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THE PROPOSED FEDERAL RULES OF CRIMINAL PROCEDURE*

Wendell Berge†

THE recently published Preliminary Draft of the Federal Rules of Criminal Procedure[1] is now before the bench and bar for discussion. The rules proposed are, of course, tentative. Following a procedure similar to that adopted in the case of the civil rules a few years ago, they have been printed and distributed by the Advisory Committee at this stage for the purpose of obtaining criticisms and suggestions. Some of the rules merely restate existing law as provided by statute or adopted by general agreement in judicial decisions. Others work substantial procedural changes. How is the product to be judged?

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 in *Adams v. United States ex rel McCann;*[2] detention and interrogation of suspects in *McNabb v. United States* and *Anderson v. United States;*[3] and the power of courts to correct errors without reference to lapse of time in *Wells v. United States.*[4] Questions of what is correct federal criminal practice, at times even difficult for United States Attorneys, must be

* Much of the material in this article was originally incorporated in a speech delivered on September 24, 1943 at the Annual Conference of the Third Judicial Circuit at Buck Hill Falls, Pennsylvania.

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[1] Federal Rules of Criminal Procedure, Preliminary Draft, with Notes and Forms. Prepared by the Advisory Committee on Rules of Criminal Procedure, appointed by the Supreme Court of the United States. United States Government Printing Office, Washington. (1943). Hereinafter referred to as Preliminary Draft.

[2] 317 U.S. 269 at 279, 63 S. Ct. 236 (1942).

[3] 318 U. S. 332, 63 S. Ct. 608 (1943); 318 U. S. 350, 63 S. Ct. 599 (1943).

[4] 318 U. S. 257, 63 S. Ct. 582 (1943).

overwhelming for the occasional practitioner in the federal courts. 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 legislative process to date has not produced a comprehensive set of rules. To a limited extent, the courts declare new rules through judicial decision. But the judicial process as exercised in particular cases is necessarily limited to dealing with specific situations as they chance to arise. In many instances, as in the *McNabb* and *Anderson* cases,[5] 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. The particular procedure here adopted insures the maximum participation of the bench and bar generally, yet it insures the final participation and approval of the Supreme Court and of Congress.

Scope. The proposed rules govern all criminal proceedings in the federal courts, with the few exceptions set forth in Rule 50, and so constitute a comprehensive code of criminal procedure. As in the case of the civil rules, questions of evidence have been deemed within the scope of the Court's rule-making power, and consequently within the scope of the committee's assignment. Rule 24, which provides in general that questions of evidence shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of common law as interpreted by the courts of the United States, is designed to codify the principle of *Funk v. United States* and *Wolfe v. United States*.[6] Various other rules have been included, dealing with specific evidentiary questions. The committee has not, however, formulated a complete code of evidence. It was probably felt that most of the rules of evidence should be the same for criminal and civil proceedings.

This article will be confined to a discussion of those features of the draft which appear to the writer to be of chief significance, following in general the same order and arrangement as that adopted in the draft. The first group of specific rules, following Rules 1 and 2 which relate

[5] See note 3, supra.

[6] 290 U. S. 371, 54 S. Ct. 212 (1933); 291 U. S. 7, 54 S. Ct. 279 (1933).

to general scope, purpose and construction, would govern preliminary proceedings.

PRELIMINARY PROCEEDINGS

Rule 3. The complaint. Rule 3 simply provides that the complaint shall be a written statement of the essential facts constituting the offense charged, made upon oath or affirmation before a commissioner, and filed with him. The statute[7] provides that persons may be arrested and imprisoned "agreeably to the usual mode of process" of the state in which the proceedings are held. A diversity of practice has therefore developed. Some states do not require that the complaint be in writing, while others do so require. Some states permit the complaint to be made on information and belief, while others require personal knowledge. This rule would secure uniformity with respect to the requirement that the complaint be in writing, but local requirements would continue to govern the question whether it may be based on information and belief.

It has been suggested that this rule operates too restrictively, in that it sometimes happens that no commissioner is available, and that the rule ought to permit the filing of complaints before any justice or judge of the United States. There is merit to this suggestion. But it might also be considered whether the statutory provision permitting complaints to be filed with certain state and local officials should not be eliminated, particularly in view of the new rule of evidence laid down in *McNabb v. United States* and *Anderson v. United States.*[8] Under present practice state and local officials are seldom used, but if the statutory authority for their use is continued, the *McNabb* and *Anderson* cases will apparently require that defendants be arraigned forthwith before the nearest official authorized to receive complaints. Obviously, great confusion may result, and it can readily be argued in almost any case that commitment could have been made earlier before a different state or local official. So, particularly because of the *McNabb* and *Anderson* rule, commitment might well be authorized hereafter only before a definitely stated class of federal officials, but federal justices and judges might well be included along with commissioners.

Rule 4. Warrant or summons upon complaint. The principal changes effected by this rule are as follows:

(1) A summons to a natural defendant may be issued in lieu of a warrant of arrest. Heretofore the summons has been the established

[7] 18 U. S. C. § 591 (1940).

[8] See note 3, supra.

method for bringing a corporation into court as a defendant. The adoption of this alternate method of bringing a natural person into court as a defendant in a criminal proceeding is quite appropriate, and may often save the government time and expense, and the defendant, in cases where the crime is not *malum in se*, unnecessary humiliation. It has been suggested, however, that the summons procedure should be resorted to only upon the request of the government, and that the words "or of the complainant"[9] should be eliminated from this rule. There is much to commend this view.

(2) More than one warrant or summons for the same defendant may be issued on a single complaint. This provision meets a real need. It permits more than one enforcement officer to carry a warrant or summons in looking for a defendant. It also greatly expedites procedure in cases where there are many defendants. Some districts at present permit only one warrant to be issued for all defendants jointly indicted, which gives rise to many difficulties in the execution and return of such warrants. Some jurisdictions also require that an officer must have the warrant in his possession to justify arrest. The complications arising from these rigid requirements would be alleviated by the rule.

