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RULES OF CRIMINAL PROCEDURE

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SUBCOMMITTEE ON CRIMINAL JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY

HOUSE OF REPRESENTATIVES

NINETY-THIRD CONGRESS

SECOND SESSION

ON

PROPOSED AMENDMENTS TO FEDERAL RULES OF
CRIMINAL PROCEDURE

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PROPOSED AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

TUESDAY, SEPTEMBER 17, 1974

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CRIMINAL JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2141, Rayburn House Office Building, Hon. William L. Hungate [chairman of the subcommittee], presiding.

Present: Representatives Hungate, Kastenmeier, Smith, and Dennis.

Also present: Thomas W. Hutchison, counsel; Stephen P. Lynch, research assistant; and Michael W. Blommer, associate counsel.

Mr. HUNGATE. The committee will be in order.

This morning we start hearings into the substance of the proposed amendments to the Federal Rules of Criminal Procedure. These amendments were promulgated by the Supreme Court on April 22, 1974, to become effective on August 1, 1974. Congress, however, enacted legislation postponing the effective date for 1 year, to August 1, 1975. The President signed this legislation on July 30, 1974, and it became Public Law 93-361.

The effective date of the proposed amendments was postponed in order to give Congress adequate time in which to study all of the proposed changes, some of which are quite controversial. The subcommittee is today beginning a close study of all of the proposed changes. We will hear from the Judicial Conference of the United States, the Justice Department, and the Center for Law and Social Policy, headquartered here in Washington, D.C. We will hear from other interested organizations and individuals at future hearings.

We begin with the Judicial Conference, which is responsible for drafting the proposed amendments. The initial work on the proposed amendments was done by the Advisory Committee on Criminal Rules. Judge J. Edward Lumbard, a senior circuit judge from the second circuit and chairman of the advisory committee, is here today. Judge William H. Webster of the Eighth Circuit Court of Appeals, a member of the advisory committee, and Prof. Frank J. Remington of the University of Wisconsin Law School, reporter to the advisory committee, accompany Judge Lumbard. The other Judicial Conference committee that worked on the proposed amendments is the Standing Committee on Rules of Practice and Procedure, chaired by Judge Roszel C. Thomsen. Judge Thomsen, a senior district judge

from the district of Maryland, is also here, as is William E. Foley, deputy director of the administrative office of the U.S. courts.

We welcome you gentlemen here, and we are grateful to you for your work. And you may proceed as you see fit.

TESTIMONY OF JUDGE J. EDWARD LUMBARD, SECOND CIRCUIT COURT OF APPEALS, CHAIRMAN, ADVISORY COMMITTEE ON CRIMINAL RULES, JUDICIAL CONFERENCE OF THE UNITED STATES; JUDGE ROSZEL C. THOMSEN, U.S. DISTRICT COURT, DISTRICT OF MARYLAND, CHAIRMAN, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES; JUDGE WILLIAM H. WEBSTER, EIGHTH CIRCUIT COURT OF APPEALS; AND PROF. FRANK J. REMINGTON, UNIVERSITY OF WISCONSIN LAW SCHOOL, REPORTER, ADVISORY COMMITTEE ON CRIMINAL RULES

Judge THOMSEN. My name is Roszel C. Thomsen. I am a senior district judge of the district of Maryland, appointed in 1954, having served as chief judge from 1955 to 1970.

I have been chairman of the Standing Committee on Rules of Practice and Procedure only since October 1973. But my experience with the adoption and amendment of Federal rules goes back to the 1930's, when, as a young lawyer, I was a member of a committee appointed by Judge Chesnut to consider the proposed new rules of civil procedure. I also had the good fortune to be one of two lawyers from Maryland who attended a session of the Judicial Conference of the Fourth Circuit, at which Chief Justice Hughes presided, where all the judges and lawyers present discussed the most controversial provisions of the proposed rules.

You may recall that as far back as 1792 (the act of May 8, 1792, 1 Stat. 276), Congress had given the Supreme Court power to prescribe the procedure in common law, equity and bankruptcy cases, and that the Court had promulgated equity and admiralty rules. The Court did not exercise its statutory rulemaking authority in the common law field, and the latter was withdrawn by the Conformity Act of June 1, 1872, C. 255, § 5, 17 Stat. 197. Rev. Stat. § 914 (1878), which confirmed the then existing practice of conforming to State procedure in common law cases. But in 1934, by the act of June 19, 1934, Congress empowered the Court not only to prescribe rules of procedure for actions at law, but also to unite the procedure in equity and at law so as to secure one form of civil action.

That act provided that if the Court should decide to unite law and equity practice, the united rules should not take effect until after they had been reported to Congress at the beginning of a session and until after the close of the session.

The Court, as we all know, exercised its authority under the act of 1934 by adopting the Federal Rules of Civil Procedure uniting law and equity practice.

Shortly prior thereto, the act of February 24, 1933, 47 Stat. 399, had granted the Court authority to make procedural rules in criminal cases subsequent to verdict, finding, or plea of guilty; and the act

of June 29, 1940, 54 Stat. 688, extended this power to the procedure in such cases prior to verdict, finding, or plea, subject to the requirement that any rules relating to the latter procedure should be reported to Congress before they took effect. Under these statutes, the Federal Rules of Criminal Procedure were prescribed by the Court.

There were three subsequent statutory developments of current interest. By the act of May 10, 1960, 64 Stat. 158, the requirement that any such rules promulgated by the Supreme Court should be reported to Congress at the beginning of a session, was modified to permit them to be reported at any time after the beginning of a session up to May 1, and the limitation upon their effective date was advanced from the close of the session until the expiration of 90 days after the rules were reported to Congress.

The second development was the grant to the Court by the act of October 3, 1964, 78 Stat. 1001, of full rulemaking authority to govern practice and procedure under the Bankruptcy Act.

The third development was the consolidation by the act of November 6, 1966, 80 Stat. 1323, of the civil rulemaking power granted by three sections of the code (§§ 2072, 2073, and 2074 of title 28), in an amended § 2072, and the broadening of the power to include the procedure in the courts of appeals.

In the preparation of the Rules of Civil Procedure and the Rules of Criminal Procedure adopted in the 1930's and the 1940's the Court availed itself of the help of advisory committees composed of judges, lawyers, and legal scholars, whose function has been to prepare drafts, circulate them widely, consider the comments and suggestions of the bench and bar, and then present to the Court a definitive draft for its consideration.

It is important, however, that after procedural rules are adopted, their application and effect be continuously studied, so that changes which are indicated by experience can be made with reasonable promptness. And it is equally important that an organization exist which is prepared to receive and study the suggestions of the public in this regard.

The act of July 11, 1958, 78 Stat. 356, amended section 331 of title 28, United States Code, to authorize the Judicial Conference to carry on a continuous study of the operation and effect of the rules of practice and procedure prescribed by the Supreme Court for the other U.S. courts, and to recommend to the Court from time to time, such changes in and additions to them as the conference might deem desirable.

To have direct responsibility for this program, the conference authorized the Chief Justice to appoint a standing committee on rules of practice and procedure, and, reporting to the standing committee, advisory committees to work in the separate fields of procedure as needed from time to time, each advisory committee to be assisted by a legal scholar as reporter.

Pursuant to that authority, the Chief Justice appointed a Standing Committee on Rules of Practice and Procedure, and Advisory Committees on Civil Rules, Criminal Rules, Admiralty Rules, Bankruptcy Rules and Appellate Rules, and later, an Advisory Committee on Rules of Evidence. All of these committees were and still are composed of lawyers, judges and law professors from all over the country, having various points of view on the problems involved. I served on the

Advisory Committee on Civil Rules from 1959 until 1973, and can testify to how that committee operated. During much of the time Benjamin Kaplan, then a professor at the Harvard Law School and now a judge of the Supreme Judicial Court of Massachusetts, was our reporter. His successors and the reporters of the other committees, including Professor Remington, Reporter of the Advisory Committee on Criminal Rules, have been men of outstanding ability. The reporter studies the procedural problems raised by new statutes, recent decisions, letters from lawyers and judges, and articles in law reviews. He presents these problems, with various possible solutions, to the members of the committee, who discuss the problems and agree in principle on what should be done. The reporter then prepares a draft of a rule and accompanying note which is mailed to the members of the committee and discussed at length, sometimes with great spirit, pro and con, at the next meeting. After a group of proposed rules and accompanying notes has been developed, they are printed and circulated among the bench and bar, with a request that comments be submitted by a given date, usually about a year in the future.

Before considering amendments to the civil rules relating to discovery, which were finally adopted in 1970, the advisory committee had a study made by a group headed by Professor Rosenberg of the Columbia Law School, who interviewed lawyers and judges in every State, and developed a mass of statistics, comments, and other information, showing what was then being done and how various groups and individuals thought the process could be improved.

In some of the circuits the proposed rules are discussed by judges and lawyers at the annual Judicial Conference; in other circuits they are discussed by the judges. But bar associations and other interested groups of lawyers, representing varied points of view, as well as the Department of Justice, study the proposed rules and send their comments to the reporter. He summarizes them in a report to the advisory committee, which considers them, debates the proposed rules again, usually making changes, sometimes many changes. Of course, at times a committee has to vote for or against a hotly contested proposal, but that is never done until all sides have been fully presented and considered.

After approval by the advisory committee, the final draft of proposed new rules or amendments to old rules is sent to the standing committee, which studies the proposed new rules and amendments, discusses them with representatives of the advisory committee, sometimes making a number of changes and in a few instances, circulating the proposed final draft among the bench and bar. After the standing committee has approved the proposed rules, its chairman, who from 1958 to 1973 was Judge Albert B. Maris, a senior circuit judge of the third circuit, and one of the most respected judges in the country, reports the final draft, including the advisory committee notes, to the Judicial Conference of the United States, which considers them at one of its semiannual meetings.

After approval by the Judicial Conference of the United States, the proposed rules and amendments are sent to the Supreme Court, which usually considers them for a period of 6 months or more, and on one occasion at least has directed that the final draft be sent again to the bench and bar for their comments.

After the new rules are prescribed by the Supreme Court—the word “prescribed” is taken from the applicable statutes—they are reported to Congress. Unless Congress takes some action within 90 days, the new rules take effect on the specified date.

Over many years, Congress did not change any rules prescribed by the Supreme Court. I believe that Congress has recognized the immense amount of work that has gone into the preparation of each rule, and has known that all judges, lawyers and groups of lawyers have had an opportunity to make their views known, and that their views have been considered. Of course, some judges, some lawyers, and some groups will object to any proposed rule, and will write very persuasive letters in support of their views. But you may rest assured if they sent their views to the committees studying the proposed rule, those views were considered, along with views expressed by other judges, lawyers and groups, and were not rejected unless the committees and the Supreme Court believed that the rule as finally proposed, which was usually recommended by the great majority of judges and lawyers, was the best rule which could be devised for solving the problem involved, which often has many facets. Those lawyers, judges and groups who approve the proposed rules do not ordinarily write letters to our committee or to your committee; they count on us to present their views.

I recognize, of course, that two recent sets of rules have dealt with problems in which there is great public interest—the proposed rules with respect to privilege and some of the other evidence rules, and the criminal rule dealing with plea agreements, or plea bargaining, whichever term you prefer.

We have studied carefully the letters you have received with respect to the new criminal rules which you are considering today. They are very sincere letters. The points raised by those who object to one or more of the rules will be discussed by members of the advisory committee, who will explain why the suggestions contained in those letters were not adopted by the advisory committee or by the standing committee, in proposing the rules which were approved by the Judicial Conference and prescribed by the Supreme Court. I will only ask you to remember that many, many other judges and lawyers approve the rules as prescribed by the Supreme Court, including those who have written you to that effect and those who count on our committees to support the proposed rules.

I want to discuss briefly one final subject. Some rules which will be proposed in the future will probably deal with subjects in which the public, as well as judges and lawyers have an interest. I am authorized to say that the Chief Justice, as well as members of the standing committee, believe it would be wise to have a closer relationship with members of the appropriate congressional committees while proposed rules are being discussed by the several advisory committees and by the standing committee of the Judicial Conference. Perhaps a member of your committee and a member of the appropriate Senate Committee, or someone from your respective staffs, might serve as members of the standing committee and of each of the advisory committees, or might attend meetings of those committees and comment on each proposal, as a representative of the Department of Justice sometimes is asked to do. I hope your chairman or some one or more of your mem-

bers designated by him will be willing to discuss this proposal with the Chief Justice informally and with me at some mutually convenient time. I hardly need say that the Chief Justice, in his opinions over a period of 19 years, has demonstrated adherence to the concept of separation of powers and as Chief Justice he has constantly urged cooperation between the Congress and the judicial branch.

Mr. HUNGATE. Thank you, Judge Thomsen. We appreciate the great amount of work that has gone into this and the fine quality of that work. We will certainly call to the attention of Chairman Rodino your suggestions concerning the possibility of a closer liaison between the Congress and the Judicial Conference.

If I might interject at this point, I suppose that what happens with the rules of evidence will influence the nature of the liaison. If nothing happens, and nothing happens by the first of next August, we may have learned a lesson—Congress is indeed not capable to deal with these problems. I should point out however, that until recently the Congress has, more or less by default, let slide a responsibility that does belong to it.

If it is agreeable with the members of the committee, you gentlemen may proceed with your prepared statements and then take questions at the end.

Judge LUMBARD. Mr. Chairman, my name is J. Edward Lumbard. I am a senior judge for the U.S. Court of Appeals for the Second Circuit, and have been chairman of the Advisory Committee on the Criminal Rules since May 1971. I served as U.S. attorney for the southern district of New York until I was appointed a circuit judge in July 1955. And I was chief judge of the second circuit from 1959 to 1971.

In order to acquaint the committee with the procedures of the Advisory Committee, I have prepared and submitted a 19-page statement and appendices which I understand, Mr. Chairman, you will make a part of the record, and, therefore, I shall not attempt to read this in any detail.

Mr. HUNGATE. Without objection, this will be made a part of the record.

Judge LUMBARD. I shall simply emphasize a few points in connection with the procedures of the committee.

In addition to that, as you know, the reasons which prompted the adoption by the committee of the proposals now before you have been set out extensively, in the notes of the committee which the Chief Justice has sent to the Congress along with the proposed amendments.

And I have with me, as you know, Circuit Judge Webster of the eighth circuit, and Prof. Frank Remington, who has been the reporter of the committee, and prior to becoming reporter, he was a member of it since 1960. And I think between us we will be prepared to answer any questions that you may wish to direct to us regarding the merits of these particular proposals.

I think I should point out that our committee at all times has been glad to receive the suggestions and the help of anyone who was prepared to offer it. On one recent occasion our meeting was attended by the counsel for Congressman Eilberg who at that time was interested in a discussion regarding the grand jury system which the committee is now actively studying. And on another occasion we had with us counsel for one of the Senate committees, Robert Blakey, now profes-

sor at Cornell Law School, in connection with the proposals regarding a revision of the criminal code which have been before the Congress the last few years.

I should like to emphasize, with respect particularly to three of the matters in which you are principally interested—namely, the pleas of guilty, the discovery proposals, and the use of the presentence report—that we were not writing on a clean slate, that these matters have been the subject of much discussion and study for many years, particularly in recent times. One such study was the American Bar Association study on criminal justice and the proposal of standards which commenced in 1964, and of which I was chairman from 1964 until 1968.

The proposals which are before you with respect to those three subjects derive very largely from the proposals made by the American Bar Association Committee on Criminal Justice. And as you know, they have the very wide support of the bar, and in fact, have been used in many of the courts of the country, and have been adopted in whole or in part in some of the States.

And so we had those studies as a firm support for many of the proposals which are before you.

Second, I want to emphasize that which I think appears in detail in my prepared statement, and that is the full and the wide opportunity which is presented to the judges and to the members of the bar and all interested parties to become acquainted with and to comment on any proposals which the committee makes. These proposals, as you know, were largely derived from preliminary drafts, one of which was circulated in January 1970, and the other in April of 1971. They were sent to some 5,000 persons. In addition, they were published by the West Publishing Co., in its advance sheets for Fed. 2nd, Fed. Supplement, and Fed. Rules Decisions. And so we had about as wide a circulation of the proposals as was possible.

Mr. HUNGATE. If I may interrupt at this point, I know that you are accurate. With the rules of evidence, we had a number of complaints about inadequate circulation of the drafts. That has not been the case with the proposed amendments to the Federal Rules of Criminal Procedure. I cannot recall anyone who has complained about lack of notice of what was going on.

Judge LUMBARD. Then, as is apparent from comparison of the original proposals and the proposals which were laid before the Congress by the Chief Justice, there were very numerous changes made in almost all the proposals as the result of criticisms and suggestions and further study by the Advisory Committee and by the Standing Committee before they were sent to the Congress.

Now, I think I should also point out that since 1960 the procedure has involved two additional checkpoints which had not existed before that time. The first was the creation of the Standing Committee, of which Judge Thomsen is now the chairman. Everything that the Advisory Committee proposes must first go to the Standing Committee. And that Standing Committee on occasion has sent back to the Advisory Committee matters which it thought required further study.

And the second additional checkpoint has been the Judicial Conference of the United States. The proposals go from the Advisory Committee to the Judicial Conference of the United States which, as you

know, consists of 25 of the judges representing all the circuits and presided over by the Chief Justice.

And the fourth matter to which I would like to call the attention of the committee is, of course, that we are required by statute to conduct a continuous study of the rules. And we are conducting further studies in addition to those which are now before the Congress. These were set out in considerable detail in a proposal circulated in April 1973 and are undergoing further study.

The three matters of particular interest in these proposals have to do with some form of sentence review by a panel of district court judges, and new rules for State prisoner habeas corpus cases, and new rules for 2255 proceedings, which are the post-conviction proceedings in the Federal court. And those are now being studied by the Advisory Committee and the Standing Committee before there will be a further circulation and before there is final action.

And I have mentioned that simply to emphasize for the benefit of the committee the manner in which the committee seeks to carry out its studies.

And that is all that I want to say by way of preliminary statement, Mr. Chairman. We are prepared to answer any questions which you may have.

[Judge Lumbard's statement and attachments follow:]

STATEMENT OF J. EDWARD LUMBARD, SENIOR CIRCUIT JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Mr. Chairman: I am J. Edward Lumbard, a senior judge of the United States Court of Appeals for the Second Circuit. I am appearing before your subcommittee as Chairman of the Advisory Committee on Criminal Rules of the Judicial Conference of the United States. I served as United States Attorney for the Southern District of New York from April 1953 to July 1955, when I was appointed a circuit judge for the Second Circuit. I served as Chief Judge of the Second Circuit from 1959 to 1971.

As background, let me first outline briefly the development of the rule-making authority and the rule-making process with respect to procedure in criminal cases.

In 1933 Congress authorized the Supreme Court to prescribe general rules of criminal procedure with respect to post-verdict proceedings. Act of February 24, 1933, ch. 119, 47 Stat. 904, as amended, 18 U.S.C. § 3772 (1970). These rules were not required to be submitted to Congress for approval, but became effective on the date ordered by the Court.

The first such rules were promulgated on May 7, 1934, to become effective on September 1, 1934. 292 U.S. 659. They concerned matters such as sentencing, post-verdict motions, appeals, bail pending appeal, and directions for the preparation of a record for appeal.

In 1940 the Congress directed the Supreme Court to recommend to the Attorney General of the United States rules dealing with procedures in criminal cases prior to and including a plea of guilty, a jury verdict or a finding of guilt by a court. The Supreme Court would then request the Attorney General to transmit those rules to Congress. The rules would not take effect unless and until the Attorney General placed them before Congress at the beginning of a regular session, and then not until the close of that session, absent Congressional action with respect to those rules. Act of June 29, 1940, ch. 445, 54 Stat. 688, as amended, 18 U.S.C. § 3771 (1970). This procedure was changed in 1949 when Congress authorized the Supreme Court to transmit new rules and rule changes directly to Congress, rather than through the Attorney General. Act of May 24, 1949, ch. 139, § 59, 63 Stat. 98. In 1950 the statute was further amended to provide that proposed rules and rule changes be reported to Congress not later than May 1st each year and become effective 90 days after being so reported, absent Congressional action on the rules. Act of May 10, 1950, ch. 174, § 1, 64 Stat. 158.

The original rules of criminal procedure adopted pursuant to the 1940 statute and dealing with procedure prior to and including verdicts, guilty pleas, or find-

ings as to guilt by courts were referred to the Attorney General by Order of the Supreme Court on December 26, 1944. 323 U.S. 821; 327 U.S. 821 (1946). The rules were then transmitted to Congress by the Attorney General on January 3, 1945, see 327 U.S. 824 (1946), and became effective on March 21, 1946. Also becoming effective on that date were additional criminal rules dealing with post-verdict procedure. These were promulgated by the Court itself on February 8th of that year, and superseded those adopted by the Court in 1934. 327 U.S. 825. Both sets of rules were integrated into a consecutively numbered code.

Despite the difference in the manner in which post-verdict rules and those dealing with all prior proceedings became effective, all the rules adopted by the Supreme Court in 1944 and 1946 were the result of a long and careful process of study. In promulgating those early rules, the Supreme Court relied heavily on the work of the Advisory Committee on Rules in Criminal Cases, a committee of eminent practitioners and legal scholars which it appointed in 1941.¹ 312 U.S. 717-18. That committee was initially charged with proposing rules for procedure prior to and including a verdict, a plea of guilty, or a finding of guilt, *id.*, but shortly after its formation the Supreme Court directed it to make recommendations for post-verdict rule changes as well. 314 U.S. 719.

The Advisory Committee on Rules in Criminal Cases met and drafted the proposed rules over a period of four years, during which time ten drafts were prepared, two of which were distributed to the Bench and Bar of the country. The evolution of the original rules over the course of the committee's study is described in L. Orfield, *Criminal Procedure Under the Federal Rules* (1966), as part of the author's analysis of each of the present rules.

The Supreme Court gave the rules recommended by the committee close attention. While it approved the bulk of the proposed rules, it refused to promulgate three of the recommended rules and made substantial changes in five others. See 1 C. Wright, *Federal Practice and Procedure* (Criminal) § 2 (1969). The rules the Court did not adopt included a rule authorizing pre-trial conferences, a rule requiring the defendant to give notice if he intended to claim an alibi, and a rule prohibiting *ex parte* communications by one counsel to the judge. It further rejected a proposal which would have allowed the government, on motion, to take the deposition of a witness in certain circumstances, although a defendant was allowed to take a deposition to prevent a failure of justice. See L. Orfield, *Criminal Procedure Under the Federal Rules* §§ 15.1-4 (1966). The Court further provided that in cases where a jury had been waived, findings of fact by a court in support of its verdict were mandatory, rather than discretionary as the committee had proposed. See Rule 23(c). The Court also rejected a proposal which would have authorized disclosure of a presentence report to the attorneys for the parties and to others with a legitimate interest. Finally, it established a time limit of two years on the making of motions for new trials based on newly discovered evidence (the proposed rule had had no time limit, while the prior Criminal Appeals Rules had allowed only sixty days), and amended one rule (now Rule 48) to require leave of the court for dismissal of a case by the government.

Through 1956 only a few amendments were made to the Criminal Rules. Most of the amendments were minor in nature and intended to conform the rules to changes in either the Criminal Code or the Rules of the Supreme Court. The single important substantive change was made to Rule 46(a) (2) in 1956. This authorized courts to grant bail to defendants during appeals of criminal convictions unless the appeal was frivolous or solely for purpose of delay. Formerly, bail had been authorized only when the appeal was found to raise a substantial question, and thus bail had been less available to the criminal appellant than it had been to the criminal defendant. See 350 U.S. 1017 (Apr. 9, 1956, effective July 8, 1956). For other minor changes in this period see 346 U.S. 941 (Apr. 12, 1954, effective July 1, 1954); 335 U.S. 949 (Dec. 27, 1948, effective Oct 20, 1949); *id.* at 917 (Dec. 27, 1948, effective Jan 1, 1949).

During these years there was no continuing study or reevaluation of the criminal rules and no substantive proposals for reform. In 1956, perhaps triggered by the Supreme Court's order discharging the standing committee which it had appointed in 1942 to make recommendations concerning rules of civil procedure, 352 U.S. 803, the legal community expressed the view that there ought to be standing committees actively engaging in a continuing study of the rules of procedure in the federal courts and making necessary recommendations.

¹ The membership of the Advisory Committee appointed by Order of the Supreme Court on February 3, 1941, is presented in Appendix 1.

In 1956 the Judicial Conference voted to recommend to the Supreme Court that the Court "revive, reconstitute and consolidate its committees on Civil and Criminal Rules." *Annual Report of the Proceedings of the Judicial Conference of the United States* 35 (1956). The Judicial Conference, created by statute, consists of twenty-five federal judges; the Chief Justice of the Supreme Court, the chief judge of each judicial circuit, the chief judge of the Court of Claims, the chief judge of the Court of Customs and Patent Appeals, and a district judge chosen from each judicial circuit. 28 U.S.C. § 331.

In 1957 the Judicial Conference approved a draft of a bill, which it recommended to Congress, providing that "the Judicial Conference of the United States, acting with the approval of the Supreme Court, shall have the rule-making power now vested solely in the Supreme Court" with respect to the general rules of practice and procedure prescribed for use in the courts of the United States. *Annual Report of the Proceedings of the Judicial Conference of the United States* 7-8 (1957). The Conference referred the problem of devising procedures for the implementation of such a proposal, should it be adopted, to its Committees on Court Administration and Revision of the Laws.

In 1958 Congress amended what is now 28 U.S.C. § 331, as recommended by the Judicial Conference, to provide for ongoing study of the rules of practice and procedure by the Conference and to authorize the Conference to submit proposed rule changes to the Supreme Court. Act of July 11, 1958, Pub. L. 85-513, 72 Stat. 356.

To carry out the duties imposed by this statute, the Judicial Conference established the Standing Committee on Rules of Practice and Procedure, and authorized the Chief Justice of the Supreme Court to appoint its members from throughout the legal community. Thus its members may consist of federal and state judges, private practitioners, government officials and other legal scholars. From its inception in 1960 until October 1, 1973, the Standing Committee was chaired by Judge Albert B. Maris of the Court of Appeals for the Third Circuit. Upon the retirement of Judge Maris, Judge Roszel C. Thomsen of the District Court for the District of Maryland was appointed chairman.²

To further assist in the process of rule-making, the Conference authorized the Chief Justice to appoint five Advisory Committees, also from throughout the legal community, to make an ongoing study of the operation of the various rules and to report to the Standing Committee on Rules of Practice and Procedure. The Advisory Committee on Criminal Rules, of which I am now Chairman, was one of these committees.

The first Advisory Committee on Criminal Rules was established by Chief Justice Earl Warren in 1960. The committee was chaired by Circuit Judge John C. Pickett of the Tenth Circuit, and was composed of two federal district judges, four private practitioners of long experience in the field of criminal law, three law professors, and the then Deputy Attorney General of the United States.³

The first series of amendments to the criminal rules formulated under the procedure adopted pursuant to 28 U.S.C. § 331 were approved by the Supreme Court on February 28, 1966, and became effective on July 1st of that year. 383 U.S. 1087 (Justices Black and Douglas dissenting). They were largely the product of extensive deliberations by the Advisory Committee between 1960 and 1965, and later by the Standing Committee and the Judicial Conference. As part of the process of making recommendations, the Advisory Committee circulated preliminary drafts of the proposed amendments in both 1962 and 1964 to the legal community. As a result of such publication and the comments received, the committee revised a number of its proposals and formulated amendments to still other rules. See *Annual Report of the Proceedings of the Judicial Conference of the United States* 23 (1964).

When the revised proposals were referred to the Standing Committee on Rules of Practice and Procedure, most were adopted. That committee, however, decided not to approve several changes, including one amendment, substantially similar to proposed Rule 12.2 now before Congress, which would have required a defendant to give notice of his intent to raise the defense of insanity. Another amendment which the Standing Committee rejected would have permitted the government the right to take depositions of witnesses for the same reasons as defendants. See *Annual Report of the Proceedings of the Judicial Conference of the United States* 53 (1965). The Judicial Conference approved the changes recommended by the Standing Committee, as did the Supreme Court.

² The current members of the committee are listed in Appendix 2.

³ The original membership of this committee is listed in Appendix 3.

The proposals finally adopted included two new rules dealing with pretrial conferences (Rule 17.1) and judicial notice of foreign law (Rule 26.1). They also authorized broader discovery rights for the defendant, together with limited rights of discovery in the government in certain cases as a condition of the award of discovery to the defendant (Rule 16). In addition, indigent defendants were permitted to secure subpoenas for witnesses at government expenses would necessary, without disclosing to the government what those witnesses would say. Procedures were adopted to help assure that a defendant would not inadvertently lose his opportunity to appeal. And provisions dealing with venue in criminal cases were also substantially broadened. The 1966 amendments affected 31 of the rules in all, although many of the changes were not of such a substantive nature.

The Advisory Committee, with some changes in its membership, continued its study of the criminal rules as intended by the Judicial Conference. Further amendments to the rules were made by Order of the Supreme Court dated December 4, 1967, 389 U.S. 1125. These became effective July 1, 1968, together with the new Federal Rules of Appellate Procedure. *Id.* These changes in Criminal Rules were largely to accommodate adoption of the separate Rules of Appellate Procedure. Additional minor changes were adopted in 1971. *See* Order of the Supreme Court, 401 U.S. 1025 (Mar. 1, 1971, effective July 1, 1971).

DEVELOPMENT OF THE PRESENT PROPOSALS TO AMEND THE CRIMINAL RULES

In January 1970 and April 1971 the Advisory Committee circulated 5,000 copies of two drafts of further proposed amendments to the criminal rules. The drafts were distributed on as wide a basis as the committee had been able to devise, including Bar Associations, law schools, and, of course, all federal judges. These drafts were also printed by the West Publishing Company at 48 F.R.D. 547 and 52 F.R.D. 409.

In part these drafts contained many changes to conform the existing rules to statutory changes. Such minor amendments were later sent to the Standing Committee, along with other amendments to the rules, but were then forwarded to the Judicial Conference ahead of more substantive proposals. They became effective in 1972 after Supreme Court approval and transmittal to Congress. *See* 406 U.S. 979 (Apr. 24, 1972, effective Oct. 1, 1972). *See also Annual Report of the Proceedings of the Judicial Conference of the United States* 22 (Apr. 1972). The one important change adopted at this time involved Rule 50(b) requiring each district court to prepare a plan for the prompt disposition of criminal cases. This particular proposal had been separately published to the legal community in March 1971, and handled on an expedited basis.

On May 10, 1971, Chief Justice Burger substantially reconstituted the Advisory Committee on Criminal Rules which was to continue the work on the proposals published in 1970 and 1971. It was at that time that I was named Chairman.

Associated with me on this committee today are three circuit judges, Wade H. McCree, Jr., of the Sixth Circuit, who was previously a district court judge, Roger Robb of the District of Columbia Circuit, and William H. Webster, now of the Eighth Circuit, who previously has served as both a district court judge and a United States Attorney; four district court judges, Walter E. Hoffman of the Eastern District of Virginia and a member of the original committee; Chief Judge Russell E. Smith of the District of Montana, Gerhard A. Gesell of the District of Columbia, and Leland C. Nielsen of the Southern District of California and a former judge of the California State Court system; R. Ammi Cutter, retired Associate Justice of the Supreme Judicial Court of Massachusetts; Joseph Weintraub, former Chief Justice of the Supreme Court of New Jersey; Henry E. Petersen, Assistant Attorney General in charge of the Criminal Division of the Department of Justice; James Vorenberg, a professor of law at Harvard and a former head of the Office of Criminal Justice of the Department of Justice; Chester Bedell, a private practitioner of Jacksonville, Florida, who was formerly associated with me in the American Bar Association project in Standards for Criminal Justice; Robert S. Erdahl, for many years head of the Appellate Section of the Criminal Division of the Department of Justice; Terence F. MacCarthy, head of the Federal Defender Program, Inc. for the Northern District of Illinois; and William B. West, III, now an attorney from Dallas, Texas, and formerly a United States Attorney. Professor Frank J. Remington, a professor of law at the University of Wisconsin, a member of the original com-

mittee, has been Reporter for the committee, and associated with him is Professor Wayne LaFave of the University of Illinois.

The reconstituted Advisory Committee promptly addressed itself to the proposed drafts circulated in 1970 and 1971 and to the comments which the committee was receiving from the legal community. The comments which were received are in the files of William E. Foley, the Secretary of the Standing Committee on Rules of Practice and Procedure, and are available for examination. The names of those who submitted comments are contained in Appendix 4 to this Statement.

The proposed changes were before the legal community for over a year. Comments, when received, were transmitted to the members of the Advisory Committee and to its reporters. The latter made a detailed analysis of the comments and further their own commentary for the benefit of the Advisory Committee.

The committee met three times in two-day sessions to reconsider these proposed rule changes. Meetings were held on September 24-25, 1971, January 14-15, 1972, and September 6-7, 1972.

The comments which the committee received, as well as the fresh viewpoint of the new committee members not involved in the preparation of the 1970 and 1971 drafts resulted in a number of substantial changes in the proposed rules. For example, the committee eliminated an earlier attempt to expand on the meaning of probable cause in Rule 4 as a result of the unfavorable response it had received. Minutes of September 24-25, 1971, at 3. With regard to proposed Rule 32.2, dealing with presentence reports, the Committee decided that the recommendations of parole officers for the sentencing of defendants should not be disclosed to defendants or their counsel and amended the proposed rule to that effect. It further adopted language suggested by the Department of Justice to restrict disclosure of a presentence report, or parts thereof, containing opinions which, if disclosed, might disrupt a rehabilitative program, or when disclosure of the report might compromise sources of information obtained upon a promise of confidentiality or might result in harm, physical or otherwise, to the defendant or others. *Id.* at 13-14. The Advisory Committee disapproved a proposed amendment to Rule 48 which would have granted the court authority to dismiss a case where it would "serve the ends of justice and the effective administration of the court's business." *Id.* at 16-17.

These changes are cited merely as examples of the revisions which resulted from the Advisory Committee's reconsideration of the proposed amendments.

It is also important to emphasize that the criticisms recently received by the House subcommittee and directed at certain of the proposed amendments were in substance before the Advisory Committee and were carefully considered during its deliberations.

For example, at the meeting on September 24, 1971, an attorney of the Department of Justice argued that the magistrate's power to issue a summons rather than a warrant should not be expanded as was contemplated by Rule 4. However, the judges on the committee were unanimous that a magistrate should have the authority to issue a summons in an appropriate case despite a prosecutor's mere assertion that a warrant should issue. Minutes of September 24-25, 1971, at 5. See also Frankel, *Bench Warrants Upon the Prosecutor's Demand: A View From the Bench*, 71 Colum. L. Rev. 403 (1971).

Similarly, at the meetings on January 14-15, 1972, the question of plea bargaining was extensively considered. Minutes of January 14-15, 1972, at 20-24. The committee had received a wide range of comments on that rule, both critical and favorable. These comments were carefully considered. Among the committee members were a number of experienced, active and former district court judges who contributed extensively to the shaping of the present proposed rule.

After the second meeting of the Advisory Committee to revise these proposals, I appointed an Editorial Committee with instructions to meet to put the proposals decided upon into final form for submission to the Standing Committee. It was at this point that the Standing Committee passed on to the Judicial Conference the minor changes approved subsequently by the Conference and the Supreme Court, 406 U.S. 979 (1972). However, the Standing Committee returned several of the substantive rule changes to the Advisory Committee for reconsideration, while continuing to study the remainder. Advisory Committee Minutes of September 6-7, 1972, at 5. Among the rules reconsidered

at the Advisory Committee's meeting in September 1972 were those dealing with plea bargaining and nontestimonial identification. The Advisory Committee, after making some changes to certain of the rules, resubmitted them to the Standing Committee.

The Standing Committee on Rules of Practice and Procedure considered the proposed amendments and finally approved all but one for transmission to the Judicial Conference. That rule, Proposed Rule 41.1, dealt with nontestimonial identification both before and after arrest. The Standing Committee felt the proposed rule required still further study. *Annual Report of the Proceedings of the Judicial Conference of the United States* 46-47 (Oct. 26-27, 1972).

Upon that committee's approval, the proposals were circulated to members of the Judicial Conference at least two weeks prior to their meeting in October 1972. The Conference approved the proposals and transmitted them to the Supreme Court. Upon that Court's approval, 42 U.S.L.W. 4551 (U.S., Apr. 22, 1974) (Douglas, J., dissenting), the proposed amendments were transmitted to Congress.

I should note that the Advisory Committee's studies have also resulted in a published preliminary draft of still additional amendments to the Criminal Rules, as well as proposed rules governing habeas corpus and section 2255 proceedings. One primary area of concern here is an amendment of Rule 35 of the Rules of Criminal Procedure to establish a procedure whereby a panel of district court judges would review sentences in certain criminal cases.

Furthermore, the Advisory Committee, in line with its duties, is in constant receipt of suggestions as to matters for study relating to criminal procedure. Chief among the subjects of importance which we have begun to study but regarding which we have not yet formed any proposals, is the grand jury system.

APPENDIX 1

The members of the Advisory Committee on Rules in Criminal Cases, appointed in 1941, were:

Arthur T. Vanderbilt, Newark, N.J., Chairman.

James J. Robinson, Professor of Law, Indiana Univ. Law School, Reporter.

Alexander Holtzoff, Washington, D.C., Secretary.

Newman F. Baker, Professor of Law, Northwestern Univ. Law School.

George James Burke, Ann Arbor, Mich.

John J. Burns, Boston, Mass.

Frederick E. Crane, New York, N.Y.

Gordon Dean, Washington, D.C.

George H. Dession, Professor of Law, Yale Law School.

Sheldon Glueck, Professor of Law, Harvard Law School.

George Z. Medalie, New York, N.Y.

Lester B. Orfield, Professor of Law, Univ. of Nebraska Law School.

Murray Seasongood, Cincinnati, Ohio.

J. O. Seth, Santa Fe, New Mexico.

John B. Waite, Professor of Law, Univ. of Michigan Law School.

Herbert Wechsler, Professor of Law, Columbia Law School.

G. Aaron Youngquist, Minneapolis, Minn.

George F. Longsdorf, Oakland, Calif., was appointed by order of May 26,

1941, 313 U.S. 602, to fill the place of the deceased Newman F. Baker,

Hugh D. McLellan of Boston, Mass. was appointed in 1947.

APPENDIX 2

Current members of the Standing Committee on Rules of Practice and Procedure are as follows:

Judge Roszel C. Thomson of the District of Maryland, Chairman.

Judge Carl McGowan of the District of Columbia Circuit.

Judge Charles W. Joiner of the Eastern District of Michigan.

Chief Judge Frank W. Wilson of the Eastern District of Tennessee.

Richard E. Kyle.

James W. Moore.

Bernard G. Segal.

Charles A. Wright.

APPENDIX 3

The members of the Advisory Committee on Criminal Rules appointed by Chief Justice Warren in 1960 were as follows:

John John C. Pickett of the Court of Appeals of the Tenth Circuit, Chairman.

Judge Walter E. Hoffman of the Eastern District of Virginia.

Judge William F. Smith of the District of New Jersey.

Joseph A. Ball, Long Beach, California.

George R. Blue, New Orleans, Louisiana.

Abe Fortas, Washington, D.C.

Thomas D. McBride, Philadelphia, Pennsylvania.

Professor Sheldon Glueck, Harvard Law School.

Professor Maynard Pirsig, University of Minnesota.

Professor Frank J. Remington, University of Wisconsin Law School.

Deputy Attorney General of the United States Lawrence E. Walsh.

The Reporter for the committee was Edward L. Barrett, Jr., Professor and later Dean of the School of Law of the University of California at Davis.

In 1969 Judge Pickett retired from the committee and was succeeded by Judge Alfonso J. Zirpoli of the Northern District of California.

APPENDIX 4

Comments Received on the Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure Dated January 1970

RULE 4. ARREST WARRANT OR SUMMONS UPON COMPLAINT

Honorable Bailey F. Rankin, magistrate, Northern District of Texas.

John P. Burke, attorney, District of Columbia.

Association of the Bar of the City of New York.

ABA Special Committee on Federal Rules of Procedure.

Department of Justice.

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION. (A) ISSUANCE

Honorable Marvin E. Frankel, judge, Southern District of New York.

Honorable Bailey F. Rankin, magistrate, Northern District of Texas.

E. E. Greenon, Clerk, District of New Mexico.

Association of the Bar of the City of New York.

ABA Special Committee on Federal Rules of Procedure.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

Honorable Jack B. Weinstein, judge, Eastern District of New York.

Association of the Bar of the City of New York.

ABA Special Committee on Federal Rules of Procedure.

Department of Justice.

RULE 16. DISCOVERY AND INSPECTION

Honorable Jack B. Weinstein, judge, Eastern District of New York.

Mitch Bernstein, Yale Law School.

Ronald E. Bensten, Yale Law School.

Jerry E. Nathan, Yale Law School.

Robert B. Mann, Yale Law School.

Alan Meisel, Yale Law School.

David Parker, Yale Law School.

David S. Golub, Yale Law School.

Martin Frederic Evans, Yale Law School.

Hillary Redham, Yale Law School.

W. Lawrence Hollar, Yale Law School.

Paul R. Rice, Yale Law School.

Ernest J. Isenstedt, Yale Law School.

Priscilla S. Burnham, Yale Law School.

Michael Fargione, Yale Law School.

Steven S. Honigman, Yale Law School.

M. Martha Hartle, Yale Law School.

Jorge C. Aguiniga, Yale Law School.

Kenneth M. Glazier, Yale Law School.
 Jeffrey L. Rogers, Yale Law School.
 William J. Clinton, Yale Law School.
 Joseph C. Williams, III, Yale Law School.
 Barbara Schlain, Yale Law School.
 Bruce A. Morrison, Yale Law School.
 Anthony M. Paul, Yale Law School.
 James N. Nowacki, Yale Law School.
 Judith Harris, Yale Law School.
 Kristine Olson Rogers, Yale Law School.
 Michael Devorkin, Yale Law School.
 Edgar L. Taplin, Yale Law School.
 Robert Gellman, Yale Law School.
 Roger W. Fonseca, Yale Law School.
 David M. Cohen, Yale Law School.
 Kathy Doggett, Yale Law School.
 S. Mark Tuller, Yale Law School.
 Thomas R. Bennett, Yale Law School.
 James C. Rawls, Yale Law School.
 George E. Henderson, Yale Law School.
 Philip C. Gans, Yale Law School.
 John J. Cleary, attorney, Chicago, Illinois.
 Robert R. Kaplan, Articles Editor, William & Mary Law Review.
 Stephen K. Lester, assistant U.S. Attorney, District of Kansas.
 Honorable Edward Dumbauld, judge, Western District of Pennsylvania.
 Steven M. Kipperman, attorney, San Francisco, Calif.
 William G. Hollingsworth, attorney, New Haven, Conn.
 Association of the Bar of the City of New York.
 ABA Committee on Civil & Criminal Tax Penalties of the Section of Taxation.
 ABA Special Committee on Federal Rules of Procedure.
 Department of Justice.
 National District Attorneys Association, Chicago, Ill.

RULE 29.1. CLOSING ARGUMENT IN JURY CASES

Honorable Jack B. Weinstein, judge, Eastern District of New York.
 Honorable Edward Dumbauld, judge, Western District of Pennsylvania.
 Association of the Bar of the City of New York.
 ABA Special Committee on Federal Rules of Procedure.

GENERAL COMMENTS

Professor Lester B. Orfield, Minneapolis, Minn.
 Comments Received on the Preliminary Draft of Proposed Amendments to the
 Federal Rules of Criminal Procedure for the United States District Courts and
 the Federal Rules of Appellate Procedure dated April 1971

RULE 11. PLEAS

Honorable Allen E. Barrow, Chief Judge, Northern District of Oklahoma.
 Honorable Jacob Mishler, Chief Judge, Eastern District of New York.
 Honorable Philip Neville, judge, District of Minnesota.
 Honorable Bruce R. Thompson, judge, District of Nevada.
 Honorable James A. von der Heydt, judge, District of Alaska.
 Honorable Bailey Brown, Chief Judge, Western District of Tennessee.
 Honorable Howard V. Doherty, magistrate, Western District of Washington.
 Honorable Philip C. Elliott, circuit judge, Seventh Judicial Circuit of Michigan.
 Honorable Jean S. Breitenstein, judge, Tenth Circuit Court of Appeals.
 Honorable Murray I. Gurfein, judge, Southern District of New York.
 Honorable Wesley E. Brown, Chief Judge, District of Kansas.
 Honorable Arthur J. Stanley, Jr., Honorable George Templar, Honorable Frank
 G. Theis, Honorable Earl E. O'Connor, judges, District of Kansas.
 Honorable Luther Bohanon, Chief Judge, Western District of Oklahoma.
 Honorable H. Vearle Payne, Chief Judge, District of New Mexico.
 Honorable Robert L. Taylor, judge, Eastern District of Tennessee.
 Honorable Ewing T. Kerr, judge, District of Wyoming.
 Honorable Ben C. Connally, Chief Judge, Southern District of Texas.

Honorable Joe Ewing Estes, senior judge, Northern District of Texas.
 Honorable Alfred A. Arraj, Chief Judge, District of Colorado.
 Honorable Olin Hatfield Chilson, Honorable Fred M. Winner, Honorable Sherman G. Finesilver, judges, District of Colorado.
 Messrs. David Alkire, David Cohen, and Dennis E. Curtis, attorneys, Jerome N. Frank Legal Services Organization of Yale Law School.
 William Knapp, attorney, New York, New York.
 Neil H. Cogan, attorney, New York, New York.
 David B. Byrne, Jr., former Assistant U.S. Attorney, Middle District of Alabama.
 Federal Bar Association.
 Department of Justice.
 Committee of the American College of Trial Lawyers.
 Association of the Bar of the City of New York.
 Committee on Trial Practice and Technique of the Second Circuit.
 Ad Hoc Committee of the ABA.

RULE 12.1. NOTICE OF ALIBI

Honorable Jacob Mishler, Chief Judge, Eastern District of New York.
 Honorable Winston E. Arnow, Chief Judge, Northern District of Florida.
 David B. Byrne, Jr., former Assistant U.S. Attorney, Middle District of Alabama.
 Federal Bar Association.
 Department of Justice.
 Association of the Bar of the City of New York.
 Committee on Trial Practice and Technique of the Second Circuit.
 Ad Hoc Committee of the ABA.

RULE 12.2. NOTICE OF INSANITY

Honorable Jacob Mishler, Chief Judge, Eastern District of New York.
 Honorable A. Sherman Christensen, senior judge, District of Utah.
 Honorable Winston E. Arnow, Chief Judge, Northern District of Florida.
 David B. Byrne, Jr., former Assistant U.S. Attorney, Middle District of Alabama.
 Federal Bar Association.
 Department of Justice.
 Association of the Bar of the City of New York.
 Committee on Trial Practice and Technique of the Second Circuit.
 Ad Hoc Committee of the ABA.

RULE 15. DEPOSITIONS

Honorable Jacob Mishler, Chief Judge, Eastern District of New York.
 Honorable Joseph F. Weis, Jr., judge, Western District of Pennsylvania.
 Honorable Bruce R. Thompson, judge, District of Nevada.
 Honorable Winston E. Arnow, Chief Judge, Northern District of Florida.
 Professor Dallin H. Oaks, University of Chicago.
 David B. Byrne, Jr., former Assistant U.S. Attorney, Middle District of Alabama.
 Federal Bar Association.
 Department of Justice.
 Association of the Bar of the City of New York.
 Committee on Trial Practice and Technique of the Second Circuit.
 Ad Hoc Committee of the ABA.

RULE 17. SUBPOENA. (F) (2) PLACE

Federal Bar Association.
 Committee of the American College of Trial Lawyers.
 Association of the Bar of the City of New York.
 Committee on Trial Practice and Technique of the Second Circuit.

RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

Henry H. Hammond, Assistant U.S. Attorney, District of Massachusetts.
 Paul R. Schlitz, Clerk, District of Maryland.
 Federal Bar Association.
 Department of Justice.
 Association of the Bar of the City of New York.
 Committee on Trial Practice and Technique of the Second Circuit.

RULE 32. SENTENCE AND JUDGMENT. (A) SENTENCE

Honorable Jack B. Weinstein, judge, Eastern District of New York.
 Honorable Wesley E. Brown, Chief Judge, District of Kansas.
 Honorable Arthur J. Stanley, Jr., Honorable George Templar, Honorable Frank G. Theis, Honorable Earl E. O'Connor, judges, District of Kansas.
 Honorable Robert L. Taylor, judge, Eastern District of Tennessee.
 Neil H. Cogan, attorney, New York, N.Y.
 Federal Bar Association.
 Association of the Bar of the City of New York.
 Committee on Trial Practice and Technique of the Second Circuit.
 Ad Hoc Committee of the ABA.

(C) PRESENTENCE INVESTIGATION

Honorable Jacob Mishler, Chief Judge, Eastern District of New York.
 Honorable Philip Neville, judge, District of Minnesota.
 Honorable Murray I. Gurfein, judge, Southern District of New York.
 Honorable Ben C. Connally, Chief Judge, Southern District of Texas.
 Honorable Joe Ewing Estes, senior judge, Northern District of Texas.
 Committee on the Administration of the Probation System of the Judicial Conference.
 Committee on Trial Practice and Technique of the Second Circuit.

RULE 43. PRESENCE OF THE DEFENDANT

Honorable Philip Neville, judge, District of Minnesota.
 Honorable Jack B. Weinstein, judge, Eastern District of New York.
 David B. Byrne, Jr., former Assistant U.S. Attorney, Middle District of Alabama.
 Federal Bar Association.
 Department of Justice.
 Association of the Bar of the City of New York.
 Committee on Trial Practice and Technique of the Second Circuit.
 Ad Hoc Committee of the ABA.

GENERAL COMMENTS

Honorable Albert V. Bryan, judge, Fourth Circuit Court of Appeals.
 Honorable Harlan Hobart Grooms, judge, Northern District of Alabama.
 Honorable Bryan Simpson, judge, Fifth Circuit Court of Appeals.
 Honorable Edward J. McManus, Chief Judge, Northern District of Iowa.

Comments sent to the Subcommittee on Criminal Justice of the House Judiciary Committee regarding proposed amendments to the Federal Rules of Criminal Procedure for the United States District Courts dated January 1970

RULE 4. ARREST WARRANT OR SUMMONS UPON COMPLAINT

Honorable Frank L. Nebeker, judge, District of Columbia Court of Appeals.
 Department of Justice.
 U.S. Attorney's Office, Southern District of New York.
 Bar Association of the District of Columbia.
 Public Defender Service for the District of Columbia.

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION. (A) ISSUANCE

Bar Association of the District of Columbia.
 Public Defender Service for the District of Columbia.
 U.S. Attorney's Office, Southern District of New York.

RULE 12. PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

John C. Randall, attorney, Durham, North Carolina.
 Department of Justice.
 Bar Association of the District of Columbia.
 Public Defender Service for the District of Columbia.

RULE 16. DISCOVERY AND INSPECTION

Honorable C. Stanley Blair, judge, District of Maryland.
 Honorable Louis Rosenberg, judge, Western District of Pennsylvania.
 Congressman Charles B. Rangel, New York.
 John C. Randall, attorney, Durham, North Carolina.
 Public Defender Service for the District of Columbia.
 Department of Justice.
 American Civil Liberties Union.
 U.S. Attorney's Office, Southern District of New York.
 Bar Association of the District of Columbia.

RULE 29.1. CLOSING ARGUMENT IN JURY CASES

Honorable Mitchell M. Cohen, judge, District of New Jersey.
 John C. Randall, attorney, Durham, North Carolina.
 U.S. Attorney's Office, Southern District of New York.

Comments sent to the Subcommittee on Criminal Justice of the House Judiciary Committee regarding proposed amendments to the Federal Rules of Criminal Procedure for the United States District Courts dated April 1971

RULE 11. PLEAS

Honorable Ben C. Connally, Chief Judge, Southern District of Texas.
 Honorable Adrian A. Spears, judge, Western District of Texas.
 Honorable Harrison L. Winter, judge, Fourth Circuit Court of Appeals.
 Honorable John R. Bartels, judge, Eastern District of New York.
 Honorable Frank L. Nebeker, judge, District of Columbia Circuit.
 Honorable J. Braxton Craven, Jr., judge, Fourth Circuit Court of Appeals.
 Honorable C. Stanley Blair, judge, District of Maryland.
 Honorable E. Gordon West, judge, Middle District of Louisiana.
 Honorable Louis Rosenberg, judge, Western District of Pennsylvania.
 Honorable Edward J. McManus, judge, Northern District of Iowa.
 Honorable James Noel, judge, Southern District of Texas.
 Honorable James R. Miller, Jr., judge, District of Maryland.
 Department of Justice.
 American Civil Liberties Union.
 U.S. Attorney's Office, Southern District of New York.
 Bar Association of the District of Columbia.
 Public Defender Service of the District of Columbia.
 Honorable John K. Began, judge, Eastern District of Missouri.

RULE 12.1. NOTICE OF ALIBI

Honorable Mitchell H. Cohen, Chief Judge, District of New Jersey.
 Department of Justice.
 U.S. Attorney's Office, Southern District of New York.
 Public Defender Service for the District of Columbia.
 Bar Association of the District of Columbia.
 American Civil Liberties Union.

RULE 12.2. NOTICE OF INSANITY

Department of Justice.
 Public Defender Service for the District of Columbia.
 Bar Association of the District of Columbia.

RULE 15. DEPOSITIONS

Edward B. Almon, attorney, Denver, Colorado.
 Department of Justice.
 Bar Association of the District of Columbia.
 Public Defender Service for the District of Columbia.

RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

Department of Justice.

RULE 32. SENTENCE AND JUDGMENT. (A) SENTENCE

Honorable Edward Dumbauld, judge, Western District of Pennsylvania.
Bar Association of the District of Columbia.

(C) PRESENTENCE INVESTIGATION

Honorable Ben C. Connally, Chief Judge, Southern District of Texas.
Honorable Louis Rosenberg, judge, Western District of Pennsylvania.
Public Defender Service for the District of Columbia.

RULE 43. PRESENCE OF THE DEFENDANT

Department of Justice.
Public Defender Service for the District of Columbia.

GENERAL COMMENTS

Honorable Robert E. Maxwell, judge, Northern District of West Virginia.
Honorable Clement F. Haynsworth, Jr., judge, Fourth Circuit Court of Appeals.
Honorable Edwin F. Hunter, Jr., judge, Western District of Louisiana.
Honorable Harold H. Greene, judge, Superior Court of the District of Columbia.
Honorable Wallace S. Gourley, judge, Western District of Pennsylvania.
Honorable Edward J. Schwartz, judge, Southern District of California.
National Legal Aid and Defender Association.

Mr. HUNGATE. Thank you.

On behalf of the committee, I thank all of you. We certainly appreciate your work and the continuing effort to improve the administration of justice. I think it is a worthwhile endeavor.

I have a few questions here based on some of the comments we have had sent to us dealing with plea agreements, or plea bargaining. When the prosecution and defense agree on a plea of guilty and a specific sentence, the court may impose this or a lesser sentence. However, if the court wishes to impose a more severe sentence, it must offer the defendant an opportunity to withdraw the guilty plea. We have received some comments that this procedure actually shifts some of the sentencing power to the U.S. attorney and his assistants, who do not have the benefit of the presentence report, and who do not have the experience of the judges. Further, a U.S. attorney in a metropolitan area would not have the time personally to review the plea agreement, except superficially, resulting in inexperienced assistants making sentencing decisions.

I am sure this is not the first time you have heard this argument.

Judge LUMBARD. We think this matter is governed largely by the discretion of the trial judge. And I would like to have Judge Webster, who was U.S. attorney and district judge prior to becoming a circuit judge, and is thoroughly familiar with how this system works, comment on this.

Judge WEBSTER. Mr. Chairman, I believe that you have summarized the major comments that have been tendered and which are reproduced in the House commentary on the proposed amendments. I do not have a formal statement to submit. I am here to answer your questions. I did submit to the chairman a letter dated July 29, 1974, which reflects my views in a more orderly way than I may present them to you this morning. And I would request that the letter be made a part of the record.

Mr. SMITH [now presiding]. Judge, we have your letter, and without objection, it will be made a part of the record.

Judge WEBSTER. Thank you, Congressman.
 [The letter referred to follows:]

U.S. COURT OF APPEALS, EIGHTH CIRCUIT,
 St. Louis, Mo., July 29, 1974.

HON. WILLIAM L. HUNGATE, M.C.,
 Chairman, Subcommittee on Criminal Justice, Committee on the Judiciary,
 House of Representatives, Washington, D.C.

DEAR BILL: I very much appreciate your letter of July 18, enclosing a copy of the House document reprinting letters of commentary about the proposed amendments to the Federal Rules of Criminal Procedure. I had hoped to have an opportunity to discuss the proposed rules with you at the Eighth Circuit Conference. We were all disappointed that the press of public business made it impossible for you to attend this year, as you are a very valued member of the Conference.

I am a member of the Advisory Committee on Federal Rules of Criminal Procedure, and as such had an opportunity to watch the evolution of the proposed rules into the form submitted to and approved by the Standing Committee on Rules of Practice and Procedure, the Judicial Conference of the United States, and ultimately the Supreme Court. The rules are now in your hands, and I can well understand your extending the time for consideration until August 1, 1975, both in terms of the content of the rules and the enormous crunch of business presently before the House. I do want to say that I fully endorse the rules as submitted to you and would like to add one or two specific comments.

As you know, the proposed drafts were submitted to the bench and bar by our Committee for consideration many months before they were finally recommended for adoption. We received and considered numerous comments, many of which are substantially reiterated in the House document of commentary. Our Advisory Committee, chaired by Judge J. Edward Lumbard of the Second Circuit, is representative of district and circuit judges throughout the country and contains as well distinguished practicing lawyers, both prosecutors and defenders. We had the benefit of advice and assistance of two of the soundest and most outstanding experts on criminal jurisprudence in the country, Professor Frank Remington of Wisconsin and Professor Wayne LaFave of Illinois, not to mention Professor Vorenberg of Harvard who is a member of the Committee. In other words, I think the legitimate concerns reflected in the House document were fully considered by men of wide perspective and experience, and these recommendations were again subjected to scrutiny by the Standing Committee, the Judicial Conference and the Supreme Court. Now, of course, it's your turn.

