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MINUTES OF THE OCTOBER 1960 MEETING OF THE
ADVISORY COMMITTEE ON CRIMINAL RULES

The first meeting of the Advisory Committee on Criminal Rules convened in the Supreme Court Building on October 14, 1960 at 9:30 a. m. The following members, constituting the full membership of the Committee, were present:

John C. Pickett, Chairman
Joseph A. Ball
George R. Blue
Abe Fortas
Sheldon Glueck
Walter E. Hoffman
Thomas D. McBride
Maynard Pirsig
Frank J. Remington
William F. Smith
Lawrence E. Walsh

Edward L. Barrett, Jr., Reporter

The Chief Justice was present during a part of the meeting. Others attending were Senior United States Circuit Judge Albert B. Maris, Chairman of the standing Committee on Rules of Practice and Procedure; Professor James William Moore, a member of the standing Committee; Warren Olney III, Director of the Administrative Office of the United States Courts; and Aubrey Gasque, Assistant Director of the Administrative Office, who serves as Secretary of the standing Committee on Rules of Practice and Procedure and the Advisory Committees.

The Chairman, upon calling the meeting to order, expressed the genuine pleasure of the Committee in having present the Chief Justice of the United States, and he invited him to speak to those present. The Chief Justice said:

"Thank you very much. Gentlemen, I do have a few words that I would like to say to you. The first thing is that I would like to be with you throughout your meeting, but it's impossible for me to do that because this is our week of arguments and our all-day Conference begins at 10:00 o'clock. So, I'll be rather busy throughout the day. If the meeting lasts until after 4:30, I think perhaps I can get in to visit with you again. But I do want to welcome you to this work that you are undertaking, and to tell you what a comfort it is to me and to the other members of the Court to know that there is a group that is working as hard as you folks are and, of course, I include all the other Committees, in order to keep us abreast of the times, and in order to enable us on the Court to fulfill our statutory responsibilities.

"As you know, for many years we have had the responsibility of preparing rules -- in admiralty, in bankruptcy and civil procedure, criminal procedure and in appellate procedure, and we haven't had

a single employee in our organization to assist us in that kind of work, and, frankly, we don't want to because we don't want to build a bureaucracy in the Court. Our Court is a small institution and its major purpose in our system is to decide cases; and the Justices don't want an administrative body in our Court that is going to take our time. And then, in addition to that, if we did have such an organization, it is my considered opinion that it could not solve our problems because we are far removed from the daily practice and the details in all these fields. We don't work with the Rules daily, as you folks do.

"So, it occurred to me that the best way to do this work, that the most democratic way to do it, and the way that would have the broadest base for writing rules, would be to put all the spade work in the hands of the Judicial Conference. The Conference agreed to that, the Court agreed to it, and the Congress agreed to it, and now we're engaged in trying to work out our problems. I want to say, too, that the suggestion for these Committees does not represent in the slightest degree any dissatisfaction with the rules as they exist today. I think our rules have worked very well. But we do have the feeling that we don't know whether we're up to

date or not, whether we're current with conditions as they face the profession. And I'm sure that through these Committees we can get the sentiment of the bar, and of the bench, and of the scholars of our country; and the Supreme Court can at all times adopt rules and be satisfied that they are in accordance with the needs of the times. And so I would say to you that, in order to justify your existence in this important work, it is not necessary for you to come in with a lot of changes, because if you find the rules are satisfactory, it would suit us, I think as well as anything you could do. But we don't know ourselves whether you would be able to find that result or not, and so we leave this work to you, knowing that it will be done well, and knowing that whatever you do will have a broad base on which to rest the result of your work. While you won't see many of the Justices as you go along in your work, I want to assure you that they do have a real interest in it and that they know what is going on. As for myself, I not only have an interest in it, but to the extent that I can be helpful to you in any way, I want to do it.

"When I'm not on the bench and when I'm not in Conference, John, I'm at your service at any time. My main purpose in coming

here this morning was to welcome you and to thank you for what you're undertaking and to express my belief that it's going to contribute very greatly in the long run to the administration of justice."