(3) Subdivision (c) (2) provides that a warrant or summons may be executed or served anywhere within the territorial limits of the state, or within one hundred miles of the place where the warrant or summons is issued. This would reduce the number of removal proceedings necessary. The question naturally arises in regard to cases where execution or service shall be outside the state, why draw the line at one hundred miles from the place of issuance? The answer may well be that the committee thought the line should be drawn somewhere not too far away. The rule in this respect may represent a compromise with sentiment for giving warrants and summonses unlimited territorial effect. Certainly the provision giving warrants and summonses effect throughout the state is reasonable. There is no practical consideration affecting rights and liberties of defendants that should operate against federal warrants and summonses that would not also apply to those issued by states, and, of course, similar process issued by a state court would run throughout the state. If a state warrant issued in New York City can be executed in Buffalo, there seems to be no reason why the same should not be true of a federal warrant. Likewise, even from the defendant's viewpoint, there would seem to be no reason why a federal warrant issued at New York and good at Buffalo should not also be honored in Hoboken or Newark. When it comes to the question

[9] Preliminary Draft 6, line 9.

whether such a warrant should be allowed as the basis for arrest and return, without removal proceedings, at Cleveland or Chicago, the considerations are, of course, less clear. The rule does not expressly state whether the warrant or summons shall be served by an officer from the district where it was issued, or whether it may be served by an officer of the district where the accused is found, and I should think that it should be more specific in this respect.

(4) Subdivision (c) (3) provides that an officer executing a warrant need not have it in his possession at the time of the arrest, but that he shall inform the defendant of the offense with which he is charged and of the fact that a warrant has been issued, and shall show it to the defendant as soon thereafter as possible. Although possession of the warrant is not required by federal law, some state laws contain the requirement and federal practice in some states conforms in this respect to the state practice. The proposed provision would create in this respect a uniform federal practice.

(5) Subdivision (c) (4) provides that a warrant returned unexecuted may be kept alive so long as the complaint is pending. This provision tends toward modernizing practice, and would result in many instances in obviating the necessity of issuing new warrants.

Rule 5. Procedure upon arrest. Subdivision (a) provides that an officer making an arrest upon a warrant issued upon a complaint, or any person making an arrest without a warrant, shall without unnecessary delay take the person arrested before the nearest available commissioner or other officer empowered to commit persons charged with federal offenses. There are several statutes providing for immediate commitment by arresting officers, and these statutes are cited in the note following this subdivision.[10] These statutes differ in language, but they seem to mean substantially the same—that persons arrested shall be taken before a committing officer "immediately" or "forthwith." These statutes thus prescribe the duties of the arresting officer.

The real controversy comes on subdivision (b), which provides that no statement made by the defendant in response to questioning by officers during any period of illegal detention shall be admissible in evidence against him if the interrogation occurs while the defendant is held in custody in violation of this rule. This is one of the few rules which deal with the admissibility of evidence, although in so doing the objective would seem to be in effect to enforce the procedural requirement with respect to prompt arraignment. It may be granted that the objective of eliminating abuses of the arresting process is a valid one.

[10] Id. 11-12.

But the question is whether the problem ought to be dealt with through a rule of admissibility imposed in rules of criminal procedure and, if it should be so dealt with, whether the present rule does not oversimplify the problem.

The *McNabb* and *Anderson*[11] cases have initiated a general reconsideration of the whole question of interrogation of prisoners by arresting officers. But even under the broadest possible construction of these decisions, there are many aspects of the problem which are either not opened or not involved. They will have 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? These and similar questions are likely to arise in subsequent cases and require judicial decision. Certainly, there will have to be a great deal of consideration given these problems in the next few years in order to assure procedure which guarantees a minimum of official abuse, but which, at the same time, does not enfeeble the investigatory process.

It is difficult to believe that the *McNabb* and *Anderson* cases say the final word on this subject. 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?

The solution proposed in Rule 5 (b) is too sweepingly simple. It is difficult to say what should be the final solution. A formula which will provide machinery for meeting completely the necessities of adeqate investigation and the requirements for proper protection of the accused has yet to be evolved, and probably cannot be worked out in time for presentation to the Supreme Court along with the rest of these rules.

The several litigation precedents that have arisen since the decision

[11] See note 3, supra.

of the *McNabb* and *Anderson* cases do not offer much comfort or satisfaction as to the way the new rule would operate. Federal investigatory agencies are encountering real, practical difficulties in applying the new rule to the investigation of sophisticated criminals. There should be general agreement that police excesses and abuses in this country must be stopped, but Rule 5 (b) does not appear to represent the final solution. It was framed before the decision in the *McNabb* and *Anderson* cases. Ultimately, in the light of those cases and of investigatory experience following them, it may be possible to work out some procedure which would formulate and define limited classes of situations in which detention and interrogation can be permitted under administrative or judicial safeguards 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.

Rule 6. Proceedings before the commissioner. Subdivision (a) protects the right of the defendant to be informed of the complaint against him, his right to counsel, and his right to have or waive a preliminary examination. He shall also be informed that any statements made by him may be used against him. Provision is made for opportunity to consult counsel and for admission to bail, as provided in Rule 42. Subdivision (b) provides that the defendant shall not be required to plead. If he waives examination he shall be held to answer in the district court, and if he does not waive examination the commissioner shall hear the evidence within a reasonable time. If hearing is not waived and from the evidence presented it appears to the commissioner that there is probable cause, the defendant shall be held to answer in the district court. This rule appears eminently fair.

INDICTMENT AND INFORMATION

Rule 7. The grand jury. The next group of rules relates to indictment and information, and includes Rules 7 to 10, inclusive. Subdivision (a) of Rule 7 authorizes the summoning of grand juries in vacation as well as term time, and also contemplates that more than one grand jury may serve simultaneously, not only in the district but also at a particular place of holding court. The number of grand juries which shall serve at one time is left to the court's discretion. The flexibility which this rule furnishes should greatly add to the efficiency of the grand jury system for the volume of criminal work is unevenly distributed around the country. In some districts the government is con-

stantly pressed to find sufficient grand jury time. In other districts the grand juries meet only infrequently and then do not have much business to transact.

Subdivision (b) provides that the government, or a defendant who has been held to answer, may challenge the array on the ground that the grand jury was not lawfully selected, drawn or summoned, and may challenge an individual juror on the ground of disqualification or bias, but only before the grand jury is sworn. It is further provided that motions to dismiss the indictment on such grounds must be made before trial and that no indictment need be dismissed on the ground that one or more members of the grand jury were not legally qualified if twelve or more jurors, after deducting the number not legally qualified, are found to have concurred in the finding of the indictment.