The principal objections seem to focus upon plea bargaining (Rule 11(e)), disclosure of presentence investigations (Rule 32(c)) and liberalized discovery (Rules 15 and 16). The Advisory Committee Notes, which accompany the rules, set forth the reasons for the changes in some detail. As briefly as I can, I should like to meet head-on the principal objections raised to the above rules.

PLEA BARGAINING

Quite candidly, I don't like plea bargaining. I don't like any part of it. But the Supreme Court has recognized that it exists as a reality and has characterized it as proper under appropriate circumstances. *Santobello v. New York*, 404 U.S. 257, 260 (1971). In many urban areas, it has been going on without official sanction for a number of years, in order to relieve heavily congested dockets. I'm sure you are aware, from your own experience in St. Louis, that some state court judges have followed the recommendations of the prosecutor almost without exception.

My own concern has been that deals are being made in chambers with the judges heavily involved in the negotiating process. I think this is wrong, and I think that it subverts public confidence in the justice system. Those who are interested in the rights of the poor are legitimately concerned that those rights are being bartered away in back rooms by appointed counsel who are unwilling to put out the necessary effort to represent the client.

The Eastern District of Missouri has never had this problem. Its docket is fully current, and the judges quite properly, in my opinion, have refused to permit any form of plea bargaining other than recommendations to drop one or more of multiple counts. Other districts, however, are not so fortunate. Viewing

plea bargaining as I did, it seemed to me far more preferable to put the bargaining out in the courtroom where it belongs and to disassociate the trial judge from any part of the bargaining process. Anyone who reads Rule 11(e) with an objective eye will see that it operates to *disassociate*, rather than implicate the trial judge in the process. He is expressly prohibited from participating (he is not now prohibited). He is not bound to accept the bargain. Thus in those districts in which there is no need for plea bargaining it would be the simplest of matters for the trial judge to tell the United States Attorney that he is not interested in hearing plea bargains and that will be the end of it. On the other hand, in those districts in which plea bargaining is a necessary fact of life, this rule strengthens the integrity of the process by putting it in the open and leaving the trial judge free to accept or reject it. As one who does not like plea bargaining as it is presently practiced, I voted in favor of the rule as drafted because I believe it will curb the practices I detest and will regulate those practices sanctioned by the Supreme Court.

DISCLOSURE OF PRESENTENCE INVESTIGATIONS

A matter of increasing concern over the years has been the *ex parte* aspect of presentence investigations. These reports, prepared by the probation office, are enormously useful to the trial judge, providing they are accurate. During his trial, the defendant enjoyed the right of confrontation and the right of cross-examination. Now comes the moment of sentencing. As it presently stands, he is apt to receive a sentence based upon information which he cannot challenge because he has not seen. This has an enormous potential to undermine a defendant's view of our justice system. As soon as this rule was first proposed, I began to make presentence reports available to defense counsel (I was then on the trial bench). I had the full cooperation and support of the Chief Probation Officer. He felt that making the reports available to defense counsel would tend to keep them purged of rumor, ill-founded conclusions, etc. I want to say here that I never once encountered any problems with disclosure. The rule permits, under special circumstances, the trial judge to withhold information, provided only that he states upon the record those items upon which he relied in arriving at a sentence. I don't see how anyone can quarrel with this alternative approach. I might say also that cases are now reaching the circuit courts in which prisoners are contending in post-conviction motions that the trial court relied upon erroneous evidence which they were not allowed to see. All of this could be obviated by the new rule.

NEW RULES OF DISCOVERY

(Rules 15 and 16). I was surprised to read in the Attorney General's letter dated June 17, 1974 that the Department of Justice did not review or consider the final drafts as submitted to Congress. It was my very clear impression that Assistant Attorney General Will Wilson and thereafter Assistant Attorney General Henry Petersen were regular attendants at the Committee meetings and were accompanied by other representatives from the Department of Justice. I note from the commentaries, as was also the case in reactions to our proposed drafts, that defense counsel object to disclosure as required by Rule 15 and prosecutors object to disclosure as required by Rule 16. You will note that the new approach follows closely the approach of discovery under Federal Rules of Civil Procedure. Presently, defendants must file numerous formal motions seeking discovery to which they are clearly entitled. The court then has to consider these and either grants them or overrules them subject to a meeting with the United States Attorney for the purpose of seeing what he is willing to show. Much of this paper shuffling is eliminated in districts which are using the so-called omnibus hearing procedure. As now set up, the rules simply provides for the interested party to make the request, and the request is to be honored unless an objection is made, at which time the court becomes involved. I think this is a sensible and time-conserving approach, one consistent with the desire to expedite the trial of criminal cases.

There seems to be some objection to the disclosure of names of witnesses. It is my understanding that this is mandated in most of the states and is considered a "must" in the minimum standards of criminal justice published by the American Bar Association.

These rules left the hands of the Advisory Committee over two years ago, after more than a year of consideration. I think it is a fair statement to say that they standardized the best practices employed by district judges on an individual basis throughout the country. In the case of plea bargaining, where

the district judge has no need for this device, he is not compelled to utilize it. In the case of presentence investigations, the judge can protect his sources if he needs to, provided only that he lets the defendant know the nature of discovery. Both sides are given an equal shot at having access to the facts on an expedited basis.

I hope I have not imposed upon our friendship by such extensive remarks, but I have lived with these rules pretty closely, and I believe in them. If there is any time while you are in the district that you can spare for such purpose, I would welcome an opportunity to visit with you about the rules in person.

With high regards,

Sincerely,

WILLIAM H. WEBSTER.

Judge WEBSTER. I start where Judge Lumbard left off, and that is, the rule was designed to provide maximum flexibility and application in the discretion of the trial judge.

As I am sure you are aware, the provisions for plea agreements are contained in rule 11 which deals with pleas of guilty generally. It provides for a variety of types of plea agreements, all of which are practiced in varying degrees in different districts of the United States, depending in large part upon the degree of congestion in those courts.

First of all, it is contemplated that a plea agreement may be reached with respect to the submission of a plea to lesser offense. This is not at all uncommon in reaching dispositions in districts which are crowded and even in districts which are not crowded.

The practice of dropping counts with leave of court is a form of plea agreement. And I would say that that practice is recognized in all districts in the United States.

Other varieties include an agreement not to oppose a plea agreement or recommending a specific sentence.

These forms of plea agreement which get into the sentencing function itself generally find their appearance or presence in congested districts where the judges have come, because of the pressure on their dockets, to depend upon the U.S. attorneys to work out appropriate arrangements.

My own district, the eastern district of Missouri, is current both in civil and criminal cases. As a U.S. attorney there it was not necessary for me, nor was I encouraged, to make any recommendations at all with respect to sentence, although I was, as I believe all U.S. attorneys are allowed to do, permitted to recommend the dropping of some counts in multiple-count cases in order to achieve a plea of guilty.

I mention that simply so that I might say to you that one does not have to like plea bargaining to recognize the wisdom of this rule. And I support this rule because I believe it does one important thing. It brings the process out into the open. And second, it specifically tells the trial judge that he is not to be a part of plea agreement discussions.

I have seen situations in my experience and practice before State courts in municipal areas time and time again when the judge, the prosecutor, and the defense counsel would make deals out of the presence of the defendant, deals which were binding upon the judge himself. This rule takes into account the statement of the Supreme Court of the United States in the *Santobello* opinion in 1971 that plea bargaining is an essential component of the administration of justice, and, properly administered, it is to be encouraged. We felt in our discussions and in facing up to the problems of plea bargaining, that this type of rule would help to provide for proper administration of plea

bargaining wherever it was in fact practiced throughout the United States. It protects rather than demeans the trial judge. It does not bind the trial judge to accept the judgment of an assistant U.S. attorney. The trial judge, as the rules provide, may defer decision on a plea agreement if he even agrees to entertain one, until after he has reviewed the presentence report.

In my view, and I believe in the view of the other judges who are members of this committee, the district judge himself can determine, based upon his own sense of need and his own docket, the exact extent to which plea bargaining will be practiced in his own community. There is nothing under this rule to prevent the district judge from saying that he does not want to hear a recommendation for sentence, absolutely nothing at all.

If, on the other hand, he feels it is advisable—and some of them do—the rules permit it. But it is out in open court.

Those who are interested in seeing that a defendant is sentenced for a term, or for an amount of punishment commensurate with his offense, and, therefore, that no deals be made to shortchange the public interest are not the only ones concerned. We are also hearing in law schools and colleges and in academic circles concern for the poor who may be shortchanged by a behind-the-scenes plea agreement. They have even given it a name. It is being called "the invisible process." I suspect that you may have already seen that term, or if you have not, I know that you will hear it in the future. The invisible process refers to that part of the judicial system in the process of justice which is not out in open court. Our view is that this rule puts it out in the courtroom, it tells the judge that he is not to be a part of it, and gives him complete flexibility to determine the extent to which, in his courtroom, with his docket problems, he will entertain plea bargaining.

Having practiced as a defense lawyer and a U.S. attorney, it did not take me very long to realize that one or two mistakes in sentence recommendation will put the U.S. attorney in tune with the court as far as what kind of sentence he is going to offer, and if the trial judge does not want to entertain sentence recommendations the U.S. attorney is not going to enter into that type of plea agreement.

So in sum, the district judge has lost none of his control. It does not demean the district judge, it protects him. It puts the process out in the open, and thereby gives it some legitimacy—it gives legitimacy to a practice which will be followed whether we provide the rules or not.

Thank you, Mr. Chairman.

Mr. HUNGATE [again presiding]. What you are suggesting, I guess, Judge, is that a lawyer will very quickly learn what sort of sentences the judge accepts and does not accept.

Judge WEBSTER. Indeed, he will.

Mr. HUNGATE. If the prosecutor suggests a sentence and the judge, gives a lesser one, then the judge is "soft." If the prosecutor suggests a sentence and the judge wants a stronger one, then the judge is subject to criticism for being too harsh. But I understand if that prosecutor works with the judge very long, he will discover what sort of sentence to offer.

Judge WEBSTER. And if he is before a judge who does not want a sentence recommendation, he will not enter into that type of plea agreement.

Mr. HUNGATE. What about the contention that when prosecutors and defendants are negotiating they do not have the benefit of a presentence investigation?

Judge WEBSTER. I think that is true, Mr. Chairman. I have talked to various judges who do use plea bargaining. And they find that since the U.S. attorney at least has access to prior felony conviction records, the Hoover sheet, that the recommendations generally are not too far off. I think that there have been some suggestions that the U.S. attorney ought to take a more direct responsibility in the sentencing process rather than leaving it to the assistant U.S. attorney. And certainly he can do this within his own office control. And I suspect that if one or two assistant U.S. attorneys are burned a couple of times, that they will start to do this.

Mr. HUNGATE. Some of the public defenders urge that a provision might be added that the court could not reject a plea of guilty solely because a defendant did not admit guilt, that the admission of guilt may not be a constitutional requirement. The individual accused might voluntarily and knowingly consent to the sentence even if he is unwilling to admit his guilt.

Judge WEBSTER. I think that is covered by the *Alford* decision, Mr. Chairman. If there is a factual basis for the plea and the defendant has a legitimate and expressed purpose for wanting to plead notwithstanding his claim of innocence, it is not error for the court to accept it.

Mr. HUNGATE. Do you think that *Alford* covers it in such a way that it need not be put into the rule?

Judge WEBSTER. That is my present view, Mr. Chairman.

Professor REMINGTON. Mr. Chairman, may I just add the fact that the rule does contain a provision for the nolo plea. And the advisory committee note suggests that, for the defendant who does not wish to admit his guilt, a plea of no contest is the appropriate route. And the rule provides that the judge should accept that plea if it is in the interest of justice to do so.

Judge LUMBARD. Mr. Chairman, on the matter of plea agreements, I think I should point out that which Judge Webster intimated, that there are many districts where there are no plea agreements—for example, the southern district of New York. There are no plea agreements in the sense of an agreement on a recommendation of a particular sentence. And the U.S. attorney will not participate in such discussions, and the judges do not accept them.

Mr. HUNGATE. Mr. Smith.

Mr. SMITH. Judge Lumbard, we have a note here that as you state, in the southern district of New York they feel, several of the judges and the U.S. attorney, that a recommendation by the prosecution of a particular sentence would put pressure on the judges to accept the recommendation. And apparently, therefore, they do not do this.

Judge LUMBARD. That is one of the reasons, Mr. Smith. But it has been done. When I became U.S. attorney in 1953 I put an end to the practice of making plea agreements and making recommendations to the court. And there have been none since that time.

Mr. SMITH. But Judge Lumbard, you are of the opinion, with the Judicial Conference, that it is a good idea to have a standard procedure and bring it out into the open?

Judge LUMBARD. I am. And in those districts where the U.S. attorneys and the judges are willing to engage in the practice, it seems to me that is a matter properly within their discretion. And what the rule attempts to do is to provide the procedure so that it is all laid out, and largely so that the defendant himself knows about it and the court is assured that the defendant knows exactly what has happened, and why, and laying it all out on the record in that way as the rule would require means that the defendant cannot at a later time in some postconviction proceeding, claim that he did not know what was going on, and that he was not fairly treated.

Mr. SMITH. It sounds like a good idea to me.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Any of you who wish may address himself to this.

What happens to the theory, if you have all this done in open court, what happens to the theory that you do not accept a plea of guilty of a man who claims he is not guilty, and here he comes in and says he is going to plead guilty under this agreement, and the judge says, well—all this is in open court—and the judge says, I do not accept this agreement, and the man says in that case, I change my plea, I am not guilty, and all this is in open court and in the newspaper, and before the court which is going to try the case? And what happens to the idea that the man is innocent unless he is really guilty, that you do not accept a plea if the man claims he is innocent, and then he can backtrack and say he is guilty one minute and innocent the next, according to whether the agreement is carried out, and this is all spread in the record and spread in the newspapers, and you go to trial with that background? That bothers me a little. I am not sure whether this open court business is good or bad.

Judge LUMBARD. Of course, if the situation is as doubtful as what you have described, the judge would be well advised not to take the plea and require that the case go to trial.

Mr. DENNIS. I agree. But it still seems to me a little odd to write up a record of that kind and spread it on the public view. What happens to the presumption of innocence? Here the judge knows the fellow was ready to plead guilty to something, and everybody else in town knows it, too.

Judge LUMBARD. Well, the presumption of innocence is something the defendant, advised by his counsel, can always waive. And as you know, he most frequently does, because 82 percent of the convictions in the Federal system are by plea of guilty.

Mr. DENNIS. I am just wondering if an informal handling of this thing—not with the exclusion of the defendant or his counsel, but the way I always participated in it, the defense counsel talked with the prosecuting attorney and he talked with the defense counsel, and you got to a tentative agreement and then you went in together and talked to the court, and you never got a promise from the court as to what he was going to do, that was understood, but you got a fairly good idea. And usually most judges were decent enough to intimate that they did not think this was very good, if they did not. And if they did not, you went back and told your client; I do not think the court is going to go along with this; do you want to do it or not? All this was done privately, as you say, informally, but you did not spread on the record

this business of saying you are guilty if you can get what you want and not guilty if you cannot, and I just wonder whether it is an improvement or is not.

Judge LUMBARD. I do not think much of the backing and filling gets on the record. Of course, that has to go on before the parties are in agreement. I think Judge Webster's programs—

Mr. DENNIS. I am not really arguing, I just want to know what you fellows think about it.

Mr. HUNGATE. Mr. Smith and I have to go to testify in the Senate. Mr. Dennis, will you take the chair?

I would suggest that you go ahead with other witnesses until we return. I have a number of questions for this panel, so if you should be done before we return, I would like to ask this panel to return this afternoon.

Would 1 o'clock be a reasonable time?

Mr. DENNIS. That is what I wanted to know.

Mr. HUNGATE. This is the group that is the laboring oar in producing the proposed amendments.

Mr. DENNIS. And then if we adjourn at noon you want to reconvene at 1 o'clock?

Mr. HUNGATE. And have this group return. We will get back before noon if we can. We are answering a Senate summons.

Mr. DENNIS [now presiding]. Go right ahead, Judge.

Judge WEBSTER. If I may respond, Mr. Chairman; first, I think it might be good to point out that these are already being filed in the district courts, both State and Federal cases, today based on the challenge that a promise made privately, an understanding with the judge, a promise by the trial court, a prosecutor, or a combination of the two was broken. This rule attempts to put those agreements out in front so that the court can ascertain in open court what agreements, if any, exist, and what promises, if any, were made, what threats, what understandings exist. And I think that this will go a long way to cutting down on some of the habeas corpus petitions that we are getting out of the prisons these days, based upon allegations of private deals. So that is a partial answer to your question.

Another partial answer to your question, it seems to me, is that the trial judge must, in taking a plea of guilty, have a factual basis for accepting the plea. And I think that problem is present in every case where a plea of guilty is offered and there is any backing or filling at all. So I do not think that the adoption of rule 11 will aggravate that problem. It is a problem that is there because of the requirement that the judge believe that there is a factual basis for a plea.

I am inclined, going back to the first point, to think that we will have less post-conviction challenges to the process with an open court proceeding than we would if the plea bargaining process is not regulated under Rule 11.

Mr. DENNIS. What happens under this rule to the situation where the man says in effect, well, I am going to plead guilty to this, but I am not guilty of anything? Does the judge go ahead and take it then, if that is the agreement, or what does he do?

Judge WEBSTER. I would not take it.

Mr. DENNIS. I would not, either. But I suppose he could.

Judge WEBSTER. The judge has discretion whether to receive the plea or not. And even on the decided cases—the First Circuit says he

has a serious duty to consider it, the District of Columbia Court of Appeals says that he has to have a good reason for not accepting the plea on either of those standards—the hypothetical question you gave would justify refusal to accept the plea.

Mr. DENNIS. It certainly would justify it. That is for sure.

Do you think it is a good idea to allow the judge—I understand he can wait until he gets the presentence judgment or report—but should he not be required—otherwise is he not really letting the district attorney set the sentence?

Judge WEBSTER. Rule 32, which will be discussed, I presume, in the course of this hearing this morning, provides that a presentence report shall be prepared in all instances except those instances in which the court states upon the record his reasons for not requiring a presentencing report. So I think the burden is on the court to demonstrate a reason for not deferring his decision until he has received a presentence report.

Second, the rules contemplate that the defendant may consent to the preparation of a presentence report in advance of his plea of guilty, so that there is a possibility at least that the presentence report may have been made available to the judge before the plea was taken.

Mr. DENNIS. I think I understand all that. It just seems to me that ordinarily the court should have that. And, of course, he does not have to have it now, I suppose. But while you are writing the rules, maybe that ought to be made a reference.

Judge WEBSTER. I think a reference to rule 32 will show that there is a clear instruction to the district judge to have a presentence report prepared unless he is prepared to state on the record why he did not want one. And I do not know of very many reasons why he would not want one. This is a very valuable tool, as I am sure the chairman knows, in assessing a sentence.

Mr. DENNIS. Does any other member of the panel, Judge Lumbard, Professor Remington, have anything to contribute to this rule?

Professor REMINGTON. If I may, I will refer to the practice that you indicate has been engaged in the area in which you practice.

The rule as proposed would allow that practice to continue, provided only that the judge does not engage actively in the negotiations. But, as I read the rule proposal, there is nothing that would preclude notice to the judge, in advance, of the results of the discussion between the prosecutor and defense counsel.

The only difference is that in many jurisdictions when that has happened, and when the case appears in court, and when the judge asks whether there have been promises made or an agreement, the defendant must answer that question "no," because the answer "yes" would, under conventional plea of guilty practice, require the judge to hold that it is an involuntary plea made as a result of a promise.

The problem is that we are requiring defendants to answer "no" to a question where they believe the answer to be "yes."

The proposed rule allows the defendant and counsel to give the truthful answer, that is, yes, there have been discussions, and the consequence of those discussions are as follows. And we think that is a much more healthy situation in the administration of justice.

Mr. DENNIS. What you are saying in effect, is that the informal type of conference that I referred to could actually take place ahead of

time, and the proceedings in open court would more or less ratify what had already transpired between the counsel on both sides and the court in the manner I described?

PROFESSOR REMINGTON. That is exactly the situation, provided only that the judge is not a party to the negotiation, that is, that he does not actively try to settle the case.

MR. DENNIS. I am thinking that he would not be that either, because counsel either go in and tell him what they have arrived at, recommend—in fact, the rule very much encourages the practice, because it says, the attorney for the Government and the attorney for the defendant may engage in discussions with a view toward reaching agreement, and so forth. So that it not only allows but actually encourages discussions of this sort. And as you indicate, it provides for a procedure in which the court may ratify the agreement if it thinks it in the interest of justice to do so. You would see nothing in the rule, then, that would prevent the district attorney and the defense counsel, once they have arrived at an agreement, from having an informal conference with the trial court before they went into the open court?

PROFESSOR REMINGTON. I do not think the rule is inconsistent with that.

MR. DENNIS. Now, coming down to your point that this permits the defendant to answer truthfully, which I appreciate, do you think you run into any possible constitutional problem there whatsoever by virtue of the fact that he says, now, this is a result of a bargain?

PROFESSOR REMINGTON. I do not. As I read the *Santobello* case, the Supreme Court of the United States has said that plea agreements are appropriate if conducted under proper circumstances. And the rule tries to insure that the circumstances are appropriate. The trial judge must also inquire into the question of voluntariness to make sure that there were no threats or inappropriate methods used to exact a plea of guilty. Under those circumstances I would think that the procedure is constitutional unless the court holds that the plea agreements are per se unconstitutional. But it seems to me that the *Santobello* case indicates the contrary.

MR. DENNIS. Judge Thomsen.

JUDGE THOMSEN. I think we must recognize the great variety of circumstances that the rule has to meet. Plea bargaining is not just a regular procedure that is always done in the same way. An enormous amount of plea bargaining goes on whether it is on top or in the bottom. You often have an indictment with a good many counts in it, and it is quite routine for a bargain to be made that a man would plead guilty to one count, and that the other counts will be dismissed, which has the effect of limiting the possible sentence which can be imposed, of course. Many mail fraud cases have dozens of counts in them. And, of course, in that type of situation there is bound to be some sort of an understanding.

And I do not think anybody really objects to that.

On the question of sentence, where the Government says it will recommend a particular sentence, the Government cannot bind the judge. And by and large, the judges of our court do not let them do it. And what often happens is that when the facts are brought out they say that the defendant is going to plead guilty to this particular count. And the Government has agreed that it will either recommend a sentence

of not more than α years, or will recommend a sentence of probation, or may say that it will not oppose a sentence of probation. There are a great many varieties that bargaining takes. And very frequently, where the facts have been brought out and the defendant has said, this is it, the judge then, before he can accept the plea of guilty, still has to find that the facts support it. And the judge often says, you understand that I am not bound to accept this recommendation; and with the knowledge that I am not bound to accept the recommendation, I will not accept it until I have seen the presentence report; do you want to withdraw your plea and go to trial before some other judge, or do you want to stick to your plea?

And in the great majority of cases, the overwhelming majority in our court, the man says, I will take a chance on you, Judge, I want my plea to stand. And in the overwhelming majority of cases the judge does give the recommended sentence, because the U.S. attorney and the defendant's attorney between them have been working out what they really believe is fair.

Now, at the present time, there is so much discovery by the defendant of what the Government has—the defendant goes in and talks to the Government. We have such a practice in our court that we have very few motions for discovery. The U.S. attorney knows what the judges will require him to give, and he gives it automatically, why waste time going to court? By the time you have had that and they have talked it over, the U.S. attorney, of course, does not have the benefit of the presentence report, but he has talked to the defense lawyer who has given him much information that is going to be told to the presentence man on the one side, and the U.S. attorney knows some things which the presentence report will not show—and that is possibly the weaknesses of the Government's case—and the fact that they may not be able to prove this count or that count. And where it appears to be in the interest of justice and often in the interest of the defendant that there be a plea, he should get the opportunity of having probation. And since we are getting more adequate probation staffs, we are able to do a better job with it.

Although you have had some letters from judges who I know and who I respect, also many judges who I know and respect equally, including the man who I think is almost generally recognized as an outstanding criminal judge, Judge Walter Hoffman of Norfolk, who you have probably seen or heard here, has said that he finds no difficulty at all in working under a procedure in his court similar to what the proposed rule provides. I would say for most of the experienced judges who I know, if a judge does not want to do it there is nothing in this rule that says he has to. The flexibility of this rule to meet all sorts of situations and to take care of the views of all sorts of judges is one of its strengths, I think. And we do not have secrets where the people say, why did he do that.

Mr. DENNIS. Thank you, Judge.

I gather from our correspondence here, what little chance I have had to look at it, that this is one of the most controversial rules. And, therefore, I want to give every man on the panel, all of whom are in support of the rule, as I understand it, an opportunity to present anything he would like to at this point.

Judge THOMSEN. May I call your attention to this? I know and respect very much the judges who have written you. But they are relatively few when you consider the great number of judges in the country. And we sincerely believe that the great majority of judges who have not written to you are not writing because they are satisfied with the rule.

Mr. DENNIS. That is usually the case, we find that in the Congress, too.

Does counsel have anything he would like to inquire about?

Mr. HUTCHISON. The changes in rule 16(b) provide that the prosecution is entitled, upon request, to inspect and copy certain tangible items in the possession of the defendant, and under rule 16(d) (2), if the defendant fails to comply with that request he may be prohibited from introducing the evidence. What is the advisory committee's position upon the constitutionality of this? It can be argued that the defendant is compelled to produce certain items of evidence, contrary to the fifth amendment, and that if he does not, he may not be permitted to introduce the evidence, contrary to the sixth amendment.

Professor REMINGTON. Mr. Hutchison, the committee came to the view that it is constitutional to require the defendant to disclose prior to trial those things, or at least some of those things, which he intends to use at the trial. The theory is that of Justice Roger Traynor, who was confronted with that question as a member of the Supreme Court of California. He said that it is not inconsistent with the fifth amendment to say to a person that if you intend to use evidence, you must disclose that prior to trial. There is nothing that compels disclosure of material which the defendant does not intend to disclose later.

The rule merely provides for the timing of the disclosure. It is, as discovery typically is, an antisurprise rule. And it says, if you are going to introduce evidence—and it also says to the Government, if you are going to introduce evidence—it is desirable that the other party be aware of this in advance of trial to enable him to prepare so that lengthy interruptions of trial may be avoided.

Now, that is not to say that it is an unimportant or not a difficult issue. And there are those who do urge that, despite the holdings to the contrary, there is a fifth amendment problem. As I understand the state of the law, the view of Justice Traynor is the prevailing view. Most courts confronted with that specific question have, I believe, come to that conclusion.

Mr. HUTCHISON. What about the sixth amendment question? If the defendant fails to produce the evidence, the penalty is prohibiting him from calling a witness or introducing the evidence? Is that settled by your answer to the fifth amendment question?

Professor REMINGTON. My memory is that the rule does have a saving clause. It does give the judge the authority to allow the introduction of the evidence, despite the failure to disclose, if there is cause shown for the failure to do so. The rule is not absolute. But if the defendant refuses to disclose, and there is no reason for doing so, he is precluded from offering that at the time.

Mr. HUTCHISON. Is not the impact of this rule to permit the Government, with a large army of investigative agents, to go out and to question and examine and run an investigation of the defendant's case, giving the Government an unfair advantage? It already has a great advantage in the FBI and its other investigative tools.

PROFESSOR REMINGTON. That is an argument that can be made. The committee was assured by its members who have had experience with discovery in places like California that that kind of thing does not happen. It is difficult to be certain that abuses of the rule will not occur. But the committee came to the conclusion that the risk of abuse is safeguarded by the discretion given the judge.

There is another argument made, and that is that giving discovery to the Government is relatively meaningless, because defense counsel will say, we have not decided what evidence we are going to use, and when we decide we will, of course, give you notice, but that decision does not take place until the trial.

But in a significant number of Federal districts there are experiments going on with new procedures such as the omnibus procedure where the judges are trying to have a maximum number of issues resolved prior to trial. It is generally thought that this kind of procedural innovation can be undertaken only if there is relatively full disclosure by both sides. The experience in these districts has been that the kind of abuse which you fear does not occur.

MR. HUTCHISON. I take it, then, that you would say that the use of the FBI or other investigative tools by the Government after the defendant has disclosed evidence, would be an abuse under the discovery rule?

PROFESSOR REMINGTON. No; I thought by your question that you were indicating that it might go beyond that. If physical evidence is disclosed, certainly the idea is that it would be subject to appropriate examination. In the case that Justice Traynor had, it was a question of medical examinations of a person whose defense to a rape prosecution was that he was impotent. It is very difficult to litigate that kind of question without knowing what those medical reports are, and very difficult for the prosecution if it is confronted with the medical reports in the midst of the trial. It seems to me important and in the interest of justice to suggest to a defendant that, if he is going to introduce medical reports, he make that fact known to the prosecution prior to trial in order to give the prosecution an opportunity to prepare its case in an appropriate way. I thought you were raising the question which is sometimes raised against discovery, and that is, if you allow either side to find the other side's theory of the case, you create the risk of fabrication, that is, you create the risk of a fabricated prosecution or a fabricated defense to meet the theory of the other party.

MR. DENNIS. You have, Mr. Remington, a similar constitutional question which exists, in your rule about notice of alibi, that you do here in this discovery matter. In other words, if you do not give your notice of alibi it cannot put the evidence in except in the court's discretion, as I understand it. We have had a statute like that in my State for a long time. I have always wondered about the constitutionality of it.

PROFESSOR REMINGTON. It is the same issue, Mr. Chairman, an issue which has not yet been resolved definitely. It is the view of the advisory committee that, with adequate authority for the judge to waive the sanction, the rule is constitutional. Without the sanction of excluding the witnesses' testimony the requirement of pretrial disclosure is not enforceable.

I might say that it was interesting that, of the membership of the advisory committee, the strongest proponents of requiring the defend-

ant to give discovery were the defense counsel on the committee. Their reason was that the kind of discovery which they thought appropriately to be required of the prosecution was not feasible unless discovery were reciprocal. And in their view it was extremely important to have disclosure prior to trial. Somewhat to my surprise, the strongest arguments in favor of the requirement of defense disclosure were made by experienced defense counsel such as Joseph Ball from California.

Mr. DENNIS. These things definitely work both ways, there is no question about that. It is a great help to make the prosecution say where and when what claims have happened, and make them produce evidence, and so forth, there is no question about that.

Mr. Blommer.

Mr. BLOMMER. Thank you, Mr. Chairman.

I would like to inquire about rules 4 and 9—I think the change in rule 4 will cause a very large increase in the use of summonses. The note gives no reason for this change. I wonder if that can be explained. What benefits are going to accrue by changing arrest procedure?

Professor REMINGTON. The question is where the responsibility should lie for determining whether a person is to be arrested pursuant to a warrant or asked to respond to a summons.

The language of the rule as it is now proposed was agreed upon only when the rule reached the standing committee. However, early drafts had raised this question. I know that the Department of Justice opposes this change in rules 4 and 9. When the tentative drafts were circulated in 1970 the Department of Justice responded in writing to the advisory committee. One sentence of that response identifies the position of the Department: "The decision as to whether a summons or an arrest warrant should be used is properly left to the executive branch."

It is the view of the advisory committee that the decision as to whether a person is to be summoned or arrested is properly left to the judicial branch. The reason is that, left to the executive branch, there are sometimes persons who are arrested, who suffer the considerable consequences of arrest where there is no adequate reason for the arrest. I recognize and have respect for the argument on the other side, an argument which, I assume, the Department of Justice, represented here this morning, will make.

Mr. BLOMMER. I understand. My question is, though, are you saying that the reason you are going to recommend the change is to protect law enforcement officers?

Professor REMINGTON. No; the reason is to put this very important decision, in many ways the most important decision from a citizen's point of view, in the hands of a judicial officer.

Mr. BLOMMER. Let me ask you this. If the Government believes that an arrest warrant should be issued the rule allows the Government to state a valid reason for the arrest warrant. What in your opinion or in the opinion of the Judicial Conference, would be a valid reason?

Professor REMINGTON. I would think that any of the reasons that are identified in the letter from the Attorney General, the expectation that the person would not respond to the summons, or that the person will secrete or destroy evidence.

There is a very important and very difficult question to which the rule does not speak, and that is whether a desire to effect a search inci-

dent to an arrest is a valid reason for the issuance of a warrant. The rule is silent on this point. In his letter the Attorney General indicates that as a consequence of the rule there will be pressure to effect an arrest without a warrant, rather than going before the judicial officer and requesting a warrant. The rule does not preclude this possibility. It merely says that if you are asking a judicial officer to authorize the taking of a person into custody, you must give a reason why the taking of the person into custody is justified.

Mr. BLOMMER. If a man is arrested by an officer without a warrant, and evidence comes into possession of the Government at that time, at a suppression hearing, can the defendant raise the question that a valid reason did not exist to bypass the summons procedure, and thereby declare the arrest invalid, and the evidence suppressible?

Professor REMINGTON. I do not think so. Court have not held, as yet anyway, that a failure to get a warrant is grounds for suppressing evidence obtained as incident to an otherwise lawful arrest. There is also concern as to whether when there is an arrest warrant and a search incident to the arrest, the defendant can litigate whether the reasons for the issuance of the warrant were adequate. The rule does not speak to that issue, and it would, therefore, be left to courts confronted with that question to decide.

Mr. BLOMMER. Thank you. I have no more questions, Mr. Chairman.

Mr. DENNIS. Gentlemen, going back to rule 16 for a moment, I gather from the file here that one of the more controversial parts there so far as the Department of Justice is concerned, is the requirement that the Government furnish a list of witnesses. Now, that strikes me as a very fair requirement, generally speaking. But I also see their point that in some types of cases it may be very dangerous for the witnesses. And I would be glad to have the comments of the panel on that subject.

Professor REMINGTON. Mr. Chairman, this is an issue which has confronted the Advisory Committee for the entire period of my 15 years as a member of and reporter for the Advisory Committee.

The Department of Justice, represented on the advisory committee over the life of the committee, has vigorously and sincerely presented the view that, in the Federal system, there are instances in which disclosure of the identity of a witness prior to trial does subject that witness to very serious risks of harm or death. The issue has been discussed in detail by the advisory committee over 15 years. The result is a proposal which tries to deal with the issue by giving to the judge the authority to make a protective order, and also authority to allow the Government to take the witness's deposition under rule 15. Rule 15 expands the right to take pretrial depositions to include depositions on behalf of the Government and to allow the Government to use such depositions. The hope is that the existence of the deposition and the opportunity to use that as evidence will lessen the incentive on the part of anyone to try to tamper with the witness and change his story.

Mr. DENNIS. You have recognized the problem, and you have two safety valves. One is your protective order which would in effect, I guess, waive the requirement in certain cases on a showing. And the other is the fact that the Government can preserve the testimony. And, therefore, I suppose, why bump a man off when you have already got his evidence?

PROFESSOR REMINGTON. The hope is that this is a realistic expectation.

MR. DENNIS. I think those are intelligent attempts to meet the problem.

Is there anyone else who wants to contribute something? I know that is one of the questions that will be raised here.

JUDGE WEBSTER. The only thing I might contribute on that, Mr. Chairman, is that this problem seems really to be a Federal court problem. It does not seem to present any problems in most of the States where endorsement of the witnesses is required as a matter of statute, and is recommended by the American Bar Association minimum standards.

MR. DENNIS. Of course, the sanctions vary now. In my own State of Indiana, unless the rules have changed since I have been up here, which they may have, they always said that you had to endorse the witnesses on the indictment. But the only sanction was that if you did not put them on the indictment and you did not show up for trial, you could not get a continuance. So there was not too much incentive. Of course, I think it is a fair thing to do myself in general, to let them know who is going to testify. But I do see the problem.

Counsel suggested a general philosophical question here which I do not know really if anybody can resolve. But it comes to this. Some of these rules, as we have already noticed, raise possible constitutional problems. And, of course, they are rules promulgated by and approved by the Supreme Court, which is the ultimate authority on what is constitutional. So what is the situation if we challenge on constitutional grounds a rule which the court has already, by implication, at least, through its promulgation suggested is constitutional? Is there any inherent problem in that? That is probably one of these law school type questions, but it is an interesting question.

PROFESSOR REMINGTON. I think not, Mr. Chairman. However wise the rulemaker may be, one can never foresee the exact context in which a particular rule may raise a serious constitutional question. I do not think the court would feel bound merely because it promulgates the rules, because one cannot foresee the circumstances in which the constitutional issue may arise in a particular case.

MR. DENNIS. I thank you, Professor.

Counsel says he has more questions about rule 16.

MR. BLOMMER. The question is not exactly on how the rule will work. It seems to me in (a) (1) (C) there have been significant changes in the burden on the defendant as far as making a showing to see what is in the Government's files. Instead of having to demonstrate to the court that his request was material and reasonable, as I read the rule, the Government is under a duty to honor a request by the defendant for anything that is material. The rule says, the things which are "material." My question is, and let me preface it by saying that it seems to me that any defense counsel would think that anything in the Government file would be material, and would request everything. If the Government refuses the defendant's request it seems to me that pursuant to (d) (2) they would have to litigate. Now, wouldn't this not only cause pretrial litigation, but in effect force them to argue the issue—that is, the Government must describe everything in its file, that it is refusing to turn over. How can a judge refuse to order the Government to turn over something to the defense on a finding that is not material? I do not see how that burden could be made either.

Professor REMINGTON. Mr. Chairman, if the reference is to (a) (1) (C), it relates to documents and tangible objects, which I think to some extent limits the question, that is, it does not speak to any evidence, but only documents or tangible objects. It is true that the question is one of materiality, material to the preparation of his defense, or intended for use by the Government as evidence in chief at the trial, or was obtained from or belonged to the defendant.

Brady v. Maryland probably requires disclosure as a matter of constitutional law if it is material to the defense. I do not know how any prosecutor could avoid disclosure and resist the claim that it was a violation of *Brady v. Maryland*. It seems to me better to have the rule speak to the issue than it is to leave it to subsequent litigation. Most defense counsel will make a *Brady v. Maryland* motion anyway to ask disclosure of any evidence which may be exculpatory. I do not know whether "materiality" and "exculpatory" are synonymous in this context, but I think they are.

Judge WEBSTER. If I may add to that, as Professor Remington has pointed out, it only deals with two types of evidence, the tangible evidence that is going to be used—which certainly defendants have a right to see—and the favorable evidence. Now, the practice in most of the district courts which trial judges have sought to avoid by means of the omnibus hearing is a routine motion for discovery under the present rule 16 which then comes before the court. In a very significant number of districts the trial judges are routinely overruling the motions without prejudice pending a conference with the U.S. attorney, after which time the parties can come back if they are still having difficulty. Now, what we have done here simply is to say, that is not necessary. The rules say to the Government, when the defendant requests to see the evidence you are going to use against him, you will show it to him unless you have a good reason for not doing so, in which case then you can come back to the court. This is court-time-conserving without any prejudice at all to the U.S. attorney.

If there is something that he does not feel he has to show, the rules provide an opportunity for him first to seek court relief, instead of requiring the defendant to make a court showing in each instance. It saves the court time. I think the overwhelming majority of district courts are permitting such discovery following various hearing procedures. They may deal with it in terms of overruling the motion, they may let the motion lie there. But they have been required to sit in court and listen to defense counsel submit motions for discovery, and this rule simply says to the Government, do what you know you are going to have to do anyway. If you think there is some reason why you should not, come to see me about it. That should save a lot of court time.

Mr. BLOMMER. In effect, I guess you are saying here that in the case of this class of evidence the Government should turn over everything it has to the defendant as a matter of good practice.

Judge WEBSTER. Yes, indeed.

Mr. BLOMMER. Thank you.

Judge WEBSTER. Well, in this class, unless there is some special exception which I cannot illustrate right now—in a very few instances they can go to the court for relief.

Mr. BLOMMER. Thank you.

Judge LUMBARD. 16(e) (2) specifically provides, with respect to information not subject to disclosure, generally speaking the Government's work product.

Mr. BLOMMER. Judge Lumbard, could I ask you a question about that? It seems to me that the existing rule, talking about the internal Government memorandum, excepts this class of tests and medical examinations and that type of thing from the notion that internal Government memoranda are not discoverable. But yet, in proposed rule in (a) (2) the exception is expanded from what I think is stated in the existing rule as (a) (2) to paragraphs A, B, and D. In other words, it talks about general statements by defendant. Now, the note says that it does not intend to get to the law on internal Government memoranda which might contain the substance of a defendant's statement. Yet, this change in the exception seems to be lying within the rule. Do you follow me on that?

Judge LUMBARD. Yes. This would have to be subject to a court ruling in a particular case if there is some doubt about whether or not information in the Government files should be disclosed.

Mr. BLOMMER. My question is, "Why did the advisory committee change the exception if it did not intend to change the law?"

Professor REMINGTON. Mr. Chairman, that is a fair question. If I were to answer it adequately it would take some time. I will be glad to check our files and see if I can respond adequately in writing.

Mr. BLOMMER. Thank you.

Mr. DENNIS. I have one question on rule 12. What is the rationale for providing that a ruling on pretrial motions may be deferred after the verdict? There is a change, as I understand it, in the rule. And it strikes me that the unusual thing to do in such a case is to make a motion to suppress evidence. For instance, Why would you want to defer a ruling on that until after the verdict? What is the reason for the change? The present rule says you can defer it until the termination of the trial of the general issue rather than ahead of time, but this goes a little further. That is rule 12(e), I think.

Professor REMINGTON. Mr. Chairman, again that is a fair question. With your permission, I would like to look carefully at the background and will be happy to prepare an answer for you.

Mr. DENNIS. By all means. I just happened to see it as I went through and wondered about it.

Gentlemen, we thank you very much. If there is anything any one of you wants to say before we pass on to the next group of witnesses, I would be very happy to entertain it.

Judge WEBSTER. Mr. Chairman, I hesitate to encroach upon your time. I believe you asked one question relating to presentencing reports as it dealt with plea bargaining. We have received a few comments in this area which are published in the House document of commentary with respect to disclosure of presentence investigations. And it might be appropriate for us to comment briefly upon our thinking and our answers to the concerns that were expressed by some of the judges.

Mr. DENNIS. Please do so.

Judge WEBSTER. First, I am sure that the chairmen and the members of the committee are aware that a trial is a search for truth. While it is an adversary system, it ought to be a system that the defendant understands to be working, and he ought to be aware of every aspect

of the trial. The practice of having the right of confrontation of witnesses and the right to disprove evidence, and so forth, works effectively up until the motion for conviction. And then comes the time for sentence. The defendant sees the judge with a sheaf of papers that say things about him that he is not allowed to see and his attorney is not allowed to see. This is subversive of confidence in the system of justice as a matter of principle. The committee felt that we should legitimize what many judges are doing throughout the country, and that is, required that the presentence report be made available to the defendant or his attorney unless there are good and sufficient reasons for not doing so.

The appellate courts are full of cases today, as I indicated earlier, where the defendant is claiming that his sentence was enhanced because of a record of conviction which was itself invalid because it was uncounseled or for some other reason, or where the information was inaccurate or untrue, but that he did not have an opportunity to refute it at the time of sentence. On appeal we have been able in some instances to affirm the trial judge because the information was clearly hearsay—for instance, it is reported that he is engaged in other offenses and the trial judge would surely know this as hearsay. But the presentence reports are not always couched in terms of rumors. They are usually made as statements of fact.

And so, following the recommendations of the American Bar Association, we decided that it was not enough merely to permit the trial judge to disclose the contents of the sentence report, but instead he should be required to do so, excluding from that disclosure such information as diagnostic material and other information which might actually harm the defendant if he had access to it. There is an area of discretion here on the part of the trial judge. The only limit on his discretion is set forth in this rule, and I think this answers a good deal of concern about confidentiality and so forth. If he does not choose for his own reasons to disclose the presentence report to the defendant or attorney, he must set forth on the record in summary form, orally or in writing, the facts contained in the report upon which he relied in assessing the sentence. We think that is minimum fair play for the defendant.

And then the defendant cannot later claim that his punishment was enhanced by other factors. Where the judge said, "Here, you have got a record of two felony convictions for this, you have been in trouble before this, and this is a serious offense, in relation to some other conduct, and I think I am going to have to take those things into consideration"—at least at the time of allocution or sentencing the rule gives the defendant an opportunity to meet those things if they are in fact not true or if there is an answer to them. And I think very simply it is not a legitimate complaint that this requires divulging confidential information.

As soon as this rule was submitted to the bench and bar, as a district judge I started routinely making the information available. I had the wholehearted cooperation of the chief probation officer. He said, this will clean it up, we will not be getting a lot of garbage put in the reports now, I am glad to have it come this way.

I sent the defense attorney to the probation officer. I did not give him the report. He went to the probation officer, and if there were

any problems with the report, then the probation officer came to me and I made a judgment as to whether to release the report or to do as this rule provides, set forth on the record a summary of those only which I relied upon.

And it worked beautifully. I am absolutely convinced that this rule will go a long way toward satisfying the man in prison that he was not somehow snookered at the very end of his trial in the sentencing process.

Thank you, Mr. Chairman.

Mr. DENNIS. I thank you, Judge Webster, for that contribution, which I think was worth making.

Judge LUMBARD, did you have something you wanted to add?

Judge LUMBARD. I have nothing to add. Thank you, Mr. Chairman.

Mr. DENNIS. Judge Thomsen.

Judge THOMSEN. May I say we have done the same thing in the District of Maryland for 15 years without any difficulty, what Judge Webster said.

Mr. DENNIS. Gentlemen, on behalf of the committee, I thank you for your appearance here this morning. And I want to remind you that the chairman said he would like you to return. So we will reconvene in the neighborhood of 1 o'clock. I suggest you gentlemen might return at approximately that time.

In the meantime, thank you very much.

The next group from whom we will hear represents the Department of Justice. I believe that Mr. W. Vincent Rakestraw, assistant attorney general for Legislative Affairs, is here.

You might, if you will, Mr. Rakestraw, introduce and name your colleagues so that we will have that for the record.

TESTIMONY OF W. VINCENT RAKESTRAW, ASSISTANT ATTORNEY GENERAL, LEGISLATIVE AFFAIRS, U.S. DEPARTMENT OF JUSTICE, ACCOMPANIED BY H. M. RAY, U.S. ATTORNEY, NORTHERN DISTRICT OF MISSISSIPPI; RICHARD L. THORNBURGH, U.S. ATTORNEY, WESTERN DISTRICT OF PENNSYLVANIA; HENRY F. GREENE, EXECUTIVE ASSISTANT U.S. ATTORNEY, DISTRICT OF COLUMBIA; AND MICHAEL W. DOLAN, ATTORNEY, DEPARTMENT OF JUSTICE

Mr. RAKESTRAW. Thank you, Mr. Chairman.

If I may have just a few minutes, I will introduce my colleagues here at the table, and also explain how we have drawn the consensus of the Department together for the subcommittee.

I have a prepared statement. I would like to submit it to preserve the time of the subcommittee and summarize for you.

Mr. DENNIS. Your prepared statement will be admitted and made a part of the record.

Mr. RAKESTRAW. Thank you.

At the far right of the table is Mr. Michael W. Dolan, legislative counsel, the Office of Legislative Affairs. Mr. Dolan is charged with—I might say before I finish Mr. Dolan's introduction that my office, the Office of Legislative Affairs, is charged with the coordination of the Department's position on the Federal rules, and also to bring the

Department's consensus to the subcommittee in its most workable form. To do that we have not only worked with the various divisions in the Department, but also the U.S. attorneys and other collateral bureaus and agencies. Mr. Dolan is the focal point and coordinator for the Office of Legislative Affairs, coordinating the work of the interdepartmental task force on the Federal rules. This task force includes representatives of the Criminal Division, the Antitrust Division, the Civil Rights Division, and other parts of the Justice Department.

To my immediate right is Mr. Henry F. Greene, who is the executive assistant to the U.S. attorney for the District of Columbia. He appears here today representing the U.S. attorney, Mr. Silbert.

To my immediate left is Mr. H. M. Ray, U.S. attorney for the northern district of Mississippi. Mr. Ray chairs the Subcommittee on Legislation and Court Rules. This subcommittee is a part of the U.S. attorney advisory council that Attorney General Saxbe has been emphasizing since confirmed as Attorney General.

To my far left is Mr. Richard L. Thornburgh, the U.S. attorney for the western district of Pennsylvania.

After my summary—and I believe that counsel has the biographical sketches of all these gentlemen—after my summary what we have done is split up the rules that we want to emphasize. Mr. Thornberg will speak to rule 16 and a small part of rule 15. Mr. Ray will speak to rules 4 and 11. And Mr. Greene will speak to rule 12, rule 12.1, and rule 12.2.

Before getting into my summary, we have some exhibits that I would like to submit to the subcommittee, and especially to counsel.

First, to better explain what we have done with the Subcommittee on Legislation and Court Rules, I have an outline of the Attorney General's directive to the subcommittee as part of the U.S. attorney's advisory council.

Second, I have a compilation that pulls together the recommendations and observations of 89 U.S. attorneys, 89 out of 94 districts. Mr. Dolan will approach the chair with that, as well as a notebook of pictures and a tape recording that bear on rule 16, the disclosure rule.

And without taking any more time, I would like to now get into my summary.

Mr. DENNIS. Let the record show that the several documents referred to by Mr. Rakestraw and presented to counsel will be made a part of the record and included in the record of these proceedings.

Go ahead, Mr. Rakestraw.

Mr. RAKESTRAW. Also, I might add at the outset is that our desire is to cooperate completely with the subcommittee. And if you deem it possible, Mr. Chairman, would you leave the record open for subsequent opinions and exhibits to come before the subcommittee?

Mr. DENNIS. I believe that is an appropriate, a reasonable length of time. I, of course, will advise the gentleman that I am only a temporary chairman here. I think the chairman of the subcommittee would have to rule ultimately on how long the record will remain open. But we will leave it open at this time.

Mr. RAKESTRAW. We will continue to work with counsel as far as anything you might need.

Now I will summarize the prepared text, Mr. Chairman. And then move on into specific discussion of the rules.

Mr. DENNIS. You handle the matter as you wish. You may proceed.

Mr. RAKESTRAW. Mr. Chairman, Mr. Hutchison and Mr. Blommer, on June 17 Attorney General Saxbe wrote to this subcommittee asking that Congress delay the effective date of the proposed amendments to the Federal Rules of Criminal Procedure until August 1975. The Attorney General noted that although the Department of Justice had the opportunity to comment on the preliminary drafts disseminated by the Judicial Conference, the final drafts submitted to the Congress, which were changed in some material respects, did not receive a review and consideration by this Department. According to this committee's report on H.R. 15461, this request as well as complaints from both bench and bar caused the Congress to enact, and the President to approve, Public Law 93-361, which postponed the effective date of the proposed amendments until August 1, 1975.

On behalf of the Department of Justice, I would like to thank this subcommittee and its chairman for recognizing the advisability of delaying the effective date of the new rules so that both the bench and the bar as well as the Congress can take the necessary time to study these proposals. I am confident that after further reflection and study, and after considering the views of this Department, as well as the views of others, this committee will insure that any amendments to the existing Federal Rules of Criminal Procedure will be in the interests of the entire criminal justice system.

The Attorney General's June 17 letter cited two significant objections that the Department had with respect to the proposed amendments. First, the amendment to rule 16 which would require the disclosure of the names and addresses of potential Government witnesses presents a grave threat to the safety of such witnesses. Second, the amended rules 4 and 9 would have a devastating effect on Federal law enforcement efforts by denying the Government the use of an arrest warrant except upon a showing of a "valid reason."

While rules 4, 9, and 16 continue to be the basis for the Department's objection to implementation of the amended rules, we would like to take the opportunity presented by these hearings to present to this subcommittee our views on several other amendments which we believe can be improved. I should like to emphasize that our comments should not be construed as criticism of the able work done by the Advisory Committee on Criminal Rules. This group has labored long and hard to devise amendments to the Federal Rules of Criminal Procedure which they believe are in the best interests of the criminal justice system. We trust that the advisory committee understands that only the most serious of objections would have forced the Department to approach this subcommittee.

This concludes my summary.

[Mr. Rakestraw's full statement and supporting materials follow:]

[NOTE.—The notebooks of pictures and the tape recording referred to by Mr. Rakestraw are on file with the subcommittee.]

STATEMENT OF W. VINCENT RAKESTRAW, ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

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RULE 4. ARREST WARRANT OR SUMMONS UPON COMPLAINT

The Proposal.—This amendment would make the summons the routine preferred process even though probable cause exists to arrest a defendant, and would preclude the issuance of an arrest warrant except where a defendant fails to appear in response to a summons, a "valid reason" is shown for the issuance of an arrest warrant rather than a summons, or a summons having issued, a "valid reason" is subsequently shown for the issuance of an arrest warrant. A new subdivision (c) in Rule 4 would provide that a finding of probable cause may be based upon hearsay evidence in whole or in part and that the magistrate may require the examination under oath of the complainant and any witness he may produce.

Effect of the Proposal.—By making the summons the routine preferred process, the amended Rule 4 would have a devastating effect on Federal law enforcement efforts as well as the criminal justice system by (1) resulting in substantially increased fugitivity among defendants charged with serious Federal crimes, (2) fostering the fabrication of alibis and the secreting and destruction of evidence by defendants prior to apprehension, (3) generating the increased usage of warrantless arrests as a countermeasure to preserve evidence, and (4) leading to substantial additional delays in the administration of criminal justice, both from offense to apprehension and from apprehension to trial.

1. Fugitivity.—The avoidance of apprehension and trial by Federal criminal suspects is already a serious problem in many Federal jurisdictions. For example, statistics of the United States District Court for the District of Columbia reveal that for the past few years approximately 20 to 25 percent of defendants in pending criminal cases were fugitives. Substitution of a summons for an arrest would simply place an accused on notice that he is involved in a criminal case and afford him an opportunity to flee prior to apprehension.

2. Fabrication of Alibis and Destruction and Secreting of Evidence.—By alerting criminal defendants to the fact that charges are to be placed against them for particular crimes, suspects would be afforded easy opportunities to construct alibis and to secrete and destroy evidence of their offenses prior to reporting in response to a summons. As one United States Attorney has noted,

"It is a fact of life that criminals quite often carry the fruits or instrumentalities of crime upon their person or within reaching range such as a felon with a gun or a pusher with narcotics. Searches incident to arrest are valid. Now, by summons, we shall be advising all to rid themselves of incriminating evidence prior to arrest."

3. *Resort to Increased Usage of Warrantless Arrests.*—In most cases, Federal law enforcement agents have a statutory right to arrest without warrant upon probable cause, and a search incident to such an arrest is lawful. It would not be at all unreasonable to expect these agents, prompted by the burdens imposed by this rule, to increase their use of warrantless arrests.

4. *Delay.*—The additional time required to locate defendant's addresses, serve summonses upon them, await their appearance in court on the designated dates, and ultimately obtain the issuance and execution of arrest warrants in the commonplace instances of nonappearances will certainly foster delays between the commission of the offenses and the apprehension of the suspects. Delay would occur between apprehension and trial as a result of the pretrial litigation that would inevitably result over the issue of whether magistrates had "valid reason" to order arrest of defendants. Additional delays in the criminal justice system are particularly difficult to justify at this time in the face of urgent efforts that have been mandated by both the Congress and the Supreme Court under Rule 50 of the Federal Rules of Criminal Procedure to dispose of criminal cases in an effective and expedited fashion.

This amendment was not included in either the January, 1970, or the April, 1971, preliminary drafts of proposed amendments to the Federal Rules and thus neither the Advisory Committee nor the Supreme Court received the assistance of the comments and criticisms of the bench or bar. Indeed, the Advisory Committee note to the proposed amendment of Rule 4 refers only to the proposed amendment to Rule 9 to suggest the reasons for the change, and the Advisory Committee note to Rule 9, in turn, cites only an article by Judge Marvin Frankel of the United States District Court for the Southern District of New York in support of the change. His article, however, is devoted not to Rule 4 at all, but *exclusively* to a critical analysis of Rule 9 and its requirement that arrest warrants issue automatically for *indicted* defendants upon the demand of the United States Attorney. See Frankel, "Bench Warrants Upon the Prosecutor's Demand: A View from the Bench," 71 Col. L. Rev. 403 (1971). Pointing up the dearth of authority in support of his novel proposal, Judge Frankel, with typical candor, acknowledged that 11 of his 13 brethren on the Southern District Bench, as well as all citable commentators, disagreed with his view. See Frankel, *supra*, p. 403, n.1 and p. 410, n.25.

In addition to the substantial difficulties which the proposed amendment to Rule 4 would portend for law enforcement and the lack of authority in support of the changes, the proposed amendment itself is vague, subject to varying interpretation, and—as Judge Frankel also acknowledged—likely to result in a whole new panoply of adversary proceedings, ostensibly at both the trial and appellate levels, to test judicial or magisterial determinations that the government demonstrated a sufficiently "valid reason" for the issuance of an arrest warrant rather than a summons. See Frankel, *supra*, p. 414, n.40. Most importantly in this regard, there is no definition of "valid reason" in either the Rule or the Advisory Committee note, and only a brief discussion of the problem in Judge Frankel's article. Indeed, the "valid reason" requirement does more than provide the judicial officer with discretion; it imposes a presumption in favor of a summons which must be overcome by a government showing of a "valid reason".

The Department also objects to the provisions of amended subdivision (c) which would authorize the magistrate to require the examination under oath of the complainant and any witness the complainant may produce. If the magistrate is not satisfied with the complaint and any accompanying affidavits, his remedy is to deny the application rather than to assume control of the investigation by calling witnesses for examination under oath.

Recommendation.—For the reasons stated above, Rule 4 should not be amended.

If, however, the Congress is bent upon giving priority to the issuance of a summons rather than a warrant, then at least the amendments should be changed to allow the attorney for the government to obtain a warrant when he believes a warrant is necessary. If the amended Rule is retained, the Department of Justice recommends that it be modified by adding a new subdivision (d), renumbering

the subdivisions of the Rule accordingly, and amending subdivisions (b) and (c) to read as follows:

- (b) *Issuance of an Arrest Warrant.*—A warrant shall issue whenever:
- (1) a defendant fails to appear in response to a summons, or
 - (2) upon the request of the attorney for the government.
- (c) *Multiple Warrants or Summons.*—More than one warrant or summons may issue on the same complaint or for the same defendant.
- (d) *Probable Cause.*—The finding of probable cause may be based upon hearsay evidence in whole or in part.

Finally, if the Committee insists on requiring the attorney for the government to present a "valid reason" for an arrest warrant in lieu of a summons, then the Rule should be further amended as follows to make clear the issuance of a warrant in lieu of a summons which is subsequently found to be without a "valid reason" is not grounds for suppression of evidence seized incident to the arrest:

"A determination by a court after an arrest that no valid reason existed for an arrest in lieu of a summons shall not be grounds for the suppression of evidence seized incident to the arrest, or to a search incident thereto."

