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SOME COMMENTS ON THE PROPOSED FEDERAL RULES OF CRIMINAL PROCEDURE

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The proposed Federal Rules of Criminal Procedure present a matter of immense importance to the fair and efficient administration of criminal justice. Certainly the many facets of the subject offer worthy challenges to the best intelligence of our profession. I present here only certain personal views based on my own experience and that of members of my staff.

Why do we need to revise federal criminal procedure by adoption of a set of court rules? This question can be answered by considering, first, the need for a revision of existing procedure and the adoption of a uniform system, and, second, the advantage of rule-making through the promulgation of rules by the Supreme Court in preference to other possible methods.

The need for uniform rules. On numerous questions the practice of various districts and circuits is in conflict. Existing legislation is fragmentary, and has not been periodically revised in any systematic way to conform to experience. As late as the last term the Supreme Court was presented with questions concerning procedural problems relating to such basic matters as representation by counsel, *Adams* v. *United States ex rel McCann,* 317 U.S. 269, 279; detention and interrogation of suspects, *McNabb* v. *United States,* 318 U.S. 332, *Anderson* v. *United States,* 318 U.S. 350; and the power of courts to correct errors without reference to lapse of time, *Wells* v. *United States,* 318 U.S. 257. All these circumstances suggest the timeliness of an overall reconsideration of our procedure and the adoption of a set of uniform rules.

Advantages of rule-making by court promulgation of a set of rules of general application. The highly technical and specialized nature of the problems involved hardly recommends the ordinary processes of legislation as a means of rule revision. The judicial process as exercised in particular cases, on the other hand, is necessarily limited to dealing with specific situations as they chance to arise. In many instances, as in the *McNabb* and *Anderson* cases, judicial declaration of a rule in a particular case has the disadvantage of retroactive effect, with unfortunate consequences to cases already pending in courts where law enforcement officers acted in good faith and according to processes which they believed to be legal. The method of judicial promulgation of rules of general application, prospective in operation, is free from these shortcomings.

Many of these rules restate existing law, giving it definitive statement and bringing it together in one place. Some of the rules

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present procedural changes. How is the product to be judged? It is suggested that we consider these rules from the standpoint of three basic objectives: (1) The development of more scientific processes for the objective ascertainment of facts; (2) Functional improvement in procedure designed to reduce waste effort, delay and expense in the administration of criminal law; and (3) Improvement in the administration of criminal law as an instrumentality for protecting the dignity and importance of the individual in our democratic system of government.

I. Rules Designed to Develop More Scientific Processes for the Objective Ascertainment of Facts

The provision in Rule 18 that depositions may be taken at the instance of the government will often permit the discharge of necessary witnesses committed under 28 U.S.C., Sections 657 or 659, because of inability to give bond. While the use of depositions by the government will necessarily be limited the rule should also be useful in various cases where a government witness is likely to be unavailable at the trial.

Rule 26 providing for the calling of expert witnesses by the court, as well as by the parties should enable the court to correct many current abuses and insure less partisan expert testimony.

Rule 30, among other things, increases the use of the presentence investigation. Under present law, the probation officer investigates cases only when they are referred to him. Under the proposed rule, there will be a pre-sentence investigation in all cases in which the court does not affirmatively order otherwise.

Another group of the rules would promote the more objective ascertainment of facts by eliminating or reducing the role of surprise in criminal proceedings. Thus, under Rule 11 provision is made that upon request a defendant shall be entitled to a copy of the indictment or information without fees or costs. Rule 17 provides for advance notice of alibi by the defendant, a practice already adopted in fourteen states. The proposed rule provides that the prosecution shall take the first step by requesting notice from the defendant if he intends to offer alibi evidence. For otherwise defendants or their counsel might sometimes be ignorant of their burden in this regard and thereby lose, through failure to give notice, their right to introduce alibi evidence.

