1943

The Proposed Federal Rules of Criminal Procedure

James J. Robinson
Indiana University School of Law - Bloomington

Follow this and additional works at: http://www.repository.law.indiana.edu/facpub

Part of the Courts Commons, Criminal Procedure Commons, and the Legislation Commons

Recommended Citation
http://www.repository.law.indiana.edu/facpub/2229

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Repository @ Maurer Law. It has been accepted for inclusion in Articles by Maurer Faculty by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.
The Proposed Federal Rules of Criminal Procedure*

JAMES J. ROBINSON†

TODAY WE ARE LAUNCHING here the preliminary draft of rules of criminal procedure for the courts of the United States. This launching begins for this draft an experience which the Navy would call a "shakedown" cruise, a test cruise to be made under the sharp eyes of an inspection and construction board made up of the judges, lawyers and other interested citizens of the nation. After that ordeal and following any necessary alterations or repairs the criminal rules under orders of the Supreme Court will enter, we trust, upon a long career of distinguished service to the courts and to the people of the United States.

It is fitting that the launching should take place here at the Judicial Conference of the Fourth Circuit. It was here at this Conference on June 3, 1938, that the keel of the vessel was laid by Attorney General Cummings. Here he advanced the proposal that the system of procedural rule-making begun by the Supreme Court, begun in 1789, should now be made complete by giving to the Supreme Court the statutory authority to make rules for procedure prior to and including verdict in federal criminal cases.1 It was this Circuit, moreover, which thereupon proceeded to provide leadership, particularly that of the Senior Circuit Judge, in advancing the proposal toward realization. And it is this Circuit which has provided in its Circuit Justice the commander-in-chief of the enterprise, because it is the Chief Justice of the United States, as you know, who under statutory direction and authority has the principal responsibility in the making and in the administration of all federal rules of court. As a final item of proof of the appropriateness of conducting this launching here in the Fourth Circuit it is to be observed that the only part of the ship which is identified with one of the federal circuits is the compartment known as Rule 37(b)(2). This rule appropriates as the method of printing the record on appeal the plan known as the Fourth Circuit Rule.2 Whether this provision, or any other particular provision or rule of this draft, will survive the "shakedown" cruise is a matter for entry later in the ship's log and has no bearing on the fact that it is here in the Fourth Circuit that we are conducting the launching today.

The provisions of the rules of the Preliminary Draft are to be discussed here later by judges, United States attorneys, practicing lawyers and others attending the Conference. The judges and others who are to speak and lead the discussion on the rules have been provided with mimeographed copies of the notes to the rules which are to be discussed by them. All of you will receive printed copies of the rules accompanied by the notes as soon as the printing can be completed. It seems desirable that I should take this opportunity to place before you facts regarding the draft which are not now available and which may not later be available either in mimeographed or in printed form for your reading and consideration, but which nevertheless are essential as a background for discussion of the individual rules. It is hoped that this introductory discussion will serve also to indicate to each of you personally the essential importance of your participation in the making of the rules and in their revision from time to time as contemplated by the statutes.

I

HISTORY OF THE DRAFT

I shall place before you first the history of the draft and the tentative schedule leading to the proposed effective date of the rules. The plan advanced here five years ago by the

---

*Address before the Judicial Conference of the Fourth Circuit, Asheville, N. C., June 11, 1943.
†Professor of Law and Director of the Institute of Criminal Law Administration, Indiana University; Reporter of the Advisory Committee of the Supreme Court on Federal Rules of Criminal Procedure.

Attorney General immediately attracted the active support of the officers and members of the American Bar Association. In the following month at the annual meeting of the Association at Cleveland, President Vanderbilt in the annual presidential address endorsed the proposal. A short time later President Hogan asked the chairman of the Section of Criminal Law to devote the year's activity of the section as completely as possible to promoting the enactment of the proposed legislation. The House of Delegates at its January, 1939 meeting unanimously endorsed a resolution presented by the Section recommending that Congress enact the proposed statute.

