

MINUTES OF THE MAY 1966 MEETING
OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

The meeting of the Advisory Committee on Criminal Rules convened in the Supreme Court Building on May 23, 1966, at 10:00 a.m. The following members of the Committee were present during all or part of the sessions:

John C. Pickett, Chairman
Joseph A. Ball
George R. Blue
Sheldon Glueck
Walter E. Hoffman
Robert W. Meserve
Maynard Pirsig
Frank J. Remington
Barnabas F. Sears
Lawrence E. Walsh
Edward L. Barrett, Jr.

Judge William F. Smith was unable to be present during the meeting.

Others attending were Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Judges Claude F. Clayton, Alfonso J. Zirpoli and Olin H. Chilson, members of the Subcommittee on the United States Commissioner System of the Judicial Conference Committee on Administration of the Criminal Law; Honorable Ernest C. Friesen, Jr., Assistant Attorney General for Administration, Department of Justice; Harold K. Koffsky, Deputy Chief of Legislation and Special Projects Section, Criminal Division, Department of Justice; Richard Braun, Second Assistant, Criminal Division, Department of Justice; William T. Finley, Jr., General Counsel, and M. Albert Figinski, staff attorney, of the Subcommittee on Judicial Machinery of the Committee on the Judiciary of the United States Senate; Professor Charles A. Wright, member of the standing Committee; William E. Foley, Secretary to the Rules Committees; Carl H. Imlay, Administrative Attorney, and Gilbert W. Lentz, attorney, of the Administrative Office of the United States Courts.

The Chief Justice of the United States and Mr. Justice Fortas were both present for brief periods during the sessions and spoke to the members.

Judge Pickett called the meeting to order by welcoming the newest member, Mr. Meserve, to the Committee and by introducing the guests.

Dean Barrett stated the general problem facing the Committee for this meeting was that of whether United States commissioners should hold preliminary hearings. One of the areas to be faced is the interaction between the rules and the statutes where the rules cannot be changed and the Committee cannot change the statutes. He stated it is almost impossible to coordinate rule action and statute action because the process is so cumbersome and time consuming as it takes approximately two years from recommendation of a rule until its adoption. He thought the rules may have to await the action of Congress to the extent that changes are thought to be desirable in the rules which may result in some action of upgrading the commissioner system. The other alternative is the proposed bill from Senator Tydings' Subcommittee on Judicial Machinery. Dean Barrett stated Congress has the authority to amend the rules in the statute and then the Advisory Committee would have to pick up the pieces by removing them from the statutes and drafting the amendments to the rules. He thought the Committee may have to wait to see what Congress does as this in turn may force the Committee to change rules.

He further stated that it would be useful for the Committee to discuss the problems in order to come to some decision as to what should be done. He stated the members of the Committee on Administration of the Criminal Law were present to propose the views which the Judicial Conference would express on pending legislation.

The Reporter pointed out that there were three basic directions in which the Committee might move: (1) not to make any changes at the present time; (2) consideration of the proposal of the Administrative Office to leave the commissioner system as it is -- compensate for its deficiencies by taking away from the commissioners some of their jurisdiction, notably on preliminary hearings; and (3) consideration of the proposal of Senator Tydings' Subcommittee to substantially change the commissioner system into a state system of magistrates providing for, at least in busy districts, well-paid full-time people to be designated as magistrates and to provide in other districts for more qualified people with higher salaries. Matters to be considered if the magistrate system is adopted would be the use of magistrates as masters and for other collateral problems in the judicial process, and the preliminary hearing which would entail a redraft of this section.

Other subsidiary problems were pointed out such as the nature and quality of the preliminary hearing, to what extent the structure of the rules should be changed to accelerate the

disposition of criminal cases in the system, to what extent the rules should put more strict limitations on time intervals between arrest and indictment and arrest and arraignment, general legality of police practices, and the serious exploration of the possibility of shifting the initial appearance preliminary hearing functions entirely from United States officials to state magistrates.

Professor Glueck inquired as to whether preliminary hearing would dispose of interlocutory matters, such as reasonableness of search, action of police, etc. Dean Barrett stated that that kind of proposal would depend on the type of commissioners the system has.

One view expressed by Professor Pirsig was that the Advisory Committee might inquire whether it would be appropriate for it to arrive at some consensus about what the commissioner situation should be (what improvements might be made, etc.) and make an expression to the Committee on Administration of the Criminal Law. He felt that if the Advisory Committee had no formal function in the matter that it would not be feasible to hold discussion.

Mr. Sears moved that the subject be discussed at this meeting in order that a conclusion be reached to determine whether the matter should be placed on an agenda for a subsequent meeting. The motion was seconded.

