to be interpreted in the light of all the attributes of any given disposition.

Assignment of Counsel. The problem of legal representation of defendants is inevitably delicate, given our adversary form of procedure, the organization of legal service on a predominantly private enterprise basis, the avoidance of criminal practice (save on behalf of corporations) by the great majority of the bar, and the fact that most individual defendants are without substantial means. In its economic aspect, the problem has much in common with that of the distribution of medical care.

The Sixth Amendment provides that "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." There is no question about this so long as the accused is able to obtain counsel of his own choice. But suppose that he cannot? Two values need to be served in this situation: the value of fairness of trial, and the value of starting the convict on his supposedly rehabili-

280. See *Diaz v. United States*, 223 U. S. 442, 455 (1912); *United States v. Noble*, 294 Fed. 689 (D. Mont. 1923), *aff'd*, 300 Fed. 689 (C. C. A. 9th, 1924); *United States v. Barracota*, 45 F. Supp. 38 (S. D. N. Y. 1942); *United States v. Vassalo*, 52 F. (2d) 699 (E. D. Mich. 1931).

281. See 36 STAT. 1164 (1911), 28 U. S. C. § 394 (1940); 2 BISHOP, CRIMINAL PROCEDURE (2d ed. 1913) § 950a; *United States v. Standard Oil Co.*, 154 Fed. 728, 730 (W. D. Tenn. 1907).

282. See NOTES AND INSTITUTE PROCEEDINGS (1946) 234-7.

tory regime without an experience of discrimination at the outset which will work against rehabilitation.²³³ In recent decisions the Supreme Court has shown a new sensitivity to this problem and manifested its intent to expand the scope and more concretely to implement the constitutional right to counsel.²³⁴

Rule 44 states the practice prescribed in those decisions:

"If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceeding unless he elects to proceed without counsel or is able to obtain counsel."

The Rule does not entitle an accused to have counsel assigned to represent him in preliminary proceedings, and it does not meet the practical problems which arise from the circumstance that assigned counsel, to date at least, must serve without compensation and without an allowance for expenses.²³⁵ Creation of a system of salaried public defenders as in many of the states—often proposed for the federal system²³⁶—was, of course, outside the scope of judicial rule-making.

283. See comments of Hon. James V. Bennett, *id.* at 239.

". . . There is no complaint that comes to me more frequently than the complaint of prisoners that the counsel that they had was not properly trained, that he wasn't a good counsel, that he didn't have time to prepare the defense, that he pleaded him guilty when he didn't want to, just to escape the difficulties of the trial, and that he advised him incorrectly. I hope that can be overcome through the public defenders."

284. *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Walker v. Johnston*, 312 U. S. 275 (1941); *Glasser v. United States*, 315 U. S. 60 (1942); *Adams v. United States ex rel. McCann*, 317 U. S. 269 (1942).

Prior to the *Johnson* decision, *supra*, assignment of counsel in other than capital cases was considered discretionary. There were two statutes on the subject. 36 STAT. 1164 (1911), 28 U. S. C. § 394 (1940) provided that "In all the courts of the United States the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law as, by the rules of the said courts, respectively, are permitted to manage and conduct causes therein." And REV. STAT. § 1034 (1875), 18 U. S. C. § 563 (1940) required the court to assign counsel in a capital case to represent a defendant upon his request.

285. See comments by Holtzoff, NOTES AND INSTITUTE PROCEEDINGS (1946) 239:

". . . I don't know whether it is a problem in the Southern District, but it is in the District of Columbia. The bar is carrying a very heavy burden. We have a comparatively small trial bar. There are thousands of lawyers in the District of Columbia, but most of them work for the Government. . . . All local crimes as well as Federal offenses are tried in the Federal court. It is the person who is charged with an offense such as burglary, pick-pocketing or robbery who is apt to be indigent. The result is that a large proportion, possibly a majority, of the defendants in the District of Columbia are defended by assigned counsel getting no compensation. The amount of work done by each lawyer in proportion to his paid work is tremendous. They do it without a murmur, but I do think it is a heavy burden on members of the bar."

286. See ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES (1938) 7-8; *id.* (1939) 10; *id.* (1940) 7-8; REPORT OF THE JUDICIAL CONFERENCE (1941) 15; *id.* (1942) 12. See also Murphy, *Public Defender in Federal Courts* (1940) 28 GEO. L. J. 937.