General Cummings was then invited to serve as chairman of the section's Committee on Supreme Court Rules of Criminal Procedure. He declined but, upon request that he suggest a chairman, he suggested Mr. Vanderbilt, who eventually accepted. That Committee was active in the introduction and support of a bill presenting the proposal to the Congress. After a hearing in May, 1939 before a Subcommittee of the Committee on the Judiciary, House of Representatives, with Honorable Zebulon Weaver of North Carolina, the chairman of the Subcommittee, presiding, the bill was amended and recommended to the House of Representatives for enactment. The bill continued to receive the active support of the Bar Association and of Attorneys General Murphy and Jackson, successively, and on June 29, 1940 it was signed by the President.

"This Act represents," said John H. Wigmore at the time of its enactment, "the most notable forward step, for a century past—or more—in the rationalizing of criminal procedure in the United States." A memorial service in honor of Dean Wigmore is being held this afternoon at Northwestern University. I believe that our Conference here at the same time, launching the preliminary draft of the new federal rules, is an equally appropriate manner in which to pay tribute to his memory. As you well know, his services in the improvement of criminal law administration have extended throughout the past half century and have not been excelled either in scope or in importance. We regret deepely the fact that we cannot continue to have his aid and companionship in meeting the standards which he set for the rules. He proposed as the standards for the rules that they would be "progressive yet not too advanced for acceptance, uniform yet based on varied regional experience, systematic yet not academic," and that they would display evidence that they had been drafted and promulgated with "harmony, courage and high wisdom."

The Supreme Court pursuant to the Act of June 29, 1940 undertook the preparation of the rules and by order of February 8, 1941 appointed an Advisory Committee to assist the Court in the undertaking. The Advisory Committee has held five meetings, the first in February, 1941, and the latest in February, 1943. The meetings have been held at the Supreme Court Building except the most recent one, which was held at the United States Court House in New York City. The Committee's Subcommittee on Style has held four meetings. They were held in New York City for a total of eight days in March and May, 1942 and in February, 1943. The extent of the discussion in these Advisory Committee meetings is indicated by the fact that the shorthand reporters' transcripts of the meetings contain approximately five thousand eight hundred pages.

Seven successive drafts have now been prepared by the Advisory Committee and its staff. A new draft has been prepared following each meeting of the Committee, incorporating the action taken by the Committee and including also new material for the consideration of the Committee. Upon completion each new draft has been delivered to each member of the Advisory Committee for his use in preparing for the next meeting of the Committee. The total number of pages of rules and notes in the various drafts is about two thousand.

The Committee has submitted two drafts to the court, the first in May, 1942, and the second in May, 1943. The May, 1942, draft was the fourth tentative draft prepared by the Committee. The May, 1943, draft, which you have before you as the Preliminary Draft of the rules, is the seventh tentative draft which the Committee has prepared.

The May, 1942, draft and the Court's in-

7. Id. 659.
8. 512 U.S. 717 (1941).
structions to the Advisory Committee based on that draft marked a turning point in the policy and plan of the Committee. Up to that time the Committee had considered that the powers given to it by Congress under the Act of June 29, 1940, and its authority under the orders of the Court which had been issued to the Committee, might not justify it in preparing a single, integrated draft, dealing not only with procedure prior to verdict but also with appeals and other subjects. The Committee, therefore, had prepared the May, 1942, draft in separate parts, the principal part relating only to procedure prior to verdict.