The Chief Justice, in asking to be excused, remarked that although he would be happy to assist in the overall program, "Judge Maris and his splendid Committee would be able to answer any questions," and he praised the very great service rendered by Judge Maris both to the rules work and, for many years, to the Judicial Conference.

Judge Pickett expressed appreciation for the appearance of the Chief Justice, and stated that he was in agreement with him that the Criminal Rules have functioned quite well. At this point, the Chief Justice retired from the room.

The Chairman referred the Committee members to the material prepared by Professor Barrett, the Reporter for the Committee, and commented that the reason attention was being drawn to the provisions of Rule 5, as interpreted in the decisions of the Supreme Court in the McNabb-Mallory cases, was the activity in the Congress for legislation to clarify or to overcome the effect of those decisions. Judge Pickett stated that, on behalf of the Advisory Committee, he had requested Senator O'Mahoney, Chairman

of the Subcommittee on Improvements in the Federal Criminal Code, and Senator Eastland, Chairman of the full Judiciary Committee, to delay action on the various legislative proposals until the Advisory Committee had a chance to study them. This was agreed to, with the understanding that the Advisory Committee on Criminal Rules begin its study and complete its work on this particular Rule as expeditiously as possible.

Judge Maris, in citing the wisdom of this action, emphasized the importance of keeping the rule-making procedure within the judiciary.

Professor Barrett called the attention of the members to a collection of state statutes designed to cope with the problem. He referred to his memorandum of September 24th in which he pointed out that the law as it stands offers more protection to a man who confesses to a crime than to a man arrested who makes no statement. Professor Barrett outlined three problems which, while closely interrelated, are not the same. The first is the administrative problem: what are the appropriate procedures for handling persons who have been arrested. The second is the extent to which police should be authorized to make investigations after an arrest is made and before the person is brought before a commissioner. Included here are such questions as what kind of investigation should be made and whether in-custody interrogation should be permitted. Finally, there is the problem of determining when confessions should be usable at the trial of the defendant.

Mr. Fortas suggested that the Mallory decision had been of greatest impact in the District of Columbia and that consideration might be given to

the desirability of separate rules, a rule applicable to the District of Columbia, and another rule applicable to the balance of the Federal jurisdiction.

Professor Barrett agreed that the District has special problems but suggested that the Committee should pursue the general problem at this time and come back to the ^{Special District problems} ~~questioned rules~~ at a later date. He pointed out that the possibility of a separate rule had been discussed at the meeting of the standing Committee in August, and Judge Prettyman was strongly opposed.

Judge Smith quoted from the Supreme Court decision in the Mallory case and queried whether by the rule-making power, standards of conduct may be set down under which police investigations may be conducted. He described as a twilight zone the time when, as in the Mallory case, three people were brought into police headquarters with no basis for a charge, and after interrogation they fixed responsibility on only one. The police claim that they will be thwarted in this type of investigation if they are not permitted to interrogate.

Professor Barrett stated, for the benefit of those who were not aware of it, that he had argued the Mallory case for the Government.

Judge Walsh questioned whether it was the function of the Committee to advise the Supreme Court on a basic Constitutional problem, in the absence of an inquiry from the Supreme Court to the Committee.

Judge Smith responded that following the Mallory decision a bill was introduced by Senators Ervin and Byrd, joined by Senators McClellan and Johnston, which provides that notwithstanding the provisions of Rule 5, a voluntary confession of the accused shall be admissible against him in any criminal proceeding or prosecution in the courts of the United States or the District of Columbia. Judge Smith suggested that the Mallory case did not turn on the question of whether or not the confession was voluntary or involuntary, but proceeded on the theory that the police officers having violated Rule 5 -- irrespective of whether the confession is concluded to be voluntary or involuntary -- had thereby violated the man's procedural rights. He felt that, in view of the pending legislation, the Committee could not evade its responsibility to consider the problem.

Mr. Gasque commented that passage of the legislation was not at all probable and suggested that the Committee, as a matter of policy, should consider the wisdom and value of each rule and remain oblivious to what Congress may be doing.

Judge Pickett stated that he felt the Committee did not have any option but to consider the problem and make recommendations.