Some questions may be raised about this subdivision. It is difficult to see why the defendants who have been arrested prior to swearing in a grand jury should have a right to challenge, whereas defendants subsequently arrested and held for grand jury action should not have such right. Since a grand jury may sit for as long as eighteen months this right of challenge would seem to inure to the benefit of relatively few defendants. With respect to additional grand jurors impaneled in place of jurors excused, will a defendant who is being held for grand jury action at the time have a right to challenge the single juror although he cannot challenge the rest of the jury? Such a right would seem rather pointless.

But why should defendants be permitted to challenge grand jurors on the ground of partiality at all? The grand jury does not determine guilt or innocence. It merely brings charges. The government must satisfy at least twelve grand jurors before an indictment is returned. Granted the occasional bias of several of the jurors, still a substantial number of impartial grand jurors remain to approve the return of an indictment. A prosecuting attorney is not legally disqualified from filing an information by the fact that he may have preconceived notions of the guilt of the defendant. Why should there be such a disqualification for grand jurors?

This subdivision also provides for a motion to dismiss the indictment by reason of objections to the array, lack of legal qualification, or bias of a juror. Presumably such motion would be passed on in advance of trial and would mean, in effect, that there would be a trial on the question of partiality of the grand jury in advance of the trial of the indictment. I think this offers abounding opportunities for pettifogging tactics.

Subdivision (c) requires the appointment of a deputy foreman as well as a foreman. This provision might well be optional rather than mandatory. In certain rural districts grand juries customarily do not remain in session more than a few days at a time, and in such cases there is no particular purpose served in requiring that a deputy foreman be designated.

Subdivision (e) relates to secrecy and provides that a juror, attorney, interpreter, clerk or stenographer may disclose matters occurring before the grand jury only when so directed by the court, preliminarily to or in connection with another 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. It also provides for sealing the indictment, upon direction of the court. The rule does not apply to witnesses and the question may well be raised whether witnesses also should not be brought within the scope of this rule. A further question arises out of the fact that the rule, read literally, has the effect of preventing a United States Attorney, or other authorized government attorney, from discussing developments before the grand jury with the Attorney General, an Assistant Attorney General, or other authorized Department of Justice officials. Such a result was probably not intended, and an appropriate exception ought to be made in the rule to cover this situation.

Subdivision (g) provides that a grand jury shall serve until discharged and that it need not be discharged until the expiration of eighteen months. The beginning or expiration of a term of court is to have no effect on the grand jury's tenure or powers. An individual juror may be temporarily or permanently excused at any time for cause and the court may impanel another person in place of a juror permanently excused.

Rule 8. The indictment and information. Subdivision (a) authorizes prosecution by information of non-capital felony cases if indictment is waived, and that any other non-capital offense may be prosecuted by either indictment or information. Subdivision (b) provides that indictment may be waived in writing in all non-capital cases if the defendant is represented by counsel. These are important and desirable provisions. At present 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. If they are not guilty they are entitled to their freedom. If they are guilty they ought to begin serving their sentences promptly.

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. Prosecution by information, where the defendant waives indictment, is certainly to be commended in non-capital felony cases. The language of this rule might be improved by requiring that the accused shall be informed of his constitutional rights under the Fifth Amendment, and that it shall appear in the record that the defendant was so informed. It might also be required that the waiver of indictment be physically annexed to the information.

Perhaps consideration should also be given to the question whether some provision should be made to permit waiver by those defendants who do not desire to be represented by counsel. In many cases defendants desire to plead and be sentenced and get it all over with, and often these defendants do not want counsel. If adequate provision is made in the rule for informing the defendants of their constitutional rights, waiver of indictment could safely be allowed where counsel is not desired.

Subdivision (c) provides that the information shall be signed by the attorney for the government and may be filed only by leave of court. Should not the government have the final say as to whether or not an information shall be filed? This could be accomplished by eliminating the clause "and may be filed only by leave of court."[12]

Subdivision (d) provides for simplification of the form of indictments and informations and states that the indictment need not contain any formal commencement, formal conclusion or other matter not necessary to a plain, concise statement of the essential facts. Excellent sample forms are found in the appendix to the rules.[13] Indictments have traditionally been encumbered with anachronistic and verbose allegations and redundant repetitions. The suggested forms eliminate all this. They are simple and unadorned pleadings which contain only the essential information necessary to notify the defendant of the charge against him.

Subdivision (e) authorizes the striking of surplusage from indictments or informations. It has been held that surplusage cannot be stricken from an indictment without the consent of the defendant. But if the defendant is going to have the power to waive indictment alto-

[12] Preliminary Draft 28, line 18.
[13] Id. 218-223.

gether, he certainly should have the power to consent to the striking out of surplusage, or to move to have it stricken.

Rule 9. Joinder of offenses and defendants. This rule covers joinder of offenses and defendants. Subdivision (a) relates to joinder of offenses and states substantially the present federal law. Subdivision (b) provides for joinder of defendants who are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting or resulting in an offense or offenses. There is no statute on joinder of defendants but federal decisions have permitted joinder under circumstances similar to those set out in the rule.

Rule 10. Warrant or summons upon indictment or information. This rule embodies provisions substantially like those in Rule 4 relating to warrant or summons upon complaint. Probably the most notable provision is that of subdivision (a) to the effect that when an indictment or information is filed, a warrant for the arrest of each defendant not in custody shall be issued by the clerk as a matter of course, unless otherwise directed by the court or these rules. This makes unnecessary an order of court for the issuance of a warrant. The summons procedure is made applicable here, as in Rule 4, except that it is provided that the summons shall be issued upon request of the government or by direction of the court. A summons to a corporation under this rule may be served within such distance as the court may order and could, therefore, run throughout the United States.

ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 11. Arraignment. We come now to the provisions for arraignment and preparation for trial. These are found in Rules 11-20. Rule 11 provides that arraignment shall be in open court, and that the indictment or information shall be read to the defendant or its substance stated to him. He shall be advised that he is entitled to a copy of the indictment or information, and if he requests it, a copy shall be given to him before he is called upon to plead. It has been suggested that Rule 11 be amended to require that the defendant be required to plead in writing.[14] Having a written plea in the record would probably avoid confusion and subsequent habeas corpus proceedings where the plea may be challenged on the ground the prisoner did not understand it or did not in fact plead guilty.

It has also been suggested that the provision authorizing the stating of the substance of the indictment can lead to differences of opinion as

[14] Id. 46, line 5.

to whether or not the substance was actually given to the defendant, and that it would be better to provide merely for the reading of the indictment or information unless the defendant waives such reading. In the case of long and complicated indictments the judge very likely has not had opportunity to analyze the indictment sufficiently to state fully its substance to the defendant, and it would probably be better to require reading in the absence of waiver. In any event, the defendant gets a copy of the indictment or information if he wants it.