Time. Rule 45 prescribes a uniform method for computing procedural intervals of time, and is substantially similar to Civil Rule 6. The chief new feature is the elimination in subdivision (c) of the term of court as a measure of or factor affecting the time permitted for the taking of any procedural step. The Rule supersedes the time provisions of Rule 13 of the former Criminal Appeals Rules.²⁸⁷

Bail. Rule 46 governs bail for defendants and material witnesses, prescribing a uniform, and in some respects simplified, practice.

The right of a defendant to bail before conviction is unchanged.²⁸⁸ By subdivision (a)(2), bail upon review, which includes both appeal and certiorari, is to be allowed only "if it appears that the case involves a substantial question which should be determined by the appellate court."²⁸⁹

The practice with respect to bail and commitment of material witnesses is not substantially changed by subdivision (b).²⁹⁰ It does, however, expressly provide that a witness committed may be ordered released "if he has been detained for an unreasonable length of time."

The appropriate amount of bail is governed by subdivision (c), which states the factors to be considered in determining whether bail is "excessive" within the meaning of the Eighth Amendment.²⁹¹ These factors include the nature and circumstances of the offense charged, the weight of the evidence against the defendant, his financial ability and his character.

287. 292 U. S. 661, 666 (1934).

288. With subdivision (a)(1) of the Rule compare REV. STAT. § 1015 (1875), 18 U. S. C. § 596 (1940) (cases not capital), and REV. STAT. § 1016 (1875), 18 U. S. C. § 597 (1940) (capital cases).

289. Compare Rule 6 of the former Criminal Appeals Rules, 292 U. S. 663-4 (1934); and 34 STAT. 1246 (1907), 18 U. S. C. § 682 (1940), which provided for the admission of the defendant to bail on his own recognizance pending an appeal taken by the Government. The final Committee Note to this Rule states that the Rule "does not supersede" 18 U. S. C., § 682. See NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (March, 1945) 39.

290. Compare the following superseded provisions: REV. STAT. §§ 879-81 (1875), 24 STAT. 635 (1887), 28 U. S. C., §§ 657-60 (1940).

290. Compare the following superseded provisions: REV. STAT. § 879-81 (1875), 24 STAT. 635 (1887), 28 U. S. C., §§ 657-660 (1940).

291. For decisions antedating the Rules, in which this question was considered, see *Bennett v. United States*, 36 F. (2d) 475 (C. C. A. 5th, 1929); *Rossi v. United States*, 11 F. (2d) 264, 265, 267 (C. C. A. 8th, 1926); *United States v. Motlow*, 10 F. (2d) 657 (C. C. A. 7th, 1926).

See also remarks of Mr. Barron, NOTES AND INSTITUTE PROCEEDINGS (1946) 241;

"The question of bail and what is excessive bail is largely a matter between the United States Attorney and the court, and there are as many different views as there are—not as many, no, because I think on the whole our United States Attorneys are pretty fair. Occasionally you will find an overzealous Assistant who thinks that \$50,000 is the smallest bail that ought to be set.

". . . It should be treated in circulars from the Department of Justice to the United States Attorneys. Those reminders are good, but something that can't be worked out by rule, and can only be worked out by courts and United States Attorneys."

Requirements as to the form and place of deposit of bail are made uniform by subdivision (d).²⁹² Execution of a bond is made mandatory, and both courts and commissioners are expressly authorized to dispense with sureties or security in their discretion.

Corporate sureties, as before, are regulated by statute.²⁹³ All other sureties are required by subdivision (e) to justify by affidavit, and may be required to make full disclosure of their assets and liabilities.²⁹⁴

292. Compare 40 STAT. 1148 (1919), 6 U. S. C. § 15 (1940); INSTRUCTIONS TO UNITED STATES ATTORNEYS, MARSHALS, CLERKS, AND COMMISSIONERS (U. S. Dept. Justice 1929) § 1565-7.

293. 28 STAT. 279 (1894), 36 STAT. 125 (1909), 6 U. S. C. §§ 6-14 (1940).