Judge Clayton made the following statement:

The problem of dealing with the subject of commissioners, as you know, on the Committee on the Administration of the Criminal Law, basically, was that we came up with a concept which would largely leave the office pretty much as it is but to carry that concept into effect would have required more rules changes than any other thing and that is probably why we are sitting here with your Committee today, with one exception, and that would require, according to our views, legislation. What we had tentatively dealt with and felt might be a solution, not necessarily the best solution, would not require an upgrading of the commissioners as such, nor would it require the great increase in expense which would be necessary under the proposal now embodied in the legislation introduced by Senator Tydings. Briefly, what we had considered might be a solution was to give to the defendant and the United States the right to test in advance of the trial, and require that they do this in the general area of the admissibility of evidence, which came into the hands of the United States either as an incident to an arrest or as the result of execution of a search warrant, or result

of search based on what the government claimed was probable cause. And also included in that would be the admissibility of any statement or confession. We envisioned a system which would require that these matters be raised by proper motion within a fixed time before the district court. The defendant's rights should have a ruling occur on his contentions which would be preserved as a following form of record. He has arrived at an appeal but many times the case is that the United States has a vital piece of evidence that is dependent on a ruling as to whether it is or is not admissible. And many times that occurs. Now the question is raised only during the trial on the merits. And quite often it happens there is an adverse ruling to the United States' position and that ends the case. You cannot effectively provide for any right of appeal on the part of the government after the jury is impounded as you run into the problem of double jeopardy. But with the availability of counsel under the Criminal Justice Act I think it constitutionally permissible that you fix a deadline within which the defendant must raise these questions and within which the government could also raise them and in the situation where there was an adverse ruling to the admissibility of key and vital evidence for the prosecution. The preliminary appeal would settle that issue in advance of the trial on the merits. The only problem would be the question of a right to a speedy trial. This is the one point that I think will require legislation -- the others I think could be accomplished by rule to a large extent. If such a system were adopted, whether by rule or by statute, insofar as the historic function of the commissioners is required it would not require an upgrading because your preliminary hearing would be either de-emphasized or abolished and you could supplement that with a system of magistrates such as envisioned in the proposed legislation by Senator Tydings. To give them the same jurisdiction as commissioners plus other jurisdiction. After all you are talking about a very few concentrated areas where there is a real need for magistrates to try petty offenses. And I think, if possible, that the system could operate under this concept -- we are not advocating this, we are not partisan for it, but it is what we came up with. And it is, I am sure, the reason why we are sitting here today. And I think the only part of it that

would require legislation would be giving the government the right to deal with an adverse ruling on admissibility.

Judge Zirpoli thought some consideration should be given to what should be done with relationship to the commissioner system. If it is to be upgraded, in part or in whole, it would determine what would be done by the Committee on Administration of the Criminal Law and presumably by the Advisory Committee on Criminal Rules. He felt if the disposition were to divorce the preliminary hearings in consideration of these matters -- if there is a commissioner system and if the commissioner has to conduct the preliminary hearing, the purpose of the preliminary hearing is to determine whether the accused should be held or discharged -- how can a commissioner avoid in the preliminary hearing the problems of unlawful search or seizure because they ultimately will determine whether there is or is not probable cause. Judge Zirpoli did not see how the divorcement could be made easily.

Dean Barrett stated that the theory of Judge Zirpoli's statement was good but he thought that in 80 percent of the area of the United States you would not have commissioners and deputy magistrates of sufficient quality that people would be content to have them make final disposition of such key issues as search and confession. He thought it might be feasible in large metropolitan areas but not in the other areas.

Mr. Ball stated that he thought the Committee should address itself to the purpose of the preliminary hearing. That in states where the preliminary hearing is successful it isn't a preindictment stage of procedure but it is a separate parallel procedure to determine probable cause. He felt that if the preliminary hearing is considered only as a procedure to determine whether to hold the man in jail or hold him until a grand jury can determine probable cause, then the preliminary hearing is senseless. He would like for the federal system to accomplish what the states of Wisconsin and California do, i.e., establish probable cause prior to trial. Inasmuch as he thought this unlikely, it would be better to emphasize the pretrial procedure to permit adequate discovery by the defendant rather than to look to the preliminary hearing for discovery of probable cause.

Professor Remington called attention to the two different meanings of preliminary hearing. The first is the relatively formal hearing to determine probable cause based on admissibility of evidence -- whether to raise questions of search and seizure, etc; and the second is that some people understand the preliminary hearing to mean the person must be brought promptly before the commissioner for a probable cause determination.

Dean Barrett stated there were two alternatives: (1) force either indictment or preliminary hearing within a brief time and then decide the corollary question who is to handle the preliminary and (2) how to reduce the custody periods.

Judge Chilson expressed the opinion that a system which works in one area will not work in another. He felt the important thing should be that the man be not put away for 120 days when he has an opportunity to be heard. He felt the best thing to do is to put a time limitation in which would require a man to be indicted or waive indictment with an information upon it and then authorize each district court to follow the procedure which will best work in its area. He also thought it would be wise to give courts authority to use state magistrates or to hold preliminary hearings -- using the number of commissioners they desire. He felt the only argument against continuing the present system is the fee basis, but that could be taken care of by a salary commensurate to the work performed. Aside from the matter of discovery, he could find no one who feels the commissioner system isn't doing what it is supposed to in each particular area and the defense lawyers he had talked to felt that they should have greater leeway for discovery. Judge Chilson thought this could be handled by a revision of the discovery procedure.

Discussion was centered around the matter of calling the grand jury at least once a month if needed and what implications this would have.

Professor Remington raised a question concerning a case of arrest without warrant being brought before a commissioner, and to the basis for holding him. The matter of arrest in a non-warrant situation was discussed fully.

