.ITTEE ON RULES OF CRIMINAL PROCEDURE

UNITED STATES SUPREME COURT

Washington, D. C.

Monday, May 18, 1942.

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ADVISORY COMMITTEE ON RULES OF CRIMINAL PROCEDURE

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The Advisory Committee met at 10:15 o'clock a.m., in room 147-B, Supreme Court Building, Washington, D. C., Arthur T. Vanderbilt, presiding.

Present:

Arthur T. Vanderbilt, Chairman

James J. Robinson, Reporter

Alexander Holtzoff, Secretary

Leland Tolman, Assistant Secretary

George J. Burke

Gordon Dean

George H. Dession

George Z. Medalie

Lester B. Orfield

Murray Seasongood

J. O. Seth

John B. Waite

Hugh D. McLellan

G. Aaron Youngquist

George Longsdorf

P R O C E E D I N G S

The Chairman (Arthur T. Vanderbilt). Since our last meeting, gentlemen, the Subcommittee on Style, made up of Mr. Medalie, the Chairman, Mr. Wechsler, Mr. Dession, Mr. Dean, Mr. Youngquist, and Mr. Holtzoff, aided by Mr. Robinson and Mr. Tolman and Mrs.Peterson, has had several very lengthy and very arduous sessions, with the result that we have our fourth tentative draft before us.

Inasmuch as we are all familiar with the subject matter of most of these rules, I am going to suggest, if it meets with your approval, that we simply call the number of the rule and then call for comment on the rule, rather than call on the reporter to expound. If that plan meets with your approval, we shall turn to Rule 1.

I may say that I did not sit with the subcommittee, because I wanted to be in an absolutely impartial position, so that I would not become unconsciously the defender of their work, but would be in the same position as the other members of the committee with regard to that.

Are there any suggestions with regard to Rule 1? It will be tentatively passed.

Rule 2 (a).

Mr. Dession. Excuse me, Mr. Chairman. I have one question on Rule 1.

notes.

Mr. Holtzoff. That is regulated by statute. That is really substantive law.

Mr. Dession. I know that. There is a further question, of course, as to how you do it when it is proper. I simply want to raise the question as to whether we want to place that here or not.

Mr. Robinson. The placing of it here is due to the action of the committee in dropping removal proceedings and requiring that this sentence, on line 4, beginning with, "and insofar as," should take the place of the old rule in the tentative draft.

The Chairman. You really raise the question at the moment, without making a motion?

Mr. Dession. That is right. I have no motion in mind.

The Chairman. All right.

Rule 2 (a). Are there any questions?

Rule 2 (b), subparagraph (1).

Mr. Longsdorf. Mr. Chairman, I would like to raise a question about the language in line 17 of Rule (b) (1). The same phrasing occurs in subsection (2):

> "Any Act of Congress locally applicable to and in force in the District of Columbia."

It contains a good many things that district courts in the United States as such have nothing to do with. I am not

by these rules, so that the District Court for the District of Columbia will have the same procedure as the other 84 district courts. That was the intention.

Mr. Longsdorf. Well, that is satisfactory to me, Mr. Chairman, but I mention it in this connection because the same language occurs over in subsection (2) under (b), and the situation is not quite the same, I think.

The Chairman. Can we hold that, then, until we come to (2)?

Mr. Longsdorf. It is line 29, over on the next page, if we are ready to take that.

The Chairman. Are there any further questions on subsection (b) (1)?

If not, we will go on to (b) (2). Will you raise your question, Mr. Longsdorf?

Mr. Longsdorf. Yes. I raised it before. I do not want to create a nuisance value for myself, but they have a lot of local laws up there that are really territorial laws. In some of these territories, in outlying possessions, those laws emanate from Congress, and in some from territorial legislators, and they cover a lot of minor local crimes that district courts of the United States as such will have nothing to do with.

The four district courts in Alaska, for instance, are courts of Alaska, but they are also district courts of the [illegible]. There was some correspondence from up there,

district court in Puerto Rico. The district court in Alaska, and also in the Canal Zone,handles all criminal offenses just as the District Court in the District of Columbia. The rule as it is now framed would cover all offenses that are tried within those courts.

Obviously, it would be highly undesirable to have two sets of procedure in the same court, especially as sometimes in one indictment there might be a count for violation of a territorial statute joined with a count under an Act of Congress of general application, like the mail fraud statute, and so forth.

Correspondence shows that there is a difference of opinion among some of the folks in Alaska and the Canal Zone as to whether or not the new rules should be applicable there; and one advantage of putting the rule in as it is now is that after these rules have circulated, if there is any feeling in Alaska that they should be excluded, they will have an opportunity to bring forward their views on that point, whereas if we exclude Alaska, they will have no opportunity to bring forward their views on that point.

Mr. Longsdorf. There is a great deal of force in that point, but there may be--I know there are--a lot of crimes in Alaska which are not prosecutable by information. If we bring them under the umbrella of these rules, they will have to call a grand jury to indict them up there, and that would be

imprisonment, and if they are punishable by less than a year's imprisonment they are prosecutable by information in the States also.

Mr. Longsdorf. As I remember the criminal procedure of Alaska, having read it, you can use an information up there under the territorial laws in any case where you can use an indictment. You have got to watch out for that, I think.

The Chairman. We will undoubtedly hear from them.

Mr. Longsdorf. We undoubtedly will, and if we are sure to get it right by that means, I have no further objection to it.

The Chairman. Suppose we also note this point for consideration, but you do not make any motion, as I understand?

Mr. Longsdorf. I have made no motion.

The Chairman. Are there any further questions?

If not, we will turn to Rule 3.

Mr. Dession. Again, Mr. Chairman, this is a question of phrasing, I think. As I read it, we make the terms "judge" and "court" synonymous. I am thinking of line 26, "or a judge thereof."

Now, I am not quite sure whether that works right or not. As we go through our rules, a judge as a judge cannot do anything that a court as a court can do. I do not think we intend that, do we?

Rule 3 (b) (1) also

Perhaps Mr. Dession's suggestion could be secured by inserting the words "or a district judge" in line 21.

Mr. Dession. You would still have the same problem. I was thinking of a judge who is not sitting as a court. Under the present practice I gather there are some things which he can do and some things he can do only as the court when the court is in session. Now, this would seem to wipe out this distinction and leave it entirely to a judge's discretion as to whether he would function on some things as a court.

Mr. Holtzoff. Rule 2 (b) (1) is an exact reproduction of a corresponding civil rule. If you insert the words "or a district judge," that same differentiation should be in Rule (b) (2). Wouldn't that cure your point?

Mr. Dession. I do not think so, because it reads,

> "Whenever in these rules reference is made to a district court of the United States, the reference includes the District Court for the Territory of Alaska, the United States District Court for the Territory of Hawaii, the District Court of the United States for Puerto Rico, the United States District Court for the District of the Canal Zone, the District Court of the Virgin Islands of the United States, or a judge thereof."

You can read that two ways.

Mr. Robinson. I think, before we take further considera-

and if that seems inadequate, after further study on it we will have to change it some other way.

TheChairman. In my State we have always had that as a matter of law. A judge may do anything a court can do, even in a Supreme Court.

Mr. Dession. That is our first problem: Is that what we want? This had just occurred to me. I have no conclusion on what we should want.

The Chairman. Should not we get away from the notion that a judge should be sitting on a bench before he can do those things? How do you feel about that, Judge McLellan?

Mr. McLellan. I should like to leave it just as it is.

The Chairman. Are there any practical disadvantages of that?

Mr. Dession. I do not have any in mind. All I am really concerned with right now is being sure that it says what we want. As it stands I think it gives you the result that you have in your State. I have no objection to that.

Mr. Burns. Are there any existing rules which limit the judicial power in cases where a judge is not actually sitting?

Mr. Holtzoff. Certain rules require certain things to be done in open court, so that is limited that way. For instance, we require that all trials shall be in open court and imposition of sentence shall be in open court.

Th. Chairman. Subject to those express provisions, there

back to various floors and from their chambers to do almost mechanical things.

Mr. Robinson. I should like to add that there are rather extensive notes on Rule 1 and Rule 2 which have been prepared by Mrs.Peterson, with the help of some others, and those will be available this afternoon for further consideration in connection with these new rules. They are mimeographing them for me at this time.

The Chairman. Are there any further questions on any part of Rule 2?

If not, we will proceed with Rule 3.

Mr. Robinson. I would like to make one suggestion, having in mind the discussion I had with Mr. Holtzoff. On line 6, strike out, "to place him under bond," and substitute, "to admit him to bail."

I believe that is more consistent with the expression elsewhere.

The Chairman. Is there any objection to that?

Mr. Longsdorf. May I ask a question? Isn't there a provision in one of the later rules for taking a bond in the case of a summons, wherefor the word "bail" would be slightly inaccurate?

Mr. Holtzoff. "Bail" includes "bond."

Mr. Longsdorf. Yes. I am not quibbling on words, but I

"Bail", I believe, includes bond and recognizance and undertaking and cash.

The Chairman. Is there any objection to Mr. Robinson's proposed change? If not, it will be regarded as accepted.

Are there any further questions on 3 (a)?

If not, we will move on to 3 (b).

Mr. Robinson. I should like to suggest there that you consider whether or not "so far as applicable" should be stricken at the end, substituting for it "with respect to form, contents, and amendment."

The reason for the suggestion is that "so far as applicable" is a sort of catch-all clause and perhaps is not specific enough. I believe that what is meant is the matter of form and of content and of amendment.

The Chairman. What else could it be?

Mr. Medalie. The complaint would not be in the same form as the motion. The complaint would be in the form of an affidavit. If you will recall, before we broke up at our last session, it was suggested that provision be made, if I recall this correctly, for the filing of an affidavit setting forth the facts which would constitute a particular offense.

Do you recall that, Mr. Youngquist?

Mr. Youngquist. I know there was some discussion about it, but I do not know what the result was.

being an affidavit setting forth the elements constituting the offense of knowledge or on information, giving the source of the information. Nothing appears here, and that is why I raised the point at our last afternoon's session. Others may not know that, because their States might not have such provisions.

Mr. Holtzoff. I am wondering whether we need (b) at all. I am inclined to think that we do not have to say anything about the form of the complaint. I have some doubt as to whether we can say "an information," because an information is just an accusation, whereas a complaint is an affidavit; but if that is so, I would go still further and be inclined to strike out the entire provision.

Mr. Medalie. I agree that (b) can go out in its present form, but I think there should be a definition defining "complaint."

4 The Chairman. I thought we agreed not to have any. Why would not form take care of that?

Mr. Medalie. You might have something about an affidavit that sets forth facts of knowledge. There is a practice in which someone makes an affidavit, using the language of the statute. I do not believe that anybody ought to be arrested on an affidavit in the language of the statute, where obviously the affiant cannot have the knowledge or does not profess to

contents, and amendments, you will find that discussed in Rule 8.

You will recall that as to nature and contents, to help Judge Crane, we simply provided that the indictment or information shall be a plain, concise, definite statement of the essential facts constituting the offense charged. There has been some confusion in Federal cases, I think due to the inadequacy of complaints, merely to state the offense charged, and I thought it would be well to call attention to that to tighten up procedure with regard to complaints.

Mr. Holtzoff. I do not see howyou can have complaints, because a complaint is an affidavit. You cannot have an affidavit --

Mr. Robinson. You can reswear an affiant.

Mr. Holtzoff. You would have a new complaint.

Mr. Medalie. I think that presents no difficulty. I think it would be better if we said:

> "The complaint shall on oath contain a plain, concise, and definite statement of the essential facts which constitute an offense."

Mr. Holtzoff. I move that we adopt that.

The Chairman. Let us get it clear for everybody.

Mr. Robinson. An Appendix of Forms, Form 3, is an effort to carry out what you are referring to in the discussion of [illegible] discussion, it was that we have

my old age if I got a job as a United States Commissioner and someone presented a complaint like this, I would decline to issue a warrant on it, on the ground that obviously he is stating conclusions and nothing of his own knowledge. By default, it is done that way.

Mr. Robinson. The point I want to call your attention to is that the body of that statement is exactly the same as the preceding provision. You feel a complaint could not be brought that way?

Mr. Medalie. I was brought up in the old school that you cannot do anything unless you knew of it as a fact.

Mr. Holtzoff. I move that we adopt the text suggested by Mr. Medalie.

The Chairman. Will you repeat that?

Mr. Medalie. "The complaint shall on oath contain a plain, concise, and definite statement of the essential facts which constitute an offense."

The Chairman. Would you like the words "set forth" rather than "contain"?

Mr. Robinson. Why not "shall be"?

Mr. Medalie. "And shall be on oath."

Mr. Holtz. "And shall set forth."

Mr. Medalie. Suppose the affiant makes a verbose complaint and you cannot dismiss the complaint for prolixity.

[illegible] so? Why plain and concise?

Mr. Youngquist. Is the other any more than gesture?

Mr. Medalie. No.

Mr. Holtzoff. Will you read that again?

Mr. Medalie. "The complaint shall be on oath taken before the committing magistrate." Otherwise you come in with a complaint issued by the notary public.

Mr. Robinson. That is done under present law.

Mr. Medalie. That differs with what we do in every State that I know of. The way in which warrants are gotten is that somebody appears before the magistrate, and, theoretically, the magistrate examines it. He used to, before we developed the clerical system. Then the magistrate writes out what the affiant has to say or the complainant has to say, and he prepares and affidavit and swears to it. There is a responsibility involved that the man has appeared. If you go to a notary public and get an affidavit and submit it to a magistrate, that responsibility for examination where it is indicated is dispensed with; and I do not think it ought ever to be dispensed with.

Mr. Holtzoff. I think the proper practice is to swear that the complaint is sworn to before the magistrate who issues the warrant.

Mr. Youngquist. I think we agreed in one of our meetings in New York that that should be the rule, whether it is or not.

committing magistrate."

Mr. Medalie. That would meet everything I had in mind, including the gesture, which seems essential here.

The Chairman. Do we need all three adjectives?

Mr. Youngquist. The three adjectives are in the description of the information and indictment, Mr. Chairman. That is where I included them there.

Mr. Holtzoff. As a matter of fact, you do not need any one of the three, but it corresponds to the other rules.

The Chairman. I am just wondering how one distinguishes between plain, concise, and definite.

Mr. Holtzoff. I think there is more reason for putting in those words with reference to an indictment than there is with reference to a complaint, because complaints are informal and you do not take the time to make them concise.

The Chairman. I still do not see the reason for all the words. They all mean one thing.

Mr. Youngquist. I think we probably took the adjectives from the civil rules.

Mr. Medalie. I think the word "essential" meets all your needs, as a matter of fact:

"The complaint shall be a statement of the essential facts constituting the offense charged."

If the district attorney or the post office inspector or [illegible] to sit down and write an essay, that is

that we wanted to use admonitory language which might serve to abbreviate the unnecessary length of the documents that we sometimes have in criminal proceedings. We are not specifically saying that there shall be used a short form of indictment, but we are in effect admonishing the prosecuting attorney to be plain and to be brief and to be concise.

Mr. Longsdorf. How about substituting the definite article "the" for the indefinite article "a"?

Mr. Medalie. "Constituting an offense," without using the word "charged." Otherwise you imply that you name the offense.

Mr. Longsdorf. If the district attorney wants to --

Mr. Holtzoff. District attorneys do not draw complaints.

Mr. Longsdorf. But they draw informations.

Mr. Holtzoff. A complaint is frequently drawn by a person who is not a lawyer, and so long as it sets forth an offense, you cannot hold him down.

Mr. Longsdorf. Let us put it: "The complaint must charge an offense, but the information should charge the offense."

Mr. Holtzoff. The suggestion is we strike out the word "charged," and substitute "constitute an offense."

Mr. Longsdorf. And drop the word "charged."

Mr. Robinson. Would it be the same thing when we come to information?

the part of the scribbler and give him a little liberty. If he charges an offense, it takes it in.

Mr. Robinson. It is still the same offense.

Mr. Medalie. There is nothing in there about its being in writing, and, of course, it ought to be. I would like to make this motion now.

Mr. Youngquist. Before you come to that, we do not have anything of that sort in our description of the indictment or information, which also, of course, must be in writing.

Mr. Holtzoff. Don't you think that that is understood?

Mr. Medalie. No.

Mr. Youngquist. I think it is superfluous.

Mr. Medalie. The practice indicates it is understood, but you do not say so.

Mr. Robinson. That is where the words, "plain, concise, and definite" come in.

Mr. Medalie. I would like to make a motion that Rule 3 (b) read:

> "The complaint is a written statement of essential facts constituting an offense and shall be sworn before the committing magistrate."

Mr. McLellan. I think "shall be" is better than "is."

Mr. Medalie. I had that in mind, too. I thought that "a" should be "the," and "the" should be "a." That is why I think

The Chairman. May we have that read again?

Mr. Medalie. "The complaint is a written statement of essential facts constituting an offense and shall be sworn before a committing magistrate."

Mr. Youngquist. "Sworn to" would be better.

6 Mr. Medalie. All right, "sworn to."

The Chairman. Haven't we used the language "shall be" all the way through here?

Mr. Robinson. Yes, I agree with Judge McLellan on that. I think we should try to preserve some resemblance.

Mr. Medalie. I succumb to that.

The Chairman. Are there any further remarks on this motion?

All those in favor say "Aye." Opposed, "No."

The motion is carried.

As I understand it, that is a substitute for Rule 3 (b).

Mr. Medalie. I now move that (a) be transposed.

Mr. Robinson. I should like to say in that connection that effort has been made to follow the same order, which was the instruction of this committee at perhaps two or three previous meetings, as was followed in Rule 8 with regard to indictment and information.

We started out with the idea of definition first and then use, and we wound up with what I think is a very good rule and

Then we go into the second part, which has to do with nature and contents.

It seems to me that where we are discussing in this rule on complaint the written accusation, the same points might well apply in this regard, as we adopted them in regard to the information.

The Chairman. It is a short rule. Nobody is going to get lost.

Mr. Medalie. What about the headings for (a) and (b)?

Mr. Dean. There should be a new one on (b).

Mr. Holtzoff. I am inclined to think that we ought to combine (a) and (b), they being so short, and make them just one paragraph. Strike out the subheading and then just keep the same heading of Rule 3.

Mr. Medalie. I think so.

Mr. Holtzoff. I so move.

Mr. Dean. I second it.

Mr. Longsdorf. In that event, both subheadings go out.

Mr. Dean. Both subheadings go out, and we have only one paragraph. We will have a paragraph of two short sentences.

Mr. Longsdorf. I suppose there would be no objection to paragraphing it when it gets into print?

Mr. Dean. I think it would be unwise to have paragraphs if you do not have separate headings.

motion say "Aye". Opposed, "No." Carried.

Mr. Youngquist. May I have the language of that? "All the essential facts"?

Mr. Medalie. "Of essential facts constituting an offense."

Mr. Youngquist. The offense which is charged?

Mr. Medalie. No. "Charged" is out. It does not matter what offense is charged.

Mr.Youngquist. I think "the" ought to be in. Whatever offense you do charge, it ought to have the essential facts constituting that offense. It is just a matter of English.

Mr. Medalie. I had the same thing in mind, and I thought we met that with a view to avoiding technicality in form. In other words, if the complaint contained a simple narration of facts and those facts were essential to an offense -- any offense -- that would make a good complaint.

Mr. Youngquist. I am not inclined to question it.

TheChairman. We move on to Rule 4. Rule 4 (a).

Mr. Robinson. Mr. Youngquist, I believe you have a suggestion on the first line, do you not? Mr. Youngquist made the suggestion that following the word "complaint" there be added "against a person not in custody."

Mr. Youngquist. I do not seem to have it here, but I recall what it is. The warrant may be issued, of course, upon [illegible] oftentimes a defendant is arrested

Mr. Youngquist. Where did that come in?

Mr. Robinson. At the beginning of line 2 insert "against a person not in custody."

Mr. Holtzoff. It is not line 2, is it? It is line 1.

Mr. Robinson. It is the same thing.

I believe you suggested that following the word "warrant" it would be well to have the word "thereon."

Mr. Holtzoff. I do not like the word "thereon."

Mr. Youngquist. You do not need it. I do not think that is particularly important. I made the suggestion.

Mr. Holtzoff. I have in mind that words like "thereon" are a little ponderous.

Mr. Robinson. Mr. Holtzoff suggested that in line 5 the word "other" be stricken out and the words "law enforcement" be substituted.

Mr. Seth. The same follows in 8, I imagine.

Mr. Robinson. Yes.

Mr. Medalie Is a postal inspector included in that?

Mr. Holtzoff. The words "law enforcement officer" are not words of art. They are generally understood to mean officers who are charged with the duty of investigating crimes and apprehending offenders. I did not like the word "officer" used without vast limitation, because lots of government employees have the status of officers who never had any power

are a lot of minor officials. Any person who holds a statutory position is technically an officer of the United States. There are thousands of people like that.

Mr. Seth. Would not the words "authorized officer of the United States" take care of that?

Mr. Robinson. How authorized, Mr. Seth? This is rather new, I think.

Mr. Seth. We have the words "any other officer of the United States." That certainly covers a multitude in this day and generation.

Mr. Medalie. I think a post office clerk or a letter carrier ought to be able to appear before a commissioner and swear a complaint and get a warrant that he can turn over to a marshal, ought he not?

Mr. Robinson. That is not what is said here. This has to do merely with issuance of a summons. You may recall our discussions on that point.

Mr. Medalie. What about representatives of the State Department?

Mr. Holtzoff. I perhaps differ from you on that point. I do not think you ought to encourage indiscriminate filing of complaints on the part of officers or government employees who are not charged with the duty of investigating crimes or making arrests.

employee or officer of the United States is not involved. Suppose you hit me in the nose in the Federal Court House or Post Office Building. I would have a right to have process issued against you, and I can go only to the Federal authorities for it. Why shouldn't I go before the committing magistrate? Why shouldn't he have the right, like a city magistrate, to say, "Well, it is a little difficult to say how it started, but to find out I will issue a summons instead of issuing a warrant"?

Mr. Holtzoff. That may be the orderly procedure. However, in the District of Columbia you go to the United States Attorney, and unless the United States Attorney will apply for process--

Mr. Medalie. Your nose remains unvindicated.

Mr. Holtzoff. Yes. In other words, take another district than New York. Here private prosecutions are not permitted. Anyway, as Judge McLellan pointed out, that is not on the point involved here.

Mr. Medalie. Certainly, in the territories that might be very important.

Mr. Holtzoff. But, anyway, that does not relate to Rule 4 (a).

Mr. McLellan. It seems to me, Mr. Chairman, that it would not be a terrible thing if the magistrate himself had a discre-

anyway. So why not let it remain as it is?

Mr. Robinson. That was discussed, and the previous action of the committee was not to extend that to a magistrate.

Mr. McLellan. So you cut down the conditions under which he may do it when you do not give him absolute power to do it.

Mr. Robinson. That was the point that I think was decided by the committee before. If you wish to allow a magistrate now to issue a summons--

Mr. McLellan. Oh, I do not, but since there is some question about that, I do not see why this rule as it is it not all right.

Mr. Holtzoff. I was just afraid of the phrase "any other officer," because the word "officer" covers so many persons.

Mr. Youngquist. Do you think there is still any danger? It is still discretionary with the magistrate. He is not required to issue a summons, but he may.

Mr. Robinson. I think you are right.

Mr. Wechsler. Suppose we speak of the consent of the Government without specifying who may make the request? Then someone authorized to make the consent will have to consent to the issuance of the summons.

Mr. Holtzoff. That may be the solution.

Mr. Longsdorf. I do not see why we should commit to these other officers besides the United States Attorney authority to

Mr. Longsdorf. All right, but why not let those proceed upon a warrant or else refer them to the United States Attorney? A lot of people want this summons business, but I do not believe in giving that to the--

Mr. McLellan. The magistrate does not have to do it.

Mr. Longsdorf. He does not have to do it. Why endow all these officers with authority to make him exercise that discretion?

Mr. McLellan. That is not the idea at all.

The Chairman. It does not make him do it.

Mr. Longsdorf. They cannot make him do it, but they can all ask him to do it.

Mr. Youngquist. Do you think there is any danger that the complaining officer will ask for a summons in a case where a warrant should be issued?

Mr. Longsdorf. Not much.

Mr. Youngquist. Don't you think that is a practical answer?

Mr. Holtzoff. I suggest that we leave the wording as it is now.

Mr. Wechsler. Suppose the complainant is not an officer? Must the magistrate get the consent of an officer to issue a summons?

Mr. Dean. Under this language, yes.

never heard of a United States Commissioner issuing a warrant on a private complaint.

Mr. Wechsler. He has jurisdiction to do it, has he not?

Mr. Seasongood. "An officer of the United States" is a term of indefinite meaning. There has been some case recently--I do not recall which it is--involving who is an officer of the United States.

Mr. Holtzoff. I think the meaning is entirely definite. There are questions occasionally arising as to whether a person is or is not an officer, but there is a definite definition of what constitutes an officer. It is a person who holds an employment under a statute, so that when his term has terminated it creates a vacancy which must be filled, as distinguished from an employee who is not appointed and does not fall in a statutory position.

Mr. Burns. If you are not determined to follow the state practice of permitting the interested party to be the moving factor in getting a summons, it seems to me you must limit it to law enforcement officer of some qualification in the definition, since "officer" includes trial examiners and thousands of people who have no relation at all with the problem of getting out summonses.

I think if you are not going to adopt the phraseology of "an interested party" you will have to limit "officer" by

making the complaint"? Let him be the one to ask for a summons.

Mr. Dean. Or the person swearing to the complaint, to cover both the private complainant and the law-enforcement officer.

Mr. McLellan. That would imply by implication that we are bringing in the right of private individuals to make complaints. I think we should keep it that way.

Mr. Holtzoff. I think we should keep away from that.

Mr. Youngquist. They have that right now.

Mr. Holtzoff. I do not think so. I think the time-honored practice is to the contrary.

Mr. Wechsler. I think there ought to be a rule limiting the filing of a complaint to an officer, if we desire to perpetuate that practice. We have nothing to show who may file a complaint. Rule 3 would open it up to anybody.

Mr. Medalie. This discussion relates only to the summons, because nothing is said as to who may apply for a warrant or who may file a complaint. I think it would be better to leave it as it is.

If you do not give the magistrate discretion, then you leave the request for the summons to a responsible officer, whether he be a law-enforcement officer, as we lastly used that term, or the United States Attorney or the Attorney General.

legal provision that now restricts it to law-enforcement officers.

Mr. Medalie. I am sure there is not.

Mr. Holtzoff. There is no statute, but it is a time-honored practice. It is the practice followed in the District of Columbia, which is a Federal territory.

Mr. Medalie. Is that because of statute?

Mr. Holtzoff. No.

Mr. Medalie. That is simply because it is worked that way?

Mr. Holtzoff. Yes.

Mr. Medalie. Some day some judge in this District may decide that he recognizes a private individual without the intervention of a public official.

Mr. Holtzoff. The District of Columbia Code contains a provision that all prosecutions shall be by the United States Attorney or the Corporation Counsel's Office. That is assumed to mean that a private individual may not initiate it.

Mr. Medalie. That is not the law outside the District of Columbia, because there is no restriction of that sort anywhere else in Federal practice, and we ought not to restrict it any further as it has been restricted in this District.

Mr. Holtzoff. I think we ought to leave it as it is.

Mr. Youngquist. So do I.

Mr. Medalie. All you need is some language indicated by [illegible] the words "any other

prosecution should be the one, other than the United States Attorney, not any officer.

Mr. Holtzoff. Why not say "officer making complaint"?

Mr. Medalie. You may get a private individual to make the complaint and he may be conducting the prosecution.

Mr. Seth. Isn't there a rule that the United States Commissioner cannot collect fees if they go ahead on the com-plaint of the private individual? Hasn't that been the deterring matter in preventing private individuals from prose-cuting the matter?

Mr. Holtzoff. I am not sure whether that has been the deterrent or not, but I do know that the Federal practice is that an application for a warrant must be made by a law-enforcement officer.

The Chairman. Now, gentlemen, let us see if we cannot solve this.

Mr. Medalie. Can I suggest this language? "Any officer conducting the prosecution."

Mr. Holtzoff. He does not conduct the prosecution.

Mr. Youngquist. "Initiating the prosecution."

Mr. McLellan. To raise the question, I move that we leave this as it is.

Mr. Robinson. I second the motion.

The Chairman. Are there any remarks? All those in favor

Mr. Youngquist. I think the choice of summons in place of a warrant is wholly for the benefit, or primarily for the benefit, of the defendant, and I should doubt whether that favor, you might call it, should be extended at the request of anyone other than an official.

Mr. Seasongood. It is still discretionary with the magistrate. It merely says he may. It is just discretionary to do it. Why not give him a broader discretion?

Mr. Holtzoff. I think that would be dangerous. I think it would be undesirable to authorize a United States Commissioner in his discretion to say, "I shall not issue a warrant, but I shall issue a summons."

Mr. Youngquist. It does not suggest that.

Mr. Seasongood. I said it is still discretionary with the magistrate. He may do it on the request of anybody filing complaint. You use "officer." I still say that is a word of uncertain meaning. There have been cases that hold that what is an officer in some circumstances is not an officer in other circumstances.

The Chairman. Why couldn't we say, "Upon the request of the United States Attorney or of the complainant"?

Mr. Seasongood. That is all right.

Mr. Dean. I think we should say "person swearing to the complaint." The complainant technically, I think, under our

of essential facts constituting an offense and shall be sworn to before a committing magistrate. Does that contain an endorsement at the end of the affidavit?

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Mr. Holtzoff. The complainant is the man that swears to the complaint.

Mr. Dean. If that is what we mean, that is all right.

Mr. Holtzoff. Yes.

Mr. McLellan. It will read, "or of the complaint."

Mr. Holtzoff. "or of the complaint."

The Chairman. Is that raised by someone as a motion?

Mr. McLellan. Yes, I move that.

Mr. Seasongood. I second it.

Mr. Dean. I second the motion.

Mr. Wechsler. I second it.

The Chairman. Those in favor say "Aye." Opposed, "No." Carried.

Mr. Medalie. That takes out the words, "any other officer of the United States."

The Chairman. Right.

Mr. McLellan. Mr. Chairman, in the fifth line.

The Chairman. In the fifth line, yes. Now, what about line 8? Well, we have this other phrase.

Mr. Holtzoff. I do not think you can limit the phrase to the complainant, line 8.

Mr. Youngquist. I would suggest that in lines 7 and 8 we strike out the words "by the United States attorney or by any other officer of the United States."

The Chairman. Is that seconded?

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The Chairman. Strike out that sentence on line 7 after the word "requested."?

Mr. Youngquist. That is right.

The Chairman. Is there anything further on Rule 4(a)?