294. This provision is similar to A. L. I. CODE CRIM. PROC. (1931) § 79; *cf.* NOTES AND INSTITUTE PROCEEDINGS (1946) 242-3:

"HONORABLE JAMES V. BENNETT: . . . you will find one fellow who would advocate some supervision of the bail brokers and the fees that they can charge, and if I had anything to say about one of the fundamental changes that ought to be made in the administration of the criminal law, it would go directly to that point. One of the means whereby we can keep people out of these deplorable jails all over the country is to change that system and make the fees not what the fellow can pay when you have got him right there, or some high fee—I think the usual fee throughout the United States Courts is generally about 10 per cent of the bail; whereas isn't it true yet . . . that in New York statutes they can't charge more than 3 per cent? Maybe 5 per cent now, but this rule about 10 per cent generally isn't accepted all over. They will take away every dime the fellow has got, to pay the fee on the bond.

"HONORABLE G. AARON YOUNGQUIST: I am wondering . . . whether it would be within the province of the court to cover this by rule.

"HONORABLE JOHN C. KNOX: That would be pretty difficult to do. The men who write bail bonds feel that they assume the responsibility, and they think they have to get high insurance.

"HONORABLE JAMES V. BENNETT: Didn't you attempt to handle that by court procedure?

"HONORABLE JOHN C. KNOX: Yes, but it was very difficult. You see nothing about it until some big case comes up. They are no doubt shaken down unjustly in many instances. . . .

"HONORABLE JAMES V. BENNETT: I suppose you know . . . they have that rule that will prevent the bail bond broker from taking some sort of indemnity bond from the friends of the prisoner. He will give bond for \$1,000. He will get an indemnity bond from the prisoner's father, and if the bond is forfeited then he proceeds to levy on the indemnity bond at the first possible moment, because the indemnity bond may be very much greater than the amount he had up. That is not at all infrequent with some of these bail bondsmen.

"Let me say I happened to see, Judge Knox, a report on the collections actually made on these forfeitures, and as it is now, as I understand it from the Department of Justice, scarcely 10 per cent of the bail bonds where forfeiture was declared were actually collected.

"HONORABLE ALEXANDER HOLTZOFF: Doesn't that take in the old forfeitures during the prohibition era? In current cases it isn't as low as 10 per cent. I know we had in the Department of Justice a stack of bail bonds written during the prohibition era. They weren't collected. It is not fair to consider those. I think practically every forfeited bail bond nowadays is collected. That is the advantage of a

The procedure for dealing with forfeitures is made more flexible by subdivision (f).²⁹⁵ Declaration of forfeiture becomes automatic on default, and the Rule distinguishes between the setting aside of a forfeiture (*e.g.*, a discharge or release of the liability of a surety before final adjudication of forfeiture) and remission of a forfeiture (*e.g.*, a release of a surety after entry of final judgment of forfeiture which operates either to stay execution or to refund part or all of the collected penalty). The court's power to set aside or remit a forfeiture is no longer restricted to non-wilful defaults.²⁹⁶ The Rule also substitutes for the more cumbersome independent proceeding by *scire facias*²⁹⁷ a simple motion procedure for enforcing forfeited bail bonds.²⁹⁸

The provision for exoneration in subdivision (g) is similar to the formerly governing statute²⁹⁹ providing for recordation of the discharge and exoneration of the surety.

Motions. Rule 47 states general requirements³⁰⁰ for all motions, as follows:

"An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court permits it to be made orally. It shall state

professional bondsman—it relieves the friend who goes on a person's bond, and who complains if he has to pay the forfeiture, the one who says, 'That means I will have to mortgage my home. I never realized this would happen.' The professional bondsman has got to make good, because he won't be allowed to write bonds in that district otherwise. . . . The real trouble in collecting is in the case of a bond of a friend who goes on somebody's bail. We want professional bondsmen.

"HONORABLE JAMES V. BENNETT: I would like to repeat—the whole procedure is within the purview of rules—the whole business related to bail is sadly in need of further study and further investigation for the reasons we have pointed out. Especially does it need some rule by which the fees could be regulated and to see that the professional bondsman really does have sureties which he claims he has."

295. Compare the formerly governing statute. REV. STAT. § 1020 (1875), 18 U. S. C. § 601 (1940).

296. There is now no time limit on the power of the court to remit a forfeiture. *Cf.* Comments of Hon. A. Holtzoff, NOTES AND INSTITUTE PROCEEDINGS (1946) 244:

"What used to happen heretofore when I was in the Department of Justice was that bondsmen who produced a defendant after the bond had been forfeited, would apply for an act of Congress to remit the forfeiture, and we used to have a practice of not objecting to legislative relief in such cases, except for deducting the additional expense caused to the government, on the theory that this course was an incentive to the bondsmen after the forfeiture to endeavor to locate the fugitive."