Judge Walsh again questioned whether the Supreme Court needed advice from the Committee on a decision so recently announced, and wondered whether it was desirable for the Committee to, in a sense, review Supreme Court opinions -- their impact -- and then advise the Supreme Court.

Professor Barrett emphasized that the Committee did not propose to overturn the McNabb-Mallory decision rule in its basic significance, but that the problem as to what the rule ought to be seems to be ^{fairly} ~~probably~~ within the functions of the Committee. He stated that his conception of the function of the Committee was that it should look at the underlying procedure prescribed by Rule 5, and not deal with the McNabb-Mallory rule in the terms the Court has put it -- that is, that confessions obtained during periods of delay will be excluded.

Judge Maris pointed out that when the Court is construing a rule on Constitutional grounds, it may not have time, or even consider it appropriate, to consider all the ramifications of the administration of the rule; and that is the function of this Committee -- to study the rules and their operation in the light of the interpretation which the Supreme Court gives them, and to say whether there is some modification that ought to be made in order to make

them workable and to cover areas that had not been covered in the decisions.

Judge Smith agreed with Judge Maris and stated that his Committee on Administration of the Criminal Law, after considering the Mallory decision, came to the conclusion that the rule itself should not be disturbed; but his Committee wondered whether it should be supplemented by a provision consistent with the Mallory decision to cover a situation where there is no basis for complaint and an investigation is undertaken.

Mr. Gasque felt that the committees should proceed over the long haul and not be too responsive to incidents, whether those incidents be Supreme Court decisions or legislation in Congress. He said he felt the role of the Committee should be to look at all the rules and not become an activating or operating committee which responded to current controversies and debate.

Judge Maris, not entirely agreeing, expressed the view that we do not operate in a vacuum and that we cannot ignore areas in the rules which present current problems.

Judge Walsh, Mr. Fortas and Judge Pickett exchanged views and it was agreed that the problem has given no serious trouble outside of the District of Columbia. However, Mr. Fortas expressed the opinion that

Rule 5 was a fundamental problem in the administration of the criminal law and should, in any event, be considered.

During a short recess at 11:00 o'clock, Mr. Olney brought in and introduced to the Committee Mr. Charles Murray, who has been appointed as Director of the Legal Aid Agency for the District of Columbia. Mr. Murray was appointed in accordance with the provisions of a recently enacted statute which establishes a legal aid agency in the District of Columbia.

Upon resumption of the meeting, Professor Barrett suggested that the discussion of Rule 5 give way temporarily to a more general discussion as to the manner in which the Committee wished to proceed with the over-all study of the rules. He indicated that the main areas, aside from the Rule 5 problem would be discovery, bail, and the counsel problem. The other main problem foreseen by Professor Barrett is the area that ought to be covered in the rules that has not been covered.

Professor Pirsig felt that it was the responsibility of the Committee to look at every rule and, if work proceeded along that line, Rule 5 would be reached quite early without appearing to pick it out as something the Committee is concerned about.

Judge Maris agreed, and pointed out that the Rules Committees were constituted as part of a permanent program for a continuing study of the rules. He informed the Committee that it was proposed to broadcast to the bench and bar of the country the fact that the rules organization is functioning, and bespeak and solicit the cooperation and suggestions from everyone concerned throughout the country. Suggestions and problems received have been and will be channeled to the appropriate committee and, in accordance with the procedure worked out at the August meeting of the standing Committee, the Reporter would, after thorough study and consultation, draft a proposal to be presented to the country through the standing Committee as a proposal that had been prepared by the Advisory Committee for the consideration of the standing Committee, and the bench and bar generally. He reported that proposals for amending the rules were now being sent out pertaining to Bankruptcy and, in the appellate field, to the Rule for the review of Tax Court decisions. The circulation of drafts at this stage would be before any consideration of the proposal by the standing Committee or the Judicial Conference. As comments and suggestions are received, they would be referred back to the Advisory Committee for consideration. Ultimately, the Advisory Committee would have a proposal on which it was prepared to stand. This would be submitted to the standing Committee for

its consideration and recommendation to the Judicial Conference, assuming that the Judicial Conference adopted what two other committees had approved, and the proposal would then go to the Supreme Court.