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

The Proposal.—This amendment would make the summons the routine preferred process on an indictment or information except when the government presents a "valid reason" for issuance of an arrest warrant.

Effect of the Proposal.—The amended Rule 9 would have the similarly adverse effect upon the criminal justice system as would the amended Rule 4. The problems of increased fugitivity, destruction of evidence, increased use of warrantless arrests, and substantial delay are described in our discussion of Rule 4. It should be pointed out that with respect to indictments and informations, United States Attorneys often use summons and mail notices to conserve the time of United States Marshals and employ warrants only when necessary.

Recommendation.—For the reasons stated above and described in our discussion of Rule 4, Rule 9 should not be amended. If the summons is to be the preferred form of process then, at the very least, the attorney for the government should be allowed to request the issuance of a warrant when he considers such to be necessary.

Accordingly, the Department of Justice recommends that subdivision (a) of proposed Rule 9 be amended to read as follows:

(a) *Issuance*

(1) *Summons.*—Upon the filing of an information or indictment the clerk shall issue a summons for each named defendant, except as provided in subdivision (a) (2).

(2) *Warrant.*—Upon request of the attorney for the government, the court shall issue a warrant instead of a summons for each defendant named in the indictment or information, if the information is supported by oath.

(3) *Multiple Warrants or Summons; Failure to Appear.*—The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. More than one warrant or summons may be issued on the same information and indictment or for the same defendant. If a defendant fails to appear in response to the summons, a warrant shall issue.

RULE 11. PLEAS

The Proposal.—The amendments to Rule 11 attempt for the first time to establish specific criteria for the acceptance of a plea of guilty, set forth specific conditions regulating plea bargaining, and stipulate full disclosure of plea agreements.

Effect of the Proposal.—While the Department of Justice is pleased that the amended Rules recognize the plea bargain procedure, we oppose those provisions of the amended Rule 11 which (1) could be construed as permitting the court to reject a plea agreement based upon a dismissal of other charges, (2) would require, without exception, disclosure of the agreement in open court, and (3) could be construed as precluding admissibility in all circumstances of statements made in the negotiation process.

1. *Rejection of Plea.*—The amended rule could be construed as sanctioning an unwarranted infringement by the judiciary on the powers of the executive. The plea agreement procedures set forth in subdivisions (e) (2), (3) and (4) should

make clear that the court may decline to accept an agreement only on the ground that the maximum sentence agreed upon is too harsh or inadequate; the court should not be permitted to reject an agreement it deems too lenient or too restrictive with respect to the dismissal of counts or the reduction in grade of the offense charged. In the sentencing area the court's prerogatives are admittedly paramount, but no rule should be promulgated which intrudes the judgment of the court in the executive decision to charge or to dismiss charges—areas traditionally reserved for the exercise of prosecutorial discretion. "(A)s an incident of the Constitutional separation of powers, . . . the Courts are not to interfere with the free exercise of the attorneys of the United States in their control over criminal prosecutions." *United States v. Cox*, 342 F. 2d 167, 171 (5th Cir. 1965), cert. denied, 381 U.S. 935 (1966), quoted with approval in *Newman v. United States*, 382 F. 2d 479, 481 (D.C. Cir. 1967) (Burger, J.). Complete executive discretion has heretofore been specifically acknowledged by the courts, with respect to decisions to accept a plea to a lesser offense from one codefendant but not another, or to prosecute a defendant on a lesser or more serious charge. See *In re Petition of United States for Writ of Mandamus*, 306 F. 2d 737 (D.C. Cir. 1962); *Newman v. United States*, supra; *Hutcherson v. United States*, 345 F. 2d 964 (D.C. Cir. 1965); *United States v. Ammidown*, 497 F. 2d 615 (D.C. Cir. 1973).

2. *Disclosure*.—Subdivision (e) (2) requires "disclosure of the agreement in open court at the time the plea is offered." Ordinarily this is acceptable, but unless some provision is made to maintain secrecy with respect to a defendant's agreement to testify, inform, or act in an undercover capacity, either his agreement will not be forthcoming or the government will be compelled to decline acceptance with the result that both the advantage of his services and the plea bargain will be lost.

3. *Inadmissibility*.—Subdivision (e) (6) could be construed as providing that statements made during unsuccessful negotiations as well as the fact of a plea of guilty that was subsequently withdrawn, or the offer of a plea of guilty, would be thereafter inadmissible in evidence against the defendant. Introduction in evidence in the government's case in chief of a withdrawn plea is barred by *United States v. Kercheval*, 274 U.S. 220 (1927), and we have no objection to barring similar use of the fact of an offer. We do object, however, to the innovation of excluding statements of fact or admissions made by the defendant in the presence of his counsel, except, of course, when the admissions themselves are tainted, such as when the plea is vacated because of coercion. We are very concerned that the Rule could be misconstrued to preclude use of such statements even for impeachment purposes; certainly the Rule should not be usable as a means of self-immunization against a revelation of perjury. See *Harris v. New York*, 401 U.S. 222 (1971); *United States v. Zane*, — F.2d — (2d Cir. No. 73-2401, April 1, 1974, slip op. at 2509-10). While we agree that conversations occurring during informal plea discussions should not be admissible in evidence, we believe that statements made by a defendant voluntarily and in open court during the course of an actual plea, with the advice of counsel, should be admissible, at least to impeach the defendant if he subsequently attempts to withdraw his plea and take the stand in his own behalf at trial. See *Harris v. New York*, supra. In any event, the Committee report should clearly reflect that only the statements themselves are inadmissible and that the preclusion does not extend to the derivative use of such statements.

Recommendation.—For the reasons set forth herein, and because the Department agrees with Advisory Committee note that an agreement that a specific sentence is the appropriate disposition of the case is another possible concession that may be made in a plea agreement, we recommend that subdivisions (e) (1), (2), (3), (4) and (6) of Rule 11 be amended to read as follows:

(e) *Plea Agreement Procedure*

(1) *In General*.—The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the opposition of a particular sentence, or will do both, or will agree that a specific sentence is the appropriate disposition of the case. The court shall not participate in any such discussions.

(2) *Notice of Such Agreement*.—If a plea agreement has been reached by the parties, the court shall require the disclosure of the agreement in open court,

except for good cause shown, at the time the plea is offered. Thereupon the court shall accept the plea unless the parties have been agreed that a specific sentence is the appropriate disposition of the case, in which event, the court may accept or reject such agreement for a specific sentence, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the pre-sentence report.

(3) *Acceptance of a Plea Agreement for a Specific Sentence as the Appropriate Disposition of the Case.*—If the court accepts a plea agreement for a specific sentence, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) *Rejection of a Plea Agreement for a Specific Sentence as the Appropriate Disposition of the Case.*—If the court rejects the plea agreement for a specific sentence, the court shall inform the parties of this fact in open court and set aside the guilty plea or plea of *nolo contendere*.

(6) *Inadmissibility of Plea Discussions.*—Evidence of a plea of guilty, or a plea of *nolo contendere*, later withdrawn, or of an offer to plead guilty or *nolo contendere* to the crime charged or any other crime, or of out of court statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil proceeding, or in the government's case in chief in any criminal proceeding against the person who made the plea or offer. However, a statement made by a defendant in open court and in the presence of counsel in connection with such plea or offer is admissible to impeach the defendant where his testimony at the subsequent proceeding varies materially from his statement at the time of the taking of the plea.

The purpose of the Department's proposed changes to Rule 11(e)(1) is to insure that the Rule does not alter existing law which leaves for Executive decision to charge or to dismiss charges. As proposed by the Department the Executive would decide, without court intrusion, whether to:

(1) reduce the charge to a lesser or related offense;

(2) dismiss other charges; or

(3) make recommendations (or not oppose recommendation) *only*. Such recommendations would not be *binding on the court*, as to what sentence, if any, the court would impose. The court would be left free to impose sentence without being bound by the recommendations of the parties, and the court could either increase or lower any punishment or recommendation.

If a specific sentence is agreed to between parties as an appropriate disposition of the case, then the court would be free to either accept or reject the agreed specific sentence. If accepted, the court would embody the agreed specific sentence in its judgment. If rejected, the court would set aside the plea of guilty or plea of *nolo contendere*.

We oppose the idea that the court should be involved in changing the terms of a plea agreement for a specific sentence by reducing the agreed sentence, or being subject, after such an agreement has been entered into, to the further urging of a defendant to lesser punishment than the defendant has theretofore agreed to. By permitting a defendant to urge for a lesser sentence than he has agreed to, we feel that such proceedings would not only be an invitation to subsequent *habeas corpus* attack through motions to vacate sentence, but would vitiate the entire thrust of the amendment to Rule 11 to encourage openness and good faith between parties in reaching binding plea agreements.

RULE 12. PLEADING AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS

The Proposal.—Generally, proposed Rule 12 would identify additional motions which must be made prior to trial and would provide for opportunity by either the government or the defense to identify evidence which the government intends to use at trial. A new subdivision (c) would change the time for making pre-trial motions from "before the plea is entered" to a time set by the court "at the time of the arraignment or as soon thereafter as practicable." A new subdivision (d)(2) would authorize the defendant to request notice of the government's intention to use any evidence discoverable under amended Rule 16.

Effect of the Proposal.—The Department of Justice objects to Rule 12(d)(2) on the same grounds discussed in more detail in our comment opposing the expanded discovery provisions of Rule 16. Discovery should continue to be a matter of judicial discretion, not of right, and we therefore object to the terminology used in the provision, "any evidence to which the defendant is entitled

to discover under Rule 16." The government often notifies a defendant of its intention to use certain evidence so as to expedite the filing and determination of a motion to suppress; the advisory Committee note recognizes this. As drafted, however, the proposed rule requires more; it seems to contemplate that the government will give notice of everything it possesses that is discoverable, regardless of whether any motion to suppress is anticipated. Government counsel should not have to do the defense's work. While the proposal involves no sanction for failure to meet a defendant's request we doubt that this provision would serve to expedite motions to suppress as much as it would be invoked as a discovery aid.

Subdivision (e) of the Rule indicates that general authority is conferred on the court to defer the determination of any pretrial motion until trial or even after verdict. This provision should not be allowed to deprive the government of its right to appeal under such statutes as 18 U.S.C. 3731.

Recommendation.—For the foregoing reasons the Department of Justice recommends that subdivision (d) (2) be deleted and that subdivision (e) be modified to read as follows:

(e) Ruling on motion.—A motion made before trial shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred if a party's right to appeal is adversely affected. . . .

RULE 12.1. NOTICE OF ALIBI

The Proposal.—This new Rule would require the defendant to notify the government of his intention to rely upon an alibi defense after which the government would be required to provide the defendant with the specific time, date and place at which the offense is alleged to have been committed. The defendant would then be required to divulge the claimed location and witnesses supporting the alibi after which the government would be required to supply the names and addresses of witnesses placing the defendant at the scene of the crime.

Effect of the Proposal.—Unlike Rule 2-5(b) of the United States District Court for the District of Columbia, Rule 12.1 would permit the defendant, by indicating his intention to rely on an alibi defense and making certain disclosures, to compel the government to disclose the names and addresses of its witnesses. Because the Department of Justice vigorously opposes those provision of proposed Rule 16 which would compel the government to disclose the names and addresses of its witnesses, we reject any alibi notice rule which would permit similar discovery at the discretion of the defendant.

Recommendation.—The Department of Justice recommends the adoption of a rule similar to Rule 2-5(b) of the United States District Court for the District of Columbia which is set forth below:

(b) Alibi Demand by the Government

(1) Upon written demand of the prosecutor stating the time, date, and place at which the alleged offense was committed, the defendant shall serve within ten days, or at such different time as the court may direct, upon the prosecutor a written notice of his intention to offer a defense of alibi. Such notice by the defendant shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witnesses upon whom he intends to rely to establish such alibi.

(2) Within ten days thereafter, but in no event less than ten days before trial, unless the court otherwise directs, the prosecutor shall serve upon the defendant or his attorney a written notice stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses.

(3) Upon the failure of either party to comply with the respective requirements of this rule, the court shall, except for good cause shown, exclude the testimony of any witness offered by such party as to the defendant's absence from, or presence at, the scene of the alleged offense. This rule shall not limit the right of the defendant to testify in his own behalf.

RULE 12.2. NOTICE OF DEFENSE BASED UPON MENTAL CONDITION

The Proposal.—This new Rule would require the pretrial disclosure of the defendant's intention to rely upon a defense of insanity or a showing lack of

required mental state. The court upon the government's motion would be permitted to order the defendant to submit to a psychiatric examination.

Recommendation.—Although the Department of Justice strongly favors the amended Rule, we recommend that the Committee report to subdivision (c) indicate that the Rule is not intended to preclude the court from ordering more than one psychiatric examination.

RULE 15. DEPOSITIONS

The Proposal.—The amended Rule would authorize the government as well as the defendant to depose prospective witnesses whenever due to special circumstances of the case it is in the interest of justice. Such depositions may be used as substantive evidence if the witness is unavailable as defined in subdivision (g) of the Rule or if the witness gives inconsistent testimony at trial.

Recommendation.—Although the Department favors the concept of depositions by the government we recommend that the language of the proposed Rule conform to the language of 18 U.S.C. 3503 to insure that depositions are taken in only the most exceptional circumstances. We also recommend that such depositions be taken under the judicial supervision of one knowledgeable in the criminal law. Accordingly, the first sentence of subdivision (a) and the entire subdivision (d) should be amended to read as follows:

(a) *When Taken.*—Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court at any time after filing of an indictment or information may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. . . .

(d) *How Taken.*—Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that

(1) in no event shall a deposition be taken of a party defendant without his consent, (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself, and (3) the deposition may be taken before a United States District Judge or United States Magistrate. After a witness being deposed by the government has testified on direct examination, upon request of the defendant or his counsel, the government shall produce any statement, as defined in 18 U.S.C. 3500, to which the defendant would be entitled at trial.

RULE 16. DISCOVERY AND INSPECTION

The Proposal.—The proposed amendments to Rule 16 would change existing pretrial discovery procedure in two significant ways: (1) in addition to other information, the government would be required to disclose to the defendant the names and addresses of all government witnesses, and (2) much discovery that is now within the discretion of the court to permit or deny would become mandatory absent a sufficient showing in opposition.

Effect of the Proposal.—1. *Disclosure of government witnesses.*—The Department of Justice cannot overstate its opposition to the provisions of proposed Rule 16 which would require the government to disclose to the defendant the names and addresses of potential government witnesses. Certainly courts have overwhelmingly upheld the government's refusal to make such disclosure. See e.g. *United States v. Condor*, 423 F. 2d 904, 910 (6th Cir.), cert. denied, 400 U.S. 958 (1970); *Hemphill v. United States*, 392 F. 2d 45, 48 (8th Cir.), cert. denied, 393 U.S. 877 (1968); *United States v. Mahaney*, 305 F. Supp. 1205, 1209 (N.D. Ill. 1969); *United States v. Westmoreland*, 41 F.R.D. 419, 427 (S.D. Ind. 1967); *United States v. Cobb*, 271 F. Supp. 159, 162 (S.D.N.Y. 1967). The consequences of such a rule are both dangerous and frightening in that government witnesses and their families will even be more exposed than they now are to threats, pressures and physical harm.

The language of subdivision (a) (1) (E) represents a virtual concession by the authors of the rule elevating the importance of a defendant's opportunity to obtain disclosure of the identity of witnesses over the need to protect the physical safety of such witnesses. Indeed, the juxtaposition in the same subsection of an absolute requirement for disclosure of names and addresses of witnesses on

the one hand, and the assurance that the government will have an opportunity to depose and preserve the testimony of such witnesses at an early date on the other, represents at once an implicit acknowledgement of the likelihood of extreme physical danger to witnesses that would emanate from the enactment of the rule, and a remarkable conclusion that the physical safety of victims of crime must assume second priority to the unnecessary expansion of pretrial discovery.

As the United States Attorney for the Western District of Pennsylvania has observed:

"Proposed Rule 16 eliminates any discretion of the court in denying discovery which the court presently possesses under Rule 16, and it requires the government to supply defendant with a list of the names and addresses of all of its witnesses. It is as if the proponents of that Rule had never heard of the murder of key witnesses in organized crime cases with which many of us are regrettably familiar. Or perhaps they have, as reflected in the additional provision that when a defendant makes a request for discovery of the names of witnesses, the government is permitted to perpetuate their testimony under Rule 15 [Depositions]. However, a key witness slated for "erasure" would not likely make it to the deposition, since Rule 15 requires notice to be given to the defendant of the name and address of the witness, as well as the time and place for taking the deposition."

Nor is the problem limited to organized crime cases. In *United States v. Estep*, 151 F. Supp. 668, 672-673 (N.D. Tex., 1957), the court observed:

"Ninety per cent of the convictions had in the trial court for sale and dissemination of narcotic drugs are linked to the work and the evidence obtained by an informer. If that informer is not to have his life protected there won't be many informers hereafter. . . . The court takes judicial notice of a number of informers that have appeared in this court who have been murdered or foully treated.

The Tax Division of the Department of Justice has noted that witnesses in its 1500 cases a year are always subject to either economic or social pressures that can be applied to distort their trial testimony, and that the problem would be materially increased by the proposed amendment to the Rule. The concern of the United States Attorney for the Southern District of New York was expressed as follows:

"The narcotic and mafia type of case may be the main problem area here but we have many 'white collar' cases in which witnesses are intimidated and perjury is suborned.

"We do not believe that the provision permitting depositions will really solve the problem as to murder and intimidation—particularly the latter because the defendants would have every notice to induce a change in testimony even after a deposition was taken. Just yesterday a cooperating defendant in a number of our most important cases was driven to commit suicide by the pressure put upon him by a defendant who had learned of his cooperation. Changes in testimony are easier to procure than suicides.

"On two occasions in the last month we taped 'white collar' defendants in the act of suborning perjury from persons who had already testified before Grand Juries.

"The murder of government witnesses is hardly unknown in this District. *United States v. Pacelli*, 491 F. 2d 1103 (2d Cir. 1974), nor are plots to murder them unknown. See *United States v. Rosner*, 485 F.2d 1213, 1218 (2d Cir. 1973), in which an attorney and a private investigator engaged in, among other things, a plot to murder George Stewart, a government informant and an important witness in *United States v. Bynum*, 485 F.2d 490, 493-495 (2d Cir. 1973); see also *United States v. Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972). Nor is such activity unknown in less important cases. We recently had a postal embezzlement case in which one of the two defendants pleaded guilty several months before trial and agreed to be a government witness. Early one morning eight days before trial, the co-defendant shot him down on a street in Queens. The case had to be nolle.

"It seems clear that we have a hard enough time securing the cooperation of civilian witnesses who 'don't want to get involved' without putting them in a situation in which, months before trial, they become subject to such depredation and harassment as may occur to an ingenious defendant, who will have far more to gain under the new rules than the present post-conviction satisfaction of revenge. Indeed, we are of the view that the law should not, in the name of 'enlightened' discovery procedures, expose innocent members of the public, who

have had the misfortune to be victims of or witnesses to criminal conduct, to the mercy of defendants any more than the confrontation clause presently requires."

Another United States Attorney, from Minnesota, argued:

"It is not fair to the citizen witness to place him in such jeopardy as disclosure of his identity will accomplish. In the areas of drug societies, organized crime, ghetto crime, prostitution rings, and, even sometimes in certain neighborhoods, respect for the criminal outweighs that for those who cooperate with the law. This will double the burden.

"It is tough enough to get witnesses in our society. Any prosecutor will tell you how difficult it is to get people to become involved. Even if they are the victims, people will not come to the police (as evidenced by a crime rate which far exceeds reported crimes)."

The comments of other government attorneys concerning the amendment are similar, calling the proposed amendment "dangerous" and "frightening," an invitation to "bribery and obstruction of justice" and to "harassment, intimidation, or elimination of government witnesses," and an inducement to perjury and the "manufacturing of defenses." As summarized by a United States Attorney from the Southwest, the proposed amendment would create "substantial problems of obstruction of justice, tampering, intimidating and even assassinating of government witnesses," thereby further exacerbating "the ever-growing problem of 'no one wanting to become involved.'"

The situation is aggravated by the current provisions of the Bail Reform Act under which dangerous defendants are set at large as long as they may be relied upon to reappear for trial, with no regard to the risk created for potential witnesses. Nor would the provision for a protective order be an adequate remedy; a court would be reluctant to act upon the prosecutor's unsubstantiated suspicions and would require a specific showing based on past occurrences in the pending case, such as an actual attempt to threaten or suborn one of the government's prospective witnesses. Correspondingly, the formal existence of this remedy would not alleviate the concern of a potential witness weighing whether he should come forward and cooperate. Indeed, preliminary data from a witness cooperation study conducted by the Institute for Law and Social Research in Washington, D.C., under a grant from the Law Enforcement Assistance Administration confirms the impact which witness fear has on criminal prosecutions. When asked the open-ended question, "What changes do you think would make witnesses more willing to cooperate?" 28.8% of those witnesses who had cooperated with the police and the United States Attorney's Office and 31.3% of those who had declined to cooperate gave one of three significant kinds of responses, all reflecting a concern with reprisal: "Better protection of witnesses by police," "Keep witness identification from defendants," and "Assure witness of protection after testimony." We believe that the already demonstrated fear of witnesses about testifying against defendants would, under the proposed Rule, become a substantial, if not totally destructive, impediment to effective law enforcement, and we further believe that in view of the already substantiated basis for those fears, the proposed Rule would be adopted only at a totally unacceptable risk to the lives and safety of witnesses.

2. Mandatory Discovery.—By using "shall" throughout the amended Rule 16, the language of the Rule would divest courts of existing discretion in handling discovery problems and would make discovery under the Rule mandatory absent the making of a "sufficient" showing by the party possessing the information requested. The Advisory Committee note to the proposed Rule explains that the reason for the mandatory language is to make clear "that discovery should be accomplished by the parties themselves, without the necessity of a court order unless there is a dispute concerning whether the matter is discoverable or a request for protective order under subdivision (d)(1)." However, rather than eliminating litigation over discovery, as the Advisory Committee note implicitly suggests would be the effect, it can be expected that, deprived of their traditional right to tailor discovery to the facts of each particular criminal case, trial courts would become embroiled in litigation fostered by both the defendant and the government over issues whether each side has fully complied with its mandatory and continuing disclosure obligations. The problem is aggravated by the fact that the shift from discovery controlled by invocation of the courts' discretion to mandatory discovery has been accompanied by removal of "access limitations" requiring specificity, reasonableness, and a showing of materiality. In addition, any insignificant noncompliance on the government's part would inevitably be alleged as a violation of due process, while noncompliance on the

part of defendants, even if serious, is highly unlikely to result in the imposition of any meaningful sanctions.

We are also concerned with the provisions of proposed subdivision (a) (1) (A) which would authorize defendants which are corporations, partnerships, associations, or labor unions, to discover the grand jury testimony of officers or employees. Such discovery would seriously hamper prosecutions of both corporate defendants and individual defendants joined with them and discourage the testimony of witnesses now protected by grand jury secrecy rules.

Recommendation.—For the reasons stated above the Department of Justice opposes the proposed amendments to Rule 16.

RULE 20. TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

The Proposal.—The amendment would provide that a person "present" in a district other than the district in which he is charged with a criminal offense may, subject to the other provisions of Rule 20, and with the consent of the United States Attorneys for each district plead guilty in the district in which he is "present".

Recommendation.—While the Department of Justice supports this change, it should be pointed out that with respect to charges against juveniles, both the United States Attorney in the district in which the charges are pending, as well as the United States Attorney in the District in which the juvenile is found, should determine whether a juvenile is to be processed in the district in which he is found. Accordingly the words "for each district" should be inserted after the phrase "United States Attorney" in subdivision (d).

W. Vincent Rakestraw was appointed Assistant Attorney General for Legislative Affairs and confirmed by the Senate in March of 1974.

He is a former Assistant Attorney General of Ohio and served as Legislative Assistant to Senator William B. Saxbe for over five years.

He was educated at Ohio University in Athens, Ohio, and the Franklin Law School at Capitol University in Columbus, Ohio, and is a member of the Ohio, Florida and District of Columbia Bars.

RICHARD L. THORNBURGH, U.S. ATTORNEY—WESTERN PENNSYLVANIA,
PITTSBURGH, PA.

Age 42—Married—4 sons.

Graduate of Yale College and University of Pittsburgh Law School (High Honors; Editor, Law Review).

Member of Bar—U.S. Supreme Court; admitted to all Federal and State Courts in Pennsylvania since 1957.

Member; House of Delegates, Pennsylvania Bar Association, American Judicial Society.

Former Board Member; Urban League of Pittsburgh; Neighborhood Legal Services Association (OEO); ACLU of Greater Pittsburgh.

Elected Delegate, Pennsylvania Constitutional Convention, 1967-1968, Secretary, Judiciary Committee.

Appointed U.S. Attorney for Western Pennsylvania, 1969, re-appointed, 1973; member U.S. Attorneys Advisory Committee to U.S. Attorney General, 1973 to date.

H. M. RAY, U.S. ATTORNEY, NORTHERN DISTRICT OF MISSISSIPPI

Has served as United States Attorney for the Northern District of Mississippi for thirteen years, and has actively participated in significant criminal and civil trials and appellate arguments. Has been a frequent contributor of proposals dealing with Federal Rules of Civil, Criminal and Appellate Procedure. Is a member of the Attorney General's Advisory Committee of United States Attorneys, and Chairman of its Legislation and Court Rules Subcommittee. Recently testified before the Senate Committee on the Judiciary on the pending proposed Federal Rules of Evidence, and before Subcommittee on Crime, House Committee on the Judiciary, on the "Speedy Trial Act of 1974." Spearheaded recent United States Attorneys successful efforts with Congress for additional consideration of important criminal rules proposals.

He is President-Elect of the Mississippi Chapter of the Federal Bar Association, a member of the American Bar, the Mississippi State Bar, a former State Legislator and former County Prosecuting Attorney.

SUBCOMMITTEE ON LEGISLATION AND COURT RULES

The purposes stated by the Attorney General in his creation of the Advisory Committee of United States Attorneys were:

- (1) To give the United States Attorneys a voice in Departmental policies;
- (2) To conduct studies and make recommendations with regard to improving management, specifically with respect to relationship between the Department and the United States Attorneys;
- (3) To improve liaison with State Attorneys General to the end of a better understanding of the proper sharing of law enforcement responsibilities by state and federal law enforcement agencies;
- (4) To promote greater consistency in the application of legal standards across the country and across the levels of government;
- (5) To aid him in formulating new programs for improvement of the criminal justice system at all levels, including the penal system;

OBJECTIVES

In order to accomplish its responsibilities for the above purposes the objectives of the *Sub-Committee on Legislation and Court Rules* shall include the following:

- (1) Establishing liaison and subsequent exchanging of views, comments and suggestions, with others involved in the Sub-Committee's areas of responsibility.
- (2) Providing comments and suggestions, on an on-going basis, to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.
- (3) Reviewing and responding to legislative proposals, including such current pending subject matter as:
 - (a) Federal Criminal Code.
 - (b) Federal Rules of Evidence.
 - (c) Speedy Trial.
 - (d) Federal Grand Juries.
 - (e) Deferred Prosecution of Adults.
- (4) Initiating legislative proposals on Criminal Justice System subject matter.
- (5) Commenting on impact of court rules, court decisions, Departmental policy, and legislation of the criminal justice system.

MEMBERSHIP

The membership of the Sub-Committee on Legislation and Court Rules shall consist of the six following *regular* members: Ralph G. Guy, Jr.—(E., Mich.); D. Dwayne Keyes—(E., Calif.); James R. Thompson—(N., Ill.); James M. Sullivan, Jr.—(N., N.Y.); James L. Treece—(Colo.); H. M. Ray—(N. Miss.), Chairman; and such other *special* members, to be selected by the Chairman, as may be needed to carry out any special or particular Sub-Committee objective.

U.S. DEPARTMENT OF JUSTICE,
UNITED STATES ATTORNEY,
NORTHERN DISTRICT OF MISSISSIPPI,
Oxford, Miss., June 14, 1974.

HON. W. VINCENT RAKESTRAW,
Assistant Attorney General,
Office of Legislative Affairs,
Department of Justice,
Washington, D.C.

DEAR SIR: I am enclosing herewith six copies of the "Comments Of United States Attorneys On New Amendments To The Federal Rules of Criminal Procedure", revised as of May 31, 1974.

For your information, on June 7, 1974, by teletype, I asked each U.S. Attorney the following questions:

1. Whether you favor the substantial modification of new amendments prior to their becoming effective?

2. Whether, in the alternative, assuming that modification is not possible at this late date, you favor legislation delaying the effective date of the rules until August 1, 1973?

As of this date 90 of the 94 U.S. Attorneys have resoundingly answered, indicating an urgent need for modification, and *all* being of the *unanimous* view that legislation is needed to delay the effective date so that the rules may be further studied by Congress.

If the United States Attorneys across this Nation are not experts in these matters, then I respectfully submit that there are none to be found. The representatives of the people should be alerted to the urgent need for modification of these rules. Please convey to the Attorney General our grave concerns and our request for his strong support in calling these serious issues to the attention of The Congress.

Sincerely yours,

H. M. RAY,
U.S. Attorney,

Chairman, Legislation and Court Rules Subcommittee.

To: W. Vincent Rakestraw, Assistant Attorney General, Office of Legislative Affairs.

Info copy to all U.S. attorneys (including overseas offices).

Fm: H. M. Ray, U.S. Atty., N.D. Mississippi, Chairman, Legislation & Court Rules Subcommittee to U.S. attorneys Advisory Committee.

Subj: Proposed amendments to Federal Rules of Criminal Procedure now pending in Congress.

In view of the substantial impact of the amendments to the Federal Rules of Criminal Procedure on the prosecution of Federal offenses, on June 7, 1974, the following questions were asked, by teletype, of each United States Attorney:

1. Whether you favor the substantial modification of the new amendments prior to their becoming effective?

2. Whether, in the alternative, assuming that modification is not possible at this late date, you favor legislation delaying the effective date of the rules until August 1, 1975?

As of this afternoon 89 of the 94 U.S. attorneys have responded. The responses have been absolutely *overwhelming* indicating that modification is needed prior to the amendments becoming effective. All reporting to this hour favor legislation *delaying* the effective date of the rules until August 1, 1975.

Please convey to the attorney general our grave concerns and request for his strong support in these urgent matters.

COMMENTS OF UNITED STATES ATTORNEYS

ON

NEW AMENDMENTS TO FEDERAL RULES OF CRIMINAL PROCEDURE

Revised as to May 31, 1974

COMMENTS OF UNITED STATES ATTORNEYS
ON NEW AMENDMENTS TO FEDERAL RULES OF
CRIMINAL PROCEDURE

As a result of the First Report and Recommendations to the Attorney General from his Advisory Committee of U. S. Attorneys, in which it was requested that the Attorney General re-examine the present policy of not opposing rules reported by the Supreme Court to Congress, the Department recently invited comments from United States Attorneys on the rules which were forwarded by the Supreme Court to Congress on April 22, 1974.

United States Attorneys are of the near unanimous view that the problems presented by the New Amendments to the Federal Rules of Criminal Procedure should be raised with the Congress.

Comments from United States Attorneys, received as of May 31, 1974, are set forth herein under the appropriate rule after which general comments follow.

RULE 4

ARREST WARRANT OR SUMMONS UPON COMPLAINT.

Comments of U. S. Attorneys

Richard L. Thornburgh, W. D. Pennsylvania:

Rule 4 would require the magistrate to issue a summons for the appearance of a defendant, rather than an arrest warrant, unless the defendant fails to appear in response to the summons or unless a valid reason is shown for the issuance of an arrest warrant. Query what the rules committee considers a "valid" reason or, what an individual magistrate might require as a "valid" reason.

It would appear that the very reason for resort in the initial instance to the complaint procedure, rather than initiating prosecution by indictment, is the need for quick apprehension of the defendant. A summons will in all probability be an invitation to numerous defendants to abscond.

Donald E. Walter, W. D. Louisiana:

I agree with Thornburgh.

W. C. Smitherman, D. Arizona:

I adopt Thornburgh's comments concerning these amendments.

Robert E. Johnson, W. D. Arkansas:

I would agree with the substance of U. S. Attorney Thornburgh's comment on proposed Rule 4.

Ira De Ment, M. D. Alabama:

With regard to Rule 4, I recommend that summons should be at the discretion of the attorney for the government.

(Rule 4, page 1)

Robert G. Renner, D. Minnesota:

I approve of United States Attorney Thornburgh's comments on proposed changes to Rule 4.

It is a fact of life that criminals quite often carry the fruits or instrumentalities of crime upon their person or within reaching range, such as a felon with a gun or a pusher with narcotics. Searches incident to arrest are valid. Now, by summons, we shall be advising all to rid themselves of incriminating evidence prior to arrest.

J. P. Farris, S. D. Texas:

We agree strongly with the position (U.S.A. Thornburgh's) stated in your teletype as to Rule 4. In recent years much emphasis has been placed upon establishing probable cause in a complaint and supporting affidavit. This rule, in addition to giving the defendant an opportunity to frustrate investigation or plea, seems to disregard the fact that the magistrate has already found that there is probable cause to arrest this individual. We predict a considerable increase in paperwork as a consequence of this proposed change, and feel that the additional burdens on the agents and the assistant United States attorneys will not be automatically compensated for by additional manpower, as well as serving no really useful purpose.

Robert W. Rust, S. D. Florida:

The implementation of the summons process would be detrimental to law enforcement for the following reasons:

1. Would decrease amount of evidence seized in a search incidental to arrest by reducing number of arrests.
2. Would increase the number of fugitives.
3. Would create more paper work for the U. S. Attorney's office and the U. S. Marshal's service.
4. Would increase the time lag between issuance of the complaint and eventual trial.

(R. 4, p. 2)

Harry D. Steward, S. D. California:

The proposed modification to Rule 4 seems to be in line with the spirit of Bail Reform Act, i.e., that a defendant is not to be incarcerated unless some good reason appears therefor. It is my impression that the Bail Reform Act did not substantially alter the courts' historic approach to incarcerating defendants in lieu of high bail where circumstances warrant it. I would assume that magistrates would routinely authorize arrest warrants where any realistic need is shown. In my judgment the modification merely recognizes the desirability, where possible, of not having to arrest defendants pending the final determination of their guilt or innocence. We have routinely used summonses in this district for a number of years. Including the use by officers of forms entitled "Notice to Appear". Surprisingly we have had those arrested and released on bail. Obviously we restrict the use of these nonarrest approaches to minor offenders who appear to be good risks. I see no objection to the modification of the rule as proposed.

Victor R. Ortega, D. New Mexico:

Priority is given under Rule 4 to the issuance of a summons rather than an arrest warrant. Over the years, we have found that substantial evidence concerning criminal activity is frequently seized at the time of a defendant's arrest upon a warrant. This is especially true in narcotics cases where sellers of narcotic drugs frequently have narcotics on their person or in their immediate environs at the time of their arrest. Frequently a determination as to where the arrest should be made upon an arrest warrant is made upon previous intelligence as to where the defendant keeps his narcotics or whether he may be a conveyor of narcotics. While we regard this as legitimate law enforcement work, others may not feel that this is a "valid" reason and arrest warrants may not issue in many situations which would result in better cases.

In addition, a failure to answer a summons may not amount to bail jumping because under 18 U.S.C. 3150, a defendant must have been released under that act, then failure to answer a summons would not appear to be a violation of the act. In the Tenth Circuit, a failure to appear as required under the Bail Reform Act is evidence which would be admissible on the main charge as evidence in the nature of flight.

Victor R. Ortega, D. New Mexico (cont'd.)

We have some concern that the new rule giving priority to the use of a summons will perhaps promote arrests without warrant based on probable cause that a felony had been committed. This might be the only way to insure that important evidence was seized at the time of the arrest. Because of the difficulties we foresee, we recommend that the proposed changes to Rule 4 be opposed by your sub-committee.

Charles H. Anderson, M. D. Tennessee:

The Bail Reform Act has created enough problems with defendants' failures to appear and report. I can think of no greater boon to the criminal element than leaving it to the whim of the Magistrate or the vagaries of the Postal Service as to whether they will appear. "Valid reason" is meaningless term; we always use the summons for defendants who we do not fear will flee. Our local magistrate has indicated he is contemplating using this test: if bond would be required, a warrant will issue; otherwise, a summons.

Stan Pitkin, W. D. Washington:

We agree that whenever feasible, a summons should be used on complaints. However, we would prefer this be set out in the rule as a policy statement rather than requiring a showing of a "valid reason" for the issuance of a warrant separate and apart from the "probable cause" necessary for the issuance of the complaint. In the rule as it now stands, there are no standards set out as to what "valid reason" for the issuance of a warrant (rather than a summons) is necessary and whether it should be under oath or in writing. If we are in fact to be required to show additional cause for the issuance of a warrant, the rule, at minimum should be clarified as to whether the "valid reason" must be shown in the complaint or otherwise in writing. Also, we would suggest a specific provision that the magistrate may not be second-guessed and that a court's subsequent determination that no "valid reason" existed for the issuance of a warrant should not be grounds for invalidating the arrest and any searches incident thereto. Otherwise, we foresee endless litigation.

H. M. Ray, N. D. Mississippi:

We see no cause for changing the present Rule 4.

Issuance of a summons in lieu of an arrest warrant should at least require concurrence of the attorney for the government. The original draft, commented on by the bench and the bar, carried over the existing provision denying the courts power to override the government's decision that a summons may safely be used, it would be anomalous to authorize courts to override the government's judgment that forcible apprehension is necessary. Decision on whether a summons or arrest warrant should be used is properly left with the executive branch.

In the alternative the proposed rule should be amended by deleting the language contained in 4(b)(2) and inserting in lieu thereof language which would require that a warrant shall issue whenever "(2) requested to do so by the attorney for the government", by deleting the entire provisions of 4(b)(3), and by deleting the language set forth in 4(c) and inserting in lieu thereof:

"A complaint or affidavit shall not be insufficient because made on information if such information appears from the complaint or affidavit (or otherwise) to be reasonably trustworthy. More than one warrant or summons may issue on the same complaint or for the same defendant."

The prohibition against issuing even a summons on an information unless it is supported by affidavits showing probable cause in the elaborate detail more and more required will result in unnecessary delay and inconvenience in prosecuting minor offenses, not only in U. S. district courts but in all probability in prosecution of minor and petty offenses before magistrates [see Rules 1, 2(a) and 3(a), Rules of Procedures For Trial of Minor Offenses].

It is also proposed to include new language in Rule 4 to provide that probable cause may be founded on "hearsay in whole or in part." The commentary merely notes that this "is current law."

Insofar as the amendment recognizes that a warrant may issue on hearsay evidence, it goes no further than the existing rule which authorizes the issuance of a warrant on affidavits. Any affidavit, even one made on personal knowledge, is hearsay "because, though under oath, it is uttered 'ex parte'",

H. M. Ray, N. D. Mississippi (cont'd.):

without notice to the opponent to afford him the opportunity of cross-examination," 6 Wigmore, Evidence Section 1709 (3rd Ed. 1940).

The amendment, however, is obviously not addressed to hearsay in this sense. The amendment is intended to approve statements by informers or third persons to the affiant which are repeated by the affiant in his affidavit. The statement of the informer to the affiant is, of course, hearsay even double hearsay when presented to the magistrate in the affidavit. The significant point, however, is not that it is hearsay, but that it is not under oath as required by the Fourth Amendment. The use of such unsworn hearsay in obtaining warrants was expressly upheld in Jones v. United States, 362 U.S. 257, 271 (1960) and long before had been approved in opinions such as Brinegar v. United States, 338 U.S. 160, 175-76 (1949) where the court said:

"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed."

The problems considered in the recent cases which have attracted the revisers' attention have arisen not from the use of unsworn hearsay, but from the reliance on unsworn hearsay which is factually inadequate to show the commission of a crime by the accused. This point is amply illustrated by the cases cited by the revisers.

In Giordenello v. United States, 357 U.S. 480 (1958), the entire complaint stated no more than the affiant's conclusion that the defendant had received and concealed narcotics without any supporting facts. The court held that "it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed," Id. at 486.

In Aguilar v. Texas, 378 U.S. 108 (1964) the relevant part of the complaint stated only the affiants' belief, on the basis of "reliable information from a credible person" that the

H. M. Ray, N. D. Mississippi (cont'd.):

defendant possessed narcotics. There was no factual detail in the complaint and the court held that the "warrant should not have issued because the affidavit did not provide a sufficient basis for a finding of probable cause," *Id.* at 115.

In *Spinelli v. United States*, 393 U.S. 410 (1969) the essential allegation of the affidavit stated merely that the affiant had been informed by a reliable informant that the defendant was conducting a gambling operation. Other facts were recited but a majority of the Court considered them innocuous or entitled to no weight. The court held that "the informant's tip--even when corroborated to the extent indicated--was not sufficient to provide a basis for a finding of probable cause," *Id.* at 418.

In all of these cases, the affidavits stated only the ultimate fact in issue--that the defendant had committed a crime. None stated, either directly or by hearsay, sworn or unsworn, any evidentiary facts to justify the belief that any offense had been committed by the accused. When the affidavits in these cases are contrasted with those upheld in other cases cited by the revisers, i.e., *McCray v. Illinois*, 386 U.S. 300 (1967); *Jaben v. United States*, 381 U.S. 214 (1965); *United States v. Ventrasca*, 380 U.S. 102 (1965), it seems clear that the defects in the former were their factual inadequacy rather than their testimonial unreliability.

For these reasons, the proposed change is an empty gesture. It adds nothing to the rule by specifically mentioning hearsay when the rule already authorizes the issuance of warrants on affidavits. It does not reach the matter of unsworn information repeated in an affidavit, and no revision of the rule can deal with the problem of a factually insufficient affidavit. Moreover, by expressly approving, in the terminology of the rules of evidence, one form of inadmissible evidence the change may be interpreted as disapproving other forms of inadmissible evidence which e.g., *Brinegar v. United States*, 338 U.S. 160, 172-73 (1949) (prior arrest for similar offense). The proposed change should be rejected altogether, but if one is to be made it should be made along the lines suggested above as an alternative to 4(c). The above suggested alternative would establish a normal, or routine, procedure that a summons would be used (carrying out the views of U.S.A. Steward), but would maintain the absolute right of the Executive Branch to require a warrant when the attorney for the government deems a warrant appropriate (carrying out the views of the other U. S. Attorneys).

(R. 4, p. 7)

H. M. Ray, N. D. Mississippi (cont'd.):

The proposed change provides further that "before ruling on a request for a warrant the magistrate may require the complainant to appear personally and may examine under oath the complainant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment."

The commentary explains that this change makes clear that the magistrate may examine the complainant or other witnesses to determine the existence of probable cause, but that such examination must be recorded. The purpose of this change "is to insure that there exists an adequate basis for reviewing the propriety of the issuance of the warrant if its issuance should be attacked upon a subsequent motion to suppress evidence seized incident to the arrest, for example." Why this is necessary or even desirable, the revisers do not say.

Justice Black's response to the holding in Aguilar v. Texas, 378 U.S. 108 (1964) is even more appropriate as applied to this proposal:

"That decision went very far toward elevating the magistrate's hearing for issuance of a search warrant to a full-fledged trial, where witnesses must be brought forward to attest personally to all of the facts alleged. . . . Of course, it would strengthen the probable cause presentation if eye witnesses can testify that they saw the defendant commit the crime. It would be stronger still if these witnesses could explain in detail the nature of sensual perceptions on which they based their 'conclusion' that the person they had seen was the defendant and that he was responsible for the events they observed. Nothing in our Constitution, however, requires that the facts be established with that degree of certainty and with such elaborate specificity before a policeman can be authorized by a disinterested magistrate to conduct a carefully limited search." Spinelli v. United States, 393 U.S. 410, 429 (1969) (Dissenting Opinion).

H. M. Ray, N. D. Mississippi (cont'd.):

To these objections can be added the further one that the proposed change will result in a needless and enormous waste of time, money and manpower.

Robert J. Roth, D. Kansas:

Oppose change. Warrants should be issued unless circumstances justify issuance of summons. When charges are first filed, frequently critical information is not yet available. Facts justifying issuance of summons normally are known or readily available.

Wayman G. Sherrer, N. D. Alabama:

Generally not objectionable. Specifically, what does this do with respect to making more difficult prosecutions under the Bail Reform Act (18 USC 3150). Secondly, all being aware of the investigative agencies' statutory right to warrantless probable cause arrests, even without prior consultation with United States Attorney, will not this provision serve to increase rather than lessen the incidence of premature or preindictment arrests?

Earl J. Silbert, D. C.:

This rule, as the Advisory Committee Note acknowledges, would give priority to the issuance of a summons over a warrant, even where probable cause exists to arrest a defendant, and would preclude the issuance of an arrest warrant except where a defendant fails to appear in response to a summons, a "valid reason" is shown for the issuance of an arrest warrant rather than a summons, or a summons having issued, a valid reason is subsequently shown for the issuance of an arrest warrant.

It is our view that this rule, if permitted to stand as proposed, would have a devastating effect on federal law enforcement efforts, as well as law enforcement efforts of local jurisdictions which adopt the rule. It would severely increase what has already been characterized as a "fugitive crisis" in this and other jurisdictions by putting those accused of crime on notice that they are being sought by law enforcement officers and should thus take precautions to avoid apprehension. (In this connection, I have

(R. 4, p. 9)

Earl J. Silbert, D. C. (cont'd.):

appended a memorandum from Charles H. Roistacher, the Chief of our Federal Grand Jury Section, to Paul L. Friedman, our Administrative Assistant, in which Mr. Roistacher details his apprehensions about the proposed amendments to Rule 4. To those who would maintain that most summoned defendants charged with serious crime will appear voluntarily, the statistics obtained from the Clerk's Office of the United States District Court by Mr. Roistacher, indicating that even in traffic cases, only ten per cent of 2600 summoned defendants appeared, are strong evidence to the contrary.) (Copy of memorandum not included in these comments; original sent to Mr. Ronald L. Gainer, Acting Chief, Legislation and Special Projects Section, Criminal Division.)

In addition to encouraging fugitivity, the proposed amended Rule 4 would also foster the fabrication of alibis and the secreting and destruction of evidence by criminal defendants before law enforcement officers had an opportunity to apprehend them. Finally, it is likely that the Rule would encourage police to effect arrests without warrants in a larger number of cases because of the difficulties of obtaining arrest warrants.

This amendment was not included in either the January, 1970, or the April, 1971, preliminary drafts of proposed amendments to the Federal Rules and thus, neither the Advisory Committee nor the Supreme Court received the assistance of the comments and criticisms of the bench and bar. Indeed, the Advisory Committee Note to the proposed amendment of Rule 4 refers only to the proposed amendment to Rule 9 to suggest the reasons for the change, and the Advisory Committee Note to Rule 9, in turn, cites only an article by Judge Marvin Frankel of the United States District Court for the Southern District of New York in support of the change. While Judge Frankel's article is discussed in somewhat more detail in our comments below, it is sufficient to note here that his article is devoted not to Rule 4 at all, but exclusively to a critical analysis of Rule 9 and its requirement that arrest warrants issue automatically for indicted defendants upon the demand of the United States Attorney. See Frankel, "Bench Warrants Upon the Prosecutor's Demand: A View from the Bench", 71 Col. L. Rev. 403 (1971). Pointing up the dearth of authority in support of his novel proposal, Judge Frankel, with typical candor, acknowledged that 11 of his 13 brethren on the Southern District Bench, as well as all citable commentators, disagreed with his view. See Frankel, supra, p. 403, n. 1 and p. 410, n. 25.

(R. 4, p. 10)

Earl J. Silbert, D. C. (cont'd.):

In addition to the substantial difficulties which the proposed amendments to Rule 4 would portend for law enforcement and the lack of authority in support of the change, the proposed amendment itself is vague, subject to varying interpretation, and--as Judge Frankel also acknowledged--likely to result in a whole new panoply of adversary proceedings, ostensibly at both the trial and appellate levels, to test the efficacy of magisterial determinations that the Government demonstrated a sufficiently "valid reason" for the issuance of an arrest warrant rather than a summons. See Frankel, *supra*, p. 414, n. 40. Most importantly in this regard, there is no definition of "valid reason" in either the Rule or the Advisory Committee Note, and Judge Frankel's almost casual dismissal of the problem is of little additional help. See Frankel, *supra*, pp. 404-405. Additionally, no provision is made for the processing (e.g., booking, fingerprinting, photographing, etc.) of defendants who are summoned, rather than arrested.

For the reasons noted above we vigorously and steadfastly oppose the promulgation of the proposed amendments to Rule 4 and urge that the existing Rule 4 be retained. Nevertheless, in the absence of the Department considering it either desirable or feasible to retain existing Rule 4, we would urge that the proposed amendment be modified to define a "valid reason" for the issuance of an arrest warrant rather than a summons by adding as a final paragraph to proposed Rule 4(b) the following language: A "valid reason" exists for the issuance of an arrest warrant rather than a summons where the defendant is charged with an offense related to narcotics or involving the risk of physical harm, where the attorney for the government certifies that issuance of a summons rather than a warrant may afford the defendant an opportunity to destroy evidence of the offense or to fabricate an alibi, or where he states reason to believe that the defendant may flee upon being summoned. (A comparable certification provision was proposed in the April, 1971 Report to the Attorney General Concerning disclosure of government witnesses. See pp. 28-29.)

Robert E. Hauberg, S. D. Mississippi:

The new proposed rule requires that only a summons be issued on a complaint or upon the return of an indictment unless some valid reason is shown for issuance of an arrest warrant. Why should this extreme burden be placed upon the government?

Extreme hardship will be placed upon arresting officers who may have evidence of a stolen motor vehicle being

(R. 4, p. 11)

Robert E. Hauberg, S. D. Mississippi (cont'd.):

transported in interstate commerce and if the officer must rely upon a summons defendant will be out of the jurisdiction before the summons could even be served upon the defendant. Certain types of crimes would never be prosecuted if a summons only is issued. Many grand jurors expect a warrant of arrest to be issued in instances where probable cause is sufficient for the return of a true bill. The law is adequate at the present time to allow a summons instead of a warrant if made upon the request of the attorney for the government.

From the Office of James R. Thompson, N. D. Illinois:

New Rule 4(a) substitutes summonses for arrest warrants in complaint proceedings before magistrates. Such a substitute is appropriate in certain categories of cases, but not in cases where either the nature of the offense or past conduct of the defendant invite the possibility of flight to avoid prosecution. Certain offenses, as well as certain types of past conduct, should, per se, fall under the arrest warrant provisions of the old rule.

New Rule 4(b)(3) provides for the issuance of arrest warrants after a showing of valid reason to the magistrate, but only after summons has issued. This presents a double-barreled problem. By the time showing is made, warrant is issued, and agents have been mobilized, it is possible for the defendant to have already been put on notice by the previously issued summons and have long fled by the time the agents arrive. Secondly, it leaves too much to the whim and caprice of individual magistrates, who do not have the background and experience ordinarily attributable to judges. Magistrates do not sit through complex and revealing trials and, therefore, never obtain the quantum of exposure available to district court judges.

The new rules as written does create the summons as a viable tool, but unless a magistrate finds otherwise, becomes the tool. The following are several suggestions which minimize the risk of premature notice to a flight prone subject and still preserves the advantages of the availability of the summons. The following is a partial list of types of offenses wherein arrest warrants should automatically issue and in which summons is unavailable:

- a. all homicide offenses;
- b. all offenses involving a weapon in their commission;

(R. 4, p. 12)

From the Office of James R. Thompson, N. D. Illinois (cont'd.):

- c. all bank robberies;
- d. robberies of postal employees;
- e. kidnappings;
- f. hijackings;
- g. all hard narcotics cases;
- h. all drug cases over a certain number of ounces;
- i. all extortions;
- j. most TFIS cases;
- k. all firearms violations;
- l. Mann Act violations;
- m. counterfeitings; and
- n. forgeries.

In addition, summons should not be available regardless of the crime, if either the defendant has been convicted of any of the felonies enumerated in a. through n. above within the past five years, if he has ever been convicted of a homicide, and if he has any charges pending against him in any court falling under the a. through n. categories listed above.

Furthermore, summons should not be available where the defendant is an alien or has no substantial ties to any one place.

At the same time, there are innumerable categories of crime where there exists little, if any, risk of flight. In these cases, unless there is a showing to the contrary, a summons should issue, and these are:

- a. tax cases;
- b. mail frauds;
- c. perjuries;
- d. bankruptcy frauds;
- e. most postal violations;
- f. vote fraud cases;
- g. IRS liquor violations;
- h. impersonation of federal officer cases; and
- i. Dyer Acts.

Probably the best alternative in revising the rule is to retain the present rule with the proviso that a summons will issue upon application by the United States Attorney and approval by the magistrate or sue sponti by the magistrates.

Paul J. Curran, S. D. New York:

The important change made by this rule is that it gives the Magistrate discretion whether to issue a summons or a warrant of arrest upon the filing of a complaint. The peculiarity of the change in Rule 4 is made clearest by the fact that in this District there are hardly any situations in which it would be appropriate to commence criminal proceedings by way of a complaint before the Magistrate without the need to secure the immediate arrest of the defendant. If the Magistrate decides in a given case that a summons is preferable to a warrant, and he is wrong, then the defendant will be but another fugitive who will have to be pursued.

Another danger posed by the new rule arises from the vagueness of the standard for immediate issuance of a warrant of arrest instead of a summons ("valid reason" - 4(b)(2) and (3)) and the likely protracting of proceedings before the Magistrate in having to show that a warrant rather than a summons should issue. A considerable amount of time is being wasted before the Magistrates now because of fairly frequent congestion in their calendars.

Additionally, of course, it appears that it will now be open to a defendant to move to suppress evidence secured incident to an arrest on a warrant on the grounds that the showing of a "valid reason" for its issuance was inadequate and that the Magistrate abused his discretion in not issuing a summons instead of the warrant. In view of the enormously protracted suppression problem which already exists in criminal cases, it is foolish to add a new and wholly unnecessary ground on which suppression motions can be based.

Moreover, since an arrest warrant need not be obtained even where there is adequate time to do so, except perhaps for nighttime arrests in a home, United States v. Gonzalez, 483 F.2d 223, 225 n.2 (2d Cir. 1973), the effect of the new rule will be to discourage attempts to obtain warrants except when really necessary. It seems wholly unreasonable for there to be a rule of criminal procedure which puts a premium on avoiding applications to a Magistrate for a warrant. The probable response to this result may be a rule that a warrant of arrest must be secured in the absence of exigent circumstances. If that happens, then of course there will be an additional wholly unnecessary ground on which defendants will make pretrial suppression motions.

(R. 4, p. 14)

Paul J. Curran, S. D. New York (cont'd.):

The net of the new Rule is to create both present and potential complications to taking custody of lawbreakers which exceed anything the Constitution requires and will surely lead to further unnecessary expenditure of law enforcement and judicial resources and delay in what ought to be the purpose of the criminal process--the prompt determination of guilt or innocence.

(R. 4, p. 15)

RULE 9

WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION.

Comments of U. S. Attorneys

Ira De Ment, M. D. Alabama:

With regard to Rule 9, I recommend that summons should be at the discretion of the attorney for the government.

Robert W. Rust, S. D. Florida:

The implementation of the summons process would be detrimental to law enforcement for the following reasons:

1. Would decrease amount of evidence seized in a search incidental to an arrest by reducing number of arrests.
2. Would increase the number of fugitives.
3. Would create more paper work for the U. S. Attorney's office and the U. S. Marshal's service.
4. Would increase the time lag between issuance of the complaint and eventual trial.

Stan Pitkin, W. D. Washington:

We have similar objections to those under Rule 4 as to requiring a showing for issuance of a warrant on an indictment. In addition, we don't see the need for an oath on an information in order to allow the clerk to issue a summons. We are not completely clear what "oath" is required, but assume it means an affidavit under oath establishing probable cause for the issuance of a summons. This makes the clerk the person who determines whether there is probable cause for the issuance of a summons, a judicial determination.

H. M. Ray, N. D. Mississippi:

We see no cause for changing the present Rule 9.

(Rule 9, page 1)

H. M. Ray, N. D. Mississippi (cont'd.):

Issuance of a summons in lieu of an arrest warrant should at least require concurrence of the attorney for the government. The original draft, commented on by the bench and the bar, carried over the existing provision denying the courts power to override the government's decision that a summons may safely be used, it would be anomalous to authorize courts to override the government's judgment that forcible apprehension is necessary. Decision on whether a summons or arrest warrant should be used is properly left with the executive branch.

In the alternative the proposed rule should be amended by deleting the following language set forth in proposed Rule 9(a)(1) "if it is supported by oaths," and by striking the sentence in 9(a) that reads "the court shall order issuance of a warrant instead of a summons if the attorney for the government presents a valid reason therefor" and inserting in lieu thereof the following:

"However, upon request of the attorney for the government, the clerk of the court shall order issuance of a warrant instead of a summons for each defendant named in the information, if it is supported by oath, or in the indictment."

Earl J. Silbert, D. C.:

Our criticisms of the proposed amendments to Rule 9 essentially track our objections to the proposed amendment of Rule 4, and all of the objections noted above to Rule 4 apply with equal force to Rule 9. Inasmuch as Judge Frankel's article, upon which the Advisory Notes purportedly rely in supporting amendments to both Rules, was explicitly addressed to Rule 9, our criticisms of that article bear particular attention here; the proposal's failure to meet the problems of the increased likelihood of fugitivity, fabrication of alibis and destruction of evidence that would result from its implementation; the lack of support for Judge Frankel's view among his brethren and legal commentators; the likelihood that it would spawn a substantial measure of additional collateral litigation in criminal proceedings; and Judge Frankel's failure to come to grips with the troublesome problems of definition inherent in the "valid reason" he would require for the issuance of an arrest warrant rather than a summons.

(R. 9, page 2)

Robert E. Hauberg, S. D. Mississippi:

The new proposed rule requires that only a summons be issued on a complaint or upon the return of an indictment unless some valid reason is shown for issuance of an arrest warrant. Why should this extreme burden be placed upon the government?

Extreme hardship will be placed upon arresting officers who may have evidence of a stolen motor vehicle being transported in interstate commerce and if the officer must rely upon a summons defendant will be out of the jurisdiction before the summons could even be served upon the defendant. Certain types of crimes would never be prosecuted if a summons only is issued. Many grand jurors expect a warrant of arrest to be issued in instances where probable cause is sufficient for the return of a true bill. The law is adequate at the present time to allow a summons instead of a warrant if made upon the request of the attorney for the government.