297. See *United States v. Mack*, 295 U. S. 480, 486 (1935); *Western Surety Co. v. United States*, 51 F. (2d) 470 (C. C. A. 9th, 1931), 72 F. (2d) 457 (C. C. A. 9th, 1934).

298. Recommendations for simplifications of the bail bond system along lines similar to those adopted in this Rule are contained in Cleveland Foundation, Survey Committee, CRIMINAL JUSTICE IN CLEVELAND (1922) 212-3.

299. REV. STAT. § 1018 (1875), 18 U. S. C. § 599 (1940).

300. For particular provisions relating to specific motions see Rules 6(b)(2), 12, 14-6, 17(c) and (e), 21-2, 29 and 41(e). See also Rule 49.

the grounds upon which it is made and shall set forth the relief or order sought. It may be supported by affidavit."

It thus differs from the corresponding civil rule³⁰¹ in authorizing the court to permit motions before or after trial or hearing to be made orally, and in not providing that the grounds for a motion shall be stated "with particularity."

Dismissal. Rule 48 provides:

"(a) BY ATTORNEY FOR GOVERNMENT. The Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant.

"(b) BY COURT. If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Leave of court for a dismissal—or *nolle prosequi*—by the attorney for the government, not formerly required,³⁰² was inserted in this Rule by the Supreme Court.³⁰³ The requirement is familiar in many of the states.³⁰⁴ Otherwise the Rule continues former practice.³⁰⁵

301. Compare the first sentence of Civil Rule 7(b)(1).

The last sentence of Rule 47 is not designed to encourage "speaking motions," but to make it clear that affidavits may be used whenever establishment of a fact is appropriate in connection with a motion. For discussion of the speaking motion in connection with the civil rules see Clark, *Simplified Pleading* (1942) JUDICIAL ADMINISTRATION MONOGRAPHS, Series A, No. 18, 18-9; (1942) 14 ROCKY MOUNTAIN L. REV. 131; HOLTZOFF, *NEW FEDERAL PROCEDURE AND THE COURTS* (1940) 34; 1 MOORE'S FEDERAL PRACTICE (1938) § 12.04 at 645-7.

302. See *Confiscation Cases*, 7 Wall. 454, 457 (U. S. 1869); *Dealy v. United States*, 152 U. S. 539 (1894); *United States v. Rossi*, 39 F. (2d) 432 (C. C. A. 9th, 1930); *Meyers v. United States*, 36 F. (2d) 859 (C. C. A. 3d, 1929); *Milliken v. Stone*, 7 F. (2d) 397 (S. D. N. Y. 1925).

The general practice, however, was to secure the approval of the Attorney General before entering a *nolle prosequi*. See INSTRUCTIONS TO UNITED STATES ATTORNEYS, MARSHALLS, CLERKS, AND COMMISSIONERS (U. S. Dept. Justice 1929) § 1137 (Dismissing Criminal Cases); DEPARTMENT OF JUSTICE CIRCULARS Nos. 1501, 2466, and 2791; REV. STAT. § 362 (1875) 5 U. S. C. § 317 (1940); CUMMINGS AND MCFARLAND, *FEDERAL JUSTICE* (1937) 486-520.

303. Compare Rule 50, FEDERAL RULES OF CRIMINAL PROCEDURE, REPORT OF THE ADVISORY COMMITTEE (1944) 54. A provision in the Committee draft that a dismissal by the attorney for the government should contain "a statement of the reasons therefor" was deleted by the Court. This provision had been criticized on the grounds that such statements would tend to become pro forma, and that where another indictment was contemplated such a statement might be prejudicial to the government if it disclosed any weakness in the former case.

304. See A. L. I. CODE CRIM. PROC. (1931), Commentaries, 895-7.

305. The second sentence of subdivision (a) restates the former law. See *Confiscation Cases*, 7 Wall. 454, 457 (1869); *United States v. Shoemaker*, 27 Fed. Cas. 1067, No. 16,279

Service and Filing of Papers. Subdivision (a) of Rule 49 provides generally that written motions other than those which are heard *ex parte*, written notices, designations of record on appeal and similar papers shall be served on adverse parties.