Mr. Wechsler. Mr. Chairman, to bring the previous matter to a head I move that we go back to Rule 3 and insert a suection (c) on who may file a complaint, reading in substance as follows:

"A complaint may be filed by an officer of the United States authorized to do so or by a private person who has personal knowledge of the facts."

The Chairman. Is the motion seconded?

Mr. Robinson. I second it.

Mr. Youngquist. I should doubt the advisability of that. The filing of complaints is a very informal and very liberal proceeding, and it has, as I think Mr. Holtzoff suggested, been a matter of practice rather than of law. I am inclined to think that it would be in general advisable to follow the practice as it has been outlined by Mr. Holtzoff and let whatever changes may seem advisable grow up rather than for us to either restrict or extend.

Mr. Wechsler. My information is that there is no legal provision against the filing of complaints by a private person. I think we should either explicitly leave the law as it is now or change it. Since there is no disposition to change it, I am

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Mr. Wechsler. I would infer from the text as it now stands that a private individual may file a complaint. Since that is the correct inference, apparently, I think the matter should be set forth.

Mr. Seth. Mr. Tolman called my attention a little while ago to some instructions which limit the right of the commissioners to issue warrants on the complaints of private individuals.

Mr. Youngquist. Is that prohibited, or is there any similar limitation?

Mr. Seth. Would you give that to us, Mr. Tolman?

Mr. Tolman. There is a requirement in the Internal Revenue Acts that the complaint be approved by the district attorney, and for that reason fees are not allowed commissioners when they issue warrants without that approval.

Mr. Seth. That is what I had in mind.

Mr. Holtzoff. We have a departmental rule, for example, that the F.B.I. may not file a complaint without the approval of the United States attorney, and that rule is followed religiously.

Mr. Wechsler. That is a matter of his personal duty to his superior.

Mr. Holtzoff. Oh, yes. I do not propose that that should be in these rules, but I only said that administrative practice is in support of my position that private prosecutions should

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practice since time immemorial, not to permit private individuals to file complaints before United States commissioners--that plus the fact that we have not specifically authorized private individuals to do it--might not a judge, taking those two things together, say these rules really exclude them?

Mr. Holtzoff. I should like to see them excluded. I should not object to having that construction placed on it. In fact, I hope it will be.

The Chairman. If we do not do it. I hoped we would not do it.

Mr. Dean. Let us do it one way or the other. I think there is something in Mr. Wechsler's suggestion there. We ought to face it. Do we want it or do we not want it? If we do want it, let us put it in.

Mr. Wechsler. I might reply, it is deemed desirable as a matter of policy to preclude filing of complaints by private individuals. Presumably that will only occur in cases in which the United States attorney refuses to act.

Mr. Youngquist. I think it probably is grounded on the fact that practically all prosecutions under the federal laws come about as a result of the activities of one of the investigative agencies of the United States. That is not true in the state courts to the same degree, and I should be inclined to agree with Mr. Holtzoff that normally the complaint should be filed, or should be initiated at least, by one of the investi-

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Rule 3 as we have it now, for that to occur if occasion should ever arise.

Mr. Waite. I agree thoroughly with Mr. Wechsler that we ought not to stick our heads in the sand and hope that somebody will follow a practice we think ought to be followed. Now, frankly, I do not know whether the complaints ought to be issued at the request of a private person or not. Our own Michigan practice requires, as a matter of fact, the approval of the prosecuting attorney before the warrant will be issued.

Mr. Holtzoff. The objection to private prosecutions, of course, is that you might have persons improvidently arrested, especially as many commissioners are not lawyers; and here is a layman who might come in before a commissioner: a lay complainant comes in before a lay commissioner and swears, and between the two of them they make a complaint and a warrant. You will find that you are apt to get improvident arrests. You have a different situation in state crimes, because you have the type of crimes where there is always a private victim, and he wants to get the law in motion, but most federal offenses are not of that type.

Mr. Waite. I am afraid you missed what I said. In Michigan it does require the approval of the prosecuting attorney; and if it is desirable not to have them issued in the federal courts on private complaint, why can we not say that? My point is, I am agreeing with Mr. Wechsler that we

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officer or employee of the United States, than to include the individual. That is the general practice, and the only reason I have suggested leaving 3 as it is is to meet the abnormal and unusual situation where it may be proper, and the federal prosecuting authorities refuse, to file a complaint.

Mr. Wechsler. Let us put it that way, then: require a private individual to go to the United States attorney first and preclude him from filing his complaint without first going to the United States attorney. Then the commissioner will know, if the complaint is filed by a private individual, that it is a case in which the United States attorney refused to act or refused to approve it.

Mr. Youngquist. That, then, would have the effect of precluding the right to file a complaint by a private individual except with the consent of the United States attorney.

Mr. Wechsler. No, I did not mean just cause, although that might be desirable. My suggestion was that a private individual be required first to lay his complaint before the United States attorney. If the United States attorney refuses to act he could still go to the commissioner, but the commissioner would then know that the United States attorney had determined against it, which would give the commissioner some protection with respect to the legal question involved but would still provide some relief in the case where the United States attorney refuses to act.

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of getting started.

Mr. Youngquist. If that were the rule you might find a situation like this in the districts with the larger areas: Someone up in Crookston, Minnesota, where there is a United States commissioner, and which is a point 300 miles from the office of the United States attorney, may have knowledge of the commission of a federal offense. If there is to be an arrest and a prosecution, prompt action must be had. It could not be had if he were first required to submit his case to the United States attorney's office in St. Paul. It is that kind of situation that I have in mind when I make the suggestion that I have made.

Mr. Holtzoff. Actually, as a practical matter, in a situation such as this the citizen notifies the investigative agency: if it is a liquor case, the nearest alcohol tax office, or the nearest F.B.I. office if it is an offense investigated by the F.B.I., and so forth.

Mr. Seth. Do they not have telephones up there, so that they could call up the United States attorney?

Mr. Youngquist. Well, what is the submission to the United States attorney?

Mr. Holtzoff. You would have improvident arrests, I am afraid, if you were to encourage private prosecutions, especially as you have so many laymen among commissioners.

Mr. Seth. You would have interference, too, with

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individual before he issues a warrant on it.

Mr. Burns. Mr. Chairman, I think the rules should make it clear one way or the other. On the question of policy normally I would feel that it is desirable to have a method whereby a private person could initiate a prosecution where the government agency refuses to act; but when I think of the Government moving now through O.P.A. and other war measures into the day-to-day business routine of this whole country, I think that to give the private individual the power to initiate without any supervision far-reaching prosecutions--it may be only a simple case, but its implications may be more serious--I think under those circumstances I would be against, on the question of policy, giving the private individual the right to initiate prosecutions; and I think, therefore, we should spell out in these rules the limitations to the investigatory agency.

Mr. Longsdorf. Mr. Chairman, may I ask a question: Are we not talking about authority to institute a proceeding in the name of the United States? Can we give anyone that authority by rule? Is that procedure?

Mr. Wechsler. We are not talking about authority to institute proceedings in the name of the United States. We are talking about authority to file a complaint. Before prosecution can be had there must be an indictment by grand jury if it is the type of case in which indictment is necessary, or else there must be an information filed if that is permissible, and

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to the attention of the grand jury, that is involved here, other than through the instrumentality of the United States attorney. I am not clear on the policy either, but I do think we ought to resolve it one way or the other.

Mr. Dean. It will be especially true in the case of petty offenses, would it not?

Mr. Wechsler. Yes.

The Chairman. Is there any motion?

Mr. Wechsler. I made a motion, and it was seconded.

The Chairman. May we have it repeated, Mr. Stenographer?

Mr. Wechsler. The motion was that there be added section (c) to Rule 3, reading:

"A complaint may be filed by an officer of the United States authorized to do so or by a private person who has personal knowledge of the facts."

The Chairman. Mr. Youngquist, will you preside for just a minute? I have been called to the wire.

(At this point Mr. Youngquist assumed the chair.)

Mr. Burke. I thought we eliminated the second section from Rule 3 and combined it with 1.

Mr. Wechsler. I am sorry. Yes. It would not be 3(c); it would either be 3(b) or an additional sentence to 3, as I understand it.

Mr. Youngquist (acting chairman). Was the motion seconded?

Mr. Orfield. Yes, I seconded it.

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who has personal knowledge of the facts."

Is there any discussion?

Mr. Seasongood. I may ask, do you have to have "authorized to do so" in there? That is, you might have the question whether he had to be definitely authorized, but presumably it would be somebody who is authorized. We could follow that. I wondered whether it would not be just as well.

Mr. Wechsler. I was trying to make the point that was raised before in connection with section 4. Do you want to take out "authorized to do so"?

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Mr. Dean. So far as it related to law enforcement officers could you not say "filed by any person having knowledge of the facts"?

Mr. Wechsler. That raises the question as to when an officer may file. Must he have knowledge of the facts?

Mr. Dean. I should think so.

Mr. Medalie. As the rule is drawn now he must have. If he has not he must supply the necessary proof by affidavit sworn to before the committing magistrate.

Mr. Holtzoff. Oh, well, he can swear on information and belief, giving the source of his information, the grounds of his belief.

Mr. Medalie. He would have to give it.

Mr. Holtzoff. Oh, yes. All the rule says is that he must make his complaint on oath, but he can make his oath on informa-

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Mr. Wechsler. It was that differentiation that I had in mind, that a private complainant who merely has knowledge or information and belief ought not to be permitted to file a complaint, but a law officer might be permitted to file it on that basis.

Mr. Youngquist(acting chairman). Did you amend the motion by striking out the words "authorized to do so"?

Mr. Wechsler. Yes. I may say, Mr. Chairman, though I should vote for this in order to keep the issue alive, I would like to think about it some more myself. I am not clear on the wisdom of this formulation as distinguished from the very opposite of it: limiting the right to file to an officer of the United States; but I should not like to decide it merely on the basis of this discussion this morning. As far as I know, it is the only consideration that has been given to the subject.

Mr. Robinson. No; on that point there has been quite a lot of study given to the question. That may have been at one of the meetings of the subcommittee that you were not present at.

Mr. Wechsler. No, it was not discussed there; I have been through the transcript.

Mr. Robinson. It has been discussed in previous sessions of this meeting. Did you examine an old transcript of this committee's meetings too?

Mr. Wechsler. No. Well, that may be.

Mr. Robinson. There have been informal discussions, too,

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matter to a head by moving a substitute for Mr. Wechsler's motion: that a complaint may be filed by the United States attorney or an officer of the United States authorized to do so.

Mr. Burns. I second that motion.

Mr. Youngquist. The question is now on the substitute motion.

Mr. Wechsler. I find it just as hard to vote for the substitute as to vote for my own with any conviction, Mr. Chairman.

Mr. Seth. Should that not be "with the approval of the United States attorney" rather than "by the United States attorney"?

Mr. Holtzoff. I do not think that we want to make that as a requirement. That is an administrative matter.

Mr. Seth. But your motion says by him.

Mr. Youngquist. I did not hear you.

Mr. Seth. The motion, as I understand it, says that the consideration is "by the United States attorney."

Mr. Youngquist. That is right.

Mr. Holtzoff. By the United States attorney or an officer of the United States authorized to do so.

Mr. Medalie. May I ask this: Take one of our public parks.

Mr. Holtzoff. Pardon?

Mr. Medalie. Take Yellowstone Park.

Mr. Holtzoff. Yes?

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bad check or picks your pocket or sells you stock or does something else that is fraudulent, and is about to leave and is getting on the bus. What do you do with them? Find the United States attorney or a public officer?

Mr. Holtzoff. I suppose a citizen has the right to make an arrest on a warrant.

Mr. Medalie. Of course he has. Now, then, he makes an arrest, and he brings the man before the magistrate. He brings him there. What happens? May he file a complaint or may he not? If he cannot find the United States attorney or a public officer, no complaint may be filed. The magistrate is helpless. The criminal escapes. He cannot hold him.

You do not want to leave the law in that state, do you?

Mr. Dession. Nowhere in these rules or anywhere else would the citizen be aware as to when he could make such an arrest without a warrant.

Mr. Holtzoff. Well, that is a rule under substantive law.

Mr. Medalie. It is, but what happens when he exercises that right, assuming he has it?

Mr. Dession. My point is that there is no substantive law on the Yellowstone Park.

Mr. Medalie. If he gives a bad check and it is found out, now, by telegraph or telephone that that account does not exist in the bank in which it purports to exist, then the victim knows he has been swindled, and the normal thing for him to do is to

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stated the rule. We do not want that.

Mr. Youngquist. We have, gentlemen, three alternatives: one is to limit the right to file a complaint to an officer of the United States; the second is to give that right to an officer or to a private individual; and the third is to leave the rule as it is. If there is no further discussion I shall put Mr. Holtzoff's substitute, which is the first alternative that I stated.

Mr. Medalie. That means, Mr. Chairman, that if we vote against these two amendments the situation is left as it is today.

Mr. Youngquist. That is why I stated the alternatives.

Mr. Medalie. Yes.

Mr. Waite. As it is today it is just vague; do I get that correct?

Mr. Medalie. No.

Mr. Waite. It is uncertain.

Mr. Medalie. They shall be sure that, there being no restriction, the citizen can have the remedy that would be denied to him by either of these amendments, because no interpretation of the law would be to the effect that you cannot vindicate the criminal law simply because the particular person happens not to be around.

Mr. Waite. Well, would not Mr. Wechsler's, then, be the law as it is today?

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Mr. Youngquist. I think it would be, and I think the suggestion was made by some member a while ago--perhaps it was myself--that the only objection to it would be the encouragement of filing complaints by private individuals.

Mr. Holtzoff. That is one reason, of the three alternatives, why I moved the substitute, because if we are going to formulate a rule one way or the other I should rather have it in the form of a substitute, which I suggested in the form of Mr. Wechsler's motion.

Mr. Youngquist. Yes.

Mr. Holtzoff. But my preference is the third alternative.

Mr. Youngquist. You probably will vote against your own motion?

Mr. Holtzoff. I shall remain silent.

Mr. Seth. Would a motion to lay that motion and the substitute on the table bring the matter to a head?

Mr. Holtzoff. Yes, it would.

Mr. Orfield. I make that motion.

Mr. Holtzoff. I second the motion.

Mr. Waite. That would mean we just say nothing; is that it?

Mr. Youngquist. Yes, we leave it as it is. Is there any further discussion?

All in favor of the motion to lay the question on the table say, "Aye"; contrary?

May I have a show of hands, please? Those in favor?

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Mr. Holtzoff. I think it does. We have reviewed 4(a).

Mr. Medalie. No; there is something in 4(a) I want to call attention to.

Mr. Robinson. Pardon me, Mr. Medalie, just a second. I think I should add this: that in view of this close vote it seems to me to be clearly proper that the reporter's staff continue a study of the law as it is now and present that by a note or otherwise to the committee for any further action you may wish to take on this point.

Mr. Medalie. Yes.

Mr. Robinson. In fact, we have a study on that subject that I think bears out the position taken here to the effect that the law is fairly well established, sufficiently so; and further I should say that no complaints in regard to the operation of the present system have been received, no recommendations, by judges or bar associations on that particular point.

Mr. Holtzoff. The gentleman had something on Rule 4(a)?

Mr. Robinson. He wants to suggest.

Mr. Dession. I want to suggest, Mr. Robinson, in that same connection I have been thinking over the point raised by Judge Burns on that, and I am rather impressed by it the more I think of it. Take your gas rationing cards. I have noticed a considerable sensitivity on the part of the public to anybody who may be getting away with something. I can easily visualize, if that feeling grows a little, and the same may be true of a

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plaint in a proper case--to cover your Yellowstone Park situation. I also want some brake on this business.

Mr. Medalie. That is the point I was about to raise with the language of 4(a). 4(a) says that the magistrate must issue a warrant or, in the appropriate case, a summons. Now, I have seen any number of examples in our busy criminal courts in New York, especially over thirty years ago when I was a young assistant district attorney of the county, where a person would swear to facts constituting a crime, and they refused to do anything for him because there was a doubtfulness as to whether he was telling the truth or they were privately convinced that he was a liar.

Now, this says the magistrate must issue a warrant. I think that is just exactly what we do not want to have done.

Mr. Holtzoff. Should we not change "shall forthwith" to "may"? That would meet your point.

Mr. Medalie. You ought to have something in there as to whether the magistrate is convinced from the complaint that a crime has been committed; if the magistrate in his own mind thinks that a crime has been committed by the person charged, against whom a charge is made, he ought to issue the summons or the warrant, as the case may be. But if he is not so satisfied he ought not to do it.

Mr. Seasongood. That is rather new, is it not? I do not know, but ought it not to be automatic? If you are going to

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Mr. Medallie. The experienced full-time magistrates in the large cities, certainly in New York City, do that kind of thing, and the district attorneys want them to do it that way.

Mr. Seasongood. Suppose he does not issue the complaint. What are you going to do?

Mr. Medallie. If he does not issue a warrant?

Mr. Seasongood. Suppose he likes the girl or the defendant or the accused.

Mr. Medallie. It is possible that he is corrupt, either mentally or otherwise, but--

Mr. Holtzoff. What would you do with lay commissioners, though? You see, in the federal system there is a lot of lay part-time commissioners. Very part-time.

Mr. Medallie. You have a practical difficulty where a public official comes and swears.

Mr. Holtzoff. No, you do not, because I think ordinarily the commissioner rules against an investigative agency.

Mr. Medallie. Yes, but where there is doubt, conscientious doubt or conviction that the crime was not committed by the person charged, I think he ought not to issue a warrant; otherwise he is a pure automaton instead of being a judicial officer.

Mr. Seasongood. Ordinarily if you file a complaint with a clerk or something, he issues the warrant, in the ordinary police prosecution.

Mr. Medallie. The clerk issues the warrant?

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Mr. Seasongood. What would you do if he would not issue the complaint? I do not think it is up to him to decide, really. I am just talking out loud. I do not know, but that is the way it strikes me.

Mr. Holtzoff. The practical solution would be this: If he believes the commissioner is unreasonable I think the officer would make the arrest without a warrant on probable cause, because an arrest on probable cause may be made without a warrant.

Mr. Seasongood. He would run a good deal of risk of a malicious prosecution suit, would he not, if he undertook to arrest when the magistrate would not give a warrant?

Mr. Holtzoff. Yes, that is so.

Mr. Medallie. He could then get the assistance of the United States attorney.

(The chairman assumed the chair.)

The Chairman. What are you going to do in those districts where you know that there are various commissioners who are influenced?

Mr. Seasongood. Surely. They will not issue the warrant.

Mr. Robinson. You have a good thought there.

Mr. Medallie. Another situation is that the person is arrested when he should not be arrested, and he probably sues, in actual operation.

Mr. Holtzoff. But in actual operation there is no problem today, is there? I never heard of any, and I think if we leave

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the magistrate must issue a warrant. That is pretty serious, and these accusations, you know, fly around like wholesale.

Mr. Holtzoff. I think that then the commissioner would send the complainant either to the United States attorney's office or to the office of the appropriate investigative agency.

Mr. Medallie. This says he must issue the warrant and not send him there.

Mr. Burns. Why not limit the complainant?

Mr. Medallie. Limit it?

Mr. Burns. Limit it to an officer.

Mr. Youngquist. We are back to rule 3?

Mr. Medallie. That in effect makes the public officer the person who determines that a warrant shall issue. The magistrate makes no determination then except automatically and except also only to the extent that he says, "This paper says that a crime has been committed." I think there must be some brake on these things, even though we unfortunately have an awful lot of ignorant magistrates in our system.

Mr. Robinson. Mr. Medallie, may I ask this: Of course you are considering the law on malicious prosecution? That would still be in effect, and you are considering it? A mere arrest does not amount to much if you do not have a United States attorney ready to follow it through. You still have the power of the United States attorney to dismiss.

Mr. Holtzoff. I think a "mere arrest" amounts to a lot if

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does not have a penny to his name.

Mr. Robinson. That is true, of course.

Mr. Dession. We are moving into a new situation; do you not think so, Mr. Robinson? Take the sabotage acts that we are hauling out now. There is no telling how enormous an increase there will be in the use of wartime acts.

Mr. Medallie. I remember the time when the Lindbergh kidnapping bill was passed. My district had nothing to do with it. We had more persons coming in who were sure they had personal knowledge as to who the kidnapper was. If they had gone directly to a magistrate and made a complaint in a moment of hysteria, an awful lot of nice people would have landed in jail.

Mr. Burns. But is that magistrate as well equipped to make the determination as the United States attorney?

Mr. Medallie. Well, he is as well equipped as some employee of a federal department who has previously had no experience.

Mr. Holtzoff. I do not think so. I think an investigative officer of the Federal Government is much more equipped than a United States commissioner. There are some competent and able commissioners; some of them are really able.

Mr. Medallie. Let us see how it really works here. In effect you are telling the official that he determines that a person shall be arrested. Is that not what you do? Why do you not give him that right, without having commissioners?

Now I give you the alternative: Why do you not tell him to

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I think there is some language in the New York code. I think so; I am not sure. Is there any in the model code?

Mr. Seasongood. He does not have to be satisfied. All he has to have is probable cause.

Mr. Burns. Cause, yes.

Mr. Holtzoff. If he is satisfied.

Mr. Youngquist. If it states the conditions.

Mr. Medallie. I believe he is satisfied there is probable cause, but it must exist in the mind of the magistrate.

Mr. Burns. Is it not true that in most states the committing magistrate is a substitute for the grand jury, and therefore he has to believe there is probable cause? I mean he is not a substitute, but for the smaller crimes, for lesser crimes, he fulfills the function of a grand jury.

Mr. Holtzoff. No; I think in the Northern States, which have done away with grand juries, the United States attorney or district attorney fulfills the function of a grand jury.

Mr. Burns. Yes, but I am thinking again of Massachusetts, where they have a grand jury system and also a committing magistrate, and the committing magistrate when he holds for the grand jury makes a determination solely on probable cause.

Mr. Holtzoff. Yes, but this relates to a stage in advance
8 of the commitment by the magistrate. This relates to issuance of the warrant, and after the person is brought in under the warrant then the magistrate holds the hearing.

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the complainant and any witness he may produce, take their depositions and cause them to be subscribed by the persons making them.

"A warrant shall be issued, except as provided in section 12, for the arrest of the person complained against if the magistrate, from the examination of the complainant and the other witnesses, if any, has reasonable ground to believe that an offense was committed and that the person against whom the complaint was made committed it."

Section 12 referred to has to do with summonses.

Mr. Holtzoff. Well, we could shorten this considerably.

Mr. Medallie. I like the idea "expressly," and we must shorten it, of course, but that is the idea, and I think that is prevalent.

Mr. Holtzoff. You could say something like this: that if the magistrate finds that there is reasonable ground to believe that an offense has been committed and that the person named, against whom the complaint is made, has committed it, he shall issue a warrant.

Mr. Medallie. Some language like that would be all right.

Mr. McLellan. Well, would you get that result if you changed "shall" to "may"? I am not saying that I am for that.

Mr. Holtzoff. I think you would.

Mr. Youngquist. I should not do it that way, because there

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various states as it is contained in the commentaries in the American Law Institute Code, page 180. There is a wide diversity in the statutory provisions of the various states relating to the conditions on which a warrant of arrest is to be issued:

That a warrant shall be issued upon a complaint made: Colorado, Florida, Indiana, Louisiana, Missouri;

That a warrant may be issued on complaint made: Connecticut, Georgia, Iowa, New Hampshire;

That a warrant shall be issued if it appears that any offense has been committed: Massachusetts, Michigan, Nevada, New Mexico;

That a warrant shall be issued if the magistrate sees good reason to believe an offense has been committed: Virginia, West Virginia.

And then more from Montana, Illinois, Arkansas, Alabama.

New York is placed under this heading: That a warrant shall be issued if the magistrate, from the complaint and any examination of witnesses made by him, is satisfied that the offense complained of has been committed and there is reasonable ground to believe that the person charged committed it.

That is the New York Code of Criminal Procedure, Section 150.

Mr. Medallie. That and the Institute code in substance run the same, do they not?

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Mr. Medallie. I think we ought to be clear on this and make sure that we have made some such provision that the magistrate is not an automaton for any federal officer or private individual who just with a complaint drops a nickel in the slot and gets his piece of chewing gum in the form of a warrant.

Mr. Holtzoff. Are you making a motion?

Mr. Medallie. What?

Mr. Holtzoff. Are you making a motion now?

Mr. Medallie. No, I think I should like this done over. Let us do it over. Let us do it overnight so we do not hold things up. If it is agreed that that is the principle we ought to follow I should like to see some of us go to work on it and do it overnight.

I move that the principle set forth in the Institute code and as indicated by the New York statute be adopted here and that an adequate drafting be done overnight and submitted tomorrow morning.

Mr. Burke. Supported.

Mr. Youngquist. I second it.

The Chairman. Is there any discussion?

Mr. Seasongood. It is an important question of policy. I do not think we have decided that it is a question of policy. It is a question of undesirabilities. The one undesirability is that a magistrate, who is often an ignorant person--to say

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least you have a very minimum idea of discretion and judgment. I think it is an important question, and I do not think we ought to resolve it just one way or the other without considering it very seriously. I think at the worst you would have lots of commissioners who would not issue a warrant when they ought to; and it has been in fact very much influenced by what Judge Burns said of these criminal offenses: you do not want everybody
9 rushing in there and filing a prosecution against you for spite or on a silly pretext, by a person of no responsibility. So I should think the happiest compromise would be just to say it has to be done by some kind of an official.

Mr. Burns. How about one other situation? As these bureaus multiply their powers increase. They follow a general pattern of seeking to extend their power, and frequently it has happened and it is happening on an enlarged scale that these bureaus are in conflict with the United States attorney. They want much aggressive action, they not having the background of preparation necessary for a successful prosecution and they, after all, being designated by some minor official, whereas the United States attorney is an appointee of the President and has been confirmed by the Senate; and in those cases it seems to me it is very important that the United States attorney be empowered to fix the policies of prosecution without being put in a box, as he may well be put in by the filing of complaints by these various agencies. And this, it seems to me, is a

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you still have left the problem, which is a very basic one, of not having the magistrate's office a sort of automatic push button affair. I think if we inserted something like "if he has reasonable ground to believe that an offense has been committed," you would not cut down at all on the operation of justice, and at the same time you do provide a reasonable basis upon which a magistrate can act as a magistrate and not just as an automaton. So I think both of them can be confined.

Mr. Medallie. May I add to this discussion this observation: If you run into an unreasonable magistrate or United States attorney or revenue agent or an F.B.I. agent, you simply go to another magistrate; the prosecution has not been killed. And you still have the right to make the arrest. Justice will not be frustrated.

Mr. Holtzoff. And you can go before the district judge if you have trouble with the commissioner.

Mr. Medallie. I am assuming you have great distances to go, and there are many magistrates available, including the justices of the peace of the village, the county, the city, and so on.

Mr. Seth. And the mayor too.

Mr. Medallie. And the board of aldermen.

Mr. Burns. It is a sort of ascending scale.

Mr. Medallie. There are plenty of magistrates. Justice will not be frustrated because of the act of a corrupt magistrate.

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a warrant. You have not far to go within that district to get a public official who is a magistrate or an officer of the state, county, or village or town to give you process if you are entitled to it.

Mr. Robinson. Yes.

Mr. Youngquist. As a matter of information and showing what the practice in the states is, it may be interesting to note that five states provide that a warrant shall be issued on complaint; four, that a warrant may be issued; and all the others provide, in varying terms, that a warrant shall issue if it appears or if there is reasonable ground to believe or if the magistrate is satisfied that an offense is stated, and so forth. So that 39 of the states do give the magistrate some discretion, four give him complete discretion, and only five require him to issue a warrant.

Mr. Wechsler. So far as existing law is concerned, Mr. Chairman, it is interesting to note that Section 591 of Title 18, which is the general section empowering magistrates, contains the words "agreeably to the usual mode of process against offenders in such State," so that there is apparently some reference in the basic provision to the state practice.

Then I notice also that in Section 594, which deals with violations of the internal revenue laws, the law is not that the complaint may be filed only by the United States district attorney or other officer; it is as follows:

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warrant of arrest shall be issued upon the sworn complaint of a private citizen unless first approved in writing by a United States district attorney."

So that the requirement is the exceptional one of approval in that instance.

Mr. Seasongood. May I ask, what did you read there? Do those states say that "if it appears an offense has been charged" or "committed"?

Mr. Dean. Committed.

Mr. Medallie. You have that.

Mr. Robinson. Well, here are summaries from five or six states in what he said. The way you stated there, Mr. Seasongood, is the law in Illinois, Kansas, Minnesota, and Wisconsin: "if it appears that the alleged offense has been committed." Now, there are four other variations in there. Would you like to take it?

Mr. Seasongood. I just did not understand the great number of states where it was "if an offense has been charged" or "if it appears that an offense has been committed."

Mr. Youngquist. I thought it was "committed" in most states.

Mr. Holtzoff. Is it not "probable cause to believe" that it has been committed?

Mr. McLellan. No; "that the offense has been committed and that there is probable cause to believe that the defendant

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section.

Mr. Robinson. Two states, "that an offense has been committed."

Mr. McLellan. What is the harm in having this written up so that we can consider it?

Mr. Medallie. Mr. Seasongood raises the point that he does not want to be committed to a policy in advance of writing this. Of course, my motion is to commit them to a policy.

Mr. Seasongood. I do not know what is the better.

Mr. Holtzoff. I offer the question, Mr. Vanderbilt.

The Chairman. All those in favor of the motion say "Aye." Opposed, "No." Something in writing, then.

Mr. Medallie. Will you take charge of appointing your own committee to write that up, then?

Mr. Robinson. Make you chairman.

Mr. Medallie. I do not want to be chairman. I will sit down and work with you for half an hour on it, assuming that I have Minnesota and the District of Columbia with me.

The Chairman. Now, that brings us, does it, to 4(b), or am I going too far?

Mr. Youngquist. May I make a comment on 4(a)?

The Chairman. Yes.

Mr. Youngquist. I think under the circumstances the additional words that I suggested, "against a person not in custody" should be eliminated, because this now applies to all

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Mr. Holtzoff. Oh.

Mr. Youngquist. Whether before or after the arrest is made. I misspoke myself. Those words "against a person not in custody" should be stricken.

The Chairman. All right.

Mr. Holtzoff. No, because this is only--

Mr. McLellan. (Interposing) I see what you say, but I do not understand.

Mr. Burns. Will that be taken care of by the committee?

Mr. Youngquist. Yes, I think it will be. It does not fit in that particular place. That is the point I am making.

Mr. Holtzoff. It does now, because they do not forfeit the complaint or warrant.

The Chairman. Well, consider that when you bring in the report on the other section.

Now we come to section 4(b) (1), beginning with line 13.