Congress, however, on May 9, 1942, enacted, for the third time since the authorization of the Committee, a statute giving additional rule making power to the Court and thereby enlarging the scope of the work in which the Committee is engaged. The Court, likewise, in a memorandum of views of members of the Court based upon the May, 1942, draft, indicated to the Committee that the Committee would have authority to prepare and submit a complete, integrated draft of rules. In view of these actions by Congress and by the Court, a memorandum and brief were sent by the Reporter to the other members of the Advisory Committee proposing that the Committee prepare a draft which would incorporate, in the chronological procedural sequence which had already been agreed upon by the Committee as the sequence for the rules, the entire procedure from arrest to and including appeal. The members of the Committee approved this plan. The considerations involved in this decision will appear more clearly in a brief discussion later of the five statutes by which Congress has authorized the Supreme Court to make rules governing criminal procedure.

The May, 1943, draft, the third draft prepared by the Committee on its enlarged plan, was submitted to the Court on May 3 with the unanimous request of the Committee that the Court authorize publication in order that the Committee might receive the suggestions and criticisms which it is hoped that the Draft will call forth from the bench and bar. Plans are being developed for securing the widest possible discussion of the rules and the greatest possible volume of comments, recommendations and criticisms. Discussion at the annual meeting of the American Bar Association is being planned for August 24th under the joint auspices of the Section of Judicial Administration, the Committee on the Improvement of the Administration of Justice, the Section of Criminal Law, and the National Conference of Judicial Councils.

The Committee has received in the past and is counting on continuing to receive extensive and useful recommendations from the Judicial Conferences. Other valuable sources upon which the Committee relies for recommendations include the special committees appointed by the various federal courts, by the Attorney General, by other officials and departments of the national and state governments, and by state and city bar associations. Serving on these special rules committees are more than 600 judges and lawyers.

A revision of the Preliminary Draft based on the recommendations received from the bench and the bar with respect to the Rules of the Preliminary Draft will be prepared for the consideration of the Advisory Committee at its next meeting, to be held possibly in October. After that meeting the Committee may submit to the Court a proposed final draft. The Court may then give the Committee recommendations for further revision by the Committee and the Court may itself of course make revisions. If the Court should promulgate a draft of rules before the end of this year, the Attorney General could then report it to Congress at the time fixed by the Act of June 29, 1940, namely, the beginning of a regular session. The second regular session of the seventy-eighth Congress will probably begin on January 3, 1944. Con-
gress after giving the rules the same appropriate consideration which it gave to the Civil Rules may consider them as becoming effective, as provided in Rule 55, "on the day which is three months subsequent to the adjournment" of the session; or perhaps a different effective date may be adopted because of the exigencies of the present national emergency or for other reasons.

II

STATUTORY AND OTHER AUTHORIZATION

I wish now to place before you the authorization of the draft, and specifically the authorization for particular rules and subdivisions of the draft.

The authorization under which the Advisory Committee has prepared the Draft has been derived from four acts of Congress, from three orders of the Court and from the Court's memorandum based on the May, 1942 draft.

Rules 3 to 29 of the draft, dealing with procedure to and including verdict, have been prepared under authority principally of the Act of June 29, 1940 and of the Court's order of February 3, 1941 based on that Act, providing for the making of rules governing proceedings in the district courts prior to and including verdict.

Rules 30 and 31 dealing with judgment, and Rules 35, 36 and 37 dealing with appeals by defendants and by the government have been prepared under authority of the Act of November 17, 1941 in which the Court authorized and directed the Advisory Committee to make recommendations respecting amendments to the appeals rules promulgated by the Court on May 7, 1934. Those rules had been promulgated under authority of the Act of February 24, 1933, as amended by the Act of March 8, 1934 which provides for the making by the Supreme Court of rules governing appeals by defendants.

Rule 34 on criminal contempt has been prepared under authority of the Act of November 21, 1941 which provides for the making by the Supreme Court of rules governing criminal contempt. The Court indicated in its memorandum based on the May, 1942 draft that it desired that the Committee propose provisions to be considered for such rules.

Rule 13 (c) and other provisions for appeals by the government, such as Rules 35, 36 and 37, have been prepared under authority of the Act of May 9, 1942 and of the Court's order of October 26, 1942 directing the Committee to make recommendations with respect to rules under this act.