Mr. Finley and Mr. Figinski entered the meeting at 12:00 noon and Mr. Finley spoke briefly about the proposed legislation of Senator Tydings. He made the following comment:

I want to speak to the Advisory Committee quite briefly about some features in our commissioner bill which affect the rule-making power of the Court and Mr. Figinski will also speak about the problem of not guilty pleas and not guilty by reason of insanity.

Everyone here has seen a copy of Senator Tydings' proposed bill to overhaul the commissioner system. We have not introduced this bill yet, we want to circulate it more or less off the record among those who have a knowledge and interest of the subject so that we can have the benefit of their advice and counsel before

actually introducing the bill. We received a lot of comments from the approximately 75 or 80 people to whom it has been sent, including all the people who have testified before the Subcommittee at the three sessions of hearings. This includes people of the Justice Department, Administrative Office, all the members of the Advisory Committee, a number of people on the Criminal Law Advisory Committee, some other district and circuit judges, and a number of United States commissioners as well. All Senators on the Subcommittee have taken a look at this too. In particular, I wanted to discuss the rationale behind those two provisions of Sections 3.03 and 3.04 of the bill dealing with preliminary hearings and discovery. We have had a mixed bay of reactions particularly to Section 3.04, which would direct the Supreme Court to make adequate discovery rules in every criminal case, taking into account not only the benefit in broad and criminal discovery dealing with the criminal defendant and the likelihood of the fact that would enhance appearance in trial, but also national security interests and well-being of witnesses. We were at first reluctant to get into the business of telling the Supreme Court what it should do with respect to criminal discovery and while we have had a lot of complimentary comments about this approach we have had very well-meaning and very thought-out cautionary criticisms. The two main divisions which the criticisms fell were: first, concern this direction coming at the present time, as it does, might be thought to reflect adversely on new federal Rule 16, which is about to go into effect; secondly, that the Congress ought not to be in the business of telling the courts specifically what to do in this area, having given the Court the rule-making power to govern procedure of this nature. With respect to the first, we did not intend it to be a judgment upon adequacy of new Rule 16 and we will be at pains, if this provision stays in the bill, if the bill is enacted to make this quite clear in the legislative history behind the bill. That is not meant to say, however, that we think federal Rule 16 is adequate in all respects. There is some concern from the Court and in the Senate whether Rule 16 covers some situations it should cover and there is a tendency to point to the scope of discovery that is different in a civil case and compare that with what is given here. Secondly, with the criticism that we ought not to be in the business of telling the court what it should do in this area, we are not sure we shouldn't be either. And particularly that point is what I wanted to talk to you about. I thought it might

be a little clearer why we resorted to this device if I explained the tactical considerations behind this approach. On the one hand, we have concluded that the preliminary hearing as it currently exists, both in theory and practice, is not a meaningful device. Certainly not uniformly meaningful, and there is some doubt as to whether it is very meaningful even where it is utilized as the rule seems to contemplate that it will be utilized. Certainly this is true for discovery purposes as probable cause devices might be considerably more applicable. Feeling that the preliminary hearing in any event is not a satisfactory discovery device for a number of reasons -- because it is not uniformly given, because it could at least under present law be preempted by their being grand jury indictment, because of the amount of discovery that the defendant gets dependent on how much discovery the commissioner or other judicial officer thinks the government must put forth to show probable cause, and because the arrest when counsel wishes a preliminary hearing is given -- doesn't bear any necessary relation to the counts the defendant will be tried upon and usually there is a preliminary hearing when probable cause has been established with respect to one count that is deemed sufficient to find the defendant for the grand jury or for district court and where there is not a preliminary hearing held with respect to other counts. All these considerations have led us to believe that the preliminary hearing should be restricted to the probable cause issue alone -- Section 3.03 of the bill does that. Having arrived at this finding and having emasculated the preliminary hearing as even a slight discovery tool, we felt that as a tactical matter it would be advantageous to demonstrate to those who were defense minded, civil libertarianism minded, or whatever, that we were not trying to restrict the scope of the present discovery devices and therefore we thought it appropriate for the bill to specifically set out some discovery procedure. When we got to this junction we felt that we were not the best people to do this -- not as well equipped as this Committee to set out what should be put into a procedure to allow a defendant criminal discovery. We thought that something could be gained by directing the Supreme Court to do this. I have off the record, some official conversations with people involved in this process and the subject came up to whether, first of all, the court itself is satisfied with the new rule. And, secondly, whether they would

be offended if this provision of the bill, a mandate to the Court, were enacted. It seems to be some thought, without getting into detail, that the Court, far from being offended by this, might even welcome it because I believe common knowledge in this room, if not elsewhere, is that the Court does not sit and review these rules with any degree of specificity. It feels that after the rule has run the gamut that it has run once it gets to the Court, unless there is something drastically wrong with it, the rule should be promulgated as it is recommended to the Court by the Conference, even if there is a consensus of the Court that if they were writing the rule they would write it a bit differently. There seems to be a feeling first of all (a) that the Court itself would not feel that this is a directive to the Court in a way to restrict its scope of operation and (b) to the extent that it might prompt this Committee to promulgate effective discovery rules, then it might even be welcomed by the Court. At this point, I am open to any comment anyone would care to make. We are not at all firmly committed to having this added feature of the bill. It may or may not remain in the version of the bill that is introduced in about a week or 10 days. Even if it does remain in the version of the bill introduced, we will be sympathetic to well-intentioned constructive criticism that this is not a proper thing for us to do and if this appears to be the result of the hearings then we will not be adverse to take it out by amendment at that time. I just wanted you to have in mind what is in our minds when we resorted to this tactic. We had a mind not only to what we felt the Court's reaction would be but also to what the reaction of the Congress would be to those who might be critical of our narrowing the scope of the preliminary hearing without, so to speak, any physical clause. If there are any comments I might just leave that with you and allow you to communicate with me any further thoughts that anybody has on individual basis. I would appreciate as much guidance as we can obtain from the people here in this room as I know the people here have more knowledge about this than probably any other group we can get together.