Professor Moore outlined the procedure followed by the Civil Rules Committee in 1942 and 1955. That committee submitted a complete draft of all the amendments that the committee proposed. However, he was of the opinion that this Committee, because of the Congressional situation, should make a thorough exploration of Rule 5 and the problems related thereto, and send it out to the bench and bar for their reaction. He felt that the Committee should proceed immediately to get out rather extended proposals or discussion of the problem in order that Senator Eastland and others of the Congress might have the assurance that the Committee is proceeding with all due speed with the problem.

Judge Maris thought that it would be enough for the Chairman, Judge Pickett, to inform Senator Eastland that the Committee is considering the problem and that a report may be expected when it concludes its study.

Professor Barrett suggested that in communicating with Congress, it be emphasized that the Committee is studying Rule 5 -- as a rule -- and not reconsidering the Mallory case.

Judge Smith pointed out that there are two areas in which the Congress is beginning to act in the rules field -- Rule 5 and Rule 8 (in the Schaeffer

case). His Committee on Criminal Law has a bill (S. 3914 introduced by Senator Hruska) which is directed to the amendments of Title 18 to ~~practice~~ ^{provide} the right of appeal. Judge Smith suggested that the procedure followed by the Committee should be flexible enough so that when matters arise in Congress, the Committee of the Congress may be informed that the Advisory Rules Committee, or the Criminal Administration Committee, has the bill, is considering it, and request time.

Professor Barrett suggested that Mr. Gasque keep track of legislation introduced and alert Judge Pickett, or the respective chairman of the other Advisory Committees, and advise the Congressional Committee that we are studying the legislation and, in this manner secure the necessary time to make thorough study.

Judge Hoffman did not think that it would be advisable to submit a proposed redraft of Rule 5 until the Committee has given consideration to all of the rules. He suggested that members of the Committee express in writing, either through the Chairman or the Rules Secretariat their views as to Rule 5, which could be correlated by Professor Barrett. Then, perhaps, the Chairman could appoint a subcommittee of three or four members to digest those views and make specific recommendations to the full Committee. He suggested that Mr. Fortas, being mindful of the District of Columbia

situation which is different from the general over-all problem, should be a member of the subcommittee in order that the situation in the District of Columbia might be fully oriented.

Professor Barrett, in line with Judge Maris' comment, suggested that a general letter be addressed to the Chairmen of the Senate and House Judiciary Committees, stating that the Committee is functioning, that a re-examination of all the Federal Rules of Criminal Procedure is proposed, including Rule 5 and Rule 8, and request that any proposals introduced be sent to us.

Mr. Gasque, following this suggestion by Judge Maris and Professor Barrett, stated that the Judiciary Committees are very responsive to the Judicial Conference and he commented that Judge Pickett might write a letter to Senator Eastland and say that the Committee has met; that it has under consideration a thorough study of the Federal Rules of Criminal Procedure; and, that, after a report has been prepared and submitted to the bench and bar, the Judiciary Committee could expect in due course to hear from the Judicial Conference.

Mr. Fortas agreed, but suggested that a communication also be addressed to the Chairman of the House Committee.

Judge Smith agreed because the House has introduced a bill, H. R. 12923, covering Rule 8b, which states that, if during the trial of a criminal

proceeding the basis for the original joinder of a defendant no longer exists, the court, on motion of such defendant, shall order a new trial for that defendant.

After much discussion on the subject of the procedure to be followed in the proposed study of the rules, Judge Smith proposed the following motion:

That the Committee proceed to a study of all the Criminal Rules, but that any tentative or final report on its recommendations be held in abeyance until the entire study has been completed, except where a situation otherwise requires.

Judge Walsh seconded the motion, and it was unanimously adopted by the Committee.