The remainder of the rules in the Preliminary Draft are authorized under one or more of the statutes and orders to which reference has been made in the preceding paragraphs.

A fifth statute by which Congress has authorized the Supreme Court to make rules for criminal procedure is the Act of October 9, 1940 providing for the making of rules governing the trial of petty offenses in certain cases before United States commissioners. The Court acting under this statute promulgated the petty offense rules on January 6, 1941. The Advisory Committee has not received an order from the Court with respect to these rules.

To summarize, Congress has enacted five statutes giving to the Supreme Court the rule-making power in criminal cases. The statutes cover proceedings before United States commissioners and in the district courts, in the circuit courts of appeals and in the Supreme Court. Two of the statutes permit rules promulgated by the Court to become effective without submission to the Congress; three of the acts require submission. Rules have been promulgated by the Court under the two acts not requiring submission to Congress, namely, the criminal appeals rules act and the petty offense rules act. The Advisory Committee has received from the Court orders with respect to rules under three of the acts, namely, the act authorizing rules of procedure prior to and including verdict, the act authorizing rules for criminal appeals by the defendant, and the act authorizing rules for criminal appeals by the
government. The Committee has received also from the Court a memorandum of general direction and authorization.

The petty offense rules are placed in a supplement to the Preliminary Draft. The limited type of proceedings which they cover seems to make unnecessary at present their incorporation as an integral part of the Draft. The Advisory Committee has not yet received from the Court or from any other source an indication that such integration would be desirable.

Integration of rules of procedure before verdict with the rules of procedure after verdict seems to be necessary. The Committee decided following the May, 1942 draft that rules prepared separately under each of these two statutes would necessarily involve duplication, confusion and inconvenience to bench and bar. For example, in each set of rules provision would need to be made of course for such matters as bail, motions, counsel for defendant, presence of defendant, harmless error, forms, filing and service of papers, scope and effective date. The result would be duplication and confusion. The Committee therefore decided, as already stated, that it would prepare a single, unified, self-contained draft of rules for the conduct of all criminal proceedings in the courts of the United States. The result is the Preliminary Draft which is in your hands today for your consideration and recommendations.

III

RULES DRAWN FROM MANY SOURCES

The sources of the provisions contained in the draft will now be considered. Federal criminal procedure is found as you know in various places. The situation is indicated by the statement of Mr. Justice Clifford in Tennessee v. Davis, 100 U. S. 257, 299 (1880), that the general statutory provision20 for federal criminal procedure "is a mere jumble of federal law, common law and State law, consisting of incongruous and irreconcilable regulations." It is generally recognized that federal criminal procedure, in most of its statutory and common law provisions and in its administration, is efficient and in fact exemplary. But a search for the present federal law with respect to details of criminal procedure requires that one examine the federal and state constitutions and statutes, the common law at various periods in the legal history of the United States, of the states and of England, the decisions of federal, state and English courts, the rules of court promulgated by the Supreme Court and by other federal courts, and the traditional details of practice and of administrative procedure which are not to be found in written or printed form. All of these sources have been consulted and considered in the preparation of the draft. All federal statutes dealing with criminal procedure and decisions of the federal courts on all points with which the rules are concerned have been read and, when advisable, abstracted and discussed by the reporter and research assistants. State statutes and decisions have been read similarly abstracted and discussed wherever they are pertinent because of conformity acts, because of the absence of federal law on the subject under consideration, or because the state provisions have offered useful precedents or analogies. English statutes and decisions have been read and similarly abstracted and discussed wherever they are pertinent because of conformity acts.

The recommendations of Attorneys General of the United States with respect to criminal procedure, as contained in annual reports of the Attorneys General during the past fifty years, have been studied and used, as indicated by the citations in the notes to the rules. The recommendations with respect to criminal procedure which have been made of the articles and case annotations relating to important details of criminal procedure which have been published in the principal legal periodicals, particularly in the American Bar Association Journal, in the Journal of the American Judicature Society, and in the Journal of Criminal Law and Criminology, and in the leading law school reviews.