Judge Hoffman inquired of Mr. Finley whether he had some note, that the Advisory Committee had not been advised of, that the Committee did not go far enough in its developments under Rule 16.

Mr. Finley stated that he did not want to make any judgment on that -- that he wanted to make it perfectly clear in the legislative history that this division is not intended to be a judgment on Rule 16. He stated that he had heard some comments to this effect, which he had not adopted necessarily as his own viewpoint. He thought the rule is a substantial improvement over the old rule but mentioned that another consideration is that the Court itself might be in a position (stated he had heard this suggested by someone who should know) of wanting broader discovery than even Rule 16 gives but it might feel reluctant to change the advice of the Advisory Committee and might welcome a mandate from the Congress that it could rest upon in effect directing the Advisory Committee to effectuate its desires.

Judge Pickett stated that it seemed to him the Court is confronted with the same thing the Advisory Committee is -- that the Committee had what it thought available help in connection with the rule and that it had spent approximately five years of study on the rules, none receiving more consideration than Rule 16. He also expressed the opinion that he would doubt if you could find any multiple group who would agree upon as to what the rule should be but that the rule was a result of continuous study for over five years. Mr. Finley stated two things in particular which he recalled were mentioned to him in conversation about Rule 16. First, that it seems permissive rather than directive, where it says "may," rather than using "shall," even though there is a clause in subsection (e) which would allow the court to accept certain categories of cases presumably in national security to the survivor. Secondly, it doesn't provide for any discovery apart from the matters that may actually be in the hands of the government; it doesn't allow for depositions to non-parties and witnesses especially where the government does not have the materials in some possession. He stated however that he had not considered these at great length.

Judge Hoffman commented that the Department of Justice was invited in on this rule and there was a sharp conflict about this, as everyone on the Committee would remember. The Committee decided it was best to put in a protective situation about revealing who the witnesses were. He expressed the opinion that the Committee could go over it again and would probably not come up with anything different. He felt there are certain cases where it wouldn't make any difference if you revealed the witnesses but in others it would.

Judge Maris stated that he was one of the people who wrote to Mr. Finley in a somewhat deprecatory manner -- with respect to Section 3.04 -- because it seemed to him it is ambiguous. He felt Section 3.04 of the proposed bill was not adding anything that wasn't already taken care of by what the Court had already done.

Mr. Finley stated he recognized the validity of this and that if the provision stays in the bill there would be some attempt to make it more specific in terms of what consideration does it take into fact but without promulgating the rule itself, still leaving the rule up to the Court.

Judge Maris stated that if that were done it would serve a useful purpose. He still felt that it may not be the appropriate thing to do but it would be understandable why it had been done.

Dean Barrett stated that it seemed to him if the Court wanted the Committee to know something he did not feel there would be reticence on the part of the Court to communicate it, and that it would not need Congress to go back and suggest to the Committee.

Mr. Finley stated this provision was not a response of something to them from the Court -- it was initiated by the Subcommittee.

Mr. Ball stated that he was one of those who was for wide open discovery but he still felt the Committee had given thorough consideration to the rule and also that the Committee was in a better position to work this out than Congress.

Mr. Finley stated the other consideration which he mentioned is really on the basis of merits whether this should or should not be in the bill and that is whether it is a tactically desirable adjunct of the statute on the standpoint of getting the entire commissioner bill passed by the Congress and he asked for comments on this.

Judge Maris expressed the opinion that inasmuch as the Court has now for the first time adopted Rule 16, giving discovery, that he felt this was the basis for something that could be taken hold of.

Mr. Finley stated it might be tactically advantageous for them to introduce the bill in its present form and then have a number of people testify that this is not necessary in light of new Rule 16. Thereby spreading on the record the fact that the scope of the preliminary hearing has not been narrowed without some mindfulness of this other problem and the tactical matter might help out some. He asked if Senator Tydings did something along this line whether it would embarrass the Advisory Committee.

Professor Wright stated that he felt this was purely a procedural point -- it is not even like the broad question of policy regarding the discovery but that he hoped Congress would not, unless it has lost all confidence in the Advisory Committee and the Supreme Court, intrude in this area.

Mr. Finley stated that he differed with Professor Wright insofar as his statement that this is a matter of procedure and not vitally a matter of policy so far as discovery is concerned. It seemed to him the need for prompt judicial determinations of the problem for a prompt determination of one's peers, if not by judicial officer, of probable cause is a matter of law immediately after arrest especially considering that the arrest may have been made without a warrant. This is very much a fundamental policy. He felt the present rules have not done a very satisfactory job in solving this problem and the new rules don't seem to make any changes. He stated it may be that the Advisory Committee is contemplating further rules that do make some sense out of this theory and if that is so that subsequent rules repeal any inconsistent prior legislation and this may be the answer to the problem.