From the Office of James R. Thompson, N. D. Illinois:

New Rule 9 adopts essentially the same substitution of summons for arrest warrants in indictments. The same reasons as set forth in our comments under Rule 4 apply herein, only more so.

Paul J. Curran, S. D. New York:

This rule requires the Government to show a "valid reason" why an arrest warrant should issue on an indictment instead of a summons; the previous rule required the issuance of an arrest warrant upon request by the Government. This proposal, also, carries with it many of the problems already discussed in connection with the changes in Rule 4.

RULE 11

PLEAS.

Comments of U. S. Attorneys

Victor R. Ortega, D. New Mexico:

The proposed changes in Rule 11 present a number of problems. Rule 11(e)(1) refers to a plea being taken to a lesser or related offense. We question whether "related" means factually related or legally related and whether or not agreements beyond what appear in the rule can be entered.

With respect to the words "other charges" we frequently run into large marihuana seizure cases or Dyer Act prosecutions involving several individuals in an automobile. Frequently one of the individuals is willing to accept the blame for the entire matter and exculpate the others. There is little we can do under these circumstances other than to accept the plea bargain which results in the dismissal of other charges against other people. We feel that plea bargaining is presently an accepted procedure; however, encasing the matter into a rule will inevitably reduce the flexibility of the device.

We are very concerned about plea bargain agreements being fully disclosed in open court at the time the plea is offered. Frequently in narcotics cases part of the plea bargain is that the defendant still perform certain useful work for government narcotics agents, such as introducing them to heroin suppliers and the like. Two of our judges have been very cooperative with respect to this problem and have not inquired too deeply into these plea bargain arrangements in public. However, one federal judge in this district insists that the entire plea bargain go down on the record or he will not accept the plea at all. In one case, the defendant was scheduled to introduce an undercover narcotics agent to an important supplier within a few days after the plea was to take place. Because of this judge's policy, we had no choice but to dismiss the case against the cooperating individual rather than reveal the entire bargain. Clearly this solution is bad not only because we have to dismiss a prosecutable case, but also because control over the cooperative individual is lost. The danger to the cooperative individual of publicizing his or her cooperation is, of course, obvious.

(Rule 11, page 1)

Victor R. Ortega, D. New Mexico (cont'd.):

Because of the problems we see with Rule 11, we oppose these proposed changes.

Stan Pitkin, W. D. Washington:

Rule 11(e)(1) raises many of the normal points of discussion in plea bargaining but is unclear whether those are the only permissible subjects of discussion. Among other matters typically discussed are testimony, intelligence, and other means of developing further cases which the government is interested in, and various matters to be offered to the defendant such as disposition of probation and parole problems or disposition of charges as to other persons.

Rule 11(e)(2) requires that the plea agreement be disclosed in open court. If part of the plea bargain is to aid the government as a witness or as a source of information, disclosure of such in open court may destroy defendant's effectiveness and will make such an agreement impossible if the defendant wants anonymity as to his cooperation. Obviously some plea bargains should not be made public in the interest of safety of the defendant or to avoid prejudice to other cases. The rule should be explicit that the court has discretion to hear such problems in chambers and to seal the record.

William D. Keller, C. D. California:

I strongly feel that the nolo plea should be abolished. There is no valid reason to protect a defendant from civil liability if he is in fact guilty of a crime. The public's confidence in the law enforcement system is diminished by the existence of such a plea.

H. M. Ray, N. D. Mississippi:

The first sentence of Rule 11(b) should be amended to read:

"A defendant may plead nolo contendere only with the consent of the government and the court."

(R. 11, p. 2)

H. M. Ray, N. D. Mississippi (cont'd.):

To avoid post-conviction hearings on all Rule 11 inquiries, to insure reliability of the defendant's statements to the Court; and for the reasons and requirements in Bryan v. United States, 492 F.2d 775, 780 (1974), it is suggested that the defendant be placed under oath at the outset of the Rule 11 inquiry. We therefore recommend that proposed Rule 11(d) be modified to read as follows:

"(d) INSURING THAT THE PLEA OF VOLUNTARY.--The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, *after he has been placed under oath*, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney."

To avoid possible danger to cooperating individuals and to conform with the language of 11(e)(5), we suggest that Rule 11(e)(2) be modified to read as follows:

"(2) NOTICE OF SUCH AGREEMENT.--If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court, *except for good cause shown*, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report."

Rule 11(e)(6) should be amended to read as follows:

"If a plea discussion does not result in a plea of guilty or nolo contendere or if a plea of guilty or nolo contendere is not accepted or is withdrawn, or if judgment on a plea of guilty or nolo contendere is reversed

H. M. Ray, N. D. Mississippi (cont'd.):

on direct or collateral review, neither the plea discussion nor any resulting agreement or plea shall be admissible against the defendant in any criminal or civil action or administrative proceeding, not only in U. S. district courts but in all probability in the prosecution of minor offenses before magistrates [see Rules 1, 2(a) and 3(a), Rules of Procedure for Trial of Minor Offenses]."

Charles H. Anderson, M. D. Tennessee:

The other proposals are salutary, particularly Rule 11's affirmation of plea bargaining. This is realistic and progressive.

Harry D. Steward, S. D. California:

Concerning plea bargaining, I feel strongly that this should be a matter of public record as much as the circumstances will allow. I think the public has more misunderstanding about plea bargaining and chamber conferences with judges than any other area of criminal law. In my district all AUSAs are directed to keep an accurate written record of plea bargaining, including the reasons why any reduction is made. Where possible, they are also to state this for the record in open court. Likewise, unless the judge insists to the contrary, or the circumstances otherwise make it impossible or unnecessary, all conferences with the court in chambers are on the record with the court reporter present. I have heard the debates about court participation in plea bargaining and have yet to come to a conclusion in this area. However, as prosecutors, I feel that we should do everything to bring plea bargaining and court conferences out into the open so that the public will know what has transpired in a given case.

(R. 11, p. 4)

Earl J. Silbert, D. C.:

This proposed Rule establishes specific criteria for the acceptance of a plea of guilty and sets forth specific conditions regulating plea bargaining and insuring full disclosure of plea agreements. While we generally support this rule, we would suggest a few modifications:

1. We continue to believe, as has been the policy of the Department of Justice since 1958, that a plea of *nolo contendere* should not be accepted by the Court without the consent of the Government. Thus, we would propose that the first sentence of Rule 11(b) be amended to read: A defendant may plead *nolo contendere* only with the consent of the Court and the attorney for the Government.

2. The plea agreement procedures set forth in Rule 11(e) (2), (3) and (4) should make clear that the Court may only decline to accept a plea agreement on the ground that the agreed upon maximum sentence is inadequate; the Court should not be permitted to reject the agreement on grounds that the number of counts or charges to be dismissed upon motion of the Government is either too lenient or too restrictive. For while in the sentencing area the Court's prerogatives are obviously paramount, it is equally obvious that no rule should be promulgated which inserts the judgment of the Court in areas clearly reserved for the exercise of prosecutorial discretion (i.e., the decision to charge or to dismiss charges). The proposed rule would accomplish an unwarranted infringement by the judiciary on the powers of the executive. It conflicts with the traditional separation of powers between the judiciary and the executive and is therefore unconstitutional. "[A]s an incident of the Constitutional separation of powers, . . . the Courts are not to interfere with the free exercise of the attorneys of the United States in their control over criminal prosecutions." United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965), cert. denied, 381 U.S. 935 (1965), quoted with approval in Newman v. United States, 382 F.2d 479, 481 (D.C. Cir. 1967)(Burger, J.). 1/ The complete discretion vested in the

1/ Cf., United States v. Ammidown, U.S. App. No. 72-1694, decided Nov. 16, 1973, Pet. for Rehg. En Banc denied, May 10, 1974. While we agree with the holding in Ammidown reversing appellant's jury conviction for first degree murder where the trial judge declined to accept a plea to second degree murder agreed upon before trial by the prosecution and defense, we are troubled by dicta of the Court suggesting that a trial judge may withhold approval of a guilty plea where he finds it does not adequately protect the public interest. See slip op. at p. 11. That decision is for the prosecutor, not the trial Court, and Rule 11 should so reflect.

(R. 11, p. 5)

Earl J. Silbert, D. C. (cont'd.):

executive over criminal prosecutions has been acknowledged by the Courts, particularly in the area of whether to accept a plea to a lesser offense from one co-defendant but not the other, or whether to prosecute a defendant on a lesser or more serious charge. See In Re Petition of United States for Writ of Mandamus, 306 F.2d 737 (9th Cir. 1962); Newman v. United States, supra; Hutcherson v. United States, 345 F.2d 964 (D.C. Cir. 1965). Therefore we would suggest the following amendments to Rule 11(e):

a. The last sentence of Rule 11(e)(2) should be amended to read: *Thereupon the Court shall accept the plea unless it rejects the sentence agreed upon, or a lesser sentence; in the alternative the Court may defer its decision as to acceptance or rejection of the plea until there has been an opportunity to consider the presentence report.*

b. Rule 11(e)(3) should be amended to read: *If the Court accepts the plea, it shall inform the defendant that it will embody in the judgment the sentence provided for in the plea agreement or another sentence more favorable to the defendant than provided for in the plea agreement.*

c. Rule 11(e)(4) should be amended to read: *If the Court rejects the plea, it shall inform the parties of this fact, advise the defendant personally in open court that the Court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the sentence in the case may be less favorable to the defendant than that contemplated by the plea agreement.*

3. While we agree that conversations occurring during informal plea discussions should not be admissible in evidence, we believe that statements made by a defendant, with the advice of counsel, voluntarily and in open court during the course of an actual plea, should be admissible, at least to impeach the defendant if he subsequently attempts to withdraw his plea and to take the stand in his own behalf at trial. Therefore, we would propose that Rule 11(e)(6) be amended to read as follows: *Inadmissibility of Plea Discussions.--Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of out of Court statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil*

Earl J. Silbert, D. C. (cont'd.):

proceeding, or in the Government's case in chief in any criminal proceeding against the person who made the plea or offer. However, a statement made by a defendant in open court and in the presence of counsel at the time a plea of guilty is taken is admissible in a subsequent criminal proceeding to impeach the defendant where his testimony at the proceeding varies materially from his statement at the time of the taking of the plea. (See Harris v. New York, 401 U.S. 222 (1971).

4. Finally, we believe as the Advisory Committee suggested (see Advisory Committee Note, to Rule 11, page 14), that it is a desirable practice that the defendant be placed under oath at the time of his plea. This will help to insure the defendant's understanding of the significance of his action in determining to plead guilty, placing his statements at the time of the taking of a plea on the same footing as his testimony in his own defense if he were to go to trial. Therefore, we believe Rule 11(f) should be amended to read as follows:
Determining Accuracy of Plea. The Court shall not enter judgment upon a plea of guilty without requiring that it be taken under oath and without making such inquiry as shall satisfy it that there is a factual basis for the plea.

Wayman G. Sherrer, N. D. Alabama:

This contains nothing of significance not already a matter of practice in our District.

From the Office of James R. Thompson, N. D. Illinois:

New Rule 11 continues to perpetuate the plea of nolo contendere. The plea of nolo serves no purpose but to permit the defendant to avoid the consequences of a guilty plea in ancillary proceedings. Whatever benefit it has inures solely to the defendant, and the plea is a relic.

That the plea of nolo is an absurdity must have been recognized by the committee drafting the new rules because they continue to leave it to the court to decide whether or not to accept a nolo plea. Theoretically, two defendants indicted together, but arrested in separate places, and transferring their cases under Rule 20, will end up with different ultimate consequences. All this is based solely upon the propensities of different judges.

(R. 11, p. 7)

From the Office of James R. Thompson, N. D. Illinois (cont'd.):

The plea of *nolo* is a fiction, since for the purposes of the primary proceeding it has the exact same function, consequence and impact of a plea of guilty. In cases of extensive frauds and where there are ancillary civil proceedings, it permits a defendant to escape with a light sentence and enjoy the fruits of his offense since the *nolo* plea is inadmissible as an admission against interest in the civil case, while the guilty plea would have been admissible. The new rule continues to ignore the rights of victims and the higher public interest.

New Rule 11(e)(1) excludes the judge from plea bargaining. It seems to encourage such bargaining between prosecutor and defense attorney, but leaves it to the judge at any later time to agree or disagree with the plea agreement. The court may accept or reject the agreement as late as after the preparation and his reading of a pre-sentence report. There are too many instances where the delay occasioned by these occasions can be ill-afforded. A defendant who is willing to plead at the beginning of one month may well change his mind 30 days later. This plan has the capability of causing untold delay.

Part of the foreseeable problem is that a prosecutor will completely prepare for trial. After this, and on the day before trial, there is plea bargaining and a supposed agreement. Subsequently, the judge is apprised of the agreement and takes it under advisement until after he reads the pre-sentence report, after which he rejects it, after which the defendant elects to go to trial, necessitating the prosecutor prepare the case from scratch a second time.

In many plea bargaining cases, the greatest incentive to the Government is the defendant's co-operation, which ordinarily is most valuable at the earliest possible time. The longer the delay between agreement and co-operation, the staler and less valuable the information he can provide.

Under new Rule 11(e)(3), the court can accept the plea agreement but can subsequently reject it only if the actual disposition is more favorable to the defendant than the one agreed upon. In large measure, this is not much different than the court's power to reduce a sentence within 120 days. However, in instances of intellectually dishonest judges, it is possible for a judge to agree to the agreement then intending never to abide by it. The actual threat, of course, is a minimal one to us since courts always were and should be free to impose whatever sentence they feel appropriate.

(R. 11, p. 8)

Paul J. Curran, S. D. New York:

This rule codifies in part the existing practice in this District of our agreeing to accept guilty pleas to less than all the counts in an indictment. However, it goes beyond that by permitting agreement between the Government and the defendant upon the penalty to be imposed, which agreement must then be presented to the trial judge and may be accepted or rejected by him.

As to the latter part of the new provisions, we have always refused in this District to make such agreements and, we believe, properly so. It is not seemly for the prosecutor to agree to attempt to set the punishment of a defendant, nor is it proper for us to try to bind the judges in any way as to what penalties should be imposed within statutory limits. Of course, the Rule does not require us to make such agreements, but the legitimization of such agreements by the Rule will put pressure on both prosecutors and judges with heavy work loads to agree to too little in order to move another case and avoid a trial.

There are additional significant drawbacks in the proposed Rule. While the punishment of a defendant has in this District always been the exclusive function of the District Judge, a determination of the charges to which the guilty plea is entered has been within the sole discretion of the prosecutor. It is clear that under Rule 11(e)(3) the Court will now have the discretion to accept or reject suggestions not only as to the punishment to be imposed but also the offense to which the plea is to be entered. While as a theoretical matter there should be no objection to judicial approval of the adequacy of the charges to be pleaded to, as a practical matter there may be a host of reasons beyond both judicial expertise and sensible disclosure by a prosecutor which could prevent a prosecutor and a trial judge from agreeing on what the plea to be entered should be. A simple example is a case where a disposition apparently heavily favoring a defendant may be welcomed by the prosecution because it will eliminate a need to disclose the identity of an informant. Yet a trial judge will not know this, and for the prosecutor to explain it to the Court will result in the very thing which the prosecutor has sought to avoid.

A similar difficulty arises from the requirement in Rule 11(e)(2) that the plea agreement be disclosed to the trial judge in open court. Frequently a condition of a plea agreement

Paul J. Curran, S. D. New York (cont'd.):

will be that the defendant act as an informant or furnish information and testimony against his criminal associates. To reveal this in open court is likely to result in the complete frustration of receiving such assistance from the defendant.

One aspect of the new rule which is particularly troubling is (e)(6), which appears to provide that all evidence arising out of plea negotiations, including a defendant's statements to Government prosecutors or agents, be inadmissible against him. Such a contention was recently rejected by the Second Circuit for reasons which show the fallacy of the provision:

"Persky's further objection that by allowing Green to testify regarding his admissions made at an attempted 'settlement' of the case against him the court some how or other involved itself in a violation of the Code of Professional Responsibility, EC5-9, DR5-101, is not supported by the cited text of that Code or by opinions issued with respect to it. Indeed it would be a rather extraordinary interpretation that would enable a witness to testify to one version of the facts without risking confrontation with a prior contradictory statement, whether or not given to the prosecutor at an unsuccessful plea bargaining session. There is no evidence that Persky's prior statement to the prosecutor was made 'without prejudice' and it is doubtful, had such a condition been imposed, that the prosecutor would have continued with the session."

United States v. Zane, Docket No. 73-2401 (2d Cir., April 1, 1974), Slip Op. at 2509-2510.

Finally, the judicial involvement in plea bargaining which Rule 11 provides will undoubtedly lead to a whole new area of appellate litigation. If a trial judge rejects a plea bargaining agreement and the defendant is later convicted at trial and is more substantially punished than he would have been under the plea agreement, there will no doubt be a claim on appeal that the trial judge abused his discretion in rejecting the plea agreement.

Rule 11 is, therefore, totally meretricious, and should be vigorously opposed despite its apparent optional form.

(R. 11, p. 10)

RULE 12

PLEADINGS AND MOTIONS BEFORE TRIAL; DEFENSES AND OBJECTIONS.

*Comments of U. S. Attorneys**J. P. Farris, S. D. Texas:*

We further observe that Rule 12 concerning pleadings and motions incorporates an unnecessary quality of verbiage concerning the discretion of the government to give notice to the defendant of specific evidence, or of the defendant's opportunity to move to have this information disclosed. It tends to increase the amount of discovery litigation and certainly establishes still another pitfall for the less experienced prosecutor.

Robert W. Rust, S. D. Florida:

The proposed amendment is substantially unobjectionable. Pretrial procedure, although more detailed generally follows current practice. However, the amendment deals with the procedure to be followed in the case where an alibi defense is asserted, and in such a case after the defendant gives notice of such defense, the government is required to inform the defendant of the specific time, date and place at which the offense occurred. If a defendant can assert an alibi defense before being informed by the government of the time, place and date of the offense, then logically he should be able to detail his alibi before being so informed by the government.

H. M. Ray, N. D. Mississippi:

As an alternative to proposed Rule 12(c), it is suggested that much delay would be avoided if the rule were to read as follows:

"Unless otherwise provided by local rule, pre-trial motions shall be made in writing and filed within 14 days after service by the government of a copy of the indictment upon the defendant, but the Court may for good cause permit such motions to be made within a reasonable time thereafter. If a hearing is required, the Court shall set a date for such hearing."

(Rule 12, page 1)

H. M. Ray, N. D. Mississippi (cont'd.):

and, if such amendment is offered, "or oral" appearing in 12(b) should be deleted.

Proposed Rule 12(d)(2) provides as follows:

"At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16."

It is recommended that proposed Rule 12(d)(2) be deleted.

It is proposed to add new language to Rule 12 providing that motions to suppress evidence and motions for severance of charges or defendants "must" be raised prior to trial. The amendment further provides that to afford the defendant an opportunity to raise these objections the government may volunteer notice of its intention to use certain evidence or the defendant may request a notice of the government's intention to use such evidence. The amendment further provides that failure to object to the evidence or the joinder before trial "shall constitute waiver thereof."

The proposed change is easily susceptible to the interpretation that where the defendant has no notice of the government's intention to use evidence either volunteered by the government or furnished pursuant to the defendant's request that his failure to object before trial does not waive the objection. The amendment should make it clear that where the defendant knows or could have known by the exercise of due

H. M. Ray, N. D. Mississippi (cont'd.):

diligence of the existence of evidence to which he would object if offered by the government at trial when his failure to object to the evidence before trial is likewise a waiver of the objection. Otherwise, in every case the government will have to volunteer notice of its intention to avoid the risk of having the objection raised for the first time during trial. It will also put a premium on neglect by defense counsel and in effect negate the provision providing for a request of notice.

The amendment also provides that "the court for cause shown may grant relief from the waiver" effected by the failure of the defendant to raise objections which must be made before trial.

To protect the government's right to appeal an order suppressing evidence under 18 U.S.C. 3731 the amendment should provide that relief from the waiver of objections may be granted only after trial by way of a motion for a new trial. When objections are raised for the first time during the heat of trial, counsel and the court both usually have to shoot from the hip. In this situation the court, concerned with "protecting the record" and subliminally aware that the government cannot complain of error, tends to aim low. Furthermore, the witnesses necessary to resolve a collateral issue such as the legality of a search or seizure are not always in attendance at the trial and the government is not in a position to make a full record on the issue. The government is as much prey to "trial by ambush" as the defendant but without the equal right of an appeal. If the defendant can hold back his objections until jeopardy has attached he can ambush the government and cut off its right to appeal an erroneous ruling suppressing the evidence. By postponing relief from waiver until after trial, the rights of both parties will be adequately protected. As the court said in United States v. Nolan, 420 F.2d 552, 554 (5th Cir. 1969), in upholding a post-trial hearing on a pre-trial motion to suppress:

" . . . If there is an acquittal, of course, then the question is moot and we don't have any worries; and everybody's rights have been preserved. If there is a conviction, then a hearing is held . . . to determine whether or not the government's assertion is correct. If . . . correct, then, of course, everybody's rights have

(R. 12, p. 3)

H. M. Ray, N. D. Mississippi (cont'd.):

been preserved by letting the conviction stand. If . . . not correct, then, of course, everybody's rights have been preserved by the court reversing the conviction."

The amendment to Rule 12 provides that the defendant may "request notice of the government's intention to use (in its evidence in chief at trial) any evidence to which the defendant is entitled to discovery under Rule 16." The provision authorizing the government to volunteer notice provides that the government may notify the defendant of its intention to use "specified evidence."

The difference in language suggests that the defendant may simply make a broadside request in the language of the rule for notice of "any evidence to which the defendant is entitled to discovery under Rule 16." If this is a correct interpretation it puts upon counsel for the government the burden of sifting through his files and researching the law to determine what evidence the defendant is entitled to discover under Rule 16. In the annotations to Rule 16, there are almost fifty pages of fine print summarizing adjudicated disputes over what is discoverable under Rule 16. If government counsel is going to be left any time to prepare his own case Rule 12 should make it clear that the defendant's request for notice must be at least as specific as his motion for discovery under Rule 16.

It is proposed to change the time for making pre-trial motions from "before the plea is entered" to a time set by the court "at the time of the arraignment or as soon thereafter as practicable." The reason given for this change is "to make possible and to encourage the making of motions prior to trial."

It is difficult to understand how this purpose is advanced by making motions due on a later date than at present. The real effect of this change is simply to delay the time for making motions, thus delaying the trial itself. Any change should be in the opposite direction, toward requiring motions to be filed earlier rather than later in order to hasten the trial of cases.

H. M. Ray, N. D. Mississippi (cont'd.):

In this district, the U. S. Attorney serves each defendant by mail with a copy of the indictment as soon as it is returned. He knows well in advance of arraignment what the charges are and in most cases he has already been arrested and is represented by counsel. He is in a position, therefore, to prepare and file motions even before arraignment and plea. For the very same reason given by the revisers, we would recommend that the rule be changed to read: "Unless otherwise provided by local rule, pre-trial motions shall be made in writing and filed within 14 days after service by the government of a copy of the indictment upon the defendant, but the Court may for good cause permit such motions to be made within a reasonable time thereafter. If a hearing is required, the Court shall set a date for such hearing."

Wayman G. Sherrer, N. D. Alabama:

We agree wholeheartedly, especially with subsections (3) and section (f).

Earl J. Silbert, D.C.:

1. We believe that for the sake of the effective administration of criminal prosecutions, all pretrial motions should be raised after indictment and prior to trial, except where the defendant will be prejudiced. Thus, we would propose that the first paragraph of Rule 12(b) be amended to read: *Pretrial Motions.--Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the Judge, and shall be filed after indictment unless the defendant can show prejudice from not being able to file a motion before indictment. The following must be raised prior to trial: . . .*

2. We object to Rule 12(b)(2) on the same grounds set forth in the April, 1971 Report to the Attorney General Concerning Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts. See pages 7-9. Division (e) of this Rule indicates that general authority is conferred on the trial court to defer the determination of any pretrial motion until trial or after verdict. This provision is particularly unfair to the Government where its right to appeal--or at least an effective appeal--depends upon whether

(R. 12, p. 5)

Earl J. Silbert, D. C. (cont'd.):

the trial judge rules before or after jeopardy attaches, or before or after trial begins or the verdict is returned. See 18 U.S.C. Section 3731; 23 D. C. Code Section 104. We would therefore propose that the first sentence of Rule 12(e) be modified as follows: *Ruling on Motion. A motion made before trial shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue or until after verdict, but no such determination shall be deferred where the timing of the ruling on the motion is determinative of the right of a party to appeal.*

RULE 12.1

NOTICE OF ALIBI.

Comments of U. S. Attorneys

J. P. Farris, S. D. Texas:

Rule 12.1, Notice of Alibi, is a nice theory and thought, but we feel that it will, as a practical matter, be unworkable, and do not anticipate that the defendant will be getting anything other than information from the government, including names and addresses of witnesses, and then we predict further that the courts will water down the defendant's reciprocal obligations to supply us with names, dates, time, and places. The dangers are too great to warrant the promulgation of this particular rule.

Robert J. Roth, D. Kansas:

Oppose disclosure of identity of government witnesses. Disclosure invites harassment, intimidation or elimination of government witnesses. Witnesses may be more reluctant to cooperate if disclosure allowed. Encourages manufacturing of defenses.

Wayman G. Sherrer, N. D. Alabama:

No serious disagreement here, except that sanctions impossible under 12.1(e) (failure to comply) would seem to detract from, rather than assist the search for the truth, and in a situation where this rule was invoked and enforced; it is believed that a bare showing by defendant of prejudice hereby would lead to instant reversal by Court of Appeals, for "abuse of discretion". (See subsection 12.1(f3))

Earl J. Silbert, D. C.:

We object to this form of a notice of alibi rule because it permits the defendant, by indicating his intention to rely on a defense of alibi, to in effect demand the disclosure of the names and addresses of Government witnesses. Inasmuch as we vigorously oppose those portions of the proposed amendments to Rule 16 which would generally permit such discovery, for reasons noted below, we likewise strenuously oppose a formulation of an alibi notice rule which will permit similar discovery at the discretion of the defendant. We would propose one of two alternatives:

(Rule 12.1, page 1)

Earl J. Silbert, D. C. (cont'd.):

a. Adoption of a rule similar to Rule 2-5(b) of the United States District Court for the District of Columbia. A copy of that rule is appended hereto. (Copy of rule not included in these comments; original sent to Mr. Ronald L. Gainer, Acting Chief, Legislation and Special Projects Section, Criminal Division.)

b. Amendment of proposed Rule 12.1(b) to read as follows: *Disclosure of Information and Witnesses.*--Upon receipt of notice that the defendant intends to rely upon an alibi defense, the attorney for the Government shall inform the defendant in writing of the specific time, date, and place at which the offense is alleged to have been committed. The defendant shall then inform the attorney for the Government in writing of the specific place at which he claims to have been at the time of the alleged offense. Within his discretion, the attorney for the Government may then file a demand for disclosure of the names of the defendant's alibi witnesses. Upon the receiving of such a demand, the defendant shall inform the attorney for the Government in writing of the names and addresses of the witnesses upon whom he intends to rely to establish such alibi. Upon receiving this information, the attorney for the Government shall inform the defendant in writing of the names and addresses of the witnesses upon whom the Government intends to rely to establish the defendant's presence at the scene of the alleged offense.

Paul J. Curran, S. D. New York:

This Rule appears to benefit the Government by requiring a defendant to furnish, in advance of trial, the particulars of any alibi defense he proposes to assert. In fact, however, the provisions of the Rule will result in considerable harm to the Government in most cases and little benefit to it.

The rule provides that if a defendant notifies us that he will assert the defense of alibi, ". . . the government shall inform the defendant of the specific time, date and place at which the offense is alleged to have been committed." Rules 12.1(a) and (b). In other words, the Government must tell the defendant exactly when and where the Government intends to prove that he committed the crime charged. While if, of course, the crime is something like a bank robbery, the indictment will have already

(R. 12.1, p. 2)

Paul J. Curran, S. D. New York (cont'd.):

disclosed most of this information*, and there is little to be

* But see next paragraph.

said against disclosing the rest. However, in a conspiracy case a defendant will obtain from the Government's response to his notice of alibi defense a good idea of exactly who the potential government witnesses are (see also Rule 16(a)(1)(E)) and also something he gets under no other present or amended rule--substantial foreknowledge of the Government's evidence against him by the disclosure of when and where he participated in the conspiracy. And there is nothing to prevent a defense lawyer from serving a notice of alibi, getting the response, and then abandoning his alibi defense. Indeed, it is hardly clear how a defense attorney can determine in most cases whether to assert an alibi defense until he known all the Government's evidence.

To what extent this same problem will arise on substantive counts depends on the precise meaning of that provision in Rule 12.1(b) which requires the Government to serve notice of "the specific time, date and place at which the offense is alleged to have been committed". As a hypothetical, A and B are charged with robbing a bank on January 2, in violation of Sections 2113(a) and 2 of Title 18, United States Code. The evidence shows that only B went to the bank, but that on January 1 A bought the pistol and the mask for B to use the next day at the bank. A serves a notice of alibi defense. Under Rule 12.1(b) it is not at all clear whether the Government is to respond with the date, time and place of the actual robbery or with the date, time and place of the acts which will be used to show that A was an aider and abettor. If the former, then Rule 12.1 is meaningless in many cases. If the latter, then in substantive crime cases the rule will provide the same pretrial disclosure of the Government's evidence that it will in conspiracy cases. And, of course, the hypothetical above is the simplest of all fact patterns. How much must be revealed, whether as to principals or accomplices, in cases in which the substantive crime is committed over time, such as mail fraud or wire fraud--just the particulars regarding use of the mail or the wires or all the events establishing the fraud? The examples are legion--Travel Act, tax evasion, illegal gambling business (Section 1955), etc.

(R. 12.1, p. 3)

Paul J. Curran, S. D. New York (cont'd.):

Finally, the disclosure of the Government's witnesses required by Rule 12.1(b) is subject to the same criticisms set forth in the discussion of Rule 16(a)(1)(E) supra.

This Rule's benefits to the Government will prove to be illusory and its detriments severe.

(R. 12.1, p. 4)

RULE 12.2

NOTICE OF DEFENSE BASED UPON MENTAL CONDITION.

Comments of U. S. Attorneys

Earl J. Silbert, D. C.:

While we do not object to the Rule, we believe that the Advisory Committee Note to division (c) should reflect that this division is not intended to preclude the Court from ordering more than one psychiatric examination.

RULE 15
DEPOSITIONS.

Comments of U. S. Attorneys

Richard L. Thornburgh, W. D. Pennsylvania:

Rule 15 presents a radical departure from the present rule which allows depositions only in exceptional circumstances, in order to prevent a failure of justice. The proposed amendment would allow them "whenever due to special circumstances of the case [they are] in the interest of justice". It would further allow such depositions to be used as substantive evidence if the witness is unavailable or if he give testimony at the trial or hearing inconsistent with his deposition, or it may be used for contradicting or impeaching the testimony of the witness. One can envision resourceful defense counsel taking such depositions simply for discovery purposes or to lay the groundwork for creating real or imaginary conflicts in the witnesses' trial testimony.

Donald E. Walter, W. D. Louisiana:

I agree with Thornburgh.

W. C. Smitherman, D. Arizona:

I adopt Thornburgh's comments concerning these amendments.

Robert E. Johnson, W. D. Arkansas:

I would suggest that any deposition rule should (1) require presence of the accused, and (2) be supervised by either a U. S. district judge or magistrate to prevent "badgering" witnesses by either side. I have personally been told by many witnesses that they will not become involved as a witness again because of their treatment in court, particularly when harassed by successive depositions in civil cases.

(Rule 15, page 1)

Robert G. Renner, D. Minnesota:

I approve of United States Attorney Thornburgh's comments on proposed changes to Rule 15.

Rule 15 is most cynical. It grants the right to the government to depose a witness after his name and address have been disclosed. We are permitted to depose a person to avoid the consequences of his ultimate unavailability. It is little comfort to a witness that his words will live on in a deposition. Witnesses are not relieved of pressure merely because their testimony is certain.

LEAA grants are being made to develop programs to better care for witnesses. Our justice system has been rightly criticized for the cursory manner with which we treat them. They are summoned into court, sent home during delays, sent back and forth without proper explanation and generally subjected to indifferent bureaucratic attitudes. The proposed rule is a step backwards for the citizen who is already afraid of the justice system.

The rule permits deposing in "special cases." No defense attorney will call his case anything but "special." No defense attorney will list testimony other than as "crucial."

The Jencks Act is frustrated because the witness statements are subject to disclosure by reason of the compulsory turning over of prior statements of the witnesses at the time of the deposition.

J. P. Farris, S. D. Texas:

As to Rule 15 relating to depositions, we see grave dangers in this area. While we would not oppose giving the government the right to a deposition in exceptional circumstances, we feel that the rule should be left as is. The theory that Rule 15 will eliminate the problems incidental to supplying a witness list under Rule 16 is folly, in that Rule 15 requires the notice of the time and place, and the name and address of the persons to be deposed. Obviously, in a situation where a witness is in danger of being liquidated, it would simply be done at an earlier stage in the proceedings, to-wit, the deposition stage. Also, there are problems raised in connection with the constitutional right of confrontation.

(R. 15, p. 2)

Robert W. Rust, S. D. Florida:

Much of this amendment is unobjectionable. However, the language "whenever due to special circumstances . . ." should be defined, or at least be narrowed by some guidelines. The language in question, if broadly interpreted, will significantly delay the trial of criminal cases, for the amendment also provides that ". . . a deposition shall be taken and filed in the manner provided in civil actions . . ." This means that notices of depositions must provide sufficient time for a witness to travel (often long distances) to the place designated. Time will also be required to allow those witnesses who do not wish to waive signature to read and approve (or disapprove) the transcript. Time will also be required to settle problems that will arise in the course of depositions, such as refusal of a witness to answer particular questions. Since objections must be stated at the time of the deposition testimony, it is clear that only an attorney thoroughly familiar with the case could handle the deposition. It would appear that deposition taking will become a significant function of both the United States Attorney's office and the public defender's office. The cost of each criminal case will rise substantially because of the increased witness expense for travel and court reporter fees, and the need to make staff increases.

An additional comment is directed to that portion of the amendment which is contained in subparagraph (d)(2) to the effect that the government is required to turn over to the defendant for use at the deposition any statements of the witness. This would appear to conflict with 18 U.S.C. 3500 which provides that such statements be turned over after the witness's direct testimony at the trial.

Harry D. Steward, S. D. California:

I wholeheartedly support the proposed modification to Rule 15 allowing the government to take depositions. On numerous occasions we have felt that depositions would be highly desirable, but have been unable to secure them as Rule 15 is a one-way street. I do not feel that most federal judges would allow defense counsel to utilize depositions simply for discovery purposes or to lay the ground work for impeachment. I feel the little we lose by expanding the courts' discretion is more than offset by our right to secure and use, if necessary, depositions in certain cases. I particularly have in mind the foreign witness who refuses to come to the United States or the witness such as the owner of the car in a Dyer Act who resides several thousand miles from the place of trial and whose appearance would be both expensive and onerous.

(R. 15, p. 3)

Victor R. Ortega, D. New Mexico:

We are very much opposed to the new rule with respect to depositions. The term "special circumstances" is much too vague and we believe that depositions will begin to be taken for the purposes of discovery.

Naturally the giving of the name and address of each person to be examined is a serious problem in many criminal cases and steps should at least be taken to insure the safety of the witnesses.

Charles H. Anderson, M. D. Tennessee:

While on balance taking of depositions will probably favor the government, it could be abused if the only criteria were the vague words "in the interest of Justice."

I suggest criteria similar to the Rules of Civil Procedure, Rule 32(a)(3), plus an additional ground: "that the witness' testimony is corroborative or circumstantial."

This would require an amendment to the proposed Rule 15(G), "Unavailability."

Stan Pitkin, W. D. Washington:

Generally we see problems under Rule 15(d) as to objections and particularly under 15(d)(2). How do you enforce 15(d)(2) without a judge there to rule when one attorney tells his client not to answer. Requiring an answer to be ruled on later at trial in a criminal case is a little different from a similar procedure in a civil case, since many times the refusal to answer in a criminal case is based on a claimed constitutional basis. Obstructive counsel could make these depositions impossible.

Also, the rule does not apply well to hostile witnesses. Consider the defendant who obtains the list of government witnesses, names them as his witnesses, and moves to depose them under the guise of perpetuating testimony but really for discovery.

William D. Keller, C. D. California:

At the very least, the language of the new Rule 15 should utilize the language of the old Rule 15 in regard to the requirement that the deposition can be ordered only " . . . after

William D. Keller, C. D. California:

the filing of an indictment or information. . . ." This language appears in both the old Rule 15 and in Title 18, Section 3503. We are currently facing pressure from our court to take depositions of alien material witnesses in smuggling cases soon after the arrest of the alien smugglers and prior to indictment. Such depositions should not be ordered, if ordered at all, until the charges are finally framed and counsel have had more adequate opportunity to prepare their cases. The wording of the new Rule 15 would encourage depositions at a premature stage.

The extensive use of depositions contemplated by the changed rules will pose numerous problems. At least some of them could be reduced if the rule made explicit provision for ready court review of objections, refusals to testify, questions of immunity, and claims of privilege.

Henry A. Schwartz, E. D. Illinois:

Expresses the concern that unless further restrictions are placed in the proposed rule there will be tremendous added administrative needs, delays in trial and abuses in the taking of depositions.

H. M. Ray, N. D. Mississippi:

It is suggested that Proposed Rule 15(a) be modified as follows to more clearly conform to the language of 18 U.S.C. 3503:

"(a) WHEN TAKEN.--Whenever due to special exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court at any time after filing of an indictment or information may upon motion of such party and notice to the parties order that testimony of such witness be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged, be produced at the same time and place. If a witness is committed for failure to give bail to appear to testify at a trial or

H. M. Ray, N. D. Mississippi:

hearing, the court on written motion of the witness and upon notice to the parties may direct that his deposition be taken. After the deposition has been subscribed the court may discharge the witness."

In recognition that depositions are to be taken only in "exceptional circumstances," it is believed that the ends of justice would be best served by judicial supervision of one knowledgeable in criminal law. The proposed rule would grant to a defendant rights not accorded to him under existing law, 18 U.S.C. 3500; it is, therefore, suggested that Proposed Rule 15(d) be modified to read as follows:

"(d) HOW TAKEN.--Subject to such additional conditions as the court shall provide, a deposition shall be taken and filed in the manner provided in civil actions except as otherwise provided in these rules, provided that (1) in no event shall a deposition be taken of a party defendant without his consent, and (2) the scope and manner of examination and cross-examination shall be such as would be allowed in the trial itself, and (3) the deposition shall be taken before a United States District Judge or United States Magistrate. After a witness being deposed by the United States has testified on direct examination, upon request of the defendant or his counsel, the United States shall produce any statement, as defined in 18 U.S.C. 3500, to which the defendant would be entitled at trial."

Robert J. Roth, D. Kansas:

Should provide that depositions of prisoner witnesses should be taken only at place of confinement. Otherwise, marshals would have to be present. Oppose broadening of deposition rule except to allow government to take depositions as defendants are now able to do.

(R. 15, p. 6)

Wayman G. Sherrer, N. D. Alabama:

Too liberal. A criminal jury can best evaluate a witness and his credibility by viewing him, his appearance, his demeanor. We believe this further undercuts the ability of the government to put on a straightforward, believable prosecutive case. Query: In the case of a coached, lying or evasive defense witness, how do you really effectively crossexamine a deposition?

Earl J. Silbert, D. C.:

While we generally favor the proposed amendments to Rule 15, we recommend that the second sentence of Rule 15(d) be amended to read as follows: *The parties at whose instance the deposition is taken shall make available to the opposing party or his counsel for examination and use at the taking of the deposition any statement of the witness being deposed which is in the possession of the party at whose instance the deposition is taken and to which the opposing party would be entitled at the trial, pursuant to 18 U.S. Code Section 3500 or Rule 16(b)(1)(D) of these rules.*

This modification is recommended in view of our position that Rule 16(b)(1) should contain an additional paragraph, (D), affording the Government the same opportunity for access to the prior statements of a defense witness after that witness has testified on direct examination as the Jencks Act (18 U.S.C. Section 3500) affords the defense with reference to prior statements of Government witnesses after they have testified. See State v. Montague, 55 N.J. 387, 262 A.2d 398 (1970); People v. Sanders, 110 Ill. App. 85, 249 N.E.2d 124 (1969); People v. Damon, 24 N.Y. 2d 256, 247 N.E. 2d 651 (1969); and the Government's Petition for Rehearing En Banc in United States v. Anthony Wright, ___ U.S. App. D.C. ___, 489 F.2d 1181 (1973), appended hereto. (These are not included in these comments; original sent to Mr. Ronald L. Gainer, Acting Chief, Legislation and Special Projects Section, Criminal Division.) We have proposed below the addition of such a section to Rule 16(b)(1) and our proposed modification of Rule 15(d) is consistent with that addition.

William Stafford, N. D. Florida:

We have a situation that has arisen in Florida which is pertinent to proposed Rule Number 15.

(R. 15, p. 7)

William Stafford, N. D. Florida (cont'd.):

Rule 3.190(1) of the Florida Rules of Criminal Procedure provides as follows:

"(1) At any time after the filing of an indictment, information, or affidavit upon which a defendant is to be tried, if he shall satisfy the court by his oath in writing, or by the affidavits of credible persons, that the testimony of an absent person is material and necessary to his defense, and that such witness resides beyond the territorial jurisdiction of the court or is so sick and infirm that with diligence his attendance cannot be procured at the trial, the court upon the proper application of the accused, or his attorney, shall order that a commission be issued to take the deposition of such witness to be used in the trial. If the application is made within ten days prior to the trial date the court may in the exercise of sound discretion deny such application.

(2) If a defendant desires to perpetuate the testimony of a witness living in or out of the state, whose testimony is material and necessary to his defense, the same proceedings shall be followed as set forth in sub-section (1) hereof; with the exception, however, that the testimony of such witness be taken before an official court reporter, transcribed by him, and filed in the trial court."

Primarily through the vehicle of subparagraph (1)(2) the Public Defender has developed a pattern of taking the depositions of all state witnesses; in the state practice in Florida the state must furnish to the defendant a list of all of its witnesses, the same as proposed Federal 16(e) will now require. The effect of this has caused great concern, reaching almost crisis proportions, to the courts and finances of the state and counties.

The Chief Judge of the State Judicial System in this district has talked to me about this on several occasions in the past two months, and the situation is not unique to this section of the state. The individual counties must pay for these depositions. In Escambia County, where Pensacola is the county seat, the cost of depositions through the month of April, 1974 has already exceeded \$20,000, and the county had appropriated only \$15,000 for the entire fiscal year, which ends September 30, 1974. I am advised that the cost of these depositions in Dade County, where Miami is the county seat, so far this year is already one million dollars.

(R. 15, p. 8)

William Stafford, N. D. Florida (cont'd.):

The State Chief Judge also advises that the money ratio in our four counties in West Florida is four to one in favor of the Public Defender; i.e., for every dollar the State Attorney spends on depositions the Public Defender spends four.

Besides the inordinate amount of money spent on these depositions, the strain on the official court reporters is severe, and as a consequence the entire judicial process is slowed and a speedy trial becomes less of a reality.

One of my Assistants worked for the State Attorney's Office here before joining our office in December. He advised that while he was there (and the same practice continues) the State Attorney's Office was just unable to attend the depositions because of manpower limitations and being engaged in the actual trial of cases. As a consequence the Public Defender's Office is often taking the depositions of state witnesses without the presence of any representative of the Prosecutor's Office.

I feel strongly that this horror story in Florida should be cranked into the decision making process before Rule 15 becomes a reality. Those who will make the decision as to whether Rule 15 will be implemented or not should definitely be made aware of the following probabilities:

1. Additional Assistant U. S. Attorneys and supporting clerical help will be required.
2. Additional Court Reporters will be required.
3. There will be a built in lag time between indictment and trial.
4. Substantial monies must be appropriated to pay for the costs of the transcripts of these depositions, together with costs for per diem and travel expenses for witnesses and government attorneys.
5. In those districts where the Federal Public Defender system is implemented, additional Public Defenders and supporting clerical help will be necessary.
6. In most federal cases there are witnesses from distant places. If the defendant wishes to depose them, then the problem really compounds itself. Either the witness has to be subpoenaed

(R. 15, p. 9)

William Stafford, N. D. Florida (cont'd.):

to the place of trial sometime prior to trial; or defense counsel would have to associate counsel at the residence of the witness; or defense counsel would have to travel to the residence of the witness. From the U. S. Attorney's standpoint, if the witness did not come to our office for the deposition, we would either have to travel to the witness' place of residence or brief the U. S. Attorney in that district and ask him to sit in on the deposition, with the full expectation of reciprocating for the other 93 U. S. Attorneys Offices who may have witnesses in our district.

7. The additional office space, equipment, supplies and other services which necessarily follow from an increase in the staff of the Court Reporter, Public Defender and the U. S. Attorney's Office.

I trust that everyone concerned will recognize that proposed Rule 15 will not be ignored by defense counsel, whether Public Defender, court appointed or private. Further, the "jail house lawyers" in the federal penal system will not be long in charging their counsel with incompetency if defense counsel fails to take advantage of Rule 15 provisions.

The disastrous experience the state courts in Florida have had with depositions in criminal cases is a barometer of what the federal system will undergo should Rule 15 be implemented as proposed without adequate funding across the board.

Additional Comments from the Office of Richard L. Thornburgh:

Deposing of Witnesses

1. Once disclosure of Government witnesses is made, it can be anticipated that defense counsel will seek to learn the Government's case by deposing Government witnesses under the pretense that they are also potential defense witnesses.

2. Depositions will multiply the number of Jencks type materials with their inordinate minor inconsistencies utilized for impeachment.

3. Depositions will substantially increase the demand on prosecutors' time as they will have to prepare witnesses for them as well as for trial.

4. Depositions will not obviate the problems of disclosure. First, witnesses can be eliminated before they are deposed. Secondly, the dispassionate reading of a deposition

Additional Comments from the Office of Richard L. Thornburgh (cont'd.):

lacks the impact of a live witness. It must be presumed that if the death or disappearance of a witness could not be linked to a defendant, the jury would never know why a witness was not present.

From the Office of James R. Thompson, N. D. Illinois:

This rule, though it genuinely may have extenuating circumstances such as the expected demise of a witness, opens criminal cases to all the procedures of civil cases. This shift in emphasis ignores the realities of a criminal prosecution, including the intimidation of witnesses, the premature demise of witnesses, the mysterious disappearance of witnesses, and subornation of perjury.

Rule 15(a) is ambiguous in that it fails to delineate what is meant by the terms "special circumstances . . . in the interest of justice . . ." The rule is subject to a wide variation in interpretation by trial judges, and what may be subject to deposition in one district would not be in another. The rule further provides (in direct violation of the Jencks Act) that regardless at whose insistence the deposition is taken, the Government shall make available to the defendant the deposed witness' prior statements. If the new amendments were genuinely interested in creating a balance of fairness, would not a defendant be required to submit statements in his possession to the Government?

More importantly, the amendment is in direct contravention to the Jencks Act. Congress specifically provided that prior statements need not be tendered until after a witness has testified. The amendment makes those statements available weeks, months, and occasionally even years in advance of the trial. The Jencks Act is the law of the land, and no committee may, by fiat, change the statutory provision. Even the courts could not do so unless prepared to hold the Jencks Act unconstitutional.

The provision for deposition provides that if the witness is unavailable, the deposition may be admitted as substantive evidence. It has been fundamental to the concept of trial by jury that an integral aspect of witness evaluation has been the jury's need to see the witness.

The one reasonable instance where the deposition can serve a valuable function is where an important witness is dying,

(R. 15, p. 11)

From the Office of James R. Thompson, N. D. Illinois (cont'd.):

or otherwise physically degenerating from causes which will make it impossible for the witness to appear at the trial by the time the case can reasonably be brought to trial. In that rare instance, the interests of justice should permit the testimony to be reduced to writing, complete with direct and cross examination.

(R. 15, p. 12)

RULE 16

DISCOVERY AND INSPECTION.

Comments of U. S. Attorneys

Richard L. Thornburgh, W. D. Pennsylvania:

Proposed Rule 16 eliminates any discretion of the court in denying discovery which the court presently possesses under Rule 16, and it requires the government to supply defendant with a list of the names and addresses of all of its witnesses! It is as if the proponents of that rule had never heard of the murder of key witnesses in organized crime cases with which many of us are regrettably familiar. Or perhaps they have, as reflected in the additional provision that when a defendant makes a request for discovery of the names of witnesses, the government is permitted to perpetuate their testimony under Rule 15. However, a key witness slated for "erasure" would not likely make it to the deposition, since Rule 15 requires notice to be given to the defendant of the name and address of the witness, as well as the time and place for taking the deposition."

Donald E. Walter, W. D. Louisiana:

I agree with Thornburgh.

W. C. Smitherman, D. Arizona:

I adopt Thornburgh's comments concerning these amendments.

Robert E. Johnson, W. D. Arkansas:

I would agree with the substance of U. S. Attorney Thornburgh's comment on proposed Rule 16.

Robert G. Renner, D. Minnesota:

I approve of United States Attorney Thornburgh's comments on proposed changes to Rule 16.

(R. 16, page 1)

Robert G. Renner, D. Minnesota (cont'd.):

Rule 16 is most damaging. While the government may make demand for production of alibi defense material, in practical application it will not work as contemplated.

The State of Minnesota has had this type of law for many years. County Attorneys refuse to use it. A defendant makes claim of an alibi, this compels the state to investigate all aspects of the alibi, and to the extent that there is any corroboration whatsoever, no matter how minimal, the state agents become witnesses for the defense.

It is not fair to the citizen witness to place him in such jeopardy as disclosure of his identity will accomplish. In the areas of drug societies, organized crime, ghetto crime, prostitution rings and, even sometimes, in certain neighborhoods, respect for the criminal outweighs that for those who cooperate with the law. This will double the burden.

It is tough enough to get witnesses in our society. Any prosecutor will tell you how difficult it is to get people to become involved. Even if they are the victims, people will not come to the police (as evidenced by a crime rate which far exceeds reported crimes).

Another difficult problem is when does a witness become a witness. The selection of witnesses is that of the advocate. It is the rule rather than the exception that new witnesses are found close to the time of trial. Frequently prosecutors in preparing for trial learn the identity of other potential witnesses. Defense attorneys will protest that these witnesses were known to the agents all along. They will seek to have them stricken for not having them disclosed.

J. P. Farris, S. D. Texas:

As to Rule 16, we feel that the entire rule is likely to become an unworkable quagmire of hypertechnical pettifoggery. We cannot dissect the new sections which tend to maintain the status quo of the existing rule, and thus feel that the entire rule should be scrapped, allowing us to work with what we have now. As to the portion requiring the government to submit names and addresses of witnesses, we feel that this goes against the existing case law to the contrary, and will generate substantial

J. P. Farris, S. D. Texas (cont'd.):

problems of obstruction of justice, tampering, intimidating and even assassinating of government witnesses. It will tend to foster the ever-going problem of "no one wanting to become involved". The portion relating to the reciprocal discovery by the defense, based on our experience with the existing reciprocal provisions, is completely unworkable. We do not feel that many, if any, of the district judges will require disclosure by the defendant of any.

Robert W. Rust, S. D. Florida:

In regard to Rule 16(a)(1)(A), the new rule provides for discovery of oral statements made by the defendant, as well as written or recorded statements. The substance of oral statements are discoverable, however, only if made in response to interrogation by a person whom the defendant then knew to be a government agent. There are no other real changes in this section.

The revision created no real problem since oral statements were made part of discovery as a regular practice anyway.

In regard to Rule 16(a)(1)(B), the new rule provides that a defendant's prior criminal record is discovery material. The major question left open by this new provision is what is included in "prior criminal record." Does this mean all arrests? All convictions? Only felony convictions? or only convictions which can be used for impeachment purposes? The proper interpretation would seem to be that of revealing only those convictions which could be used for impeachment purposes.

In regard to Rule 16(a)(1)(C), the only real addition in this section is that all items seized from a defendant are discoverable, whether or not they are intended to be used as evidence and regardless of their materiality to the defense. This change should pose no real problem.

In regard to Rule 16(a)(1)(D), there is no change in this section from the present requirements.

In regard to Rule 16(a)(1)(E), this is an entirely new section requiring the government to furnish the defendant a list of all government witnesses and their addresses. This is the most frightening change from the present rules. The comments of U. S. Attorney Thornburgh adequately cover the disadvantages of this proposed change.

(R. 16, p. 3)

Robert W. Rust, S. D. Florida (cont'd.):

Query--what about confidential informants? Would the court permit the use of business addresses through which a witness could be contacted in lieu of his home address? Also, what latitude, if any, would the trial court have in permitting the government to keep secret the names and addresses of "endangered witnesses"?

Harry D. Steward, S. D. California:

Concerning the modifications to Rule 16, we have followed these procedures informally in this district for a number of years. We were one of the districts selected for the pilot projects of the Omnibus Hearing in 1967 or 1968. We have found that the courts in our district will not require us to disclose names of proposed witnesses when in our judgment to do so would not be advisable. Otherwise we routinely provide defense counsel with full discovery, including names and addresses of witnesses. We have not had any untowards results by following this program, having in mind that the courts will, and have, excused us from discovery where the circumstances warrant.

It would also seem to me that promptly taking the deposition of a key witness who might be subject to "erasure" would tend to protect the witness except for retribution. It would seem preferable to incarcerate this material witness pending the deposition rather than subject him to a lengthy incarceration either in jail or protective custody in a safehouse awaiting trial. Being a border district we have hundreds of material witnesses in custody each year, and we find that their testimony does not improve with extended periods of incarceration in jails. Despite this fact we have resisted successfully all attempts of defense counsel to depose these witnesses as we feel expedited trial is a better solution as depositions in the routine case can be extremely time consuming. I make reference to this apparent inconsistency to demonstrate that the courts will not authorize depositions merely because defense counsel requests them.

By way of summary I am inclined to liberalize the courts' discretion in areas of arrest and bail. It is my feeling that most judges and prosecutors may well tend to err on the side of caution to the end that many defendants are arrested or incarcerated needlessly. This is an area that is open to considerable debate, but if the proposed modifications prove to be unsuccessful, I am confident that the judges will tighten up or that the rules can again be revised. I feel that we should give it a go.

(R. 16, p. 4)

Victor R. Ortega, D. New Mexico:

The requirement of the disclosure of witnesses is going to present a major problem. Putting to one side the question of the safety of witnesses, we think the amended Rule 16 will present some other snares. In order to adequately protect the prosecution of the case, it will become necessary to name any remotely possible witness. The failure to name even a minor witness would, of course, become a major issue in every case in which it occurred.

In addition, the mandatory disclosure provisions of the amended Rule 16 will add to the dimensions of litigation considerably. While we normally furnish many of the matters discoverable under the present Rule 16, failure to do so does not result in reversal of the case or any serious legal problems. Where a motion is made, a good faith effort is made to comply with the court's order, and the discretionary nature of the rule generally prevents the prosecution from going astray on the failure to furnish something.

With respect to the matter of discovery and depositions, the present clamor for speedy trials has resulted in cases being brought to trial almost as fast as we can possibly prepare them. If the use of depositions becomes widespread, we feel that the dimensions of criminal litigation will become more involved and more time consuming. Our ability to comply with time requirements of Rule 50(b) plans or possible future speedy trial legislation will be seriously hampered by an expansion of the deposition practice or discovery practice present in the amended rules.

Charles H. Anderson, M. D. Tennessee:

The most dangerous proposal is the requirement we furnish names and addresses of government witnesses upon demand. The criminal element should give an "Oscar" to the fellow who suggested that! Obviously they did not contemplate witnesses in protective custody. This is an invitation to bribery and obstruction of justice.

As a last resort, the least they could do is give the prosecutor the same opportunity, but this would be slight compensation for the damage done.

(R. 16, p. 5)

Stan Pitkin, W. D. Washington:

The only objection we have to Rule 16 is that we don't like to be required to give the witness list in every case. However, a Ninth Circuit opinion says that on a showing to the court under Rule 16(b), defendant is entitled to a witness list. Presently, therefor, we either voluntarily provide such lists or are so forced by court orders. Although we might wish more discretion on balance, with the reciprocal discovery provisions, we can live with Rule 16.

William D. Keller, C. D. California:

The present statement of this rule would encourage unscrupulous counsel to have scientific tests made with instructions that the defense expert not prepare any written report which would be available under this rule. The rule should require the preparation of such reports.

The provision in regard to protective orders should be strengthened. It should explicitly state that the court may at any time "in its discretion" order that the discovery or inspection be denied, etc. There are undoubtedly instances where such protective orders will be necessary for the protection of witnesses.

H. M. Ray, N. D. Mississippi:

The proposed amendments to Rule 16 should be opposed in their entirety.

It is proposed to change Rule 16 to require the government to discover to the defendant "the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person known to the defendant to be a government agent." The commentary observes that the same reasons for permitting the defendant to discover his written or recorded statements "obviously applied to the substance of any oral statement which the government intends to use in evidence."

The commentary may be correct as to oral statements made "after arrest in response to interrogation by . . . a government agent" since in such situation there always lurks the possibility of a Miranda objection. The commentary is not

H. M. Ray, N. D. Mississippi (cont'd.):

necessarily true with respect to statements made before arrest, however. In these circumstances, by definition there can be no basis for objection to the statement. Since discovery of statements before arrest cannot be justified as affording a basis for raising objections before trial, it must rest on some other ground.

The commentary justifies "broad discovery" on three general principles:

1. "Fair and efficient administration of criminal justice,"
2. "Minimizing the undesirable effect of surprise at the trial" and
3. "Contributing to an accurate determination of the issue of guilt or innocence."

None of these ends are served by discovery which allows the defendant to tailor his defense to meet the evidence against him. There can be nothing fair and efficient in the guilty escaping conviction. There can be nothing undesirable from the point of view of justice of catching the defendant in a lie at trial by surprising him with a prior inconsistent statement, and the jury is more likely to make an accurate determination of the issue of guilt or innocence if they know he is lying. Self-preservation is one of the first laws of Nature and the rules of discovery ought to take into account that perjury is a very real problem in criminal prosecutions. It's no answer to say that the defendant could be prosecuted for perjury because this usually is not feasible and has a flavor of "sour grapes" to it which discourages prosecution.