The mode of service is prescribed in subdivision (b) and follows the practice in civil actions.³⁰⁶ Where a party is represented by an attorney, service should be on the attorney unless the court otherwise orders.³⁰⁷

Subdivision (c), governing notice of orders, provides that immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party affected thereby a notice thereof and shall make a note in the docket of the mailing.³⁰⁸

The filing of papers is covered by subdivision (d), which provides that papers required to be served shall be filed with the court in the manner provided in civil actions.³⁰⁹

Calendars. Rule 50 provides that the district courts may provide for placing criminal proceedings upon appropriate calendars, and that preference shall be given to criminal proceedings as far as practicable. The Rule states the familiar inherent power of the court over its own calendars, although as a matter of practice in most districts the assignment of criminal cases for trial is handled by the United States Attorney.³¹⁰

Exceptions Unnecessary. Rule 51, which is practically identical with the corresponding civil rule,³¹¹ provides:

"Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the

(C. C. Ill. 1840). Subdivision (b) restates the inherent power of the court to dismiss a case for want of prosecution. *Ex parte Altman*, 34 F. Supp. 106 (S. D. Cal. 1940).

306. Compare Rule 5(b), F. R. Civ. P.

307. Compare *In re Hewitt Grocery Co.*, 33 F. Supp. 493 (D. Conn. 1940). The court will usually require that an order, disobedience of which is punishable as a contempt, or an order to show cause why a party should not be punished for contempt, shall be served on the party himself. See 1 MOORE, FEDERAL PRACTICE (1938) § 505.

308. This subdivision is an adaptation of Rule 77(d), F. R. Civ. P. In a case where the losing party in reliance on the clerk's obligation to send a notice failed to file a timely notice of appeal, the court was held properly to have vacated the judgment because of the clerk's failure and to have entered a new judgment (the term of court had not expired). *Hill v. Hawes*, 320 U. S. 520 (1944).

309. Rule 5(d) and (e), F. R. Civ. P. is thus incorporated by reference.

310. NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (March 1945) 42. Compare Rules 40 and 78, F. R. Civ. P.

311. Rule 46, F. R. Civ. P., construed in *Ulm v. Moore-McCormack Lines, Inc.*, 115 F. (2d) 492 (C. C. A. 2d, 1940), and *Bucy v. Nevada Construction Co.*, 125 F. (2d) 213, 218 (C. C. A. 9th, 1942).

court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him."

Many states have similarly abolished the use of exceptions in criminal and civil proceedings.³¹²

Harmless Error and Plain Error. Rule 52 states two familiar principles:³¹³

"(a) HARMLESS ERROR. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

"(b) PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

The Rule does not undertake to state the criteria of "harmlessness," or of "affecting substantial rights." These criteria are being currently debated in a series of cases arising in the Second Circuit.³¹⁴ Nor does the Rule provide that plain error *shall* be noticed.³¹⁵

Regulation of Conduct in the Court Room. Rule 53 prohibits the taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room.³¹⁶

312. See the Note to Rule 51, *op. cit. supra* note 310 at 43.

313. With subdivision (a) compare 40 STAT. 1181 (1919), 28 U. S. C. § 391 (1940); and REV. STAT. § 1025 (1875), 18 U. S. C. § 556 (1940). With subdivision (b) compare *Wiborg v. United States*, 163 U. S. 632, 658 (1896); *Hemphill v. United States*, 112 F. (2d) 505 (C. C. A. 9th, 1940), *rev'd* 312 U. S. 657 (1941). Rule 27 of the RULES OF THE SUPREME COURT provides that errors not specified will be disregarded "save as the court, at its option, may notice a plain error not assigned or specified."

314. *Kotteakos v. United States*, 66 Sup. Ct. 1239 (U. S. 1946); *Bihn v. United States*, 66 Sup. Ct. 1172 (U. S. 1946); *Bollenbach v. United States*, 66 Sup. Ct. 402 (U. S. 1946); *United States v. Antonelli Fireworks Co., Inc.*, 155 F. (2d) 631 (C. C. A. 2d, 1946).