In a further discussion of procedure, it was suggested that Judge Walsh get suggestions and comments from the United States Attorneys and contact the chief investigative agencies of the Government. Professor Barrett also remarked that it would be helpful to have some sort of solicitation for suggestions from district judges. Mr. Ball outlined the procedure followed in the Ninth Circuit for soliciting comment from the bench and bar. Judge McBride said that he thought each member of the Committee ought to be free to contact local and state bar associations in his respective district, to meet with United States Attorneys, state prosecutors and others.

Judge Maris informed the Committee of the plan to announce as widely as possible a general invitation, bearing upon all the rules, to send in suggestions. This will be done by a statement published in all legal journals, State Bar Journals, and so forth, and should go out during the latter part of November.

There was a recess for luncheon at 1:00 and the meeting reconvened at 2:00 p. m.

Judge Pickett summarized the morning discussion as to the method of operation by stating that the Committee had decided to proceed on a rule-by-rule consideration.

A discussion was held as to whether or not, particularly concerning Rule 5, a separate set of rules should be considered for the District of Columbia and another set for the remainder of the Federal jurisdiction. Mr. Fortas expressed concern that the Committee may come out with something less than the best possible set of recommendations as applied to federal jurisdiction generally, simply because of some complication introduced by the peculiar situation in the District of Columbia.

TERMS OF MEMBERS

Judge Maris called the attention of the Committee to the resolution of the Judicial Conference which provides that members shall serve for

either two or four year terms so as to provide overlapping appointments. The resolution provides that there may be one reappointment, but after that an individual's obligation is completed. Judge Maris stated that the Chief Justice did not want to assume the responsibility of determining who would be appointed for two years and who for four years but had suggested that the obvious way to determine this would be by lot. The terms will start on October 1, 1960. The term of the Chairman will be for four years.

Lots were drawn and the following terms were allotted:

Joseph A. Ball	4 years
George R. Blue	2 years
Abe Fortas	2 years
Sheldon Glueck	2 years
Walter E. Hoffman	4 years
Thomas D. McBride	4 years
Maynard Pirsig	2 years
Frank J. Remington	4 years
William F. Smith	4 years
Lawrence E. Walsh	2 years

It was also announced that the term of the Reporter is for a period of four years.

Rule 5 was again discussed and Mr. Fortas referred to the consideration given to the problem by the Judicial Conference of the District of Columbia and, on the question of the definition of "unreasonable delay," it was the sense of the Conference that the main purpose is to make sure that the

apprehended individual is advised of his procedural rights and that he has the opportunity to effectively assert them. He thought that it is probably within the province of the Committee in considering Rule 5 to address itself to various possible ways in which the purpose may be implemented. One proposal made in the discussion in the District was to provide some sort of a sanction with respect to police detention beyond the specified period. Although Mr. Fortas was not sure that this would be a proper function of the Committee he thought it should consider police procedure (a) from the point of view of trying to analyze the objectives of the rule, and (b) from the point of view of saying how these objectives could best be attained.

Judge Smith suggested that after studying the problem in terms of the fifty states, it would be diplomatic and proper to bring them to the attention of the Judicial Conference of the District of Columbia and request their views on whether or not special conditions should be laid down.

There was discussion as to whether or not Rule 5 governs police conduct. As Professor Barrett interprets the Mallory decision, the Court states that Rule 5 prescribes a rule of conduct of the police. Mr. Blue felt that it was not the function of the Committee to regulate the operation of police departments and Professor Glueck also questioned whether it was within the compass of the work of the Committee.

Judge Smith again reiterated the theory that the main problem area is not where a complaint is made -- because that is covered by the rule -- but in the area of police investigation which is not covered by rule.

Professor Remington questioned whether, under the Mallory decision, there is a mandate to the law enforcement officers not to release a person who has been arrested unless he is brought before a commissioner, or does it mean "if" you are going to bring a man before the commissioner you shall do so. Judge Smith agreed that the Court used "funny" language by using the term "book." If a man is booked and no complaint is ever filed he can be released. If he is arrested, then, the rule says he shall be taken before a commissioner. Judge Smith said that the rule requires that a man shall be taken before a commissioner. The rule either means that he must be, or it means that he may or may not be brought before the commissioner at the option of the police. Or, it may mean that there are certain situations in which a person can be released and not in others.