The proposed change limits discovery of the defendant's oral statements to those which "the government intends to offer in evidence at trial." The possible penalty for failure to disclose is that the court may "prohibit the party from introducing in evidence" the material not disclosed. The rule does not indicate what action the court should take if it appears that the government had before trial but did not disclose, because it had no intention of using it, a statement that later during trial becomes material either on the case in chief or in rebuttal and the government then decides to offer it. For example, the government may have an exculpatory statement which it has no reason or intention to use. At trial, however, the defendant may attempt to develop either

H. M. Ray, N. D. Mississippi (cont'd.):

through cross-examination of the government witnesses, the presentation of defense witnesses, or the defendant's own testimony, evidence which is inconsistent with his prior statement. Would the government be barred from introducing this statement on its case in chief or in cross-examination of the defendant or in rebuttal?

Rule 16 is further amended to eliminate the requirement that the defendant make "a showing of materiality" and a showing "that the request is reasonable" on a motion to inspect and copy books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof which are within the possession, custody or control of the government. Instead, the government would be required to permit the defendant to inspect and copy any of these items "which are material to the preparation of his defense or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant. The commentary states that this amendment would require disclosure where "the defendant shows that disclosure of the document or tangible object is material to the defense." This plainly is not what the rule itself says since all reference to a showing of materiality is eliminated. Furthermore, elsewhere, the commentary states that the reason for eliminating the requirement of a showing of materiality by the defendant is because "it may be difficult for a defendant to make this showing if he does not know what the evidence is." The plain language of the rule as amended says that the items must be disclosed if they are material and the commentary acknowledges that the defendant may have no knowledge of what evidence he is fishing for, much less its materiality. It is obvious, therefore, that the onus is going to be on the government attorney to discover for himself not only what evidence may be in his file but also anywhere within the possession, custody or control of the entire government. Then, without knowing what the defense is, he must determine whether any of this evidence is material to the defense.

This is an onerous, unreasonable, impossible and utterly absurd responsibility to impose on any attorney.

These revisions seem to be based on the assumption that with discovery the criminal defendant will not fabricate evidence but without discovery the government will suppress evidence. Indeed, the revisers cite Brady v. Maryland, 373 U.S. 83 (1963), as perhaps requiring disclosure of documents and objects material to the defense. Apart from the fact that Brady v. Maryland

(R. 16, p. 8)

H. M. Ray, N. D. Mississippi (cont'd.):

dealt with a request for specific evidence which at least two members of the Supreme Court of the United States were not satisfied was material after having the benefit of briefs and argument by opposing counsel and with the benefit of the records and opinions of the trial court and the highest state appellate court on a motion for a new trial and on a petition for post-conviction relief, Brady and every case cited in it involved suppression of evidence by a state prosecutor. These, after all, are Federal Rules we are revising and they ought at least to be based on Federal practice and experience. In the absence of some demonstrable tendency of Federal prosecutors to suppress evidence, this type of dragnet discovery ought to be rejected. It is one thing to be under an ethical and official duty not to suppress evidence knowingly, but it is another thing to be under a court order to search out and weigh evidence for the benefit of one's adversary.

It is proposed to amend Rule 16 further to substitute "shall" for "may" in the discovery provisions to make discovery without any showing of any kind mandatory rather than discretionary with the court. It is significant that the provision regarding limitations on discovery, however, is left unchanged so that "the court may" but only "Upon a sufficient showing" enter a protective order limiting discovery. Certainly if unlimited discovery is going to be mandatorily granted without any showing, then protective orders ought to be mandatorily granted where there is a sufficient showing of the need for them.

The commentary cites several cases as demonstrating the need to make discovery mandatory rather than discretionary. It is only necessary to examine these cases to see how much discovery was allowed and on what basis some was denied to demonstrate how unnecessary this change is. For example, the commentary twice cites United States v. Kaminsky, 275 F.Supp. 365 (E.D. Wisc. 1967), apparently as illustrating the abuse of the present rule. In that case, there were "blanket requests" under which the court granted the defendant the right to inspect at least one week before trial any F.B.I. reports of interview with the defendants which the government intended to offer in evidence. The court denied production of "any cryptic or 'foolscap' notes by government attorneys" until trial where the court indicated even they would be subject to discovery under the Jenck's Act. The court also denied disclosure of the fact whether any electronic devices had been used in

H. M. Ray, N. D. Mississippi (cont'd.):

gathering evidence because there was no showing of even "any likelihood that such devices were used in the investigation." The court also declined to impose upon government counsel "an obligation to furnish long before trial all kinds of information which some lawyer might conceivably interpret as exculpatory evidence or leads to such evidence" because "Nothing in Brady v. State of Maryland requires such an unworkable procedure." The other cases mentioned in the commentary are similarly discriminating in their holdings and the entire opinion in United States v. Louis Carreau, Inc., 42 F.R.D. 408 (So.D. N.Y. 1967) cited prominently in the commentary is a detailed rebuttal to the argument for broader discovery.

Anyone who has had to answer motions for discovery under the present rules can readily appreciate the potential for harassment, delay and frivolous objections in the proposed changes. The motion can be filed pro forma without any sense of responsibility but it will have to be answered in earnest with a conscientious effort to comply fully with the letter and spirit of the rule. Where it is doubtful that the defendant is entitled to the information requested, the pressure will be to disclose nevertheless to avoid objections to admissibility and the criticism of having suppressed evidence. Inadvertent omissions and honest errors of judgment will be the basis for many objections at trial and new errors on appeal. Again it seems the appropriate time and place to determine whether the prosecution is guilty of suppressing evidence is after trial on a motion for a new trial where the issues have been clearly defined and a full record made. At that time, the prosecution will have had an opportunity to discharge its duty not to suppress evidence and the significance of any evidence withheld can be measured in concrete terms rather than hypothetically. If boundless discovery is to be granted before trial, however, there ought at least to be some limits on it in terms of reasonableness and specificity.

It is proposed to amend Rule 16 further to require the government to disclose to the defendant any documents or objects which "are intended for use by the government as evidence at the trial, or were obtained from or belong to the defendant." The commentary says simply that "this is probably the result which should be reached under present Rule 16" but since some courts don't reach it, then the result is to be compelled by the change in the rules.

H. M. Ray, N. D. Mississippi (cont'd.):

This proposal, like the others, based on the intentions of the prosecutor reflects a complete disregard for the problems of preparing for trial and trying a case. Often it is not known in advance precisely what evidence will be used at trial and documents and objects that will be used are not always readily available to government counsel before trial. For example, the prosecution may have fingerprints taken from the defendant in the F.B.I. laboratory in Washington and does not intend to call an expert from Washington to introduce them until it appears at trial that its eyewitness on direct examination cannot identify the defendant or his identification is discredited on cross-examination or is contradicted by defense witnesses. Even if it were intended all along to use the fingerprints, the actual exhibits thereof that will be introduced into evidence may not be in existence until just before trial. It is not unusual to discover for the first time at the trial that a government agent has photographs, for example, which would be helpful in explaining his testimony to the jury and it is decided then to introduce them. The prosecution may have some item of evidence which it does not intend to use because it cannot connect it to the defendant, but at trial some witness for the prosecution or the defense may surprisingly produce the missing link and make it admissible.

The further amendment to Rule 16 providing that where a party "decides to use additional evidence . . . he shall promptly notify the other party" does not eliminate these problems and is itself unnecessary and unwise. The defense of a case does not begin with the close of the government's evidence but with the cross-examination of the government's first witness, and the defendant doesn't have to prove that he is not guilty but only cast doubt on the fact that he is. Thus, the defendant will start off with the prosecution's witnesses building up the defense that possibly it was someone else who committed the crime, or that he may have been entrapped, or that he could have been insane. Having no other defense, the defendant may build his whole case on such bare suspicions and then pound away at the jury that the government has not proved its case beyond a reasonable doubt. These are, of course, legitimate defense tactics but it is equally proper for the government to explode these phony defenses when it has the evidence to do so. If, however, the prosecution is required every time it sees such a defense developing to notify the defendant that it has the evidence to refute it then he will avoid that line of defense and probe until he finds another which the government by its silence admits it cannot answer. If the defendant's only defense to a charge is to confuse and mislead the jury, he should

(R. 16, p. 11)

H. M. Ray, N. D. Mississippi (cont'd.):

be allowed an opportunity to present it, but the prosecution should also have the right to expose its falsity and reveal the absence of any valid defense. There is nothing unfair about giving the defendant enough rope to hang himself. That the prosecutor must strike only fair blows does not mean that he must telegraph his punches.

The further amendment to Rule 16 requiring the prosecution to disclose any additional witnesses or evidence it decides during the trial to use is simply discovery for discovery's sake. Obviously, by the time the trial has begun, it is too late for such evidence to be the basis for any pre-trial motions and any witness who takes the stand must give his name and address before testifying and any exhibit must be shown to opposing counsel before a witness can be examined about it. The only purpose to be served by giving the defendant advance notice of such evidence is to alert him not to stake his case on the mistaken belief that the evidence is unavailable to the government.

The commentary states that a majority of the revisers are of the view that "the giving of a broader right of discovery to the defense is dependent upon giving also a broader right of discovery to the prosecution," but the scant discovery afforded the prosecution is so limited as to be practically meaningless. Before the prosecution has bargained away everything it has to offer in the way of discovery, some effort ought to be made to require meaningful discovery of the defendant. There certainly won't be much pressure from the academicians and the defense bar to broader discovery once a defendant has obtained everything in this way that he desires. At a very minimum as a condition to discovery by the prosecution, the defendant ought to be required to submit himself and all of his witnesses to the taking of their depositions not to be used as evidence in chief for the prosecution but solely for impeachment and as a basis for a prosecution for perjury in the event the witness or the defendant takes the stand at trial and departs from the deposition. This would put the defendant and his witnesses in the same position as government witnesses under the Jencks Act and would largely remove prosecution objections to broader discovery on the grounds that it facilitates fabrication of evidence. This no more compels the defendant to give evidence against himself than conditioning his right to testify on the obligation to submit to cross-examination compels him to give evidence against himself. Furthermore, the defendant could avoid giving his deposition before trial by simply waiving discovery on

(R. 16, p. 12)

H. M. Ray, N. D. Mississippi (cont'd.):

the part of the government. Discovery by the government is not constitutionally required and thus the defendant is not being compelled to surrender one Constitutional right in order to take advantage of another one. Just as a defendant can do so, likewise he could waive the right to maintain absolute silence before trial to gain the benefits of discovery by the government. In any event, the oberblown theory that requiring the defendant to make the discovery as a condition to obtaining discovery is in some way unconstitutional should be tested further in light of Williams v. Florida, 399 U.S. 78 (1970), before the prosecution has yielded up its entire file and no longer has anything to offer in exchange.

Robert J. Roth, D. Kansas:

We should resist expansion of discovery. Our omnibus hearing procedure is proof that discovery generally benefits only defense.

Regarding Rule 16(e)--oppose disclosure of identity of government witnesses. Disclosure invites harassment, intimidation or elimination of government witnesses. Witnesses may be more reluctant to cooperate if disclosure allowed. Encourages manufactring of defenses.

Wayman G. Sherrer, N. D. Alabama:

(16(e)) List of Government Witnesses: We object to this requirement wholeheartedly, emphatically and without reservations! The progressively successful, albeit much misguided attempts to equate civil and criminal discovery under the guise of some basic analogy between civil lawsuits and criminal prosecutions misses the mark. A civil suit and a criminal prosecution are different animals entirely, and never were meant to be conducted under similar substantive rules. They deal with completely different areas of obligation, interests, rights, burdens of proof, and most importantly, different constitutional protections premised on the simple fact that civil litigation, in the main, is between private person and private person; whereas a criminal prosecution is the state versus a citizen, therefore the formidable constitutional bulwarks raised to protect the accused (conspicuously absent in civil suits). Frankly, the prosecution needs no further problems in attempting to insure that the public right is fulfilled, that is speedy, effective and fair prosecutions.

(R. 16, p. 13)

Earl J. Silbert, D. C.:

At the outset of our discussion concerning the proposed amendments to Rule 16, we should note our agreement with the general comments contained in the Report to the Attorney General Concerning Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure for the United States District Courts (April, 1971), both with reference to the undesirability of providing for mandatory discovery without the exercise of the trial court's discretion and with reference to most of the specific provisions commented upon in that report. We are also concerned in general with the fact that nowhere in the proposed amendments to Rule 16 is the problem of the timing of requests for discovery and responses to such requests adequately met. In nearly all instances, the disclosing party is required to comply only upon the "request" of the discovering party. It is our view that in virtually every instance discovery should not take place until after indictment and that in many instances, particularly those where mutual disclosure of witnesses and witness addresses is required, discovery, if it is permitted at all (and we strongly oppose it), should occur only within three days of trial. Cf. 18 U.S.C. Section 3432 (where, even in capital cases, Congress felt it unnecessary to require pre-trial disclosure of Government witnesses more than three days in advance of trial).

With reference to Rule 16(a)(1)(A), we oppose the last sentence of the subsection providing that where the defendant is a corporation, partnership, association or labor union, the court may grant the defendant, upon its motion, discovery of relevant recorded testimony of any witness before a Grand Jury who was, at the time either of the charged acts or of the grand jury proceedings, so situated as an officer or employee as to have been able legally to bind the defendant in respect to the activities involved in the charges. Notwithstanding the Department's earlier support of this language in its April, 1971 Report to the Attorney General, it is the view of our Fraud Section that this rule would severely impair prosecutions of both corporate defendants and individual defendants joined with them, and that it should be deleted.

With reference to Rule 16(a)(1)(B), we would recommend that the subsection be amended to read: *Defendant's Prior Record. Upon request of the defendant, the government shall furnish to the defendant such copy of his prior criminal record, if any, as is in the possession of the attorney for the government.* This change is

Earl J. Silbert, D. C. (cont'd.):

identical to a proposal in the April, 1971 Report to the Attorney General and we support it for the reason set out in that report. See pages 19-20.

With reference to Rule 16(a)(1)(C), relating to disclosure by the government of documents and tangible objects, we object to this subsection for the reasons set out in the April, 1971 Report to the Attorney General at pages 20-23 and, with the exception of providing for disclosure of photographs, recommend that the language of the present rule be retained.

With reference to Rule 16(a)(1)(E), providing for the disclosure by the Government of the names, addresses and prior felony convictions of its witnesses, we feel most strongly that this subsection should be vigorously opposed; indeed, if at this time the resources of the Department are to be focused upon any single proposed amendment to the rules in an effort to seek Congressional modification or rejection, we feel that it is Rule 16(a)(1)(E) which should draw the Department's attention. In the Report by the Department committee to the Attorney General in April, 1971, this proposed amendment is criticized at length. We would only note that the final language of the subsection as it is written represents a virtual concession by the authors of the rule elevating the importance of a defendant's opportunity to obtain disclosure of the identity of witnesses over the need to protect the same subsection of an absolute requirement for disclosure of names and addresses of witnesses on the one hand, and the assurance that the Government will have an opportunity to depose and preserve the testimony of such witnesses at an early date on the other, represents physical danger to witnesses that would emanate from the enactment of the rule, and a remarkable conclusion that the physical safety of victims of crime must assume second priority to the unnecessary expansion of pretrial discovery.

The apprehensions of witnesses to crime that they may suffer reprisals if they testify are not imaginary or inconsequential, as was reflected in the examples set out in the April, 1971 Report to the Attorney General, pp. 25-26. Additionally, preliminary data from a witness cooperation study conducted by the Institute for Law and Social Research under a grant from the Law Enforcement Assistance Administration revealed that, when asked the open ended question, "What changes do you think would make witnesses more willing to cooperate?", 28.8 per cent of those witnesses who had cooperated with the police and the United States

Earl J. Silbert (cont'd.):

Attorney's Office in prosecutions and 31.3 per cent of those who declined to cooperate gave one of three significant kinds of responses, all reflecting a concern with reprisal: "Better protection of witnesses by police", "Keep witness identification from defendants", and "Assure witness of protection after testimony."

In summary, we believe that proposed Rule 16(a)(1)(E) should be vigorously opposed in favor of retention of the present rule which make no reference whatever to witness disclosure. Alternatively, we would recommend that in the event witness disclosure is to be permitted, some burden be placed on the party seeking disclosure to show a reasonable need for the information sought, and that whatever disclosure in this regard is permitted, no party be required to disclose earlier than three days in advance of trial. Finally, it is particularly critical that in this area the trial Court retain discretion as to whether or not to grant the discovery sought. Thus, if subsection (E) of Rule 16(a)(1) is to be retained, we would urge that the first sentence of the rule be modified to read as follows: *Upon motion and a showing by the defendant that his request is reasonable, the Court may order the attorney for the Government, three days in advance of the date of trial, to furnish to the defendant a written list of the names and addresses to all government witnesses whom the attorney for the Government intends to call in the presentation of the case in chief together with any record of prior felony convictions of any such witness which is within the possession of the attorney for the Government.*

With reference to the requirement in Rule 16(a)(1)(E) that the Government turn over prior felony convictions of its witnesses, we also object. Such a rule not only imposes an unnecessary administrative burden upon the prosecution but will very likely result in discouraging witnesses from testifying for reasons of potential embarrassment totally unrelated to their credibility. To the extent that the prosecution is aware of the conviction of a witness that could be used for impeachment of that witness's credibility or to show bias or prejudice, the prosecutor should, of course, make such disclosure; the prosecution should be under no duty, however, to independently seek such information. In urging rejection of this portion of subsection (E), we note that Courts have uniformly upheld denial of requests for such disclosure. See e.g., *United States v. Condor*, 423 F.2d 904, 910 (6th Cir.), cert. denied, 400 U.S. 958 (1970); Hemphill

Earl J. Silbert, D. C. (cont'd.):

v. United States, 392 F.2d 45, 48 (8th Cir.), cert. denied, 393 U.S. 877 (1968); United States v. Mahaney, 305 F.Supp. 1205, 1209 (N.D. Ill. 1969); United States v. Westmoreland, 41 F.R.D. 419, 427 (S.D. Ind. 1967); United States v. Cobb, 271 F.Supp. 159, 162 (S.D. N.Y. 1967). Moreover, we believe that a procedure requiring such disclosure is a direct assault on the privacy of an individual citizen whose only connection with a criminal proceeding is that he was the victim of or witness to a crime.

With reference to Rule 16(a)(2), "Information not Subject to Disclosure", we would recommend that this portion of the rule be modified in keeping with the recommendations we have made above to read as follows: *Except as provided in subdivision (a)(1) this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case, or of the names, addresses, statements or prior criminal records of government witnesses or prospective government witnesses except as provided in 18 U.S.C. Section 3500 or Rule 16(b)(1)(D) of these rules.*

With reference to Rule 16(a)(3), "Grand Jury Transcripts", we would recommend that this subsection be amended to include reference to the Jencks Act and to read as follows: *Except as provided in Rule 6, subdivision (a)(1)(A) of this rule and 18 U.S.C. Section 3500, these rules do not relate to discovery or inspection of recorded proceedings of a grand jury.*

With reference to Rule 16(b), relating to disclosure of evidence by the defendant, we recommend several changes that would track modifications which we have suggested in Rule 16(a) to maintain as nearly equally as possible mutuality of discovery between the Government and the defense. In particular, we urge modification of subsections (A) and (B) of Rule 16(b)(1) to require disclosure by the defense of documents, tangible objects, and reports of examinations and tests which the defendant obtains in connection with the case. The effect of our proposed modification would avoid a circumstance, for example, where a defendant who wished to raise an insanity defense obtained examinations by five different psychiatrists, four of whom found the defendant without mental illness and one of whom found him sick, only to have the defense suppress the results of the four negative examinations while introducing the testimony of the favorable fifth psychiatrist. Finally, while we object to disclosure of defense witnesses because we object to disclosure of government witnesses, if disclosure of government witnesses is to be permitted, along with their criminal records, we believe that disclosure of defense witnesses

Earl J. Silbert, D. C. (cont'd.):

and their criminal records should be permitted on the same basis. With these considerations in mind, we would recommend that subsections (A), (B), and (C) of Rule 16(b)(1) be modified as follows:

(A) *Documents and Tangible Objects.* Upon request of the Government, the defendant shall permit the Government to inspect and copy or photograph books, papers, documents, photographs, tangible objects or copies or portions thereof, which are within the possession, custody or control of the defendant, and which are material to the case or which the defendant intends to produce as evidence in chief at the trial.

(B) *Reports of Examinations and Tests.* Upon request of the Government, the defendant shall permit the Government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with a particular case, or copies thereof, within the possession, custody or control of the defendant, or the existence of which is known to the defendant.

(C) *Defense Witnesses.* Upon request of the Government, the defendant shall furnish the Government a list of the names and addresses of the witnesses he intends to call in the presentation of the defendant's case in chief, together with any record of the prior felony convictions of such witnesses within the possession of the defendant or his counsel. When a request . . .

Finally, as noted above, we strongly recommend the addition of a new subsection, (D), "Statements of Defense Witnesses", to Rule 16(b)(1) which would afford the Government discovery of prior statements of defense witnesses after those witnesses have testified at trial or in pretrial hearings, precisely comparable in scope to discovery permitted of prior statements of Government witnesses under similar circumstances by 18 U.S. Code Section 3500. See State v. Montague, supra; and the Government's Petition for Rehearing En Banc in United States v. Anthony Wright, supra, filed therein. We would propose that Rule 16(b)(1)(D) read as follows: *Statements of Defense Witnesses.* After a witness called by the defendant has testified on direct examination, the Court shall, on motion of the Government, order the defendant to produce any statement of the witness in the possession of the defendant which relates to the subject matter to which the witness has testified. If the entire contents of any such statement relate to the subject

Earl J. Silbert, D. C. (cont'd.):

matter of the testimony of the witness, the Court shall order it to be delivered directly to the attorney for the Government for his examination and use. The term "statement" as used in this subsection means a written statement made by the witness and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to the defendant, his counsel or his agent and recorded contemporaneously with the making of such oral statement. If the defendant elects not to comply with an order of the court to deliver such a statement, or portions thereof, to the Government as the Court may direct, the court shall strike from the record the testimony of the witness.

In keeping with the above proposed amendment, we would urge modification of Rule 16(b)(2), "Information Not Subject to Disclosure", by the addition of the words, *except as provided in subdivision (1)(D) of this rule, at the end of Rule 16(b)(2).*

Additional Comments from the Office of Richard L. Thornburgh:

Requiring Disclosure of Government Witnesses

1. Most obviously, this would create the serious risk of threats, pressures and physical harm to witnesses and their families. It is suggested that the U. S. Attorneys' offices and enforcement agencies prepare supporting lists of witnesses in their districts who have incurred threats or harm upon discovery without free disclosure. By way of example, a Western District of Pennsylvania list would include:

(a) Octabio DeLarosa, witness in U.S. v. Burrell and Baskin (bank robbery) - four shots fired through his front window into chair he had just been sitting in.

(b) Nicky Farrentino, witness in U.S. v. Bertone (ITSP) - shot to death - case dismissed.

(c) Marge Morris, witness against Zack Robinson in U.S. v. Robinson, Brown et al. (narcotics) - shot to death - Robinson acquitted.

(d) Emma Mozee, witness against Brown in above case - threatened - relocated after testifying.

(e) Glicks, witnesses in U.S. v. Raucci threatened, car firebombed.

Additional Comments from the Office of Richard L. Thornburgh (cont'd.):

2. The Government would have a more difficult time getting witnesses and information in the first place, at investigatory and grand jury stages. The vagaries of a court finding of "sufficient cause" to delay or deny disclosure may be too uncertain a prospect for many. Once the rule of disclosure, with its attendant risks, becomes known, it can be anticipated that some persons will not supply information from the beginning. The "I don't want to get involved" syndrome should increase.

3. The provision for court findings exempting some witnesses and/or cases from operation of the disclosure rule does not provide sufficient protection. First, it is subject to the whims and predilections of the various judges. Secondly, even sympathetic judges can be expected to seriously consider exemption only in "organized crime" cases. As can be seen from the W.D. Pa. list above, "run of the mill" drug violators and bank robbers are also quite capable of moving against witnesses. In cases of official corruption, use by a defendant of the powers of his office to deter or discredit witnesses can be contemplated. At the very least, the rule should be amended to prevent disclosure upon the filing of an affidavit by the U. S. Attorney that in his good faith judgment disclosure in a given case would not be in the best interests of justice.

4. Disclosure would prevent the development of valuable information after indictment. In some cases, persons who have provided information about a subject-defendant have remained in contact with them following indictment and thus been able to provide further information helpful in attaining conviction. This would of course be obviated by post-indictment disclosure of them as witnesses.

Provisions for Defense Disclosure are not a quid pro quo Making the New Rules Worthwhile or Palatable for the Government

1. Government knowledge of defense witnesses hardly protects Government witnesses from the hazards they face.

2. The requirements of defense disclosure probably could not be enforced. It is highly unlikely that a court would bar a "last minute" alibi witness, for example, with any excuse from the defense for tardy disclosure. If a court were to enforce these provisions, due process and 2255 claims would abound.

From the Office of James R. Thompson, N. D. Illinois:

Rule 16(a)(1)(E) provides that the Government will furnish to the defendant a written list of the names and addresses of all Government case-in-chief witnesses. Rule 16(a)(2)(C) confers a similar right upon the Government. The attempted mutuality is for appearance only and essentially illusory. In the ordinary and vast majority of the cases, defendants do not call witnesses other than character witnesses, and the discovery of their names is valueless to the prosecution. Secondly, defendants, when they do call witnesses, do not know who their witnesses are going to be until just before the witnesses are summoned because the defendants' case-in-chief must be responsive to what the Government has proven, and that cannot be firmly determined until the Government is close to resting its case.

Of all the proposed amendments, this amendment is the most problematic. It opens an avenue for witness intimidation and subornation of perjury. Admittedly, upon the showing of cause, the Government may withhold the names and addresses of witnesses. In those rare cases where dictable, the saving clause has some merit. However, ordinarily a predilection of that sort is not predictable until it has happened, and then it is too late.

This provision is also in direct contravention of an existing Congressional enactment. Congress provided that in capital cases, the Government must tender a list of witnesses (only 3 days prior to trial). The very existence of that special legislation shows that Congress did not intend defendants in criminal cases to have lists of witnesses in other categories of cases. Had they so intended, it would have been simple to so provide.

From the list of witnesses, it is a small matter for a defendant to construct for himself the whole of the Government's case prior to trial. Case law has stood steadfast against the discovery of witness' names and the theory of the prosecutor. The reason for the traditional reluctance to disclose that information is that it gives ample time for a defendant to fabricate a defense and the more time allowed in which to fabricate, the more full proof and impenetrable the fabrication becomes. It can be argued that a defendant can always manufacture a defense, but under existing rules, the time allowed is minimal, and the chances of a good fabrication substantially reduced.

Paul J. Curran, S. D. New York:

The important provisions of this new Rule require the Government to furnish the defendant before trial with a list of its witnesses and all documents and other tangible items to be introduced at trial or material to the preparation of the defense for trial. Reciprocal obligations are imposed on the defense where applicable. Pretrial depositions of witnesses whose names are disclosed are made mandatory on the application of the disclosing party.

On the surface Rule 16 gives the impression that its drafters doubtless intended--that it is designed to improve the fairness and accuracy of outcome in criminal cases by providing both sides with more extensive pretrial disclosure than heretofore authorized. In practice the Rule will increase the likelihood of miscarriages of justice by providing criminal defendants with the opportunity and temptation to dispose of or "reach" the Government's witnesses before trial. Its use of depositions as a palliative to this danger, which in many cases will be to innocent members of the public, cannot be other than insufficient, overburdening to prosecutors and judges alike, and obstructive of the prompt disposition of criminal cases. The requirements concerning pretrial document production will be impossible for the prosecution to discharge, no matter how hard it tries, and the result will be endless litigation, reversals, and new trials over matters that could not have made any difference to the proper determination of the guilt or innocence of the defendant. The reciprocal rights of the prosecution to make discovery of a defendant's case will be illusory because they will not be strictly enforced and because most defendants offer no witnesses or evidence at their trials.

In short, Proposed Rule 16 adds enormously complicated problems and unnecessary risks to human life to the administration of criminal justice without conferring commensurate legitimate benefits on either side. It protracts pretrial proceedings and offers a host of collateral legal problems having nothing to do with the determination of guilt or innocence.

The limitation upon the disclosure of oral statements by the defendant to those made to persons whom he knows are law enforcement agents should be extended to written and recorded statements as well.* It should be made clear that the phrase

* This extension would have the effect of overruling such cases as United States v. Crisona, 416 F.2d 107 (2d Cir. 1969). That decision, we believe, construes existing Rule 16 in a way which conflicts with 18 U.S.C. Section 3500. See United States v. Percevault, 490 F.2d 126 (2d Cir. 1974).

Paul J. Curran, S. D. New York (cont'd.):

"known to the defendant to be a government agent" should be limited to agents whom he knows are engaged in investigating his conduct. In other words, it should not apply to an IRS Agent whom the defendant thinks is accepting a bribe, but who, in reality, is acting in an undercover capacity.

Insofar as corporations are concerned, the Court should order disclosure of the Grand Jury testimony only of those officers and employees who can bind the corporation by their Grand Jury testimony. There is no reason to disclose to the corporation the testimony of, for example, former corporate officers who are now testifying against the corporation. Otherwise, a situation could be created where the Government, in order to indict the corporation, might be forced to disclose its entire case through Grand Jury testimony without any reason therefor.

This paragraph compels the Government to disclose to the defendant every single exhibit without exception that the Government proposes to offer as part of its case in chief. The main problem here is that this may come close to compelling disclosure of the identity of every single person who will testify since identifying the papers may necessarily identify the person who will be testifying concerning them. The objection to this change, therefore, must be considered in conjunction to the objections in 16(a)(1)(E). It should be noted that the reciprocal provision for discovery of defense evidence under 16(b)(1)(A) will prove to be illusory for the reason set forth in connection with 16(a)(1)(E).

More sinister is the requirement that the Government also disclose to a defendant any other such items "... which are material to the preparation of his defense ...". The Advisory Committee's statement, 48 F.R.D. 553, 602 (1970), that this rule is merely a partial codification of Brady v. Maryland, 373 U.S. 83 (1963), is incorrect. First of all, the Brady standard is "evidence favorable to the accused ... material to guilt or to punishment ...". Brady v. Maryland, *supra*, 373 U.S. at 87. A simple comparison of the Brady standard to the provision in this subsection of Rule 16 establishes that the standards are not the same, and it is clear that Rule 16 as written would require disclosure of the kind of information which has not had to be disclosed under existing law. *E.g.*, Moore v. Illinois, 408 U.S. 786 (1972); United States v. Ruggiero, 472 F.2d 559, 605 (2d Cir.), *cert. denied*, 412 U.S. 439 (1973). In addition, the application of a standard of materiality to

Paul J. Curran, S. D. New York (cont'd.):

preparation for trial rather than materiality to guilt or punishment is limited by those cases which have developed it*,

* Some considerable question may exist as to whether these cases do not go further than the Supreme Court meant to in Brady.

e.g., United States v. Kahn, 472 F.2d 272, 287 (2d Cir.), cert. denied, 411 U.S. 982 (1973), to cases of deliberate or grossly negligent prosecutorial suppression, but it is not so limited by the rule. The Advisory Committee Note on the meaning of Brady, cited supra, is overbroad and ambiguous for this very reason. Compare United States v. Pflugst, 490 F.2d 262, 275-277 (2d Cir. 1973).

Most important, as the above suggests, the burden of furnishing a defendant with all documents or tangible objects, regardless of the obviousness of their value to him, which are "material to the preparation of his defense" is an impossible one for the prosecution to meet, as the Second Circuit explicitly noted in United States v. Ruggiero, supra, 472 F.2d at 605. Existing law places on the defendant the burden of particularizing the kind of material he believes will be exculpatory. United States v. Brawer, 367 F.Supp. 156, 171 (S.D.N.Y. 1973), aff'd., Dkt. No. 72-2199 (2d Cir., May 3, 1974). The shifting of this burden to the prosecutor in the pretrial context will require an unattainable omniscience on his part, for who but the defendant can know what is "material to the preparation of his defense." The result of this Rule will be endless accusations of suppression, more hearings in the District Courts and more work for the Courts of Appeals, all of it unnecessary and none of it likely to further the administration of justice.

This is the provision that requires the disclosure of the names of all witnesses who will testify for the Government in its case in chief. The other important provision here is that if the Government provides these names in response to a request, the Government acquires the right to take their testimony by deposition in order to perpetuate it. This appears to be aimed at minimizing the danger of Government witnesses being murdered or intimidated. (The reciprocal provision permitting defendants to take depositions is not, presumably, intended to serve the same purpose. Apparently it is merely intended to create an appearance of symmetry and has no rational function.)

It is assumed that the problem of the murder, intimidation and subornation of Government witnesses was considered by

(R. 16, p. 24)

Paul J. Curran, S. D. New York (cont'd.):

the Advisory Committee in connection with this provision of Rule 16. We believe, however, that the Advisory Committee must have been unaware of how common such conduct is. The following are some of the cases which have reached the appellate level in the last two years notwithstanding the deprivations or attempted deprivations against Government witnesses:*

* Some of the cases cited were affirmed without opinion; they are signaled "***"

1. United States v. Arroyo, Dkt. No. 73-2193 (2d Cir., March 22, 1974), slip op. at 2320 n. 11--a Government informant was murdered shortly after a narcotics trial at which his informant status was revealed.
2. United States v. D'Amato, 493 F.2d 359, 361 n. 1 (2d Cir. 1974)--a lower-echelon member of a narcotics ring, who was arrested before the more important members of the ring and agreed to cooperate, was found murdered ten days after his arrest.
3. United States v. Zanfardino, Dkt. No. 73-2778 (2d Cir., March 14, 1974)** --Six defendants paid two New York City Police detectives \$100,000 in cash to destroy videotapes of their narcotics activities and to furnish them with the address of a principal government witness so that she could be murdered.
4. United States v. Cioffi, Dkt. No. 73-2612 (2d Cir., March 14, 1974)--attempt to intimidate prospective Grand Jury witness in stock fraud investigation.
5. Prior to his trial in February, 1972, for narcotics conspiracy Vincent Pacelli, Jr., murdered Patsy Parks by cutting her throat; Parks had sought out Pacelli on the night he killed her to tell her that the Government was attempting to subpoena her to testify at his trial. United States v. Pacelli, 491 F.2d 1103 (2d Cir. 1974). At Pacelli's narcotics trial, another young woman, with whom Pacelli had dealt in narcotics, repudiated her prior statements implicating him and falsely testified that she did not even know Pacelli. United States v. Pacelli, 470 F.2d 67, 69 (2d Cir. 1972).

Paul J. Curran, S. D. New York (cont'd.):

6. In United States v. Rosner, 485 F.2d 1213, 1218 (2d Cir. 1973), an attorney and a private investigator engaged in, among other things, a plot to murder George Stewart, a crucial Government witness in United States v. Bynum, 485 F.2d 490, 493-495 (2d Cir. 1973). The defendants in Bynum had themselves, prior to their arrests, almost succeeded in their plan to murder Robert Wollack, a New York City Police officer and drug dealer whom they suspected of revealing their activities to the authorities. United States v. Bynum, supra, 485 F.2d at 495. Ironically, Wollack was no stranger to such forms of witness tampering, for when a member of his narcotics gang was arrested a few months prior to the attempt on Wollack's life, Wollack took him to the offices of some attorneys, where they discussed whether they had been betrayed by an informant whom they ought to kill. United States v. Wollack, 486 F.2d 1398 (2d Cir. 1972).**
7. United States v. Boyd, 489 F.2d 752 (2d Cir. 1974)***-- After the truck hijacking which formed the basis for this prosecution, one of the hijackers went to the home of the victim and intimidated him in the presence of his wife; another subsequently sent him a threatening letter. As a result, after the arrest of one of the hijackers, Crawford, the victim refused to identify him, either in a line-up or at his first trial, which ended in a hung jury. Between the time of Crawford's first trial and the time of his second trial, at which he was convicted on the victim's testimony, Crawford participated in the attempted robbery of a United States Postal Service truck, during the course of which the guard on the truck was shot and killed; Crawford ultimately pleaded guilty to second degree murder for that crime.
8. United States v. Bonanno, 487 F.2d 654, 656 (2d Cir. 1973)-- An individual who, after his arrest for counterfeiting, assisted Secret Service agents in apprehending the defendant, refused to testify at trial because of his "fear of physical violence".
9. United States v. Sclafani, 487 F.2d 245, 249 (2d Cir. 1973)-- After the arrest and indictment of the defendants in this case, they attempted to change the testimony of the victim of their extortion scheme by intimidating him.
10. United States v. Lazinsky, 483 F.2d 1399 (2d Cir. 1973)** and United States v. Cuomo, 479 F.2d 688, 691 (2d Cir. 1973)-- After the Government was obliged to reveal the identity of

Paul J. Curran, S. D. New York (cont'd.):

the informant who had participated in the transactions in both of these cases, the informant testified for the defendants, falsely claiming that he had framed them.

11. United States v. Cirillo, 468 F.2d 1233, 1240 (2d Cir. 1972)--
The defendant hired an assassin to murder the principal Government witness against him, despite the fact that the witness was in protective custody in a remote location.

The cases discussed above are not fully demonstrative of the problems that this provision of Rule 16 will cause. First of all, as noted, these are cases in which the acts of defendants against Government witnesses did not prevent their conviction. However, such cases are just the tip of the iceberg, and fare more frequently the subornation, intimidation and murder of Government witnesses prevents conviction and, often, even indictment. For example, in the last two weeks an individual cooperating with our office in a Grand Jury investigation was apparently driven to commit suicide by the pressure put on him by a prospective defendant who had learned of his cooperation. Second, and just as important, in most of the cases cited above the defendants were aware of the prospective witnesses' identities without being furnished with the kind of "shopping list" which the Government will now be required to furnish.

The proposed Rules have provided two devices which are apparently designed to forestall the murder, intimidation and subornation of Government witnesses. One is the protective order provision in Rule 16(d)(1); the other is the deposition procedure in Rule 15 and Rule 16(a)(1)(E). Neither will be effective.

First, the protective order provision in Rule 16(d)(1) permits a trial judge to deny or defer discovery of the identity of a Government witness "[u]pon a sufficient showing". However, since the policy of Rule 16(a)(1)(E) clearly favors pretrial disclosure of the identity of Government witnesses, it is plain that a "sufficient showing" cannot be the simple fact that defendants who are facing substantial prison terms will often attempt to tamper with persons they know will testify against them. This is the hard truth that Rule 16(a)(1)(E) simply ignores, and in most cases it will simply not be possible for the Government to foresee, beyond this, that a particular defendant in a particular case will attempt to tamper with a particular witness, which is the kind of showing that Rule 16(d)(1) appears to contemplate as the basis for a protective order.

Paul J. Curran, S. D. New York (cont'd.):

The alternative of pretrial depositions of Government witnesses whose identity is disclosed is unsatisfactory for a number of reasons.

First of all, the Rule clearly contemplate that a witness's identity will be disclosed and that thereafter a deposition will be noticed and taken. The taking of a deposition can be subject to a host of delays, both real and feigned. During this period, a defendant will have plenty of opportunity to "reach" the witness if he is so minded.

Second, the use of pretrial depositions by the Government will by no means destroy the incentive to a defendant to murder or suborn Government witnesses, even if a deposition is successfully taken before hand. A deposition is no substitute with a jury for a live witness. The testimony in a witness's pretrial deposition, even if admitted at trial, will necessarily carry less weight with a jury if that witness is suborned or intimidated by a defendant into giving testimony at trial in conflict with it.

Third, because witness tampering cannot be foreseen by the Government in every case in which it will arise, it is clear that the effect of the provisions of Rule 16 will be that a certain number of witnesses, and therefore cases, will be lost.

Fourth, the taking of depositions of all Government witnesses who are possible subjects of witness tampering will put a burden on prosecutors which can simply not be substantiated with present manpower. Moreover, it seems clear that in most cases depositions will have to be carried out under the direct supervision of District Judges or Magistrates, thus adding to the demands on an already heavily overburdened judiciary. If we are not mistaken, there has been a widespread attack in recent years upon the Federal Rules of Civil Procedure on the ground that the delays involved in discovery proceedings and the immense expense connected therewith do considerably more to defeat the ends of justice than to advance it. There is simply no justification in importing this situation into the field of criminal justice, where, for the most part, defendants never wish to come to trial at all and where the failure to provide prompt disposition of cases has been a matter of widespread concern.

Perhaps the most important point to emphasize is that this Rule appears to have overlooked the principal purpose of law enforcement, which is the protection of the public. We believe strongly that the law should not, in the name of

(R. 16, p. 28)

Paul J. Curran, S. D. New York (cont'd.):

"enlightened" discovery procedures, expose innocent members of the public, who have had the misfortune to be victims of or witnesses to criminal conduct, to such violence or harassment as may occur to an ingenious defendant, who will have far more to gain under the new rule than the present post trial satisfaction of revenge. The legitimate benefits which a defendant can derive from knowledge of the identity of Government witnesses before trial simply do not justify subjecting these witnesses to the mercy of criminal defendants beyond what is presently required by the Confrontation Clause. This view also has a very practical side, for the prosecution presently has difficulty enough in securing the cooperation of civilian witnesses who "don't want to get involved".

There are, of course, other objections to the deposition procedures other than those outlined above. The use of a deposition by the Government will require pretrial disclosure to the defendant of that witness's testimony. The availability of pretrial depositions will provide unethical defense counsel with an opportunity to take the deposition of Government witnesses before trial by the simple device of listing them as defense witnesses. The requirement in Rule 16 that a defendant disclose the identity of his witnesses is not likely to be enforced strictly, and it is far more likely that the Government's failure to list a witness will result in the exclusion of that witness's testimony than that such a consequence will be visited on a defendant for a similar failure. To the extent that depositions provide honest defense counsel with advantages, they will be compelled by conscience to pursue them to the limit. This may in many instances considerably increase the cost of providing the defendant with an adequate defense. Who will pay for all the time and all the transcripts that would be involved?

RULE 17

SUBPOENA.

Comments of U. S. Attorneys

Robert W. Rust, S. D. Florida:

In regard to Rule 17(f)(2), this amendment appears necessary in order to avoid the expense and potential hazard involved in requiring the U. S. Marshal to produce a defendant at possible far off places of a witness's residence. However, said witnesses who may now have to travel long distances on short notice will probably not agree.

Robert J. Roth D. Kansas:

Should provide that depositions of prisoner witnesses should be taken only at place of confinement.

H. M. Ray, N. D. Mississippi:

The Confrontation Clause as well as the requirements of Proposed Rule 15(b) would require that a defendant be present (unless he waives same) at the taking of a deposition. The witness or the defendant may be a dangerous person. Without some further modification, the proposed rule may cause tremendous expenditure of funds and manpower by the U. S. Marshal Service, Bureau of Prisons, U. S. Attorneys and defense counsel as well as create grave danger to the public if depositions of witnesses are taken at any place other than the place of confinement of an incarcerated defendant or witness. Some of these problems would be ameliorated if Proposed Rule 15(a) and (d) are modified in accordance with my hereinabove recommendations (see comments of H. M. Ray, N. D. Mississippi).

Exact language for revision of proposed Rule 17 has not been formulated, however from the comments of the various United States Attorneys concerning proposed Rules 15 and 17 it is apparent that this proposal, dealing with subpoenas, should undergo revision.

(Rule 17, page 1)

RULE 20

TRANSFER FROM THE DISTRICT FOR PLEA AND SENTENCE

Comments of U. S. Attorneys

H. N. Ray, N. D. Mississippi:

Rule 20(d) should provide that the United States Attorney "for each district" consent to the juvenile proceeding under Rule 20.

Earl J. Silbert, D. C.:

With reference to Rule 20(d), we agree with the recommendation in the December, 1971 Report to the Attorney General concerning the preliminary draft of these proposed amendments that the consent of both the United States Attorney in the District in which the charges against the juvenile are pending, as well as the United States Attorney in the District in which the charges were first brought, should have a voice in determining whether a juvenile is to be processed in the District in which he is found, and that this subsection should be consistent with the procedures set forth in subsection (a) of Rule 20. Thus, the words, "United States Attorney" in line 8 of subsection (d) should instead read, "*United States Attorneys.*"

RULE 29.1

CLOSING ARGUMENT.

Comments of U. S. Attorneys

Richard L. Thornburgh, W. D. Pennsylvania:

The consensus in this office appears to oppose the Government closing first, and strongly enough to warrant formal opposition. This could be fashioned as follows:

1. Since the Government bears the burden of proof, and a particularly heavy one, it requires the last closing.
2. The custom and tradition in districts where the Government closes last should not be disturbed.

At the least, in addition to removing the limitations on Government rebuttal argument under the new rule, express provisions should be made for unfettered rebuttal. Otherwise, despite the removal of the original limiting language, it can be anticipated that some judges will regard limiting Government rebuttal to be within their discretion.

Paul J. Curran, S. D. New York:

We are aware that this Rule is in effect in some other jurisdictions. We concede that in some instances it might make an improvement. However, we would oppose it because we believe that, on balance, it will increase miscarriages of justice. This is particularly so because the scope of the Government's rebuttal, which is not clearly defined by the Rule, will be interpreted by some judges to be very narrow. Summations will also be interrupted by colorable objections far more often than at present. On balance, justice will be the loser.

RULE 32

SENTENCE AND JUDGMENT.

Comments of U. S. Attorneys

J. P. Farris, S. D. Texas:

We feel that the section on disclosure of the pre-sentence investigation would be unwise. In this district the judges generally do not, in their discretion, authorize discovery of the pre-sentence investigation, and if this rule is implemented requiring this disclosure upon request, we foresee many practical problems notwithstanding the provisions allowing excising, re-doing, summarizing, etc. We do not favor this as a practical solution to a problem that does not seem to exist and that has been adequately dealt with under the cases to this time.

Robert W. Rust, S. D. Florida:

Rule 32 sets out guidelines for the handling of sentence and judgment. No major changes have been made under that portion of the rule dealing with sentencing, except for the requirement of notification of the defendant of his right to appeal. The advisory committee has added one sentence, making it unnecessary for the court to advise the defendant of his right of appeal after a plea of guilty or nolo contendere. This is a sensible addition.

The major portion of the new rules is devoted to the handling of the pre-sentence investigation. The rule would require the preparation of a PSI in all cases, unless the court otherwise directs, in which case the rule would now direct the court to put its reasons on the record. This change is not a beneficial one, as it would limit the court's discretion, and just create a new appealable issue to weigh the sufficiency of the court's reasons for not ordering a PSI. Certainly, no substantial right of the defendant is violated by not requiring a court to voice its reasons.

As to disclosure of the PSI, the rule would alter the present enactment by making it incumbent upon the court to disclose the PSI less any recommendations of sentence upon motion by the defense. Some discretion is still allowed the court in determining what parts could be properly disclosed.

The rule would also provide for the court, in lieu of disclosing the report for one of the reasons set out in (c)(3)(A), stating a summary of the factual information contained therein to be relied on in determining sentence.

(Rule 32, page 1)

Robert W. Rust, S. D. Florida (cont'd.):

As to the above change, it is not a beneficial one, as it would again create a new appealable issue for a defendant to weigh the sufficiency of the reasons stated as against the sentence imposed.

James M. Sullivan, Jr., N. D. New York:

Report received by U. S. Attorney James Sullivan, Jr., Liaison Representative of the Legislation and Court Rules Sub-committee to the Second Circuit Committee on Sentencing indicates that on January 7, 1974, the Judicial Council of the Second Circuit introduced and adopted as the policy and practice of the districts in the Second Circuit the directives as set forth in the pending Proposed Rule 32(c).

From the Office of James R. Thompson, N. D. Illinois:

Rule 32(a)(3)(A) and (B) provide the disclosure of the information contained in a pre-sentence report or a summary of its contents relied upon by the judge when the pre-sentence report per se should not be disclosed for various reasons. It is easy to envision circumstances wherein the court's summarization, in an effort to shield confidential sources, would automatically enlighten the defendant as to who the confidential sources were, since certain types of information all are not privy to.

Therefore, the attempted saving clause is not a saving feature at all and the mandatory disclosure of a pre-sentence report would automatically dry up relevant sources of information given under the protection of confidentiality.

Robert E. Hauberg, S. D. Mississippi:

Many persons would decline to furnish information to the Probation Officer if they realized that their name might be available to the defendant or his counsel. Although the proposed rule allows the Court to state orally some of the factual information, some Judges would prefer just handing over the pre-sentence report to the defendant or his counsel.

(R. 32, p. 2)

General Comments of U. S. Attorneys

J. P. Farris, S. D. Texas:

Based on our experience and our knowledge of the magistrates and judges in this district, we feel that an implementation of the proposed rules as written at this time would likely generate additional procedures and hearings, and would require at least an increase of 25% in the AUSA and secretarial support staff, with no corresponding benefit to the quality of justice administered and with the possibility of substantial detriment to the public safety.

William D. Keller, C. D. California:

In regard to Rule 24(c), this rule is not changed. I feel, however, that a change is appropriate to adopt the practice in the California state courts; namely, that alternate jurors are not released at the time the jury retires but remain available, although they are kept separate from the jury deliberations. If a jury becomes incapacitated, an alternate can be added, thereby avoiding any requirements for a mistrial.

H. M. Ray, N. D. Mississippi:

In addition to specific comments regarding individual rules, there are certain general comments which apply to the full range of proposed changes.

First, don't change the rules at all. Considering the time it takes for the Bar to become familiar with the new rules, for a proper case to arise presenting the rule change for decision, and for that decision to find its way into a published opinion, there are undoubtedly many unanswered questions regarding the last changes.

A rule implies, and to be of any usefulness requires, some degree of stability. Every change in the rules is a fresh source of uncertainty which can be removed only by litigation. Such litigation will invariably involve needlessly upsetting some convictions otherwise valid except for a misunderstanding of an amendment to the rules. This of course is inherent in the legal process but it can mount to intolerable proportions by piling uncertainty on top of uncertainty.

(General Comments, page 1)

H. M. Ray, N. D. Mississippi:

Second, each proposed change should be carefully weighed in terms of the time and cost it will add to a criminal prosecution. For example, the authorization and thus the encouragement of magistrates to examine on the record the complainant and other witnesses both on an application for an arrest warrant or at the initial appearance before the magistrate where the arrest is made without a warrant and also at the preliminary hearing seems to be a needless and expensive duplication of effort.

The prohibition against issuing even a summons on an information unless it is supported by affidavits showing probable cause in the elaborate detail more and more required will result in unnecessary delay and inconvenience in prosecuting minor offenses, not only in U. S. District Courts but in all probability in prosecutions of minor and petty offenses before magistrates [see Rules 1, 2(a) and 3(a), Rules of Procedures for Trial of Minor Offenses]. It means that an agent and attorney will have to interrupt their other work to make arrangements to meet, and then meet to draw up an affidavit which a secretary will have to type and an attorney will have to review and perhaps have retyped while the agent waits so that he can sign it.

The requirements of broader discovery will be particularly burdensome in this respect. It takes some time, especially in a case of any magnitude or complexity, to go through a file and sort out the documents and reports to be discovered to a defendant. It is sometimes necessary to excise portions of such documents and is frequently necessary to write the investigating agency for copies of documents which are only summarized in the report. Furthermore, although the rule contemplates that the copying will be done by the defendant, as a practical matter it must be done by the United States Attorney since he is not going to allow his file to go out of his office and defense counsel does not ordinarily have portable copying equipment.

It is not unusual to spend a day gathering and copying documents, showing exhibits, and orally answering other requests by defense counsel and thereafter to be served in the same case with a formal motion for more discovery which will require a response, briefs, oral argument, and possibly some further discovery. All of this is under the present rule and in addition to the response required by a motion for a change of venue and a motion to dismiss the indictment, and thereafter may follow motions to suppress evidence, for a bill of particulars, for a continuance, for a severance or a challenge to the grand jury.

H. N. Ray, N. D. Mississippi (cont'd.):

These might seem to be petty objections if raised against recognition of constitutional rights but constitutional rights are not in issue. Even where the rules touch on constitutional rights the question is not the enforcement of such rights but the tenuous extent to which the procedures for their prosecution ought to be drawn out.

Third, therefore, each change should be weighed in terms of its necessity. If a change is neither required by the constitution nor essential to a fair trial in the common sense of the word then it should not be adopted merely to ratify the latest academic theory or simply to give the guilty another technical weapon to fend off or attach a just conviction. In making this judgment each proposed change should be considered in the context of the entire criminal process, not in isolation as though it alone were the only barrier standing between the accused and an unjust conviction. In this regard due account should be taken of the fact that there is in the criminal process the stage known as the trial where the prosecution reveals its evidence and exposes its witnesses to cross-examination. There is also provision for a motion for a new trial where genuine claims of prejudicial surprise by the proof or suppression of evidence by the prosecution can be heard and relieved. Of course at this stage mere claims of prejudice are not so lightly entertained as before trial since the court is no longer dealing in unknown quantities but can confidently judge such claims against the record before it.

Furthermore, a motion for a new trial is not so easily used as a device for inducing error as a pretrial motion for discovery. Many pretrial motions are made in the hope they will be denied and the point can be argued as error on appeal. A conservative ruling by the court on a pretrial motion or parsimonious compliance by the prosecution will be inflated on hypothetical facts in the Court of Appeals to a constitutional deprivation of the gravest proportions. Actually proving after trial real prejudice resulting from a lack of discovery is a lot harder to carry off.

This perhaps explains the relative neglect by the revisers of Rule 33 which has been amended only once to enlarge the time for filing motions for new trial in favor of over-emphasis on pretrial remedies. Indeed the proliferation and expansion of pretrial motions and the multiplication of grounds on which they may be granted threaten to reduce the trial itself to a post-trial proceeding where the defendant after having pre-tried every conceivable issue on the basis of the government's evidence without necessarily revealing a particle of his own proof is given one last chance to catch the prosecution unprepared to meet some surprise defense or at least to persuade one member of the jury that he should not be convicted.

(Gen. Com., p. 3)

Earl J. Silbert, D. C.:

We generally have not commented upon the Advisory Notes to the proposed Rules, except where (1) we agree with the language of the rule but feel the Advisory Committee Note opens the Rule to misinterpretation, or (2) the language of the rule, while unobjectionable, is nevertheless vague and that vagueness is not clarified by the Note. Wherever we have suggested substantive changes in a rule, we presume that in the event those changes are accepted, the Advisory Committee Note will be appropriately modified.

While our comments above are set forth in numerical order according to the number of the rule commented upon, I should emphasize that we are particularly concerned with changes which the proposed amendments would effect in Rule 4, "Warrant or Summons Upon Complaint", Rule 9, "Warrant or Summons Upon Indictment or Information", Rule 11(e), "Plea Agreement Procedure", and Rule 16(a)(1)(E), concerning discovery and inspection of the names and addresses and prior criminal records of government witnesses, as well as new language which we propose as subsection (D) of Rule 16(b)(1), "Statements of Defense Witnesses". In the event it is decided to focus the Department's efforts to legislatively modify any of the proposed amendments on one or two rules, we believe that primary attention should be given to an attempt to obtain these modifications.

We are strongly of the view that the problems we have addressed with reference to Rules 4, 9, 11(e), 12.1, 16(a)(1)(E), as well as the additional provision, (D), we have urged as a new subsection to Rule 16(b)(1), are of sufficient importance to be brought to the attention of the Congress in order that these portions of the Rules may be appropriately modified before being approved.

From the Office of James R. Thompson, N. D. Illinois:

The amendments to the Federal Rules of Criminal Procedure attempt to embody a philosophy of "fundamental fairness" to defendants in criminal cases. As drafted, however, they are more a reaction to existing laws than a sound, well thought out system of workable rules in their own right.

(Gen. Com., p. 4)

From the Office of James R. Thompson, N. D. Illinois (cont'd.):

The old rules do not exist in a vacuum, but are the result of experience through case law and are supported by case law. New amendments enter in a vacuum unsupported by case law and, unfortunately, too frequently beyond the mainstream of criminal trial practice.

The term "amendments" is a misnomer. Rather, they are a sudden and violent intrusion which in one stroke changes the basic underpinnings of federal criminal justice as it now exists. It is uncontestable that there are aspects of the existing federal rules which logically should be subject to change, and in fact, some of the changes contained in the amendments are long overdue.

The history of jurisprudence is synonymous with flux. Substantive laws and administrative rules constantly change and well they ought to. Past modifications, however, have been introduced slowly, carefully and with appropriate reflection in response to an existing intolerable.

Our experience with the administration of federal criminal justice has shown that the federal system, although substantially less than perfect, has been a good one. It may be less efficient than a contemporary English system, but it is recognizably and measurably better than a majority of state systems. It is better in that it is more efficient and fairer, and it has become that under existing rules.

The new amendments strive to bring into operation what is envisioned as a philosophy of fairness to defendants charged with a crime. One might suppose that the projected amendments are a reaction to a belief that the prosecution is in possession of all the trumps and the amendments balance the deal of the hands. The bringing of a criminal prosecution is divisible into a multitude of stages. More often than not, prior to and during the investigative stages, the advantage is with the subject of the investigation. Hopefully, if he is innocent, incriminating evidence will never be found. Unfortunately, if he is guilty, the uncovering of incriminating evidence depends upon the skill and good fortune of the investigator.

Suffice it to say, during these early stages, the advantage is not with the prosecution. The only time the advantage is with the prosecution is at the indictment stage, for it is then that the prosecutor may draft the indictment in a manner compatible with what he knows the proof to be. In some instances, he may even elect between a variety of statutes. At this juncture, the advantage is with the prosecutor.

The next stage is one belonging more to the accused than to the prosecutor: the trial. Every rule of evidence, every word

(Gen. Com., p. 5)

From the Office of James R. Thompson, N. D. Illinois (cont'd.):

the prosecutor may utter, and every other facet of the criminal trial is geared and calculated to protect the presumption of innocence.

Therefore, if the new rules are destined to try to change a balance which may be envisioned to be to the advantage of the prosecutor, that supposed balance is only a vision.

Paul J. Curran, S. D. New York:

We believe it is fair to state that these new Rules will make the prosecution of crime more difficult and time consuming with no improvement whatsoever in the administration of justice in this District. These proposals, particularly Rule 16, will add a host of unnecessary pretrial issues and procedures to federal criminal prosecutions, increasing the demands on prosecutorial and judicial resources far out of proportion to the legitimate benefits to be conferred on defendants. They will turn the administration of criminal justice into more of a game than ever and will hinder, obstruct, and delay the prosecution of crime. In our judgment these provisions will result in a significant increase in the number of guilty people who are either not brought to trial at all or who are acquitted.