315. Compare Additional Statement by Messrs. Dession, Glueck, Orfield, and Wechsler, FEDERAL RULES OF CRIMINAL PROCEDURE, PRELIMINARY DRAFT (1943) 255, 259:

"We believe that this rule relaxes the duty of the appellate courts to notice plain error as that duty has been affirmed by decisions of the Supreme Court (*Sherwin and Sheridan v. United States*, 313 U. S. 654; *Hemphill v. United States*, 311 U. S. 634). Under these decisions, as we understand them, an appellate court is not merely permitted to notice plain error not assigned; it is obliged to do so. We think, moreover, that such should be the law, particularly in criminal cases. Accordingly, the rule should in our view be formulated in mandatory terms. . . ."

Rule 52(b) is construed in *Fisher v. United States*, 66 Sup. Ct. 1318 (U. S. 1946).

316. For the Committee history of this Rule see Address by Hon. F. E. Crane, NOTES AND INSTITUTE PROCEEDINGS (1946) 254-5.

With reference to the type of abuse of judicial process which this Rule is designed to circumscribe see Robbins, *The Hauptman Trial in the Light of English Criminal Procedure* (1935) 21 A. B. A. J. 301, 304; *Report of the Special Committee on Cooperation between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings* (1937) 62 A. B. A. REP. 851, 862-5; (1932) 18 A. B. A. J. 762; (1926) 12 *Id.* at 488; (1925) 11 *Id.* at 64.

This Rule will not eradicate trial by the press in sensational cases, nor will it resolve the public relations problem of the administration of justice in our culture. But, as a specific and *ad hoc* provision, it is oriented toward those ends.

Application and Exception. Rule 54 deals with the scope and application of the Rules³¹⁷ and with the definition of terms employed.³¹⁸

Records. Rule 55 provides that the clerk of the district court and each United States Commissioner shall keep such records in criminal proceedings as the Director of the Administrative Office of the United States Courts, with the approval of the Judicial Conference of Senior Circuit Judges, may prescribe.³¹⁹

Courts and Clerks. Rule 56 provides:

"The circuit court of appeals and the district court shall be deemed always open for the purpose of filing any proper paper, of issuing and returning process and of making motions and orders. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Sundays and legal holidays."

The Rule follows the former legislative policy of "avoiding the hardships consequent upon a closing of the court during vacations."³²⁰ "Legal holidays" include Federal holidays as well as holidays prescribed by the laws of the State where the clerk's office is located.³²¹

Rules of Court. Rule 57 recognizes that local rules of court have their place. The Federal Rules were never intended or conceived to be a mere "restatement" of law and practice. Nor was the effort to prescribe every detail. As the Chairman of the Advisory Committee has expressed it: "Our thought was concentrated throughout not in the

317. See Dession, *The New Federal Rules of Criminal Procedure* (1946) 55 YALE L. J. 694, 702-4.

318. See subdivision (c) of the Rule.

319. Compare Rule 79, F. R. CIV. P. And see NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (March, 1945) 54-5:

"Subsequently to the effective date of the civil rules, however, the Act establishing the Administrative Office of the United States Courts became law (Act of August 7, 1939; 53 STAT. 1223; 28 U. S. C. 444-450). One of the duties of the Director of that Office is to have charge, under the supervision and direction of the Conference of Senior Circuit Judges, of all administrative matters relating to the offices of the clerks and other clerical and administrative personnel of the courts, 28 U. S. C. 446. In view of this circumstance it seemed best not to prescribe the records to be kept by the clerks of the district courts and by the United States commissioners, in criminal proceedings, but to vest the power to do so in the Director of the Administrative Office of the United States Courts with the approval of the Conference of Senior Circuit Judges."

320. See *Abbott v. Brown*, 241 U. S. 606, 611 (1916); 36 STAT. 1088 (1911), 28 U. S. C. §§ 14-5 (1940).

321. See NOTES TO THE RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (March, 1945) 55.

minutiae of practice but on such rules as will insure all the elements of a fair trial."³²²

The Rule is not, however, intended to encourage the proliferation of local rules. Too specific local rules have often been promulgated by district and circuit courts, and then ignored. And these local rules have never been conveniently accessible to other than local counsel.

Subdivision (a) is therefore concerned to keep local rules consistent with the general Federal Rules, and to insure their adequate publication and availability.³²³ Subdivision (b) suggests their real function: "If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute."

Forms. The appendix of twenty-seven forms³²⁴ is described by Rule 58, as follows:

"The forms contained in the Appendix of Forms are illustrative and not mandatory."