Rule 13. Pleadings and motions; defenses and objections. Subdivision (a) abolishes demurrers, motions to quash, pleas in abatement and pleas in bar. The defenses and objections heretofore raised by these forms are to be raised only by motion to dismiss, or for other appropriate relief.

This simplification is certainly commendable and should eliminate a lot of confusion. Under this rule any matter of defense or objection capable of determination before the trial of the general issue may be raised before trial by a motion. When a motion before trial raises an issue of fact, the defendant is entitled to trial by jury if the issue is one which heretofore might have been raised at the trial under a plea of not guilty. All other issues of fact raised by motion before trial may be tried with or without a jury, or on affidavits, or in such other manner as the court directs. The court may determine the motion or may order that the defenses or objections raised be submitted for determination at the trial of the general issue.

Rule 14. Relief from prejudicial joinder. This rule seems to state substantially the present federal law and does not appear to present anything controversial. Possibly, the rule extends the present law in that it appears that relief from prejudicial joinder can be granted at any time, even during trial, prior to verdict. This rule suggests the question whether severance after trial has started would prevent retrial of the defendant severed on ground of double jeopardy.

Rule 15. Trial together of indictments or informations. This rule authorizes the trial together of indictments or informations if the offenses and the defendants could have been joined in a single indictment or information.

Rule 16. Pre-trial procedure. At any time after the filing of an 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, and (4) such other matters as may be related to 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. The orders entered at the pre-trial conferences control the subsequent course of the proceeding, unless modified at the trial to prevent manifest injustice. This rule shall not be invoked in the case of any defendant who is not represented by counsel.

Already this pre-trial procedure has been employed to great advantage in many districts. It has been criticized to some extent by prosecuting attorneys as providing a fishing expedition for the defendant, and by defense attorneys as constituting a means of coercing concessions and stipulations to which the defendant would not otherwise agree. But in one form or another pre-trial conferences have been held in criminal cases all through the ages, even though they were not expressly labeled as such. The technique should be recognized and encouraged, as it provides a method that can be useful in many cases in disposing of time-consuming routine matters in advance of trial and in narrowing the issues, the number of witnesses and volume of evidence introduced at the trial.

Rule 17. Alibi notice. This rule provides that the government may serve upon the defendant a reasonable time before the trial a notice specifying precisely the contention of the government as to the time and place where the defendant committed the offense charged. If the defendant intends to introduce evidence that he was at a place other than that specified, he shall within a reasonable time serve upon the government a statement specifying the place where he claims to have been. Neither side thereafter shall be permitted to introduce evidence inconsistent with its specification unless the court for good cause permits the specification to be amended. If a defendant fails to make the specification required by this rule, the court shall exclude evidence in his behalf that he was at a place other than that specified by the government.

The practice of providing for advance notice of alibi by the defendant has already been adopted in fourteen states but is new in federal practice. The various state provisions differ in detail and they are very well summarized by a chart in the printed rules.[15] One of the important points of difference in these provisions is whether the prose-

[15] Id. 96-97.

cution shall be required to take the first step by requesting notice from the defendant if he intends to offer alibi evidence. Only three states, Minnesota, New Jersey and New York, require the prosecution to take the first step, but that procedure has been adopted in the proposed rule. Many of our United States Attorneys would go further and place on the defendant the burden of coming forward with notice of an alibi if he intends to prove one. But defendant or counsel might sometimes be ignorant of their burden in this regard and thereby lose, by failure to give notice, their right to introduce alibi evidence. Probably the rule should be adopted with the provision that the government shall invoke its application.

A number of these rules, and this one in particular, are to be commended for their tendency to reduce the element of surprise in criminal cases. Criminal trials should not be regarded as sporting games in which the adversaries have secret plays which they may properly conceal until some dramatic moment. Excitement for participants or spectators is not the goal of a criminal trial. We should move in the direction of more affirmative pleading wherever possible. There is still a long way to go in this direction, considering the considerable variety of defenses now available under the relatively noncommittal plea of not guilty. The alibi notice provision is a step in this direction but only with reference to one particular defense. Is the element of surprise any less with reference to other defenses?

Rule 18. Depositions. Subdivision (a) authorizes the court at any time after the filing of an indictment or information to order that the testimony of any witness (either for the government or the defendant) be taken by deposition if it appears that subsequently he may be unavailable. The court may also direct that the testimony of a material witness who has been committed for failure to give bail shall be taken by deposition, after which the court may discharge the witness from custody.

Subdivision (b) makes provision for the payment of reasonable expenses of the defendant and his attorney where the defendant, at whose instance a deposition is to be taken, cannot bear the expense.

Subdivision (c) provides for production of the defendant at an examination of a witness whose deposition is being taken at the instance of the government, and provides for payment in advance of travel and subsistence expenses to the defendant's attorney and to a defendant not in custody, where a deposition is taken at the instance of the government.

Subdivision (d) provides that where the witness is unavailable, the depositions may be used at the trial or other hearing so far as otherwise admissible under the rules of evidence, or to contradict or impeach the testimony of the deponent as a witness.

Subdivision (e) provides that objections to receiving depositions in evidence may be made as provided in civil actions.

Subdivision (f) provides that where a deposition is taken at the instance of the defendant the court may, upon the defendant's request, direct that it be taken on written interrogatories.

The principal change in Rule 18, of course, is the provision that depositions may be taken at the instance of the government. The possible objection that this provision violates the right of confrontation guaranteed by the Sixth Amendment is met by providing for the presence of the defendant when the deposition is taken. This rule should serve a particularly useful function in the case of necessary witnesses who have been committed under 28 United States Code, section 657 or 659, because of inability to give bond. Such witnesses may be discharged from custody as soon as their depositions have been taken. No doubt the use of depositions by the government in criminal cases will necessarily be limited, but the rule should be helpful in some cases.

Rule 19. Discovery and inspection. This rule 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. The only restrictions are that the matter sought should not be privileged, that it be shown to be material to the preparation of the defense, that the request be reasonable, and that the request be made after the filing of the indictment or information and after the defendant has been taken into custody. Beyond this the rule would leave the entire matter to the discretion of the court.