Rule 19 would authorize the court to order the attorney for the government to permit inspection before trial by the defense of books, papers, documents, or tangible objects. There is some precedent in federal practice for the pre-trial disclosure sanctioned by Rule 19. But the instances have been relatively few. A strong case for disclosure can be made out where the matter sought is an

object which is itself evidence and to be used as a basis for expert testimony. Questioned documents, fingerprint and ballistics exhibits, and the like would fall into this category. Beyond this we move into less well charted ground. Should the defendant ever be permitted to inspect statements of witnesses before trial? Should he be permitted to inspect the statement or confession of a co-defendant? Should he ever be permitted to inspect the minutes of a grand jury, or the transcript of an administrative investigatory hearing? The rule requires a showing that items sought are not privileged and are material to the preparation of the defense. This may be broad enough to include items which would not be admissible evidence at the trial. Should not disclosure be limited to material evidence? A more definite indication of policy in the rule, or at least in the note, would be helpful.

I think that in time we could well afford to travel considerably further toward eliminating the element of surprise. For example, there is a considerable variety of defenses available under the relatively non-committal plea of "not guilty." Should we not move in the direction of more affirmative pleading? The alibi notice provision is a step in that direction, but is the hazard of surprise any less with reference to other defenses?

Another respect in which the proposed rules seek to improve the machinery for objective ascertainment of facts is reflected in the many provisions assuring an adequate presentation of the defendant's case. Thus the rules seek to safeguard the defendant's right to counsel (Rule 39 and related provisions); and to reduce the often prohibitive burden of printing the record on appeal (Rule 37). Other provisions designed to assist the defendant who is without the means or knowledge adequately to present his case are found in Rule 6(a), where it is provided that the commissioner shall inform the defendant fully of his rights; Rule 6(b), where it is provided that the defendant shall not be called upon to plead at the preliminary examination; Rule 14, which provides relief from prejudicial joinder; Rule 35(a) (2), safeguarding the defendant's right of appeal; and Rule 40(c) (2), enlarging the grounds for change of venue to avoid prejudice.

II. Functional Improvements in Procedure Designed to Reduce Waste Effort, Delay and Expense in the Administration of Criminal Law.

Various provisions are designed to simplify procedure. The abolition by Rule 13 of demurrers, motions to quash, pleas in abatement and pleas in bar, in favor of a simple motion to dismiss, is a reform which should have been inaugurated a long time ago.

I cannot urge too strongly the importance and advantage of

the provision in Rule 8 permitting waiver of indictment in non-capital felony cases. Persons unable to furnish bail are often held in jail for many months pending submission of a case to a grand jury. Most of these persons would be glad to waive indictment in order to get an immediate trial. Under present practice the government is put to a great deal of expense in maintaining these persons during the months they are jailed prior to indictment, and they, of course, lose precious time which, even if they are guilty, does not count on their sentence.

Another important aspect of Rule 8 is the provision (subdivision (d)) dealing with the nature and contents of indictments and informations, and the accompanying sample forms. They are simple, unadorned pleadings containing only the essential information necessary to notify the defendant of the charge against him.

The provision for pre-trial conferences in Rule 16 provides a means to simplify the issues, reduce the number of witnesses and thus expedite the trial and save expense to both parties. Already it has been employed to great advantage in many districts, and particularly by Justice Laws in the District of Columbia. It should be noted that participation in the conferences is not by direction of the court as in civil procedure, but is voluntary upon invitation by the court.

Another provision which may also be recommended as a sensible improvement is found in Rule 40(c) (1), providing that a defendant who is arrested in a district other than that in which the indictment or information is pending may, if he desires to plead guilty or *nolo contendere,* waive his right to be tried in the district where the offense occurred and consent to disposition of the case in the district where he is arrested, subject to the approval of the United States Attorney in each district. There would seem to be no practical reason why a defendant should be required to travel to the district where the indictment was returned in order to plead and be sentenced.

Similar considerations commend the provisions of Rule 4 and Rule 10, extending the territorial limits for execution of warrants and service of summons. These provisions obviate the necessity for removal proceedings from one district to another in the state, or from one state to another within a radius of 100 miles of the place where the warrant or summons is issued.