Mr. Robinson. May I suggest the saving of some words there; Mr. Holtzoff I believe suggested it: that "the name of the complainant and" be stricken out. Some of the forms of warrant contain it; some do not. We can get along without it, I think. After "contain" in line 13 strike "the name of the complainant and."

Mr. Youngquist. How can they do that?

Mr. Medallie. It is sometimes difficult for a man who has been stealing from many people to know just which particu-

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Mr. Medallie. Or if a person is engaged in a number of neighborhood assaults, going from barroom to barroom, he would like to know just who isn't satisfied.

The Chairman. If there is no serious objection the word will be stricken.

Mr. Medallie. I object to it.

The Chairman. Seriously?

Mr. Medallie. Most seriously.

Mr. Holtzoff. Methinks you do protest too much.

Mr. Medallie. I stated it facetiously, but I am quite serious about it. That is a provision we have had in our law so long.

Mr. Holtzoff. No, the form of federal warrant does not contain the name of the complainant.

Mr. Medallie. Oh, in our states we have it.

Mr. Holtzoff. I know, but this is federal.

Mr. Medallie. Also, if it is something with which a particular public official is charging you then you know what kind of an offense you are charged with committing.

Mr. Youngquist. Is that not stated in the complaint, Mr. Medallie, and if there is an assault is not the assaultee named?

Mr. Holtzoff. You will find that the blank forms that you have used, as a United States attorney, do not contain the name.

Mr. Medallie. I never saw the warrants which I caused to be issued when I was a United States attorney.

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Mr. Holtzoff. Yes.

The Chairman. It seems to be.

Mr. Medallie. All right.

Mr. Waite. Mr. Chairman, I should like to call attention to what seems to me like an inconsistency here. In line 17 it provides that the warrant shall command the marshal to arrest the defendant. Then if you drop down to line 26 it says the warrant may be executed--which, I take it, means the defendant may be arrested--"by a United States marshal or some other authorized federal agent." So I would suggest that line 17 be altered to read: "It shall command that the defendant be arrested and brought before the magistrate," and then line 26 will take care of the person by whom it may be done.

Mr. Holtzoff. Yes, I second the motion.

Mr. Medallie. Yes, that is very sound, except that it kills the essential nature of the warrant, the historic nature of the warrant. I do not mind that; it is all right.

Mr. Waite. That is the provision in a great many states already.

Mr. Medallie. I think it is pretty sound. We are getting rid of many anachronisms here now.

Mr. Holtzoff. Warrants do not always read to marshals. More often they do.

The Chairman. How would it read then? "It shall command"--

Mr. Waite. "It shall command that the defendant be

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The Chairman: Anything further on this section?

Mr. Burns: I am a little puzzled by the last sentence in 1, "or may be delivered and personal receipt returned by registered mail."

Mr. Youngquist. Where is this?

Mr. Burns. That is in (a)--no, it is in (c), on page 2 of Rule 4, line 29.

Mr. Youngquist. The same language occurs in (a)?

Mr. Burns. That is right. What is the intention, to make the service of summons by registered mail valid?

Mr. Robinson. Right.

While you are on that point, in that line 29, "personal receipt returned" I believe may be stricken out because provision is made elsewhere that I think is sufficient for that, the words "and personal receipt returned", because that is provided for in lines 44, 46.

Mr. Burns. There I also have a question. The words "by registered mail with return receipt signed by the defendant".

Mr. Robinson: Yes.

Mr. Burns: Suppose the defendant does not do it?

Mr. Robinson: Send a warrant for him.

Mr. Burns: Well, isn't it enough if you say, "registered mail with return receipt requested"?

Mr. Robinson: Well, I think not, Judge. It would be well to check up on whether or not the defendant is going to

subsequent, and I think it ought to read, "with return receipt requested".

Now, if the summons does not work it may not work because he did not get it or because he did not want to come.

Mr. Robinson. Don't you think it would be an advantage if the magistrate or other officer issuing the summons might know right away that the servee is not going to honor the summons?

Mr. Burns: Yes, I think so, but I don't think we ought to put in our rules a condition that the defendant sign the return receipt. You define it by saying that you register it and request return receipt.

I do not think you ought to go beyond that.

Mr. Youngquist. I doubt if you need to ask for a return receipt.

I had a question on that rule as proposed before. It was provided only that they be served by mail, only.

I have two questions: to serve by ordinary mail; and the other question is, "at defendant's last known address".

Mr. Holtzoff. I want to raise a point that just dawned on me, if it is by ordinary mail the magistrate can use a frank envelope. He won't have funds for registering, because there are no funds for registered mail, and, after all, I do not think a registry ought to be required, because this is for the benefit of the defendant. If he does not show up, use your

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Mr. Dession. Well, aren't we going to have a summons enforceable by commitment?

Mr. Holtzoff. No, I don't think we should. If a person does not take advantage of the opportunity to appear in court without being arrested, then issue a warrant.

Mr. Youngquist. Then they will probably arrest him in the evening and keep him in jail overnight.

Mr. Robinson. I see no objection to this provision going out if that is the wish of the Committee. Of course in court we know how some other person is brought in and is accused of not having complied with court requirements; you know how loose it is sometimes.

If we are going to use a summons, why not have a little precision about it instead of just dropping it in a post office box and forgetting it?

Mr. Burns. I was wondering, Mr. Chairman, what proof there will be of service by simple mail delivery, and it is conceivable there might be half a dozen defendants, some of whom appear and others who might not.

The Chairman: Well, I suppose the theory is, if they do not get any answer to a letter they will get a warrant.

Mr. Robinson. You do not know a man is not coming until after the magistrate has set his preliminary hearing.

The Chairman. You have no assurance anyway that he is going to accept the invitation and you are not going to punish

Mr. Robinson. Would you like this to read just by mail?

Mr. Holtzoff. Yes.

Mr. Robinson. All right. Line 11, strike out "by registered mail as hereinafter provided".

Mr. Medalie. Everything after the word "summons"?

Mr. Robinson. All right. Just end the sentence there.

Line 22, after "place" a period, and strike out the rest of the sentence, or two lines.

Line 29, strike out everything after "delivered" until "by", and then strike out "registered".

Mr. Medalie. Then, "The summons may be served by anyone authorized to serve summons in a civil action,"--

Mr. Robinson. "--or it may be delivered by mail."

Lines 44 and 45, after "by" strike out "registered", and after "mail" strike out the rest of the sentence.

Mr. Youngquist. That is a little too fast. Line what?

Mr. Robinson. 45. After the word "by" strike out "registered", and after "mail" put a period and strike out the rest of the sentence.

Mr. Youngquist. Leaving the word "mail"?

Mr. Robinson. Yes, "by mail."

The Chairman. Is there anything further on (b)(2)?

Mr. Medalie. There is only one little matter of keeping records.

The magistrate issues a summons and gives it to someone

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The Chairman: Is there anything further on (c), beginning on line 25?

Mr. Longsdorf. Are we through with (b)(2), Mr. Chairman? I want to make a comment.

The Chairman. All right.

Mr. Longsdorf. I have a pretty serious question whether we are not transgressing on the jurisdiction of the district courts. Congress has defined their jurisdiction by creating districts. A State may be one district or numerous districts.

Now, if the authority--

The Chairman. Isn't that covered in line 31?

Mr. Robinson. Line 20.

Mr. Longsdorf. Line 21?

The Chairman. 31.

Mr. Longsdorf. Am I proceeding ahead of the matter considered by the committee?

The Chairman. That is right; I think by about 10 lines.

Mr. Longsdorf. I thought we had gotten over here to (2) in subsection (b). I beg your pardon. I did not hear correctly.

The Chairman. I did call for questions on (2)(b), and that goes from line 20 to line 24.

Mr. Longsdorf. I pass on 24. I am not ready for that.

The Chairman. Are there any questions on (c)(1), from line 25 to line 30?

Mr. Robinson. Mr. Holtzoff suggests that "federal agent"

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officer authorized by law." Insert "by" after "or", insert "officer" after "other", insert "by law" after the word "authorized", strike out "federal agent".

I think that is proper.

The Chairman: If there is no objection that will be the course.

Anything further on that section?

If not, we will go on to (c)(2), lines 31 to 36.

Mr. Longsdorf. Now my question will be in order. I cannot help but have very serious doubts whether a district court can be authorized to send a process other than summons to a corporation outside of its district throughout the limits of a state which contains two or more districts, or outside of the state within 100 miles by a usual mode of travel.

Can we do that?

Mr. Holtzoff. You are right, but Congress amends this existing law by permitting that to be done.

These rules when promulgated by the Supreme Court will

3 have the force of an act of Congress.

Mr. Longsdorf. The Committee did not have the right to change the jurisdiction of federal courts?

Mr. Holtzoff. No. I think that is procedural.

The jurisdiction relates to the right to try that case. As to that, I agree with you that we cannot enlarge jurisdictions, but this merely relates to process, and the fact that

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cerned.

Mr. Holtzoff. Well, that is the action of the Supreme Court by promulgating the civil rules.

Mr. Longsdorf. Well, I am interested in raising the question.

Mr. Holtzoff. Well, I have just a verbal change in line 31. The word "except" I think should be "other than".

Mr. Seth. In lines 34 and 35, "the place where the warrant or summons is returnable." Now, if you have made no provision in the form of the warrant making it returnable before any particular officer--

Mr. Youngquist. Isn't that in (d) in line 47?

Mr. Holtzoff. We provide that the warrant shall require the person arrested to be brought before the magistrate, and that would necessarily imply the place where the magistrate holds forth.

Mr. Seth. Well, the law is, you must take him before the nearest United States commissioner.

Mr. Holtzoff. Not on a warrant.

Mr. Seth. Take him before the nearest. That is the United States Commissioner practice.

Mr. Holtzoff. What?

Mr. Seth. Take him before the nearest one.

Mr. Wechsler. That is the present law, Alec. It shall be the duty of the marshal, his deputy or other officer who

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And the magistrate or officer issuing the warrant shall attach thereto a certified copy of the complaint, and upon the arrest of the accused and return of the warrant with copy of the complaint attached shall confer jurisdiction on such officer as fully as if the complaint had been made before him.

Mr. Holtzoff. Ordinarily, of course, the way the thing operates is, the commissioner who issues the warrant is generally the nearest commissioner, and the warrant is returned before him.

Mr. Medalie. No.

Suppose in my district a warrant is issued out of the Federal Court Building, it may be served in Queens County or way up the Hudson River.

You can run down the river and find a few, in fact, quite a number.

When a certain warrant is issued for an offense committed in the neighborhood of the courthouse there isn't much sense in a man being arraigned out in some other county 140 miles away from the only place that is interested and where most of the witnesses will be found, where an officer or federal commissioner probably exists.

In other words, the statute as has just been read is a very impractical one and is probably constantly breached. I am sure it is.

Mr. Holtzoff. The question now is where the 100 miles

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Mr. Seth. I think arresting an individual outside of the State where the warrant is issued is wrong. I do not believe under present conditions these warrants should run outside the State.

Mr. Holtzoff. Well, we have cases where a man may be arrested in Jersey City for an offense originating in New York and he may contest for several months taking him across the Hudson River, and it is that sort of situation this is intended to meet.

Mr. Seth. Well, why a hundred miles? Why not make it two hundred?

Mr. Holtzoff. The reason is that subpoenas in civil cases run a hundred miles.

Mr. Seth. I know that is the fact in civil cases, but if we are going to repeal the law why not make it effective?

Who is going to serve the warrant, the marshal in New Jersey or New York?

4 Mr. Holtzoff: Either one. It might be an F.B.I. man, or a Treasury agent.

Mr. Seth. What is the Constitution about it, entitled to a grand jury of the district, does that apply to the preliminary?

Mr. Holtzoff. No. The constitutional provision only applies for trial.

Mr. Robinson. In that connection I should place before you a proposal that has come through the committee which was

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United States.

Instead of limiting it to a hundred miles, your warrant to be effective throughout the country.

Mr. Seth. I favor that on a bench warrant issued through indictment, but we have here now the commissioner's warrants just on a complaint, and I doubt whether anybody on a commissioner's warrant could be taken out of a state and taken to another state or even to another district.

Mr. Medalie. Isn't the distance more important than the state boundary?

Mr. Seth. Oh, yes, of course.

Mr. Medalie. It seems to me there is more hardship involved in having a man arrested up in the Adirondacks to be brought down to lower Manhattan, than to bring him from Newark to the courthouse in Manhattan. I think distance is the real hardship.

Mr. Seth. Don't you think that is the reason for that provision in the law, the nearest United States Commissioner?

Mr. Medalie. Yes, that is the reason, but it has been completely ignored because it has been found impracticable.

The commissioner who gives full time to the job, as he does in our district and probably does in your district, is available to attend to the business of the disposition of the case and has the facilities for doing it, and the witnesses near him and available to him; and if a person is to be

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Mr. Seth. Well, we have a situation out our way, of course, that a man might be taken 400 miles to the commissioner that issued the warrant and put to a terrible hardship away from his witnesses and everything else.

Mr. Medalie. I think it is a choice between hardships.

Mr. Holtzoff. Well, how would it be to change this to provide so that the 100 miles distance be measured from the point where the warrant is issued?

Mr. Seth. I think we had better not try to change the existing law by these rules.

Mr. Robinson. Well, isn't there quite a waste of time and effort that serves no purpose?

Take the Southern District of New York, if you want to arrest a man over in the Eastern District you get a warrant from the commissioner in the Southern District.

You know he is over in the Eastern District but you have to get a return from the marshal in the Southern District.

Then you have to go through the process of notifying the United States Attorney in the Eastern District that you want this man, and that involves the business of having the man arrested; it involves that there must be a proceeding in the Eastern District; you have to bring the witness, one and maybe more, possibly the complainant, over to the Eastern District and get a warrant over there, and then on that warrant--on that [illegible] that warrant then you have to arrest your man;

ought to avoid if we can.

Mr. Medalie: I wonder if we can consider another practical point too, how much is there of arrests made on commissioners' warrants where the defendant has to be brought from a great distance? Does that represent a considerable number of cases or are those rare cases?

Mr. Holtzoff. I imagine that is the exception.

Mr. Medalie. It seems so to me.

Mr. Holtzoff. Except in the rural areas where there might be a couple of hundred miles between commissioners. That occurs in places like Montana or Idaho.

Mr. Longsdorf. Or San Bernardino County, California.

Mr. Wechsler: Wouldn't it be adequate to have the warrant run as provided here but retain the duty to bring it up before the nearest magistrate?

Mr. Holtzoff. Not the nearest magistrate.

Mr. Wechsler. Nearest commissioner.

Mr. Medalie. He may be a justice of the peace.

Mr. Wechsler. Well, under the existing statute, the nearest commissioner or judicial officer having jurisdiction, under existing law.

Mr.Holtzoff. Suppose today a man is arrested in Bronx County; the nearest magistrate is a city magistrate in the local Police Court.

Actually the prisoner will be brought down to the Federal

Mr. Medalie. That is one law I am sure we are violating.

Mr. Holtzoff. I think, if it is violated, we have an opportunity to change the law here and I think we should take advantage of it because it is better for all concerned that this prisoner should be taken a United States Commissioner in the Federal Building, and we can save defendant's rights by changing that to read, "brought before a magistrate as promptly as reasonably possible."

Mr. Wechsler. And that eliminates concern for distance as one of the defendant's rights. It is an asset to a defendant to be taken before a commissioner or magistrate where he is rather than somewhere else where the warrant was issued.

I think, as was said before, you have to make a choice here, but I do not think we can eliminate entirely concern for moving arrested persons around.

Mr. Holtzoff. Well, I thought we agreed on that in the subcommittee.

Mr. Robinson. Will this take care of this part--

Mr. Wechsler. I did not know about the statute.

Mr. Robinson. (Continuing) --in 5 (a) where we took up the matter of returning the arrested person to the magistrate, of course the provision in line 7, paragraph (a), does repeat the clause of section 591--or, the following sections, in regard to the nearest magistrate.

Mr. Wechsler. You have repeated this clause where he is

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is made outside of the district in which the complaint is issued. We can put that in in line 5.

Mr. Wechsler. That is an arguable solution.

Mr. Medalie. Well, then, what will you do with your witnesses that will be, for their own convenience, available only before the magistrate issuing the warrant?

Mr. Robinson. Well, I am not saying I would favor changing it that way. It seems to me there are questions both ways.

If it is necessary to have any safeguard against the commissioner abusing this power of having his warrants served in other districts or other states, that might be one way to safeguard it.

Mr. Medalie. Well, don't we have a similar situation under existing state practices? A crime is committed in one corner of the state, the defendant happens to be in another corner of the state. The warrant may be issued by a magistrate and there are provisions for executing it in other counties and bringing it up before the magistrate who issues the warrant.

Mr. Robinson. Some states provide a justice of the peace cannot serve outside of the county.

Mr. Medalie. Then there are other officers.

Mr. Robinson. Yes.

Mr. Waite. Mr. Chairman, I ask for information now on this discussion. In view of the constitutional provision that a man can be tried only in the state or district where the

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Mr. Holtzoff. It would be, because it is not required by the Constitution. There might be statutes. The Constitution merely provides the right to be tried in the district where the crime is committed. It does not go beyond the trial of the case.

Mr. Waite. So it would be possible, then, to arrest a man in California for an offense committed in New York, and bring him back for a preliminary hearing in New York.

I do not say it would be wise but it would be possible under the Constitution?

Mr. Holtzoff. Yes.

Mr. Wechsler. The statutory provision on that I think is only this, where an offense is committed in any other district, it shall be the duty of the judge seasonably to issue and the marshal to execute a warrant for his removal to the district where the trial is to be had.

Mr. Robinson. Yes, that is section 304 of Title 18?

Mr. Wechsler. 591.

Mr. Robinson. Section 604--

Mr. Longsdorf. What section did you show, Mr. Wechsler?

Mr. Wechsler. 591.

Mr. Seth. Mr. Chairman, I move, in line 34, you put a period after "state" and strike out the rest of the sentence. That will bring it down to the civil procedure rule. Let it be served anywhere in the state.

Mr. Seth. That is good all over there, based on New York's complaint.

Cut out the"100 miles". This is a subpoena rule rather than a service under the civil rule.

Mr. Medalie. Mr. Seth, in dealing with a situation where there is a large territory, don't you subject a man to less inconvenience if you state he may be arrested within 100 miles of the place from which the warrant is issued? That is, wouldn't there be greater inconvenience against that than if he could be arrested in the other corner of the state?

Mr. Seth. That may be true, but I do not think this committee should extend the scope of the criminal law, Mr. Medalie. That is the way it is done here. They can go clear across Rhode Island, two states.

Mr. Robinson. But you do feel, on indictment or information, you favor a warrant country-wide?

Mr. Seth. Yes.

Mr. Medalie. Which comes to the same thing. Particularly because of a man's ability to move around very quickly, a hundred miles is no great distance today.

The Chairman. We have a motion. Do I hear it seconded?

Mr. Medalie. A man can easily move over a border and be 25 miles away from the place where the warrant is issued.

Mr. Wechsler. Does this represent a change of the existing situation insofar as it affects the whole state?

least should be defined.

Mr. Holtzoff. Well, if a person is charged in the state court at Dallas, Texas, with a state offense, and he happens to be in El Paso, at the other end of Texas, he would be arrested and transported back to Dallas.

Why shouldn't the federal courts have the same authority to that extent?

The Chairman. We have a motion.

Mr. Medalie. Can I take up something else?

The Chairman. Yes.

Mr. Robinson. Line 34, "state in which it is issued". That was your suggestion?

Mr. Holtzoff. Yes.

Mr. Robinson. If that is desirable we will, after "state" insert "in which it is issued".

I am not sure that is necessary, but you have reason for thinking it is, don't you?

Mr. Holtzoff. Well, just better English.

Mr. Wechsler. We have to do something with the word "returnable".

Mr. Robinson. "Issued." Is that satisfactory?

Mr. Holtzoff. Yes; "is issued" instead of "is returnable".

Mr. Robinson. Yes.

In line 35 substitue "issued" for "returnable".

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the civil rules with reference to service of subpoenas, and, by statute.

Mr. Seth. Is the airplane a usual mode of travel down there?

Mr. Burns. Not after the next two or three weeks.

Mr. McLellan. I move the words "mode of travel" be stricken.

Mr. Holtzoff. I do not think we need it. I second the motion.

The Chairman. Any remarks?

All those in favor say "Aye." Opposed, "No."

Carried.

Mr. Robinson. In the last line, Mr. Youngquist suggested that the word "may" be stricken out.

Strike out "may" and change "order" to "orders".

Mr. Medalie. How does that read now?

Mr. Robinson. That is line 36.

Mr. Medalie. How does the sentence read?

Mr. Robinson. As corrected?

Mr. Medalie. Yes.

Mr. Robinson. Mr. Youngquist suggested, "may be served wherever the court orders it to be served."

And I would like--in the following paragraph--

The Chairman. Well, is there anything further on (2)?

All right.

Mr. Medalie. Well, all of the last sentence is unnecessary, "The summons shall be served in the same manner as summons in civil cases".

Mr. Robinson. What line?

Mr. Medalie. The last sentence of (3) on the very same page, "The summons shall be served"--"by anyone authorized to serve summons in a civil action".

Mr. Robinson. Well, that is the person, not the manner.

Mr. Medalie. Can't we get it all in in one place?

7 Mr. Robinson. Isn't it just as well to differentiate between them?

Mr. Medalie. All right. Withdrawn.

The Chairman. Have you some others?

Mr. Robinson. Line 39, Mr. Youngquist suggests that the word "the", the third word, we should strike out to and including the "a" and insert instead "causes of the arrest and of the fact that".

It will read then--after "arrest" strike the comma: "In making the arrest the officer shall inform the defendant of the causes of the arrest and of the fact that a warrant has been issued for his arrest".

Mr. Holtzoff. The cause of the arrest. It ought to be singular, I think.

Mr. Robinson. Right; "the cause of the arrest and of the fact that a"--the last word in the line--"warrant has been

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the fact that John Smith has filed a complaint against him.

Mr. Holtzoff. Does the officer have to go that far? I think the officer merely has to say, "I have a warrant for your arrest."

If it is a deputy marshal he may not know the nature of the complaint.

Mr. Medalie. We want him to know.

In other words, you don't want to take a man from El Paso and bring him to Dallas without at least telling him you are arresting him for running a still in Dallas.

Mr. Holtzoff. Well, if you have a warrant you show the defendant the warrant.

Mr. McLellan. Then you inform him of the cause of arrest.

Mr. Medalie. Well, he has to wait if the officer hasn't got it with him until it is practical.

Mr. Burns. What are the sanctions on failing to carry out the manner specified?

Mr. Holtzoff. I suppose the only sanction is a suit for false imprisonment against the officer. I don't think there is any other sanction for that.

Mr. Medalie. Well,responsible federal officials will take the pains, knowing the law, that there is a remote consequence involved, of telling the man he is arrested for mail fraud, selling stock in the XYZ Company.

Mr. Holtzoff. I was under the impression the present law

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all right.

Mr. Burns. What is the practice? The United States Attorney mails the warrant, say, to Los Angeles. Is that it?

Mr. Holtzoff. No. Today a warrant only runs in the district. The warrant is turned over to a United States marshal and he delivers it to one of his deputies.

Mr. Wechsler. Isn't it really in the case of arrest without a warrant that this thing is important?

The F.B.I. learns that a man is wanted for a crime in New York. He is traveling in Oklahoma, and they learn that over the teletype or some other swift means of communication, and they make the arrest without a warrant, and that is where the thing is really necessary, isn't it?

Mr. Holtzoff. Yes.

Mr. Wechsler. To meet the modern development of nation-wide police.

Mr. Holtzoff. Yes.

Mr. Wechsler. I do not see the real need for that for arrest with a warrant. Although many states do allow an arrest by an officer without a warrant in his possession if he has personal knowledge of its issuance.

Mr. Holtzoff. But the suggestion made is what the officer shall inform the defendant of. I don't suppose it is very important.

Mr. Wechsler. If the officer does not know what the

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Mr. Holtzoff. That is right.

Mr. Medalie. What if he does not have the warrant with him?

Mr. Wechsler. I say he should at least know what the warrant is issued for before he makes the arrest.

Mr. Holtzoff. I agree with that.

The Chairman. Mr. Tolman tells me lunch is ready.

Mr. Medalie. Couldn't we finish that one sentence?

The Chairman. I was thinking, because of Mr. Youngquist's interest in it, we might hold it back.

We will have lunch served across the hall.

(Thereupon, at 1:00 o'clock p.m., a recess was taken until 1:45 o'clock p.m. of the same day.)

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A F T E R R E C E S S

The proceedings were resumed at 1:45 o'clock p.m., at the expiration of the recess.

The Chairman. We will come to order, gentlemen. Is there anything further on (c) (2), page 2, Rule 4?

Mr. Robinson. There is one further suggestion, Mr. Youngquist, that saves us two words, I believe. In line 43, at the end of the line, insert "may be"--that is,"as soon as may be." Then strike out in the next line "practicable after the arrest."

The net gain is two words saved.

Mr. Seasongood. Did we leave in the person making the arrest is supposed to tell the cause of the arrest, Mr. Chairman?

The Chairman. Yes.

Mr. Seasongood. I do not want to argue about it, but it seems to me to be a very dangerous situation. How can he state accurately the cause of the arrest? It has never been done before. I do not see why it is done now.

Mr. Robinson. Mr. Youngquist would like to be heard on that.

The Chairman. Suppose we pass that until Mr. Youngquist gets here.

Now, let us go to (d).

Mr. Seth. A somewhat similar question arises. Thelast

magistrate.

Mr. Holtzoff. You do not return it to the magistrate issuing the warrant.

Mr. Longsdorf. May I ask Mr. Wechsler to read what Section 594 says about that? Is there something in Section 594 about returning?

Mr. Wechsler. I think it does cover that, because the return should presumably be made by producing the prisoner at the time the prisoner is produced.

Mr. Holtzoff. I think perhaps the problem can be solved by omitting (d). I do not think it serves any substantial purpose. The only time you need a return is when you are unable to execute it. I move we strike out (d).

Mr. Robinson. Is it true that you never bother about a return except when you cannot execute it?

Mr. Dean. What about mailing the summons? Do you need a return on that?

Mr. Holtzoff. No, because if the defendant does not show up, you just issue a warrant for his arrest. The summons is for the benefit of the defendant.

Mr. Wechsler. I do not agree. I think the warrant should be returned when the prisoner is arrested and brought before a magistrate.

Mr. Burns. Isn't it the practice in Massachusetts to make

of the endorsement, and the important thing is the production of the prisoner before a magistrate.

Mr. Robinson. In Rule 11 there is an incorporation by reference of this part of Rule 4. I think the two rules belong together, and it would not be wise to strike out this clause without considering the other rule.

The Chairman. The words "to the magistrate" are ambiguous. What is the solution of that?

Mr. Holtzoff. This does not require a return when the warrant is executed. It is at least equally as important to make an honest return as to make a return where the warrant is executed.

Mr. Medalie. Why do you want the word "executed"? Dealing with both situations, the language could be:

> "The officer who receives the warrant or a person who receives the summons before service shall make return thereof."

That covers both cases.

The Chairman. Who is the magistrate?

Mr. Medalie. Whoever issued it.

Mr. Holtzoff. But if you bring your prisoner before a different magistrate, you do not return a warrant to the magistrate who issued the warrant.

Mr. Wechsler. Youreturn it to the magistrate before whom

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person who receives the summons before service."

Mr. Seasongood. That won't be comprehensive enough for the mailing.

Mr. Medalie. If the magistrate himself does the mailing, then no one need appear before him to make a return, but the paper has been served, because he has mailed it and made a notation on it.

Mr. Holtzoff. Why not say"the person who receives the warrant or summons for service shall make return thereof promptly"?

Mr. Robinson. You execute a warrant and you serve a summons, do you not?

Mr. Holtzoff. I think the word "serve" is not wrong. You either serve or execute a warrant. I have seen both words used interchangeably.

Mr. Burns. What is wrong with the present wording, striking out "to the magistrate"?

Mr. Holtzoff. Because it refers to executing the warrant. That implies it was executed. Suppose the officer has been unable to make the execution. He still has to make the return.

Mr. Burns. "The officer to whom the warrant has been issued."

Mr. Holtzoff. "The person who receives a warrant or summons for service shall make return thereof promptly."

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Mr. Holtzoff. I think the only return would be an affidavit that he mailed it.

Mr. Burke. It would then change the type of service to a warrant without any knowledge as to whether it had actually reached the hands of the person to whom it was addressed, which might be of some importance.

Mr. Holtzoff. The mailing would have to be done by the magistrate, so you would not need a return if the service was mailed, because the magistrate could make his own notation.

Mr. Burke. And then upon his failure to appear, if the alternative of a warrant should be made, without any knowledge on the part of the magistrate as to whether he had actually received it.

Mr. Holtzoff. Well, I do not think the defendant would be prejudiced under those circumstances, would he, because the summons is something for his benefit, and if the summons does not reach him or if he fails to respond to it, he is not really prejudiced by having the warrant issued, because the warrant could have been issued to him in the first instance.

Mr. Burke. I was thinking, if it was really of no substantial value to him, or if through no fault of his he failed to receive it--as happens sometimes--should he then be penalized because of having a warrant issued?

Mr. Holtzoff. I do not know how else you could get around

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service shall make a return thereof promptly."

Mr. Holtzoff. My suggestion was to combine the two, thereby shortening it, by saying that the person who receives a warrant for service or execution shall make return thereof promptly.

Mr. Medalie. I am inclined to favor that. It is very simple. The word "return"has a definite meaning. We do not need to explain what "return" means.

Mr. Robinson. "For execution" is enough.

Mr. Medalie. Yes, a person who receives the warrant or summons for service. You serve a warrant.

Mr. Robinson. In Rule 4 (a) we provided that there might be more than one warrant or summons. Therefore, they could be put out and not all of them could be served. I think the first words should be, "An officer who receives or a person."

Mr. McLellan. Suppose a person who receives a summons is not an officer. Don't you want to change the word to "person"?

Mr. Medalie. The word "person" would include officer and person.

Mr. Holtzoff. I think Mr. Robinson's suggestion could be taken care of by saying "any person."

Mr. Medalie. Say "a person."

Mr. Holtzoff. "A person who receives a warrant or summons for service shall make return thereof promptly."

That takes us to Rule 5.

Mr. Seasongood. Before you come to that, I think that the Committee on Style could do something about this mailing summonses. Mr. Medalie says that the magistrate is to mail the summons. Is that right?

Mr. Medalie. Not necessarily, but he might, or he might give it to a person or officer to mail it.

Mr. Seasongood. I think that it should be the marshal just as much in one case as in the other.

Mr. Medalie. You cannot always get the marshal. He may be miles and miles away.