There is some precedent in federal practice for pre-trial disclosure of this kind, as the note in the rule indicates.[16] But the instances have been relatively few. It is consequently difficult to foresee just how this rule would be interpreted in practice. A strong case for disclosure can obviously be made out where the matter sought is an object which is itself evidence to be used as a basis for expert testimony. Questioned documents, fingerprint and ballistic exhibits, and the like would fall into this category. Beyond this we move into less well charted ground. Under the heading of papers and documents we will have to deal with

[16] Id. 103.

a great variety of material raising a variety of problems. 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? It is stated in the note that the rule does not provide for the inspection of grand jury minutes, but there is nothing in the rule which expressly precludes this. The rule requires a showing that items sought are material to the preparation of the defense. This is broad enough to include items which would not be admissible evidence at the trial. Should not disclosure be limited to material evidence?

The answers to questions such as these involve decisions on broad policy. As the note indicates, the prevailing policy has been to grant disclosures of these kinds very sparingly if at all. If no change in that policy is contemplated the rule is misleadingly broad in its language. If change is contemplated, a more definite indication of policy in the rule, or at least in the note, would be helpful. As it now stands, an extreme diversity of practice might well develop. Should not limitations, at least with respect to statements of witnesses, memoranda and notes of the prosecutor, and grand jury minutes, be written into the rule?

Rule 20. Subpoenas. This rule makes one significant change in practice. Subdivision (b) provides that the court in its discretion may direct that books, papers, documents or objects designated in a subpoena duces tecum 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, objects, or portions thereof to be inspected by the parties and their attorneys. The note states[17] that this provision has been inserted in the interests of fairness and for the purpose of preventing delay during the trial, particularly in cases where numerous documents may have been subpoenaed. This again is a provision that tends to reduce the element of surprise, and its proper use ought to facilitate the trial of cases.

TRIAL

Rule 21. Trial by jury or by the court. The next section of the rules is devoted to trial and includes Rules 21-29. Rule 21 expressly authorizes waiver of jury trial by the defendant, and requires that it

[17] Id. 107-108.

be in writing, with the approval of the court and the consent of the government. It also provides that the trial may be by a jury of less than twelve, where so stipulated with the approval of the court. Where the defendant is found guilty in a trial without a jury the judge "may in addition find the facts specially or file an opinion instead of such special findings." As a practical matter, there probably will be few cases in which defendants will consent to a trial by a jury of less than twelve. The question may well be asked whether court rules are the proper place to provide for reducing the size of the jury. As a practical matter, however, the question is probably not of great importance.

Rule 22. Trial jurors. The chief features and changes provided by this rule may be summarized as follows:

(1) Provision is made that the court may permit counsel to conduct the examination, or may itself conduct the examination, but in the latter event the court shall permit counsel to supplement the examination by such further inquiry as it deems proper, or may itself put additional questions submitted by counsel.

(2) If the offense charged is punishable by death, each side is entitled to twenty peremptory challenges. If the offense charged is punishable by imprisonment for more than one year, each side is entitled to six peremptory challenges; but, if there is more than one defendant, the defendants jointly are entitled to ten peremptory challenges. If the offense charged is punishable by imprisonment for not more than one year, or by fine, or both, each side is entitled to three peremptory challenges; but, if there is more than one defendant, the defendants jointly are entitled to six peremptory challenges.

As many as four alternate jurors may be impaneled in both felony and misdemeanor cases. An alternate juror who does not replace a regular juror before the jury retires shall not retire with the jury, but shall remain under order of the court and shall not be discharged until the jury is discharged. If at any time prior to the return of the verdict a juror dies or becomes ill or otherwise unable to perform his duty, the court may order him to be discharged and may order an alternate juror, in the order in which he was impaneled, to take the place of the juror discharged. Provision is also made for peremptory challenges of alternate jurors.

There seems to be great sentiment among United States Attorneys for providing unconditionally that the examination shall be conducted by the court, with provision that the examination may be supplemented by questions submitted by the parties. It is believed that in most in-

stances the court could more fairly conduct the examination, and that the procedure of having the court do so would save time.

It is to be noted that the rule specifically provides that the alternate jurors shall not be discharged when the jury retires to deliberate, but shall be held under order of court until the jury is discharged. This procedure will meet the contingency which sometimes arises when a regular juror becomes incapacitated after the jury begins its deliberations.

Rule 24. Evidence. This rule provides that the admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of common law as interpreted by the courts of the United States. Adoption of the principle of uniformity in regard to the rules of evidence in federal criminal cases should be welcomed.

The principle has been sanctioned in *Funk v. United States* and *Wolfle v. United States.*[18] This rule goes much further in adopting the uniformity principle than the corresponding civil rule (Federal Rules of Civil Procedure, Rule 43(a)),[19] which provides, among other things, that evidence shall be admitted which is admissible under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. We now have a body of adjudicated rules of evidence in the federal courts, and there is no reason why these rules should not be uniform over the entire country.

Rule 25. Proof of official record. This rule merely incorporates by reference Rule 44 of the Federal Rules of Civil Procedure which provides a uniform method of proving public records and entry or lack of entry. All statutes providing a method of proof of official records remain in force, and proof may be made either according to their provisions or according to this rule.

Rule 26. Expert witnesses. This rule provides that the court may order the defendant or the government to show cause why expert witnesses should not be appointed, and may request both parties to submit nominations. The court shall appoint any expert witness agreed upon by the parties, and if they do not agree the court may appoint witnesses of its own selection. At the trial an expert witness may be called by the court or by either party, and shall be subject to cross-examination by each party.

[18] See note 6, supra.

[19] Published, among other places, in U. S. C. (1940), following title 28, § 723 c.

Rule 27. Motion for acquittal. The chief features and changes made by this rule are as follows:

(1) The motion for a directed verdict is abolished and motion for a judgment of acquittal is to be used in its place.

(2) 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 has returned a verdict or after it has returned a verdict of guilty, or has been discharged without having returned a verdict. If the motion is denied and the case submitted to the jury, the motion may be renewed within ten days after the jury is discharged. It may include in the alternative a motion for a new trial.

There is much to be said for the view that after a verdict of guilty the court should not on questions of fact have authority to do anything but grant a new trial. It may be that the evidence was insufficient to sustain the verdict, but perhaps on a retrial the government would have additional evidence. However, the practice provided in this rule has been upheld in *United States v. Stone*,[20] affirming (by an equally divided court) *Ex parte United States*,[21] and is not greatly different in effect from the old judgment *non obstante veredicto*.