The recommendations of Attorneys General of the United States with respect to criminal procedure, as contained in annual reports of the Attorneys General during the past fifty years, have been studied and used, as indicated by the citations in the notes to the rules. The recommendations with respect to criminal procedure which have been made of the articles and case annotations relating to important details of criminal procedure which have been published in the principal legal periodicals, particularly in the American Bar Association Journal, in the Journal of the American Judicature Society, and in the Journal of Criminal Law and Criminology, and in the leading law school reviews.

The recommendations of Attorneys General of the United States with respect to criminal procedure, as contained in annual reports of the Attorneys General during the past fifty years, have been studied and used, as indicated by the citations in the notes to the rules. The recommendations with respect to criminal procedure which have been made of the articles and case annotations relating to important details of criminal procedure which have been published in the principal legal periodicals, particularly in the American Bar Association Journal, in the Journal of the American Judicature Society, and in the Journal of Criminal Law and Criminology, and in the leading law school reviews.

The American Law Institute Code of Criminal Procedure, with its Commentaries, has been regularly consulted and each of its provisions has been examined in connection with any relevant proposed rule. Two or three of the proposed rules in the Preliminary Draft are taken in part from the provisions of that Code. Numerous other rules in the Preliminary Draft show an indebtedness to the Code. The Commentaries of the Code have been valuable as collations of state statutes and decisions. The direct applicability of the Code and its Commentaries, however, has been reduced somewhat by the fact that few references or citations to federal statutes and decisions are found therein. The Code provisions were necessarily directed to meeting the requirements of a state code rather than those of a federal code. The Code nevertheless has provided invaluable assistance in the drafting of the rules, as indicated especially by the numerous citations to the Code in the notes to the rules.

The Federal Rules of Civil Procedure have been used extensively in the preparation of the Draft. In fact the first tentative draft considered by the Advisory Committee was prepared on the basis of paralleling the civil rules as closely as possible, with the purpose of discovering to what extent the order and the subject matter of each civil rule could be used or adapted for a corresponding criminal rule. This plan was informative and helpful in its results, but the Advisory Committee decided that a chronological procedural order for criminal rules would require an arrangement different from that followed by the civil rules. The Committee, while making all possible applications of the civil rules, and while realizing the necessity of coordinating the work of the two Advisory Committees, decided that the possibilities of adapting the civil rules or in fact of using any existing code of procedure as the basis or model of organization or of content for the criminal rules were limited and unpromising, except in isolated instances. In short, the Committee soon realized that its task was unique and that only very limited use or adaptation of rules already prepared could be made.

IV
ACCEPTABILITY BASED ON EXPERIENCE AND ON CONSTITUTIONALITY
We have now considered the history of the Preliminary Draft, its authorization, and its sources. We shall consider, finally, its acceptability.

In discussing each rule, the question before the Conference will be whether the rule, in its present form, seems to be acceptable generally to the judges, the lawyers and the other citizens of this country. If the answer to this question is Yes, the matter resolves itself into the effective endorsement and support of the rule. If the answer is No, the further question is whether the rule can be amended and should be amended in a manner which would make it acceptable.

The acceptability of the draft as a whole and therefore of each rule in it, either with or without amendment, seems to be determinable by two considerations: first, that it is based on experience, and second, that it is based on the provisions of the Constitution of the United States.

First, the draft is made up of provisions which are tested by experience. Provisions of the draft which constitute at least 85 per cent of the total number of provisions are now the law or practice in one or more of the 85 federal districts or, stating it somewhat differently, in one or more of the 11 federal judicial circuits. Provisions of the draft which constitute about 10 per cent of the total draft are based on the present law or practice in one or more states, with adaptations made by the Advisory Committee when considered to be necessary or desirable. Not over 5 per cent of the total number of provisions in the 56 rules of the Preliminary Draft can be considered to be substantially new provisions. The chief characteristics of the draft are intended to be simplicity, clarity, conciseness and uniformity; the draft is not intended to be characterized by a zeal to reform present procedure or to originate new procedure. On the contrary, the members of the Advisory Committee have retained wherever possible present provisions of law which have met successfully the test of experience.