Mr. Seasongood. Well, then, somebody. It is just whatever you want to make it. It does not seem to me clear the way it says here in line 11 of 4 (a), where it says the magistrate shall deliver the warrant or he may mail the summons. If it means that, if that is the way it is done, that is all right.

Mr. Medalie. The magistrate mails it. It is his responsibility.

Mr. Seasongood. If that is what you want, all right. I do not know whether that is the thing to do or not.

Mr. Holtzoff. I think that is the simplest way.

Mr. Seasongood. Have the magistrate mail the summons?

Mr. Holtzoff. Yes.

The Chairman. We shall now go back to Rule 4 (c) (3).

verify that. It was either his suggestion or Mr. Holtzoff's.

Mr. Holtzoff. It was not mine.

Mr. Youngquist. That goes back to the language of tentative draft 3.

Mr. Chairman, I must confess that I do not recall having originated the suggestion. I note that it follows the language that was in tentative draft 3, and I think it better language, because, after all, the important thing is not that the complaint has been filed, but that the officer has a warrant for his arrest.

Mr. Holtzoff. Shouldn't that be limited to requiring the officer to notify the defendant of the fact that a warrant has been issued for his arrest?

Mr. Youngquist. I think that is enough.

Mr. Wechsler. That language is in the model code and it probably reached here by some roundabout method.

Mr. Holtzoff. I suggest that we omit "cause of the arrest" and have this read:

> "In making the arrest the officer shall inform the defendant of the fact that a warrant has been issued for his arrest."

Mr. Medalie. That is no news to him. He wants to know why he is arrested.

Mr. Holtzoff. Well, he can see the warrant.

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Mr. Medalie. We have introduced it. Let us take care of it by informing the culprit with what particular offenses he is being charged or, if he has never had any other clashes with the law, what he is charged with.

Mr. Burns. If he has the warrant, he is compelled to show it, but if one is out and he does not have it, he should state what it is. I do not think the marshal or officer has any business making an arrest without knowing what the warrant is about.

Mr. Holtzoff. He has the warrant with him. I do not think he is compelled to know what the facts in the warrant are.

Mr. Burns. But he should be compelled to show him what the warrant is.

Mr. Holtzoff. I agree with that. Suppose the marshal has a half donzen warrants to execute in the same locality, as is frequently the case. He mightknow the general charge--

Mr. Medalie. Doesn't he keep a notebook or something or get a slip of paper from someone?

The Chairman. It would seem to me clear that if the deputy does not have the warrant the District of Columbia or somebody should at least give him a piece of paper which he could keep in his pocket with the name, John Jones, and what the crime is.

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Then go back to the second sentence, which says that if he does not have the warrant with him he should tell the defendant generally what the cause of his arrest is.

Mr. Longsdorf. Aren't there provisions in some of the state statutes requiring the officer to identify himself and disclose his official character?

Mr.Burns. That has relation to the privilege of using force. I think the corelative of that should be a duty on the part of the officer to show the warrant or to state that the warrant is in existence and state the general substance of it.

Mr. Youngquist. That would be covered by informing him of the cause of his arrest and the fact that a warrant has been issued.

TheChairman. Will the committee rearrange the sentences, then?

Are there any objections to the paragraph rephrased in that form?

Mr. Seasongood. In 3 (a) we are not going to say "the accused" instead of "the defendant"?

Mr. Robinson. He is the accused before a complaint is filed, but after criminal proceedings have begun he becomes a defendant, does he not?

Mr. Wechsler. I do not think he becomes a defendant upon the filing of the complaint.

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The first sentence, of course, provides:

"The officer executing a warrant of arrest shall without unnecessary delay take the person arrested before the magistrate."

That ought to be "a magistrate."

I think the words "nearest or most accessible" ought to be omitted in line 7, because the usual practice is to take a prisoner before the United States Commissioner rather than the local justice of the peace, even though the local justice of the peace may be a little closer to the place of arrest, if a United States Commissioner is within a reasonable distance from the place of arrest, and I think it is a practice that we should perpetuate.

On the other hand, if the United States Commissioner is beyond a reasonable distance, you then take your prisoner before the justice of the peace.

For that reason I think you ought to strike out "nearest or most accessible magistrate, " in line 7, having in mind that the phrase "without unnecessary delay" in line 4 protects the defendant against being carted several hundred miles.

Mr. Burns. How does it protect him, Mr. Holtzoff?

Mr. Holtzoff. It says "without unnecessary delay."

Mr. Burns. I know,but how does it protect him? What is the sanction of it for the defendant's right not to be held

You would be changing the existing practice in a detrimental way if you put in the words "nearest and most accessible" and expect it to be followed.

The Chairman. Why shouldn't you state it in the rule as you have argued it? He shall be taken to the nearest commissioner that can be reached, and if not, to the nearest and most accessible.

Mr. Burns. Within a reasonable distance.

Mr. Holtzoff. I will be in favor of it.

The Chairman. Then you would have a rule which you might reasonably expect the marshals to live up to.

Is that feasible, Judge, in your judgment?

Mr. McLellan. My experience is not enough to let me answer the question, but I agree with the suggestion.

Mr. Burns: We do not undertake in any way to pass judgment on what would be the effect on the defendant's rights of unnecessary delay.

Mr. Holtzoff. I think the only effect would be his right to sue the officer for false imprisonment.

Mr. Burns. Or possibly habeas corpus.

Mr. Wechsler. There is another sanction. The officer loses his mileage, under the statute. I do not know whether that is followed or not.

Mr. Holtzoff. Well, these rules will have the effect of

for us along those lines, if there is no objection.

Mr. Wechsler. Does that direction encompass the case where the arrest is with the warrant? We are back to the same problem again.

As things stand now, if the arrest is with a warrant, the man be taken before any magistrate.

Mr. Robinson. That would be inserted there in that first sentence--the same provision.

Mr. Wechsler. That is, the procedure would be the same whether it is with a warrant or without a warrant?

Mr. Robinson. The provision the chairman mentioned.

Mr. Wechsler. I think it should be the same whether it is with or without a warrant.

The Chairman. In other words, it would apply to the first and second sentences.

Is there anything further on (a)?

Mr. Seth. How about that delegation of power? A man arrests a man for another, for a felony in his presence. He says he cannot go to the commissioner and he may turn him over to another one to take him. That is dangerous.

Mr. Robinson. That is an existing provision, but I have got to find where it is.

Mr. Seth. I move that that next sentence be stricken out.

Mr. Wechsler. I second the motion.

Suppose a private

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sheriff to take charge of the prisoner. Why should the private individual be required to be made to go to the magistrate to file a charge? Why can't he let the officer take care of him?

Mr. Wechsler. That is not delegation.

Mr. Holtzoff. The officer may take physical possession of the prisoner, but how can the officer be expected to make an oath to the charge?

2-2 Mr. Robinson. That is where we got into a discussion of knowledge and information and belief.

Mr. Holtzoff. The officer may not even have information and belief.

Mr. Robinson. Well, if the private individual tells him all about it, he has some information about it.

Mr. Holtzoff. Yes, but suppose the officer does not consider the private individual a creditable person. Suppose he does not know anything about his credibility.

Mr. McLellan. May I ask Mr. Seth if the sentence he suggests should go out begins with the words "If it is impossible"?

Mr. Seth. Yes. It is unnecessary.

Mr. Robinson. How is the problem met if it is impossible for the person making the arrest to go ahead to the nearest magistrate and make the complaint? Wouldn't this make it imperative that if the private person makes the arrest he must

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bring our discussion down to an issue, because there seem to be two distinct ideas in this one paragraph. One is the right of a man to be taken before a magistrate promptly, and the other is the obligation of somebody to file a complaint against him. It seems they will have to be dealt with separately.

It would be quite unnecessary, I would suppose, for the man who made the arrest to take the man before a magistrate. It might be very unwise for him to leave his place of duty while he was doing that, and yet at a later time it might be very necessary for him to go around and make the complaint.

Couldn't we leave this to the committee to be reformulated, so that those two ideas would be separate?

Mr. Holtzoff. I am under the impression that there is a motion to strike out that sentence. Perhaps we might dispose of that.

Mr. McLellan. That was seconded.

Mr. Burns. The headnote of Rule 5 is not quite accurate, since down to line 11 it deals with procedures prior to bringing the defendant before the commissioner or magistrate.

Mr. Robinson. Is that true? The first sentence says that the officer shall bring the man arrested before the magistrate.

Mr. Burns. It is prior to the proceedings. The title is "Proceedings Before the Magistrate," not proceedings anterior, but proceedings in front of.

[illegible] that the way you start proceedings

The Chairman. Let us see if we can clarify this situation. We have a motion pending and seconded to strike out the sentence beginning on line 9 running through line 11. Is there any discussion on that?

If not, all those in favor of that motion, say "Aye." Opposed, "No." It is carried.

Next we have a question raised as to the title. Is there any motion?

Mr. Holtzoff. I move that we change the title so as to read, "Proceedings After Arrest."

Mr. Robinson. That will cover all the rest of the rules.

The Chairman. We have a five-page rule here which is devoted substantially to proceedings before the Commissioner. Maybe we had better hold that question of dealing with the title of it until we deal with the whole five pages.

Now, the motion is made by Mr. Waite, and seconded, I believe, that Section (a) be referred back to the reporter for redrafting, keeping in mind separation of the physical fact of taking the defendant in custody and the further fact of appearing to make the complaint against him.

Mr. Waite. If we strike out that sentence, as was just done, then that eliminates the complaint preceding, so I do not know that it need be redrafted, so I withdraw the motion.

Mr. Holtzoff. We still have to redraft it to embody your

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The Chairman. Is that motion seconded?

Mr. Robinson. Seconded.

The Chairman. Are there any remarks?

All those in favor say "Aye." Opposed, "No." The motion is carried.

Are there any suggestions on the balance of Rule 5 (a)?

Mr. Wechsler. Lines 15 and 16, Mr. Chairman, the words beginning with "also" toward the end of line 15: I move that that go out to the end of the sentence and that there be substituted for it the following words:

"That any statement made by him may be used against him."

Mr. Dean. I second it.

Mr. Robinson. Would you consider an alternative, simply adding that after the word "should"?

Mr. Wechsler. I do not see why the magistrate should
2-3 advise the accused that he may make a voluntary statement to any person. It is inappropriate to the magistrate's duty, which is to advise him of his rights.

Mr. Holtzoff. I second Mr. Wechsler's motion.

The Chairman. I would like to ask, by point of information, what was meant to be covered by the words that are in question in Mr. Wechsler's motion.

Mr. Robinson. Some of the hypocrisy that exists now when

Mr. Holtzoff. He is not questioned before a magistrate.

Mr. Robinson. No, but he is being questioned probably just after he has been to the magistrate.

Mr. Holtzoff. No. He is questioned before.

Mr. Robinson. All right, before. This privilege against self-incrimination is worked pretty hard to have the magistrate say nothing to the accused except, "Now, you don't have to talk," or "Any statement you make may be used against you," without saying to him, "If you wish to say something in proper defense," without letting him understand that he may if he wants to.

Mr. Wechsler. He is told that he does not have to open his mouth.

Mr. Robinson. It is just put in here for your consideration, and I have no objection whatever, of course, to Mr. Wechsler's suggestion, if that is the wish of the committee. I think that would take care of the situation.

The Chairman. Question: All those in favor of the motion say "Aye." Opposed, "No." The motion is carried.

If there is nothing further, we go on to 5 (b).

Mr. Medalie. May I point out that in 5 (b) there is a very fundamental omission? There is no provision made for admitting a defendant to bail or committing him pending the examination. The provision for commitment or bail is made only where the defendant is held to answer. Where a defendant

Mr. Medalie. No.

Mr. Robinson. Over in Rule 6 with reference to bail is there no provision that covers it? If it is not taken care of, of course it will be taken care of.

Mr. Holtzoff. Line 26 refers only to postponements at the defendant's request. I think we ought to have postponement's at the Government's request.

Mr. Robinson. That has been stricken out, but line 26, "at the defendant's request," should go out.

Mr. Holtzoff. Was that stricken out?

Mr. Robinson. We have not got to it yet.

The Chairman. Where would this bail provision begin?

Mr. Robinson. Either in this provision or the one with reference to bail, with a cross reference.

Mr. Medalie. I think it should come in here: "His bail or commitment pending examination."

Mr. Holtzoff. I think that ought to be covered in line 26.

Mr. Youngquist. Does not Rule 6 apply to bail fixed by the committing magistrate? If that is so, since that is the rule making the bail, should not we put it in there, rather than in 5?

Mr. Medalie. No, because you have a provision with regard to bail in Rule 5, page 2:

"If it appears from the evidence that there is

defendant or admitting him to bail. That is in Rule 5.

Mr. Holtzoff. There is another one on line 23, which takes care of the other contingency. It seems to me that your provision ought to go in at either line 23 or line 26.

Mr. Medalie. That seems to be the only omission in (b), and instead of stopping now, suppose, with the other assignment we have taken, we rewrite that.

Mr. Holtzoff. Yes. This is all part of the same rule.

The Chairman. If there is no objection, that will be the course.

Is there anything further on (b)?

Mr. Medalie. At the top of page 2, line 28, "If it appears from the evidence," and line 32, "If it appears that there is not probable cause."

That word "appears," as we found out from the other analysis on the issuance of the warrant, involves two ways of these things appearing. One is automatically and the other is by the conscience of the judicial officer being satisfied. I am in favor of providing that the conscience of the judicial officer should be satisfied and should not be an autonomy.

Mr. Burns. I think that is the fair inference here, but I do not think there should be any doubt about it.

Mr. Youngquist. I do not think it makes any difference. It is up to the magistrate to determine whether there is

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The Chairman. Let us put in, if there is any doubt about it, "If it appears to the magistrate."

Mr. Medalie. "If the magistrate is satisfied," or some such similar language as in the model code.

The Chairman. I would not go so far as to say "satisfied," because some magistrates would never be satisfied.

Mr. Waite. Are we striking out "from the evidence"?

The Chairman. No. "If it appears to the magistrate from the evidence."

I suppose that applies again to line 32?

Mr. Medalie. Yes.

Mr. Holtzoff. You could shorten line 32 by striking out line 32 and the first half of line 33 and saying, "otherwise the magistrate shall discharge him."

Mr. Orfield. Is it clear from Section (b) that the defendant can appear at the preliminary examination and testify? Is he guaranteed that?

Mr. Burns. Doesn't it say that he may cross-examine witnesses?

Mr. Orfield. I suppose it is implied there.

Mr. Seasongood. Is it clear that he can do that by counsel?

Mr. Robinson. The general rules say he has a right to counsel.

Mr. Seasongood. It says [illegible]

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Mr. Robinson. Rule 13.

Mr. Burns. Is there any necessity to have a cross reference to the determination of bail throughout? Suppose you just said "admit him to bail" and said nothing about how it is fixed?

Mr. Medalie. You are doing it throughout all the rules.

Mr. Waite. Mr. Chairman, before we drop (b), in draft No. 3 there was a provision that the magistrate might interrogate the accused after informing him that he need not answer, and that if he did answer, the answers might be used against him, and the further provision that the magistrate shall also inform him that his refusal to answer might be used against him.

I notice that was stricken out, and we argued it pretty fully once before. I do not imagine there would be any value in proposing its reinstatement, but it does seem to me that we ought to have something in here getting away from the anarchistic idea that the magistrate cannot even ask a question.

I would like to move that we add to (b) something to this effect--I do not care about the precise language--:

> "Whenever any person has been brought before a magistrate and has been advised of his right to counsel and to a preliminary hearing as herein provided, the magistrate may interrogate him concerning his participa-

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against him."

Then leave out any suggestion that his refusal to answer might be used.

The Chairman. Is that seconded?

Mr. Orfield. Seconded.

The Chairman. Is there any discussion?

Mr. Burke. I do not quite understand the point that is involved there, unless it is a change of that portion of Rule 5, lines 14, 15, 16, and 17.

Mr. Waite. No. It comes up this way. On occasion the magistrates, having informed the man that he need not answer and that his answers may be used against him, have perhaps incautiously asked him questions, and the man's answers have in fact been incriminating.

There has been question in the courts whether those admissions before the magistrate could be used in evidence. The New Jersey courts, if I remember rightly, have held they can be used in evidence. One or two others have held that they could not be.

It has always seemed to me rather absurd, when a man admitted something incriminating, after having been warned that he need not do so, so that he is under no compulsion, and having been warned that it might be used against him, to say

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that it cannot be used merely because it came out in answer to

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Mr. Holtzoff. I think it is none of the magistrate's business, in a sense. The magistrate is a judicial officer. He is neither a prosecuting officer nor an investigating officer, and I do not think it would be wise to give him a function to partake of the other two functions.

Mr. Waite. Isn't it just as much his duty to find out the truth of the situation, if he can find it by asking questions of the accused, as it is his duty to find out the truth by asking the questions of the witness?

Mr. Holtzoff. You might as well say that the judge at the trial shall interrogate the defendant, with the privilege to the defendant to refuse to answer.

Mr. Burns. It seems to me you do not settle this by saying it is a judicial function as against some other type of function, because the judge can ask questions in probing him at the trial.

Mr. Holtzoff. He cannot ask questions of the defendant unless he takes the witness stand.

Mr. Burns. Oh, yes, that is right.

Mr. Holtzoff. But this proposition goes further, as I understand it. Even if the prisoner does not take the stand, the magistrate should have the privilege of interrogating the witness, and it is that feature that I think is objectionable.

Mr. Waite. Since he is trying to find out whether there

Mr. Waite. This would put him under no obligation to answer questions.

Mr. Holtzoff. It is the duty of the prosecution to produce sufficient evidence to warrant the magistrate to issue a warrant of probable cause.

Mr. Waite. I see that, but I do not see any reason why the magistrate should not be permitted, if he thinks it will ascertain the truth, to ask the questions.

Mr. Youngquist. His duty begins only when the preliminary examination is begun.

Mr. Dession. I am not sure of that. The magistrate does not have to accept a waiver.

Mr. Youngquist. That is true, but, at any rate, his duty of determining whether there is probable cause begins only with the beginning of the preliminary hearing. Suppose he refuses to accept the waiver?

Mr. Dession. As I understand it, Mr. Waite's question is not whether that is the way it is now. I think it is clear that is the way it is now. But should it remain that way?

Mr. Youngquist. I think it should, considering the function of the committing magistrate.

Mr. Burns. Isn't the committing magistrate a device for the protection of the defendant?

Mr. Dession. Yes.

[illegible] waive it. It seems to me if he does

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Mr. Holtzoff. You will find publicity seeking magistrates sending for reporters in a case that might attract public interest and conducting an interrogation of the defendant. I do not think it is fair to the defendant, and I do not think it will help the prosecution's case.

Mr. Waite. If you leave out the sending for reporters, I do not see why the magistrate cannot do it. I agree it is not his function to do it. I suggest that we should change it in the interest of ascertaining the truth and the effectuation of justice.

Mr. Youngquist. Wouldn't you be expanding his duties to those of an investigativeofficer?

Mr. Waite. I would not be expanding his duties at all. I would be expanding his privilege perhaps to that of an investigating officer, yes. It has been demonstrated time and

6 time again that when the magistrate does ask questions he oftentimes gets the truth in the answers, when at a later date the truth does not come out.

Mr. Youngquist. In view of the fact that we have been complaining so much of the administrative agencies lately, that they have combined the functions of investigator, prosecutor, and judge, I think it would be inappropriate for us to combine those functions here; but beyond that, it seems to me that, after all, if there is a preliminary hearing and the magistrate [illegible] think he should even

these rules if we put that in, because those opposed to it would say that we are sniping at the rights of the defendant, and you could make a fine oration about the poor defendant being brought before the magistrate, flanked on either side by armed policeman, and a judge in a black robe before him firing questions at him. What could a poor fellow do?

Mr. Waite. I am inclined to think that a better talker than I am could make a fine oration on the other side.

As far as the matter of adoption is concerned, my idea is that we ought to put through what we regard as the best rules, regardless of what lawyers may want.

My impression is that it would be helpful if it is adopted, because it will show that we have realized the progress of conditions and the necessity for such adoption.

Mr. Burns. Under present conditions the committing magistrate frequently conducts examinations of witnesses produced by the Government.

Mr. Holtzoff. Yes.

Mr. Burns. And frequently, when the defendant takes the stand to show that there is no probable cause and to show that he should not be charged, the magistrate is then free to ask questions.

Mr. Holtzoff. Yes, but 99 times out of a hundred the defendant does not take the stand before a magistrate, and I [illegible] the magistrate clothed with authority to

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by this committee?

Mr. Holtzoff. I certainly think so. It would introduce the French inquisitorial procedure into our practice, which is foreign to our ideals. Maybe the French system is the best. I do not know.

Mr. Dession. This would not be the same.

Mr. Medalie. The interrogating officers are trained and skilled for that work and give it all their time.

Mr. Dession. There is another difference. There is no privilege under the French system. A man can be kept coming back for a year. The real abuse in France is not the fact that a man is questioned; the abuse is that sometimes a magistrate takes a year to conclude his investigation, and the man is in jail waiting for him all the time.

There is another thing here. Apart from the merits of this particular approach, to which I am rather sympathetic, it does bring up a problem that I do not think we have dealt with in any satisfactory way, and that is the whole problem of arranging for the questioning of an accused. At the present time you say it is an investigative function; it is for the police officers. We say here he is to be brought, without any unnecessary delay, right after arrest, before a magistrate.

Is this supposed to be a good excuse for delay?

Mr. Holtzoff. No.

Mr. Youngquist. In what respect is the existing law not followed?

Mr. Wechsler. With respect to taking the arrested person immediately before a magistrate.

Mr. Holtzoff. I think the existing law is generally followed.

Mr. Wechsler. When is a man interrogated by the F.B.I., then?

Mr. Holtzoff. If he is arrested in the evening, he can be brought to court the next morning. If he is arrested Saturday evening, he cannot be brought to court until Monday morning.

Mr. Dession. Suppose he is arrested on Monday morning at 10:30.

Mr. Holtzoff. If he is arrested Monday morning at 10:30, he will be brought before a commissioner.

Mr. Dession. Even if it was Barker, the suspected kidnaper? You would rush him on to court?

Mr. Youngquist. We have a sheriff up in northwestern Minnesota. When he arrested an accused, if he got a statement or a confession at all, he got it on the drive from the place of arrest to the jail to the magistrate. That is when he is most likely to do his talking.

Mr. Holtzoff. I donot think as a matter of practice there are any violations of the existing law, because there are intervals that are reasonable between the time of arrest and

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Mr. Holtzoff. The law does not contemplate that a man will be brought to a magistrate at midnight or on Sunday.

Mr. Wechsler. I am not sure about that.

Mr. Dession. The opportunity to question is an accident of time and not present at all times.

Mr. Dean. That explains a large number of Saturday night arrests.

Mr. Holtzoff. No question about that.

The Chairman. You have heard Mr. Waite's question. All those in favor say "Aye." Opposed, "No."

7 I am in doubt. All those in favor make a show of hands. Five. Opposed. Nine. The motion is lost.

Mr. Dession. May I raise one other question, going back a little ahead of that? I see that waiver of a preliminary examination is a right of the defendant, as we have it written. As I understand it, that is probably the existing law, but I am not sure.

Now, are there any situations where he would not be allowed to waive, even though he is proceeding to waive? In other words, does the Government have an interest in having a preliminary examination in any situation?

Mr. Robinson. I have never found any suggestion of it in the cases.

Mr. Dession. I do not recall any cases where the Govern-

Mr. Youngquist. One purpose of the device of a preliminary hearing is for the Government to get its witnesses committed by their testimony. I am merely suggesting that as a possible reason for having a preliminary hearing. In some States that is taken care of by giving the magistrate the power to call any witnesses at the request of the prosecuting officer and having them interrogated on the particular subject, so that the same purpose is served. That is not so under the Federal law, so far as I know.

Mr. Robinson. We have that request made now. Do you think we should incorporate a provision of that sort, that the prosecuting officer be given the power to recall witnesses? They use it in New York; they use it here.

They have a notice which looks a good deal like a subpoena. By sending that to the man the United States Attorney wishes to consult or discuss a case with, they bring him in.

Mr. Holtzoff. I think that is a different point from the one Mr. Youngquist was speaking of.

Mr. Youngquist. No; I was speaking of the two. I was speaking of what the purpose of the preliminary hearing against the wish of the defendant might be, and, as an alternative, the provision that is found in the statutes of some States instructing the magistrate, at the request of the prosecuting officer, to examine witnesses. I have used that latter

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Mr. Burns. I think the Government has adapted the procedure of a preliminary examination to its ends byhaving witnesses produced by subpoena and then having them put under bond for their appearance, or sometimes put in jail; and some of the prosecutors I have known of have used the device of preliminary examination to have government witnesses identify the defendant. But that ought not to make any less valid the theory which is found in the cases and in practice that the preliminary examination is for the protection of the defendant and he may waive it.

Mr. Orfield. Section 40 of the model code gives the prosecution an absolute right to the preliminary examination. Section 40, subsection 2, provides:

> "Notwithstanding waiver of examination by the defendant, however, the magistrate, on his own motion, may, or on the demand of the prosecuting attorney shall, examine the witnesses for the State and havetheir testimony reduced to writing or taken in shorthand by a stenographer and transcribed. After hearing the testimony, if it appears that there is no probable cause to believe the defendant guilty of any offense, the magistrate shall order that he be discharged."

Mr. Youngquist. I do not think we ought to have what amounts to an examination of witnesses for the purposes of the

about it and provide an independent procedure for the calling in of witnesses in cases where the defendant waives preliminary examination.

Mr. Robinson. That is comparable, of course, to what is done in the grand jury. A grand jury is called and the power of subpoena is lost. Prosecuting attorneys examine witnesses in the grand jury room. There again it is a device that we might well consider supplanting some direct proceeding. The United States Attorney here, Mr. Curran, and his assistants, Mr. Margolius,and Mr. McCarthy, are quite willing to have that considered a possibility. I am pleased to prepare a submission of that kind.

The Chairman. Have we any motion?

Mr. Dession. I move that the section dealing with that be amended to permit the Government to hold a preliminary hearing, notwithstanding waiver by the defendant.

Mr. Medalie. On that occasion. Otherwise he can hold grand jury hearings--

Mr. Dession. I mean simply to hold a preliminary hearing.

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Mr. Medalie. That is, the defendant is brought in before a magistrate for examination.

Mr. Dession. That is right. He wants to waive.

Mr. Medalie. "Nevertheless," the district attorney says, "I want my witnesses examined now."

Mr. Dession. That is right. Maybe they are hostile; maybe they would not make affidavits. He wants to see what they will say under oath specifically.

Mr. Medalie. The district attorney has controlled that.

Mr. Seasongood. And the way you have it here in this line it says, "If the defendant does not waive a preliminary examination the magistrate shall proceed."

Mr. Medalie. But I mean that the proposal is that where the district attorney wants to proceed to take those depositions, even though the defendant has waived, on that occasion he may do it, but he will know whether or not it is a useful thing to do, not like when you get over comfortable.

Mr. Dession. No, ordinarily he will not do it, I admit.

Mr. Holtzoff. Very rarely that was not done.

Mr. Waite. He does not have to do it. All he has to do is issue a grand jury subpoena, even when the grand jury is not used.

Mr. Holtzoff. We have taken the position, with the United States attorney on one occasion, that he may not issue a grand jury subpoena except when a grand jury is in session.

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a grand jury subpoena when the grand jury was not in session.

Mr. Medalie. Where do you get the power to reprimand or rebuke the United States attorneys, who are Presidential appointees, and not me, et cetera?

Mr. Holtzoff. Well, the statute provides that Justice attorneys shall supervise the activities of the United States attorneys.

Mr. Medalie. Of course I can understand.

Mr. Holtzoff. And when I say "we" I mean the Department of Justice that rebuked the United States attorney.

Mr. Medalie. All right. There is a new breed of United States attorneys. Just leave that to us.

Mr. Holtzoff. The Department of Justice rebuked the United States attorney for using the grand jury subpoena when the grand jury was not in session.

Mr. McLellan. Was that motion seconded?

The Chairman. I do not know.

Mr. Wechsler. I second it.

The Chairman. Seconded.

Mr. Waite. Now, what is the motion?

The Chairman. Mr. Dession's motion is, in effect, that this section (b) be rewritten and provide for a preliminary examination even where the defendant waives it.

Mr. Seasongood. Permits it.

Mr. Medalie. With this sentence in, it is very easy.

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it not enough for the Government?

Mr. Dession. I do not feel strongly on that. With the Government, then. This is in Rule 5 (b).

Mr. Seth. I think it should be "request of the United States attorney only."

The Chairman. Do you accept that as an amendment?

Mr. Dession. Yes.

The Chairman. Is there discussion on the motion further?

(There was no response.)

The Chairman. All those in favor of the motion say "Aye." Opposed, "No."

Let me get it, then. Those in favor of the motion, show your hands. Nine. Carried.

Mr. Youngquist. Mr. Chairman, I assume, referring back to that, that the provisions should be guarded so that the hearings held as a preliminary hearing would be held properly.

Mr. Dession. Oh, yes.

Mr. Youngquist. And in the presence of the defendant if he chooses to be present. I was doubtful about the vote, but assuming that those safeguards would be thrown about the proceeding I voted "Aye."

Mr. Medalie. That means also the "cross" is in.

Mr. Youngquist. Yes.

Mr. Dession. Yes.

Mr. Medalie. There cannot be any objection to that, be-

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tion on the United States attorney's investigating, examining, any witnesses in any other fashion?

Mr. Dession. I do not think I would want to do that unless we make some such change as the one Mr. Waite had in mind, because at the present time we believe any type of investigating officer can question a revenue agent of the Alcohol Tax Unit or the F.B.I. As long as they can do it I do not know any good reason to prevent a United States attorney from doing it, or his office. I would trust him more than any of the others.

Mr. Youngquist. Mr. Chairman, while we are on the same subject may I revert to line 28 of Rule 5? I think we are right there now.

2 The Chairman. Yes.

Mr. Youngquist. And suggest the use of language that appears in the third tentative draft, so it would read, "If from the evidence it appears to the magistrate that there is probable cause." I think that reads a little bit more smoothly.

Mr. Holtzoff. You mean shift the words around?

Mr. Youngquist. Yes. "If from the evidence it appears to the magistrate that there is probable cause."

The Chairman. Very good.

Mr. Holtzoff. Mr. Chairman, in line 34, while we are on this subsection, just an item there: I think the word "when" ought to be changed to "after".

discharging or holding the defendant.

The Chairman. Right. 37 is deleted.

All right. Section (c)(1).

Mr. Wechsler. Mr. Chairman, before we go to section (c) I am curious to know whether the vote on Professor Waite's motion constitutes the judgment of the Committee that we ought not to do anything on the whole subject of regularizing or regulating interrogation. You may recall that at an earlier session there was a proposal by Judge Crane, which I am advised is still under advisement, although it does not appear in this draft; and there was some discussion of it at that time. I do not believe that there is anything before us that we could act on at this time, but I do believe that unless the Committee is determined to forego looking into that subject some work should be done upon it.