Mr. Figinski then addressed the Committee stating that he wanted to talk about a problem which several judges had written to Senator Tydings about, as follows:

Outside of the District of Columbia when insanity defense is raised at trial and the person is found not guilty he walks free from the courtroom, regardless of whether that mental condition which causes him to be relieved of criminal responsibility persists or not and the Senator is very interested in trying to find some solution to the problem. I think that at the outset we would need a verdict of not guilty by reason of insanity at the very least and then some type of triggering device whether for commitment of examination purposes or for a hearing to determine whether or not the person is dangerous to himself and others and then commitment or set time until he regains his sanity, so to speak. The problem at least requires change in statute relating the types of verdicts that can be handed down in federal criminal courts, probably to require additional treatment facilities and at least a procedure for habeas corpus provisions once a person is under treatment. The districts in this area use St. Elizabeth's for pretrial commitments; perhaps the districts in this area could continue to use St. Elizabeth's for post-trial commitments. We have facilities in Springfield, Mo., where people could be held and perhaps state institutions could be used to some extent. The problem of what to do with a person is very acute even if you decide you want to handle it. I don't think it is a problem we can close our eyes to and we would like to introduce legislation in this area. We are trying to get the views of people who know the most about criminal law to help us draft a solution to this

problem. We get the feeling that there are a number of people today in federal institutions who are there primarily because they can't be tried, for if they were tried and found "not guilty" they would walk out free -- creating a problem both to themselves and society. Having this violence, so to speak, hang over a person while he is in pretrial commitment is vital, it certainly doesn't seem to be a desirable way to handle the thing. We are trying to get advice to achieve a solution to the problem.

Judge Zirpoli stated that there are no provisions in the present magistrates act for section 4244, that is as it is right now, and this will apply in the minor offense cases - perhaps 50 percent of the criminal cases.

Mr. Figinski said this had been called to their attention and they hoped to amend the bill for this purpose.

Further discussion continued and Mr. Finley and Mr. Figinski departed at 12:50 p.m.

The Committee gave full consideration to the matters presented by Messrs. Finley and Figinski and the Committee decided that the Chairman should write a letter to Senator Tydings stating the appearance of Mr. Finley and Mr. Figinski was appreciated and that the Committee will continue to study the matter and propose such amendments as may be necessary. Also, that in light of this, the Advisory Committee felt that Section 3.04 of the proposed bill is unnecessary.

Dean Barrett stated that the next matter for consideration was whether the Committee felt it should, within the immediate future, propose rules changes for circulation dealing with the matters considered thus far at the meeting. He felt there were two problems: (1) what happens at the moment the defendant first appears before the commissioner in terms of some kind of probable cause determination, and (2) what should be done about preliminary hearings -- whether there should be time limits, etc., and more generally whether the Committee should try to build into the rules a series of time limitations designed to encourage the general expediting of the process, more frequent grand juries for processing cases to alternate disposition.

Discussion was confined to the first part of Dean Barrett's proposal as to probable cause.

Mr. Ball moved that the Committee establish the requirement of probable cause upon filing of the complaint and this could be done by affidavit in accordance with the Giordenello standard. The Reporter stated this would probably have to be done in Rules 3

and 5. Discussion was then held as to the amount of work this would add to the United States Attorneys' offices. It was felt this would be requiring the attorney to do this in a large number of cases where probable cause may never arise as an issue and may add a trap to the proceedings that will have little or no value.

Mr. Braun said he would like to check to see if this would be a problem for the attorneys' offices.

Judge Walsh inquired whether Mr. Ball would amend his motion to be subject to a check being made to see what burden this would create. Mr. Ball was agreeable.

Mr. Sears also thought there was an added matter in the problem of arrest without warrant as in the arrest without warrant there is also involved the question of validity of arrest.

The Committee further discussed the matter and Dean Barrett thought the Committee should determine to what extent the magistrate should, at this stage of the proceeding, pursue this issue and if so in what form he should pursue it. Dean Barrett stated the issue is whether the officer should be sued for damages having made an illegal arrest and since there is no assurance for criminal charge should the magistrate be pushed into looking at the issue of probable cause to hold the man for further proceedings determined on the basis of what was known when he came before the magistrate and not what the officer knew at the point in which he made the arrest.

Judge Pickett stated the Committee understood the motion to mean that the Reporter be asked to study the matter and prepare draft amendments for the Committee to consider. The motion was duly acted upon and unanimously carried.

The Committee then considered the second portion of the problem related by Dean Barrett as to whether it should make any changes in the rules governing the question as to what should be done at the present time regarding preliminary hearings. The present rule merely says there shall be a preliminary hearing within reasonable time and no rules [other than the very general reading of the time rule (Rule 48)] with reference to the timing after the first point in which he is brought without unreasonable delay before the commissioner. He stated this is included in all the drafts, including the Tydings' proposal. He thought it might be wise to work toward a rule, without regard to what Congress does, that would permit a man unless indicted within some period (presumably longer period not in custody and shorter period if in custody) to have a preliminary hearing.