Moreover, the committee members, in proposing new procedure, have tested it by their own experience in the court room and elsewhere in criminal law administration and by the experience of their research assistants and of the judges and lawyers who have been supplying the committee with suggestions and criticisms. The members of the committee are from the
District of Columbia and 11 states, extending from New York and Massachusetts to California, and from Minnesota to New Mexico. They include lawyers, law teachers and law writers. Their professional experience includes services as federal and state judges, as federal and state district attorneys, as assistant attorneys general, as defense counsel and as lawyers in the general practice of law. The law teachers and law writers include an adviser in the drafting of the Code of Criminal Procedure of the American Law Institute and the joint author of a standard cyclopedia of federal procedure and practice and authors of various books and articles in the field of criminal law and its administration.

The research assistants of the Committee in the office of the Reporter in the Supreme Court Building who have had current experience in federal criminal law administration have included, so far as their regular official duties would permit, Fred E. Strine of the Department of Justice, whose services were made available by the Attorney General; Marks Alexander, Assistant United States Attorney, Springfield, Illinois, whose services were made available by United States Attorney Howard Doyle of the Southern District of Illinois, President of the National Association of United States Attorneys; and Douglas W. McGregor, United States Attorney, Houston, Texas, chairman of the committee appointed by Mr. Doyle to cooperate with the Advisory Committee.

Judges, other government officials and lawyers have made their experience available through committees appointed to assist the Advisory Committee. Two committees which have been especially convenient for calls from the Reporter's office for assistance are the Department of Justice committee headed by Assistant Attorney General Wendell Berge, and the District of Columbia court committee of which the chairman is United States Attorney Edward Curran. Many of you are well aware of your own services in making available to the Advisory Committee your own experience and judgment.

These facts help to show that the Preliminary Draft will be in general acceptable to those who value practical experience as a guide in the preparation of rules of criminal procedure for the federal courts.

Second, the draft is regarded as acceptable because each rule is considered to be clearly constitutional and therefore not vulnerable to the most common objection made to almost any proposed change in criminal procedure, namely, unconstitutionality. It is of course a fundamental principle that a proposed rule of federal criminal procedure must not infringe in the slightest degree upon the general requirement of due process of law or upon one or more of the 14 specific requirements with respect to criminal procedure set forth in the United States Constitution. The general due process requirement, stated in the 5th Amendment and repeated in the 14th Amendment with the same meaning but with different application, provides that no person shall be deprived of "life, liberty, or property without due process of law." This guaranty traces its lineage, as you know, to the 29th chapter of Magna Carta, that document which celebrates this month its 728th birthday. The people of the United States, like the people of the British Commonwealth of Nations, seem to be in no danger of forgetting the due process clauses as guaranties of law and liberty. Any proposed changes in criminal procedure of course must conform absolutely to the mandates of due process of law.

"Due process of law," said Mr. Justice Day, in Garland v. Washington, 232 U. S. 642, 645 (1914), "this court has held, does not require ... any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution."

The requirements of due process for a defendant in a criminal proceeding, as analyzed by the courts, may be divided into the following procedural guaranties: (1) Reasonable notice of the accusation; (2) a fair hearing on the accusation; (3) an impartial tribunal; (4) an impartial tribunal; (4) an

orderly procedure; and, according to some cases, (5) a conclusive judgment. Each rule is consistent with these five standards of the general constitutional guaranty of due process of law and at the same time with the 14 specific constitutional guaranties governing criminal procedure which are contained in Article 3 and in the 4th, 5th, 6th and 8th Amendments.