And so, to bring the matter to a head, I might move that that question be referred to the Reporter for consideration and submission to the Court.

Mr. Holtzoff. I should like to ask a question of Mr. Wechsler, or rather make a suggestion: It seems to me that that would be beyond the scope either of the jurisdiction of this Committee or even of the rule-making power under the enabling act, because the enabling act and the charter of this Committee, so to speak, relates to rules of procedure in district courts and before United States commissioners. Now,

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of evidence, which is clearly within the jurisdiction of the Court.

Mr. Holtzoff. Oh, yes.

Mr. Wechsler. And within the jurisdiction of this Committee for recommendation to the Court. The proposal, as I recollect it, was that no statement made by the defendant should be admissible in evidence unless it had been taken in a designated way.

Mr. Burns. That would involve--

Mr. Wechsler: (interposing) --getting into it, if we want to get into it.

Mr. Burns. That would involve inferentially repeal of practically all the administrative statutes of the last 7 or 8 years that have conferred upon administrative bodies powers of interrogation and investigation. I have in mind the various acts that the Securities and Exchange Commission administers whereby they can compel answers under oath to written questionnaires, or they can hold hearings which are in the nature of grand jury investigations and require the production of records and the presence of witnesses, and they are empowered to compel answers and avoid the privilege against self-incrimination by virtue of the generally accepted statutory method. Now, are we prepared to formalize and regularize the diverse methods used by these agencies in getting at facts?

Judge Crane's proposal, Judge Burns, was

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the defendant in custody is fully protected by the rule against duress and inducement. No, I think that it would not be satisfactory, and it certainly will not help the innocent--and that is what the privileges are for--it will not help the innocent, to provide that any statement that the defendant may make to a police officer or law enforcement officer shall not be admissible against him unless it is made before a magistrate. I remember that Judge Crane made that proposal. That rule of evidence was never enforced by the court of which Judge Crane was chief judge.

Mr. Wechsler. It never was the law of New York.

Mr. Holtzoff. No, but I suppose the Court of Appeals had the power to make it law if they so chose.

Mr. Wechsler. They never had the rule-making power.

Mr. Holtzoff. No. I mean that sort of thing could be case law, I suppose. I think it would be very unwise.

Mr. Wechsler. I think that is the weak part of your argument, by the way.

Mr. Holtzoff. I see the case law made in a more adequate fashion than that would have been. I am strongly opposed to any prohibition against interrogation by arresting officers, subject to the existing limitations, which sufficiently safeguard the accused.

I think we also ought to bear in mind this, from the tical standpoint: I suppose those who advocate such a

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Mr. Medalie. An erroneous decision.

Mr. Holtzoff. What?

Mr. Medalie. An erroneous finding.

Mr. Holtzoff. I do not think that is so.

Mr. Medalie. They had specific evidence it was being done by the Secret Service in my district, and I had to have it stopped by unjustified means.

Mr. Holtzoff. You mean in counterfeiting cases?

Mr. Medalie. Yes.

Mr. Holtzoff. I do not think the Secret Service is indulging in it any more.

Mr. Medalie. The Wickersham commission, you know, came at a time when the practice was on.

Mr. Holtzoff. I do not think it will promote the administration of justice by just clamping down on interrogation by police officers, and it will not help the innocent.

Mr. Wechsler. I do not think the idea is to clamp down on interrogation by police officers if the process of interrogation is reasonable or necessary. The question is whether it shall be under any supervision or whether it shall be, as at present, under no supervision. Now, it does seem to me that you have a strange paradox in the whole legal system when you refuse, on the one hand, as modest a proposal as that made by Professor Waite in granting investigatorial power, although the [illegible] has a choice not to answer and is specifically warned

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a magistrate if he made the arrest, since the sanctions are weak for failure to bring before a magistrate immediately, or even after he has been held, has been committed, if he can get access to him in the jail. I refuse to believe that there is not a pattern there that is subject to some reasonable regulation that will preserve the legitimate interests and right of the Government to investigate and the protection of the defendant against improper interrogation.

Mr. Waite. Am I right that your proposal would not necessarily delay the interrogation until this formal preliminary hearing?

The Chairman. Your proposition now is that a rule be drafted to that end or solution?

Mr. Wechsler. Unquestionably, yes. I am not prejudging what the rule should be, Mr. Chairman. It just seems to me that we have skipped this whole subject and I think have skipped it pretty much because of the feeling that it is not anything that is easy to talk about: it is a subject that is almost taboo. And I do not think it is taboo. I agree with Mr. Holtzoff that it is something that ought to be faced openly, and I think it would be a healthy thing to have considered what methods of interrogation are appropriate and what are not; and I believe that so far as our jurisdiction is concerned we reach it either because the defendant is in custody or because [illegible] through the drafting of a rule of

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Mr. Robinson. Really we have done a lot of work on it, Mr. Wechsler, and there has been a lot of discussion on it, you know, and it was quite thoroughly discussed the last time; and it seems to me--this is my conclusion, speaking for myself only--that the alternative is: either accept Mr. Waite's proposal as it was on our previous draft with full force, or the present system, not try to work out a compromise between the two. You remember as a practicing lawyer--and when I am
4 defending I do it, and when you are defending you will do it--he will tell a client, a defendant, "Now do not talk. If you are asked any question about this matter simply do not talk. Whether you are before a magistrate or whether you are somewhere else, just do not tell them a thing. They cannot make you talk, and on the trial they have to prove their case without your talking," and so on. You have that situation. There is no use of trying to finesse it somehow so that a man will talk and you will get information out of him without somehow going not strictly according to rules that you may write in a book about it.

Mr. Waite. Mr. Robinson, I sent you a copy of a Law Review article by Kauper.

Mr. Robinson. A very excellent article.

Mr. Waite. You remember he suggested something that might be intermediate between the police interrogation and this more formal preliminary hearing. If I remember rightly he provided

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Mr. Robinson. Yes, but there you deprive him of counsel, do you not?

Mr. Waite. Oh, yes.

Mr. Robinson. And this complements the second provision, which you have just said we were utterly unwilling to accept, namely, that on the trial it be possible for the Government to introduce evidence that such and such a question was asked of this defendant and that he refused to answer.

Mr. Waite. Yes.

Mr. Holtzoff. I do not think, under the guise of the rule of evidence or in any other manner, even if we have technical jurisdiction under the guise of the rule of evidence, that this Committee should attempt to regulate the administrative activities of law enforcement officers and other administrative officers.

The Chairman. I do not quite see that, because we are concerned primarily, I take it, with seeing that justice is done on both sides, and that would be a means of doing it. As a matter of procedure I think we might make it our jurisdiction.

Mr. Waite. Mr. Chairman, I think Mr. Wechsler's motion was not seconded. I should like to second it and vote in favor of it, even though when the proposal is made I may violently react against it.

[illegible] You have heard the motion, duly seconded.

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magistrate, when a man is brought in, to require some kind of report under oath from the arresting officer as to time of arrest, where he has been in the meantime, whether he has been arrested, if so where and by whom, and let that be a matter of record.

Mr. Holtzoff. How does that become a part of the criminal proceedings?

Mr. Dean. Proceeding before a commissioner.

Mr. Holtzoff. What before a magistrate would require it?

Mr. Dession. If this was something the commissioner was supposed to do on the occasion of a man being brought in to him, I guess it would become part of the procedure.

Mr. Robinson. I should like to say one more sentence on this matter, going clear down to the roots of it. The big trouble is the question whether or not the privilege against self-incrimination is workable in the shape it is now in. Dean McCormick of the University of Texas a few weeks ago made an address raising the question that bears on avoidance of the privilege against self-incrimination, and as rapidly as it might become evident to us we will be willing to amend our constitutions; but that is another thing, and certainly it is beyond our jurisdiction to proceed toward putting our weight against self-incrimination as found in the Constitution. In neither way can you meet the deep-rooted difficulties that are due to an effort

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not to. I would simply be requiring a report from the arresting officer on just what has happened since the man was first taken into custody. What I have in mind is this: I think that when a duress question is raised at a trial and again on appeal, more often than not the appellate court has no way of finding out what the truth is. You have conflicting testimony. Judge Crane in open court, I recall, one time decided that maybe on the Mummiani case things were not as they should have been. They reversed. Mummiani then apologized to the police for saying the things he had said about them. That seemed to be a little hard on the Court of Appeals.

Mr. Waite. He remarked, if I remember, "Well, a man has got to have some kind of a defense."

Mr. Dession. Yes. I do not think the remedies we have for this thing are practical, and I am not a bit optimistic about finding an ideal solution. Even with a French examining magistrate you have a third degree, only there is a slang word for it in France, but I do think we might improve this situation a little bit.

Mr. Holtzoff. I call for the question.

The Chairman. You have heard the motion. All those in favor say "Aye." Opposed, "No."

Those in favor, show your hands. Opposed.

Mr. Robinson. I would like to see the motion carried on [illegible] that Mr. Wechsler give us the benefit of his

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The Chairman. I think it is a very important subject. Would you do that?

Mr. Wechsler. Yes.

The Chairman. That is fine.

Mr. Seasongood. That means that we shall not finish at this session, does it not?

The Chairman. Oh, no. Professor Wechsler has been in that field before today.

Mr. Wechsler. I am not saying that I have pursued the initial problem to its conclusion.

Mr. Seasongood. Is it proper to ask if this is supposed to be a final meeting?

The Chairman. I think we can tell that better when we come to the end.

Mr. Burns. I should like to get an expression of sentiment about a proposal on the assumption that we, the Committee, have the power to issue a rule that any statement made by a defendant after he is arrested shall not be admissible against him at the trial.

Mr. Robinson. We had that up on a previous draft, you know.

Mr. Burns. Has there been anything recent?

Mr. Robinson. There is a statute on that.

Mr. Seth. Do you mean while he is in custody?

Mr. Burns. While he is in custody.

advance it.

Mr. Holtzoff. But let me put it the other way: I mean it seems to me it would be a shield to the guilty rather than a help to the innocent.

Mr. Burns. My feeling is that the prosecutor has made his case prior to the arrest and that in the case of a hardened criminal he gets no help because the criminal's first reaction is, "See my lawyer," and, "I am not talking." Now, in the case of a nonprofessional the Government has a great advantage because of the atmosphere of duress that, no matter how nice the surroundings are, is always present in the case of custody. So it seems to me that the innocent will be protected and the guilty will not have any great advantage.

Mr. Holtzoff. It seems to me that that is coddling the defendant a little too much, for this reason: You say that the professional criminal will say, "I am not talking. See my lawyer." Well, that is not always the case. But even if it were the case, you have the less hardened criminal who perhaps does not resort to that subterfuge or to that expedient. It seems to me that you would deprive the enforcement of the law of a very important weapon.

I was reading the other day an opinion of Justice Holmes in which he observed that under our modern practice it is much more likely that the guilty will escape than that the innocent [illegible]. Coming from Justice Holmes that was, I thought,

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Mr. Wechsler. It would be helpful, however, to me, Mr. Chairman, to have some discussion of it by the Committee.

Mr. Robinson: I would refer Mr. Burns to Rule 20 of the third tentative draft, line 32, as mailed to you. That had a provision that no confession made to an officer shall be admitted in evidence unless the defendant has first been taken before a magistrate, as provided here.

Mr. Holtzoff. Well, that was not passed upon, Mr. Robinson.

Mr. Robinson. No, but it was considered.

Mr. Holtzoff. No, it was not. You mean it was suggested by one member of the Committee. It was never considered by the Committee.

Mr. Robinson. Oh, no, but that is a proposal, Mr. Burns, for consideration.

Mr. Dean. As I understand, Mr. Chairman, Mr. Burns' proposal is even broader than that proposal which you just read dealing with confessions. He would make it apply as well to all admissions of statements of the accused.

Mr. Burns. That is quite right, Mr. Dean.

Mr. Dean. I should like to throw one little bit in if you will not hold it too much against me, and that is this observation: When Mr. Robinson was pointing out a moment ago he made the deduction, I believe, that if you required that no confession would be admitted unless it was made before a magistrate of some kind the men would not make these confes-

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the magistrate, but the confession filed in the presence of the magistrate and signed by the accused. Now, if you had such a rule as that, I am not so sure that it would result in their not signing so many confessions.

Mr. Holtzoff. You mean the signature to the confession, not the interrogation?

Mr. Dean. That is right. In other words, some kind of a guarantee that it was in the light; that is all.

Mr. Holtzoff. What advantage would anybody get by having a written confession taken before a magistrate after it was made and having it subscribed in his presence?

Mr. Dean. The only advantage would be this: that you would have a guarantee that it was not taken under duress; you would also have the guarantee that it was taken or made by a man who had the advice of counsel.

Mr. Holtzoff. You mean that he would have advice of counsel before he signs it before a magistrate?

Mr. Dean. Otherwise, you see, the whole objection to it, it seems to me, proceeds on the assumption that if he had had the right to counsel you would never have the confession.

Mr. Holtzoff. Well, no.

Mr. Dean. Therefore you only get the confession when the man is without counsel.

Mr. Holtzoff. Now let us get this from a practical stand-

int. The man is interrogated by an F.B.I. agent or by an

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gets a lawyer, and the lawyer says, "I instruct you not to sign that confession," and then the confession will never be signed. Now, as a practical proposition, is that not the result that will be reached by such a course?

Mr. Dean. I think you would have a certain percentage of that, but you would have the guarantee that none of them was secured under duress. And duress is a very difficult thing to prove. Assuming that it exists, it is extremely difficult to prove.

Mr. Holtzoff. No, it is not, because we know that juries are always prone to accept stories of duress on the part of prisoners, and sometimes, as in the case, for instance, that Judge Dession just mentioned, police officers are practically convicted of duress unjustly on such a statement.

Mr. Dean. I think that has happened.

Mr. Dession. That sometimes happens.

Mr. Holtzoff. Yes.

Mr. Dession. And the opposite sometimes happens. It is very hard to tell.

The Chairman. Have we a motion before us?

Mr. Dean. Simply to include this broader subject, is it not, in Mr. Wechsler's motion?

The Chairman. Yes. There was no motion before us, as I recall. If there is no motion I think we should proceed to section (c).

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or other magistrate, first taking up in (a) the bringing of the defendant before the magistrate and the proper preservation of the rights of the defendant, under (a).

Then, (b) preliminary examination before the magistrate, usually with the idea of committing the defendant for the action of some higher court.

And now in (c) we come to trial of offenses by United States commissioners. (c) is based on the rules of procedure for trials before commissioners, as promulgated by the Supreme Court on January 6, 1941, and as found in 18 U.S.C.A., following 576a.

Taking those rules, the effort has been made here to incorporate those rules as a code of procedure following somewhat the outline and style of expression of the rest of our rules. Therefore you will see that the problem in connection with this incorporation is much the same as our problem in connection with the incorporation of rules of criminal appeals. In both cases the advantage of such incorporation is the idea of having a unified set of rules, complete from beginning to end of a criminal proceeding. The disadvantage with respect to this provision, namely (c), and also with respect to our criminal rules, is, of course, that the Supreme Court's power to promulgate rules under these two heads is not restricted as it is with respect to promulgating rules under the statute under which we are acting, that is, the chief statute under which we

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that the rules are so prescribed as not to be submitted to Congress but can be promulgated by the court itself as soon as it is satisfied on them. So that is on the other side of the ledger.

And, therefore, my present suggestion is this: It seems to me that we can do with this matter, this subject of rules for trial before United States commissioners, what we have done with regard to rules for criminal appeals, namely: try to work them out so that they do form part of a complete set of rules, but at the same time reserve our tactical plans for later determination, deciding whether or not we wish these places to indicate that--for instance, here we would say: The trial of petty offenses before United States commissioners shall be governed by the rules promulgated by the Supreme Court under authority of the act of, whatever the date is. And so with our appeals rules. But in any event it seems to me desirable that we consider the present rules on the trial of petty offenses just as we also are considering the present rules with regard to criminal appeals.

Mr. Dean. Does this draft contain any changes from the present rules on petty offenses? Are there any departures from the present rules in this draft?

Mr. Longsdorf. I should like information on that too.

Mr. Robinson. There may be one or two additions. For

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of substance, with the only exception of this matter of not requiring a plea of guilty.

Mr. Holtzoff. Well, do you require a plea of guilty?

Mr. Burns. You do require a plea of guilty.

Mr. Robinson. Well, you do require a plea of guilty here in this case. I am thinking of (b) preceding.

Mr. Holtzoff. That is right.

Mr. Robinson. Yes, there is no change that I know of between these rules and the rules already promulgated except this: that the term "information" is used by the court, where we use the term "complaint." That has caused some discussion--the use of the term "information" in the court rules--but in these rules we say: "written complaint before the magistrate or before the commissioner."

Mr. Holtzoff. Outside of that?

The Chairman. Outside of that there is no confusion.

Shall we run over these?

Mr. Medalie. May I make some suggestions there: under (1) line 42, "forthwith issue a warrant or summons as provided in Rule 4". I do not think you need to include the words "as provided in Rule 4." There is no other way to do it under these rules.

Mr. Robinson. Just for convenient reference you do not think it is needed?

[illegible] necessary to be done.

Mr. Holtzoff. "may issue".

Mr. Medalie. You have to have some process.

Mr. Robinson. Now, the Supreme Court's rule reads this way:

"Rule 1. A warrant of arrest shall be issued only on an information, under oath, which shall set forth the day and place it was taken, the name of the informer, the name and title of the Commissioner, the name of the offender, the time the alleged"--

So it says it shall be issued only on information.

Mr. Holtzoff. Well, I withdraw my suggestion.

Mr. Medalie. Nevertheless, the Supreme Court may not have in mind what we have just discussed this morning about being satisfied, the Commissioner being satisfied in his own conscience that the crime has been committed, whether there is probable cause to believe one has been committed. Either "shall" ought to go out or there ought to be the other provision, "if satisfied." This compels him again to act as an automaton, and we do not want to have that done.

Mr. Robinson. I think we used "may" before. We should use it here, Mr. Medalie. That is, I agree with you--

Mr. Youngquist. Redrafting 4 (a) will give the Commissioner that discretion.

Mr. Robinson. Yes.

filed," and so on.

Mr. McLellan. Do you thinkin 4 (a) it would be sufficient to just substitute "may" for "shall" again?

The Chairman. I would think that there would be a natural reference back. I mean it seems to me it is tied up closely enough together without repeating language; do you not think so?

Mr. Medalie. Yes.

Mr. Youngquist. But should not we then say "as provided in Rule 4," to make it certain?

The Chairman. Well, maybe we should; it would be better than repeating a lot of language.

Mr. Youngquist. Yes.

Mr. McLellan. A change shall be made?

The Chairman. A change shall be made, to reinsert "as provided in Rule 5."

Mr. Medalie. All right.

Mr. Holtzoff. Leave out "forthwith." You do not need "forthwith."

Mr. Robinson. Change "custody" to "presence," probably.

Mr. Holtzoff. Yes.

Mr. Youngquist. Why not cut out "if necessary to secure the custody of the accused"?

Mr. Medalie. You do not need that.

Mr. Robinson. Well, if the accused is already under arrest

The Chairman. We may eliminate that last clause.

Mr. Holtzoff. Well, if you do that, nine times out of ten or more in these petty offenses the arrest is made without a warrant.

Mr. Medalie. That is exactly what is not provided for here.

Mr. Holtzoff. That is not provided for. That is why it is thought.

Mr. Medalie. I was just coming to that in the other sentence, line 45: "is brought before the commissioner." He might be arrested without a warrant.

Mr. Holtzoff. But before youcome to that, in your first sentence you make it a duty on the commissioner, if you leave out that last clause, to issue a warrant or a summons whenever a complaint is filed. But the complaint might be modified.

Mr. McLellan. You have changed "shall" to "may."

Mr. Robinson. Yes.

Mr. Holtzoff. Oh, I see. That would be it, would it not?

The Chairman. "may issue a warrant or summons". Then I think you could strike that part from the beginning in the next sentence, could you not?

Mr. Medalie. "forthwith" is out.

The Chairman. Could you not just say, "When the defendant is brought before the commissioner"?

The Chairman. Oh, have you it out already?

Mr. Robinson. "When the defendant is brought" insert "or appears," because on summons he just appears.

The Chairman. Why not say "appears"?

Mr. Robinson. Well, if he is arrested he may be appearing.

Mr. Holtzoff. He may be appearing by compulsion.

The Chairman. But he is appearing.

Mr. Robinson. "When the defendant"--

The Chairman. You can do a lot of things to make him appear.

Mr. Robinson. Would it not indicate that it was a voluntary appearance?

The Chairman. Not at all.

Mr. Holtzoff. I do not think so.

Mr.Robinson. "When the defendant is brought or appears".

The Chairman. There were various steps at common law by which to make him appear. You were not before the court until you had been committed and entered your stipulation.

Mr. Robinson. All right. Then leave off the first sentence, all of it?

The Chairman. No. Let it read: "When the defendant appears before the commissioner and is informed of his rights as provided in Rule 5 (a), the commissioner shall further inform the defendant".

48 I suggested there be a

that the Supreme Court Rules make that so important as a condition precedent to anything being done that we cannot stress it too much.

Mr. Youngquist. What was the suggestion, please?

Mr. Holtzoff. My suggestion is that in line 48 we put a period after the word "commissioner" and strike out the rest of the sentence. The only information that has to be given to the defendant is that he has a right to elect to be tried before the commissioner, and you do not need the rest of that.

Mr. Robinson. No.

Mr. Holtzoff. If he elects to be tried there, then the commissioner must procure his written consent.

Mr. Robinson. Let me read the last sentence of Section 576, under which these rules are drawn:

> "The commissioner before whom the defendant is arraigned shall apprise the defendant of his right to make such election and shall not proceed to try the case unless the defendant after being so apprised, signs a written consent to be tried before the commissioner."

Mr. Youngquist. Is that not taken care of by the last sentence: "If he signs his written consent * * * the commissioner shall arraign"?

Mr. Robinson. Should he not first be informed by the [illegible] of his right?

Mr. Robinson. That is all that is provided here.

Mr. Holtzoff. No, no; you go further than that.

Mr. Longsdorf. Mr. Chairman, was not that language that we are at this moment discussing incorporated into the rule made by the Supreme Court for the very purpose of having written evidence that he elected to be tried?

Mr. Holtzoff. Oh, well, we provide; the next sentence provides.

Mr. Longsdorf. Or did the Supreme Court put that in for a specific purpose of frustrating somebody's quibble?

Mr. Holtzoff. No, the next sentence requires that he sign.

Mr. Longsdorf. Yes.

Mr. Holtzoff. All I am suggesting is the elimination of the repetition.

Mr. Longsdorf. Well, leave it where it is, and then change it if he signs his written consent, if he consents to be tried.

Mr. Holtzoff. I think it is better to follow the statute. The statute says that the commissioner must apprise the defendant of his right to elect to be tried before the commissioner; it does not say that he must apprise him of the fact that if he does so elect he will have to sign.

Mr. Longsdorf. Does the statute imply that? I have not read it for some time.

Mr. Youngquist. Just a minute.

[illegible] just had it read.

which authorizes the Supreme Court to make these rules and again in the rules that the Supreme Court made? Does it appear in one or in both?

Mr. Robinson. It appears in the statute. Now let us have it in the rules.

Mr. Holtzoff. Will you read the statute?

Mr. Robinson. Yes, the provisions of the statute on the requirement of the docket, in "Docket," Rule 3 of the Supreme Court's rules:

"Docket. The Commissioner's proceedings shall be entered in his docket, which shall show: (1) The defendant's written consent to be tried before the Commissioner;"

That is the only reference in the rules to it.

Mr. Youngquist. That is taken care of by the last sentence.

Mr. Longsdorf. It is the same thing.

Mr. Robinson. Yes.

Mr. Holtzoff. In other words, neither the statute nor the rules say that in apprising the defendant the commissioner must apprise him both of his right to elect and of the necessity of signing.

Mr. Waite. That is what I want to know.

Mr. Holtzoff. It only requires him to apprise the defendant of his privilege of electing, and I think we should just

written consent to be so tried" in line 48, Mr. Robinson, would you say?

Mr. Robinson. All right, if that is the way you feel about it.

Mr. Holtzoff. Yes.

Mr. Seth. In lines 47 to 50 it is not clear what happens to the defendant if he has tobe tried in the district court. Does that mean the commissioner must bind him over without any evidence, or does the commissioner sit as a committing magistrate in that case?

Mr. Holtzoff. The last sentence answers that, if you will just read it.

Mr. Youngquist. No.

Mr. Seth. No, it does not.

Mr. Holtzoff. Does it not?

Mr. Seth. No.

Mr. Youngquist. It does not.

Mr. Seth. It says if he elects the commissioner shall hold him to answer in the district court.

Mr. Holtzoff. Oh, I see. I suppose the rule contemplates, although the statute is silent on the point and so are the Supreme Court rules, that the commissioner shall act as a committing magistrate.

Mr. Seth. I would think so.

[illegible] suppose so.

"If any person charged with such petty offense shall so elect, however, he shall be tried in the district court of the United States which has jurisdiction over the offense."

The preceding sentence:

"For the purposes of sections 576-576d of this title the term 'petty offense' shall be defined as in section 541 of this title."

So if any person charged with such petty offense--in other words, the reference back does not qualify this sentence, and therefore it indicates, Mr. Seth, that he shall be tried.

Mr. Seth. I know, but what happens to him? Does he have to go to jail?

Mr. Robinson. Well, he can be put on bail.

Mr. Seth. Well, who fixes it? It does not say anything here. He may be brought before the commissioner on a summons, but here this rule says if he elects to be tried in the district court he has to be bound over to the district court.

Mr. Holtzoff. If he is bound over he can give bail.

Mr. Robinson. The Supreme Court rules do not even say that.

Mr. Seth. It says he shall be held to answer.

Mr. Burns. Does it not imply a bail process?

Mr. Seth. I do not know. That is what I was worried about

Mr. Seth. Have they the language?

The Chairman. They have no bail provision at all in it.

Mr. Seth. But here it might be interpreted as making it mandatory on the commissioner to bind him over without evidence or without anything.

Mr. Robinson. That is the way the statute and the rules read.

Mr. McLellan. Mr. Seth, how would it be to say, "the commissioner shall if probable cause appears," before "hold him to answer in that court"?

Mr. Seth. Why not say "shall proceed as a committing magistrate"?

Mr. Youngquist. If I understand the statute as the reporter read it, it does not contemplate that there should be a preliminary hearing, and the theory of it, as I would see it, is that the defendant is given a choice of immediate trial before the commissioner--

Mr. Seth. Or go to jail.

Mr. Youngquist. There should be provision for bail, but if he chooses not to be tried before the commissioner and simply chooses to be tried before the district court and in that event no preliminary examination would be required, there should of course be provision for admitting him to bail.

Mr. McLellan. Of course that is all inferred, you see.

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Mr. Burns. Why not add "subject to the usual bail provisions"?

Mr. Youngquist. Where is that?

Mr. Waite. Lines 49, 50.

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Mr. Holtzoff. I do not think I would agree.

Mr. Burns. I do not think you need it.

Mr. Holtzoff. Holding him to answer includes the right of bail, I think, by necessary implication.

The Chairman. I should like to suggest that the last two sentences be reversed.

Mr. Robinson. Reversed?

Mr. Holtzoff. I think so.

Mr. Robinson. All right.

The Chairman. All right. If there is nothing further we shall go on to (2) on the next page.

Mr. Dean. Should not we specifically provide how the case gets to the district court? I was thinking of a sentence possibly saying that if he elects to be tried in the district court the commissioner shall transmit the file in the case to the district court.

Mr. Holtzoff. I think that is purely administrative. He holds him to answer, and I do not think you have to have those administrative details included.

Mr. Dean. It is different than holding a man to answer,

Mr. Holtzoff. Well, you are sending up your original file in the other cases also.

Mr. Dean. It is not your accusatory document on which the case proceeds from that point on.

Mr. Holtzoff. No.

Mr. Robinson. Do you want (2)? Did you want to make a motion?

The Chairman. Have we satisfied Mr. Dean on that point? Is there anything in the rules there about sending up the docket?

Mr. Robinson. No, sir, there is nothing. It just says under "Docket":

"The Commissioner's proceedings shall be entered in his docket, which shall show:"

The Chairman. And it describes the record.

Mr. Holtzoff. No.

Mr. Robinson. That is all it says on the record.

Mr. Holtzoff. No. Mr. Chairman, as a matter of phraseology I should like to make some suggestions on the last sentence, which now becomes next to the last sentence. I should like it treated something to this effect: If he elects to be tried before the commissioner and signs a written consent to that effect the commissioner shall arraign him as provided in Rule 14. It does not change the meaning; it is just by way of change of phraseology.

the district court.

Mr. Holtzoff. I just thought of having parallel structure. You have "If he elects" in one sentence. It might be well to start the other sentence with the words "If he elects," just as a matter of parallel structure. And then "in the manner"-- if you can substitute the word "as" for "in the manner".

Mr. Robinson. You will notice on line 47, Mr. Holtzoff, it says "right to elect to be tried before the commissioner". You can go right on, "if he signs his consent to be tried before the commissioner in writing."

Mr. Holtzoff. All right. Change "in the manner" to "as."

Mr. Robinson. Yes, that is right. Strike out "in the manner" beginning in line 52, as I understand.

The Chairman. All right. Now (c)(2).

Mr. Robinson. Mr. Holtzoff and I have discussed the last all except--beginning with line 54, (2). We believe that "If the plea is guilty," can go out in that sentence and the next sentence also. But see what you think about it. It would read then, line 53:

"(2) Plea. Upon arraignment, the defendant shall plead either guilty or not guilty."

Period. And the next would be "(3) Trial." line 57.

Mr. Burns. You have in Rule 15 a provision about entering a plea of not guilty when the defendant is silent.

here.

Mr. Holtzoff. What is the question?

Mr. Burns. Well, according to Rule 15 it provides that if the defendant is mute the plea of not guilty is entered.

Mr. Robinson. I will tell you how we will take care of that, Mr. Burns. In line 59, or beginning in 57, "(3) Trial.", just strike out the first three lines, and beginning just at the end of line 59 before "The trial" and insert this:

"If the plea is not guilty or if the defendant does not enter a plea or does not plead, the trial shall be conducted by the commissioner without a jury."

Mr. McLellan. Does that mean you can proceed to trial without any plea being put?

Mr. Robinson. That is right. You are going to have to make a separate sentence, Judge, are you not? "If the plea is not guilty the commissioner shall enter a plea of not guilty"?

Mr. Holtzoff. How are you making paragraph 3 read?