Rule 28. Instructions. This rule is patterned on Rule 51 of the Federal Rules of Civil Procedure. It provides that at the close of the evidence, unless further time is granted, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies shall be furnished to the 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 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 hearing of the jury. The provision for exchange of copies of requested instructions will enable the government more effectively to assist the court and obviate error when a proper or necessary instruction requested by the defense has been omitted through inadvertence.

Rule 29. Verdict. This rule permits a verdict by a stated majority of the jurors on stipulation, with the approval of the court. There is no

[20] 308 U. S. 519, 60 S. Ct. 177 (1939).

[21] (C. C. A. 7th, 1939) 101 F. (2d) 870.

express provision for special verdicts or findings, and it has been suggested that provision should be made in these rules for special verdicts and special findings in cases where more than a single offense is involved, on the analogy of the rules of civil procedure. Apart from this, the rule embodies substantially the present law.

JUDGMENT

Rule 30. Sentence and judgment. The next group of rules relates to judgment and consists of Rules 30 and 31. The most significant features of Rule 30 relate to the pre-sentence investigation. Subdivision (c) (1) requires the probation service of the court to make a pre-sentence investigation and report before the imposition of sentence or the granting of probation, unless the court otherwise directs. This investigation is to be made after determination of the question of guilt, unless the defendant consents in writing that it be made earlier. Under present law the probation officer investigates cases only when they are referred to him, and the law does not prescribe the scope of the pre-sentence investigation. The proposed rule in subdivision (c) (2) contemplates that the report will present a thorough social case history of the defendant, such as may be of aid in imposing sentence, granting probation or providing for correctional treatment.

No doubt much more remains to be done to modernize our laws and procedure with reference to the correctional treatment of criminals. The Federal Corrections Act, recommended by Judge Parker's committee, carries this program much farther. But at least the proposed rule is in line with the modern trend and is a step in the right direction.

Subdivision (c) (2) also provides that after determination of the question of guilt the report shall be available to the attorneys for the parties, and to such persons or agencies having a legitimate interest therein as the court may designate, and upon such conditions as the court may impose. There is a substantial difference of opinion as to whether the probation reports should be treated as confidential. It has been argued that probation officers will not be able to obtain information with respect to defendants unless they can assure their informers that the information will be treated as strictly confidential. For example, information may have to be obtained from a defendant's wife, and the subsequent revelation of such information might well be the cause of marital strife. Where a report reflects an incurable mental disorder, disclosure to the defendant may mean serious psychic trauma. Certainly it seems that there is much to be said for striking the clause

that would authorize disclosure of the report "to such other persons or agencies having a legitimate interest therein." Whether the report should be made available to attorneys for the parties seems to me to present a close question.

Rule 31. Relief from judgment or order. The principal changes in this rule are:

(1) Subdivision (a) permits the correction of errors in the record "arising from oversight and omission" at any time. Disabilities resulting from the expiration of a term of court are thus removed.

(2) Subdivision (b) provides that the court may reduce a sentence without regard to whether the term has expired, upon motion made within sixty days after sentence, or within sixty days after receipt by the district court of a mandate upon affirmance, or within sixty days after the receipt of an order of the Supreme Court denying an application for writ of certiorari.

(3) Subdivision (c) provides that a motion for a new trial based solely upon the ground of newly discovered evidence may be made at any time before or after final judgment, but if an appeal is pending the court can grant the motion only on remand of the case. A motion based solely upon grounds other than newly discovered evidence must be made within three days after verdict, or finding of guilty, or within such further time as the court may fix during the three-day period.

(4) Subdivision (d) provides that the court may arrest judgment if the indictment or information does not charge an offense, or if the court was without jurisdiction of the offense charged. The motion in arrest shall be made within three days after verdict, or finding of guilty, or within such further time as the court may fix during the three-day period.

Subdivision (b) has been criticized on the ground that it will submit judges to continual applications for reduction of sentence. It appears reasonable to extend the power of a judge to reduce a sentence imposed after a trial held near the end of a term, and, on the other hand, to put a limit on the reduction of sentence in cases where the term will run for an extended time following sentence.

The rule certainly recognizes and extends the tendency to do away with the significance of the term of court. It makes no express provision for relief comparable to that available under the common law writ of error *coram nobis*, which permitted reopening of a judgment at any time to consider allegations of error of fact not apparent on the face of the record. However, the note expressly states that nothing in the rule

limits existing power of the court to grant any type of relief from judgments or orders not expressly provided for in the rule. The Supreme Court has not finally determined whether relief comparable to the common law writ of *coram nobis* is available in federal criminal cases.

SUPPLEMENTARY AND SPECIAL PROCEEDINGS

Rule 32. Removal. The next group of rules relates to supplemental and special proceedings and includes Rules 32-34. The most important features of Rule 32 are:

(1) It provides that only a defendant found in a district in another state a hundred miles or more from the place where the warrant was issued need be removed. This conforms to the modifications with respect to execution and service of warrants and summonses, provided in Rules 4 and 10.

(2) Where a certified copy of an indictment is produced it need be supplemented only by proof of identity, and where a certified copy of an information or complaint is relied on it must be supplemented by proof of identity and of probable cause.

Serious consideration might be given to the question whether it is desirable to hold preliminary removal hearings before a commissioner. This is the present system, but in practice it has developed into two hearings; one before the commissioner, and another before the judge. It might save time for everybody if the rule should provide that if a defendant does not waive a hearing, such hearing shall be held forthwith before a judge.

The provision that when prosecution is by indictment removal shall be ordered upon production of a certified copy of the indictment and proof of identity is especially commendable. As is well known, the practice has developed in some districts of practically trying the case on the merits before ordering removal. But where a grand jury of another district has regularly returned an indictment, and the identity of the defendant is established to the satisfaction of the court where he is found, removal should automatically follow. Where prosecution is by information, it seems appropriate to require a showing of probable cause, but even then the court should not require more than a showing of probable cause.

Rule 33. Search and seizure. This rule is substantially similar to existing legislation dealing generally with search warrants. It expressly provides that property subject to confiscation will not be returned even in cases of unlawful search, and makes explicit the present practice of

suppressing illegally obtained evidence. Provision is also made for review by the district court of decisions by a commissioner or judge concerning the return of property or the suppression of evidence. The rule would not supersede the numerous statutes dealing with search and seizure in particular types of cases or under particular circumstances.