It is not suggested, in support of the proposed Rules, that existing provisions of the Federal Rules of Criminal Procedure work miscarriages of justice or tend to prevent defendants from getting fair trials. Rather, we suppose, the changes in the Rules are intended to improve a system that already works, if not perfectly, at least well enough. However, the proponents of the new Rules have created provisions whose capacity for unnecessarily complicating, delaying, and increasing the risks and expense of criminal justice far outweighs the illusory theoretical and superficial improvements submitted in their support.

The most unfortunate of the new Rules is Rule 16

The foregoing comments establish, we suggest, that the changes in many of the Federal Rules of Criminal Procedure will cause miscarriages of justice and burdens to federal judges and prosecutors far outweighing the benefits contemplated by the proponents of the changes in the Rules. The changes are sufficiently important and, we submit, harmful to warrant their consideration by the Congress before they become law.

(Gen. Com., p. 6)

Mr. RAKESTRAW. And I would like now to turn to Mr. Thornburgh, who will discuss rule 16 and collaterally rule 15.

Mr. DENNIS. Mr. Thornburgh.

Mr. THORNBURGH. Thank you, Mr. Chairman.

I am going to concentrate particularly on those provisions of rule 16 which drastically alter the position of the Government and defense in criminal cases with respect to the obligations to make disclosure of the names and addresses of witnesses, in particular speaking from the Department of Justice viewpoint, focusing your attention on the suggested revision embodied in rule 16(a) (1) (E). I am not an academic; I have not made a protracted study of this rule and the questions implicit in the suggested changes. I do not profess to be familiar with all of the case law that has developed in the area of discovery in criminal cases. But I feel compelled, as a practicing trial lawyer, and for the time being as a practicing prosecuting lawyer, to bring to this committee's attention the views of myself and my colleagues as U.S. attorneys within the 94 judicial districts with respect to the perceived metamorphosis in practice with relation to the obligation to make disclosure of the names and addresses of witnesses previous to a criminal trial.

And, incidentally, I think it is worthwhile to notice in this area that the U.S. attorneys who were canvassed and solicited for views on this one question were of a single mind, and were concerned that the changes embodied in the proposed rules from present practice, first, to a discretionary right in court the production of the names and addresses of witnesses, and finally, in the final rules of changes suggested to a mandatory furnishing of this witness information.

I would advert to the problem inherent in discovery in criminal cases. I think that one of the difficulties that is encountered conceptually is making the transition from a civil trial environment to a criminal trial environment. Judge Webster alluded to the process of trial as a search for truth. And indeed, in many aspects any trial is such a search. But I think it is well to note—and I would refer to the reference by Dr. Karl Meninger in the book "The Crime Punishment," and an observation by Justice Devlin with respect to criminal trials.

Trial by jury is not an instrument for getting at the truth, it is a process designed to make it as sure as humanly possible that no innocent man is convicted.

And our great constitutional principles of presumption of innocence, the protection of the fourth, fifth, and sixth amendments, and the whole body of law that has developed to make sure that the chances of an innocent man being convicted are in the finest and inviolable traditions of our constitutional democracy.

But when one moves out of the area of constitutional imperatives into the need of particular rules to be adopted in the implementation of the orderly business of the administration of the criminal justice system, one necessarily becomes involved in a process of balancing interests. And I would suggest that there are serious problems in the particular balance that has been struck with regard to the pretrial disclosure of the names and addresses of witnesses in Federal criminal cases. There is a serious risk of physical harm, of intimidation, of attempts to suborn perjury, of other ingenious means to obstruct the process of justice inherent in the proposed adoption of such a rule.

And perhaps it is significant that I as a lawyer from Pittsburgh in western Pennsylvania, appeared to present this case to this committee because, I think, there is abroad in this land a feeling that this type of intimidation, obstruction and the like, takes place only in places like New York or Chicago. The influence of modern fact and fiction and the news media attention upon organized crime figures and the attempts to corrupt the process in our major metropolises sometimes leads us to ignore the fact that these kinds of risk are inherent in most metropolitan areas and indeed, in most areas where the criminal process proceeds.

I am bound, at the risk of engaging in any trial lawyer's propensity to tell war stories, to certify to this committee that in my district, the western district of Pennsylvania, we have had serious problems with the protection of witnesses. In a major narcotics case, where the principal defendant was arrested in possession of over \$300,000 in cash, the fruits of a large-scale heroin distribution scheme, the Government's principal witness was sought out by hired killers and assassinated before the case could come to trial. Another witness was so harassed and intimidated by agents of the defendant that it became necessary to move her out of the district and place her within the protection of the U.S. marshalls.

In another case a major hijacking case was developed with the aid of an inside man, who was moved out of the district and attempted to be kept as it were on ice for the trial. On the eve of trial he was assassinated in the State of Ohio.

In another case involving large-scale political corruption within the county prosecutor's office in our district, there was a constant staccato of attempts to intimidate, suborn perjury, and the like, in an attempt to frustrate this prosecution.

Other cases involving assault on witnesses, the firing of weapons at them in their homes, and on the street, the burning of automobiles, and other damage to physical property, abound.

Indeed, I am compelled to note how broad this type of attempt to influence is by referring only half facetiously to two cases where the defendant married the principal witness who was to testify against him in order to prevent her testimony against him. I do not know that this is a reflection on marriage, but perhaps a reminder that the ingenuity of the criminal element knows no bounds.

All of these depreations and assaults on the criminal justice process took place without the Government being compelled to furnish the names and addresses of witnesses in the particular criminal cases. And it is for that reason, I think, that the minds of prosecutors within the Federal criminal justice system are set upon the prospect that might ensue if this laundry list of witnesses were to be made available as seemingly compelled by the rules. The compelled disclosure would occur early in the process when we are unable to insure the safety of those witnesses and when the particular defendant is set free under the Bail Reform Act, not with respect to any threat that he might pose to witnesses, but only with respect to the possibility that he might not show up for trial.

It has been suggested that there are remedies for the Government's concern for what I suppose might be characterized as the prosecutor's paranoia in these instances. But I would submit to this committee

that the remedies that have been referred to are illusory in fact. There is in the rule itself a kind of macabre juxtaposition of language which indicates that the drafters of the rules themselves recognize that making these names and addresses available was a distinct threat to the well-being of the witnesses and to the process of criminal justice. I refer, of course, to the provision for taking depositions. To put it quite bluntly, it said, do not worry even if the witness is bumped off, or even if the witness is reached, you will have a deposition, and perhaps in this day and age, as we have done in our district, a video-taped deposition for use at trial.

That is small comfort to a witness who has put his faith in his Government, who has come forward with some trepidation to testify about wrongdoing of which he has knowledge. The fact that his testimony may outlive himself, I think, is a poor selling point to induce public cooperation in the criminal justice process.

It is also suggested that there is a reciprocity feature here, that the defense itself is obliged to come forward with the names and addresses of witnesses which the Government may then utilize in the preparation of its case.

Some expression of advice was indicated by Professor Remington that the defense bar was among the vociferous supporters of this need for reciprocity. I think it is no surprise when anyone attempts to trade a pound of lead for a pound of gold, because there may well have been at some time in our process attempts by the Government to assassinate defense witnesses. Somewhere there may have been attempts by the Government to suborn perjury. And there may have been attempts somewhere for the Government to engage in the process of obstruction of justice that I have referred to. But I do not know of such instances. And I think that one has to think long and hard of the particular interests involved in the prosecution function and the defense function. It ill serves the interests of the prosecution to engage in these activities where the sanctions imposed are drastic and result in the termination of what might have been a successful prosecution. On the other hand, from the defense point of view, there is a nothing-ventured-nothing-gained proposition. It need not require unethical counsel, but sometimes they are present. But the defendant himself, in cases that I am personally familiar with and can summarize for this committee, knows no constraints that would hinder him before the bar of justice in attempting to enhance his case by working these methods upon witnesses for the Government.

There is an even larger concern, however, with respect to the other suggestions that there is some balm in Gilead for the paranoid prosecutor here. It is suggested that a protective order can be entered in a particular case if there is a sufficient showing that the particular individual may be subject to some threat. I think that protective order might well suffice in any given case. But I suggest that the committee look at the philosophy embodied in that kind of approach to the problem. You are asking a witness at the outset of the proceeding to take a chance, to say to him, maybe we will be able to get a protective order that will cause us to keep your availability as a witness secret from the defense. Maybe we will be able to keep you in a State where you need not be looking over your shoulder and listening for those footsteps behind you. But I say generally, in the overall

problem of getting the cooperation of the public in criminal prosecutions—and Lord knows, today we must be, I would submit, concerned with the public's belief in the integrity of the system to serve them as victims and witnesses, as well as potential criminal defendants—the public unfortunately, knows through the reports as recently as this summer with the tragic events of an escaped group in Colorado tracking down witnesses who had testified against them after the trial. And they know that there is a distinct possibility that they may be subject to threats, intimidation and physical harm certainly before trial when it would do a greater good to the particular defendants.

Mr. DENNIS. Mr. Thornburgh, you are making a very persuasive argument. But I would like to ask you one question. You and I know that in preparing any case for trial the one thing we want to do is talk to all the witnesses on both sides. Now, are you not in effect, saying that that kind of separation, which is almost essential, cannot be made by the defendant in a criminal case who probably needs it more than anybody else?

Mr. THORNBURGH. I do not know that that kind of approach is implicit in the process as it now goes forward. Certainly, there is a desire on counsel's part, both defense and prosecution, to have available to him all of the evidence, all the facts that underlie the particular event that occurred. I emphasize from a fact point of view and not a constitutional point of view, I would like to have the defendant's version of what happened, or physical evidence that may be protected by the fourth amendment. By the same token, the defendant would like to have the Government's files open to him. There is no question about that. There has even been some reference made to that this morning as a possibility.

Mr. DENNIS. How is the defendant to prepare for a trial if he does not even know or have any way to find out who the witnesses are against him until they walk into the courtroom?

Mr. THORNBURGH. I have tried cases against some pretty good defense counsel who have not had the benefit of this rule. And they have been able to prepare and artfully structure a very good defense. And in some cases—and I do not believe it was completely due to my incompetence—they have been able to secure acquittal because the Government failed to carry out the strong burden of proof that exists. And I think implicit in the concept of the burden of proof that is lodged in the Government's hands, the defendant has no burden, he must only introduce into the case some doubt, some reasonable doubt on the part of the 12 men in the jury, men and women in the jury, as to his guilt. So that I do not think that this can be—and again I suggest, with all deference, Mr. Chairman, I do not think that we can rely on analogizing between the civil case and the criminal case because of the different rules that are observed in going forward with the trial itself. I acknowledge—and perhaps I did not make this clear—that if I were defense counsel in the preparation of the case, I would like to and would prefer to have the files of the Government open to me, or at the very least, a list of the names and addresses of the witnesses. I am merely suggesting—and this is the whole thrust of my testimony before you this morning—that in the balancing of the interests between what the desire for the maximum effect toward the effective preparation of the case is by defense counsel, and the real,

not imagined, threat that exists to witnesses in cases like this, there be some recognition of the reality of the latter.

One other thing that I will acknowledge quite freely, that in many, many cases in my office the U.S.—assistant U.S. attorney, myself, who is trying the case, will sit down and will in effect open the file to the defendant in a case where we do not have these particular problems available, and will use that as a tool to induce plea many times, or to indicate the strength of the Government's case. What I am concerned about is a philosophy stated that that should be the rule rather than the exception within the judgment of the prosecution as a matter of sound judicial administration.

Mr. DENNIS. What would you think as a possible compromise of a rule which gave the defendant a right on an appropriate showing, to have the list?

Mr. THORNBURGH. I think that was what was indicated in the first draft that the advisory committee circulated. I have to be frank with you, I am not as happy with that as I am with the present state of affairs. But I think some of the matters, particularly in matters of philosophy that I have adverted to this morning, would be touched upon favorably by that. There would then be a juxtaposition of the burden of going forward. And I think with greater equanimity I could talk to prospective witnesses about alleviating their fears of willy nilly disclosure of their names and addresses and locations.

Mr. DENNIS. I thank you. Go right ahead.

Mr. THORNBURGH. I think in the nearest of time, I am betraying, I am afraid, my trial lawyer's instinct. And I will defer back to Mr. Rakestraw.

Perhaps I might suggest, if there are questions on rule 16, and particularly this matter of witnesses. I will answer them now if the Chair wishes, or I will stay and answer them later.

Mr. DENNIS. I think if there are questions that anyone wants to ask on this question they may ask them.

Mr. HUNGATE. I would just as soon go ahead.

Mr. DENNIS. Mr. Rakestraw.

Mr. RAKESTRAW. I will introduce Mr. Ray, who will discuss rules 4 and 9 in the same manner in which Mr. Thornburgh discussed rule 16.

Mr. DENNIS. Mr. Ray.

Mr. RAY. Mr. Chairman and members of the committee, it is a real honor for me to appear before you here today.

I am afraid that I cannot discuss this in the manner that my distinguished colleague from the western district of Pennsylvania did. And in the interest of time, I will refer you at this time to materials which are before you which I think clearly set forth my position.

You have the red book, as we call it. This is a compilation of views of U.S. attorneys across this land. And I put them together as chairman of the Subcommittee on Rules and Legislation, particularly rules 4 and 9. And almost without exception, we view these rules as causing tremendous additional work. We are not all the same in this country in the first place, we do not sit all in one courthouse. I want to make that point.

I was up on speedy trials a few days ago when the idea was put forth that the U.S. attorneys have offices and can readily go before magistrates all over their district. That is just simply not true. And so

we, of course, oppose the rules 4 and 9 changes, for the reasons set out in Mr. Rakestraw's statement, namely, we believe that by changing the rule to make it a matter of standard procedure that you issue a summons, and if you want a warrant, then you have to show valid reason, we believe that that rule will increase defendants—defendants will learn of the charges, and they will be hard to catch.

For example, in the District of Columbia here, 25 percent of the defendants in pending cases, a study showed, were fugitives. We believe that the summons requirement would give criminal defendants an opportunity to learn of crimes against them, to fabricate and destroy evidence, and secrete evidence.

Mr. HUNGATE. May I inquire?

You mention the District of Columbia. Does it use the summons system or the warrant system?

Mr. RAY. That is under the present system, is it not?

Mr. GREENE. That is under the existing system.

Mr. HUNGATE. Summons or warrants?

Mr. GREENE. They are using a combination of summons and warrants. I think that in the Federal district court in a majority of cases on preindictments certainly in the felony area we use warrants, although there are summons used also.

Mr. HUNGATE. What percentage would you estimate are summons?

Mr. GREENE. I would think—and it is only a guess—I would think it is a small percentage, 5, 10, or 15 percent.

Mr. HUNGATE. Thank you.

Mr. RAY. And then we think it would increase the likelihood of law enforcement officers, as has been brought out by the other witnesses, going ahead and arresting without taking the trouble to secure a warrant.

I think one of the most important considerations is that we believe that this would delay the whole process of moving trials through the district courts, and that the additional time required to locate defendants' addresses, serve summonses, and await their appearance in court on designated dates and ultimately obtain the issuance and execution of arrest warrants in commonplace instances of nonappearance will certainly foster delays between the commission of offenses and the apprehension of suspects.

Of course, the language we have proposed is pretty much like rule 4, except that there is one significant difference. Of course, a grand jury has returned an indictment, and that speaks for probable cause itself. Of course, in rule 4 you have got a complaint which I assume is probable cause, or a magistrate would not issue the papers. And we can see that if the rule goes through in the present form that this might even cause some problems with the trial of minor offenses. We may have to use secretaries and agents to do a lot of paperwork here. We are quite concerned about the burden that it is going to put on us in U.S. attorneys offices to comply with this. The rule as set out to the bench and bar by the court did not have this proposal in it. This was changed. And the first time we saw it as U.S. attorneys were when the rules were transmitted over to the Congress. The earlier rule proposals sent out to the bench and bar for comment did not have this language in it that is before you.

I would like to just take questions. I think that our prepared testimony here probably deals with this quite adequately. But if there are any questions on these two rules at this time, I would be prepared to answer them.

Mr. HUNGATE. The first draft that went around had rules 4 and 9 in it?

Mr. RAY. Yes. But the draft that went out to the bench and bar in January 1970, did not propose to take away the right of the U.S. attorney to get a warrant on his request. And I might say that we propose in rule 4 that the rule be changed to provide that a warrant shall issue whenever, (1) a defendant fails to appear in response to a summons, or (2) upon request—

Mr. HUNGATE. That is in the rule now?

Mr. RAY. That is in the rule now as proposed. And we proposed, though, that a warrant should issue on request of the attorney for the Government. We feel, quite frankly, that the prosecutor would be able to know which people are likely to flee, and that to engage in having to have a summons for him is a useless procedure.

Mr. HUNGATE. What is the police, whether it is FBI or other police agencies, input into this determination now?

Mr. RAY. As you perhaps know, on all complaints the U.S. attorney authorizes the filing of complaints, except for the agencies such as the Bureau of Alcohol, Tobacco, and Firearms, where the agent actually catches the offender in the commission of an offense. So when the agent, the FBI, presents his case to the U.S. attorney's office, the U.S. attorney gets filled in at that time on the background of the defendant, and that kind of information.

Mr. HUNGATE. You say the proposed rule increases paperwork. Would you give specific attention to that? I do not quite follow it.

Mr. RAY. I might say that I can turn to my own comments in the book here. This will mean that an agent and an attorney will have to interrupt their other work to make arrangements to meet and then draw up the affidavit, which a secretary will have to type, and an attorney will have to review, and perhaps have it retyped while the agent waits so that he can sign it. The simple mechanics of this will be overwhelming.

Let me give you an example. I operate out of Oxford, Miss. And I have three other division points. And I do not have any staff in these other division points. And yet, there are magistrates sitting there. And that is where the agents will take the case to be presented, if the offense occurs over there.

Mr. HUNGATE. The agents will take the case there. Will you have to show up there or not?

Mr. RAY. We will have to do the paperwork. And if there are any questions about it, there would be another minitrial. And in this day and time of having speedy trials, we think that, as a practical matter, this rule is just going to make life pretty hard for us to comply with.

Mr. HUNGATE. In other words, this is requiring an affidavit that at present is not required; do I understand that rightly?

Mr. RAY. Yes, sir; that is the way we do it.

Mr. HUNGATE. What about the words "valid reason"?

Mr. RAY. That concerns us.

Mr. HUNGATE. Would you think that should be defined in the rule, or taken out?

Mr. RAY. We recommend in our formal statement here filed with Mr. Rakestraw's testimony that the Congress does adopt the words "valid reason", that it would help us.

Mr. HUNGATE. Thank you, Mr. Chairman.

Mr. DENNIS. Mr. Ray, really, the proposed change is just a shift in the burden, is it not? At the present time, you get a warrant unless the district attorney says a summons is all right. And under the proposed rule you get a summons unless the district attorney would show the magistrate that there should be a warrant, do you not? That is about the size of it, is it not?

Mr. RAY. Except for one important addition. It puts the presumption in favor of the summons.

Mr. DENNIS. That is what I am saying. Is that not a humane sort of thing to do? Do we not get a lot of these minor people in there when there is really no reason for them being arrested and thrown in jail and having to post bond?

Mr. RAY. Of course, we are operating under the Bail Bond Reform Act now where the burden is on us to show why they should not have bail. We think that the proper time to let the magistrate and judicial officer determine that, is after the arrest takes place, then the court does rule on that. And, of course, I noticed in one comment filed earlier with the committee, someone has suggested that in rule 9 we are proposing the right to rearrest. That is, of course, absurd. We operate on the Bail Bond Reform Act, and once a man is arrested on a complaint, he makes bond to await trial. So there is no rearrest.

Mr. DENNIS. Do you feel that as a U.S. attorney there should be a warrant, that you are going to have much trouble convincing the ordinary magistrate that this is a case for a warrant?

Mr. RAY. I think it will depend on the magistrate, Mr. Chairman.

Mr. DENNIS. My experience in the Federal system is limited. I practiced more in State courts. But such as it was, I never felt that the DA had much trouble convincing a magistrate of almost anything.

Mr. RAY. I think it has changed somewhat with the Magistrate Act. And I think it would just depend on the magistrate again. I think it might be, once they have some experience. But it still causes the additional workload to be there. And I cannot see that it really contributes to any significant rights or constitutional rights that defendants might have.

Mr. DENNIS. I think when we get the other gentlemen back possibly we ought to ask them more than we did before what their rationale for the change is. We did not go into this very much.

I thank you. Go ahead with your presentation.

Mr. RAY. Before I comment on rule 11, Mr. Thornburgh has a very good comment on rule 4 and 9 on the seizure of evidence.

Mr. THORNBURGH. Oftentimes the arrest warrant is used in an attempt to secure on the basis of probable cause additional evidence of the criminal act charge. And by introducing this new technology that in addition to probable cause for arrest, there must be a valid reason for using a warrant, there is a great deal of uncertainty raised as to the justifiability of the question of valid reason and its effect on any evidence that might be seized at the time of the arrest. In other words, envision a parade of horrors, a situation where a judge might ultimately determine that there was no valid reason for the issuance of an arrest warrant, and the suppression of the evidence that was seized

in the exercise of a warrant that was issued on probable cause. I suppose what it gets back to is the difference of opinion to which the branches of government the decision as to issuing the warrant or summons would attach has already been touched on.

Mr. DENNIS. Would it help to use the language "probable cause" here instead of "valid reason"?

Mr. RAY. I am not sure, Mr. Chairman, because then you would have a split level determination of probable cause. One, probable cause of making the arrest in the first place, and second, probable cause for filing the complaint in the first case, and then the probable cause as to whether the proper thing to use was the summons or the arrest warrant.

Mr. DENNIS. Still you would be using a word of art that has been defined, and if you could translate the same definition more or less, perhaps it might help the problem.

Mr. RAY. That is really the present state of the law today.

Mr. DENNIS. Thank you. Go ahead.

Mr. RAY. We have one other comment from the District of Columbia on this.

Mr. GREENE. I would like to first refer to a question that Congressman Hungate asked concerning the history of who received notice about this rule. Not only was the rule in its present form, that is, with the presumption in favor of the summons, and not in the original committee drafts, but the advisory note to those drafts indicates that virtually the only source for the proposed amendment was an article by the distinguished U.S. district judge for the southern district of New York, Marvin Frankel, in which he advocated this rule on the basis only of his own experience as a judge. And he conceded in that article in the Columbia Law Review where he advocated this change that 11 of his 13 brethren on the bench for the southern district of New York did not agree with him. And there is no case authority or other authority that we have been able to discern for this rule proposal.

Second, if I could, in connection with rule 4, I would like to comment on a question that was raised earlier by Mr. Blommer of one of the gentlemen who testified before us. And that the irony of leaving the custody determination in a case where you do not have a warrant, that is, where you have no judicial scrutiny whatsoever over the process to the law enforcement officers, and yet are requiring the intervention of the judiciary in the custody determination where the court or the magistrate determines in the first instance the issue of probable cause to arrest. We should not lose sight, I think, here of the fact that the judiciary will still be making the critical and traditionally important determination of whether probable cause exists to believe that the accused has committed a criminal offense. And it is only at that point that the issue as to whether a summons or a warrant should issue is reached. And I say that partly also in response to your question, Mr. Chairman, raising the issue as to whether this is not just a slight change. I think it should be viewed in the perspective of the fact that we still retain the traditional need for the magistrate or the judge to make the determination as to probable cause. And indeed, that determination, until these rules, has always been thought of as a determination of probable cause to arrest. Probable cause to believe the

defendant has committed an offense has been viewed as one and the same as probable cause to arrest. And really, what this proposed rule does is to separate and distinguish between these two determinations as things that are separate. But traditionally, in our system they have always been viewed as identical.

Mr. RAY. Mr. Chairman, regardless of whether the judiciary or the executive has the power here, we do feel that this is a question that the Congress, I guess under the necessary and proper clause, should resolve. And we hope that you will take suggestions on these two rules that are filed with our papers here.

Now, we would like now to talk some about rule 11. I notice that seems to have been of great concern to the committee.

While the Department of Justice is pleased that the amended rules recognize the plea bargain procedure, we oppose those provisions of the amended rule 11 which (1) could be construed as permitting the court to reject a plea agreement based upon a dismissal of other charges, (2) would require, without exception, disclosure of the agreement in open court, and (3) could be construed as precluding admissibility in all circumstances of statements made in the negotiation process.

The amended rule could be construed as sanctioning an unwarranted infringement by the judiciary on the powers of the executive. The plea agreement procedures set forth in subdivisions (e) (2), (3) and (4) should make clear that the court may decline to accept an agreement only on the ground that the maximum sentence agreed upon is too harsh or inadequate; the court should not be permitted to reject an agreement it deems too lenient or too restrictive with respect to the dismissal of counts or the reduction in grade of the offense charged. In the sentencing area the court's prerogatives are admittedly paramount, but no rule should be promulgated which intrudes the judgment of the court in the executive decision to charge or to dismiss charges—areas traditionally reserved for the exercise of prosecutorial discretion.

There are just many, many cases giving this power, the executive decision, to dismiss, to charge or not charge. And we think the rule ought to be clearly stated in those areas that this is executive decision, while we certainly admit and insist that the court's ruling in sentencing when you get to specific sentences is paramount.

We would recommend that there be some change to the rule in section (e), rule 11(e)(1). We would suggest language that generally tracks what the advisory committee has recommended. But there is some slight difference. We would suggest, that (e)(1) read:

The attorney for the Government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the Government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both

Now, that is the way the rule reads—we would suggest the following additional language: "or will agree that a specific sentence is the appropriate disposition of the case." And then the same language, "The court shall not participate in any such discussions," should be left in.

And then on the notice of the agreement, 11(e) (2), we would propose that the language read :

If a plea agreement has been reached by the parties, the court shall require the disclosure of the agreement in open court, except for good cause shown,

And that is the only addition in that sentence—

at the time the plea is offered. Thereupon, the court shall accept the plea unless the parties have agreed that a specific sentence is the appropriate disposition of the case, in which event, the court may accept or reject such agreement for a specific sentence, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the pre-sentence report.

So what we are suggesting here is that if we are only talking about dismissal of counts, reducing the charges, or a mere recommendation of sentence—if we are not dealing with a specific sentence, then the court at that time should accept or reject, but if it deals with a specific sentence, then the court should have an opportunity to examine the presentence report.

Now, we would propose a new section sub(e) (3) and (4) which would read:

If the court accepts a plea agreement for a specific sentence, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

We have taken out this idea that the court should tell them he will give them either that sentence or a lesser sentence. And I will explain that in a few moments.

Then we would say that (4) should be amended to read, (e) (4):

If the court rejects the plea agreement for a specific sentence, the court shall inform the parties of this fact in open court and set aside the guilty plea of nolo contendere.

Then, in sub (6) we would propose this language :

Evidence of a plea of guilty, or a plea of nolo contendere, later withdrawn, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of out of court statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil proceeding, or in the Government's case in chief in any criminal proceeding against the person who made the plea or offer. However, a statement made by a defendant in open court and in the presence of counsel in connection with such plea or offer is admissible to impeach the defendant where his testimony at the subsequent proceeding varies materially from his statement at the time of the taking of the plea.

The feeling that we have on (e) (1), the general change, is to clear up and make it very clear that the rule does not alter existing law which leaves for executive decision to charge or dismiss charges. As proposed by the Department, the executive will decide without court intrusion, whether to:

- (1) Reduce the charge to a lesser or related offense;
- (2) Dismiss other charges; or
- (3) Make recommendations (or not oppose recommendation) only.

Now, when we are dealing with this recommendation, we say that such a recommendation should not be binding on the court as to what sentence, if any, the court would impose. It is just a recommendation. The court would be free to impose the sentence, to go higher or lower. But if a specific sentence is agreed to between the parties as an appropriate disposition of the case, then the court would be free to accept or reject the agreed specific sentence. And then if accepted, it is embodied in the judgment, and if rejected it sets aside the plea of

guilty or nolo. We set aside the idea that the court should be involved in changing the terms of a plea agreement for a specific sentence by reducing the agreed sentence, or being subject, after such an agreement has been entered into, to the further urging of a defendant to lesser punishment than the defendant has theretofore agreed to. By permitting a defendant to urge for a lesser sentence than he has agreed to, we feel that such proceedings would not only be an invitation to subsequent habeas corpus attack through motions to vacate sentence, but would vitiate the entire thrust of the amendment to rule 11 to encourage openness and good faith between parties in reaching binding plea agreements.

Mr. DENNIS. Let me ask you a question right there. I am not sure whether I understand you or not. Are you saying that if the court saw fit to impose a lesser sentence than the agreement?

Mr. RAY. We are saying that that language is an open invitation, we are saying, take that out and just let the court reject or accept.

Mr. DENNIS. You are saying, then, the court has either got to reject or accept the agreement, then?

Mr. RAY. Yes, sir.

Mr. DENNIS. Is that not quite an encroachment on the court's general powers?

Mr. RAY. I do not think so. I think it might help the court. What little experience I have had with this rule—and I might say until January 1 this year, we have no plea bargaining whatsoever on specific sentences in my district, and have not had since 1961 since I have been U.S. attorney—it works out pretty good, without being involved in the procedure.

But I have seen—and the rule so contemplates in the notes—that you enter into this agreement—in fact, we put it in writing, and then the judge defers sentence, and then he is faced with allocation in asking for a lesser punishment if agreed to. And I can see this developing later down in the history into questions about the whole procedure, and probably increasing attacks or motions to vacate sentences.

Mr. DENNIS. I can see how maybe you would not like it written in there specifically that the court should tell him it will either be this or something less. But I cannot see how you can have a rule which says that once the district attorney and the defendant make an agreement, that the court cannot reduce it if it wants to. I think the court has an inherent right to do what it pleases.

Mr. RAY. That is true.

Mr. DENNIS. And it would not have to accept or reject that agreement, it could change that agreement or reduce it if it felt like it. I do not see how you can do that.

Mr. RAY. He can, of course, reject the agreement and say so.

Mr. DENNIS. He can reject it. But suppose he rejects it by imposing a lesser sentence? You say he cannot do that?

Mr. RAY. He can reject the agreement and come back and take a plea.

Mr. THORNBURGH. Mr. Chairman, there is already an encroachment on the judicial function from outside, as far as sentencing, that is to say, if the judge perceives that the sentence ought to be greater than that agreed upon, he is not empowered to impose a greater sentence by these rules. So once the principle is gone of the exercise of the judicial power, I would suggest that it ought to operate both ways, that if the

agreement is unsatisfactory to the court, the court ought to reject it, and then the parties are left in the position that they were originally.

Mr. DENNIS. I think you have a valid point, that either way they are cutting down something from the court, although the opponents say that is not true. But I must say, that the one that I commented on bothers me more. You may have more logic, but it does not convince me. I think if the court felt like being more lenient than the district attorney, he certainly has that right. And I think he can be tougher, too.

Mr. GREENE. Additionally, Mr. Chairman, if you permit the court to require the Government to stick to its bargain, which may have resulted in the dismissal of some more serious counts, and in fact serious counts which may have required a mandatory sentence, whereas lesser counts may not have required a mandatory sentence, in a sense, you are permitting the court not only to become involved in the sentencing process where it should be involved, but also in the process of deciding what charges should or should not be dismissed. In other words, if the Government reaches a bargain to reduce the charges in the case in exchange for what it views along with the defense as a reasonable sentence, and then the court reduces that sentence, the court may well be in a position of indirectly encroaching on the charging authority of the prosecutor. And, of course, that goes to one of our fundamental objections to the possibility of the way this rule could be construed.

Mr. DENNIS. I am not sure that there would not be relief from that point of the agreement about the charges if the court refused to go along. And I think you are right, that the sentences of the court are the charges of the prosecutor. And I think that is a sound and general rule.

Mr. GREENE. That is all we are saying. And I think that is what Mr. Ray was saying when he said, of course, the court can disapprove the plea. Our position is that the court cannot require the Government, on the one hand, to stick to its agreement concerning dismissal or the reduction of charges, and on the other hand, reduce the agreed-upon sentence.

Mr. DENNIS. It seems to me that perhaps the court could reduce the agreed-upon sentence on the matter that is before him. But maybe that would not preclude the Government from bringing some other matter forward that they were going to dismiss, but since the agreement was not carried out, they do not feel like dismissing it now. I do not know that that is necessarily impossible.

Mr. RAY. That is why we think it would be a much clearer cut procedure just to accept or reject. And we think the rights of both parties to the agreement would be preserved.

I might mention one thing, Mr. Chairman. I noticed a question you put to Professor Remington about discussions maybe after the lawyers had talked, and they go informally to see the judge. I would have to commend the writers of this rule, that before we get down to discussing plea agreements, it is anticipated that the court would determine, after advising the defendant of all of his rights that he has on the nature of the charge, the sentencing and all, and the understanding that if he pleads that he is waiving trial, it is anticipated that the court would find his plea to have been voluntarily entered prior to going into a discussion of the plea agreement. And I would very much and strongly oppose any type discussion by the lawyers with the judge that is not

on the record. If we get into that, then we are right back to where we are in habeas corpus and motions to vacate sentence. When we bring the judge in we must be able to show that everything he has done has been open, and it is on the record.

And I would cite to the committee's attention a case, *Bryan v. United States*, 492 F. 2d 775, at page 780, Fifth Circuit Court of Appeals. That is one of my own cases. In that case we overcame in attack on plea bargaining which we did not have. And the record, I think, is very clear. But the fifth circuit has adopted pretty much the ABA pre-adjusted standards on plea bargaining. So in the fifth circuit we now have this as a tool.

I must say in talking to U.S. attorneys across the country, I was rather impressed that southern New York does not make any agreement as far as specific sentences. I think that has been the case pretty much throughout the country with maybe one or two exceptions.

Mr. DENNIS. You do not feel, Mr. Ray, that under these rules it ought to be possible for the district attorney and the defense counsel to talk to the court before you go into court?

Mr. RAY. I think anything you do should be on the record. And to open it up to formal discussions with the judge, without the presence of the defendant, and without the record, is just an open invitation to habeas.

Mr. DENNIS. You have got the defendant's counsel present, I assume.

I think at this point, since we have a quorum call, we had better adjourn until 1:30 p.m. I will ask all the witnesses present to come back—unless someone has a question.

Mr. HUNGATE. That is fine.

But would you give me that citation again, please?

Mr. RAY. It is my comment. *Bryan v. United States*, 492 F. 2d 775, at page 780, 1974.

Mr. DENNIS. Gentlemen, we will adjourn to 1:30 p.m. I will ask the witnesses, including both the present and prior panel, to return at that time.

[Whereupon, at 12:20 p.m., the hearing was recessed, to reconvene at 1:30 p.m., this same day.]

AFTERNOON SESSION

Mr. HUNGATE. The committee will resume its sitting.

Mr. Rakestraw, we will hear from you or anybody in your group.

TESTIMONY OF W. VINCENT RAKESTRAW, ASSISTANT ATTORNEY GENERAL, LEGISLATIVE AFFAIRS, DEPARTMENT OF JUSTICE, ACCOMPANIED BY H. M. RAY, U.S. ATTORNEY, NORTHERN DISTRICT OF MISSISSIPPI; RICHARD L. THORNBURGH, U.S. ATTORNEY, WESTERN DISTRICT OF PENNSYLVANIA; HENRY F. GREENE, EXECUTIVE ASSISTANT U.S. ATTORNEY, DISTRICT OF COLUMBIA; AND MICHAEL W. DOLAN, ATTORNEY, DEPARTMENT OF JUSTICE—Resumed

Mr. RAKESTRAW. We have only one series of comments by Mr. Greene. This will be a comment on rule 11 and also rules 12.1 and 12.2. And then we will stand ready for questions, and then be ready to work later with counsel and answer any additional questions you may have.

Mr. HUNGATE. That would be very helpful. If questions arise later, we can submit them to you for written reply.

We will be glad to hear from you, Mr. Greene.

Mr. GREENE. Mr. Chairman, if I might just respond at the outset in my remarks to one question which you raised earlier in the proceedings of the day concerning the question of whether under rule 11 we are lifting the sentencing authority to the U.S. attorney by permitting him to take part in this plea bargaining process, I think it is important to note that the prosecutor in our system knows some things about a case that may be exclusively within his purview and which are particularly relevant to the sentencing process. He knows the witnesses, he knows the victims, he has talked to them. He has access to the defendant's records, he knows the mitigating and exasperating circumstances which might be relevant to sentencing but which were not admissible in the absence of trial. But if it is determined that it is appropriate to have this kind of plea bargaining process, then we submit that it is appropriate for the U.S. attorney to be represented in that process because of the input which he can make in that regard.

If I can I would like to go briefly to the proposed amendments now to rule 12. And there are two particular concerns which we have with that rule.

First of all, for reasons which we state more expansively and which were eloquently stated, I think, by Mr. Thornburgh, we object to the provisions of rule 12(d)(2) on the same grounds that were discussed concerning our opposition to expanded discovery in rule 16. We think that the discovery should continue to be a matter of judicial discretion tailored to each individual case, and not a matter of right. And, therefore, we object to the terminology which is used in the provision "any evidence to which the defendant is entitled to discover under rule 16."

Now, the Government does often notify a defendant of its intention to use certain evidence, so as to expedite the filing of the motions of suppression. And the Advisory Committee note to rule 12 recognizes this. But it is the proposed amendment that is drafted that requires more. It seems to contemplate, or at least could be construed to contemplate, that the Government will give notice of everything that it possesses that is discoverable regardless of whether any motion to suppress is anticipated.

The second provision concerning rule 12 which we have a problem with is subdivision (e), which indicates that the general authority is conferred on the court to defer the determination of pretrial motions until trial or even after verdict. And while we do not have problems with what we think was the intention of the rule, we are concerned that the rule could be construed in such a way as to deprive the Government of its right to appeal under 18 United States Code, section 3731, which does permit the Government to appeal a pretrial order granting the motion to suppress if that appeal is taken before jeopardy attaches. And we would, therefore, request an amendment to rule (e) which we have proposed on page 19 of Mr. Rakestraw's statement, to the effect that a motion made before trial shall be determined before trial unless the court orders it deferred, but that no such determination shall be deferred if a party's right to appeal is adversely affected.

Mr. HUNGATE. It is your position that after jeopardy attaches you might not be able to appeal, even if the motion is determined favorably after the trial.

Mr. GREENE. It is an open question whether we would have a right to appeal. It may be a more closed question as to the effectiveness of that right to appeal, because even if we had a right to appeal, that is, to litigate the issue involved, as far as the case in which the issue arose is concerned, the attachment of jeopardy may have included an effective remedy in that case.

Let me move very briefly, unless there are other questions, to rule 12.1, the notice of alibi rule.

The Government generally supports this rule. However, again, we have an objection which is an outgrowth in general of our objection stated by Mr. Thornburgh to the requirement of the disclosure pretrial of witnesses. Unlike the alibi notice rule which is in effect in the U.S. District Court for the District of Columbia—the proposed rule 12.1 would permit the defendant, by indicating his intention to rely on the provided defense, and by making disclosure, to compel the Government to disclose the names and addresses of its witnesses. In other words, the defendant triggers that process. And because we vigorously oppose those provisions of proposed rule 16 which would compel the Government to disclose the names and addresses of its witnesses, we oppose any alibi notice rule which would permit similar discovery, and we would in its place propose the enactment of a rule similar to rule 2.5(b) of the U.S. District Court in the District of Columbia. And that rule is made part of our proposal at page 21 of Mr. Rakestraw's statement.

In connection with rule 12.1, I should also like to address a question which was raised earlier by counsel, Mr. Hutchison, in which he wondered, in connection with the reciprocal discovery provisions of rule 16, if we were confronting a problem of invasion or intrusion upon the defense's constitutional rights under the fifth amendment. And I think one case which is particularly relevant in this regard, and was addressed to the alibi notice rule of the State of Florida, but is really more generally addressed to the problem of requiring defendants to disclose evidence that they would disclose at trial in advance of trial, is the case of *Williams v. Florida*. And the Supreme Court specifically indicated in the *Williams* case that it had no problem in ordering pretrial disclosure of evidence by the defense where it was only a matter of changing the timing of that disclosure rather than requiring the disclosure of evidence that the defendant would not otherwise disclose at trial.

The Supreme Court in *Williams* in a footnote specifically reserved the second question raised by Mr. Hutchison, which was the question of validity of the sanction if the defendant fails to comply, not permitting him to introduce the evidence at trial. But it seems to us that in implicitly sanctioning the rule itself in *Williams*, that the rule would be meaningless without the sanction that is prescribed by the rule. And so that is why the Supreme Court did not address the question, because it did not have to reach the question in that way.

We really think that any kind of an alibi notice rule or discovery rule requiring pretrial disclosure by the defense really is meaningless without an effective sanction to give the rule substance.

Mr. HUNGATE. What are you suggesting as a sanction?

Mr. GREENE. I am suggesting that it is an appropriate sanction under both the alibi notice rule and under the reciprocal discovery provisions of rule 16 to preclude introduction in evidence of material by the defense which the defense has not turned over prior to trial, pursuant to its obligations under the rule. In other words, if a defendant is ordered to disclose evidence in advance of trial pursuant to either the alibi notice rule or rule 16, that it is appropriate and it is constitutionally appropriate to impose the sanction of them not being permitted to introduce that evidence at trial, with the exception of his own testimony.

Mr. HUNGATE. Take a bank robbery case. Can an accomplice, who, say, bought the gun and the mask that were used but who did not go to the scene of the crime, be tried as a principal?

Mr. GREENE. I do not quite understand your question, Mr. Chairman.

Mr. HUNGATE. All right. Two men agree to rob a bank. One of them buys the gun, arranges for the getaway car, and gets the mask. The other man uses the gun, mask, and the car and robs the bank. The first guy stays in bed that day. Are they both liable for bank robbery?

Mr. GREENE. Yes.

Mr. HUNGATE. Now, suppose that one of them furnishes notice of intent to use an alibi defense. Would you then have to reveal what evidence you had on both of them?

Mr. GREENE. Let us assume that the defendant who stayed home gives notice that he is going to raise an alibi defense that he was at some other place at that time, and that witnesses X and Y put him at that place. The Government would then be obliged to disclose, if the Government under our proposal, filed a demand for notice of alibi to the defendants, the Government would then be obligated to disclose to that defendant's attorney the evidence it had placing the defendant at the scene of the offense and who its witnesses were. It seems to me, though, Mr. Chairman, that you have raised perceptively the very issue which we were concerned about in terms of who triggers the alibi notice rule. In other words, if the Government triggers the rule through its demand, then it can take into the calculus of whether it is advisable or indeed, safe to disclose its witnesses to all the panels, it can take that into consideration in deciding whether to file the demand. But under the rule as it is now proposed, one defendant of several codefendants could trigger the alibi notice rule by disclosing to the Government his alibi defense and his witnesses, thereby putting the Government in the position of being compelled to disclose its witnesses and its case not only to that defendant but for all intents and purposes, to other defendants.

Mr. HUNGATE. Thank you.

Mr. Dennis.

Mr. DENNIS. Mr. Chairman, just one question.

Do you have the citation in that *Williams* case?

Mr. GREENE. Yes, I do.

Mr. DENNIS. Counsel has called it to my attention in one of the documents before us here. 399 U.S. 78.

Mr. GREENE. 1970, yes.

Mr. DENNIS. Thank you very much.

Mr. GREENE. If I could, then, I would like to move then very briefly to rule 12.2, and indicate that this rule, which requires the pretrial disclosure of a defendant's intention to rely on the defense of insanity for a showing, or showing a lack of the required mental state, is a rule which has the strong support of the Department of Justice. And our own concern is that the advisory committee note should reflect, and we would hope the report of this subcommittee would reflect, that the rule is not intended to preclude a district court judge from ordering more than one psychiatric examination of a defendant in a case. We are sure that was not the intention of the rule, but we think it should be made clear at least in a note to the rule.

That concludes my testimony on rules 12, 12.1, and 12.2. I would ask the Chair's indulgence if I could, for an additional 2 minutes to make a brief comment on rule 16, which I did not have a chance to address when Mr. Thornberg was speaking.

Mr. HUNGATE. Yes, please proceed.

Mr. GREENE. Mr. Chairman, Mr. Thornberg articulated, we think, extremely effectively the problems, the substantial problems involving the safety and possible threats to witnesses which inclined the Government so strongly to oppose the provisions of rule 16 relating to disclosure of witnesses' names before trial. However, there is another consideration which also prompts the Government operation to which Mr. Thornberg briefly alluded, but which I think merits emphasis. And that is the problem of witnesses and victims of crime being discouraged from testifying in criminal cases. We have recently taken note of those who have been involved in looking at the administration of criminal justice have taken note of the fact that our victims and our witnesses and our jurors are the participants in our system of administering criminal justice to whom scant attention has been given in the past 15 or 20 years during a process when we have increasingly been vigilant of the constitutional rights of defendants and of the other incidents involving the way the administration of justice works, during this entire period scant attention has been given to the problems involving witnesses and victims of their real apprehensions about testifying.

Recently the Law Enforcement Assistance Administration funded a survey of victims and witnesses to crime in the District of Columbia to try to ascertain to what extent, if any, the apprehensions and fears of witnesses affect their reluctance or, in fact, their refusal to come forward and to report criminal events which they either observed or which they are victimized by. And that grant is made by the Institute for Law Enforcement Research. And it reveals that when witnesses in a substantial number of cases were asked what changes they thought would make witnesses more willing to cooperate, 30 percent, or nearly 30 percent, 28.8 percent of those witnesses who had cooperated with the police, and 3.3 percent of the witnesses who had not cooperated, indicated that they wanted better protection for witnesses by the police, and that they wanted witness identification kept from defendants, or that they wanted witnesses assured of protection after testimony.

So I think it is important to indicate that even if you do have a protective order which is provided for by those amendments to rule 16, and even if there are cases in which the Government could make the required showing, this is not going to meet the increasing problem of the

reluctance and unwillingness of witnesses and victims to come forward at a time when both the executive branch and the legislative branch of our Government have taken notice of increasing problems involving crime in our society.

Thank you.

Mr. HUNGATE. Thank you.

Mr. Dennis.

Mr. DENNIS. I do not have any questions. But I just question whether anything is going to overcome the reluctance of witnesses to come forward. They just do not want to be witnesses. And they are going to have to come forward eventually, of course, if they are going to appear at all.

Mr. GREENE. I understand that, Congressman. But I would pose what I guess is the rhetorical question of whether it is not reasonable to assume that a witness who knows that it is the common practice that his identity is going to be disclosed if he comes forward rather than that his identity is going to be protected at least until the time of trial. And, of course, in some cases involving informants, their identity can be protected if they will not actually be witnesses, but if they disclose other information which leads to other witnesses, I think it is fair to say that the witness who knows his identity is going to be disclosed is less likely to be willing to come forward than the witness who knows that the Government is going to seek to protect their identity. Indeed, in our jurisdiction I believe there are situations in the superior court where jurors have raised objections to the fact that their addresses as well as their names are on jury lists which are given to defense attorneys prior to trial. So it is not a problem confined only to the witnesses, it is a problem involving the reluctance and fear and apprehension generally of our innocent participants in the administration of criminal justice.

Mr. HUNGATE. Mr. Thornburgh.

Mr. THORNBURGH. Just as a footnote of that, I think the timing is of some note here, because if you are going to make effective use of a witness, obviously you are never going to be able to seal his name and address in perpetuity. But I think when you look at the terms of the Bail Reform Act you can see the tools that are available to the Government to provide protection to an individual who is likely to be subject to physical harm are certainly few.

Prior to conviction the only consideration as to whether or not a defendant should be at large is whether or not he is likely to appear for subsequent legal proceedings. After conviction, when the fat is in the fire, and the witness has been exposed by his own testimony, the court may take into account whether or not that particular convicted defendant poses a threat to the community, and could be incarcerated on those grounds alone if we are able to come forward and establish a propensity on his part to engage in these types of heinous acts that we are talking about.

Mr. HUNGATE. Mr. Rakestraw, Mr. Greene, Mr. Ray, Mr. Thornburgh, and Mr. Dolan, the committee expresses its appreciation for your contribution here today, and for your willingness to be available for further inquiry. We may be in contact with you.

Mr. RAKESTRAW. Thank you, Mr. Chairman. We hope that we have assisted the subcommittee. And we stand ready to either support our statements or answer additional questions, as indicated before.

Mr. HUNGATE. Thank you very much.

I would like to recall the previous group of witnesses before going to the last group of witnesses.

Judge Lumbard, Judge Thomsen, Judge Webster, and Professor Remington.

Thank you, gentlemen, for waiting and returning. The Chair suggests that we ask a few questions here, and then proceed to the other witnesses. When we have concluded with all the other witnesses, whether that is weeks or months from now, we would like to call you again and get your comments on the other suggestions we have heard. If that is agreeable to you, we think that it would be helpful to us.

TESTIMONY OF JUDGE J. EDWARD LUMBARD, SECOND CIRCUIT COURT OF APPEALS, CHAIRMAN, ADVISORY COMMITTEE ON CRIMINAL RULES, JUDICIAL CONFERENCE OF THE UNITED STATES; ACCOMPANIED BY JUDGE ROSZEL C. THOMSEN, U.S. DISTRICT COURT, DISTRICT OF MARYLAND, CHAIRMAN, STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF THE UNITED STATES; JUDGE WILLIAM H. WEBSTER, EIGHTH CIRCUIT COURT OF APPEALS; AND PROF. FRANK J. REMINGTON, UNIVERSITY OF WISCONSIN LAW SCHOOL, REPORTER, ADVISORY COMMITTEE ON CRIMINAL RULES—Resumed

Judge LUMBARD. We would very much appreciate that opportunity.

Mr. HUNGATE. When the prosecutor and the defense counsel want to work out a sentence, they will do so, I assume, without benefit of the presentence report?

Judge LUMBARD. Ordinarily, yes.

Mr. HUNGATE. It is not available unless the defendant wants to make it available, is that right?

Judge LUMBARD. It can be agreed that the court should have the benefit of it prior to the plea. But ordinarily it is not available prior to the plea.

Mr. HUNGATE. And do you see any danger, Judge, in the parties agreeing to a sentence without the benefit of the presentence report?

Judge LUMBARD. Well, there may be cases where important information is developed on the presentence report. And, of course, there you had the flexibility of the judge's discretion in the light of the presentence report. But for the most part, Mr. Chairman, I think defense counsel and the prosecutor usually know most of the facts that would be relevant to any agreement. Ordinarily, that is the case.

Mr. HUNGATE. Judge Thomsen.

Judge THOMSEN. I was just nodding agreement. I think that has been our experience.

Mr. HUNGATE. We have received comments critical of making presentence reports available to the defense attorney and the prosecutor. The argument is that disclosure of the report might destroy the principal advantage of the report by making it public. How would you meet that contention?

Judge LUMBARD. Judge Webster, I think, can answer that.

Mr. HUNGATE. Yes, sir.

Judge WEBSTER. Mr. Chairman, it is my understanding that rule 32 does not contemplate making the presentence investigation public. It contemplates making it available to the defendant or his counsel. And to that extent, if we are talking about presentence reports in general terms, I think we are fully protected there. If we are talking about it in terms of an advance look at the plea bargaining, I do not think the rule provides that the prosecution has an advanced look at the presentence report. It is just the judge.

Mr. HUNGATE. Under rule 32, as I understand it, the presentence report, with some exceptions which I am not that acquainted with, shall be made available to the defendant and his attorney. The argument is made that this will destroy the confidential nature of the report—that it is bad for the defendant to know how he is diagnosed, I suppose.

Judge WEBSTER. There are express provisions for withholding any information which in the opinion of the judge may be harmful to the defendant, such as diagnostic information, and if the judge feels on balance that the report is such that it simply ought not to go to the attorney, all that he has to do under the rule is disclose instead either orally or in writing a summary of the factual information upon which he relied in assessing the sentence. In other words, he is saying to them, whatever else is in there did not influence me in fixing the sentence. These are the things that I rely upon.

Judge LUMBARD has called my attention to the fact that this requirement which I just referred to, revealing on record the information upon which the court relied, may be made to the parties in camera. The important thing is that it is and must be made in the defendant's presence so that we cut off, at least hopefully, the postconviction contentions that the judge relied upon matters which, if the defendant had known about, could have been corrected or the record set straight.

Mr. HUNGATE. When that is made available to defendant's attorney in camera, is it also made available to the prosecutor?

Judge WEBSTER. Only in the discretion of the court.

Mr. HUNGATE. Mr. Smith calls my attention to rule 32(c).

Judge LUMBARD. It would be made to the parties. The prosecutor would be included in the proceedings in camera, according to the proposed rule.

Mr. HUNGATE. Do you find any difficulty with that?

Judge WEBSTER. I find no difficulty at all with it. The important thing at that stage of the game is that the trial which has proceeded on an adversary basis with the right of confrontation, the right to correct the record, and so on, proceeds to sentencing without an ex parte aspect where the defendant does not know what the judge has in his hole card that he is using to determine the sentence.

Mr. HUNGATE. Turning now to rule 15, which deals with the use of depositions in criminal cases, is it possible under that rule to have an entire trial by that deposition?

Judge LUMBARD. That is conceivable. But I do not know of any criminal case where that has happened, Mr. Chairman.

Mr. HUNGATE. The contention is that this would impair the defendant's right to a jury trial because the jury cannot pass on the witness' credibility, since there is no appearance and opportunity for confrontation. What do you say to that?

Judge LUMBARD. Of course, the provisions for deposition give full opportunity to the defendant to be present and to confront the witness and to confront each witness. This does not necessarily mean that the witness must be confronted by the jury, so to speak.

Mr. HUNGATE. Thank you.

We have received a suggestion concerning rule 43. Did the advisory committee consider permitting a defendant to waive his appearance and arraignment, where the only purpose of appearance is to enter a guilty plea?

Judge LUMBARD. I think that would be done only in cases where you were dealing with a corporate defendant.

Mr. HUNGATE. The problem—it is not a widespread thing, I hope—is that some defendant is broke and in Nova Scotia. He would save a lot of money and avoid a long and expensive trip if counsel would enter a plea and waive arraignment.

Judge LUMBARD. It might be permissible to have that done in certain misdemeanor types of offenses where only fines might be imposed; or something of that sort.

Mr. HUNGATE. Thank you, Judge.

Mr. Smith.

Mr. SMITH. Mr. Chairman, I missed the meat of his testimony, so I am not going to ask any questions.

Mr. HUNGATE. Mr. Dennis.

Mr. DENNIS. Under rule 16, gentlemen, what would you think about a compromise which gave the defendant a right, not on the prosecutor's being nice about it, but a right to elicit the witnesses if he could make a showing, but casting the burden on him rather than on the Government to show that they should not be revealed?

Judge LUMBARD. Just a one-way street to get a list of the witnesses?

Mr. DENNIS. In other words, I suggested to them when these other gentlemen were testifying that they want a complete right to refuse. And they said, often we give it to them. But that is really a matter of grace. I am suggesting that we might give the defendant a right, but not an absolute right, require him to make a showing that there is not any danger to the witness, that he does not need to know who he is, and so forth.

Judge LUMBARD. That there would be no corresponding obligation on the part of the defendant to disclose his witnesses?

Mr. DENNIS. Well, I had not considered that particularly. That is another phase of the matter. But what I am trying to ask you is whether there is any middle ground between the position that the Government should completely determine the matter and the position that the defendants should get them automatically unless the Government can show some good reason for not.

Judge LUMBARD. There is a possible middle ground. And the committee considered it very carefully and thought that there were greater advantages in making it a two-way street on the theory that as Professor Remington outlined this morning, the more disclosure you get in the discretion of the court, of course, and in the proper cases, the less surprise there is at the trial, and the more likelihood there is that there will be some kind of a settlement of the case on terms that are fair to both the parties.

Professor REMINGTON. I might add that one of the reasons for putting the burden on the Government is the feeling that discovery ought to be by the parties without having come to the court. As Judge Webster indicated, a lot of time is spent on motions for discovery, which can be avoided if, when the defendant goes to the Government and asks for discovery, the Government responds, and vice versa. If the Government has a basis for refusing discovery, it can come in to the judge and give the reasons. It would be possible to draft a provision which would provide that if the Government refuses discovery, the burden would be on the defendant to show cause why he needed the witnesses in the face of the Government's objection. The burden of coming forward with justification can be put on the defendant. But the whole thrust of rule 16 is to make discovery voluntary in 99 out of 100 cases, so that taking court time is the exception rather than the rule. In practice, parties are more and more handling discovery without the requirement of a formal motion to the court.

Mr. DENNIS. Of course, that is the trend in the civil case. But Mr. Thornberg's contention is that we cannot equate this kind of thing to a civil case, and that we are going too far in that, and that it is for the executive branch to determine, for instance, whether a man should be arrested, or whether the Government should give out its witness list or not, those are executive functions, according to him. I take it, you gentlemen would rather think they are judicial functions?

Judge LUMBAUD. Yes.

Mr. DENNIS. A fundamental conflict of philosophy underlies this problem.

Professor REMINGTON. I might say, Congressman, that there was a proposal which the committee circulated which would have allowed a judge to accept a plea to a lesser offense without the concurrence of the Government. On reconsideration, the committee, recognizing the importance of the separation of powers question, concluded that a reduction in charge was an executive function. That amendment to rule 11 was not forwarded by the advisory committee. So the advisory committee has been sensitive to the interest of the executive branch. But the decision to take a person into custody is in the view of the advisory committee, probably one of the most important decisions affecting that individual and ought therefore to be made by a person who is neutral and detached, and able to look at both sides of the issue.

Mr. DENNIS. These are very important questions and not easy ones either.

Judge THOMSEN. And the practice differs so in different districts. Some districts have an omnibus hearing practice, people come in and have a very few sessions before a judge. In some other districts where they do not have it the U.S. attorney knows what the judges are going to require him to disclose. And the defense lawyers pretty well know it, too. And when they go and request certain information, usually the Government attorney gives them everything he knows the judge will require them to give. And so you do not have to come to court all the time for it, only for the occasional disputed problem.

Judge WEBSTER. Congressman Dennis, there is one other aspect. I agree completely with what Judge Thomsen and Professor Remington have just said. But I think there is inherent in the Government's argument the problem that confronts the defense counsel in trying to

demonstrate that he needs to know the names of witnesses. The underlying assertion on his part is that he cannot properly prepare his case unless he knows who the witnesses are going to be. And that in effect, it seems to me, requires him to prove a negative. And I do not know how he does that. It is inherent that he would like to know who is going to come in to testify. But I do not know how he would ever prove that he cannot prepare his case without knowing.