Mr. Dean. Why do you not say, "If a not guilty plea is entered"? That would cover your mute situation.

Mr. Robinson. All right. That would save time. "If the plea is not guilty, the defendant's not-guilty plea shall be entered"?

Mr. Holtzoff. What?

Mr. McLellan. What is that?

Mr. Robinson. As I understood him. I am trying to please

trial shall be conducted by the commissioner."

Mr. Holtzoff. I do not like the phrase "the plea is entered". Why not say "the defendant pleads not guilty"?

Mr. Dean. Because we just raised the situation where he does not plead not guilty.

Mr. Holtzoff. "or if he fails to plead".

Mr. Robinson. Yes.

Mr. Dean. All right.

Mr. Youngquist. You had first "or the defendant does not plead". If you say "or if the defendant refuses to plead," would it not take care of it and then you go right on?

Mr. Robinson. Well, I like this last suggestion. "If a plea of not guilty is made or is entered"; would that include both?

Mr. McLellan. "is entered".

Mr. Robinson. "is entered".

Mr. Youngquist. But what provision do you make for the entry of a plea of not guilty in case of a refusal to plead?

Mr. Robinson. I would assume that the commissioner had that power.

Mr. Burns. Well, you give that power in Rule 15.

Mr. Seasongood. To the trial court.

Mr. Burns. To the trial court.

Mr. Seasongood. That is right.

[illegible] entendere before a commis-

Mr. Waite. That is where you find them.

Mr. Burns. That is where they have nolo contendere. This absolutely will be the place where you will have a lot of these X-card litigations.

Mr. McLellan. You do not want to give the commissioner the discretion to enter a plea of nolo contendere, do you?

Mr. Robinson. No.

Mr. Holtzoff. No.

Mr. Burns. I do not think so. I think it might be very well to leave out completely the one-to-infinity chance that somebody will be mute and you will have to enter before a commissioner a not-guilty plea.

Mr. Robinson. That is what we have done here.

Mr. Holtzoff. I think that is right.

Mr. Burns. I think that is the better way. I just read it because of the Rule 15 provision.

Mr. Robinson. Which would mean this: before "The trial," at line 59, after "desired": "If the plea is not guilty, trial--" Strike out "the". -- "trial shall be conducted".

Mr. Holtzoff. "the". We ought to leave out "the". 13

"trial".

Mr. Robinson. All right. "the trial shall be conducted--" I would insert "by the commissioner". -- "without a jury as are trials of criminal cases in the district court."

[illegible] present language in that

Mr. Robinson. I am afraid that would be assuming too much. I would rather have "If the plea is not guilty". Are there others who will support that? Mr. Youngquist, what do you think about it? Of course what I am trying to do is to save two or three sentences.

Mr. Youngquist. I do not think it would be necessary. I think it would be all right to say simply "the trial".

Mr. Robinson. All right.

Mr. Youngquist. If you want to say, "Upon plea of not guilty trial shall be conducted"--

Mr. McLellan. Well, that is kind of assuming, is it not?

Mr. Youngquist. Yes; I think it is all the same.

The Chairman. Yes, I think so.

Mr. Youngquist. I do not think we need any.

Mr. Robinson. You think, do you, that lines 53 and 54 would be sufficient without the provision in there?

Mr. Youngquist. Yes.

Mr. Burns. I think that is quite clear.

Mr. Robinson. Therefore, (3) will read, as we drop out the first sentence and simply retain the second sentence:

"The trial shall be conducted without a jury as are trials of criminal cases in the district court before a district judge when a jury is waived."

rather than "where".

[illegible] it not be simply "conducted by the

Mr. Robinson. Some said they liked it, and some did not.

Mr. Medalie. After the words "without a jury" strike out the words "as are trials of criminal cases".

Mr. Robinson. I would take the exact language of the Supreme Court's rule on that. Now, whether you want it or not is up to you.

Mr. Longsdorf. I feel as though we ought to stick pretty closely to the language of the Supreme Court rules. Why should they be changed? What is wrong with them?

Mr. McLellan. Does the first sentence of (3) come out?

Mr. Robinson. Yes, sir, if that is agreed.

Mr. McLellan. All right.

The Chairman. Why is it necessary to say "as are trials of criminal cases in the district court before a district judge"? Who in the world would try them but a district judge?

Mr. Robinson. You would be interested to know that there is more redundancy than that in these rules. Let me read it to you.

Mr. Youngquist. Why not strike out the words "before a district judge"?

Mr. Robinson. Let me read you this sentence:

"Trials shall be conducted as are trials of criminal cases in the district court before a district judge in a criminal case where a jury is waived."

Mr. Medalie. You do not.

Mr. Robinson. What about your procedure, though. Are you sure the procedure will be understood?

Mr. Burns. Well, I raise a question that seems to be one of substance: Is there a provision in all the district courts that there shall be a record of the testimony by a stenographer?

Mr. Holtzoff. No.

Mr. Burns. You notice that on the record on appeal to the district court where a fellow has waived his right there is a consent. If he has consented in writing to a trial by the commissioner, he under these present rules will have great difficulty in raising substantive issues of law and in establishing them over the judge's objections. It is a very informal procedure that is intended to be created, but I think it may work out so that there is no method whereby he can establish what would be the equivalent of a bill of exceptions.

14 Mr. McLellan. That is something later, is it not, Judge?

Mr. Burns. Yes, but I wanted to find out now whether there was a provision requiring a stenographic report of the proceedings.

Mr. Seth. No.

Mr. McLellan. No, not even in the district court.

Mr. Burns. I should like to have that considered, because it seems to me it is important.

[illegible] not amount to anything.

Mr. Holtzoff. There is a proposal pending before the Judicial Conference of the Department of Justice, which has jointly cooperated on the bill that is now pending. It will take legislation to do it.

Mr. Burns. I think we ought to put it in the rules. Why would it take legislation?

Mr. Youngquist. We discussed that quite fully at previous meetings, and the conclusion was that we had better wait to see what the Judicial Conference does about it.

Mr. Burns. Well, now at this late date can you wait for that?

Mr. Youngquist. I mean to say nothing about it here, but to leave that for future action.

Mr. Robinson. That is it.

Mr. Holtzoff. It involves a heavy financial expense, and it involves the appointment of court officers, namely reporters, which is beyond, I think, the rule-making power.

Mr. Burns. I think we ought not to delude ourselves into thinking that an appeal from a commissioner is worth very much.

Mr. McLellan. Especially as they only allow the appeal to open up questions that could be opened up, come along, on a writ of error.

Mr. Burns. That is right.

Mr. McLellan. Without any of the evidence going up. And I [illegible] perhaps sometime later, but I

Mr. Youngquist. All right; in line 61.

Mr. Robinson. Now, how do you have that?

The Chairman. Just strike out those words, so that it will read: "shall be conducted by the commissioner without a jury as are trials in criminal cases in the district court," and so forth.

Mr. Robinson. Would you change "where" to "when"? "when a jury is waived"?

Mr. Longsdorf. Mr. Chairman, may I ask for the privilege that we go back for a moment? I should like to ask why Rule 1 of those rules drawn by the Supreme Court does not appear in here.

Mr. Robinson. Well, the substance of it does.

Mr. Longsdorf. Where are they?

Mr. Youngquist. What is Rule 1?

Mr. Longsdorf. Of the Supreme Court rules.

Mr. Robinson. It says this:

"Rule 1.--Information and Warrant

"A warrant of arrest shall be issued only on an information, under oath, which shall set forth the day and place it was taken, the name of the informer, the name and title of the Commissioner, the name of the offender, the time the alleged offense was committed and the place where it was committed and a description

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Mr. Longsdorf. Now, some of those particulars are put in there to fix in the complaint the fact that the offense occurred in a national park or federal reservation. Am I not correct in that?

Mr. Holtzoff. We defined a complaint in a previous rule this morning and that explanation is broad enough to comply with these proceedings and that does away with the necessity.

Mr. Longsdorf. Well, perhaps you may be right on that but can you be assured it would be implied that it must be committed in Yellowstone Park or was committed in Yosemite Park?

Mr. Holtzoff. Well, if you do not set that forth in your complaint will that be insufficient?

Mr. Robinson. Their words were, "The complaint shall be a written statement of the essential facts constituting the offense."

Mr. Longsdorf. Oh, the implication is possible, I agree to that.

Now, about the second paragraph of that rule,--

Mr. Robinson. If arrest is made on view.

Mr. Longsdorf. How do we cover that?

Mr. Robinson. The same thing.

Mr. Longsdorf. Do you thinkwe have covered that sufficiently by a prior rule?

Mr. Robinson. I believe so.

Mr. Longsdorf. Well, I want to know.

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Mr. Robinson. "If the plea is guilty or if the commissioner finds the defendant guilty"--may we insert, "If the plea is guilty or if the commissioner finds the defendant guilty, the commissioner shall impose sentence." I had better repeat, "the commissioner".

Mr. McLellan. I might say, "If the defendant is adjudged guilty". That will cover both.

Mr. Medalie. Well, another reason why I think Jim's line is better than that, and that is, if the commissioner understands what we mean; if we say "adjudged guilty," the commissioner probably would not know what we were saying. A lawyer would.

Mr. Robinson. Oh--

Mr. Medalie. You think he would? Well, the things that have been told me--

Mr. McLellan. I would rather he would go and find out, rather than put all those words in.

Mr. Youngquist. I can shorten it even more by saying, "If the defendant pleads or is found guilty".

The Chairman. "If the plea is guilty or the defendant is adjudged guilty, the commissioner shall".

Mr. Robinson. Then, in line 65, after the word "acquittal", Mr. Holtzoff and I discussed that line and decided we could put a period and strike out the rest.

Say that again.

g3

enumerating what should be in the docket.

We have a provision that the administrative office of the United States courts may prescribe. I take it they may incorporate what the Supreme Court rules say.

Mr. Youngquist. Does that general provision relating to dockets cover petty offenses?

Mr. Robinson. I think it does.

Mr. Holtzoff. If that were so we could even go one step further and strike out--

Mr. Robinson. He gets instructions from the administrative office as to what dockets to keep, and we have a general rule authorizing the administrative officer to prescribe which records he shall keep.

Mr. Youngquist. Oh, yes. That covers it.

Mr. Holtzoff. I think we can strike out 5.

Mr. Youngquist. I so move.

The Chairman. Moved and seconded. Those in favor say "Aye." Opposed, "No."

The motion is carried.

Mr. Robinson. I have no exception to 77.

Mr. Medalie. Judge McLellan raised the question and I agree with him.

" * * the decision of the commissioner upon questions of fact shall not be re-examined by the district court."

[illegible] opinions shows it is advisable that some court

g4

real--

Mr. Youngquist. How does the rule read, or the practice, if there is anything in the practice?

Mr. Robinson. Well, the rule reads, "Only errors of law apparent from the record as certified by the commissioner shall be considered by the court."

Mr. McLellan. Well, suppose there is no substantial evidence to warrant conviction, not simply that the thing is wrong but there is no substantial evidence. Ought not that be reviewed?

Mr. Youngquist. Isn't that an error of law?

Mr. McLellan. But you say, "Only errors of law apparent from the record." That does not include the question as to whether, upon all the evidence--

Mr. Seth. And since the commissioner makes only one finding, that he is guilty or not guilty, it seems to me to be misleading.

It is not like a civil case where he finds facts A, B, C, D, and E.

In this situation it is either a conviction or an acquittal, and I think a defendant ought to be entitled, if he can establish the record,--and the establishment of the record is another problem--to have the district court review.

Mr. McLellan. You do not use those words, that are equivalent.

g5

which the courts reviewed, were errors of law other than the sufficiency of evidence, so you are raising a question that is exceedingly difficult.

Judge Cramer could have told you all about that. That word "law" does not mean anything.

Mr. Holtzoff. But whether or not there is substantial evidence is a question of law.

Mr. Medalie. Well, that is exactly what the Court of Appeals of New York held was not a question of law, prior to 1926.

Mr. Holtzoff. But whether the evidence is sufficient is always a question, is that not a fact?

Mr. Youngquist. That I think is what was intended by this.

Mr. McLellan. When you say "apparent from the record" then you have the question of whether the testimony is part of the record, which traditionally it is not.

Mr. Youngquist. Could you pass on that question if the evidence was not included in the record?

Mr. Holtzoff. Judge, I wonder if that wouldn't be cured by letting the sentence read, "Only errors of law shall be considered by the court."

Mr. McLellan. Well, that improves it but I am afraid it is not quite adequate.

Mr. Seth. We have no procedure for establishing the

page 4, you will see that the record is whatever the commissioner has certified; and there is nothing in these rules which would give a party a way of showing the errors of a commissioner who, up to now, has been shown to be just a little above a high class moron.

Mr. McLellan. Of course the reason was that the evidence was not part of the record, could not have been used on a writ of error; and they developed a bill of exceptions to show what errors were made that were not apparent on the record.

Now, I don't know as you want to provide for a bill of exceptions but there ought to be some way of getting the evidence there so the judge can decide whether it has been supported by evidence at all.

Mr. Seth. But it may become very important from the standpoint of the administration of justice--you recall when the prohibition law caused almost a breakdown of the federal courts, it was suggested by Mr. Justice Frankfurter that they could find a way of handling these prohibition cases without the constitutional right of trial by jury.

Now, if you are going into a field where there may be hundreds of thousands of priority violations it may be to our interest to work out a procedure which will appeal to the average lawyer as getting a square deal, but if you have a situation where he is completely at the mercy of this commissioner, I doubt whether a lawyer would be wise in advising his client

g7

when we do come to the business of prosecuting these violations of priorities and the rest of these new devices to win the war, I think it will be found that the very severe penalty will be a reason why juries will not convict, and we probably will have to reverse the process.

Now, it seems to me if we do that we ought to try to develop a procedure which might meet with general approval.

3 Mr. Holtzoff. I was about to say that most of the statutes to which you refer, even though the violations are of minimum character, have provided very severe maximum penalties. That is why I called attention to the six months' provision.

Mr. Longsdorf. May I also call attention that this cannot apply on only those offenses committed on a federal reservation--it cannot be extended to a multitude of petty offenses.

Mr. McLellan. Mr. Chairman, may I change a word in the last sentence to read, "Only errors of law, including among others a question of whether a conviction was supported by substantial evidence, shall be considered by the court."

Mr. Seth. In these remote cases like federal parks, there is no chance of getting a court stenographer to take these little petty offenses.

I think the only remedy is to let the district court try it de novo.

Mr. Robinson. That is a terrible situation if practically

g8

record?

Mr. Medalie. I can conceive of a case where no record has been made, the commissioner is required to make what is called in some states a return.

Now, suppose two of us were in an automobile; one of us was driving, and he convicted both of us of speeding. His return shows the man driving; I was sitting alongside of you; and that was the only evidence he had.

It would be apparent from that, sketchy as it is, that there would be no evidence to warrant my conviction.

The Chairman. Well, you get it in about the same way as the average judges. They have no stenographer.

Mr. Medalie. Also if he has not made a correct record you could raise that question with the district court.

Mr. Holtzoff. After all, of course lots of criminal cases are tried in the federal courts without a reporter.

Mr. Seth. But not appealed.

Mr. Youngquist. While the fact perhaps should not influence us, I might call your attention to this, that these two sentences, lines 73 to 77, are verbatim the Supreme Court rule on the subject.

Mr. Medalie. Well, if we pointed out to them the reason for our suggestion for changing this, they might agree with us.

Mr. Youngquist. I say I am merely pointing that out. I am not suggesting that should restrict our operations.

g9

present trend of events is such that commissioners will try more offenses; their jurisdiction will be extended.

Mr. Burns. If you adopt Judge McLelland's suggestion, then it becomes apparent that the commissioner must take some notes in order to certify a question of law which may be raised, to wit, that there is no substantial evidence to support the conviction.

Now, if we go to "Record on Appeal to the District Court" and add to that a sentence that it shall be the duty of a commissioner upon request of a defendant to report so much of the evidence as is necessary to make clear to the district court the issues of law sought to be raised--

Mr. McLellan. Good. I knew that something would have to be done but I did not know what it was.

We have got to have some way of getting that up there.

Mr. Robinson. Well, the next paragraph is predicated on that.

The Chairman. We haven't finished with Judge McLellan's suggestion, have we?

Mr. Orfield. Couldn't you also add this, not giving the defendant the right to retrial, but permitting the district court to retry if it is thought it ought to be retried?

Mr. Robinson. Do you think that would be better than sending it back to the commissioner for trial?

Mr. Medalie. Why don't you leave that to the district

g10

Mr. Burns. They come miles to establish an appeal, and, if the court is not busy, perhaps it would be the businesslike way to dispose of it then and there.

Mr. Seth. I think we ought to leave the Supreme Court rules alone.

Mr. Robinson. Well, we have perhaps the same problem that they have to deal with, not on this particular subject, but--

Mr. McLellan. Well, I haven't ever run across a court that could try a man for a crime punishable by six months in jail where the defendant was not afforded the right to have the question raised of whether his conviction was supported by evidence. This is a departure from anything in modern times.

Mr. Medalie. Did you tell me that some parking offenses under federal law--did you tell me that parking offenses under federal law were punishable by 100 days imprisonment?

Mr. Holtzoff. Pardon?

Mr. Medalie. Parking offenses, 100 days imprisonment; that the court has the power, although it usually says only $2?

Mr. Holtzoff. All those local violations are punishable by state law. The state law governs in federal reservations.

Mr. Medalie. What else can come up in a national park?

Mr. Holtzoff. Well, violation of the Migratory Bird Act.

4 Mr. Medalie. Can you get 30 years for that?

Mr. Holtzoff. No.

The Chairman. Two dollars.

The Chairman. I am satisfied with the Supreme Court rules. They have come through the wash.

We got a qualified permission to submit something very tentatively with respect to rules on appeal after verdict. I had three or four talks with the Chief Justice about that. The first one was he did not think that anything needed to be done.

Then I pointed out two or three things that we had discussed here, and he said of course those changes should be made.

Then at a later conference he told me that the situation had come up of an actual case in which the Court in its rules had made no provision at all. He was very much chagrined by that.

There has been nothing said about these rules at the other end of the spectrum. These are all more recent too than the appeals rules.

Mr. Robinson. They went into effect just two days before this Committee was appointed.

Mr. McLellan. I don't believe this question of what is really meant by "errors apparent on the record" could be covered, that is, the history of the thing. Perhaps it is but it is a very new thing.

The Chairman. It certainly is a light way of putting a man out of circulation for six months.

Mr. Medalie. Now, I want to be very sure, what are the

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I think, however, an offense committed on a federal reservation is punishable by the penalty prescribed by the state law.

It may be assault and battery.

If the state statute prescribes not in excess of six months and such an offense is committed on a federal reservation, it would be tried on these rules.

Mr. Medalie. What about offenses like vagrancy and other things that usually run up to six months?

Mr. Holtzoff. Yes. The majority of these cases will be traffic violations. He has a right to elect to be tried by the district court in the first instance.

Mr. Longsdorf. Mr. Holtzoff, if there are a multitude of park regulations--

Mr. Holtzoff. Yes.

Mr. Longsdorf. (Continuing) --feeding bears at the wrong time and place--

Mr. Medalie. But most people won't appeal from that kind of thing. It is only when someone does get six months or three months that there would be a little action about it. He would have to appeal. In the state courts there would be a county judge and he would examine the record to see whether it was justified.

The Chairman. Well, now, let's see.

[illegible]'s motion is still pending.

gl3

Are you ready for a vote on that question?

Mr. Seasongood. We can hardly grant an appeal in that if we don't have a bill of exceptions.

The Chairman. This goes to the substance of the method of getting the record.

Those in favor say "Aye." Opposed, "No."

Carried.

Mr. Youngquist. Do you strike "apparent from the record as certified by the commissioner"?

The Chairman. Yes.

Now, what was your suggestion, Judge Burns?

Mr. Burns. On page 4 of Rule 5, after the last sentence insert the following:

"The commissioner shall include in his certification a report of so much of the evidence as may be necessary to reveal to the district court the issues of law sought to be raised on appeal."

Now, that leaves completely open the question of how he will get that, whether by conference with the attorneys, from his own notes, or what.

Mr. Holtzoff. I did not get that.

Mr. Burns. Will you read that, please.

(Record read as requested.)

The Chairman. Are there any remarks on the motion?

If not, all those in favor say "Aye." Opposed, "No."

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the "Record on Appeal to the District Court."

Mr. Youngquist. Line 92 speaks of matters "certified by him"; you say, "The commissioner shall include in his certification".

Mr. Burns. Oh, yes, I think that is all right.

The Chairman. I think that is all right.

Mr. Holtzoff. Line 86--before you read that--the word "prison" should be "institution".

Mr. Youngquist. Or "place".

Mr. Holtzoff. Or "place".

And I think the next sentence might well go out. I don't think you want the formality of assignment of errors, do you?

5

Mr. Medalie. Well, here is the difficulty; in getting up your record the commissioner does not know what record to get up. We are excluding it from appeal to the district court later and had in mind that we ought to exclude it here, but the proposal is, it sets forth the grounds.

Mr. Youngquist. That is right.

The Chairman. Is that a question on the paragraph beginning on line 93, or on the paragraph beginning on line 100, or on the paragraph beginning on line 104?

Mr. Medalie. Well, what provision is there for having the commissioner amend or amplify a record?

Mr. Longsdorf. On retrial of the case?

Mr. Medalie. Do you think it is implied?

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this record."

Mr. Robinson. That is line 89.

Mr. Longsdorf. How about the words "in relation to the appeal", then.

Mr. Youngquist. What does the word "order" mean, then, as used in line 108? He does not really make an order except an order relating to bail.

Mr. Burns. Well, if you just add in "any order or certificate" it seems to me then he has the power to be referred back.

Mr. Seasongood. You provide that you have to have 5 days' notice of application for appeal in the district court.

Mr. Holtzoff. I don't think you need 5 days' notice.

Mr. Seasongood. No, I should think not. That is not the rule in the court of appeals.

Mr. Holtzoff. This does not require 5 days' notice for application.

Mr. Longsdorf. Well, is the order admitting to bail an order in relation to appeal?

Mr. Seasongood. It says here "any order for the granting of bail." You don't want that language relating to 5 days, in determining whether you can get bail or not.

Mr. Holtzoff. If we don't mind tinkering with the Supreme Court rules, I would like to strike out "5 days' notice".

Mr. Longsdorf. Upon notice, without specifying time.

Mr. Holtzoff. Well, I don't think you have got to say

district court's power to have special rules for procedure on appeals.

The Chairman. Anything further on this section?

Mr. Seasongood. "Five days' notice" is stricken?

Mr. Holtzoff. Yes.

Mr. Medalie. What about the district court electing to try the case?

Why not leave it to the district court either to retry the case or send it back?

Mr. Holtzoff. Well, I think we ought to take care of that in the last paragraph on this page.

Mr. Medalie. All right.

Mr. Holtzoff. Strike out the word "standing" in line 1

Mr. Medalie. "Standing"?

Mr. Youngquist. I note in lines 110 and 111 you say, "Motions subsequent to the judgment of conviction shall no entertained by the commissioner." And in the paragraph b ning on line 114 you say, "Within 60 days after convicti defendant may move for a new trial".

Isn't that inconsistent?

Mr. Robinson. It is still a Supreme Court rule.

The Chairman. In line 111 why shouldn't it be "The district court may by rule not inconsistent wit rules".

dalie. That is right. It could be don ld be done by rule. S

g17

to a specific case, would it not?

Mr. McLellan. The court has the inherent power to do that anyway.

Mr. Youngquist. What do you say about this new trial provision that would make it consistent with prohibition against motions?

Mr. Robinson. It does not make it consistent. The Supreme Court rules are inconsistent.

"Motions subsequent to the judgment of conviction shall not be entertained by the commissioner."

6

Mr. Burns. "Within 60 days after conviction a defendant may move for a new trial on the ground of newly discovered evidence. The motion shall be in writing, addressed to the commissioner"--

Mr. Youngquist. I do not see how that can work because under these rules you must take an appeal within 5 days after judgment and conviction.

Mr. Robinson. That is stricken out now.

Mr. Youngquist. Not the appeal. That line 78, "An appeal shall be taken within 5 days after entry of judgment", on page 3.

Mr. Robinson. That is right.

Mr. Youngquist. Does this "newly discovered evidence" rule provide if he does not take an appeal he may, notwithstanding, move for a new trial?

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the commissioner and transmitted by him. Line 120.

Mr. Youngquist. That is intended only to apply if an appeal has been taken before. Because otherwise the case would not be in the district court.

Mr. Longsdorf. Mr. Youngquist, I do not so construe that paragraph. That applies whether or not an appeal has been taken.

Mr. Robinson. Right. Either way.

Mr. Youngquist. What would be the reason for transmitting to the district court a motion for a new trial on grounds of newly discovered evidence if no appeal has been taken to the district court?

Mr. Longsdorf. Because the commissioner's jurisdiction has ceased with respect to that particular prosecution.

Mr. Robinson. What is the difference?

Mr. Dean. The district court does not have the case though. Why would you make the motion?

Mr. Seth. What would the district court do? It would not know anything about the evidence that had been introduced before the commissioner.

Mr. McLellan. It could not know anything about the importance of the newly discovered evidence.

Mr. Robinson. There you have line 118.

Mr. McLellan. "* * * shall set forth * * the nature of the evidence", that is, the newly discovered evidence, not the

discovered without showing what the original evidence was?

Mr. Robinson. This Rule 5 states, "Within 60 days after conviction a defendant may move for a new trial on the ground of newly discovered evidence. The motion shall be in writing, addressed to the commissioner and shall set forth under oath the nature of the evidence and the reason it was unavailable at the trial. A copy of the motion shall forthwith be served upon the United States attorney. The commissioner shall transmit the motion together with a transcript of his docket entries to the district court. The court shall hear the motion and, if it deems a sufficient showing has been made, may vacate the judgment of conviction and direct the commissioner to re-try the case."

Mr. Medalie. Well, that rule left out getting the version of the evidence from the commissioner.

Mr. Youngquist. What did you say?

Mr. Medalie. This rule makes no provision for getting the version of the evidence from the commissioner.

Mr. Youngquist. No, that is the point that Mr. Seth just made. The only thing before the court is newly discovered evidence.

Mr. Longsdorf. I suppose you would have to show what the old evidence was in order to show that the other was new.

Mr. Medalie. Someone would have to answer. I suppose the United States attorney would appear and would get his informa-

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we should very carefully consider the matter before we say we cannot do anything about this same tendency here and now.

Now, there is a study being made through the Administrative Office, United States Courts, and Mr. John Hanna of Columbia University and others are engaged in that study.

There is litigation in Congress as you know to take care of the commissioner situation. And, altogether, it seems to me that we should at least keep the matter open, rather than just decide finally that we cannot do anything about it.

Now, if I am wrong about that I of course am glad to be overruled.

Mr. McLellan. May I ask the Chairman just one thing, because I shall not understand what it is about at all if I don't.

Now, am I to understand that while we are permitted to make a rule like this (c), we are not required to do so?

The Chairman. Well, I would take it, Judge, that our task was to bring in rules of procedure relating to the district courts generally.

We are not attempting to say what should be done in the district courts of the District of Columbia or the criminal courts of the District of Columbia. They have their police courts here, their traffic court, and this it seems to me is a specialized thing.

Mr. McLellan. Well, they have not asked for us to do

offense procedure or the preliminary procedure?

Mr. Robinson. Those are the words of the statute.

Mr. Youngquist. Well, would that mean the law as to petty offense rules? That law does not require submission to Congress. I think as a matter of construction, proceedings before a commissioner would be held and limited to preliminary proceedings.

Mr. Holtzoff. I think so.

Mr. McLellan. Well, if there is any possibility of that construction I am heartily in favor of the motion.

The Chairman. Well, it seems to me we stand a good chance for stubbing our toes by trying to do just a little more than we have to. We can provide a set of rules with such few changes, I think our work is much more likely to find favor with the Court and with Congress than if we get into this situation of the petty cases where you are always confronted with one or the other horn of the dilemma, the desire for summary disposition, and for rendering an appeal, in effect, almost impossible on the merits.

You that in the states as well as in the federal courts.

And on the other hand is our normal human desire to do full justice to every defendant.

Mr. Holtzoff. Mr. Chairman, I don't like to have the statement in, I don't think the Reporter fully meant to say that the commissioner assists in breaking down.

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Mr. Holtzoff. I think it may be improved but I think it is an exaggeration to say it is weakening or getting worse.

Mr. Longsdorf. Mr. Chairman, it seems to me we are taking pretty serious risks when we get into any of the special lines of procedure. They are too intricate. We haven't space to handle it or time to reach a conclusion.

I think we ought to keep out of that as much as possible and have a general code of rules for the general procedure.

Mr. Seth. Wouldn't the adoption of this motion require some slight modification of some of the rules we have already considered this morning? Because there are constant references to cases the commissioner may try, in some of the earlier rules.

The Chairman. It might, Mr. Seth. I wouldn't want to say.

Mr. Seth. I wouldn't want to stop now.

I am just making that as a suggestion to the committee on style.

Mr. Robinson. There are other statutes in which the commissioners have their trial powers. You have these national park cases. Every time a national park system is set up there is a new commissioner and a new statute to take care of it.

It looks like you might have some commissioner problems in connection with these territories. I wouldn't say we are not going to have to do anything about trial commissioners.

Mr. Youngquist. Are they charged now with the petty offense rules?

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Mr. Robinson. I think this committee should come up almost to the completion of the thing. There are two questions, one has to do with the getting up of the record.

Judge Burns was getting that in shape. But the reports keep coming into the Reporter's office from the United States Attorney of the Southern District of New York and elsewhere, and I am told orally and by letter that the commissioner system has got to be improved; and it seems the people who write to us--many of them I can get the letters before you, copies of the letters--they feel we ought to do something about it. Whether we should or not is something for us to decide.

I think what has been here this afternoon is virtually the completion of arranging of whatever rules may be necessary.

Mr. Seth. In connection with Judge Burns' amendment, it seems to me it is a procedure now where the referee in bankruptcy makes a certificate of the facts.

Mr. Holtzoff. Don't they have a stenographer in proceedings before referees?

Mr. McLellan. Sometimes they do, sometimes they don't.

Mr. Seth. But the law requires, as I recall, that they certify the evidence or the facts.

Mr. Burns. We have had for years in our district a practice whereby a district court hearing without a stenographer may be the subject of an appeal to an intermediate appellate court and there the counsel confer with the judge and they

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the same time if you are going to have the essence you have to have some way, and some means of passing on the ruling of the judge who is trying the facts.

The Chairman. You don't have the facts, do you?

Mr. Burns. No.

The Chairman. We have the same procedure, which means between the time their case is tried and they decide the facts the judge decides what the law is, and he fixes the facts, so there hasn't been one reversal in 50 years.