The collection of forms is incomplete. What the forms—and particularly those for indictments and informations—illustrate, is that simple modern English may be utilized, assuming that the draftsman has thought through the law and facts of his case.

Effective Date, and Title. The effective date of the Rules, as the formula in Rule 59 worked out, was March 21, 1946. Under the same Rule, they govern not only cases thereafter commenced, but also "so far as just and practicable all proceedings then pending."

Rule 60 provides that the Rules may be known and cited as the Federal Rules of Criminal Procedure.

322. Address by Arthur T. Vanderbilt, NOTES AND INSTITUTE PROCEEDINGS (1946) 111, 117:

"The mere fact that some particular point is not dealt with in the Rules is not to be taken as proof that the matter was not considered by the Advisory Committee. Rather, it may be presumed that the matter was examined and that the Committee came to the conclusion that it should not be treated with in general rules but rather by local rules or possibly not at all. Among such topics which seem appropriate to local rules are the order in which peremptory challenges shall be administered to jurors, the order of the argument of the respective counsel for the parties, and the like. It was deemed best to leave these matters for regulation by local rules as minor matters of procedure in which differences would not be particularly disadvantageous."

323. The Rule provides:

". . . Copies of all rules made by a district court or by a circuit court of appeals shall upon their promulgation be furnished to the Administrative Office of the United States Courts. The clerk of each court shall make appropriate arrangements, subject to the approval of the Director of the Administrative Office of the United States Courts, to the end that all rules made as provided herein be published promptly and that copies of them be available to the public."

324. RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES (1946) 61-91.

CONCLUSION

Compared with the former practice these Rules are an advance, and have been generally so received. The conception towards which they move can be briefly stated: The function of criminal sanctions in any society is to insure public order in the areas where realization of the values of the society so requires. Given a democratic orientation and legal system which places a prime value on the individual, the criminal law function should be performed with the least possible infliction of severe deprivations upon individuals, and with the widest possible participation in the process of decision throughout all phases of administration.

The advance wrought by the Rules should not be exaggerated. There is no break with recently established trends. The procedure is not yet perfected, and still involves compromises. But we are speaking of a phase of organized human relations. Like other group endeavors to cope with social friction problems, criminal law administration cannot far outstrip the dissemination of such science and technology concerning human relations as we now possess. Rule-making in our society requires wide participation. Rule-adoption depends on wide agreement. To demand further advance now would have been to forfeit adoption.

The limiting factors which have been mentioned, moreover, probably assume their maximum proportions in relation to advance in the field of criminal law. This is the area of human relations in which the majority respond to minority patterns of behavior which are experienced as intolerable. Destructive emotions tend to be aroused, and rationality to be strained. The common urge is to have the intolerably behaving individual out of the way, to be reassured that the behavior need not have occurred. Interest in the "criminal" from there on, as an individual, tends to be at a minimum.

Despite all this, the Rules reflect a growing appreciation of the interests of the individual defendant as well as of the government and the public. Significant new features have been introduced. The simplification of appeal benefits all parties. The elimination of unwarranted removal proceedings and of other unnecessary procedural steps and paper work facilitates administration. The new provisions designed to avoid unnecessary incarceration pending appearance in the district court, to insure that defendants without means or without counsel have an opportunity adequately to present their cases, for the taking of depositions, and for discovery, substantially improve the position of the defendant. The comprehensive formulation of the whole procedure for the first time in a simple, integrated set of rules, should prove an enormous convenience to courts and counsel. Measured against the procedures of the states and of other nations, our federal criminal procedure may now be considered modern.

We have a code—not a mere restatement; and it is a uniform code for all federal courts. In view of our common law conditioning, these novel but fundamental aspects of the Rules should be stressed. The experience with the Civil Rules as with our various “uniform laws” has demonstrated the limitations which inhere in the common law emphasis. We are unaccustomed to dealing with codes. There is a tendency to defeat code purpose through failure to interpret particular provisions in the light of policy as manifested in a code as a whole, and there is a tendency to defeat uniformity through undue adherence to the divergent rulings on questions of detail which inevitably accumulate in multiple jurisdictional districts.

Realization of the objectives endorsed by the Rules now rests on the district judges. Success depends on a full recognition that the policy of the Rules, which seek to prescribe the basic essentials of a fair proceeding, and avoid detail, is to favor flexibility; and that precedents antedating the Rules are not, generally speaking, pertinent to their interpretation.