In subdivision (e), relating to the motion for return of seized property and to suppress evidence, it is provided that the hearing on such motion may be held by the judge or commissioner. While provision is made for review by the district court of any decision by a commissioner, there is a question whether the matters presented by such motion should be heard by commissioners. These questions involve vital constitutional rights and often present difficult legal questions within the competence of a judge only to determine. It may therefore be suggested that such motions should be heard by district judges only, and that the rule should be amended in this respect.

Rule 34. Criminal contempt. This rule substantially restates the existing law on criminal contempt in so far as the right to notice and hearing and the right to jury trial are concerned. In cases of summary punishment without notice or hearing, the judge is to certify that he saw or heard the conduct constituting the contempt, and that it was committed in the actual presence of the court. In cases where the proceeding is by notice and hearing, the notice shall state the essential facts constituting the alleged criminal contempt, and describe it as such. When the alleged contempt consists of disrespect to or criticism of a judge, that judge shall be disqualified from presiding at the trial or hearing except with the defendant's consent.

This rule, in effect, covers proceedings where a defendant is not entitled to a trial by jury under the doctrine of *Nye v. United States*.[22]

APPEAL

Rule 35. Taking appeal and petition for writ of certiorari. The next group of rules covers the subject of appeal and includes Rules 35-37, inclusive. The principal changes made by Rule 35 are:

(1) In subdivision (a) (1) petitions for allowance of appeal, citations, and assignments of error are abolished, and it is provided that the notice of appeal shall set forth all of the essential matters. A juris-

[22] 313 U. S. 33, 61 S. Ct. 810 (1941).

dictional statement is required, as at present, where the appeal is made directly to the Supreme Court.

(2) Subdivision (a) (2) provides that an appeal by a defendant may be taken within ten days after the entry of the judgment or order appealed from. But if a motion for a new trial has been seasonably made, an appeal from a judgment or conviction may be taken within ten days after the entry of the order denying the motion. Thus, the time for a defendant to appeal is enlarged from five to ten days. Appeals by the government must be taken within the thirty-day period now prescribed by statute.

(3) Petition for writ of certiorari shall be made within thirty days after entry of the judgment, or within such further time, not exceeding thirty days, as the court or a justice thereof may fix.

Rule 36. Stay of execution and relief pending review. The principal points here involved are:

(1) Subdivision (a) (1) provides that a sentence of death shall be stayed if an appeal is taken.

(2) Subdivision (a) (2) provides that a sentence of imprisonment shall be stayed if an appeal is taken and the defendant elects with the approval of the court to remain in detention pending appeal, or is admitted to bail. The effect of this is to require that an affirmative step be taken by the defendant if he desires a stay.

It has been suggested that the rule should be amended so that if the conviction is affirmed the defendant shall get credit on his sentence for all time spent in jail, irrespective of whether he elected to commence serving his sentence prior to affirmance. Such amendment would apply where the defendant elects to remain in detention during appeal and ultimately loses his appeal.

Subdivision (c) provides that if application is made to the circuit court of appeals, a circuit judge or a justice of the Supreme Court for bail, or for extension of time for docketing the record, or for any other relief which might have been granted by the district court, the application shall be upon notice, and shall show that application to the district court is not practicable, or has been made and denied, with the reasons given for the denial, or that the action of the district court on the application did not afford the relief to which the applicant considers he is entitled.

Rule 37. Supervision of the appeal by the appellate court. Subdivision (b) (1) provides that the rules of practice governing preparation and form of record on appeal in civil cases shall apply to the record

on appeal in criminal proceedings, which means that a bill of exceptions is no longer required.

Subdivision (b) (2) provides that 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, and the appellant may set forth in an appendix to a reply brief such additional parts as he desires the court to read, in view of the appellee's brief. If the appellate court thinks the appellant has failed to print as much of the record as adequately presents the questions raised by him, it may impose as costs the expense incurred by appellee in printing the omitted matter.

It is provided in other subdivisions of this rule that the circuit court of appeals may dispense with the printing of the record and review the proceedings on the typewritten record, and appropriate provisions are made for docketing the appeal, summary disposition for nonpayment of fees, and setting the appeal for argument.

The provision eliminating the necessity of printing the record on appeal in a separate volume embodies the practice which has been adopted in several circuits, and there found satisfactory. A minority of the Advisory Committee criticized the practice on the ground that it does not provide for a continuous printed record, and suggested that this objection could be overcome by providing that the appellant and appellee should in turn designate the portions of the record on which they rely, all of which should be printed in continuous form in a single volume.

Some of the circuit judges in western circuits covering many states and sparsely populated territory have objected that the local printing service is inadequate in many localities where the parties live, and that the printing of the appendices could not be done to the satisfaction of the court by these local printers, whereas the court's contract printer can do a much better job. Conceivably, the situation in this regard may be very different, for example, in the Tenth Circuit than it would be in the Third.

There is some question whether this matter of how the record shall be printed should be the subject of an enforced uniform practice throughout the country, or whether each circuit should be left free to

deal with it as local printing and other conditions may dictate. The present rule does not in terms make the practice now used in the Third and a few other circuits mandatory on all, although it strongly suggests that a uniform practice is desirable.

GENERAL PROVISIONS

Rule 38. Presence of defendant. The last group of rules contains various general provisions and includes Rules 38-56. Rule 38 clarifies the law concerning the stages of a proceeding at which a defendant *is entitled* to be present, and those at which he *must* be present. It provides *inter alia*:

(1) In all non-capital cases the defendant's voluntary absence after the trial has commenced in his presence shall not prevent continuing the trial and including the return of the verdict.

(2) A corporation may appear by counsel for all purposes.

(3) In misdemeanor cases the court may, with the written consent of the defendant that counsel shall act for him, permit arraignment to be had and a plea of not guilty to be entered, or the trial to be conducted in the absence of the defendant.

Rule 39. Counsel for the defendant. This rule simply provides that if the defendant appears in court without counsel the court shall advise him of his right and assign counsel to represent him, unless he requests to proceed without counsel or is able to obtain counsel of his own choice.

Rule 40. Place of trial. The principal changes in this rule are:

(1) In a district containing more than one division arraignment may be had, a plea accepted and the trial conducted or sentence imposed, if the defendant consents, in any division of the district and at any time.

(2) Where a defendant is arrested in a district other than the one in which the indictment or information is pending, and desires to plead guilty or *nolo contendere*, he may, if represented by counsel, consent to and have his case disposed of in the district in which he is arrested, subject to the approval of the United States Attorney for each district.