A few words should be said about some of the appeal rules. Certainly the procedure is improved and simplified by Rules 35, 37 and 47. The abolition of petitions for allowance of appeal, citations and assignments of error will obviate a lot of unnecessary and

confusing paper work. The provision making exceptions unnecessary is, of course, sensible and should be adopted.

The provision eliminating the necessity of printing the record on appeal in a separate volume also will provide a great saving in time and money. The procedure provided in rule 37(b) (2) is that of having each party print, as an appendix to his brief, such portions of the record as the party desires the court to read. The alternate suggestion in the supplement at page 25 would provide that the appellant and the appellee shall in turn designate the portions of the record upon which they rely, which shall then be printed in continuous form in a single volume. The choice should be governed primarily by the convenience of the court. Either provision is a vast improvement over the old practice of printing the whole record even when only a minute portion is pertinent to the issues on appeal.

III. Improvement in the Administration of Criminal Law as an Instrumentality for Protecting the Dignity and Importance of the Individual.

A judicial proceeding involves something more than adjudication of a particular case. It is also a public demonstration of a conception of law and of a political system. Confidence in the integrity of judicial proceedings, and in the capacity of our system to protect individual rights against arbitrary encroachment, is thus a *sine qua non* of democracy.

The rules preserve existing procedural safeguards, public participation in the judicial process through the grand jury and the petit jury, and in many other ways too numerous to mention punctiliously protect and strengthen the individual rights of defendants.

There will be much controversy about Rule 5, and particularly subdivision (b), which provides that no statement made by a defendant in response to questioning by officers during any period of illegal detention shall be admissible. The question is whether the problem of eliminating abuses of the arresting process ought to be dealt with through a rule of admissibility imposed in rules of criminal procedure and, if so, whether the present rule does not oversimplify the problem.

The *McNabb* and *Anderson* cases have initiated a general reconsideration of the whole question of interrogation of prisoners by arresting officers. But many aspects of the problem remain to be settled in subsequent cases or in specific legislation or court rules. May persons in custody be questioned at all prior to arraignment where arraignment occurs as promptly as possible? Are statements *volunteered* to police officers prior to arraignment admissible? To what extent may there be questioning by arresting

officers where arrests are made on holidays or at times when committing magistrates are actually unavailable? Are there special circumstances which may warrant or require that exceptions be made to the rule of the *McNabb* and *Anderson* cases? Can the right to immediate arraignment be waived by the person in custody?

There may be cases where a successful investigation is absolutely dependent upon immediate interrogation, or where a short period of detention pending further investigation is necessary to prevent the escape of confederates although evidence has not been sufficiently developed to warrant making formal charges before a commissioner. If exceptions are to be made, how are they to be limited and what administrative and judicial safeguards can be provided?

Perhaps, if sufficient time remains, the Committee could consider the possibility of formulating and defining limited classes of situations in which detention and interrogation could be permitted under administrative or judicial safe-guards sufficient to insure that civilized methods will be maintained and that the conditions and judgments with respect to detention shall not be left to the uncontrolled discretion of the arresting officer. I realize that this would be a difficult undertaking. It may be better to postpone it until after we have tried to live under the *McNabb* and *Anderson* decisions a year or two. Perhaps after we have had a little more experience under the *McNabb* and *Anderson* rule we will be able much better to chart a course for the future and some rules to enforce it.

The rules do not deal with the qualifications or method of selection of jurors, but in his letter of transmittal, the Chairman of the Advisory Committee states that the Committee has considered the recent report of the Committee on Selection of Jurors, of which Judge Knox is Chairman, and that the Committee favors the proposed legislation framed by Judge Knox's Committee to prescribe uniform qualifications of jurors. The selection of jurors is one of the most delicate problems in judicial administration. Without many of the functional improvements embodied in the proposed legislation relating to jury selection, the revision of criminal procedure proposed by the Advisory Committee would be incomplete.