There was also discussion as to the matter of preliminary examination. Dean Barrett stated it is generally agreed that at

the level of the warrant and first appearance before the commissioner affidavits and hearsay are permitted to determine issue of probable cause. But as to preliminary examinations, when you determine probable cause, whether the man should be held for the other determination of probable cause by a grand jury and what kind of evidence shall be required.

During the discussion a suggestion was made to rewrite the rule to permit cross-examination of those who actually appear as witnesses as you can't cover affidavits, and another suggestion was made to leave the rule as written and add Judge Zirpoli's suggestion on time limitations.

Judge Hoffman moved that after the sentence where the defendant may cross-examine the witness who may introduce evidence in his behalf to add the phrase "affidavits submitted by the prosecution to establish probable cause may be considered and if controverted the hearing may be continued to require the presence of witnesses." He did not restrict his motion to any definite terminology but was agreeable to any language to be worked out by the Reporter.

The Committee discussed the word "controverted" and whether it applies in offering proof. A suggestion was made that the word "disputed" be used instead of the word "controverted." Judge Hoffman was agreeable.

Mr. Blue differed with Judge Hoffman because he was afraid this would open a door to the introduction of affidavits at a commissioner hearing where the rule does not now state they are admissible.

Judge Pickett stated he understood the motion to mean that the Reporter should make a study and submit this type of amendment to the rule and then the Committee will consider whether it should be adopted. Dean Barrett stated he did not like this type of motion asking the Reporter to make a study. He thought the Committee should offer concrete direction.

Mr. Blue offered a substitute motion to leave the rule as adopted.

Judge Hoffman stated that in order to get the motion on the floor he would withdraw his previous motion and move that the rule be left as it is.

The motion was duly acted upon and lost by a vote of 5 against the motion to 4 in favor of it.

Judge Hoffman then restated his motion that the Reporter give consideration to the rule with the insertion of the phrase "affidavits submitted by the prosecution to establish probable cause

may be considered and if disputed the hearing may be continued to require the presence of witnesses."

The motion was duly acted upon and carried unanimously.

Dean Barrett, for point of clarification, stated the consensus, as he understood it, to mean that he was to draft an appropriate rule which would take care of specific time limits for a man in custody, the preliminary examination shall be held within 7 or 10 days (or whatever number of days is decided upon) unless he has been indicted, subject to good cause shown the judge may extend, and he inquired how long the Committee wanted to state before requiring the indictment?

After discussion, Dean Barrett stated he understood the consensus to be 10 days for the man in custody, reasonable time for the man not in custody, an extension for good cause by the commissioner.

It was pointed out that this should be incorporated in Rule 5(d).

The next matter for discussion was that of an alternative model for federal procedure to the present one which would be a model with another set of problems and would say as soon as the man has had his first appearance before the commissioner he is to be transported to the seat of the court and handle everything from there on. This matter was discussed and it was pointed out that this would solve some of the logistic problems, but on the other hand create other problems in taking the man several hundred miles away from his home.

Judge Hoffman moved that 10 days be allowed for the party in custody and reasonable time for one not in custody. The motion was duly acted upon and unanimously carried.

The matter of extensions of time being decided by a commissioner was also considered. Judge Zirpoli stated this is already done in habeas corpus cases and he did not feel the defendant would be satisfied if the commissioner granted extension of probable cause without going before the district judge.

Mr. Ball moved that the Committee adopt Judge Zirpoli's position that the time be extended at request of the defendant or request of prosecution for good cause shown. The motion was duly acted upon and unanimously approved.

The matter of whether rules should put some time limits between holding to answer indictment was considered. The matter was discussed in relationship with the districts having only two grand jury sessions a year to those districts having grand juries subject to call.

Judge Hoffman moved for a 60-day provision with the idea that the man must be released at the end of that time unless a reasonable time in advance of the 60 days (10 or 15) the United States attorney show cause why the defendant shouldn't be released, or why his case cannot be presented to the grand jury within the 60-day period. If either one of these reasons are shown, the court may extend the time.

The motion was duly acted upon and unanimously carried.

Meeting was adjourned at 5:00 p.m., and reconvened at 9:00 a.m., May 24, 1966.

The Reporter suggested that the next major problem to be considered was that of pretrial disposition of trial issues, particularly the products of search and confession. He stated the two main problems were (1) problem of pretrial disposition of issues which are evidentiary issues -- issues as to which there would be at the trial motion to exclude or suppress, and (2) the problem of having pretrial examination by the judge into issues of illegal police behaviour which do not result in evidence that might be excluded. Discussion was held on the drafts of Rules 16.1 and 41.1 in the May 18, 1966 memorandum by the Reporter, to provide for pretrial hearings on the admissibility of the product of searches and of statements or confessions by the defendant.

Dean Barrett stated he put one item in Rule 16.1 which he felt there was no authority for but he wanted to call it to the attention of the proper committee and thought it may come under the jurisdiction of the Committee on Administration of the Criminal Law. He stated the point is picked up in the New York procedure and is drafted as subdivision (b) of his draft on page 26 of his memorandum. It is a simple provision that if a man makes a pretrial motion and loses that he can raise the issue on appeal by simply pleading guilty and appealing for his conviction on a plea of guilty.