Mr. McLellan. We don't do that.

Mr. Burns. You either have to have the trial de novo or the essential elements of the trial procedure.

I think the trial de novo is very bad.

First, it makes the Government expose its hand. We have that trial de novo from the criminal courts and it works out pretty badly, and it seems to me if we can work out some minimum requirement so we can raise the issue of whether there was substantial evidence, that, plus other errors of law, like Mr. Medalie says, where two men cannot be convicted,--I think we have got enough.

Mr. McLellan. Judge, I agree with everything you said, but, while you were out of the room we were finding some other things, I think, the matter with the recent rules in the Supreme Court, and it got to be too much for the Chairman and so he has made a motion that we cut the whole business out; and

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forthcoming publication of the rules it would be well at this point to insert that trials before commissioners are dealt with by rules of the Supreme Court, with the citation of those rules; leaving the matter pending without killing it right now until we can see how this study of the commissioners comes up which is being made under the Administrative Office, and see whether later there might be something that this committee might do.

The Chairman. It seems to me what we are trying to do is to try to figure out what we hope will be a civilized, intelligent set of rules with an injection into it of another situation which is rather primitive and not up at all to the standards we are laying down.

I ask, inasmuch as the Supreme Court has done the job, why should we, a year and a half later, do it all over?

Mr. Medalie. I still would like to have it represented that we think there are some manifest injustices in their rules.

Mr. Longsdorf. Mr. Chairman, why can't we do like they did in the civil rules, not offer a rule but let them know we have considered this, and let them show whether they are very much interested in it? If they want us to go on and recast this rule they can ask us to do it, order us to do it.

I don't want to put the thing out of all further consideration but I am afraid of this rule.

Mr. McLellan. It seems to me as a practical matter that

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it is in the interest of the whole set of rules that we keep away from it.

Mr. Robinson. What is the situation in regard to some district judges who are simply refusing to entertain any jurisdiction at all of offenses which have been declared offenses by Congress?

You take the Migratory Bird cases and other cases which Congress says shall be offenses, then you have district judges saying, "We don't want those cases brought into our court." What is to be done?

Mr. McLellan. Well, the only thing to do is to take them and fine them $2.

Mr. Youngquist. There is no authority for the trial of those cases under the present law.

Mr. Robinson. Of course not. But something has got to be done about it.

Mr. Youngquist. Doesn't Congress have to act first?

Mr. Robinson. Sure.

Mr. Youngquist. Don't you think our job is big enough without that?

Mr. Robinson. The answer to all you say is, Yes.

Mr. Holtzoff. I think you are misinformed.

Mr. Robinson. I have been told by assistant United States attorneys that some of them are being thrown out.

Mr. Holtzoff. Well, some of the judges that don't sympa-

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is now covered by the rules previously promulgated by the Supreme Court.

The Chairman. All right. All those in favor of the motion say "Aye." Contrary--

Mr. Longsdorf. Before you put the motion may I ask that Mr. Robinson's proposal is that these rules in our tentative report be merely referred to or set out at large in an appendix?

Mr. Robinson. The proposal is that they be referred to.

Mr. Longsdorf. All right. Nothing further.

The Chairman. That brings us down to Rule 6.

Mr. McLellan. Did you vote?

The Chairman. Oh, pardon me. Didn't I call for a vote?

Mr. Youngquist. No, you didn't. You cut off the ayes.

The Chairman. Opposed, say "No."

It seems to be unanimous. Carried.

9 Rule 6 -- Well, that deletes everything commencing with (c), on page 2 of Rule 5.

Paragraphs (a) and (b) stand.

Now we come to Rule 6. 6 (a).

Mr. Robinson. You will recall at a previous meeting there was a discussion of what items should be considered by the committing magistrate or the judge, the court, in fixing bail, and this 6 (a) incorporates the items which members of the Committee felt should be included in such an inquiry.

Mr. Robinson. I am just trying to find that.

That is based on a statute or code. I will have to look up the source of it.

Mr. Holtzoff. I suppose under existing law at the present time the judge would have a right to increase bail without notice, have bail increased.

Mr. McLellan. Well, isn't it just as well not to invite him to do it without notice?

The Chairman. In other words, not adopt the sentence, the clause, "without notice to the defendant."

Mr. McLellan. Yes. That helps a little

Mr. Seth. Yes.

The Chairman. If there is no objection, the words on lines 10 and 11, "and with or without notice to the defendant", will be deleted.

Anything further on (a)?

Mr. Medalie. What do you delete? You leave that open, then?

The Chairman. Leave that out.

Mr. Medalie. Yes.

Now, the commissioner has no power to increase--

Mr. Holtzoff. Well, this is limited to the court as it is now framed.

Mr. Medalie. Well, isn't this a general provision for bail?

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Mr. Longsdorf. What about bail by a commissioner during a postponement?

Mr. Youngquist. We say in line 2, "as in the judgment of the court or committing magistrate will insure the presence of the defendant".

In line 9, speaking of increasing or reducing bail, that "may be required by the court or by a judge thereof".

Why do we refer here to a judge thereof, and may I not suggest that we substitute for that the words "or magistrate"?

Mr. Holtzoff. Why not omit this clause entirely?

Mr. Youngquist. That's right. Strike out "by the court or by a judge thereof".

Mr. Medalie. In line 4, do you need "or committing magistrate"?

Mr. Longsdorf. No.

Mr. Medalie. Well, shall that go out?

Mr. Burns. Well, in Rule 5 you have talked about the magistrate shall admit him to bail, and I suggest a cross-reference to Rule 6.

Now, you have no provision for bail before a magistrate. Should you make it applicable to both magistrates and court judges?

Mr. Medalie. Yes. But the word "committing" ought to be left out of "magistrate".

Mr. McLellan. Oh, yes. Just strike out the "committing".

Mr. Medalie. Yes.

The Chairman. Then the change is made at the end of line 9 which you have defined, strike out "by the court or by a judge thereof", and later in line 10 strike out "and with or without notice to the defendant".

Mr. McLellan. Does it end with the word "required"?

The Chairman. "* * at any time for good cause."

Mr. McLellan. "The amount of bail may be increased or reduced"--

The Chairman. --"or new or additional bail may be required at any time for good cause."

Mr. McLellan. I get it.

The Chairman. All right.

If there are no questions, we go on to (b).

Mr. Waite. I noticed in Draft No. 3 there was added to (b) provision that the officer shall refuse to accept any surety who does not appear to be qualified.

I am just curious as to why that was left out of this draft.

Mr. Youngquist. I think the reason for it was that that was assumed. I have no very definite recollection.

Mr. Waite. I remember we discussed it at the previous meeting and decided to put it in.

I haven't any preference as to whether it should go in or not. I am just curious about it, and [illegible]

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paragraph.

Mr. Burns. Doesn't it require some finding by the magistrate, as to the worth of the affidavit as well as the worth of the surety?

Mr. Medalie. It means that he has justified or has not justified, in the judgment of the magistrate or the judge.

I think the less we say about it the more care will be exercised.

For example, I can imagine the senior district judge in my district, where the surety did not really justify but he felt pretty sure the defendant would not run away--he had a wife and six kids--he just forgets about the full justification.

I think we must leave that to the judges pretty much.

Also it may be desirable to think the thing over a couple of days. Those are rare cases, but we ought to give the judges a little leeway.

Mr. Longsdorf. That is right.

Mr. Holtzoff. I think we could shorten this by leaving out the last two words in line 13, all of line 14, and the first six words of line 15.

The Treasury Department issues a list of approved surety companies.

Mr. Medalie. I second the motion. Strike out the words beginning on line 13, "and has filed evidence of such approval in the district court for the district where the bail is

Mr. Robinson. Further, strike out "attached to" at the beginning of line 16. Just say, "filed with the bond".

Mr. Holtzoff. You don't need anything. The first six words of line 16 can be stricken out.

Mr. Burns. "* * shall justify by affidavit the bond or undertaking".

Mr. Seasongood. How does it finally read now?

Mr. Youngquist. What did we do with line 16, Mr. Chairman?

The Chairman. The suggestion was to strike out the words "attached to the bond or undertaking".

Mr. Robinson. Strike out the words "attached to", and instead of "attached to", "filed with".

Mr. Medalie. What do you mean by the provision of filing with? It becomes part of the record. An affidavit is not worth anything unless it is filed.

Mr. Burns. Well, what does he justify?

Mr. Medalie. If the bail is a thousand dollars he is supposed to show he has available funds which can be reached to the extent of a thousand dollars over and above his liabilities.

Mr. Burns. Then he justifies his undertaking as surety?

Mr. Medalie. Yes.

Mr. Burns. Don't you think we ought to say, justifies it is enough?

Mr. Medalie. The word "justify" is a term that is used.

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accepted the bond as filed--

Mr. Medalie. But that is a different procedure. Here the law requires justification. In ordinary civil procedure the justification is not necessary, but here the law requires it, so you don't need to say anything.

Mr. Burns. Isn't there usually an order of the court approving the surety?

Mr. Medalie. Yes.

Mr. Burns. Now, we say nothing about that.

Mr. Medalie. I don't think we need to.

Mr. Seasongood. Well, it is only the fact that it might appear after he signs the bond he files the affidavit. Shouldn't he do that before the court approves him as a surety?

Mr. Burns. Ought we to add "shall prior to approval"?

Mr. Youngquist. I don't think that is necessary. The justification of surety is really a part of the undertaking so far as approval of the bond is concerned, and the court approves the bond only upon a showing of justification.

I have no objection to it except putting in words that lawyers think are superfluous.

Mr. Medalie. I am quite sure that nobody in any federal court or state court will believe that a surety may justify after a defendant has gone out on the filing of that bond.

Mr. Burns. Then "justify" is the filing of an affidavit plus the finding of a judge?

is done.

The Chairman. Justification is the act of a man who is about to become a bondsman.

Mr. Burns. Then it seems to me our rule is deficient.

Mr. McLellan. No. One of the conditions precedent to the approval.

Mr. Burns. Well, we don't say anything about the approval in this rule.

Mr. Medalie. As it reads now, one might say that the minute he files a justification it requires no order, the warden must let him out.

Mr. Burns. If justification means he must show he has assets, then, although he may have made a false swearing, he technically has justified if justification does not include the element of judicial approval.

Mr. Seasongood. Well, in line 12, a "prospective surety," would that do it?

Mr. Youngquist. Well, I had in my notes, to add on (b) this language: "No bond or undertaking will be approved unless surety appears to be qualified."

Mr. Waite. I wondered why that was omitted here.

The Chairman. Something like that should be here, because the justification is only the surety's act, as I understand.

We want to convey the idea of judicial approval.

Mr. McLellan. Then would it be all right to say something

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be judicial approval?

Mr. McLellan. Yes.

Mr. Waite. That brings up a problem. As it was before it was, "No officer shall accept one whose security does not qualify."

Your suggestion is, I gather, that the bonds shall not be effective until there has been this justification.

Mr. McLellan. No, until following the justification there is approval by the court.

Mr. Waite. It leaves it up to the court to approve one that did not qualify if he wanted to.

Mr. Holtzoff. Well, it seems to me that that would be necessarily implied, that if the judge should find it is not sufficient--

Mr. Waite. In that case I suggest it should be put back as it was, that the officer shall refuse to accept any surety who does not appear to be qualified.

The Chairman. Instead of "officer" why don't we say "judge or commissioner"?

Mr. Waite. I was just giving it as it was previously.

The Chairman. The court or magistrate is the way it was previously.

Mr. Seth. In actual practice, where a bench warrant issues and the judge fixes the bond on the bench warrant, he or an agent sees the bond and the bond is accepted without the court's

surety thereon appears to be qualified."

Mr. Holtzoff. I second that motion.

The Chairman. Any discussion?

All those in favor of the motion say "Aye." Opposed, "No."

Carried.

Mr. Seasongood. Why shouldn't you justify by affidavit? Why do you have to attach it to the bond?

Mr. Robinson. I think the reason for putting it this way, as I understood it, it was considered a good idea to have the bond and affidavit together.

The Chairman. It might very well happen that that could not be.

Mr. Robinson. The language of a good deal of this is statutory, but I don't have the statutes at the present time.

The Chairman. All right. We go to (c).

Mr. Seasongood. Is that stricken?

Mr. Holtzoff. That is out.

Mr. Youngquist. I notice that we in (c) for the first time use the word "recognizance".

Mr. Robinson. That is to go out. I think that should be stricken. Don't you?

Mr. Holtzoff. Yes.

The Chairman. If there is nothing on (c), we will proceed to (d).

Mr. Youngquist. Just a minute. "* * unless the court

Mr. Holtzoff. "* * unless otherwise ordered". Yes.

The Chairman. Is that something a magistrate would order?

Mr. Seth. No.

The Chairman. That should go to the court, shouldn't it?

Mr. Longsdorf. Suppose he is bailed for preliminary examination.

Mr. Holtzoff. Why not say, "unless otherwise ordered"?

The Chairman. I am wondering if that is not solely the court's prerogative.

Mr. Seth. I think so.

The Chairman. What about that? Is that something a magistrate can do?

Mr. Longsdorf. How about his surrender to the magistrate?

Mr. Medalie. It says "is surrendered."

You have various conditions under which bail is given.

You have bail to appear for examination before a magistrate, as bail to answer. You give new bail, don't you, after defendant is held to answer?

Mr. Youngquist. It continues under this provision.

Mr. Medalie. That is right.

Now, under what conditions would the court otherwise order?

Mr. Youngquist. Suppose the matter is pending before the commissioner and he chooses to release the defendant on his own recognizance?

Mr. Longsdorf. Suppose new bail is required and the court

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are within the jurisdiction of the commissioner, we can say "unless otherwise ordered", but I was a little in doubt about it.

Mr. Medalie. We have given the commissioner the power to reduce bail. This will be a case when new bond is furnished or additional bond is furnished. When a new bond is furnished the old bond is discharged. That would be the order.

Mr. Burns. The bonding company may have gone broke. A new bond may be necessary.

Mr. Medalie. You may need a new surety.

Mr. Youngquist. It would not be any good to discontinue the old bond in that case.

The Chairman. I think we had better change it in line 24 to read "unless otherwise ordered".

All right. We will go to (d).

Mr. Medalie. Excuse me; I think there is a little error here. When you have bond to appear for examination and then a defendant is held to answer, new bond must be given, must it not?

Mr. Youngquist. I thought one of the purposes of (c) was to continue the bond. It says, "The bail shall continue in effect until judgment is rendered in the proceeding in connection with which it is given," and that cannot be rendered except in district court.

Mr. Medalie. Then bail to appear for examination would [illegible] bail also if held to answer?

is held. That I think would be your interpretation.

Mr. Youngquist. That would be my interpretation of this language.

Mr. Burns. What is the undertaking now? I think the average bond that I am familiar with is that he shall appear for examination; and when he appears the surety is no longer liable, and you have to have a new bond if you want to hold him for final trial on the merits.

Mr. McLellan. It all depends on the reading of the bond.

Mr. Medalie. That is why this cannot be correct language.

Mr. McLellan. You haven't any power to make that kind of bond.

Mr. Medalie. But when you give bail only for examination that bail cannot continue down to the day of judgment unless it is written to include to appear for examination and to answer to the district court should the defendant be held.

Mr. Youngquist. My recollection was that was the form of bond provided before commissioners. Have you something there?

Mr. Robinson. Yes. Here is a bond in which it is provided he will appear before the commissioner at a certain time and if he is held by the commissioner, will appear before the district court when required to do so from time to time, then this is to be void, otherwise to be in full force and effect--

Mr. McLellan. That is right. I have continued those bonds 25 times. But if it were written differently from that

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its disposition if held.

It would be describing the form of bond.

Mr. McLellan. In describing the effect to be given a given bond, but the bond shall be valid if given so and so.

There is danger of some surety company getting on to something here.

Mr. Youngquist. Are our rules going to have a form of bail bond appended to them?

Mr. Robinson. I think they should.

Mr. Youngquist. Of course the rule cannot hurt anything.

Mr. Longsdorf. Then you will have to have two forms of bail bond, one for those cases where he is indicted, and one where he is brought in on a bench warrant.

Mr. Youngquist. Yes. This rule would cover both classes of cases.

If the bond would call only for appearance before the commissioner I suppose it would be sufficient, to that extent.

Mr. Burns. Don't we need another subheading, "The Bond--What It Shall Contain"?

Mr. Robinson. Yes.

Mr. Seth. Shouldn't it be that bail for appearance in district court shall continue?

Mr. Robinson. What would it continue that to?

Mr. Medalie. Bail to appear for examination shall also provide that defendant shall answer to the district court, if

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Mr. Seth. Then he can change it and make new bond?

Mr. Medalie. Yes. But this provides the form of the bond where the defendant gives bond to appear for examination before the commissioner and where he is held.

Mr. Seth. I think we ought to limit this rule to bonds providing for the defendant's appearance before the district court, and then we are on safe ground; that is, the continuing

13 bond.

Mr. Holtzoff. I wonder if we ought to leave out paragraph (c) entirely.

The Chairman. I think the object of that was that bond be provided that carries clear through the proceeding, instead of having a bond for the commissioner and each term of the court. That was the object.

Mr. Holtzoff. Depending upon the surety, how far he was willing to go.

Mr. Burns. You may have a surety who will undertake that the defendant will appear for examination but not up to final judgment.

So if you leave out (c) you can ignore entirely the question of the range of the bond and leave that up to the existing practice which is already frozen and is already well understood.

Mr. McLellan. I second that.

Mr. Medalie. All sureties, with few exceptions, are surety [illegible]. They take a fee which calls for going through the

Carried.

Gentlemen, it is getting close to 5:30.

Mr. Medalie. Well, "Forfeiture and Remission." It is the same rule. Then we take a new chapter.

Mr. Youngquist. What do you do tonight? Do we meet?

The Chairman. Oh, yes, I think so. Don't you?

Mr. Youngquist. At what time?

The Chairman. About 8:00 o'clock shall we be back?

Mr. Dean. We could hold it out there if it is more convenient.

The Chairman. I think it would be better to come back here.

Mr. McLellan. And you had better indicate the time for us to come back.

The Chairman. Eight o'clock.

Mr. Medalie. We are coming back totalitarian style, aren't we? All together?

The Chairman. I hope each will be all together.

Mr. Medalie. Well, don't you want to take this last subdivision (d), then we will have a new chapter when we come back?

Mr. Waite. I have a question to raise about (d) which might take some time.

Mr. Medalie. All right.

(Whereupon, at 5:30 o'clock p.m., a recess was taken til 8:00 o'clock p.m. of the same day.)

NJC
Advisory
Committee
5/18/42

EVENING SESSION

The proceedings were resumed at 9 o'clock p.m., at the expiration of the recess.

The Chairman. I think we were up to (d), Rule 6.

Does that mean that forfeiture is not automatic and that you have to get the surety in, and all that business?

Mr. Burns. What about on motion of the United States Attorney?

Mr. Holtzoff. The forfeiture is automatic, but you have to bring a proceeding to get forfeiture.

Mr. Burns. Should the court be required to be on top of all these things to make a declaration, or shouldn't you provide "shall declare it on motion of the United States Attorney"? Isn't it his job to look out for the assets of the United States?

Mr. Holtzoff. This is on the motion of the United States Attorney.

Mr. Burns. I think it should state, "The court shall on motion of the United States Attorney declare forfeiture of the bond."

Mr. Waite. I would like to ask why is it so different from the provision in Rule 52? Rule 52 (d) has eight or ten lines and this has five lines. It looks like much the same thing.

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different draftsmen.

Mr. Waite. I like No. 6 better than I do 52, but unless there is some reason for the difference, I think it would be well to have them alike.

Mr Holtzoff. I would like to say something about 52. 52 is taken from the civil rules, and it was considered quite a step forward. The advantage of 52 is that you have no difficulty in getting jurisdiction over the surety under the procedure outlined in 52 (d), and there is no reason why you should, because 52 (d) in effect provides surety on a bail bond on appeal, appoints the clerk of the court or his agent for the purpose of receiving service of the papers.

I would like to see 52 (d) carried back into 6.

Mr. Robinson. I think that would be desirable.

Mr. Holtzoff. I do not see any reason why they should not be.

Mr. Burns. I do not think, in any event, you should call for automatic forfeiture. Here you call for motion by the court.

Mr. Longsdorf. Is it necessary that the bond shall contain a recital that the sureties submit this to the jurisdiction?

Mr. Holtzoff. That is a question of drafting the bail bond.

Mr. Longsdorf. Is it necessary that the bond contain that

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revise 6 (d) so as to include the provision of 52 (d).

Mr. Waite. I support that.

Mr. Medalie. Which provision? Jurisdiction of the court and appointing the clerk as his agent?

Mr. Holtzoff. Yes.

Mr. McLellan. And doing away with the necessity of an independent action?

Mr. Holtzoff. Yes.

Mr. McLellan. Do you want to wait to do it now or have somebody do it?

The Chairman. I think it should be referred back to the reporter.

Mr. McLellan. Yes.

The Chairman. It is moved and seconded. Are there any further remarks?

Mr. Youngquist. Yes, I have this remark to make. Sometimes bail is represented by property, security, and collateral, on deposit with the court. 6 (d) is broad enough to cover that. 52 (d) is not. Therefore, I would suggest that when Section 6 (d) is drafted it be made broad enough to include cash bail, as we call it.

The Chairman. Is that motion seconded?

Mr. Medalie. Seconded.

The Chairman. Are there any remarks?

"Aye." Oppose "No." The motion

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Mr. Burns. The rule as proposed would not commit the United States Attorney to take advantage of any statement made to him after the defendant has been released on bail. Now, it may be desirable to incorporate the generally accepted ethical provision that you do not talk to your opponent's client after an appearance has been filed and issue has been joined, but I think if we were to follow the general philosophy, it ought to be changed to read, after "5 (a)," as follows:

"Or, after the defendant has been committed by a magistrate, if the interrogation occurs," insert:

"While the defendant is in custody in the absence of the defendant's counsel," and strike out:

"Or of a United States commissioner," because after he has been committed the United States Commissioner is a stranger to the proceeding.

Mr. Wechsler. I accept that change, Judge Burns. I had in mind that the whole thing would apply only in a case where the defendant is in custody. The point about the United States Commissioner was to find some substitute in the situation where the defendant has no counsel.

The Chairman. Would you read it through, Judge, with the amendment you suggested, so we can all get it?

Mr. Burns. No change in the present proposal up to "in violation of Rule 5 (a)":

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concerning interrogation while he is held in custody in violation of Rule 5 is concerned, but I am very skeptical of the wisdom of saying that you cannot use anything that is learned by interrogation after he has been committed.

I do not see why in the world we should not use it. The rule against undue pressure, and all that sort of thing, is perfectly sound and clearly accepted; but is there any real reason why, if a defendant makes an admission of guilt in answer to a question, that should not be used, merely because he has been in custody when the question was asked?

Mr. Wechsler. Mr. Chairman, I would like to answer Mr. Waite, but before doing so I would like to point out one general point about this formulation. Under no circumstances would this formulation exclude a voluntary statement by a defendant, whether in custody or not in custody. It is addressed only to the case of a statement made by the defendant in response to interrogation by an officer or agent of the Government.

Second, it does not preclude interrogation prior to commitment by a magistrate in the course of taking the arrested person before a magistrate or in the course of holding him prior to taking him before a magistrate, so long as there is no violation of Rule 5 (a)--that is to say, so long as he is taken before a magistrate within a reasonable time.

Now, in a case where the defendant has already been before a magistrate and has been committed to custody to await trial, it seemed to me that in that situation--he is now in custody--there is no longer any justification for interrogating him in the absence of his counsel.

Mr. Waite. Suppose the prosecuting attorney gets hold of some information which seems pertinent. I can't see any reason at all why he should not discuss that with the defendant and ask the defendant what he has got to say about it.

Mr. Wechsler. He can discuss it with him.

Mr. Waite. Well, only if he calls in the defendant's counsel, and you know what it means. It gives the counsel a chance to tell him to keep his mouth shut, and I do not know why in the world we should have a man present to tell the defendant not to make any admissions of truth.

I would go with you the whole way in opposing improper interrogation, but I can't see anything improper in that sort of thing.

Mr. Wechsler. Well, I suppose the question is what you believe the right to counsel be intended for. Again I come back to what seems to me a basic paradox in criminal procedure. In the courtroom the man is surrounded with every conceivable right. He must be given counsel. The procedure against self-incrimination comes into play insofar as any interrogation may be any compul-

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we play another type of game.

Mr. Waite. I should say there is a distinction there. His right to counsel in the courtroom is his right to advice as to law. Nobody originally conceived, I think, that he has a right to be told what to say and when to keep his mouth shut; and the only reason why he needs counsel is to advise him when he is in the courtroom.

Mr. Wechsler. I disagree with that. I think his right to counsel is a right to advice by counsel in every movement that he has to make. I do not think that means counsel is supposed to tell him what to say.

Mr. Waite. But you know that is what it really means. That is what the public is going to say. I revert to what Mr. Holtzoff, or Mr. Youngquist, I guess it was, said, and which I disagreed with then.

You said we must consider to some extent how the public is going to take this sort of provision, what the public--and I mean the legal public--reaction will be; and I think if we put a provision of that sort in it is going very definitely to hurt the adoption of the rules.

I am trying to be consistent. I think it ought not to go in because it is not a wise thing. I am not trying to keep it out because of what the public would put in.

Mr. Wechsler. I think the public would not be simultane-

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it is unethical for the Assistant Attorney General to seek out the plaintiff in the absence of plaintiff's counsel and interrogate him about any matter which may be of interest to the Government; and yet, in a criminal case, where his liberty is at stake, and possibly his life, it is not only not ethical but it is looked upon as a thing that is blessed for the Government to inquire at a time when the whole atmosphere is one that breathes duress and where the defendant particularly is at a disadvantage, because he is in jail?

Mr. Waite. Suppose we leave the prosecuting attorney out, because there we have the complication which grows out of the relationship between lawyers, the impropriety of going over your opponent's head to his client. So let us leave the prosecuting attorney out of it. Let us have some other official of the Government.

Mr. Burns. What other official has the right to interrogate?

Mr. Waite. It is not a matter of the right to interrogate. Suppose some other official does interrogate and gets information which is definitely conducive of the truth. I think it would be a reversion to the ideas of the past generation to say that that information could not be used because it had been gotten by asking the man questions.

Mr. Burns. I think our suggestion is progressive about

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Mr. Waite. Well, unfortunately, it does not. Now, you have suggested a voluntary statement might be used, but you can't conceive of the accused calling the marshal in and saying, "I want to tell you something."

Mr. Burns. No, but I can conceive of a visit at the jail, and I think there are a number of cases where the Government has relied upon statements made to a relative.

Mr. Wechsler. Statements made to a fellow-prisoner were commonly used.

Mr. Waite. This does not preclude that, but I do not see any more reason why you should preclude it merely because it is an answer to the marshal.

Mr. Wechsler. But I think there is a valid answer to that, and the merit of the whole thing turns on this proposition, I think: The United States Attorney or an F.B.I. agent comes into the prison after a man has been committed by a magistrate and says, "I want to talk to you about this," and begins to ask him questions.

It seems to me inescapable that pressure is being exerted upon that man. Now, it may be the subtle pressure of the office held by the questioner or it may be an implication of greater pressure to come, but the fact is that, from the point of view of the defendant, his antagonist is the prosecutor;

11 and it is that situation that it seems to me justly lends

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the third degree.

Mr. Waite. That would be the only justification that I could see for excluding it.

Mr. Youngquist. That is all the suggestion is aimed at, isn't it--an attempt to eliminate the third degree?

Mr. Wechsler. Yes, it goes further than that, and it clearly goes beyond the purpose of the confession rule, which rests upon the untrustworthiness of the confession. I agree that a statement made by a defendant in response to interrogation by the United States Attorney, in the absence of any other form of duress, is a statement that carries a reasonably high degree of trustworthiness. It is made against interest.

It seems to me that the defendant has a right--and this is as fundamental as anything else--that the Government be put to its proof. That is the underlying basis of the rule against self-incrimination.

Mr. Burns. Be put to its proof, which we assume it has before it has instituted its proceeding.

Mr. Waite. I believe the Government must be put to its proof, but I believe what you are trying to do is hamper reasonable efforts of the Government to get the proof. That is as I look at it. I agree with you that we ought not to allow the third degree. We ought to put a stop to real duress. But you can go so much further here.

[illegible] because that is

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a rule that requires proof of duress which is a rule that works in anything but exceptional cases, because in all but exceptional cases a defendant cannot prove duress.

A rule of this kind actually operates in part as a prophylactic rule, going beyond the situation in which duress can be proven, at least in part, for the sake of meeting that situation. I do not agree that it has no merit in terms of an objective of eliminating only duress.

Mr. Waite. I should hate to try to have to justify this before the public.

Mr. McLellan. Question.

The Chairman. The question has been called for by Judge McLellan. Is there any more discussion?

The question is on the rule as drafted by Mr. Wechsler and as amended by Judge Burns with Mr. Wechsler's consent. All those in favor say "Aye." Opposed, "No."

I call for a show of hands. Those in favor. Six. Opposed. The motion seems to be lost.

Mr. Wechsler. Mr. Chairman, may I move that that part which Professor Waite said he would agree with--

The Chairman. Suppose you restate it, if you will.

Mr. Wechsler. As written, with a period after "5 (a)."

The Chairman. Is that seconded?

Mr. Dession. I second that.

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Mr. Wechsler. Rule 5 (a) imposes a duty on a person making an arrest to bring the arrested person before a magistrate within a reasonable time. That is the essence of it.

12 Mr. Youngquist. Without unnecessary delay, it says.

Mr. Wechsler. It is subject to redrafting, as I understand it, but that is the principle of it; and this is intended to apply to those cases in which the person arrested is not brought before a magistrate without unnecessary delay. So that, in my view, it would apply to any detention after that reasonable time prescribed by Rule 5 (a) has passed.

Mr. Youngquist. And it would be necessary for the court, then, in each instance to determine whether any part of the period intervening between the time of the arrest and the arraignment before the magistrate constituted unnecessary delay?

Mr. Wechsler. That is right.

Mr. Burns. That is quite appropriate. At the time 5 (a) was being discussed question arose as to what sanction there was for that right, because it is described as a right of the defendant, when that right has been violated by unnecessary delay; and the answer was given, perhaps it was an arrest void ab initio, but he had his action against the officer, which I think is strictly a law school reply.

Mr. Waite. There have been a lot of cases of that character.

Mr. Youngquist. That would hardly be a sanction, because they might hold them for days without asking them any questions at all. The purpose of the defendant's being produced before a magistrate without unnecessary delay is to give him an opportunity to call for his preliminary hearing or to apply for bail; but it seems to me a rather backhanded way to impose a sanction for a violation of the rule requiring that he be produced before the magistrate without unnecessary delay, by saying that any questions that he may answer in the meantime shall not be admissible in evidence.