Judge Hoffman discussed the matter of right of representation which begins when a man is detained against his will. He feels that the spirit or purpose of Rule 5 is to enable a man to talk with counsel, and that there should be no restriction beyond that to the right of interrogation on the part of arresting officers once they advise the man that he has a right

to counsel. Mr. Fortas agreed with Judge Hoffman that the right to counsel is something very special in our scheme of values and he feels that the right to counsel attaches at the moment of detention.

Mr. Ball, who stated his sympathies as being pro-Mallory, said he thought there was no trouble with Rule 5 except that it might be strengthened by some additions regarding preliminary warning before questioning.

The problem of interrogation was discussed. Mr. Ball felt that the Committee should attack the problem of Rule 5(a) which describes the procedure an officer shall take when he arrests a man -- that he shall take him without unnecessary delay before a commissioner. If the problem is the vagueness of the language, he suggested that the Committee put their minds to the task of making it less vague.

It was agreed that interrogation was a separate problem. --

Judge Smith pointed out that Rules 4 and 5 have no sanctions written into them. The Supreme Court in Upshaw and Mallory have given a sanction and have said to the police "if you violate this rule, the confession you take under these circumstances will be of no use." The pending legislation has the effect of removing this sanction. Judge Smith wondered whether the Committee should simply ignore the legislation and let the Supreme Court

deal with it in the course of its opinions, or whether the Committee should attempt to create a rule. He thinks that the Committee should not substitute another sanction, but that it might very well add a requirement of what shall be done in what he termed the "twilight zone."

Judge McBride, Judge Smith and Professor Pirsig held a lengthy discussion on probable cause. Professor Pirsig suggested that there is a fundamental question here on which Professor Barrett should brief the Committee -- what is the difference in the existing rule on the Federal level, and if there is a difference, the Committee has a drafting job to define the rights of the defendant in the preliminary hearing.

Professor Barrett requested that the members of the Committee undertake to write individual memoranda on what direction the Committee should take in this area (Rule 5) and he would have the memoranda circulated.

Professor Barrett stated that he proposed, following the meeting, to start a rule-by-rule examination.

Mr. Blue asked if the Committee members had already received a copy of the O'Mahoney Report and that, if not, it be forwarded to them by Mr. Gasque, the author.

A question was asked as to what form of report of this meeting would be sent to the members of the Advisory Committee, whether a verbatim

record or minutes. It was stated that rather full minutes would be prepared, and it was the consensus that those would be very satisfactory.

Mr. Ball suggested that much more could be accomplished if the work of the Committee were broken down and assigned to small subcommittees.

Judge Hoffman referred back to Professor Barrett's request for a memorandum from the members regarding Rule 5, and said that he thought the members of the Committee owed Professor Barrett an obligation to write a brief and give him a consensus of their views on Rule 5 in order that he may crystallize his thinking. Judge Hoffman agreed with Mr. Ball that, ultimately, subcommittees would be the answer to getting something accomplished.

Judge Maris suggested that the most useful program would be for the Reporter to start drafting some very preliminary tentative drafts of proposed changes in the rules -- perhaps three or four alternatives representing various points of view -- that these should be sent out to the Committee members and, then, the problem is pinpointed and the Committee can get down to something specific. He reiterated that the purpose of having a Reporter was to have research and technical work going on, and to have someone to submit a series of consistent drafts.

Judge Pickett summarized the consensus of the Committee as being that the Committees of the Congress should be advised that the Advisory Committee on Criminal Rules has undertaken its work generally; that this should not be done merely by personal contact but by a letter from the Chairman of the Committee; but that it might be supplemented by a personal contact by Mr. Gasque with the Chairman of the Senate Judiciary Committee. Judge Pickett stressed that Mr. Gasque should not leave the impression that the Committee is going to change the rule, and Mr. Gasque agreed that he would state only that it was under discussion and was being considered.

No definite time was set for the next meeting, and Judge Pickett assured the Committee that meetings would be held "as needed."

Judge Smith moved that the Committee adjourn and the motion was carried.

The Meeting adjourned at 5:10 p. m.