Judge Clayton suggested that this rule be adopted if a provision were made paralleling this by a proper statute enacted to give the government the right to appeal in advance of the trial on merits.

Discussion continued and Judge Hoffman moved that the Committee abandon any further consideration of the Reporter's draft of Rules 16.1 and 41.1, contained on pages 26-28 of the memorandum. The motion was duly acted upon and lost by a vote of 5 against the motion to 3 in favor of it.

Dean Barrett stated he thought there were some separable issues which should be considered for guidance in future drafting. One being whether the Committee wanted to cover notice procedure

in Rule 16.1 to require disclosure of evidence derived from the search of the person or someone other than the defendant. Another being confessions and whether this should include confession to anything or confession made to agent of the government.

Consideration was given to these matters and Judge Hoffman thought this should have further consideration on it at least of the drafting as to the proper terminology. He questioned whether the Department of Justice would have time to consider implications that would come up from use of present language requiring the government to come up within 7 days of arraignment and plea and the use of the words "statement or confessions." He thought it might be an impossible task unless limited to confession taken by agent of the government such as FBI, Secret Service, etc. Judge Zirpoli thought there was some danger in the use of the word "statement." Mr. Braun suggested that in Rule 16.1 with respect to statements to say any statement or confession made by a defendant to an agent of the government or government official or agent. Dean Barrett felt this would narrow it but did not see how it would help on the side problem. He further stated he felt the consensus of the Committee was that it had not decided whether Rule 16.1 proceedings are wanted, but if so, the confession issue should be limited to an agent or officer of the government and the time provision should be redrafted to permit the judge to set a later time.

Judge Zirpoli suggested that a determination be made as to the experience under Rule 17 for pretrial and based upon that experience then determine whether the other factors should be written in.

Dean Barrett stated that in addition to the other matters discussed on Rule 16.1, Mr. Imlay had suggested to write it on the search issue to include wiretap motions where the motion is to exclude the product of the wiretap. Another matter is whether the second sentence of the rule is too broad or how much of a burden it puts on the government when you enrichen it by saying that they have to give notice that they are going to introduce certain evidence derived from the search; that they have to give a notice of time, place, circumstances and list of participants in or witness to the search.

Mr. Koffsky stated that the Department is troubled by a number of things. One is the assumption that all their assistants are experienced to recognize statements or confessions and will know what to put down in time, place, circumstances of the search. He would, however, like to get their advice on how much of a burden it would be for the Department, and whether the Department is against it. He further stated he would be prepared, if the Committee so desired, on the next draft to circulate it to the United States attorneys and to the various divisions of the Department of Justice because of the antitrust and tax problems.

Consideration was given to doing this on a search issue and whether the Committee wants the pretrial government issue.

Judge Hoffman moved that the Reporter be requested to rework proposed Rules 16.1 and 41.1 and that the Department of Justice be asked to circulate the redrafts in order to obtain views of the prosecuting branch of the government and that the matter be presented to a subsequent meeting of the Committee.

The motion was seconded and passed by majority vote. Dean Barrett stated the consensus of the Committee to be that there were a few problems but he would bring them back in alternate form.

RULE 11

The Reporter presented a draft of Rule 11 in his memorandum, dated May 2, 1966, page 5. The problem concerning this rule is how to take care of what happens in the guilty plea so that you can get a full resolution of the issues of fact then, so as to avoid having to deal with them again on Section 2255 or to have a record to deal with them so as not to have to rely on memory some years later. One suggestion made was to require the judge to make a record determination of the representation issue in the theory that this might help later on. If the appellant court, getting the 2255, were to get a record to show that counsel was appointed some days in advance as opposed to counsel appointed 10 or 20 minutes before the plea of guilty, it might make the posture of the latter collateral attack easier.

Judge Clayton thought the record already shows this, but Judge Pickett stated this may be true in assignment of counsel but post-conviction cases create problems and it seems that if there was a record of what transpired at the time of his plea, hearings could be eliminated and it may eliminate the requirement for district judges holding a hearing in connection with allegations in a motion which are without substance. Judge Zirpoli said his court covers this by a check list both at the time of plea and at the time of judgment.

Mr. Sears called to the attention of the Reporter that the words "and the consequences of the plea" had been left out after the word "charge" in line 5. Dean Barrett stated it was inadvertent.

Judge Hoffman further stated that he did not feel Rule 11, as revised by the Committee to go into effect July 1, is going to be aided by this suggested language, as every district judge knows that you have to give an adequate opportunity to confer with counsel and knows that if he has some illiterate person who

does not know his rights that a lawyer must be appointed. He thought one constructive thing might be to permeate into the state system, to put out a suggestion form for use by district judges in accepting pleas of guilty and nolo contendere. The suggestion was made that there should be some committee of the Judicial Conference which this would appropriately come under. Judge Chilson suggested that a study be made of the proportion of Section 2255s that arise in each area, picking out areas where the practice is different and see if it makes much difference as to what kind of record is kept. He thought the proportion of inmates in state and federal institutions, who come before the court are probably in the same proportion. He felt that it wouldn't make any difference what kind of record was kept, that if the inmates want to petition, they usually find a reason for doing it. Judge Pickett thought there would be a good many cases you could eliminate or be able to sustain a denial of hearing without going to extremes to get around it.