Notice of the accusation, which is reasonable notice under the established standards of the due process clause and under the specific requirements of the 4th, 5th and 6th Amendments, is secured for the defendant by complaint, by indictment or information, by warrant and otherwise by the provisions of the rules, particularly by those of Rules 3 to 11.

The provision in Rule 8 (b) that an offense not punishable by death may be prosecuted by information if the defendant, being represented by counsel, waives indictment in writing has been questioned on the ground that it violates the specific constitutional requirement of the 5th Amendment that "no person shall be held to answer for . . . infamous crime unless on a presentment or indictment of a Grand Jury." The constitutionality of the provision of the rule seems to be clearly recognized however by competent authority. The Judicial Conference of Senior Circuit Judges in 1941 and in 1942 recommended provision for waiver of indictment.22 Attorneys general of the United States23 have advocated the proposal for many years. Neither the circuit judges nor the attorneys general have stated that a constitutional amendment would be necessary in order to permit the waiver. In present federal law by statutory provision24 petty offenses may be prosecuted upon information. Misdemeanors for which punishment is prescribed which is greater than that prescribed for petty offenses but which is not infamous punishment may be prosecuted by information instead of indictment.25 The change in the present federal law made by the provision of Rule 8 (b) is therefore the authorization of prosecution by information of non-capital offenses for which infamous punishment is prescribed, that is, punishment by imprisonment for a term exceeding one year or by imprisonment for any term with

---

in any criminal case to be a witness against himself.” The rule, however, does not compel a defendant to be a witness; it requires only that if he intends to introduce voluntarily at the trial evidence of alibi he shall give before trial notice of that intention. The notice, like the plea of not guilty, is not evidence; it is not primarily concerned with establishing the actual guilt or the actual innocence of the defendant. It is concerned primarily with the defendant’s intention to present evidence of alibi, namely, before rather than after the trial begins. When the defendant, under present practice, presents at the trial surprise evidence of alibi he has no constitutional privilege which would prevent the court from ordering a recess of the trial in order to permit the government to investigate this evidence which raises in effect a new issue rather than directly denying the government’s evidence. On what grounds can it be said that the defendant nevertheless has a constitutional privilege to refuse to give a notice before trial which would serve to avoid such a recess by enabling the government to make the same investigation before the trial?

Moreover, even if the defendant in giving the notice were considered to be a witness giving evidence, he would not necessarily be “a witness against himself”; he would be more likely a witness in favor of himself. If the notice is based on truth, the charge against the defendant will very likely be dismissed immediately and without trial. If the notice is based on honest mistake, it will still be a benefit to the defendant to have the government’s specification of time and place as provided by the rule, which should assist him to discover the mistake before it would be discovered at the trial—at which time such a discovery is usually fatal to any defendant. If the notice is not based on truth or on honest mistake, can it be said that the defendant cannot be required to give notice because he would thereby give evidence prejudicial to himself that he intends to commit or to suborn perjury at the trial? The constitutional privilege against self-incrimination protects a defendant against disclosing evidence of a crime which he has committed; it does not protect him against giving evidence, in complying with a procedural statute or rule such as the alibi notice rule, that he intends to commit a crime in the future.

It seems clear therefore that Rule 17 does not violate the 5th Amendment by compelling a defendant to be a witness against himself, first, because it does not compel him to be a witness or to give evidence at all, and second, because even if it be assumed that the rule compels him to give evidence it does not compel him to give evidence against himself.

Statutes or rules of court requiring a defendant to give notice of alibi are in effect in 14 states. The constitutionality of the provisions has been sustained by each of the courts,—in New York and in Ohio,—in which the issue of constitutionality has been decided in reported opinions. Attorneys General of the United States and many federal judges have recommended such a provision for federal procedure. United States attorneys who voted in a poll conducted by a committee of the National Association of United States Attorneys voted 2 to 1 in favor of placing in these rules an alibi notice provision and they contributed a list of federal criminal cases in which there have been obstructions or failures of justice because of the lack of such a provision in federal criminal procedure.

