

RULES OF CRIMINAL PROCEDURE.

ORDER.

It is ordered that Rules of Criminal Procedure for the District Courts of the United States governing proceedings in criminal cases prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, be prescribed pursuant to the Act of June 29, 1940, c. 445, 54 Stat. 688. And the CHIEF JUSTICE is authorized and directed to transmit the Rules as prescribed to the Attorney General and to request him, as provided in that Act, to report these Rules to the Congress at the beginning of the regular session in January 1945.

MR. JUSTICE BLACK states that he does not approve of the adoption of the Rules.

MR. JUSTICE FRANKFURTER does not join in the Court's action for reasons stated in a memorandum opinion.

DECEMBER 26, 1944.

MEMORANDUM OF MR. JUSTICE FRANKFURTER.

That the federal courts have power, or may be empowered, to make rules of procedure for the conduct of litigation has been settled for a century and a quarter (*Wayman v. Southard*, 10 Wheat. 1). And experience proves that justice profits if the responsibility for such rule-making be vested in a small, standing rule-making body rather than be left to legislation generated by particular controversies. These views make me regret all the more not to be able to join my brethren in the adoption of the Rules of Criminal Procedure for the District Courts of the United States.

By withholding approval of the adoption of the rules I do not imply disapproval. I express no opinion on their merits. With all respect to contrary views, I believe that

this Court is not an appropriate agency for formulating the rules of criminal procedure for the district courts.

From the beginning of the nation down to the Evarts Act of 1891, though less and less after the Civil War, the members of this Court rode circuit. They thus had intimate, first-hand experience with the duties and demands of trial courts. For the last fifty years the Justices have become necessarily removed from direct, day-by-day contact with trials in the district courts. To that extent they are largely denied the first-hand opportunities for realizing vividly what rules of procedure are best calculated to promote the largest measure of justice. These considerations are especially relevant to the formulation of rules for the conduct of criminal trials. These closely concern the public security as well as the liberties of citizens.

And this leads to another strong reason for not charging this Court with the duty of approving in advance a code of criminal procedure. Such a code can hardly escape provisions in which lurk serious questions for future adjudication by this Court. Every lawyer knows the difference between passing on a question concretely raised by specific litigation and the formulation of abstract rules, however fully considered by members of the lower courts and the bar. I deem it unwise to prejudge, however unintentionally, questions that may in due course of litigation come before this Court by having this Court lay down rules in the abstract rather than deciding issues coming here with the impact of actuality and duly contested.

And there is one more important consideration. The business of this Court is increasing in volume and complexity. In the years ahead the number of cases will not decrease nor their difficulties lessen. The jurisdiction of this Court has already been cut almost to the bone. If the Court is not to be swamped, as it has been in the past, and is to do its best work, it must exercise rigorously its discretionary jurisdiction. Every additional duty, such

as responsibility for fashioning progressive codes of procedure and keeping them current, makes inroads upon the discharge of functions which no one else can exercise.

Brief as is this statement, it can leave no room for doubt that the reasons which have constrained me to withhold approval of adoption of the rules completely transcend judgment of their merits.

DECEMBER 26, 1944.

And the Chief Justice is authorized and directed to transmit the rules as prescribed in that Act, to report the same to the Congress at the beginning of the regular session in January next.

December 30, 1944.

1. Violations of Statute. Violations of statute are to be treated as violations of the law and not as violations of the rules of procedure. *United States v. U. S. S. 333.*

2. *Id.* Complicity in violation of statute is to be treated as complicity in violation of the law and not as complicity in violation of the rules of procedure. *United States v. U. S. S. 333.*

3. Abandonment of Conspiracy. Evidence insufficient. *Hartford Empire Co. v. U. S. S. 333.*

4. Remedy. Provision of District. May not impose penalties in rules of preventing future violations. *Id.*

5. *Id.* Effect of vagueness and generality. *Id.*

APPEAL. See Jurisdiction; Procedure.

ASSEMBLY. See Constitutional Law, III; VI, (A), 1-3.

ASSEMBLY CHIEF. See Constitutional Law, IV, 1; V, 1-3.