The Chairman stated that from the conversation he understood the consensus to be that something in this field may be accomplished. Dean Barrett stated that he thought there is enough experimenting going on in the various districts, that the development is rapid enough, and that the Committee should watch it. He felt it impossible to cover all details in the rule and if appropriate it could be placed on the next agenda. He also felt there may be a Judicial Conference committee that would be paying concrete attention to passing on information to judges. Judge Murrah's sentencing institutes were mentioned. Judge Walsh stated that from the discussion he had reconsidered his views on this and it now seemed to him that there is a basis for study. He stated that at present there is a formality -- the period of plea and sentence is an important ritual and one worth the study of the Reporter to come up with one which is dignified from the point of view of the court to the greatest extent consistent with the overall dignity of the proceedings to avoid these post-conviction attacks. He did not think the federal courts, as a whole, are served by a different system of questionnaires, and consistency in the federal courts might be a good and dignified thing. He moved that the Reporter study this and perhaps a system of precise statements and questions could be worked out. The Committee and the rule could be a definition of what due process is in this area and get around it if there is a formula and it is carried out. Discussion continued and Professor Glueck inquired whether the words "intelligently and" are necessary if the word "understandably" is used in the 7th line of the draft. Dean Barrett stated this was lifted from the language of the Supreme Court and stated one of the problems here is historical. Judge Hoffman thought it was the Committee's duty to comply with the language suggested but the difficulty in putting the phrase "intelligently and understandably waived his right to counsel" in the rule is that if the prisoners have access to this, and regardless of how thorough the judge's inquiry may be into whether the prisoner intelligently understood his rights, he has a right to file his claim to Section 2255 saying that he had not understood his rights and the judge

could not turn him down on a hearing regardless of what was done on the preliminary hearing. Judge Pickett, however, did not agree because he thought the record would show the type of man the prisoner was and that this should be recognized as frivolous. Discussion was completed and Judge Walsh restated his motion that this matter is worthy of the Reporter's time for a study to be made to determine whether a solution to the problem could be accomplished. The motion was duly acted upon and unanimously carried.

Judge Clayton expressed the opinion that he did not think there should be any further extension or enlargement of the rule but liked the suggestion for a handbook or check list to be uniformly applied as much as possible.

RULE 15

Dean Barrett explained the problems concerning this rule as to what the rule intends -- whether when deposition is taken at the instance of the defendant the trial judge should have discretion to provide for the payment of expenses of the indigent defendant as well as his lawyer (it now provides for the lawyer to attend the deposition). He discussed the case in which the Administrative Office had asked for a ruling from the Comptroller General as to whether the Administrative Office or the Department of Justice should pay the expenses of the defendant and his lawyer. Judge Maris inquired whether the Committee thought this was procedural or was a matter for Congress. After further consideration Dean Barrett suggested the matter be tabled to see if the Administrative Office and the Justice Department could talk it over and then have it on the agenda so that the next time rules are circulated the Committee may at least want to deal with making it clear that the presence of the defendant as well as his attorney is taken care of.

The motion was seconded and unanimously carried.

The Reporter called attention to the letter from Judge Will of Chicago on the matter of requiring a commissioner on issuance of search warrant not only to look into the issue of probable cause but also to explore the issue of whether the information which established the grounds of probable cause is secured unlawfully. The Reporter thought it better to let this issue come up at a later time rather than to try to force the commissioner into this. However, Mr. Sears thought this should be given thorough consideration. Dean Barrett called attention to the fact that this was only on a search warrant and not arrest.

Judge Hoffman moved that the matter be carried over to another meeting. The Committee so agreed.

RULE 53

The Reporter stated that with regard to the regulation of conduct in the courtroom the rule is fairly narrow whereas the Judicial Conference had taken action which is broader and directs judgment more restrictively than the rule does. The Judicial Conference issued a memorandum to the judges, dated April 1, 1965, and Dean Barrett stated the rule is not consistent with what the Conference had told the judges to do.

The Committee did not feel this difference created a problem and after discussion of the matter it was decided to discontinue any further study of this as no amendment seemed necessary.

The Chairman announced that Dean Barrett would resign from the Committee before the end of the summer. He further expressed the gratitude of himself and the members of the Committee for the monumental work which had been performed by Dean Barrett over the years. The Chairman also stated that consideration had not been given to a successor to Dean Barrett but that the incoming Reporter, when appointed, would be fully informed of all action taken by the Committee at this meeting.

Judge Walsh inquired whether there had been items returned by the standing Committee for further consideration of the Advisory Committee and whether these should be again placed on the agenda. Professor Wright stated the standing Committee had voted on Rule 15, Depositions at the Instance of the Government, and Rule 12.1, Notice of Insanity, that the Advisory Committee be asked to reconsider the matters as the standing Committee would not approve the rules as drafted. He further stated that in the matter of alternate jurors, the standing Committee took concrete action directing that a study be made covering the ground of both civil and criminal.

The Committee did not set a date for the next meeting, but stated it would be called after the materials are distributed and ready for consideration.

There being no further business, the meeting was adjourned at 1:10 p.m.