It seems clear that the constitutional requirement of a fair hearing for the defendant is not violated by Rule 17 or by its companion rules which likewise would contribute to careful preparation for the trial instead of leaving everything to be dealt with during the actual trial period.

A tribunal which is an impartial tribunal according to the established standards of the due process clause and under the specific provisions of Article 8 and of the 6th Amendment

---


for trial by jury is secured for the defendant so far as procedural provisions are concerned by the rules for trial by jury or by the court, particularly by Rules 21 to 23, and by the provision for transfer of the proceeding on account of prejudice, as provided in Rule 40 (c) (2).

The provisions for waiver of privileges in connection with trial by jury might have been subject to challenge before the decision of Patton v. United States, 281 U. S. 276 (1930), but they are now considered to be clearly constitutional. In Rule 21, Subdivision (a) provision is made for waiver of jury trial by the defendant, and in Subdivision (b) it is provided that he may consent that the jury consist of less than 12 members. In Rule 29 (a) provision is made that the defendant may consent that the verdict be returned by a stipulated majority of the jurors. By each of these three subdivisions the waiver is to be permitted only with the approval of the court. In Patton v. United States the Circuit Court of Appeals of the Eighth Circuit certified to the Supreme Court of the United States the following question: "After the commencement of a trial in a Federal court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the government, through its official representative in charge of the case, consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?" In supporting the affirmative answer of the Supreme Court Mr. Justice Sutherland said, supra at 308: "It is not denied that a jury trial may be waived in the case of petty offenses, but the contention is that the rule is otherwise in the case of crimes of the magnitude of the one here under consideration . . . We are unable to find in the decisions any convincing ground for holding that a waiver is effective in misdemeanor cases but not effective in the case of felonies."

The decision of the Supreme Court in Patton v. United States, supra, is regarded as supporting these provisions of Rules 21 and 29.

Procedure which is orderly, and not irregular and arbitrary, as measured by the established standards of the due process clause and by the specific requirements of the 4th and 8th Amendments, is secured for the defendant by the provisions of the rules considered either as a whole or separately. A simple, definite, comprehensive and integrated system of federal criminal procedure is provided by the draft as a whole.

Specific rules in which the constitutional right of a defendant to orderly procedure is particularly safeguarded are, for example, Rule 33 governing search and seizure, and Rule 34 dealing with criminal contempt.

A judgment which is a conclusive legal judgment according to established standards of the due process clause, and which would protect the defendant under the specific requirement of the 5th Amendment forbidding double jeopardy, is secured for the defendant by the provisions for judgment in Rules 30 and 31 and for appeal in Rules 35 to 37. The provisions of the rules in this classification, like those in the four preceding types of procedural guaranties, are considered to be consistent with each of the constitutional safeguards under due process of law and under the specific guaranties of the amendments constituting the federal Bill of Rights.

The Preliminary Draft has now been considered from four principal viewpoints, namely, its history, its authorization, its sources and its acceptability. The transcendent consideration is the acceptability of the Draft to the judges, lawyers, and other citizens of the United States. That question is to be determined by all of the foregoing considerations, namely, the history of the draft, from its beginning here five years ago through its successive stages of development; its authorization by acts of the Congress and by orders of the Supreme Court; its sources, in constitution, statute, and common law, in court rules, crime surveys and procedural codes; and finally, the fact that it is based upon experience and upon strict conformity to the provisions of the Constitution of the United States for the protection of the rights and liberties of the individual.

Looking to the future, the successful acceptance and operation of federal rules of criminal procedure as finally promulgated seems assured. The probability of success for the criminal rules is indicated by the success of all of the federal procedural rules which heretofore have been promulgated by the Supreme Court. They include the admiralty rules, the equity rules, the