Mr. DENNIS. Of course, in another way it is almost axiomatic that he does need to do it. This is a tough question, because I can see their point too, about the harassment of the witnesses, and so on, there is a real balancing of interests in this respect.

Judge LUMBARD. May I mention a fundamental practice which I think we are all aware of but which has to be kept in mind in this whole subject of discovery?

In most criminal cases the defense counsel is not fully informed by his client as to what the facts of the case are, and he does not learn them unless and until he finds out what the prosecution knows. And this is one of the fundamental reasons why as full a discovery as possible within proper limits, and safeguarding as much as we can witnesses and other factors, is going to be of assistance in reaching the right result at the trial and the right kind of a settlement by way of pleading.

Mr. DENNIS. There is a lot of truth to that. Of course, if the defendant came more or less clean with his counsel, they usually would at least know who the main witnesses were, as a matter of fact. That is another side of it.

Judge LUMBARD. They usually have a pretty good idea.

Judge WEBSTER. I think that you will find too, that the provisions in the rule accord the trial judge wide discretion and wide power to control not only whether the information is to be given at all, but also what use is to be made of the information in terms of harassment. When the situation warranted it, at the same time as I ordered the information supplied I directed that the defense counsel or his client should not approach the witness if I thought there was a valid reason for keeping the witness free from fear of harassment.

So the trial judge has a lot of control and a lot of flexibility under this rule, I think all he needs.

Mr. DENNIS. I thank all of you gentlemen.

Mr. HUNGATE. Thank you. We will be in touch with you at a later date.

Mr. SMITH. Mr. Chairman, I have one question. Judge Webster just touched on it.

What is your experience as a trial judge with harassment, intimidation and possible murder, and so forth, of witnesses?

Judge WEBSTER. I missed the first two words, Congressman.

Mr. SMITH. What has been your experience as a trial judge in this field of harassment and intimidation in criminal law?

Judge WEBSTER. I think that in the 10-year span between the time I went on the bench as a trial judge and the time I was a U.S. attorney a lot of change took place. I used to have more problems as a U.S. attorney. I had very little problem as a district judge with that type of activity. You know, of course, too, that provision for taking witnesses into protective custody can be utilized if we reached that point of concern.

Judge THOMSEN. There are cases. We have had two murders of witnesses in the district of Maryland within the last 2 years. So it is true that it is not limited to New York. It is wherever, I think, you get into the big league of crime, is where the danger increases a great deal. Unfortunately, Baltimore has gotten into the big league.

Mr. HUNGATE. It may be a question of time. If the defendant did not know the identity of the prosecution's witnesses until the day of a trial, then the protective custody would be of a short duration. The earlier a defendant learns the names of the prosecution's witnesses, the longer the protective custody may have to be.

Judge WEBSTER. Most of these cases seem to involve narcotics problems, cases of that kind. I will mention one case in which, under a Supreme Court decision, I felt that the name of the informant had to be disclosed. In doing so I granted the Government a period of time in which to locate the informant and to take necessary steps to protect him before the name was disclosed. There are all sort of different ways to go about it in special situations. The rule contemplates the normal situations.

Mr. SMITH. And your advisory committee in the Judicial Conference kept those matters well in mind as you discussed in the new rules?

Judge WEBSTER. Yes, sir.

Mr. HUNGATE. Thank you again, gentlemen.

Our final witnesses today are from the Center for Law and Social Policy, the public interest law center located here in Washington. Howard Lesnick, professor of law at the University of Pennsylvania, and Mr. Herbert Semmel, attorney, will testify on behalf of the Center. G. James Frick, attorney, will testify on behalf of the Washington Council of Lawyers. Mr. Semmel and Mr. Frick are also appearing on behalf of the National Association of Defense Lawyers. We appreciate your patience and we are glad to have you with us today. You may proceed.

TESTIMONY OF HERBERT SEMMEL, CENTER FOR LAW AND SOCIAL POLICY, WASHINGTON, D.C.; HOWARD LESNICK, SCHOOL OF LAW, UNIVERSITY OF PENNSYLVANIA, PHILADELPHIA, PA.; AND G. JAMES FRICK, WASHINGTON COUNCIL OF LAWYERS, WASHINGTON, D.C.

Mr. SEMMEL. Thank you, Mr. Chairman. I appreciate the opportunity to appear before you. I am Herbert Semmel.

On my right is Prof. Howard Lesnick. And on my left is Mr. James Frick, who is the executive director of the Washington Council of Lawyers.

I am going to be talking about the substance of the rules which are presently before the committee. Professor Lesnick will address himself primarily to the rulemaking process, and bring some considerations about that process to the committee.

I have submitted to the committee a prepared statement which I request be put in the record.

Mr. HUNGATE. Without objection, it will be made a part of the record. (See p. 186.)

Mr. SEMMEL. In general, Mr. Chairman, we urge that the committee approve the proposed rules if a small number of critical changes are made in the rules. We believe that proper respect for the rulemaking process should not lead the committee to tinker with various minor changes which we might have suggested. We do think, however, that there are certain matters, particularly those raising constitutional issues, in which the committee has a function to play and in which the Congress has a function to play in the rulemaking process.

The situation of the criminal rules is substantially different than that of the evidence rules, where serious questions were raised as to whether the Supreme Court acted within their powers under the Rules Enabling Act. These criminal rules are matters of procedure. But there are areas, particularly of a constitutional nature, to which we feel that the committee and the Congress should pay particular attention.

There is another legislative matter which I will bring to your attention. And that is, that if the proposed rule 16 is approved, then we would suggest an amendment to the Jencks Act which deals with disclosure of statements of witnesses before trial.

I would like to address myself first, to rule 11, in which the major change is a recognition of the reality and practice of plea bargaining and the regulation of that process. There seems to be some controversy with respect to that provision, in the sense that the rule would allow a withdrawal of a plea if the judge rejects the bargain and indicates that he would issue a sentence in excess of that which had been agreed upon. It seems to us to be a rule which is eminently fair.

There has been some discussion about the necessity for the recognition of guilt in connection with a plea of guilty. I think that the reality of the plea bargaining process, at least in some cases, is that the defendant assesses the evidence against him and determines that a guilty plea is in his best interests, even though he may feel that his innocence could be maintained at the trial. The plea bargaining in that situation is a two-way street. And if the defendant is going to be subjected to a higher penalty, he should have the right to proceed to trial.

Now, I think the rule will clearly facilitate the plea bargaining process and avoid unnecessary trials by taking the defendant out of the position where he has to play somewhat of a guessing game with the judge. In many situations the defendant reaches some understanding with the U.S. attorney, but then must make his assessment of whether the judge is going to accept the arrangement. In some cases, and particularly with judges who have a reputation for heavy sentencing, the defendant may decide it is in his interest to go to trial, because he fears the judge will not accept the bargain. In fact, he may be wrong, and the judge might be perfectly willing to accept it. Under the procedure of the rule the defendant can plead guilty, and the judge will examine the presentence report and the bargain and then advise the defendant and the prosecution as well if the arrangement is acceptable. If not, the defendant then can either continue with his plea and allow the judge to sentence him or withdraw it.

There is one matter with respect to rule 11, which we were concerned about, and with respect to which we would recommend that the rule be amended. And that is the advice to be given to the defendant

before a plea of guilty is accepted. Now, in the case of *Boykin v. Alabama*, 395 U.S. 238 (1969), the U.S. Supreme Court very clearly specified the kinds of rights which the defendant must be advised of before he pleads guilty. One of them was his fifth amendment privilege against self-incrimination. And another is his right to a jury trial. And the third is his right to confront the witnesses against him.

In addition, other cases have established that if the defendant is not represented by counsel, he has a right to be informed before a plea is made that he is entitled to counsel, and that counsel will be appointed if he is indigent and cannot retain counsel.

Now, for some unexplained reasons, these specific rights were not included in rule 11(c), which listed the advice the court must give to the defendant before accepting the plea. Instead, the rule provides only in effect that the defendant must be told that he has a right to plead not guilty, and that if he does plead guilty, there will be no further trial. The advisory committee contends that this limited advice is sufficient to explain to the defendant his right to a jury trial, and so on. The problem is that the advice specified in rule 11(c) would probably explain the rights only to a lawyer who knows there is a right to a jury trial, a right to confront witnesses, and so on. But if the defendant does not know that he has a right to a jury trial, then simply telling him that there will be no further trial does not make him aware of the fact that he has a right to a jury trial which he is waiving by pleading guilty.

The same is true for the right to confront witnesses and for the fifth amendment privilege against self-incrimination. The advisory committee notes seem to indicate that by telling the defendant he has a right to plead not guilty and have a trial that the defendant is informed that he need not incriminate himself and need not take the stand at a trial, and that the jury will be instructed that they may not draw any adverse inferences from his failure to take the stand.

Now, in practice, I think most Federal judges today are giving the specific instructions, which we recommended be included in the rule, because the Supreme Court decision in *Boykin* specifically requires it. I am not clear why the proposed rules omit this. In most situations it only takes a few minutes to advise the defendant, and if the defendant is represented by counsel and counsel has done his job properly, then the matter should be disposed of without any substantial delay.

So because this is a matter that appears to be one of constitutional rights, we would urge that rule 11 be amended to require specific advice to the defendant on the matters that I have mentioned.

Mr. SMITH [now presiding]. Mr. Semmel, if you will bear with us for a moment, there are some other people who are coming in to use this room at 2:30. And so we are going to suggest, if you are willing to do it, that we move next door to 2148, which is the library of the Judiciary Committee. The accommodations are not as large as this, but I think they will hold all of us.

So let us adjourn while we move down the hall to 2148.

[Whereupon, the subcommittee recessed, to reconvene in room 2148.]

Mr. SMITH. All right, Mr. Semmel, would you proceed, please?

Mr. SEMMEL. Before I proceed, Mr. Frick has one comment on rule 11 that he would like to make at this time.

Mr. FRICK. Yes; Mr. Smith. My comment relates to rule 11(e) (4). In going over the rules, I am somewhat concerned, and as a matter of fact very concerned, about what a judge should do in the event that he rejects a guilty plea agreement. When I say what should he do, I mean what should he do in the future in the terms of the particular case. It is my feeling that a judge who rejects a guilty plea agreement should recuse himself from any further proceeding with regard to that defendant or any cases relating to that defendant.

Mr. SMITH. Why is that?

Mr. FRICK. The reason I feel that is, if the judge rejects the guilty plea agreement, he does so presumably because he feels the term of the imprisonment is not harsh enough. Immediately we have a judge who feels that the defendant before him, if he is to be punished, should be punished more harshly than the prosecutor thinks.

Mr. SMITH. That is, if he is guilty.

Mr. FRICK. That is, if he is guilty.

What I am concerned about is whether a judge who has rejected a guilty plea agreement could go ahead and fairly try that case. The reason I am concerned is that in some of the issues that come up is that, first of all, the defendant has pleaded guilty in front of the judge, he has admitted that he is guilty at least to some of the charges that have been lodged against him. So the judge has a bias toward the guilt of the defendant at the beginning.

Mr. SMITH. I do not think that is necessarily so, because the judge knows that this is an agreement.

Mr. DENNIS. Would it not make some difference, maybe, whether you were going to have a jury or not?

Mr. FRICK. I certainly think that would be true. But I am concerned here again with the complete impartiality of the judge in all stages of the proceedings. We have to remember that the judge that is going to be trying this case, in all probability, and deciding whether or not to accept the guilty plea arrangement, has had made available to him a pre-sentence report which will explain in great detail all the elements of the offense and all the circumstances surrounding it. I do not know whether a judge can sit in impartial judgment in a case like that. Of course, the jury is the trier of the facts, and presumably would act as a buffer against any prejudice the judge would have toward prejudging the case on the facts. But again, I feel it is important that something, some guidelines at least should be given to a judge as to whether he should or should not recuse himself from further proceedings in a particular case where he rejects a guilty plea agreement.

Mr. SMITH. I think it is an interesting thought. And it might very well turn upon the particular case.

Mr. FRICK. If I may offer one example of what the judge might do, since he has already previewed the entire case and the presentence report, he might rule that certain evidence is inadmissible without even permitting counsel to argue the point on the evidence. That might occur, because he has in fact reviewed all the evidence in the case, and he may feel it is inadmissible, and that evidence will never get to the jury, and the arguments about it will never be heard. That is one thing that a judge might do. And again, I think I would be

reluctant to try a defendant in front of a judge who had heard my client plead guilty in a previous proceeding and who had rejected an agreement between the prosecutor and myself as to what the sentence would be. I think my client, going into court, if he is found guilty by a jury, is going up against a stacked deck of cards, he is really in a tough position. And I think some consideration at least should be given to what a judge should do in terms of recusal from further proceeding in the case.

Mr. **BLOMMER**. If I could make an observation at this point, Mr. Chairman, first of all, it is not clear to me that the judge will have a presentence report. But even if he does, I do not believe that a presentence report reviews the evidence of the trial, at least the presentence reports I am familiar with, do not. Is that common practice?

Mr. **FRICK**. They do not review the evidence of the trial, they review the nature and the circumstances of offense and usually the evidence, the ones I am familiar with, of what happened.

Mr. **BLOMMER**. Do they not focus on the personal life of the defendant and his history rather than the offense?

Mr. **FRICK**. Absolutely, they do bring that into consideration. But the ones that I have read—and I do not know whether we are in jurisdictions where there are any—but the ones I have seen go into the circumstances of the offense. I would assume that a judge, in deciding whether to accept a plea bargain agreement, would have to have some information about the case in front of him, because unlike a situation where you sat through the entire trial, he has not heard any evidence with regard to what actually happened. And I would assume that he would have to have at least some information in the presentence report in order to make a determination as to what sentence should be imposed.

Mr. **BLOMMER**. I just say that that is not in the rule as proposed.

Mr. **FRICK**. I understand that. It is not necessary that he has the presentence report. But in fairness to all judges, I believe they almost order that up to decide whether a plea agreement is a fair one and whether it adequately protects the defendant and the public.

Mr. **SMITH**. Let me informally ask Professor Remington whether the committee considered this possibility in your discussions and determination with regard to this rule, the possibility that a judge might be prejudiced by rejecting such a plea.

Professor **REMINGTON**. That is an obviously important issue. It was discussed. Currently in Federal practice, for example, a judge who rules on a motion to suppress evidence prior to trial is not automatically excluded from presiding at the trial. He may have been confronted by the fact that narcotics were found in the pocket of the defendant, and defendant's contention that it was the result of an illegal search, and he may deny the motion to suppress, but he is not automatically disqualified. And that is a more prejudicial situation, I think, than a guilty plea in such a case. There is an opportunity to file an affidavit of the prejudice against the judge. And I would think it good practice in case a defendant does raise the issue in a multijudge court to get another judge to do it. But the rule does not mandate that result, it allows for it, but as has been pointed out, it does not require it. Some State statutes—Illinois, for example—provide that the judge shall be recused automatically. It is an issue,

and it was thoroughly discussed by the advisory committee. And it was resolved in a permissive rather than a mandatory way.

Mr. FRICK. One of the reasons I brought it up is that I as an attorney, would file a motion in any case to have the judge recuse himself from any further proceedings. If I did that and he refused, I would have to appeal. I wonder if we should not consider incorporating some form of recusal or recusal guidelines in these rules as apparently the other States have?

Professor REMINGTON. You could have a motion—has that been handled satisfactorily?

Would you similarly file a motion to disqualify the judge in every case in which the judge ruled on the pretrial motion?

Mr. FRICK. No, I think that is a little bit of a different situation, when he is ruling on that type of a motion, to suppress. That is one part of the evidence that might be brought into trial and can be brought into trial.

Professor REMINGTON. If it is the evidence that the defendant had narcotics in his pocket, that can be very serious on the issue of whether the defendant was in possession of the narcotics.

Mr. FRICK. I agree with that, but—

Professor REMINGTON. But that is not the problem, but whether the Federal judiciary has been able to handle that problem. And as far as we could tell, they had been. So it is the conclusion that they could have probably adequately handled this problem.

Mr. SMITH. You say, Professor Remington, that some State statutes require it automatically?

Professor REMINGTON. Yes.

Mr. SMITH. Which is what Mr. Frick is suggesting.

Go ahead, Mr. Frick.

Mr. FRICK. That is one item that I did want to bring to the committee's attention. That is basically all that I had—I have to say about it. And I hope that it will be considered in the final drafting of the bill.

Mr. SEMMEL. I would like to go on to rule 32, which also relates to pleas and sentencing, and take up two issues. Basically, the major change in the rule is that it provides for mandatory disclosure of the presentence report, except if disclosure will be harmful to the defendant, or if it will cause harm to other persons. And, of course, the change in this rule is that the practice is now discretionary with the judge, and in fact, in many Federal districts there is no disclosure of the presentence reports to the defendant. This is a rather strange procedure, because we have a system in which the most elaborate procedural safeguards are set up concerning trials involving guilt. However, in fact, guilty pleas account for somewhere near approximately 90 percent of all convictions in Federal cases. The major question in most criminal cases is not whether the defendant is guilty, but in fact whether the defendant shall be sentenced to imprisonment, and if so, how long. And then the judge proceeds to make that determination based on information which has come to him which the defendant may not know of, and which in fact may be wholly erroneous. Of course, the probation officers go out and obtain a variety of information. Some of it may be very accurate. On the other hand, some of it may be gossip, and some of it may be

a malicious neighbor, and some of it may be someone who is under investigation by the police and who is anxious to cooperate, and thinks the police will be more lenient with him if he will supply derogatory information.

In many cases the information in the report is not obtained directly from the informer, that is, obtained by the probation officer who at least has an opportunity to ask some questions and make some judgment of his own. The probation officer gets some information from local police files, and he gets information from the FBI, and various other law enforcement agencies which are based on material in their files, and so the informer never talked to the probation officer.

The result is that undoubtedly there are some cases where defendants are being sentenced based on misinformation. Now, these cases do not surface all the time. For one thing the defendant, if he can never see the report, can never later complain or contend that he was sentenced based on misinformation. There is a New Jersey case which I have cited in my written testimony on page 11, in which the defendant was convicted of forgery and was sentenced to 3 to 5 years, but was sentenced to 7 consecutive terms. After he was in jail for 8 years he was finally able to discover that there was error in the presentence report, and he was thereupon released. Had the information been correct in the first place, he probably would not have served more than approximately a year in prison.

So that the sentencing process, the central area in the whole criminal justice system is operating in somewhat of a vacuum.

There were some arguments which were received—

Mr. SMITH. I assume, Mr. Semmel, you are in favor of the rule as proposed?

Mr. SEMMEL. Yes; I am in favor of the rule. I only make the point—perhaps too strongly, because in the communications received by this committee, particularly from some Federal judges and U.S. attorneys, there was some opposition expressed to this rule, primarily on the theory that sources of information which would dry up and they would refuse to come forward if the defendant had a right to inspect the report.

Mr. SMITH. Under the proposed rule, though, apparently the court still has the right and the discretion to protect those sources if the court feels that this is important.

Mr. SEMMEL. I think that is right. And I think that largely takes care of the problem, assuming the problem existed. The American Bar Association Committee on the Standards on Sentencing looked into this matter, and concluded that there really is no problem, because there are a number of States in which disclosure of the report is mandatory, and there is no evidence that there is any more difficulty in those States in obtaining information than there is in States in which the report is not made available as a general matter.

So that as far as the rule goes, we support it.

There is one further matter, however, which we think should be included in the rule as a matter of constitutional compulsion. And that is the question of an evidentiary hearing on matters which the judge will take into account in sentencing. If the defendant raises a good faith dispute over information in the presentence report, the rule simply provides that the defendant shall have the opportunity to

comment upon the report. It does not provide that he has the right to present any evidence to rebut information in the report. And furthermore, it does not provide that where necessary he might even have the right to cross-examine persons who have given information which is derogatory to him and which may result in a very heavy sentence.

I think in considering the necessity for this the committee should take into account what is probably the attitude of most district judges with respect to the probation reports. Now, I have quoted in my written statement from one judge. He said that, [T]his court has great respect for the probation service in this and other districts, and I believe as a whole they are a group of officers who are extremely objective, very concerned with the welfare of the defendant whom they report on, and are also attendant to their duties as officers of the court. And when the statements are made categorically, as they are made here, the court has no alternative but to accept as true the information furnished the court, which in turn was obtained by the probation officer from the FBI and the Narcotics Bureau."

Now, the last portion of that quotation explains one of the problems that we have here. The probation officer went out and did his job in a proper manner. But all the information that he submitted came to him from the FBI and the Narcotics Bureau's files. Now, when the Ninth Circuit Court of Appeals looked at that confidential file, the court said: "To say that it corroborates the very broad charges contained in the presentence report is an overstatement. Moreover, it contains nothing to show, rather than to assert, that the informant was reliable, or otherwise to verify the serious charge made against Weston. It appears from the record in this case that Weston's house was searched after the arrest and nothing was found, nor was any narcotics found on her person or in her purse."

In this particular case, the court was dealing with a first offender in a narcotics case, and announced an intention to sentence the defendant to 5 years. After looking at this report, the court increased the sentence to 20 years, which ultimately the ninth circuit reversed because of the unreliability of the court report.

Mr. SMITH. Supposing in that case the court had not announced ahead of time what kind of sentence he was going to mete out, would there still be a question about the constitutionality?

Mr. SEMMEL. Yes; I think so. If we compare the situation to two cases where the Supreme Court has held there must be an evidentiary hearing, I think the constitutional issue becomes clear. One is in the parole. And the second is where the law provides for a supplemental sentence over and above the normal sentence for the offense, because of some other conduct unrelated to the offense, such as a multiple offender statute, the sexual psychopath, and so on.

Now, in those situations the Supreme Court has held that due process requires a separate evidentiary hearing to determine if, for example, the defendant has committed the act which leads to his parole revocation. Now, the situations are very similar in a sense, that in each case the defendant is convicted for certain kinds of conduct. But the issue before the court is not only the conduct that he was convicted of, but some other conduct of the defendant. The parole revocation is something which happens after he was convicted but which is going to put him back in jail. The presentence report is something which happened

before the conviction but which will also mean that he will have to go to jail. But in those situations I think that if necessary, where appropriate, and where the issue is bona fide, the defendant should have a right to cross-examine the witnesses against him. Now, in some cases that would not be necessary. In some cases the judge might reject the information in the report and say he will not take it into account in sentencing. In other cases the judge might be satisfied from the defendant's statement, or whatever positive evidence he could present, that the information was false. But I think there will be situations in which the only alternative is to allow the defendant to cross examine the witnesses. In most of the cases this should not present any substantial problem. In the parole revocation case the Supreme Court did indicate that perhaps the right to confront a witness is not absolute if it was necessary to prevent risk of harm to the witness. And if that is the constitutional standard, then I think that would also be appropriate in this case. But those, I think, are rare situations.

Mr. DENNIS. What is the revocation case?

Mr. SEMMEL. It is *Morrissey v. Brewer*, 408 U.S. 671.

Mr. SMITH. The two situations are not exactly identical, of course, because the revocation of parole rests upon an alleged violation of the terms of parole. And, therefore, I certainly agree with the Supreme Court that he ought to have a hearing and confront witnesses. The other situation, the presentence report, is background material for the judge in using discretion in setting a length of sentence which is discretionary with him. So they are not exactly identical. And it may very well be that the provision in the proposed rule that the court shall afford the defendant or his counsel an opportunity to comment will answer your little caveat here, in that it would seem to me that if the defendant and his counsel are not learning what is in a presentence report, and they say, that is not so, that was not me, it was my cousin, any judge, before using that material in making up his mind as to what sentence to give, would afford some kind of evidentiary hearing, I would think, if he was going to use it.

Mr. SEMMEL. If I was confident of that I would not recommend the change. I do not think judges do that.

Mr. SMITH. It takes more time and builds up an already busy schedule.

Mr. SEMMEL. And that is the problem. And I recognize that time is always a problem in these cases.

Mr. DENNIS [now presiding]. Of course, the problem with what you suggest is that you are going to have a second trial almost every time on the question of sentence. And I see the thrust of what you are saying. A good judge would cure it, because a good judge in the case that Mr. Smith suggests, if there was a real question raised of fact, would inform himself. But if you get a rule which says he has got to do it, you are going to have another trial every time there is a sentence. And I do not know whether that is practical or not.

Mr. SEMMEL. If we had all good judges, we would not need so many rules.

Mr. DENNIS. That is right.

Mr. SEMMEL. But there is a wide variety among judges. I think the time problem is the same kind of problem which comes up all the time, that whenever you talk about due process, due process takes time.

Mr. DENNIS. True.

Mr. SEMMEL. I do not think the result will actually be a second trial all the time. I do think the judges sentence based on some informer who says this person who is found with one grain of heroin is a major narcotics dealer, and the defendant says, I am just a poor junkie, I think that defendant should not be sentenced because he is a major narcotics dealer. And if the judge is going to take that into account, then there should be a hearing in that type of situation.

Mr. DENNIS. There is something to what you say. I doubt if you can get the court, though, to say that you have got a constitutional right to due process to an evidentiary hearing prior to sentence. It is not quite the same as a parole revocation or second offense, because there you do have to prove a definite fact, of course, in order to justify what you are doing.

Mr. SEMMEL. It is true that in the sentencing case there is a discretionary element in the judgment. But very often it is apparent that the judge in fact relied on the statements in the presentence report in the sentencing based on that information, just as in a parole revocation the defendant would be sent back to prison based on a specific factual determination. And I think in practice they may be very close, in effect.

Mr. DENNIS. That is an interesting question. Of course, the rule says the defendant could comment. I suppose he would be given a chance to deny it and put forth a lot of arguments. And if he did a good job, of course, a court who was sitting there conscientiously ought to then call in some people. But it is true some of them do and some do not.

Mr. SEMMEL. I think that is probably what happens right now.

Unless there are more questions to that rule, I would like to talk about discovery, rule 16 and to some extent the notice of alibi rule, rule 12.1.

One of the approaches which this rule takes is the so-called parity approach to pretrial discovery, which suggests that if the defendant is going to be given a certain amount of discovery rights against the prosecution, that the prosecution should be given like rights against the defendant. I think this approach ignores somewhat the reality of the resources of the parties in pretrial investigation, as well as raising serious constitutional problems under the fifth and sixth amendments.

Now, when we are dealing with pretrial discovery we have to realize that the prosecution has available to it what is probably the best pretrial discovery device imaginable, which is the grand jury. The Government is free to call witnesses, including potential defense witnesses, before the grand jury, and to question them at length. They can make transcripts so that they will have them available for trial in case the defense witnesses in any way attempt to change their story at trial. The defendant is not even assured that he will have a like benefit of Government witnesses called before the grand jury, because the law does not require the Government to maintain a transcript of grand jury proceedings. And in many cases there are no minutes taken of the grand jury testimony.

In addition, even if they are taken, the Government very often uses hearsay testimony before the grand jury, which is permissible, so that the person who testifies at the grand jury may be the FBI investigating officer, but the witness at the trial is the actual person who observed the conduct, but who has not testified before the grand jury.

In addition to the grand jury, there is available to the Government the vast resources of local law enforcement authorities, the FBI and the other various Federal agencies engaged in law enforcement.

Perhaps some indication of what is available to defendants is the fact that the Criminal Justice Act provides a limit of \$300, except in extraordinary cases, for all pretrial investigation and experts on the part of defendants. And even when we get defendants who are not indigent, the average defendant spends so much of his money in attorney's fees that he has little, if anything, left for investigative resources.

In fact, the advisory committee states that the Government normally has resources adequate to secure much of the evidence for trial. It is really only in exceptional cases that the Government, in the opinion of the advisory committee, needs discovery against the defendant, but the rule here is one of general applicability, which establishes some very extraordinary rights on the part of the Government to discovery. For the first time, discovery against a defendant is unconditional. Until now the Government's discovery against a defendant has been conditioned on the defendant's seeking discovery from the Government.

Second of all, the discovery has been expanded particularly to include names of witnesses the defendant intends to call at the trial. And in addition, the defendant now is obligated to provide any physical evidence and any documentary evidence that he intends to use at trial.

Now, I think Professor Remington earlier, in referring to the constitutionality of this kind of unconditional discovery against defendants, referred to the oft cited opinion of Justice Traynor in the California Supreme Court, *Jones v. Superior Court*. I think, however, that case illustrates just how narrow a situation he was talking about. And the subsequent decision of the California Supreme Court illustrates why we believe that the proposed rule 16 is unconstitutional as applied to defendants. In the *Jones* case the discovery was limited to issues related to impotency, which was a defense in a rape trial, and it was held that the defendant had to provide information relating to that defense.

Now, in that situation there was nothing that the defendant was going to provide the Government which could possibly incriminate him of the rape; all he was going to do was give the necessary information to the Government to prepare for his defense of impotency. There was nothing which the Government could use in its affirmative case.

Later on the California Supreme Court had another case, *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 466 P. 2d 673, 85 Cal. Rptr. 129 (1970), which was an attempt there to obtain the same kind of discovery, including names of witnesses, and documents, for use in a criminal trial. And the California Superior Court rejected the discovery and said that the *Jones* case had to be analyzed in the light of the policy considerations there. That the issue is whether the information supplied by the defendant could be of use to the Government in its case in chief, so that the information supplied by the defendant would then be used by the Government to convict him. And then, they gave several examples of situations in which that might occur. In the case of the defendant in a murder case, if he intends to call a witness to testify that the defendant killed in self-defense, pretrial discovery of

that information could provide the prosecution with an eyewitness to the defendant's homicide. The effect of disclosing the names of witnesses which a defendant intends to call only as a last resort to testify in his defense is to provide the prosecution with testimony which can be used in making its prima facie case. And this just runs right up against the entire principle of the privilege against self-incrimination, that the defendant cannot be forced to provide the prosecution with the evidence to convict him.

Now, one of the problems with this rule, which Professor Lesnick will touch on at slightly greater length, is the fact that the Supreme Court in the rulemaking process does not consider specific situations in the normal case and controversy context and does not purport to be making a constitutional adjudication. Nevertheless, the fact that the Supreme Court has promulgated rules carries with it a certain amount of force. And at least one district court has regarded the rules as having a presumption of constitutionality, and they are not about to overrule the Supreme Court. So that the likelihood is that at least the lower courts are not going to give much attention to these constitutional issues because of the fact that the Supreme Court has promulgated these rules.

The same constitutional problem arises under the sixth amendment. I think it is perhaps even clearer under the sixth amendment, which provides that the defendant shall have the right to have compulsory process for obtaining witnesses in his favor. And this has been held to include, of course, the right to actually have the witnesses testify at trial, and to present other evidence at trial.

Now, rule 16(d) would impinge upon this right, because it would permit the court to refuse to allow the witnesses to testify at trial, other than the defendant, if the defendant failed to provide a list of witnesses prior to trial.

Now, the argument, of course, in favor of the constitutionality of this provision is that since the defendant is going to reveal the information at trial anyway, why there is no harm in having him reveal it before trial. But the sixth amendment simply says that the defendant has the right to present evidence at trial. It does not say he has the right to do it if he cooperates with the prosecution by telling them before trial who the witnesses are going to be, or what his documentary evidence is going to be. So that the same problem here is presented, and again because of a serious constitutional question.

In this regard, I would also bring to your attention the ABA provisions on standards relating to pretrial discovery in criminal cases, which are cited in my memorandum. The ABA at least in their provision on discovery against the defendant starts out by saying, "subject to constitutional limitations." At least that kind of caveat would make it clear that the rules are not intended as an opinion that they are constitutional in all cases as applied to defendants.

Mr. DENNIS. It seems to me I have got a pretty valid point to my notion in a situation where a defendant does not know whether he wants to call a witness or not. And that will depend on how the trial goes. And he may not want to put him on that list. And I can see how that could be a real embarrassment to a defendant in many situations.

Mr. SEMMEL. I am glad you reminded me of that, Congressman. It has been suggested that the defendant could avoid any discovery by simply saying, I will not know until the prosecution's case whom I am going to put on, therefore, I cannot tell you who I intend to call. And the rule would become meaningless.

Mr. DENNIS. That is true.

Mr. SEMMEL. On the other hand, if that kind of answer is not accepted routinely, then you have these constitutional problems.

Mr. DENNIS. I think you may have a real problem there. I do not think I am much impressed by the idea that a trial judge will rule everything is constitutional just because the Supreme Court—that the court is going to sit down and write these rules and pass on them. I think that is too unrealistic.

Mr. SEMMEL. If there is nothing more on that, I have a few comments on discovery by the Government, and particularly on the question that has been raised as the greatest objection by the Justice Department, the names of the government witnesses being supplied to the defendant.

I think it is hard to exaggerate how important this is in the preparation of an adequate defense. And I am sure that you gentlemen, being lawyers, and having participated in trial, are aware of that. It was emphasized to me by the fact that some defense lawyers, including apparently, the people on the advisory committee, were willing to buy what I considered to be a bargain, that in order to get discovery of the names of the Government witnesses, they were willing to provide discovery of the name of defendant's witnesses. I do not think that those two necessarily go hand in hand, because the considerations are much different in terms of investigative ability.

But to place this whole issue in the context of the coercion of witnesses, I think is just placing it out of focus. Certainly, the members of the advisory committee, the defense lawyers there, did not want to know the names of prosecution witnesses so they can go out and suborn perjury, or participate in, or at least through their clients to arrange for the assassination of these witnesses. They had perfectly legitimate reasons for wanting that information.

Now, this really comes down to a question of whether we should adopt the rule of general applicability, and then provide, as the rule does, for exceptions. And the rule clearly allows the trial judge to take whatever action is necessary to protect a witness, including denial of the name of the witness to the defendant. And I think the members of the Judicial Conference who spoke today, have really covered this in quite detail.

It just seems to me from my experience that normally most witnesses in Federal trials are not coerced. There are, of course, cases of coercion, and cases of assassination and subornation of perjury. But that is an exception to the general rule. And it should be treated as such.

My own experience was in Illinois where we had a rule requiring the pretrial disclosure of the names of the prosecution witnesses. I am not aware that this has caused any special problem. All the horror stories that the Justice Department told us were in a context where there was no required disclosure of the names of witnesses. I suppose the people who are going to assassinate witnesses have no difficulty in finding out who they are. And I think that the people who require

disclosure, the average defendant, and particularly the defendants of limited means, who cannot engage in substantial investigation, are not the people who are engaged in this kind of coercive conduct. And we should not draw a rule designed to take care of a small number of cases involving organized crime in narcotics and ignore that there are a whole other variety of cases in which this is simply not a problem.

Mr. DENNIS. Would they not ordinarily know who the witnesses are, as a matter of fact?

Mr. SEMMEL. It varies, depending on the nature of the crime. And particularly when you get into conspiracy cases, the defendant may not know who the witnesses are. So it varies very much, depending on the nature of the crime.

For example, if the crime is one which a defendant denies having committed, then the issue is identification, such as, say, Federal bank robbery cases. The defendant is unlikely to have any information as to who will identify him in a case of that kind.

Mr. FRICK. I might add also, that a defendant would have particular difficulty in identifying potential witnesses if in fact he were innocent of the crime of which he was charged. And we must, of course, presume that to be the case.

Mr. SEMMEL. If rule 16 with respect to names of the Government witnesses goes into effect, then I would urge you to also make a minor amendment to the Jencks Act in this context. At present the Jencks Act prohibits compulsory disclosure of pretrial statements of witnesses. And it follows that the statement does not have to be disclosed until the witness has actually testified at the trial.

The result of that is that when the Government literally carries out the terms of the Jencks Act, the whole trial has to stop, and the defense then has to read the statement, and then prepare for cross examination. And this sometimes takes as long as half a day, or even more, depending on how lengthy the statement is, and the like.

There are really two reasons why Congress passed the Jencks Act. One was to eliminate fishing expeditions into the Government's file. And that is taken care of by the terms of the act. The only thing that has to be revealed under the terms of the act is a statement which is verbatim or substantially verbatim statement adopted by the witness. The other reason was some fear along the lines that we discussed, that harm would come to witnesses if their names were revealed in the course of revealing their statements. But, of course, that does not apply at all, once their names are revealed. And I think that in practice most U.S. attorneys are giving the statement prior to trial. It just simply does not make sense to hold them back. Sometimes they may not furnish statements early in the proceedings, but certainly in the week or 10 days before the trial they will release them. And this amendment would simply permit the court to require the disclosure of those statements at an earlier date. The court, if the Jencks Act were amended to allow pre-trial delivery of statements, could still refuse, for good cause shown by the Government, to allow the release of the statement.

There is one other matter with respect to discovery by the prosecution. And that is, the scope of the duty of the prosecutor in obtaining the information which he is required to disclose. Now, for some reason, which is not explained in the committee notes, there

is a difference in the scope of the obligation, depending upon what is to be disclosed. In dealing with statements of the defendant, and examinations and tests, in those areas the prosecutor is required to disclose material not only which he may have, but which is obtainable by the exercise of due diligence. That is over in rule 16(a)(1)(A) and 16(a)(1)(D). Discovery must be made of material which is within the possession, custody and control of the Government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the Government. So in effect, the attorney simply cannot look at his own file which may have been handed to him and say, this is all I have. On the other hand, for some unexplained reason, when it comes to prior convictions of either defendant or witnesses for the prosecution, 16(a)(1)(B) and (E) simply talk in terms of information within the knowledge of the attorney for the Government.

Now, what is surprising about this is that one of the simplest things that the Government can do is to get the prior conviction records. They are readily available from the FBI. We have been informed by the FBI that they provide something like 40,000 criminal records a day to law enforcement officials around the country. They will not, and indeed are prohibited by statute, from making this available to private attorneys. And, of course, these conviction records are vital to cross-examination. There is literally no way defendant can get this information other than from governmental sources. And so unless there is some explanation which is not offered in the notes, we would strongly urge that the language of the sections regarding prior convictions of the defendant and Government witnesses be amended to conform to the sections dealing with discovery of tangible objects, examinations, and tests, and statements of the defendant.

Mr. FRICK. If I may interrupt a minute, I had a particular problem with this sort of situation in Maryland not long ago in the trial of a murder case. I had an 18-year-old defendant who was accused of felony murder. I obtained from the prosecutor a list of the Government witnesses, and reviewed that list with my cocounsel. And he said, I need these two guys A and B who were at the top of the list and who were listed as witnesses to the murders. And I went back to the prosecutor, and I said, "Tom, do you have any prior convictions on these guys?"

And he said, "Why do you ask?"

And I said, "Because my cocounsel knows that these guys have been dealing in drugs and narcotics out here in Prince Georges County for 25 years. Do you have anything on prior convictions?"

"No, I do not," he said, "nothing in my file."

And I said, "Would you call the FBI and see if they have anything?"

And he said, "No."

"Would you call the police department and see if they have anything?"

And he said, "No."

And so I called the FBI and asked for the record of their convictions. And they said, "No."

And I called the Prince Georges County Police Department and asked for any record they had, and they said, "No."

And I ended up summoning the chief of police of Prince Georges County on the date of a trial, who handed me a paper saying, "I will

produce whatever record the court requires with regard to these eye witnesses."

And I also had to go to the District of Columbia Superior Court and file there under the reciprocal subpoena statute a motion to require a subpoena from Maryland to be honored in the District of Columbia, so I could subpoena the FBI records from the FBI building.

It was unbelievable to me that the prosecutor can merely pick up the phone and call the FBI, and give the FBI the number, and obtain the criminal records that he needs to impeach a witness at trial, and I cannot. And I think that this rule could be easily changed so that I would have the same facility as the prosecutor in obtaining those records.

Mr. SEMMEL. On the same subject, as one final point, on discovery by the Government, the Advisory Committee note states that it determined not to codify the *Brady* rule which requires disclosure of exculpatory material. We think disclosure of exculpatory information should be included in rule 16 because the law is presently vague as to the same issue that I have just been discussing, what effort the prosecutor has to make to obtain exculpatory material. It seems to me that a reasonable approach is that which is found presently in the proposed 16(a) (A) and (D), rules requiring the prosecutor to use due diligence at least in inquiring of other governmental agencies. That obligation is not clear from the present state of the cases. And it could be clarified by simply including in the rule provisions for disclosure of exculpatory material under the same standard that is provided for statements of defendants and documentary and tangible evidence.

If there are no further questions on discovery, I would like to make one closing comment on the issue of summons and arrest.

We fully support the provisions of the rules as adopted by the Supreme Court regarding the use of summons in place of arrest, except where some showing of necessity is made. I think the issues have been fully explored. Again, I think the Government is taking the exceptional case and urging that the normal rule be adopted to meet the exceptional case rather than what the Advisory Committee has done, which is to adopt a rule which follows the norm and then provides exceptions to take care of the Government interest in this situation.

One time that came up my own experience was in representing a client who was arrested on a charge of conspiracy to harbor a deserter. She was the mother of five children, and she was arrested when her two pre-school children were at home. Before she left she called her babysitter, who was not home. She did not know that her babysitter had also been arrested as an indicted coconspirator. She was actually forced to leave her children unattended for some time. The story had a happy ending in the sense that the charges were dismissed without trial. But these are the kinds of things that could be easily avoided through the summons process. I do not think that that woman was about to flee if she had been notified by the Government to appear in court rather than having the FBI come to arrest her in the middle of the day.

I appreciate the time that you have given me. And now, Professor Lesnick will address you on the other issues.

[The prepared statement of Herbert Semmel follows:]

STATEMENT ON BEHALF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE WASHINGTON COUNCIL OF LAWYERS ON THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, PREPARED BY HERBERT SEMMELL, CENTER FOR LAW AND SOCIAL POLICY

We appreciate the invitation of the Subcommittee to submit comments and suggestions concerning the proposed amendments to the Federal Rules of Criminal Procedure submitted to the Congress by the Chief Justice on April 22, 1974. The National Association of Criminal Defense Lawyers is a nationwide organization of 1,250 lawyers actively engaged in the practice of criminal law. The Washington Council of Lawyers is a voluntary association of lawyers in the District of Columbia in private practice, in government, and in the law schools. The Council has more than 400 active members.

After a careful review of the proposed amendments, we conclude that with some changes suggested below, the amendments should be approved, leaving to judicial interpretation and the rule-making process the task of clarification and further improvement of minor deficiencies. The remarks below are addressed to the major issues raised by the proposed amendments. Although not included in the detailed remarks, for the reasons set forth by the Advisory Committee we also fully support the provisions of Rule 4 which provide for the use of summons instead of arrest unless a valid reason for an arrest has been demonstrated. We find the fears of the Justice Department with respect to this change to be illusory and believe that good sense of the United States Judges and Magistrates will protect the just interest of the government in situations where an arrest in the first instance is necessary.

The issues addressed below are as follows:

Rule 11—The regulation of the plea bargaining process is equitable and will facilitate disposition of cases without trial, p. 4.

Rule 11—The provisions on advice to the defendant should be made more specific so as to meet good practice standards and constitutional requirements, p. 6.

Rule 32—Disclosure of pre-sentence reports to the defense is necessary to ensure accuracy and to avoid injustice and may be constitutionally required, p. 9.

Rule 32—The defense should be given an evidentiary hearing if contested factual issues arise which are relevant to sentencing, p. 14.

Rule 16—The relationship of pre-trial discovery to investigative resources, p. 20.

Rule 16. The discovery rules as amended fall short of the minimum standards of the American Bar Association with respect to disclosure by the government:

A. Limitations imposed by the Jencks Act, p. 25

B. The affirmative duty of the United States Attorney to obtain information subject to discovery, p. 27

C. Failure to require disclosure of exculpatory material, p. 30.

Rule 16—The provisions for compulsory unconditional disclosure by defendants impinge upon rights protected under the Fifth and Sixth Amendments, p. 31.

Discovery by defendants and the privilege against self-incrimination, p. 32.

The Sixth Amendment right of defendants to present witnesses in their own behalf would be infringed by the denial of right to call witnesses and present physical and documentary evidence if a defendant declined to comply with compulsory discovery requirements, p. 37.

RULE II—PLEAS

The regulation of the plea bargaining process is equitable and will facilitate disposition of cases without trial

The major change effected by Rule 11 is a salutary one—it recognizes the reality of plea bargaining and regulates the process. The major change in current practice is the provision allowing the defendant to withdraw the plea if the court rejects the bargain and notifies the defendant it intends to impose a sentence less favorable to the defendant than contemplated by the agreement. Rule 11 (e) (4).

We are surprised that some federal judges are opposed to this change, some apparently on the ground that the proposed rule would involve the court in the plea bargaining process. Proposed Rule 11(e)(1) expressly excludes the court from any participation in the plea bargaining discussions. The only "participa-

tion" by the judge in the process is the judge's decision to accept or reject the bargain. But judges in most federal districts, where the prosecution may recommend a sentence, have been doing precisely the same thing for many years. The only change here is to make the process fair to the defendant by allowing him to withdraw his plea if the bargain is rejected by the judge. Such a provision seems overwhelmingly fair on its face. The reality of plea bargaining is such that a defendant may sometime find it to his advantage to plead guilty even if he asserts his innocence. In *North Carolina v. Alford*, 400 U.S. 25 (1970), the Supreme Court held there was no denial of due process in accepting a guilty plea from a defendant who nevertheless asserted his innocence. The Court recognized that the evidence against a defendant may appear to be so overwhelming that a guilty plea is in his best interests despite his asserted innocence. The same considerations apply on the side of the government. Difficulties of proof may mean that a plea to a lesser included offense or in exchange for a relatively light sentence may be the best obtainable and in the public interest.

The ability of the criminal justice system to function requires that plea bargaining be encouraged and the number of trials needed be kept to a minimum. Problems of delay are severe in many federal districts. Plea bargaining encourages the disposition of cases without trial, is indeed essential to that process. The practice of binding the defendant to a plea but permitting a judge to reject the consideration and impose a stiffer sentence discourages a defendant from pleading. It is no secret that certain federal judges are regarded by defense counsel and prosecution alike as maximum sentencers, resulting in a reluctance of defense counsel to recommend guilty pleas even if a reasonable sentencing recommendation is made by the government. The proposed Rule 11 will do away with such impediments to the disposition of cases by allowing the withdrawal of the plea if the bargain is rejected by the judge. It will ensure simple fairness to defendants who now play Russian roulette in many districts when they plead guilty, never knowing if the bargain will be accepted.

Other judges have expressed opposition to Rule 11(e) on somewhat opposing grounds, that it will remove too much of the sentencing power from judges because the pressure of court calendars will coerce judges into accepting the bargain. This is indeed a feeble objection by a federal judge who wields such awesome power in the sentencing process. The judge should have no difficulty in rejecting a bargain he regards as unwise or unwarranted. It is hardly appropriate to abandon a procedure that will facilitate plea agreements and that is so fundamentally fair because a judge will feel a little pressure from his calendar. Indeed, some second thoughts on the part of the judges might be desirable before rejecting a plea agreement which the prosecution and defense attorneys, the persons best acquainted with the case, find equitable and in the best interests of the public and the defendant.

The provisions on advice to the defendant should be made more specific so as to meet good practice standards and constitutional requirements

Rule 11(c) which governs advice to a defendant before acceptance of a plea should be amended to specify that the defendant be notified of his recognized constitutional rights and that his guilty plea waives such rights. Such specificity will ensure protection to defendants and at the same time reduce requests for appellate and collateral review of guilty pleas.

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Supreme Court held that a defendant must be advised of his Fifth Amendment privilege against self-incrimination, his right to a jury trial, and his right to confront witnesses against him. 395 U.S. at 243. The court explained the importance of a full statement of rights before accepting a guilty plea:

"What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequences. When the judge discharges that function, he leaves a record adequate for any review that may later be sought (citation omitted) and forestalls the spin-off of collateral proceedings that seek to probe murky memories." 395 U.S. at 243-44.

The proposed Rule 11(c) does not give the defendant the solicitude the Court required in *Boykin* and does not create a record which bars serious collateral attack. In place of a specific instruction as to a right to a jury trial, or to confront witnesses, the proposed Rule only requires the defendant be advised "there will not be a further trial of any kind" (Rule 11(c)(4)). In place of an ex-

planation of his right to plead not guilty and yet not be compelled to testify at trial, the defendant is merely told that he has a right to plead not guilty and persist in that plea (Rule 11(c))(3)). Perhaps trained lawyers know such rights exist but no such assumption is warranted in the case of defendants in criminal cases. If one is unaware of a right to jury trial, how does one knowingly waive that right if he is told only that he will not have a trial of any kind. If the defendant has never heard of his right to remain silent, how can he learn of its existence by telling him that he has a right to plead not guilty.

The Rule also omits one other fundamental right about which defendants should be advised at the time of a plea, even if so advised earlier, the right to counsel. *U.S. v. LaVallee*, 330 F.2d 303 (2d Cir.) cert. den. 377 U.S. 998 (1964).

Why these fundamental rights are not specified is somewhat of a mystery. Most federal judges specify all these rights and more before accepting a plea. The entire process usually takes about five minutes, particularly if the defense counsel has discussed these matters with his client in advance of the hearings, as defense counsel should. The Federal Rules of Criminal Procedure should not invite judges to do less than current practice, nor should they sanction records which will leave in doubt whether the defendant understood his rights and made an informed, voluntary decision to plead guilty.

Therefore, Rule 11(c) should be amended to require that the defendant also understand his right to counsel if not represented, including right to appointment of counsel for indigent defendants, right to jury trial, right to confront and cross-examine the witnesses against him, and his Fifth Amendment privilege against self-incrimination.

RULE 32—SENTENCING AND JUDGMENT

The proposed Amendment to Rule 32 grants to defendants the right to inspect and comment upon the pre-sentence report, except where the court finds that disclosure would result in harm to any person, violate confidentiality, or disrupt a program of rehabilitation of the defendant. The amendment would bring Rule 32 into substantial conformity with the ABA Standards Relating to Sentencing Alternatives and Procedures § 4.4 (1967). It reflects the practice currently followed by some District Judges, probably only a minority of the District Court bench. We support the proposed amendment as necessary to protect against the injustice of sentencing based upon possibly inaccurate, incomplete, or wholly false information. However, we submit that if the defendant raises a substantial factual issue on any allegations in the report likely to affect the sentence, he should be entitled to a hearing on the issue, not merely the right to comment now contained in Rule 32 (c) (3).

Disclosure of presentence reports to the defense is necessary to ensure accuracy and to avoid injustice and may be constitutionally required.

Our Constitution wisely requires the most stringent procedural safeguards before an accused can be convicted of a crime. But in the vast majority of cases these procedures have little impact because the case is disposed of by a plea of guilty. It is estimated that over ninety percent of all convictions are the result of guilty pleas. Advisory Committee Notes to Rule 11, Committee Print, p. 31. In almost every case the real issue is the sentence, not guilt or innocence. Yet, this most crucial determination is made in the majority of cases based on information contained in a pre-sentence report which is never shown to the defense, information which may be accurate but may also be the gossip of malicious neighbors, the imagination of a suspect eager to cooperate with law enforcement officials, or the unverified statement of faceless informers.

Although many probation officers make some attempts to verify information, the amount of time which can be devoted to a particular case is necessarily small. Probation officers lack the power to cross-examine their informants and often fear that close questioning will frighten off sources of "information". Much of the information they report to the court is second hand, from the records of local police departments or the FBI, and the probation officer has never even spoken to the informant. In case of confidential informants, the probation officer does not even know the informant's name. Yet the District Judges tend to regard the pre-sentence reports as highly reliable. For example, in *United States v. Weston*, 449 F.2d 626 (9th Cir. 1971), the District Judge increased the sentence from five to twenty years on the basis of reports by the FBI and the Narcotics Bureau that defendant was a major narcotics dealer. The sentencing judge commented:

"Well, as I commented, Mr. Kempton, in the companion case, the Jackson case, this Court has great respect for the probation service in this and other districts, and I believe as a whole they are a group of officers who are extremely objective, very concerned with the welfare of the defendants, who they report upon, and also are attentive to their duties as officers of the Court.

"And when statements are made categorically as they are made here, the Court has no alternative, in the face of contrary factual information, rather than simply a vehement denial, but to accept as true the information furnished the Court which in turn was obtained by the probation officer from the officers of the Federal Bureau of Narcotics and Dangerous Drugs."

When the Court of Appeals for the Ninth Circuit reviewed the confidential information submitted to support the allegation that defendant was a major narcotics dealer, it concluded:

"To say that it corroborates the very broad charges contained in the presentence report is an over-statement. Moreover, it contains nothing to show, rather than to assert, that the informant was reliable, or otherwise to verify the very serious charge made against Weston. It appears in the record in this case that Weston's house was searched after her arrest and nothing was found, nor was any narcotic found on her person or in her purse." (448 F. 2d at 630).

The Weston case is a rare example where sentencing upon vague allegations surfaces in a reported opinion. But experienced attorneys recognize the attitude of the District Judge toward the probation report as typical. It seems almost incredible that our system permits people to be imprisoned for years without being given the information upon which the sentencing judge relies. In *State v. Pohlabel*, 61 N.J. Super. 242, 160 A. 2d 647 (App. Div. 1960), the defendant was sentenced to seven consecutive terms of three to five years for forgery, based on misinformation in the pre-sentence report. Because there was no requirement for disclosure of the report, it was only after eight years of imprisonment that the defendant learned of the misinformation in the report, and an additional year of litigation was required before he was freed.

The arguments against disclosure of pre-sentence reports are based on unsubstantiated fears, generally that sources of information will dry up if the report is made available to the defendant. This argument has been exposed by the ABA Advisory Committee in its Comments on the Standards Relating to Sentencing Alternatives and Procedures (1967), § 4.4(b), p. 219-20, and in the Standard itself. The Advisory Committee found that the "dry up" argument "falters on two grounds".

"The first is based on the experience of those members of the Committee who have lived under a system in which disclosure is routine, and is supplemented by the Committee's examination of sample reports produced under such a system. The conclusion is that there is little factual basis for the fear that information will become unavailable if the report is disclosed. The quality and value of a pre-sentence report will turn to an infinitely greater extent on the skill of the probation service and the availability of adequate supporting facilities than it will on whether its contents remain a secret. This view is further supported by the experience of the Legal Aid Agency in the District of Columbia. . . .

"The second reason is more fundamental. One of the basic values underlying the manner in which the guilt phase of a criminal case proceeds is that the defendant is entitled to know the details of the charges against him and is entitled to an opportunity to respond. It is believed that this value is subverted by a system which does not require disclosure of the information contained in the pre-sentence report.

"Perhaps an example can best make the point. Assume two statutes, one defining the offense of robbery and providing a ten-year maximum term and the other defining the offense of armed robbery and providing a twenty-year maximum. It would be unthinkable in this country to permit the defendant to be convicted of robbery under the first statute and yet sentenced to twenty years under the second because of a report submitted to the court by a probation officer which disclosed for the first time the fact that the defendant was armed. Defense of this result on the ground that the sources of such information would dry up if the defendant were told about it would be dismissed out of hand.

"But contrast a jurisdiction which takes a different approach. Assume here that the legislature has defined only one offense of robbery and has remitted to the sentencing court the job of grading the offender within the range of a twenty year maximum term. In this context we seem quite prepared to admit the propriety of the same twenty year term on the same ground, namely that the

defendant was armed. Yet this time we make no requirement that the defendant be informed that the judge may act on this basis."

The ABA Advisory Committee also rejected the argument that disclosure will unduly delay the proceedings. It noted that it is the obligation of the defense attorney "to assure that the sentence is based on adequate and accurate information", *Id.* at p. 222, and that disclosure of the pre-sentencing report facilitates this process rather than delays it. Further, the Advisory Committee said

"Nor can the majority of the Advisory Committee accept the argument that non-disclosure should follow because the proceedings will be delayed by disclosure. In the first place, such an argument is a difficult one to make in the face of a conclusion that basic fairness requires disclosure; it completely avoids the fundamental relevance of justice to the defendant as a factor in determining procedural requirements. In the second place, the majority believes that this too is a straw man which both is not likely to find support in the facts of many cases and which in most can be avoided by the presentence conference proposed by section 4.5, *infra.*" *Ibid.*

We fully support the principle of disclosure of presentence reports. As the ABA Advisory Committee concluded, "disclosure of the report ought to be required because such a practice will increase the fairness of the system, because it will increase the appearance of fairness, and because it will assure a greater degree of accuracy in the sentencing determination."

The defense should be given an evidentiary hearing if contested factual issues arise which are relevant to sentencing

The proposed amendment, 32(c) (3) (A) affords the defense the opportunity to "comment" upon the pre-sentence report. The amendment would more fully achieve its purpose of assuring accuracy of the information in the report by specifying that the defense shall have the right to rebut derogatory information, including the power to subpoena witnesses and cross-examine them.

The cases of *U.S. v. Weston* and *State v. Pohlman*, *supra* pp. 10-12 are examples of the necessity for such safeguards. Another example is *Collins v. Buchkoc*, 493 F.2d 343 (1974), where the defendant, convicted of rape, was sentenced to life imprisonment based upon the pre-sentence report and a separate confidential accusation of rape by another alleged victim which the defendant denied. The defendant was never given the opportunity to rebut the allegations of other rapes. The judge said he was

"entirely satisfied that this defendant is possessed of an abnormal sex urge . . . that it was uncontrollable . . . that he did far more than that [the convicted offense], . . . not only with the girl who is the complainant in this case, but I am satisfied with other girls."

On appeal the Sixth Circuit reversed, holding that the reliability and truthfulness of the information considered in sentencing is a matter of fundamental concern. While recognizing the broad discretion of the sentencing judges as to the nature and source of information utilized by him in sentencing, the court found there are nevertheless limitations imposed by the requirements of due process, including the opportunity to rebut derogatory information demonstrably relied upon by the sentencing judge when such information can in fact be shown to have been materially false. Other cases in the Courts of Appeal for the First, Third, Fourth, Fifth, and Ninth Circuits are cited in the decision supporting the right of defendant to a hearing on factual matters in dispute which are material to the sentence.

The cases have not required and we do not propose a full scale post conviction trial following strict rules of evidence. See *Williams v. New York*, 337 U.S. 241 (1949). What is necessary is that the defendant have the opportunity to present evidence in the manner called for under the circumstances of the case. As revealed in the quote from the District Judge in *U.S. v. Weston*, *supra*, p. 10, the mere denial by defendant of a charge in a pre-sentence report will not carry much weight with the judge. In some cases the defendant can offer direct evidence disproving derogatory information. In other situations, where defendant denies a charge, the only method of demonstrating its falsity is to cross-examine the person making the charge.