If we are going to put sanctions on it, let us put a penalty on the officer who is guilty, rather than put a burden on the prosecution.

Mr. Dession. There is a penalty now, but it does not do any good.

Mr. Burns. I do not prefer to go into the law of officer and prisoner, but I venture to make a guess that in ninety-nine out of a hundred cases where there has been any delay it is due to the fact that the defendant has not come across, and it is tied up with the fact of a governmental agent seeking information.

Mr. McLellan. Who decides this question of unnecessary delay? Does the court decide it and then, if it is a question of fact, leave it for the jury to say?

[illegible] questions of fact, I presume.

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Mr. Wechsler. It does not give any to him, but I do not think that is an argument against this, because I do not think you can draft a rule that will do that, since any rule would necessarily be in terms of bringing the prisoner before somebody else.

You have a rule--asfar as any rule can go--to bring the prisoner before somebody, to wit, a magistrate. Even that rule is violated, and when it is violated you have a question of unnecessary delay.

The Chairman. Why should it be a question of carting a person from the hills in some part of New Jersey down to Newark, on a mountaineering trip?

Mr. Wechsler. If you want to hit that, you should do it by retaining the existing law, which requires them to bring him to the nearest magistrate, instead of suggesting the modofication of that law which was suggested earlier today.

But I do not think that point bears on whether we should have this protection, assuming that there is to be that scope as to where he is brought. In other words, this whole rule was designed for a partial remedy of what I think is a difficult situation. I think the rule could have been lived up to. I certainly think this part of it is good.

Mr. Waite. It just occurs to me, in view of what Mr. Wechsler says, that we could send this back to be redrafted [illegible] need not be taken before the nearest

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Mr. Robinson. It will be ready for you in the morning.

The Chairman. Suppose we pass this for the time being, with the motion pending on the first three and a half lines.

We move on to Rule 7, then, beginning Chapter III. I think most of you are quite familiar with it.

Mr. Holtzoff. I have just a probable suggestion in lines 2 and 3, "The grand jury shall consist," and so forth. Strike out the word "impaneled" and change "every" to "the."

Mr. Robinson. I believe it was suggested that the word "grand" be stricken. In line 5 strike out "grand" before "jurors" and make it "at least twelve."

Mr. Medalie. The heading takes care of that.

Mr. Robinson. Does it go out there?

Mr. Medalie. You mean in line 7?

Mr. Robinson. Line 5.

Mr. Youngquist. It occurs in a great many cases.

3-1 Mr. Robinson. Was it not the wish expressed by the committee, in talking about grand jury, to leave out the word "grand"?

It occurs in line 5; you can take out the word "grand." In line 10 you can take out the word "grand." In the middle of line 18 is the next one. I believe that is all on this page.

The Chairman. Is that wise?

I am wondering whether it is. I donot

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Mr. Youngquist. What rule was that in the third draft?

Mr. Robinson. In the second draft it was Rule 100.

Mr. Youngquist. I have it. It is Rule 80.

The Chairman. Are there any suggestions besides taking the word "grand" out where it occurs before the word "jurors"?

Mr. Waite. Somebody had a suggestion about line 2.

Mr. Holtzoff. I suggested that we change the word "every" to "the," and strike out the words "impaneled before any district court," so that the first few words of that sentence will read, "The grand jury shall consist of not less than," and so on.

Mr. Waite. Would it not be better to have it "a" rather than the definite article?

Mr. Holtzoff. Perhaps so.

The Chairman. What shall it be, gentlemen?

Mr. Youngquist. I like the definite article.

Mr. Robinson. I like "the" better.

Mr. Holtzoff. I like "the" better.

Mr. Waite. That indicates a particular grand jury, does it not?

Mr. Holtzoff. No. We speak of the court and the jury.

The Chairman. Referring to an institution.

What was the next change after that?

Mr. Holtzoff. Line 5, take out "grand" and in line 18.

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As written, unless you interpret "when required in the course of judicial proceedings"--and even then I am not able to see how it can be interpreted to meet my objection--a witness who is subsequently indicted will not be permitted to acquaint his attorney with what he has testified to before the grand jury. As a matter of fact, this requirement literally interpreted would really make adequate preparation of a case for a defendant extremely difficult.

Mr. Robinson. That was my view on this, Judge, and I thought at the previous meeting of the committee it was decided that such secrecy should exist only during the pendency of the proceedings--that is, up until the indictment was found. At least, that was a strongly advanced view at one time in our session. After the indictment was found there was some expression of opinion that it should wait until the whole criminal proceeding was concluded. Then a grand juror or a witness could testify.

Mr. Burns. Well, I have no objection to a grand juror, to a stenographer, or to a district attorney being held down strictly to the present oath, which they must take to keep secret the proceedings; but when it comes to a witness, it seems to me you collide with the defendant's rights, and I do not think any great public disservice is done if the witness is permitted to tell, if he is not under oath.

[illegible] that the practice now is, in many of the

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of the Committee on Style. I imagine that since it is here, it is because those of us who held the views now expressed by Judge Burns were in the minority. I am glad to have it brought up again. I feel very hostile to this provision.

Mr. McLellan. Would it be all right to strike out the words "or witness"?

Mr. Burns. Yes.

Mr. Holtzoff. Should not the witness be required to maintain secrecy until an indictment is found?

Mr. Burns. Why?

Mr. Holtzoff. Well, it seems to me that there are two reasons. One is to prevent the possible defendant from escaping, and the other is to protect the prospective defendant if the grand jury decides not to indict him.

Mr. Medalie. May I give you a simple case? A man receives, assuming that the subpoena states the truth, a subpoena to appear in the case of United States against Joseph Brown, and he shows it to his wife, to his clerk, and to his partner. There is a complete disclosure that there is something brewing against Jopseh Brown. Everybody in town knows it. He may not state that he has appeared before the grand jury whatsoever. It is just an absurdity.

The Chairman. Would you have him tell what he testified to?

Mr. Medalie. He does it today, and I see no harm. I am [illegible] imagined, in view of the fact

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recent origin.

Mr. Medalie. It may be ancient, but it was not used.

Mr. Holtzoff. It has been used in many districts.

Mr. Medalie. Only very recently.

Mr. Holtzoff. I do not think so.

Mr. McLellan. I would like to ask the question as to what happens to a witness who does disclose to a lawyer what took place before the grand jury, by virtue of anything in these rules.

Mr. Holtzoff. I suppose it is contempt of court, is it not?

Mr. McLellan. Contempt of court by virtue of these rules?

Mr. Holtzoff. That would be the effect, would it not?

Mr. Seasongood. Except there was a holding that it was held to be contempt where a witness was sworn to secrecy and he told about it.

Mr. McLellan. There the violation was based on the violation of his oath, but when you put anything in here it either creates an offense or it does not. It is not our business to create an offense of that kind.

Mr. Medalie. You have some simple situations that occur quite frequently. Someone in a business enterprise is the subject of a grand jury investigation. His partner is subpoenaed before the grand jury. His head bookkeeper, his outside [illegible] brought in there, and the

Mr. Dean. I do not think we decided on it this way in the Committee on Style.

Mr. Medalie. It did not seem to me that we did.

Mr. Dean. We had the situation of the vice president of a corporation, for example, who was brought in as a witness. He might not be the prospective defendant. He is naturally going to disclose that. It would be completely against human nature if he did not disclose that to the president of the corporation and the counsel for the corporation.

Mr. Burns. And every witness who is subpoenaed, who is an officer of the corporation, is able to know, from the questions of the district attorney and the questions of the grand jurors, that they appear to be pointing toward the indictment of the president.

Frequently, a man who knows he is about to be indicted can write a letter to the district attorney, and the practice is to let him appear, and very often the grand jury refuses to indict on the appearance of the president. All this is choked off, and for no very obvious public good.

Mr. Holtzoff. To bring this matter to a head, I move that we strike out the words "or witness" in line 19.

Mr. McLellan. I second the motion.

The Chairman. Is there any further discussion?

Mr. Longsdorf. I would like to ask a question. In what

after everybody has been apprehended--and the decisions have supported that except this one that happened in the Ohio District.

The Chairman. That would be contempt in my State.

Mr. Medalie. That is what they decided, and they held otherwise in New York, Virginia, and elsewhere.

Mr. Dean. Impeachment of the witness I think would be the most usual one, where you are using the grand jury transcript to impeach him.

Mr. Medalie. There you have a judicial proceeding that is clearly a judicial proceeding, but I do not see why you eliminate preparation for other forms of judicial procedure than trials--a motion to quash, for example, which you cannot make without interrogation of the grand jurors--and if everybody is apprehended there ought to be no limitation on making the inquiry.

Now, in all the cases that have arisen up to date and which can be found on the books, and there are not very many of them, but there are a few of them, I cannot conceive how any harm was done to the administration of justice on that kind of interrogation of the grand jurors.

What we ought to say here is that after the defendants have been apprehended there is no restriction as to certain things which happened before a grand jury which are material

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proceeding, not in the proceeding, however.

Mr. McLellan. Is the question whether the words "or witness" should come out?

Mr. Holtzoff. That is the motion. I call for the question.

The Chairman. Is there any further discussion?

If not, all those in favor of eliminating the words "or witness" say "Aye." Opposed, "No." The motion is carried.

You surprise me. If a grand juror ever disclosed anything in my State, no matter if the case has been tried and on appeal, he is subject to contempt. The same with any witness.

Maxson
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9:45 pm

hs

Maxson
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The Chairman. All right. Are there any other questions on this section?

Mr. Longsdorf. If it is in order I should like to ask why the oath to be given by the Grand Jury, contained in the third rule, was omitted in this.

Mr. Robinson. By order of the Committee.

Mr. Holtzoff. We thought, some of us, that the text of an oath ought not to be in the rules, any more than the text of an oath to petit juries or to witnesses.

Mr. Longsdorf. I just wanted to know.

Mr. Robinson. One other matter in the transcript, going back a moment to a matter that is now not important, yet to correct the record should be mentioned: upon talking here with Mrs. Peterson and Mr. Tolman we are inclined to believe that at the last committee meeting when this was taken up the matter was not settled. It went into a discussion of whether or not at common law a witness was under a duty not to disclose what he had been asked about, testified to before the Grand Jury, and we were instructed to make a study of that, which we have done. Mr. Holtzoff, too, has given some assistance on that. Chitty puts it that the witness was under a duty not to disclose.

Mr. Holtzoff. We can dispose of that.

Mr. Robinson. Yes.

Mr. Longsdorf. What did you find about the common law? Was it permissible?

Is that not the result of it?

Mr. Medalie. Did we not also find that that was for protection of the defendant?

Mr. Robinson. I am not sure about that.

Mr. Youngquist. In this memorandum?

Mr. Holtzoff. That rule gives it.

Mr. Youngquist. Yes. We have more rules on it.

The Chairman. All right. Now, is there anything further, gentlemen, by way of suggestions on (c)? If not, let us move on to (d) (1).

Mr. Medalie. Well, now you still make it impossible to find out how the defendant's rights were violated, as they sometimes are, before the Grand Jury. Motions to quash have been based on such considerations, and they have been disclosed by grand jurors. I do not see why they should not be.

Mr. Longsdorf. How shall an attorney be permitted to make inquiries and investigations like that? Who can give it to him? The foreman?

Mr. Medalie. Why ask the foreman?

Mr. Dean. You can say "except when the disclosure is to be used in the course of a judicial proceeding."

Mr. Medalie. That would be all right.

Mr. Dean. That would cover that motion to quash.

Mr. Medalie. And provided everybody had been apprehended.

Mr. Youngquist. I do not think that a statement of the

evidence was produced. That is what they disclosed in the Schmidt case, or tried to.

The Chairman. Gentlemen, we have ruled on it, so unless there is a motion to reconsider let us go on to something else.

Mr. Longsdorf. I am speaking of the grand jurors. They were the ones interrogated there.

Mr. Medalie. I would reserve the right to bring it up again some day.

The Chairman. In other words, we move on to (d) (1). If there is nothing on (d) (1) may we proceed to (d) (2)?

Mr. Dean. Would it not be a little better to say in line 31 "is not legally qualified" instead of "is not qualified in accordance with law," just as speaking of disqualification?

Mr. McLellan. "in accordance with law" is already in.

Mr. Youngquist. Do you mean to put in "legally qualified" instead of "qualified in accordance with law"?

Mr. Dean. Yes, that is the suggestion.

Mr. McLellan. You would strike out, Mr. Dean, the words "in accordance with law"?

Mr. Dean. Yes, sir. It is either a legal qualification or it is a qualification by virtue of the fact that he has a state of mind that prevents him from acting impartially.

Mr. McLellan. May I suggest, that is better.

Mr. Wechsler. Why do we want "without prejudice to the substantial rights of the challenging party" in line 33? Is it not

tence with the word "impartially" and strike out the rest of it.

Mr. Burns. That is it.

Mr. Medalie. I think so.

Mr. Waite. In what line was that?

Mr. Burns. Line 33. Strike out all after that.

Mr. Medalie. "acting impartially." Period.

Mr. McLellan. Are jurors who are being questioned for the purpose of determining whether they are qualified and unprejudiced to be subjected to an oath?

Mr. Medalie. Well, you must come in there with knowledge; you cannot fish. It is the only way you can question.

Mr. McLellan. I did not say you could fish. I asked you whether you intended to provide that the jurors upon the voir dire should be sworn.

Mr. Youngquist. This is under (1)? Speaking of (1)?

Mr. McLellan. Any. Either one.

Mr. Medalie. The only way that I could conceive of a juror being sworn before the oath as a juror is administered to him is when he is testifying. Now, the only way a question can be laid which would require his testifying would be to file or present a challenge. Then the challenge is tried, and on the trial of that challenge he could be sworn.

Mr. Robinson. That is right.

Mr. Medalie. He could be sworn as a witness in the trial of a challenge.

Mr. Medalie. Or by a defendant.

Mr. McLellan. I take it all back. You know, what I was thinking of was the other kind of a jury.

Mr. Robinson. A petit jury.

Mr. Burns. Voir dire.

The Chairman. That is where the District Attorney would do it, but where does the defendant's attorney do it?

Mr. Medalie. The same place.

Mr. Youngquist. If he has been bound over.

Mr. Dean. He does not know.

Mr. Medalie. Yes, he does. He has been held to answer.

Mr. Dean. That is the situation where he would know he has been bound over.

The Chairman. So where he does not know it he is just out of luck.

Mr. Youngquist. That is right.

Mr. Medalie. No, he is not. After he has been indicted he can challenge the array.

The Chairman. Oh, (2). I see.

Mr. Burke. How could you substitute, then, that the challenge shall be made before the administration of the oath to the jurors?

Mr. Medalie. I did not get that, Mr. Burke.

Mr. Burke. Does this have reference to the grand jurors -- the challenge?

Mr. Medalie. When he has been held to answer.

Mr. Burns. When he has been held for the Grand Jury.

Mr. Youngquist. I suppose the word "grand" in line 29 should come out?

Mr. Medalie. No. "the Grand Jury"?

The Chairman. No.

Mr. Youngquist. This is all Grand Jury?

Mr. Robinson. No; we dropped the word "jurors," is all.

Mr. Medalie. "Grand Jury."

Mr. Youngquist. I am sorry.

The Chairman. I still have doubt as to the wisdom of that, gentlemen, because lawyers are going to be quoting this, and a judge might not have it right before him, and he might think it relates to petit jurors.

Mr. Medalie. Well, the heading is, "Objections to Grand Jury or to Grand Jurors." The title is, "Objections to Grand Jury or to Grand Jurors."

The Chairman. In other words, Mr. Pettifogger gets up and reads that to the Court in connection with something that deals with petit juries, and unless the judge is very much on his toes he will be misled.

Mr. Medalie. All the judge need do is read it.

Mr. Longsdorf. He might get into trouble in a state like California, where it has become settled law -- entirely too well [illegible] that the headlines are no part of the statute and must

7 The Chairman. I shall not press it. I shall withdraw it.

Mr. Longsdorf. I agree with you (addressing Mr. Medalie).

Mr. Medalie. This is rule 4.

Mr. Longsdorf. The judge cannot look at the headlines.

Mr. Medalie. Oh. Well, here the body of this covers it anyhow.

The Chairman. All right, gentlemen. Are we up to (d) (2)?

Mr. Youngquist. We say in (d) (2) that a motion may be made. Did we not mean a motion to dismiss? That is the only motion I suppose that could be made.

The Chairman. I should think so.

Section (e).

Mr. Youngquist. May I ask another question in connection with that?

The Chairman. Surely.

Mr. Youngquist. Suppose a defendant who has been held to answer to the District Court interposes a challenge to the array, and the challenge is found not true. Then in (2) we provide that the motion to dismiss may be made after indictment or based on objection to the array if not previously determined upon challenge. Is there danger that the determination of the challenge of the defendant held to answer would be controlling in the case of a defendant in some other indictment found by the same Grand Jury?

Mr. Holtzoff. No, I think this only relates to the decision of the defendant.

sound very good to me. That is, the idea is that the indictment is the result of the deliberation and not merely the vote, and if this man is disqualified he may have influenced the others who did return the indictment, to return it.

Mr. Holtzoff. Well, it is the present statute. It was the statute of 1934.

Mr. Seasongood. I do not think much of it, because the jurors are all supposed to have participated in the deliberations, and the bad one has doubtless influenced, or may have influenced, the others to return the indictment. I do not press it.

The Chairman. (e).

Mr. Waite. Mr. Chairman, before we take up (e) may I make another suggestion?

The Chairman. Yes, sir.

Mr. Waite. At the last time, if I remember correctly, we were all pretty much in agreement that a man who had pleaded to the indictment and been found guilty on the merits ought not to have the conviction reversed because of defects in the Grand Jury proceedings unless he had raised the question of the defect in the Grand Jury prior to the trial. My recollection is, we were pretty well agreed on that last time. I do not find it in any rule.

Mr. Youngquist. That is covered in another rule.

Mr. Holtzoff. That is covered in a different rule.

The Chairman. In 15.

Mr. Waite. I caught that in 15, but it seemed to me in-

9 the court shall be raised only by motion and before trial."

That "and before trial" was just an incidental to something else, and it seemed to me it was so obviously incidental there that I am afraid it would not be accepted as applicable to this situation; so I would like to suggest that we have a (d) (3), the gist of which should be that no judgment of conviction on the merits -- after fair trial on the merits -- should be set aside unless the defects in the Grand Jury proceeding were called to the court's attention before the trial.

The Chairman. Why can we not do that in line 36 by saying, "After indictment but before trial a motion to dismiss may be made"?

Mr. Waite. We could if we feel sure that the courts would limit it that way. I should feel happier if it were stated explicitly that the judgment of conviction should not be set aside unless the motion were raised before trial.

Mr. Holtzoff. I think that would be a dangerous statement, for this reason: If you start enumerating here and there throughout the rules that a judgment of conviction shall not be set aside for this defect or that defect, then on the principle of expressio unius est exclusio alterius we are going to get into trouble: somebody will say, "Well, they did not say that this particular defect should not be considered as being sufficient to justify setting a judgment of conviction aside." I think you get into deep water if you start enumerating that way, and you

just stuck away.

The Chairman. It is broader; I do not know why you would add anything.

Mr. Waite. You see, it is stuck away and incidental to something else, and I am afraid it would be overlooked.

Mr. McLellan. What is the harm of putting in your suggestion that it be raised before trial?

Mr. Holtzoff. That is all right.

Mr. Medalie. That means stating it twice. It is so fully stated in rule 15, I do not think there can be the slightest doubt about it.

Mr. Holtzoff. I do not see any objection to the Chairman's suggestion.

Mr. Medalie. Yes, I think there is an objection as a matter of style.

Mr. Holtzoff. Oh.

Mr. Youngquist. You have the statement there.

Mr. Medalie. Well, you have to state it generally and so clearly as we have in rule 15.

Mr. Youngquist. I do not think there could be any misapprehension about it.

Mr. Holtzoff. I do not either.

Mr. Waite. You see, it is put in there in the conjunctive in 15.

Mr. Holtzoff. Let us strike out the word "and."

Mr. Holtzoff. If the word "and" goes out I think that emphasizes it.

The Chairman. The strongest words in the sentence are the last two words.

Mr. Waite. Oh, strike out "and" entirely? I did not get that.

The Chairman. Then that leaves it the place of honor.

Mr. Waite. Yes, that might take care of it.

The Chairman. All right.

Mr. Seasongood. If this second sentence is the statute why do you want to repeat it? What is the sense of putting it in?

The Chairman. The idea is to repeal the statute.

Mr. Seasongood. No.

Mr. Dean. So it is the exact language. I do not think this is the exact language.

Mr. Holtzoff. It is the exact thought.

Mr. Dean. Thought?

Mr. Holtzoff. Yes. It is a little briefer than the statute, a little more succinct and simple, but it is the exact thought of the statute.

Mr. Seasongood. What is the purpose of putting it in?

The Chairman. The object is, Mr. Seasongood, to get rid of a lot of statutes. That is what this is. This is final on

The Chairman. As are various other rules that we have all the way through, you know.

Mr. McLellan. The trouble is, with him and me, we both think the statute is a very mean statute.

Mr. Seasongood. Why is it not? What is the rule in an ordinary jury case if you find afterward that one of the jurors was disqualified? You are entitled to a new trial, are you not?

Mr. Holtzoff. Yes, but in an ordinary jury case you are required to have it unlimited.

Mr. Seasongood. Not in Ohio; you are not; you only need nine.

Mr. McLellan. But one disqualified juror sets the thing aside here?

Mr. Seasongood. I think so. I would not be positive, but I have seen statements that the judge says, "Now, you must all deliberate, and you must accept each other's counsel and opinion." And here is this fellow that is disqualified, who presumably has influenced the others to return the indictment.

The Chairman. Suppose his only offense is that he is sixty-five and a half years old instead of being sixty-five. I mean, really, you would not want to throw it overboard in that case.

Mr. Holtzoff. Why, that statute was enacted in 1934 and was supposed to be at that time according to form and do away with technicalities.

Mr. Holtzoff. Yes.

The Chairman. Well, we do not have to follow it because it is the statute.

Mr. Seasongood. If you adopt it you approve of it.

The Chairman. True, but I mean the fact that it is a statute is no reason for saying it must be in these rules; we can recommend a contrary rule, what we think wise.

Mr. Holtzoff. No; I only refer to the fact of the statute as an indication that this is not a novelty; it is a continuation of existing law.

Mr. Robinson. Is it not a matter of fact, Mr. Seasongood, that if you try to pick the man you are going to have to disclose how each juror voted and get into a difficulty both with respect to secrecy and with the complications of figuring it all out?

Mr. Seasongood. I should not think so. As I say, the indictment is the result of deliberation, and presumably all the jurors have entered into the deliberations.

Mr. McLellan. And there has been in the jury room a man who had no business there.

Mr. Seasongood. Well, if you do not get any support from anybody else I suppose it is not worth considering.

Mr. Burns. It is pretty clear that if a stranger were in the jury room the proceeding would be null and void.

Mr. McLellan. What is that?

The Chairman. Described as "a snake in the gräss."

Mr. Burns. He is an alien.

Mr. Seasongood. I shall make a motion that that sentence be stricken.

Mr. McLellan. I second it.

The Chairman. It is moved and seconded that that sentence be stricken. Is there any discussion?

All those in favor say "Aye." Opposed, "No." The motion is lost.

Gentlemen, it is getting on, ten minutes after ten.

Mr. Medalie. Let us do a couple of rules.

Mr. Waite. Time to quit.

Mr. Seasongood. Let the Chairman get well by tomorrow if he wants to.

The Chairman. Do not bother about me; I can stand it. We put Judge Crane under the weather last time; we do not want to do it any more this time. All right.

Mr. Robinson. Go ahead.

The Chairman.(e). Why should the attorney for the Government be present during the deliberations of the jury?

Mr. Seasongood. He should not.

Mr. Medalie. Prohibit it.

Mr. Youngquist. The last sentence.

Line 46

The Chairman. Are there any comments on (f)?

Mr. McLellan. May I ask if this is a general practice, that (f), according to your experience?

Mr. Medalie. No. It is handed to the judge normally, as I know of.

Mr. McLellan. That is what I have been used to.

Mr. Medalie. And that has been a nuisance pretty much and unnecessary.

Mr. McLellan. Well, I do not know. The foreman takes an indictment and leaves it with the clerk. Now, I have had a number of experiences where, being asked to go in to take a report of a Grand Jury, I have looked over the indictments and found as many as four or five of them, on occasion, improperly signed or not signed by somebody.

Mr. Robinson. That is right.

Mr. McLellan. And I always look them over.

Mr. Medalie. The clerk is more likely to do it.

Mr. McLellan. I think it is pretty good practice to have the indictment returned to the judge unless that is contrary to the usual practice.

Mr. Medalie. No, that is the usual practice, but I think the clerk is more likely to look at them than is the judge.

Mr. McLellan. But what can the clerk do about it? The judge says, "Why, I think you had better take those indictments [illegible] gentlemen," and let it go at that.

Mr. Medalie. Only a matter of signature. Defects in the indictment are none of their business.

Mr. Robinson. There may be other defects too. I have seen the judge have to tell the foreman to go back and sign it himself.

Mr. Medalie. That is what I am talking about, signing it. That is the only thing that you can mention that the judge or the clerk would have anything to do about.

Mr. McLellan. I think it is better to have the indictment returned to the judge.

The Chairman. Certainly he is entitled to that degree of formality.

Mr. Holtzoff. Judge, may I call your attention to a situation that sometimes arises: I remember we had a situation two years ago or a year ago in North Dakota where a resident judge was away in Florida sick during the winter. A Federal judge from Minnesota was sent to North Dakota, and he impaneled a Grand Jury, went back to Minneapolis, the Grand Jury was in session without a judge for a week or two at a time, and at intervals the judge would come back. Now, would it not have been well --

Mr. McLellan (interposing). Yes, that is all right. That is one instance, but we always poll a Grand Jury too.

Mr. Youngquist. You do?

Mr. McLellan. Surely. They come into court and we poll them.

and see if they answer to their names.

Mr. Youngquist. On each indictment?

Mr. Seth. Oh, you call the roll?

Mr. Dean. Call the roll.

Mr. Holtzoff. What object is served by having them there and polling them and handing them a bunch of indictments?

Mr. Dession. It might be just this: maybe they have just found them without looking at them.

Mr. Seasongood. The Grand Jury reports to the court, and they ought to report to the court and not to the clerk, is my idea.

Mr. Robinson. The judge does not here require that the Grand Jury accompany the foreman. In other words, by this rule a foreman could walk into the clerk's office alone and hand the indictment to him.

Mr. Youngquist. That was my idea.

Mr. Robinson. Surely it should not say that.

Mr. Youngquist. Make it a subcommittee.

Mr. Robinson. Let the other grand jurors get away.

Mr. McLellan. Yes, and the foreman can come and say, "Here is an indictment, Mr. Clerk." That is what it says.

Mr. Youngquist. No, surely.

Mr. Medalie. That is what we meant.

Mr. Robinson. It is too brief.

The Chairman. That is too efficient.

Mr. Seasongood. Y

ings are interrupted, and we get them out about as fast as we can. There is not even a pretense of formality any more, except that the judge nods to the foreman if he remembers them.

Mr. McLellan. Poll them, --

Mr. Medalie (interposing). They do not do that.

Mr. McLellan. -- they report the indictments, the judge looks them over. If there is some technical thing the matter he calls attention to it. If everything is all right he says, "The report of the Grand Jury may be received," and then, "The usual process may issue." I remember saying that before I knew what it meant.

Mr. Robinson. How would it be to reincorporate the words in Draft 3, "The indictment shall be filed by the foreman with the judge or the clerk in open court"?

Mr. McLellan. I do not like that either.

Mr. Seth. Leave the clerk out.

Mr. Robinson. "with the judge."

The Chairman. "in the presence of the Grand Jury."

Mr. Robinson. You want that in?

The Chairman. Yes.

Mr. McLellan. Why not let it be returned to the court? The judge is hired to be there.

The Chairman. Do they not have long poles with white on each end in these various jurisdictions?

Mr. Medalie. What?

Mr. Waite. It used to have a basket on each end.

Mr. Medalie. In capital cases.

The Chairman. Not less than ten years ago I have seen counsel sent home to put on black clothes and not wear white sports suits.

Mr. Medalie. They do not do that here any more.

Mr. Burns. In the interests of more pageantry I move that (f) be amended to read:

"The indictment shall be returned by the foreman to the judge in open court in the presence of the Grand Jury."

Mr. Seth. That is right.

Mr. Holtzoff. How is that again?

7 Mr. Burns. "The indictment shall be returned by the foreman to the judge in open court in the presence of the Grand Jury."

Mr. McLellan. If you strike out the words "by the foreman," I should like it better.

Mr. Medalie. As I get older, if I don't grow more pious, I get to regard ritual as more important.

Mr. Burns. It is a manifestation of internal poverty.

Mr. Medalie. That is all that is left, I suppose.

The Chairman. Judge McLellan says he would like it better if you had the return by the Grand Jury.

Mr. Burns. In open court. To the judge in open court.

Mr. Waite. I should like to ask, what is the present practice? Is it returned in the presence of the Grand Jury?

watches.

Mr. Seasongood. Well, that is all right.

Mr. Burns. In New York, keeping an eye on their overcoats.

Mr. Robinson. And watches.

The Chairman. You have heard the motion as amended. Are there any remarks?

All those in favor say "Aye." Opposed, "No."

(The motion was carried.)

The Chairman. I am glad to see, Mr. Burns, your interest in pageantry is growing.

Rule 8 (a).

Mr. Youngquist. The heading of 7 (f) should be "Return of Indictment," then, instead of "Filing of Indictment."

The Chairman. "Return of Indictment."

Mr. McLellan. I thought now you were going to stop, were you not?

The Chairman. I am willing to if anyone will volunteer with a motion.

Mr. McLellan. I move we adjourn.

Mr. Youngquist. I second it.

The Chairman. It is moved and seconded that we adjourn. All those in favor say "Aye."

Mr. Robinson. Until what hour?

The Chairman. What hour do you prefer?

Mr. Robinson. That is right.

The Chairman. We have a lot of work to do in three days.

Mr. Robinson. We meet at 10 in the morning.

Mr. Medalie. All right. That will be better.

The Chairman. What?

Mr. Medalie. Our subcommittee on redraft of rights before magistrates.

Mr. Holtzoff. How about having a subcommittee meeting right now?

The Chairman. All right.

Mr. McLellan. I should like to know to what time we adjourn.

The Chairman. 10 o'clock.

(Whereupon, at 10:25 o'clock p. m., an adjournment was taken until tomorrow, Tuesday, May 19, 1942, at 10 o'clock a. m.)