These two provisions should result in a very considerable saving of time and in greater flexibility of administration, especially in districts where terms of court are few and far between.

(3) On motion of the defendant the court may transfer a proceeding to another district or division if (a) there exists in the district or division where the prosecution is commenced so great a prejudice

against the defendant that he cannot there obtain a fair and impartial trial; or (b) the indictment or information alleges an offense committed in more than one district or division, and in the interest of justice the proceeding should be transferred. These are desirable changes. It is not easy to see why change of venue should not be possible in federal practice as in the practice of most states, and these provisions may prove helpful in working out a better answer to the always vexing problem of venue in involved conspiracy cases.

Rule 41. Time. This rule provides a uniform method of computing time. The most significant portion is subdivision (c), which provides that the period of time for the doing of any act or the taking of any proceeding is not affected by the expiration of a term of court, and that the power of a court to do any act or take any step in a case pending before it shall be unaffected by the expiration of a term of court.

Rule 42. Bail. This rule clarifies and simplifies the existing procedure. The chief features and changes are as follows:

(1) Subdivision (b) deals with commitment and bail for material witnesses. It provides *inter alia* that the release of such witnesses may be ordered whenever the court or commissioner finds that they have been detained for an unreasonable length of time.

(2) Subdivision (d) provides a uniform rule governing the form of bail and the types of security which may be required.

(3) Subdivision (e) provides that every surety other than a corporate surety shall be justified by affidavit, and may be required to describe in the affidavit the property in respect to which he proposes to justify, and to set forth the encumbrances thereon, the number and amount of other bonds and undertakings entered into by him and remaining undischarged, and all his other liabilities.

(4) Subdivision (f) distinguishes between discharge and remission of a forfeiture, and makes express provision for both. In the event of a breach of condition of a bond the declaration of forfeiture is to follow automatically, subject to later discharge or remission. Subdivision (f) (3) prescribes a simple enforcement procedure by motion, obviating the necessity of an independent action. It is also provided that by entering into a bond the obligators submit to the jurisdiction of the district court and irrevocably appoint the clerk as their agent upon whom any papers affecting their liability may be served.

Subdivisions (d), (e) and (f) of the rule raise some serious questions. Some months ago a survey of the bail bond situation in the federal courts was conducted on behalf of the Department of Justice. Sev-

eral million dollars on bail forfeitures and judgments were found to be outstanding, about ninety percent of which appeared to be worthless.

The reasons why they were worthless have a direct bearing on the procedure outlined in the proposed rule. An utter lack of uniformity with respect to methods and standards for qualifying sureties was found to exist. In the great majority of cases of uncollectibility the system for qualifying had simply been inadequate. As the rule is now drawn subdivision (e) would leave the most material requirement to the discretion of the officer taking the bond, which might well mean going on with the old system of having the surety state his net worth. The trouble with this is that it often turns out that he has no property upon which an execution could be issued with any hope of recovery. His property turns out to be community property or subject to dower rights, life estate or some other complication. If the property is unencumbered there is nothing to prevent him from encumbering or disposing of it before judgment. It is suggested, therefore, that subdivision (d) be amended to require that the bond shall be on a form approved by the Attorney General which shall be uniform in all districts, and include justification of sureties as a part of it; and that the word "shall" be substituted for the word "may" in subdivision (e).[23] It is also suggested that subdivision (f) (3) be amended to provide that by entering into a bond the obligators thereby create a lien on all their property real and personal whether listed on justification or not, and agree that the same will not be further encumbered or disposed of without permission of the court until the bond is discharged.

Paragraph 4 of subdivision (f), dealing with remission, appears similarly inadequate in the light of conditions disclosed by the survey. Under this paragraph a surety can come in long after final judgment and file a petition for remission. This possibility of remission should be limited, if not to the time before final judgment, at least to some reasonably short period. In one district, for example, the United States Attorney's office followed a practice after terms of court of sending out notices to sureties whose principals had wilfully defaulted, suggesting that they come in and file petitions for remission. On the docket of that same court hundreds of cases where forfeitures had been set aside on condition that the surety pay twenty-five dollars were found, and even this was not collected. Disinclination to penalize a surety for several thousand dollars where, if the defendant had appeared and pleaded

[23] Preliminary Draft 183, line 59.

guilty his fine would have been much less, was an attitude not infrequently encountered.

Rule 43. Motions. This rule deals generally with motions and provides that a motion may be supported by affidavit, thus removing any objection to a "speaking" motion.

Rule 44. Dismissal. This rule provides that the Attorney General or the United States Attorney may file a dismissal of an indictment or information, and that such dismissal shall be accompanied by a statement of reasons. Such a dismissal may not be filed during trial without the consent of the defendant.

The requirement of a statement of reasons is open to question. This should be discretionary with the government. The reason for dismissal may be the final judgment of the prosecutor that the evidence is insufficient to convict. Perhaps it is planned to seek another indictment and it would be prejudicial to the government to disclose the weakness of its former case. One can readily think of other reasons why the government should not be required to state the reason for dismissal. The imposition of this requirement might have the effect either of preventing the dismissal of indictments that should be dismissed or encouraging the assignment of reasons which do not in fact constitute the true or principal reason for dismissal.

Rule 47. Exceptions unnecessary. 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 court and the grounds therefor; and, if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 48. Harmless error and plain error. The chief features are as follows:

(1) Superseding that portion of 28 United States Code, section 391, dealing with "technical errors, defects, or exceptions which do not affect the substantive rights of the parties" and that portion of 18 United States Code, section 556, dealing with "any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant," subdivision (a) of the rule provides that any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded.

(2) Subdivision (b) states the doctrine of plain error by providing

that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

A minority of the Advisory Committee thinks that this rule relaxes the *duty* of appellate courts to notice plain error, and they recommend that the rule be made to read that "plain errors and defects affecting substantial rights *shall be noticed* although they are not brought to the attention of the court."[24]

The remaining Rules 49-56, with the exception of Rule 50, relate to more or less routine matters. Rule 50 relates to the application of these rules, and exceptions to their application.

The draft as a whole is already provoking much discussion. Numerous criticisms and suggestions have already come from local associations of bench and bar throughout the country. The stimulation of such widespread discussion and consideration is indeed an essential feature of the rule-making procedure. The Advisory Committee will have a rich store of constructive suggestions to draw from when in its final revision. Out of it all should develop a set of rules which will constitute a great landmark in the administration of criminal law.

[24] Italics supplied.