Issues in the sentencing process collateral to the crime for which defendant was committed are very much the same as those present when parole or probation is to be revoked. In each case, the defendant is to be imprisoned at least in part for conduct for which he has never been convicted. In such circumstances the Supreme Court has enunciated specific procedural rights required by due

process. In *Morrissey v. Brewer* 408 U.S. 471 (1972), involving parole revocation, the Court held:

"Our task is limited to deciding the minimum requirements of due process. They include

- "(a) written notice of the claimed violations of parole,
- "(b) disclosure to parolee of evidence against him,
- "(c) opportunity to be heard in person and present witnesses and documentary evidence,

"(d) the right to confront and cross examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)."

The Supreme Court has held that where an additional sentence may be imposed because of factual matters beyond the scope of the conviction—such as multiple offenses or sexual psychopathology—the defendant is entitled to an evidentiary hearing. *Specht v. Patterson*, 386 U.S. 605 (1967). There is little reason to distinguish this situation from one in which a defendant is sentenced to a maximum term instead of receiving probation or a minimum term because of information relied upon by the sentencing judge without opportunity for effective rebuttal by the defendant. Yet the Rules of Criminal Procedure, even after the proposed amendments, would seem to permit imposition of years of imprisonment under the same circumstances as the multiple offender laws without any requirement for a hearing.

There is legislative precedent for an evidentiary hearing in the special sentencing provisions of both the Organized Crime Control Act of 1970, 18 U.S.C. § 3575(b), and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 849(b) which provide:

"In connection with the hearing [on sentence], the defendant and the United States shall be entitled to assistance of counsel, compulsory process and cross-examination of such witnesses as appear at the hearing."

These provisions may fall short of the due process requirements of *Morrissey v. Brewer*, *supra*, if they were interpreted to permit a court to consider information from a person who avoided service or failed to respond to a subpoena. Nevertheless, they indicate the kind of provision which Rule 32(c) should contain.

The same arguments are likely to appear against an evidentiary hearing as were advanced against disclosure of the presentence report, in particular, an added reluctance of informants to provide information if they are subject to later questioning under oath. But perhaps this reluctance has its advantages as well as its drawbacks. We are dealing with information which may send a person to prison for many years. Should we not encourage caution on the part of informants by reminding them that they may have to justify their remarks? The Supreme Court has already held that the informer's privilege must give way if revelation of his identity is "essential to a fair determination of a cause." *Roviaro v. U.S.*, 353 U.S. 53 (1957). And *Morrissey v. Brewer*, 408 U.S. 471 (1972) indicates that due process requires an evidentiary hearing on disputed fact issues. At the same time, the Court there recognized an exception if confrontation would subject an informant to risk of harm.

What we are ultimately faced with is the problem so familiar in criminal procedure of protection of individual liberty without unduly hampering enforcement of the law. We are dealing with the most fundamental issue in most criminal cases, liberty, probation, or imprisonment, and the length of imprisonment. Individuals may not be deprived of their liberty on the unsworn testimony of informants who know they will never be called to a day of reckoning before the courts if the information they offer is untrue or inaccurate.

PROPOSED CHANGES IN THE DISCOVERY RULES (RULE 12.1 AND RULE 16)

The relationship of pre-trial discovery to investigative resources

Unprecedented changes in the proposed amendments would require defendants to supply information to the prosecution in a scope beyond that found in either federal or state practice and would require such discovery regardless of whether the defendant has sought discovery from the prosecution. Such changes are founded on a misconception of the investigative resources available to the prosecution and defense.

The proposed amendments for the first time require the defendants to provide the government with the names and addresses of defense witnesses, a requirement of general applicability not found in state practice. In addition, the

right of the government to obtain physical evidence and documents to be produced at trial has been made absolute. Formerly, virtually all discovery on the part of defendants has been conditioned on their first requesting discovery of the prosecution. To a large extent, broad and unconditional discovery has been imposed upon defendants supposedly to achieve "parity" of discovery between prosecution and defense. Since the prosecution will now be required to supply defendants with the names and addresses of witnesses, so the argument goes, a like requirement should be imposed on defendants.

Such an argument is an abstraction divorced from reality. It compares elephants and peanuts and finds them equal. The government has available to it the most extensive investigative resources imaginable—the FBI, specialized federal law enforcement agencies such as the Narcotics Bureau and the Internal Revenue Service, and all state and local police organizations. Every conceivable kind of expert is available from government agencies, plus the services of specialized crime experts and laboratory facilities of the FBI. In addition, the government has available to it the best pre-trial discovery device that any lawyer could ever wish for—the grand jury. The United States attorney may call any potential defense witness before the grand jury and question him at length. Neither the witness nor the defendant is permitted to have counsel in the jury room. A transcript of the testimony of the defense witness is prepared and available for cross-examination. On the other hand, prosecution witnesses need not be called before the grand jury; government investigators often appear instead and testify to the results of their investigation. Even if a potential prosecution witness is called, there is no requirement that a record of his testimony be made and often no record is made. This practice prevents defendants from using the transcript of the grand jury proceedings for cross-examination at trial.

In contrast, most defendants have almost no investigative resources available to them. For indigent defendants, the Criminal Justice Act provides only \$150 for both investigative and expert assistance without prior approval and a maximum of \$300 with prior court approval. 18 U.S.C. §3006A(2) and (3). Expenditures in excess of \$300 can be authorized only for services of "unusual character or duration" and these require the additional approval of the chief judge of the Circuit. Approvals of amounts in excess of \$300 are rare in practice.

Similarly, defendants of modest, limited means generally have no funds available for investigation, their resources having been exhausted in retaining counsel. It is only the wealthy defendant or the rare case of a defendant who attracts widespread public sympathy and support who may actually have funds to conduct an adequate investigation, and even these well-heeled defendants cannot begin to match the resources of the government. Even when investigators are employed by defendants, or the attorney himself investigates, their effectiveness is markedly less than that of government counterparts. Records of businesses, banks and myriad government agencies are opened to the prosecution but are regularly denied defense investigators. Many witnesses feel a much greater compulsion to talk when a law enforcement officer flashes his badge than when an investigator for a private party seeks out information.

The issue then is how this imbalance of resources can be corrected. In the criminal rules we are not dealing with private parties but with the public interest in ensuring that justice is achieved. The oft-repeated admonition "the responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict" (ABA Code of Professional Responsibility, EC 7-13) is honored in the breach by the proposed amendments if the price the defendant must pay is that he must supply the prosecution with information which may incriminate him, see *infra*.

There is also an intensely practical reason for not supplying names of defense witnesses which is illustrated by reports from attorneys as to police investigatory techniques in the states requiring disclosure of alibi witnesses. A police officer approaches an alibi witness and the following dialogue occurs:

POLICEMAN: "We have John Jones on a charge of robbery on June 25. He says you were with him that night."

ALIBI WITNESS: "Oh no, I never saw him that night."

Even the lawyer trained in semantics might respond as the witness did, since the witness views an acknowledgement of association with defendant as implicating the witness in the crime. Is this not the natural reaction of the average person? Later, at trial, after the alibi witness testifies that he was with defendant far from the scene of the crime, the prosecution calls the police officer who is

asked of his conversation with the alibi witness and answers (truthfully) that the witness told him he had not seen the defendant on the night of the crime. What this illustrates, of course, is that police investigation is by its nature coercive and threatening to the average citizen. Requiring the defense to expose each of its witnesses increases the possibility that justice will be distorted.

The Advisory Committee Notes to the proposed amendments acknowledges that "the government normally has resources adequate to secure much of the evidence for trial", but finds that unspecified situations might require disclosure by defendants "in the interest of effective and fair criminal justice administration". In essence, the Advisory Committee found disclosure to be necessary in only exceptional cases but promulgated a rule of general applicability. A much more careful approach, tailored to the actual needs of the government is necessary particularly where serious questions are raised of invasion of the constitutional rights of defendants under the proposed amendments.

The discovery rules as amended fall short of the minimum standards of the American Bar Association with respect to disclosure by the Government (rule 16(a))

A. Limitations imposed by the Jencks Act

To a substantial extent, the departures in the amendments from the ABA minimum standards are required by the limitations on pre-trial disclosure of statements of government witnesses found in the Jencks Act, 18 U.S.C.A. § 3500 (Supp. 1973). The interrelationship between the Jencks Act and other pre-trial discovery requires that Congress amend the Jencks Act to coordinate with the proposed amendments to the Criminal Rules.

The Jencks Act prohibits compulsory disclosure of statements of prospective government witnesses or their grand jury testimony until after the witness has testified on direct examination at trial. When the statement is delivered after the direct examination, the defense must be given time to study it and to prepare cross examination based on the statement. If the statement is in any way lengthy, this may often entail a delay of several hours. In which the jury, the judge, and the prosecution are immobilized. The resulting delays have caused many U.S. Attorneys to voluntarily turn over Jencks statements prior to the beginning of trial. However, some U.S. Attorneys still withhold them until after direct examination.

The American Bar Association standards provide for pretrial discovery of the "relevant written or reported statements" of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial. Likewise, a grand jury minutes containing testimony of such persons is also subject to pre-trial discovery. ABA Standards, §§ 2.1(a) (i) and (iii).

The primary purpose of the Jencks Act, as revealed by the legislative history, S. Rep. No. 981 on S. 2377, 85th Cong., 1st Sess. (1957), was to prevent wholesale fishing expeditions into the prosecution's files, a result Congress thought might follow from the decision of the Supreme Court in *Jencks v. U.S.*, 353 U.S. 657 (1957). Requiring pre-trial disclosure of "Jencks Act statements" (only substantially verbatim statements or written statements of the witness) does not in any way infringe upon this objective of Congress. In addition, Rule 16(a) (2) under the proposed amendments would specifically provide against discovery of "reports, memoranda, or other internal government documents made by the attorney for the government or other government agents in connection with the investigation or prosecution of the case."

Suppression of statements of government witnesses has sometimes been supported by a desire to protect the witnesses from coercion or intimidation. Since the amendments call for the government to reveal the names and addresses of its witnesses (Rules 16(a) (1) (D)), suppression of statements of witnesses no longer will serve to protect their identity. If there is a reasonable possibility of such coercion, the government may obtain relief from discovery under amended Rule 16(d) (1). Similarly, it has been asserted that in some cases where the government must call a hostile witness, pre-trial disclosure of his statement may make it easier for the witness to tailor his testimony so that it will assist the defendant without directly contradicting an earlier statement. Such cases are rare, and upon a reasonable showing the court may deny discovery under amended Rule 16(d) (1).

In sum, an amendment of the Jencks Act to permit pre-trial discovery of substantially verbatim statements of prospective prosecution witnesses would bring the proposed amended rules into conformity with the ABA minimum standards

and would not impinge upon the protection which the Jencks Act sought to give to prosecutorial internal files.

B. The affirmative duty of the United State attorney to obtain information subject to discovery

Rule 16 also falls to meet the ABA standards with respect to disclosure by the government of prior criminal records of the defendant and prospective government witnesses. The principal shortcoming is the failure to require the prosecutor to take reasonable steps to obtain such information.

The ABA Standards, Section 2.1(d), require the prosecutor to disclose—

"material and information in the possession or control of members of his staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to his office."

Amended Rules 16(a)(1)(A) and (D) contain substantially equivalent language requiring disclosure of statements of the defendant and reports of physical or mental examinations or scientific experiments. These rules use the language requiring disclosure of information "within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government." However, Rules 16(a)(1)(B) and (E) use different language when dealing with the prior felony convictions of witnesses or prior criminal record of the defendant. Rule 16(a)(1)(B) requires discovery of the defendant's prior criminal record "as is then available to the attorney for the federal government". Rule 16(a)(1)(E) requires discovery of prior felony convictions of prosecution witnesses "which is within the knowledge of the attorney for the government". The Advisory Committee notes do not explain the different language between subsections (B) and (E) and subsections (A) and (D). The result of the difference is significant, however.

The language of subsections (B) and (E) apparently would not require the U.S. Attorneys to request a full report of prior criminal convictions from the FBI, although this is readily available with a minimum of effort. It is virtually impossible for defense counsel to obtain information as to prior convictions, particularly as to prosecution witnesses, except from the prosecution. The prior conviction may have occurred in any of the jurisdictions of the United States. We have been informed by the FBI that they provide governmental agencies with criminal records of 40,000 persons daily, but will not make such information available to defense counsel. We see no reason why the rule should not require the government to use "exercise of due diligence" to discover any prior convictions of the defendant or a witness.

Furthermore, we believe that the discovery of criminal activity by prosecution witnesses should not be limited to prior convictions for felonies, but should include all convictions, including misdemeanors. In *Davis v. Alaska*, 94 S.Ct. 1105 (1974), the Supreme Court held that a defendant may have a constitutional right under the Sixth Amendment's confrontation clause to impeach a witness by evidence of prior conviction, even a juvenile offense, if, under the facts of a case, the criminal conduct of a witness would indicate a propensity to cooperate with the prosecution in exchange for leniency or a desire to avoid suspicion. The defendant then has a right to introduce evidence of the existence of such conviction. This right is meaningless, however, unless the information is available to the defendant. Often, the only source of such information is the government itself. Accordingly, the word "felony" should be deleted from Rule 16(a)(1)(E).

C. Failure to require disclosure of exculpatory material

Section 2.1(c) of the ABA standards requires the prosecution to "disclose to defense counsel any material or information within his possession or control which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor." The proposed amendments to the Criminal Rules do not contain any such provision. The Advisory Committee Notes to Rule 16 state that the committee "decided not to codify the *Brady* rule" (*Brady v. Maryland*, 373 U.S. 83 (1963)). Codification is necessary, however, because there is no clear cut guideline as to what effort, if any, the prosecutor must make to obtain exculpatory information not contained in his own files. At present, there is no clear cut requirement on the part of prosecutors to obtain exculpatory material in the hands of the FBI, police, or other investigatory agencies, even when available on request. See cases summarized in *Hall, Kamisar, LaFave & Israel*, *Modern Criminal Procedure* (1969) 1060-66. Prosecutors

often make no attempt to comply with the *Brady* rule on exculpatory material beyond examining their personal files. Information which might establish innocence might thus be denied to the court, resulting in serious miscarriages of justice. *Cf. Giles v. Maryland*, 386 U.S. 66 (1967).

To clarify the obligation of the prosecutor in such cases, an additional subsection F should be added to proposed Rule 16(a) (1), as follows:

"(F) Upon request of a defendant, the government shall disclose to the defendant any material or information which tends to negate the guilt of the accused as to the offense charged or would tend to reduce his punishment therefor which is within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known to the attorney for the government."

The provisions for compulsory unconditional disclosure by defendants (rules 12.1(e) and 16(b)) impinge upon rights protected under the fifth and sixth Amendments

The provisions for compulsory discovery by defendants raise grave questions of constitutionality under the Fifth Amendment privilege against self-incrimination and the Sixth Amendment right of a defendant to call witnesses in his own behalf. Under the rules presently in effect, the government has no unconditional right of discovery against a defendant, although the defendant can be compelled to give certain "non-testimonial assistance" to the government, such as handwriting samples, voice samples, fingerprints, and appearance in line-ups. Otherwise, discovery by the government against the defendant presently comes about only if the defendant requests discovery from the government. Even in such cases, discovery is limited to either medical or scientific reports or other papers or physical objects which the defendant intends to produce at the trial.

A. *Discovery by defendants and the privilege against self-incrimination.*— Even the limited conditional discovery presently available against defendants raises substantial constitutional questions. Justices Black and Douglas dissented in 1966 from the promulgation of the discovery rules presently in effect, in part because of their concern over the constitutional questions under the Fifth Amendment. 39 F.R.D. 272, 276. Professor Charles Alan Wright, himself a member of the Standing Committee on Rules of Practice and Procedure, has described the current limited reciprocal rule as operating "near the border of the Fifth Amendment". 1 *Wright, Federal Practice and Procedure (Criminal)* § 255. Wright concluded that it would have been extremely difficult to reconcile unconditional discovery by the government with the privilege against self-incrimination. *Wright, supra* § 256.

The amendments to the rules would require precisely such unconditional discovery by defendants. The amended Rule 16(b) would require the defendant to disclose to the government before trial

(1) any writing or other tangible object which the defendant intends to introduce at trial,

(2) the names and addresses of witnesses the defendant intends to call at the trial (also required by Rule 12.1(b) in case of alibi defense), and

(3) any results or reports of physical or mental examinations and scientific tests which the defendant intends to introduce as evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial.

Under the proposed amendments, the government has an unconditional right to such information even if the defendant has never requested any discovery from the government.

The argument that such disclosure may be required without violating the privilege against self-incrimination rests on the notion that the defendant will be called upon to disclose only that which he will disclose in any case at the trial. See *Williams v. Florida*, 399 U.S. 78 (1970). Professor Wright explains the weakness of this argument as follows:

"But this appealing argument may not be a complete answer. Defendant will shortly reveal those things he intends to produce only if the government has first made a case against him sufficient to survive a motion for directed verdict. Unless the government can prove a case sufficient to go to the jury, a defendant need prove nothing. There is nothing in Rule 16, as amended, which prevents the government from using material which it has obtained by discovery as part of its own case-in-chief and thus it may be that there will be cases where the government is able to make a *prima facie* case only with the aid of evidence it has obtained by discovery." (*Wright, supra*, § 256)

A study in the Harvard Law Review reached the conclusion that "the policies adherent in the Fifth Amendment privilege against self-incrimination indicate that the prosecutorial discovery provisions of the proposed amendment to Rule 16 are unconstitutional and should be rejected." Note, *Prosecutorial Discovery under Proposed Rule 16*, 85 Harv. L. Rev. 994 (1972).

Williams v. Florida, *supra*, is often cited as authority for unconditional pre-trial discovery against defendants of anything the defendant will reveal at trial. See, e.g., *Wright, supra*, § 256 (Supp. 1973); ABA Standards, Supp. 1970, pp. 4-6. However, the *Williams* case dealt only with a limited notice-of-alibi situation, not generally discovery against defendants.¹ The pre-trial revelation of an alibi or alibi witness will be much less likely to risk incrimination of a defendant than the general discovery required by the proposed amendments to Rule 16(b).

The distinction between discovery of non-incriminating defenses and general discovery against defendants, in light of the Fifth Amendment, was highlighted by two decisions of the California Supreme Court. In the widely-cited *Jones v. Superior Court*, 58 Cal. 2d 56, 372 P. 2d 919, 22 Cal. Rptr. 879 (1962), the California Supreme Court required disclosure by the defendants of information which related to the defense of impotency in a rape case. In a later case, the same court limited the holding of the *Jones* case, noting that details of the impotency defense could not possibly incriminate the defendant. *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 466 P. 2d 673, 85 Cal. Rptr. 129, 133 (1970). Unconditional discovery of witnesses and documents to be produced at trial by a defendant was rejected, the court cogently explaining the reasons as follows (2 Cal. 3d at 326-27, 85 Cal. Rptr. at 133):

"Thus, if we analyze *Jones* in the light of the policy considerations discussed in *Schader*, it is apparent that the principal element in determining whether a particular demand for discovery should be allowed is not simply whether the information sought pertains to an 'affirmative defense,' or whether defendant intends to introduce or rely upon the evidence at trial, but whether disclosure thereof conceivably might lighten the prosecution's burden of proving its case in chief. Although the prosecution should not be completely barred from pretrial discovery, defendant must be given the same right as an ordinary witness to show that disclosure of particular information could incriminate him. . . ."

"For example, if a defendant in a murder case intended to call witness A to testify that defendant killed in self-defense, pretrial disclosure of that information could provide the prosecution with its sole eyewitness to defendant's homicide. Similarly, consider the effect of disclosing the name or expected testimony of witness B, whom defendant intends to call only as a 'last resort' to testify that defendant only committed a lesser-included offense. . . ."

The proposed amendment to Rule 16(b) sweeps aside this fundamental distinction as to whether the defendant's pretrial disclosure will assist the prosecution in presenting its case in chief. Although the Supreme Court in approving rules of procedure presumably does not intend to offer any views as to constitutional issues which may be raised by application of the rules, Rule 16(b) is likely to be regarded by the lower courts as an indication that a literal enforcement is constitutional. There is, in fact, some support for an inference of constitutionality inherent in promulgation of a rule of procedure. See *Hanna v. Plumer*, 380 U.S. 460, 471 (1965). Not surprisingly, the District Courts are likely to regard the rules as carrying "a strong presumption" of constitutionality. See *Helms v. Richmond-Petersburg Turnpike Authority*, 52 F.R.D. 530, 531 (E.D.Va. 1971). The proposed Rule 16(b) does not even contain the caveat found in each section of the ABA Standards relating to discovery against defendants—"subject to constitutional limitations". Such a caveat should be included in any rule concerning disclosure by defendants which Congress approves.

B. The sixth amendment right of defendants to present witnesses in their own behalf would be infringed by the denial of right to call witnesses and present physical and documentary evidence if a defendant declined to comply with compulsory discovery requirements (rules 12.1(e) and 16(d)).—The Sixth amendment to the Constitution guarantees defendants the right "to have compulsory

¹The majority opinion in *Williams* would sanction the disclosure requirements of Rule 12.1(b) in notice of alibi situations. The court expressly left open the question as to whether a court may refuse to allow defense alibi witnesses to testify if the defendant declines to comply with a discovery order. 399 U.S. at 83, fn. 14. For the reasons noted above, we believe Rule 12.1(b) requiring disclosure of the names of alibi witnesses is unwise as a matter of policy. In addition, we find the dissenting opinions in the *Williams* case, 399 U.S. at 106 to be more persuasive in their analysis of the Fifth Amendment's application to discovery of witnesses in alibi cases.

process for obtaining witnesses in his favor". This right to compulsory process includes the right to actually have the witness testify at trial. In *Washington v. Texas*, 388 U.S. 14 (1967), the Supreme Court held (388 U.S. at 19):

"The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as the accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense, this right is a fundamental element of due process of law."

The amendment to Rule 16(d) would impinge on this right to present witnesses. If the defendant refuses to submit a list of witnesses prior to trial, he may be denied the right to call witnesses at the trial. If he refuses to assist the prosecution by furnishing it with documents and physical evidence prior to trial, he may be barred from offering such items as evidence at the trial. It is not enough to say the choice is that of the defendant since he may call the witness or introduce the evidence if he makes pre-trial disclosure to the prosecution. The Constitution contains no provision affording a right to call witnesses only if the defendant cooperates with the prosecution, even to the point of incriminating himself. The right to a defense is fundamental to due process and may not be so conditioned. In *Chambers v. Mississippi*, 93 S.Ct. 1038 (1973) the Court found this right so fundamental as to strike down on constitutional grounds a long established rule of evidence recognized in most states. An exception to the hearsay rule is recognized for "statements against interest", subject to two well-recognized limitations—the declarant must be unavailable for trial and the statement cannot be solely against penal interest. In *Chambers*, exclusion of a hearsay statement was held unconstitutional as an infringement on the right to present witnesses in defense, even though the statement was against penal interest and the declarant had actually testified at trial.

The Supreme Court has never decided whether a court may refuse to allow defense witnesses to testify if the defendant declines to comply with a discovery order. Even in the limited context of a notice-of-alibi rule, the Supreme Court expressly reserved judgment on the question in *Williams v. Florida*, 399 U.S. 78, 83, fn. 14 (1970).

The Court now seems to have offered in Rule 16(d) a *sub silentio* advisory opinion, in contravention of its own long recognized prohibition on such advisory opinions. The proper vehicle for resolution of such issues is an actual case or controversy as provided in Article III of the Constitution, with adequate opportunity for briefs, argument, and full consideration by the court. The fears of Mr. Justice Black as to misuse of the rule-making power appear to have been well taken. See dissent of Mr. Justice Black to the 1966 amendments to the Federal Rules of Criminal Procedure, 39 F.R.D. 272 (1966).

Mr. SMITH. Professor Lesnick.

Prof. LESNICK. My name is Howard Lesnick. I am a professor of law at the University of Pennsylvania, where I have been a member of the faculty since 1960. Before that I served as a law clerk to Mr. Justice John M. Harlan of the Supreme Court of the United States. I teach a course and a seminar on the legal profession, and have been a member of the Board of Trustees of the Center for Law and Social Policy, since its founding 5 years ago.

I guess I am speaking to you under a triple inhibition. First, I realize that I am the last of a long list of witnesses. Second, I am here to change the subject, as it were, from the criminal rules amendments specifically, to the rulemaking process itself.

Third, along those lines, I could not help noticing Mr. Dennis' reference earlier today to at least one of the issues, which I want to raise, as a law school question; being somebody who works at a law school, perhaps I am a little sensitive about that. And I guess I am here to try to persuade you to transfer the issue from one that is talked about in the building where I work to one that is talked about in the

building where you work. In other words, I think it is a question for Congress to consider primarily.

I think that the core of the issue is this. The writing of rules is the writing of legislation. When I say that I do not in any way mean to suggest that it is inappropriate for courts to make rules, but to speak to the procedure that is used in connection with it. It is the writing of legislation, because you are dealing with general rules for the future, and because as we have seen today and in other places, you are dealing not simply with considerations of judicial administration, calendar congestion, the trial process and the like, but a lot of hotly disputed issues of social policy.

And I think, to speak very generally, the model of the way a court operates, and the model of the way a legislature operates are very different. Courts are supposed to be independent and insulated; legislatures are supposed to be accountable to the public and open. And here we have a procedure which is a legislative procedure devised and carried out by judges. And it falls between two stools. I suppose, essentially, that is our position. And neither as the model of the adjudication of cases, which, of course, is the judicial model, nor as a legislative model, does it, in our judgment, pass muster.

And when I say that, we are not here to say that it is an indefensible, outrageous procedure. It is not. It has been worked out responsibly over the years. And we think that the experience that the committee has had in the case of the rules of evidence, and now in the case of the criminal rules, has demonstrated serious deficiencies in the rulemaking procedure, and perhaps more important, demonstrated really enormous gaps in public knowledge and in congressional knowledge about the way that procedure operates. The legislature, as everyone knows, almost 20 years ago authorized the Judicial Conference to carry on a continuous study of the rulemaking process and recommend rules to the court. It did not at all time, of course, prescribe the procedures to be followed. We now have had two experiences—we are in the process of a second—in the legislature which have had enormously salutary effects. But they also carry within them the seeds of devitalizing the rulemaking process itself. The Advisory Committee on the Criminal Rules has indefinitely postponed the deadline for comments on the habeas corpus rule, a preliminary draft of which came out over a year ago, awaiting the legislative reaction to these rules. And it is obvious, I suppose, to everyone that 90 days is simply an inadequate period of time to consider seriously in the legislature proposed rules. At the same time, if Congress is routinely going to do what it did this time, forestall them for a year, or do what it did in the case of the rules of evidence and take over the job itself it is perfectly clear that the rulemaking process is going to be sapped of all its vitality.

So we are at an ideal point, I submit, to look at the process itself, to see whether reforms are necessary, to devise an appropriate manner of making the reforms, and then to let the rulemaking process go on as before; that is, without serious continued congressional oversight.

Now, in our judgment, there are four areas of the rulemaking process which require serious examination and rethinking. And we are here in part today to urge this committee in some appropriate way to examine the rulemaking process and to consider these questions.

The four areas that we have perceived—and I want to emphasize seriously that these are tentative perceptions on our part, and even more tentative proposals for reform, because so little is known about the process, and what is known is so informally known—but the four areas which we have identified on the basis of what we do know are, first, the lack of a sufficiently widespread input by all segments of the legal profession, and by the public, into the rule drafting process.

Related to that, the relative unrepresentativeness of the Advisory Committee, and the excessive centralization of the appointing authority under it.

The third is the inappropriateness, as we see it, of utilization of the Supreme Court as the official promulgator of the rules.

And the fourth is the present lack of a meaningful mode of congressional reviews which does not undercut the rulemaking process itself.

And if I can very briefly speak to each of these, I have a statement which was submitted which develops these more fully.

Mr. SMITH. And that will be made part of the record.

Prof. LESNICK. Thank you.

As I said, Congress, when it delegated to the Judicial Conference the continuous oversight and ruledrafting and recommendation function, did not address the question of procedure. Nor has the conference itself seen fit to publish rules of procedure. What we know about the rulemaking procedures we know from articles and speeches of judges who have been active in it, or, by, for example, a statement like that submitted to the subcommittee by Judge Lumbard this morning.

Were the conference to publish rules of procedure, it would have two useful consequences. First of all, it would enhance public awareness of the procedure and participation. More important, it would require the conference to face specifically the question whether its procedures are presently adequate to obtain a broad range of public input. It is perfectly clear that they were intended to do that. There are references by judges and others, some of which I cited.

But I think it is also clear that the rules of evidence hearings disclosed important insufficiencies. Five thousand copies of the preliminary draft, of course, is an impressive figure. It is symptomatic that I do not know and I do not know of anyone outside the process who knows just what that mailing list is. And I think it is clearly not enough simply to mail out copies to bar associations, judges, and to publish it in advance sheets. No attempt is made to seek out actively, so far as I know, comments of groups who may have a vital interest in the area. There is no attempt made to notify lay groups at all, even though they may have a vital interest in certain areas. And the reaction of the medical community 2 years ago to the proposals dealing with doctor-patient privilege are an example of that.

No public hearings are held. This was proposed quite some time ago by Professor Moore of Yale who was involved in the rulemaking process for many years. And I think public hearings, as this hearing, are enormously important. There is just a world of difference between having a committee member or reporter or whoever, go through a pile of letters, and having the actual members of the committee sit there, and hear live bodies make a submission. And I need not make that point in any detail to this subcommittee. Anyone who has served on or appeared before such a committee knows that.

In addition to that, often major changes are made after the final tentative draft is circulated. And again, consider the legislative model: this Congress, of course, meets in executive session, and Congressmen meet privately. But nearly every step in the legislative process is published—subcommittee report, committee report, debate, votes, every change can be identified, and in most cases identified very quickly. And no disclosure is made within the advisory committee, within the standing committee, or within the judicial conference. An important question is whether there is any division. We have learned either from Justice Douglas once or twice, or from testimony before Congress, that there were hotly divided issues. And a number of people have testified today that there was resubmission, revision of thinking. But that was never flagged. And again, I think any lawyer knows that it is the identification of controversy that tends to bring interested parties into the arena. If anything, the rulemaking process discourages that. It engenders an air of blandness from the very beginning the advisory committee notes, they will refer to a dispute, but say simply we have adopted another view. But the general impression is one of simply perfecting the workings of a basically mechanical system, and it tends to engender the idea that there is not very much going on that is controversial. And indeed, as we all know, there is a lot going on that is controversial.

Now, related to that is the composition of the advisory committee. And this is a very sensitive area for many reasons. But I think it is important that it be thought about and examined, because it has just grown without legislative oversight, and without, so far as I know, any act of public inquiry from Congress.

When I said earlier that the advisory committees are not broadly representative, I did not mean to overstate that. They are obviously drawn from leading members of the bar who are able and hard-working lawyers, and they are representative of a segment of opinion. But as the legal process gets more complex, and as more and more segments of the lay community come to need representatives, it has become clear to us that it is not enough simply to choose between a broad range of established, successful lawyers. It has been pointed out that the average age of the advisory committee which drafted the rules of evidence was 65. The groups in society which are less able to call on lawyers, the poor, racial minorities are obviously going to be less represented, unless a deliberate attempt is made to overcome that. And I think, if I may say so, that it simply is not enough to put a prestigious criminal defense lawyer, or a well-known plaintiffs' lawyer in stockholders suits on one or another of these committees. As the issues become more and more reflective of the many points of view in our society, that should be built into the point in process too. And that is particularly true now when they operate as they do so much in private. It would be true in any case.

The second problem is even more fundamental, and even more difficult to broach. And that is that the role of the Chief Justice in this process is, as I say in my statement, and I think it is true, without parallel in the lawmaking system. And I say this in criticism of no particular Chief Justice. As you know, it has been true of at least the last two, and probably beyond that. The Chief Justice appoints the members of the advisory committee, he appoints the members of the

standing committee, he appoints the reporters, he sits at some of the meetings of the advisory committee, and, of course, he presides over the Judicial Conference. And he then presides over the Supreme Court when he promulgates the rules. I think it is true that there is not in this building any similar single official with so pervasive a role in the legislative process.

Now, I can say as an earnest of the fact that I make this point as an institutional one, that I have no idea what either the current Chief Justice's or his predecessors' contribution was to particular rules. But long ago, I suppose, when the Rules Committee of the House was given the authority it now has, it decided that there was a limit to the role that a single official should play in the legislative process. I am speaking of the Speaker of the House. And, of course, the Chief Justice even less so, I think, should play such a central role, because he is primarily a judge who sits on cases.

Now, this is an enormously difficult problem to deal with. It is very closely related to the notion of who should be given the rulemaking function. And I would like to speak to that.

Now, Congressman Dennis, I cannot disagree in one sense with the statement you made a few minutes ago, that everybody knows that Justice Douglas is right when he says the Supreme Court does not really look at the rules. I cannot imagine that you are wrong about that. Of course, members of the Judicial Conference have continued to say to the contrary, including Judge Lumbard this morning. The Supreme Court at least once, in *Hanna v. Plumer*, which I quote on page 13 of my statement, said specifically that when a situation is covered by one of the rules.

* * * the Court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

And I think it probably is not a sufficient answer to say that Justice Douglas is right, even if some people say he was wrong, because the Supreme Court did promulgate them, and then naturally, many people, not all, are going to feel somewhat committed to them as a result.

District judges, I think—and Judge Merhige did say there was a strong presumption of constitutionality but it certainly is a serious consideration that if the Supreme Court is not in fact passing on them, it is not a good thing, for it looks as if they are. What we have—and remember, Chief Justice Warren in the passage I referred to spoke about Congress, too—what we have here is so many agencies of the Government, and private citizens, passing in inappropriate ways on constitutional issues, that when we are all done, we have a feeling that everybody has OK'd it, whereas actually no one has OK'd it. The advisory committees, the reporters say that the fifth amendment is this, and we think it is that. And the Judicial Conference similarly. The Supreme Court similarly. None of those decisions were made in the way we are all used to seeing judges decide constitutional questions, on the record, with briefs, with arguments, with an opinion. They are all offhand. And they may be the most sound opinions we can think of, or they may not be. But that is not the way judges are supposed to decide.

Mr. DENNIS. You get that when somebody challenges the rule; do you not?

Prof. LESNICK. You do. But then, you get a rule—again, I have the Chief Justice's rule—which it is said has already been OK'd by the reporter, the advisory committee, and the courts, and by Congress. And the inaction of Congress is used as a buttress to support that idea. Now, when Congress really acts, when Congress enacts a bill, it holds hearings, and it issues a report, and it states dissenting views, and it has debate, amendments, and a vote. And the presumption of constitutionality attaches to that. But we have here is four or five steps along the line, no one of which gives you what you want. Now, when you say later you get it, sure, you get it. But you get it fighting an uphill battle.

Mr. DENNIS. Of course, one way to reach what you are saying—and I am sure that is not what you are really arguing for—would be just to put it all back in Congress and have no rules unless we legislate.

Prof. LESNICK. I am not arguing for it.

Mr. DENNIS. I know you are not. But that would be a way to get what you are talking about with hearings and all the rest of it. That is what we did in the rules of evidence, of course.

Prof. LESNICK. In this one case. And that certainly would be throwing out the baby with the bath. Justice Douglas and Justice Black proposed that the Judicial Conference be given officially what they say is the unofficial situation now, and that the Enabling Act be amended to say that the rules are promulgated by them and come over here directly since the Supreme Court is out of it. That is one way of dealing with it. Another way of dealing with it would be for Congress to pass a statute setting up an independent commission with all three branches, the Chief Justice, the President, the Speaker, and the President of the Senate, nominating members, which would draft and promulgate rules which would come over to the legislature. And there are probably other methods that I have not thought of. Any of those methods have the advantage of removing the Supreme Court from this role, and leaving the Supreme Court in its historic role of dealing with constitutionality, unencumbered by some prior commitment which has a dubious basis in fact.

Mr. DENNIS. Would you have laymen on that commission?

Prof. LESNICK. Well, that is really a central question. I think that there probably is a very strongly held feeling, certainly within the judiciary, and perhaps within the bar as well, that when you are dealing with rules of procedure, only lawyers should be involved, just as there are only lawyers on the Judiciary Committees of the Congress. And I think that view probably should be given weight. But I think that fact is probably one reason why it is of even greater importance to seek out lay views in some consultative way. One would need to give more thought to the distinction between the membership of the committee and its advisory structure. But I think that even though laymen properly should not be on the committee, in area where lay groups have a predictable interest, some structure should be built in by which they could have input at the drafting stage.

Mr. FRICK. I would certainly suggest that you have a few ex-convicts on it, they seem to be pretty well up on what the rules are and what changes are needed.

Prof. LESNICK. I am not speaking of the criminal rules alone.

Finally, congressional review. As I said earlier, the ad hoc responses in this connection, and in connection with the rules of evidence, are things which I think are very healthy. But as the old saying goes, we cannot go on meeting this way. And I think that either Congress is going to have to quietly drop its series of ad hoc reviews—and I think serious structural problems have been uncovered, and controversial rules are going to continue to come along—or it is going to have to devise a method by which it can keep the reviewing authority there and keep it viable without rendering ineffective the viability of the rulemaking process.

Now, Judge Maris had a couple of proposals in the Senate in connection with the Rules of Evidence Act. You may remember that the House passed a provision saying that the court may promulgate future amendments to the rules of evidence, but they would not be effective for 180 days, and could be vetoed by either House. He objects to the single House veto. And I have to agree with him. He points out that you could provide for each House by a resolution of that House, to continually forestall the effective date for definite periods of time, while they looked at the matter. That certainly seems a practical notion. I think this committee could address itself to what lawyers call the substance-procedure dichotomy. The Enabling Act has been given a very broad construction by the Judicial Conference and the Supreme Court itself. And many have argued and advised that if the rule-making process were kept down a little more—the issue of privilege is an example of that—and if rules of procedure that do affect substantive rights were not dealt with in the rules, then Congress could justify letting the rulemaking process go on as it has been. And that, I think, is certainly something that needs to be thought about and ought to be dealt with. It is something that the Judicial Conference could deal with itself.

If, as I suggested, it spelled out rules of procedure which would confront this question finally, and they did it satisfactorily, perhaps the matter could stop there. But I think that Congress would always want to reserve to itself some acceptable method, particularly if a lesser body than the Supreme Court is to promulgate the rules, of having an input. And I think a 6-month delay which could be, I repeat, triggered by a single House, coupled with an invigoration of the substance-procedure dichotomy, might be a solution. But I emphasize that I do not really know, I do not have a solution. I am here arguing that the problems need attention. And not just in a law school.

[The prepared statement of Prof. Howard Lesnick follows:]

STATEMENT OF PROF. HOWARD LESNICK

My name is Howard Lesnick. I am a Professor of Law at the University of Pennsylvania, where I have been a member of the Faculty since 1960. Before that I served as law clerk to Mr. Justice John M. Harlan of the Supreme Court of the U.S. I teach a course and a seminar on the Legal Profession, and have been a member of the Board of Trustees of the Center for Law and Social Policy, Inc., since its founding five years ago.

I appreciate the opportunity to testify before this Subcommittee. I want to use that opportunity to speak, not to the substance of the Criminal Rules amendments now before you but to the rule-making process itself.

Recent experience has made it abundantly clear that it is timely for the Congress to re-examine the processes and procedures by which the Federal Rules are

drafted and promulgated. The congressional preemption of the Rules of Evidence after their promulgation by the Supreme Court, followed by the year-long postponement of the effectiveness of amendments to the Rules of Criminal Procedure, have not only provided meaningful congressional review of the issues raised by those Rules, but have effectively drawn in question the continued vitality of the rule-making process itself. The Advisory Committee on the Criminal Rules, for example, has apparently postponed indefinitely the deadline for comments on a published Preliminary Draft of further amendments to the Criminal Rules and of a new set of Rules governing habeas corpus actions for state prisoners and collateral attacks on federal convictions under 28 U.S.C. Section 2255. The provision in the Rules Enabling Act for a 90-day postponement of the effectiveness of Rules promulgated by the Supreme Court was never intended to occasion full legislative review of each set of Rules amendments. As recent legislative experience makes clear, ninety days is too short a time (see the statement of Senator Ervin (120 Cong. Rec. S11965 (July 9, 1974)), and routine legislative reconsideration of the issues resolved by the draftsmen of proposed Rules would inevitably sap the vitality of the drafting process as we know it. Unless we are to return to the era of legislative prescription of procedural rules, full-scale legislative review of court-promulgated rules cannot be the norm; yet recent events seem on the verge of making it so.

It would be difficult to find a supporter of a return to the days of legislative rule-making. The reform of federal procedure which followed the enactment of the Rules Enabling Act is justly lauded as a major achievement of our legal system, in which the legislature, the judiciary and the bar justly share pride. But it seems equally plain that Congress should not simply turn its back on the experience of its inquiry into the Rules of Evidence, an experience which disclosed major deficiencies in rule-making procedures and important gaps in Congressional and public knowledge about the way in which the system has actually worked. If the rule-making process is to be revalidated, it must be as a result of reforms in the procedure by which that process operates. Thus, by focusing on that procedure, and not merely on the issues raised by particular Rule amendments laid before Congress, this Committee can make it possible for the process once again to operate as originally intended.

Four areas of the rule-making process require serious examination and rethinking. They are:

(1) The lack of sufficiently widespread input, by all aspects of the legal profession and by the public itself, as a result of the procedures by which the Judicial Conference and the Advisory Committees reporting to it draft rules and recommend them to the Supreme Court;

(2) the relative unrepresentativeness of the Advisory Committees, and the excessive centralization of the authority to appoint members of Judicial Conference committees;

(3) the inappropriateness of utilization of the Supreme Court as the official promulgator of the Rules;

(4) the lack of meaningful mode of Congressional review which does not undermine the rule-making process itself.

Before speaking briefly to each of these, I want to note at the outset the tentativeness of the perceptions, and particularly the proposals for change, set out in this statement. One of the great difficulties with the rule-making process is its fluidity and relative invisibility, and it is very likely that simply by conducting full-scale hearings on the question this Committee will contribute enormously to the fund of knowledge about the process, with the likely results that other problems may come to light and new proposals for improvement may surface.

(1) *Judicial Conference procedures should be made more open, and should be published.*—In authorizing the Judicial Conference to "carry on a continuous study of the operation and effect" of the Rules of Procedure and to recommend changes in them to the Supreme Court (28 U.S.C. § 331), the Congress said nothing about the procedure by which the Conference should carry out the task. Nor has the Conference itself seen fit to publish rules of procedure, or even a more informal statement of its procedures. What we know about the method by which Rules are drafted and considered comes largely from speeches or articles by judges active in the work of the Conference. See, for example, Judge Maris' article, *Federal Procedural Rule-making: The Program of the Judicial Conference*, 37 A.B.A.J. 772 (1961).

Were the Conference to publish its procedures it would not simply enhance the awareness of interested persons and thereby facilitate their participation; it would be required to face explicitly the question whether its procedures presently provide adequate means for obtaining a broad range of input. There is certainly no doubt that such was the intention of those judges active in the origins of the present system,¹ but, as became clear in connection with the Rules of Evidence, it is insufficient simply to have a preliminary draft published in the West Reporter advance sheets and to mail copies to Bar Associations and various public officials. No attempt is made to seek out actively the comments of groups with a vital interest in the issue. No attempt is made to consult lay groups at all, even though they are often importantly affected by procedural rules. No public hearings are held, as was proposed by a long-term participant in the rule-making process, Professor J. W. Moore (1A Moore, *Federal Practice* ¶ 0.511-512); yet, as a legislative committee is surely aware, a submission that is entirely written is simply not equivalent—whether to the author or the recipient—to one which may be supplemented, however briefly, in a face-to-face encounter.²

There is no assurance that, if major changes are to be made in a draft after its circulation, there will be further disclosure and opportunity for comment: the Rules of Evidence were extensively rewritten in private, prior to their final consideration by the Court. Finally, no disclosure is made of any division within the Advisory Committee, Standing Committee or Conference itself, which might alert interested lawyers and legislators that matters of controversy are being resolved. It is only rare fortuitous disclosures—such as Mr. Justice Douglas' passing reference to adoption of certain Criminal Rules amendments "by the narrowest majority," 383 U.S. at 1093 (1966)—that bring the reality of policy formulation to wider consciousness.³

It should be borne always in mind that the process of promulgating Rules is essentially a legislative one. To say that is not to assert that it must be carried out only by the Congress; the point is rather that, just as the Legislature has set up procedures designed to encourage the citizenry to make its views known and to make it more likely for Congressmen to become aware of varying inputs, so judges and advisors to judges, when acting in a legislation-writing capacity, should use procedures similarly democratic in their conception. It is dangerously misleading to say that "rule-making is a matter for research, study, and judicious analysis and critiques, not one for the public platform." Clark, *Two Decades of the Federal Civil Rules*, 48 Colum. L. Rev. 435, 444 n. 45 (1958). Research and study are surely essential; they are surely not all that is involved. In fact, it is exactly the notion that the rule-making process is simply the technical perfection of housekeeping matters, of legitimate interest only to the Judiciary and a small group of lawyers advising it, that is the central vice in the present rule-making apparatus.

In this connection, it is instructive to recall the requirement of the Freedom of Information Act that each agency shall "state and currently publish * * * for the guidance of the public": "Statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available; * * *" 5 U.S.C. § 552(a) (1) (B).

The Administrative Procedure Act exempts "the courts of the United States" from its requirements (§ 551(1) (B)). While the members of the Judicial Conference are judges, it seems clear that in exercising the functions conferred under § 331 of the Judicial Code, they are not acting as a court. The point here, however, is not whether there is a legal basis for a claim of non-compliance with the APA; even if those particular requirements were not thought appropriate surely some analogous modes of insuring optimal public visibility and participation in the rule-drafting process should be a part of that process.

¹ See, for example, Judge Biggs' statement at a panel discussion, chaired by Mr. Justice Clark, before the Section of Judicial Administration of the American Bar Association at the time that Congress was considering the Judicial Conference proposal to delegate to it the rule-drafting functions it has now. *The Rulemaking Function and the Judicial Conference of the U.S.*, 21 F.R.D. 117, 215 (1957).

² The written submission is rendered even less effective because one is discouraged from reviewing the comments submitted by others, and flatly denied access to critical documents, such as the Reporter's memoranda, which would illuminate the issues addressed by the Advisory Committee.

³ There were reported to be deep divisions within the Advisory Committee on several sections of the Rules of Evidence, which only came to light because of Congressional intervention. Did the Judicial Conference, and the Supreme Court, learn of the existence of such strong controversy when those bodies considered the Rules?

(2) *The composition of the Advisory Committees should be more representative, and the appropriateness of the extreme centralization of authority in the Chief Justice should be examined.*—Greater care needs to be taken that the lawyers appointed to the Advisory Committees reflect a true cross-section of those segments of the public and of the Bar likely to be affected by the Rules in the relevant areas. While there is absolutely no doubt that the Advisory Committees have been staffed by extremely talented, dedicated, and high-minded lawyers, the question is a more fundamental one, that of representativeness. See the discussion of the particular instance of the Advisory Committee on the Rules of Evidence, in the hearings on the Rules of Evidence before the Subcommittee of the House Judiciary Committee on Reform of Federal Criminal Laws, *Hearings*, 93d Cong., 1st Sess. at 178-79 (1973) (statement of Charles R. Halpern and George T. Frampton, Jr.). Especially if it is thought necessary to confine committee membership to members of the Bar, it is essential that genuine priority be given to the need to assure that relatively under-represented groups—the poor, racial and ethnic minorities, women, children, and those generally less able to call upon the services of the legal profession—be included in some meaningful way. Congress has, in many other areas of legal regulation, enacted into law general guidelines expressing its wish that selections made by the Executive Branch or by administrative officials be so representative, and there is nothing inappropriate in doing the same with respect to the constitution of Advisory Committees. Again, though we are dealing with judges, we are not dealing with the exercise of adjudicatory functions.

The second problem is more fundamental still. As the work of the Judicial Conference has become more sophisticated and complex, the centralization of authority in the Chief Justice has been enhanced. He appoints the members of the Standing Committee on Rules on Practice and Procedure and the members of the Advisory Committees. He appoints the Reporters to the Advisory Committees, typically law professors, who do the actual drafting of rules and memoranda. He sometimes attends meetings of the Advisory Committees. He presides at the meeting of the Judicial Conference when it decides whether to recommend a proposed set of Rules to the Supreme Court, and of course presides over the Supreme Court's deliberations on the decision to promulgate.⁴

Surely it is not a criticism of any of the Chief Justices who have exercised this authority to observe that this is simply too much power to be lodged in one person. It is probably accurate to observe that the Chief Justice plays a role in the promulgation of Rules which has no analog in the Legislative Branch. One would have to recall the office of the Speaker of the House in the days of Speakers Cannon and Reed, prior to the modern constitution of the Rules Committee, to name a figure so centrally involved in selecting the personnel who shape the final proposal, and in the deliberative processes involved. It is even less appropriate for such power to be centralized in an individual who, for all his necessary functions as the chief administrative officer of the federal judicial system, nonetheless remains primarily one of the nine Justices of the Supreme Court with the duty to hear and decide cases and controversies within its jurisdiction, including those involving the validity or interpretation of the Rules. It is not easy to devise a cure for this problem, but the difficulty only counsels more strongly for the need for this Committee to come to grips with it.

(3) *The assignment of a Rule-promulgating role to the Supreme Court is unwise and inappropriate, and should be re-examined.*—There has apparently never been full consideration by a Congressional Committee whether there is merit in the proposal that the Judicial Conference be given the entire rule-promulgation role, and the Supreme Court returned to its central function under the Constitution of deciding cases. This was the proposal of Mr. Justice Black and Mr. Justice Douglas in 1963, dissenting from the promulgation of several amendments to the Civil Rules, see 374 U.S. 861, 869-70, and was apparently considered by the Judicial Conference itself in 1957, although rejected by it. See Judge Clark's article, cited above, 58 Colum. L. Rev., at 444 n.44. As Justices Black and Douglas observed, with respect to the Judicial Conference:

⁴ Professor Charles Alan Wright, who has been involved in the rule-making process for many years and is now a member of the Standing Committee, wrote in 1967 that Chief Justice Warren attended meetings "to the extent that his schedule permits." *Procedural Reform: Its Limitations and Its Future*, 1 Ga. L. Rev. 563-566. Again, the allocation of appointing authority is nowhere set out, whether in statute or published rule of the Conference. It is apparently thought of as the natural prerogative of the Chairman of the Conference. See Judge Maris' article, cited above, p. 774.

"It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power."

The point is not that the Court is doing less than it ought. Indeed, it takes little reflection to realize that the Supreme Court, by reason of its caseload and its mode of operation, would be unable to undertake any real rule-by-rule review of the merits of controversial proposals.⁵ Even were the Court somehow to think it necessary or warranted for it to consider on the merits a particular controversial issue, our legal traditions suggest that it should do so in the method by which courts have historically attempted to resolve disputed questions: briefing, argument, deliberation, and the preparation and publication of opinions, including those stating different views from those prevailing. For the Court to decide *in camera*, and without even a general invitation to the Bar to submit briefs (much less an opportunity to respond to the submissions of others), any of the controversial questions raised about recent Rules amendments—the scope of privilege, or of governmental secrecy, the use of a summons rather than a warrant to commence a criminal case—would be most unfortunate, for we would be accorded neither the due process which is associated with the adjudication of cases nor that which accompanies the consideration of legislation.

It is inevitable, however, that the Rules, bearing the Court's "imprimatur," will have a stature enhanced by that contact.⁶ Indeed, in at least one case, *Hanna v. Plumer*, 380 U.S. 460 (1965), the court unblushingly said as much:

"When a situation is covered by one of the Federal Rules * * * the Court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court and Congress erred in their *prima facie* judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions."

And, not surprisingly, at least one District Court has expressly ruled that a "strong presumption" of constitutionality supports any Rule approved by the Supreme Court, for surely the Court had presumably acted within its power. *Helms v. Richmond-Petersburg Turnpike Authority*, 52 F.R.D. 530, 431 (E.D. Va. 1971). Of course, what the Supreme Court adjudicates about the Constitution, after submission to it of a case on record, with opposing briefs and argument, carries not only the presumption but the authoritative determination of constitutionality. And what the Legislature *enacts*—after submission of a bill, its referral to committee, hearing and report (including publication of them, with the individual views of Committee members), debate, amendment and vote, all similarly published—carries a presumption of constitutionality. Here, however, we face the unique situation of Rules, drafted by a committee of private citizens and judges acting in an advisory capacity, which operates for the most part in private; approved by a body of judges, meeting entirely in private; promulgated by the Supreme Court without any real expectation, or the procedure to warrant that expectation, of focused consideration of constitutional questions; and "approved" by the Legislature through simple inaction for a period of 90 days. In short, neither as a legislative nor an adjudicatory process does the present structure for rule-making meet the expectations of our constitutional traditions; in the amalgam of roles, the participation of neither Court nor Congress serves adequately to assure genuine consideration of serious policy questions, let alone of constitutional matters.

There are other ways of meeting the problem than delegating the entire function to the Judicial Conference. One might favor the creation by statute of an independent Commission with its members chosen by leaders of all three Branches of Government and the adequacy of its procedures assured by law. For the present, it is sufficient to note that several substitute mechanisms may be desired, and their relative wisdom assessed—one there is acknowledgement of the inappropriateness of the present involvement of the Supreme Court.

⁵ As Professor Sunderland observed four decades ago:

"Courts cannot, and ought not to be expected to assume the burden of keeping the procedural system in proper adjustment to the needs of the time. They have judicial work to do which is of fundamental importance, which cannot be postponed, and which must occupy almost their exclusive attention. Their primary function is to administer an existing system, not to engage in the research necessary for the development of new methods of administering justice."

Character and extent of the Rule-making Power Granted the U.S. Supreme Court, 21 A.B.A.J. 404, 460 (1935).

⁶ Mr. Chief Justice Stone's assurance for the Court, that its promulgation of a Rule does not "foreclose" consideration of its validity or construction (*Mississippi Pub. Co. v. Murphree*, 326 U.S. 438, 444 (1940)), answers too narrow a question.

(4) *A workable mode of genuine congressional review needs to be devised.*—Plainly, neither the Houses of Congress nor their Judiciary Committees can adequately consider the wisdom of proposed Rule amendments in 90 days. It is therefore necessary either to return to the regime which in effect operated prior to the promulgation to the Rules of Evidence, whereby there is no real congressional oversight, or to devise a method of providing it which does not so undermine the rulemaking process that it collapses, as indeed may now be threatened. Experience has shown that the legislative mandate that Rules "shall not abridge, enlarge or modify any substantive right" (28 U.S.C. § 2072) has not been self-executing; the proposed Rules of Evidence are now generally conceded to have contained much that was "substantive" within any relevant meaning of that term.⁷

A partial solution might be to spell out more fully the thrust of the limitation on the Enabling Act protecting existing substantive rights. Such a result could come about through legislative amendment, through a decision of the Supreme Court in a case challenging a Rule (although all such challenges have been quickly turned aside, from *Sibbach v. Wilson*, 312 U.S. 1 (1941), through *Hanna v. Plumer*), or, indeed, through a rule published by the Judicial Conference itself as part of the set of procedural rules we recommended above, which would give further content to the substance-procedure dichotomy and fuller guidance to the Advisory Committees considering future Rules changes.

It might be contended that an invigorated concept of "substantive rights" under the Enabling Act, coupled with reform of Judicial Conference procedures, would render feasible a return to congressional passivity in future promulgation of Rules amendments. But there would probably still be a need for a mechanism whereby limited or occasional genuine legislative review will be readily to hand.⁸ One approach would be in some appropriate manner to involve representatives of the Congress in the rule-making process itself, although that method poses grave dangers of its own. Perhaps a simple lengthening of the 90-day period of delay in effectiveness would suffice, as the House has provided with respect to future changes in the Rules of Evidence. H.R. 5463, § 2. Judge Maris has suggested that each House be empowered to delay further the effectiveness of proposed amendments (Statement to Senate Judiciary Committee, June 4, 1974). For the present, it is enough again to observe that the difficulty of devising a ready solution is no argument for ignoring the serious difficulties with the present regime; rather it is one for this Committee to act, as it uniquely can, as a powerful stimulus to the setting of many minds—within Congress and without, within the judicial system and without—to thinking on the problem and its solution.

Mr. SMITH. I thank you very much. I think your remarks are very apropos, and do present an area that both the Judicial Conference and the Congress ought to look at. I am sure Professor Remington will take the word back to the Conference, the standing committee, and the advisory committee. I guess I agree with you that perhaps the suggestions ought to come out of the Judicial Conference on reform.

Mr. Hungate said this morning that we have been trying to get the Senate to take up the Federal Rules of Evidence that this committee worked so hard and diligently on. He said this morning, if they cannot do it, why, maybe it will be an indication or some evidence that Congress does not have the aptitude to do this job. The Judiciary Committee in the Senate was to have met yesterday, I guess, and they did not have a quorum. So we just have our fingers crossed as to whether the

⁷ It is interesting to recall Professor Wright's admonition in 1967 that *Hanna v. Plumer*, *supra*, by holding that the Rules could validly override state law in a case governed by state law, imposes a "heavy burden" on rule-drafters to exercise self-restraint not to trench too closely on the substance-procedure dichotomy. See the article cited above, 1 Ga. L. Rev., at 571-3. He uses, as a compelling example, the question of privilege in the law of evidence. Just this example served, a very few years later, to demonstrate the failure of self-imposed restraint.

⁸ H.R. 5463, § 2, would enable a single House to veto further amendments to the Rules of Evidence. As Judge Maris has pointed out (Statement to Senate Judiciary Committee, June 4, 1974), this is an excessive assertion of oversight power, which might well impair the vitality of the Rule-making process.

Senate is going to act on the Federal Rules of Evidence during this session of Congress. We hope they will. We do think generally, that the Congress does have the aptitude to do this job. But if we miss this one, it may be the evidence that we do not have.

Your suggestions have been very good and very well thought out. And certainly, they present some areas that we and the Judicial Conference ought to give a long, hard look at.

As far as the Federal Rules of Evidence are concerned, it was our understanding that they have been some 12 years in the preparation. I had sort of got the feeling that almost everybody in the United States was involved with them at some stage in the proceeding.

Prof. LESNICK. That turned out not to be the case.

Mr. SMITH. Thank you very much, gentlemen.

And if there are no further witnesses, we will declare this hearing adjourned.

[Whereupon, at 3:45 p.m., the subcommittee was adjourned, subject to the call of the Chair.]







